

COMMUNITY OPPOSITION TO AFFORDABLE HOUSING:
JAMMING THE SYSTEM

by
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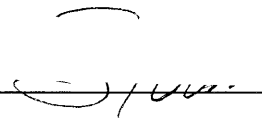
Submitted to the Department of Architecture in partial
fulfillment of the requirements for the degrees of
Master of Science in Architecture Studies and
Master of City Planning at the
Massachusetts Institute of Technology

May 1989

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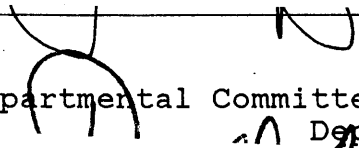
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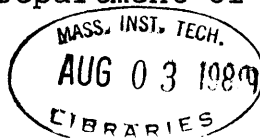


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Abstract

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by Stuart David Dash

Submitted to the Department of Urban Studies and Planning
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This thesis explores community opposition to affordable housing in the suburban communities of Massachusetts. In the twenty years since Chapter 774 was enacted, a significant amount of affordable housing has been developed. However, there are still many communities with less than the required ten percent of affordable housing. These communities are opposing affordable housing development in ways which are more sophisticated, forcing developers to anticipate a longer and more expensive development process.

In order to examine the opposition within a community, and how this opposition is often transferred from community members to local officials, the thesis looks at three case studies from the last ten years. The thesis will use material from interviews with affordable housing developers, and other actors in the affordable housing process, as well as material from the Housing Appeals Committee files. The process of affordable housing development is discussed, with emphasis on the points of intervention used by communities. The stakeholders in the development process are reviewed, along with their motivations, interests, and concerns.

The three case studies rely mainly on sworn testimony from the HAC hearings, and reveal a number of ways in which community opposition is used to "jam the system," using strategies that are both everyday and unusual. Each case presents the actors in the opposition, their location in the process, and a discussion of the effectiveness of their strategy.

The final chapter discusses why this opposition occurs in these ways, and makes recommendations for reducing the negative impact on the affordable housing development process. Recommendations are made for addressing the opposition discussed in the cases. These include initiating an project specific assisted negotiation process, a regional fair share negotiation process, and a more flexible state rule system for affordable housing.

Thesis Supervisor: Langley Keyes
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Acknowledgements

I would like to thank my thesis advisor, Langley Keyes, who challenged my ideas, offered advice, and made himself available for many thoughtful conversations, and much appreciated encouragement. I would also like to thank my reader from the School of Architecture, Sandra Howell, who provided me with many long discussions, guidance, and unwavering support. I would also like to thank Lawrence Susskind, my reader from The Department of Urban Studies, who provided me with key structural insights into my work, as well as helpful, detailed comments.

The many people who gave their time for interviews were also an invaluable part of this work. Murray Corman, Liza Nolan, Robert Jenkins, Robert Engler, Murph Yule, Gene Kelley, Shelley Miller, and Phil Herr all drew on their years of experience in the field to give me a broad range of first-hand ideas on community resistance to affordable housing.

Finally, I would like to thank my children, David and Sam, for bringing me the laughter and enthusiasm of their day-to-day lives, and my wife Robin, who lost her father in the middle of this work, and yet managed to keep our family in celery and smiles.

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CHAPTER 1 - JAMMING THE SYSTEM OF AFFORDABLE HOUSING

Introduction

In Massachusetts, the system for delivering affordable housing is being "jammed" by community opposition. Community members who find that their interests are not being considered in the affordable housing process as it is presently constructed in Massachusetts are consistently finding ways to stop, reduce, or delay development. They are often able to transfer their concerns to local officials and town boards, where the battle escalates in terms of time and money. The risk of being caught in a jammed system has caused developers to take unusual cost cutting measures if the project is in process when it is "jammed," or to increase density to pay for the higher costs of doing business in such a system. This results in a vicious cycle of community opposition to high density developments, and demands for higher density from developers seeking to protect themselves from long delays. While this "jamming" occurs throughout the affordable housing development process, the conflict revolves around Chapter 774.

Chapter 774

In 1969, Massachusetts passed an act "providing for the construction of low or moderate income housing in cities and towns in which local restrictions hamper such construction."¹

¹ Chapter 774, Act 1969 Massachusetts General Laws

This was the start of Chapter 774, also known as the "anti-snob zoning" bill.

Under Chapter 774, a town which did not have at least 10% of its housing units classified as affordable was considered to be acting inconsistently with "local and regional housing needs" and subject to a review of their Zoning Board of Appeals (ZBA) decisions on affordable housing proposals. The law allowed a developer of affordable housing to apply for a Comprehensive Permit. This permit would function as an "all in one" permit for a developer, and was to be issued by the local ZBA. The law allowed the ZBA to overrule zoning by-laws as appropriate, and to solicit comment from any other town board as part of the permit process. The second part of the law created a state Housing Appeals Committee (HAC) which would hear developer's appeals if a local ZBA chose not to issue the Comprehensive Permit.

In the first few years of the law, it was tested repeatedly. Appeals were brought to the HAC by developers who had been denied a permit by the local ZBA, and appeals were brought to the State Supreme Court by the ZBA of the towns. The results of these appeals made it clear to the towns that they were not going to be able to win appeals at the HAC or the State Supreme Court unless a very unusual set of circumstances

existed.²

This resulted in a dramatic increase in the percentage of Comprehensive Permits granted by the local ZBA decrease in the frequency of appeals over time, as the chart below shows in a comparison of the first eight years of the law with the first sixteen years:³

<u>Comprehensive Permit Applications</u>				
	1969 -1978		1969 - 1986	
	#	%	#	%
Granted.....	17	15.3	146	50.0
Granted..... w/Cond.	38	34.2	49	16.8
Not.....	47	42.3	96	32.9
Granted Other.....	9	8.1	1	.3
Total	111	100	292	100

The 10% Minimum

However, all is not well with the affordable housing system, or Chapter 774. Most suburban towns throughout Massachusetts

² The details of these initial cases of the HAC and those appealed to the Supreme Court are in the 1987 MCP Thesis by Cynthia Lacasse The Anti-Snob Zoning Law: The Effectiveness of Chapter 774 p.16-23

³ As noted in 1987 Thesis by Lacasse, the information gathered is from two different sources, and so cannot be separated out for each eight year period. Undoubtedly, however, the percentage of approved permits at the local level would show a similar increase.

are not close to the 10% minimum set by Chapter 774. In the housing count of 12/88 by the Executive Office of Communities and Development (EOCD), only 21 out of the 351 towns surveyed in Massachusetts had 10% or more of their housing constructed under a state or federal subsidized housing program for family, elderly, or handicapped units.

Towns with between 5% and 10% of their units under a state or federal subsidy, number 82. These towns account for approximately 600,000 of the Commonwealth's housing units, or 27% of the state's housing. The 21 towns with over 10% affordable units total 690,000 housing units, or 31% of the state's total.

On the other hand, there are the towns which have remained at or hovered near 0% for years. This group numbers 122. Half of those 122 towns (actually 64) are towns that have fewer than 1000 units in the town, many of them very small towns in Western Massachusetts or on Cape Cod. In fact, almost all of the small rural towns are in this 0-2% category. The other 58 towns represent approximately 100,000 housing units, or 4.5% of the total in Massachusetts. These towns generally represent more suburban communities, and so their low percentage probably indicates more of a reluctance to build affordable housing than those in a rural location, which are generally

located long distances from employment and transportation.

The group left, the 2-5% towns are some of the biggest question marks. They represent 35% of the state's housing units, and their position as having built some affordable housing, but not a lot, leaves them, along with the 58 towns with over 1000 units that are hovering near 0% as the significant opposition to affordable housing in Massachusetts.

Family or Elderly Housing?

When looking at numbers for affordable housing, it is critical to note the type and size of the unit. While few towns openly welcome affordable housing, they would much rather have one bedroom units subsidized for the elderly, on the whole, than three bedroom family units. Elderly units produce less traffic, less noise, and no school children to be concerned about or pay school taxes for. This makes many towns strive to have elderly housing be their "affordable housing commitment."

How many towns do this? The EOCD inventory lists 90 towns as having more than 75% of their affordable units as elderly units, while the statewide demand for elderly and family units is generally seen to be close to fifty-fifty. These ninety

towns, if aggregated, represent 329,000 living units in their towns, and have a reasonable 5% affordable housing. When separated out, however, there are 14,792 elderly units and 2250 family units. The elderly units account for 87% of the affordable units.

HAC Cases

What has occurred over the years is that community members and town officials have learned how to "jam the system" of Affordable housing. This jamming has allowed these towns to have only a small percentage of their housing as affordable housing units. This jamming has forced developers to include higher margins for risk in their projects, and left them wary of bringing a proposal to those towns known to consistently jam the system.

One of the ways this jamming is reflected is in the number of cases brought to the HAC:

Housing Appeals Committee Cases 1970 - 1989

1970 - 3	1977 - 5	1984 - 5
1971 - 8	1978 - 5	1985 - 13
1972 - 14	1979 - 5	1986 - 26
1973 - 5	1980 - 14	1987 - 33
1974 - 10	1981 - 13	1988 - 40
1975 - 9	1982 - 10	1989 - 27 to 5/1/89
1976 - 2	1983 - 8	

The HOP Program

The increase in the number of cases at the HAC reflects at least three issues of affordable housing in Massachusetts.

First, a new housing program began in 1985 which was popular with developers, the Homeownership Opportunity Program (HOP). This program created a set of subsidies for low and moderated income people who wanted to purchase a home. Developers saw an opportunity to make more profit on the sales of the condominium units rather than the management of rental units, saw an active market for this type of unit, and so pushed hard to develop proposals.

Secondly, this program brought new developers into the "game" of subsidized housing, many of whom were not adept at the rules of the game, such as picking communities and sites carefully, or working closely with the town officials.

The third aspect is that the HOP program was accompanied by very good funding and publicity for developers. The increase in activity involved many of those towns who had been "laying low" for years in the affordable housing debate and had remained relatively untouched by developers of rental housing. Developers who saw no market for rental housing in the wealthy suburban communities saw a good market for mixed income

condominiums.

However, the community members in these towns, with or without the support of their local officials, had learned how to jam the system, and were unwilling participants in the process. They have quickly brought an overload of cases to the HAC, while their opposition has become "more sophisticated, and occurs before, during, and after construction."⁴

While this thesis will focus on the opposition of communities to affordable housing, it is not meant to diminish the importance of other obstacles, which include:

- * exclusionary land use laws;
- * the high cost of land;
- * restrictive subdivision regulations;
- * complex environmental impact requirements;
- * the high cost of construction and land improvement;
- * Discrimination in real estate firms and lending institutions

⁴ Jane Davis - Land Use Attorney for a number of Housing Authorities Throughout Massachusetts. Workshop for Local Housing Authorities at EOCD - 3/89

This thesis will discuss how community members have "jammed the system," and how they have brought in the local and state government officials as participants in this "jamming". The following chapters will examine affordable housing development, actors in this process, and discuss four examples of strategies communities use to oppose affordable housing, taken from two different cases. The final chapter will discuss some possible remedies to this "jammed system."

CHAPTER 2 - THE DEVELOPMENT PROCESS

As discussed in the Chapter 1, the development process has a specific path and timetable. For the community member wishing to intervene in the process, knowing the path and timetable are critical. They must know at what points they can intervene, who must represent their views, and what issues are acceptable and likely to have an impact at each point. Following is a discussion of the development path, noting the formal and informal points of entry by the community.

The process the developer goes through to build affordable housing in most Massachusetts towns under the Comprehensive Permit process involves a single entry point through the Planning Board, followed essentially by three separate tracks, the Conservation Commission, the Board of Health, and the Zoning Board of Appeals.

Subdivision Approval

The application to the planning board for Subdivision Plan approval is necessary to register the title to the property under the developers name. The developer must do this in order to show the various funding agencies that they have "control of the land." They may also accomplish this by having an "option" to own the site they are proposing to build housing on.

If the development is classified as a subdivision (new streets will have to be created) Preliminary Subdivision Plans are submitted to the Planning Board. After input from the board, the developer must get approval for Definitive Subdivision Plans. Community input generally occurs at a public hearing at this stage.

There are no statutory limits on the time limits for these hearings, and developers may face six months or a year while waiting for this signature. Developers do not use the Comprehensive Permit process to speed this process up, and there would seem to be a Catch-22 if they wanted to use it. They would need the Planning Board "signature" to "gain control" of the land to get preliminary "funding approval" to use the "Comprehensive Permit" to speed up the process to get a Planning Board "signature".⁵

If a new subdivision plan was not required, the developer may submit their site plan to the Planning Board for approval under the "81-P" process.

At the point the developer has the definitive subdivision plan approved, or 81-P approval, the plan may be submitted (with

⁵ Interview with Phil Herr, 4/89

the signature of the Planning Board) to the Registry of Deeds.

Plans for the proposed development are then submitted to the local zoning administrator, generally the building inspector. The building inspector will determine if a Special Permit or a Zoning Variance is required.

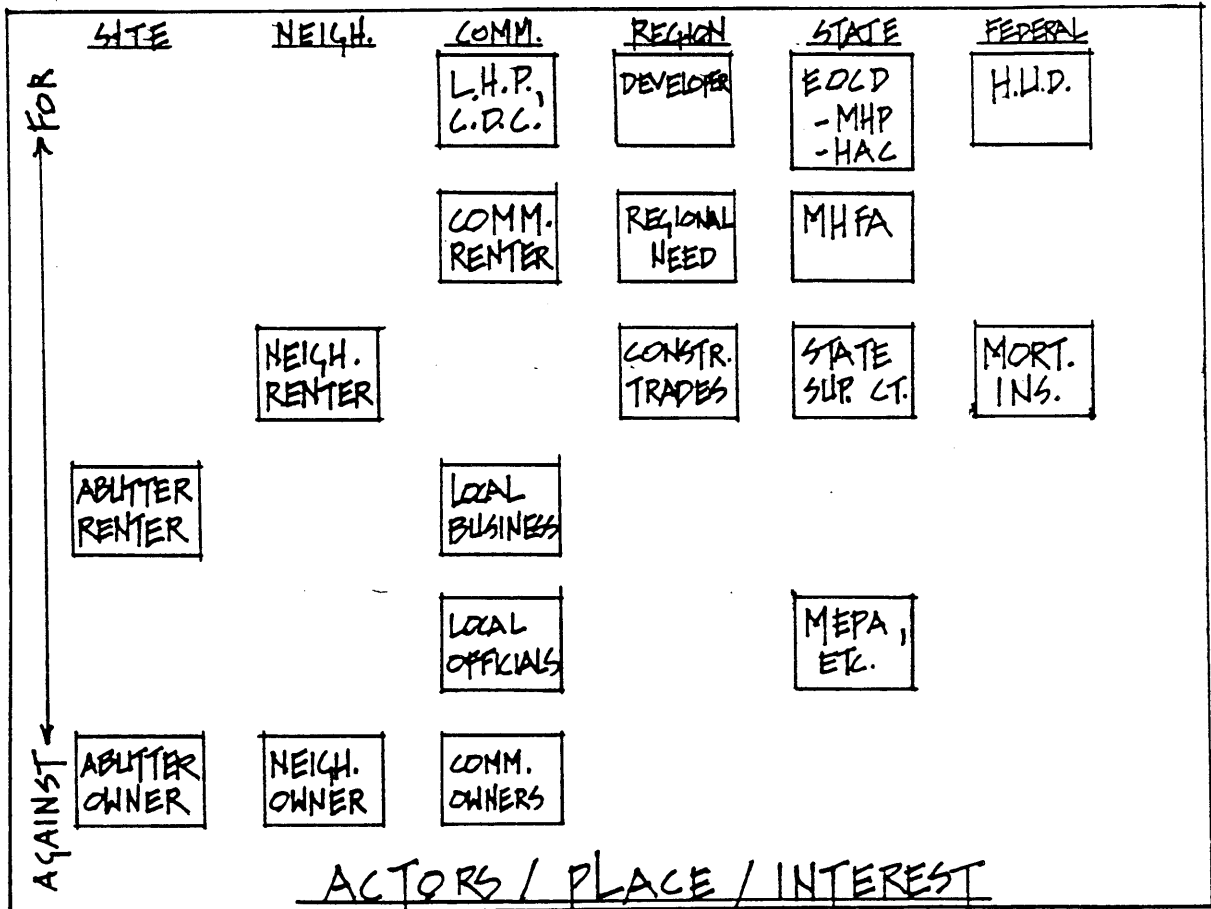
If a zoning variance or a special permit is required, the plans are submitted to the Appropriate permit granting authority, which is generally the Zoning Board of Appeals.

At the same time, two other town boards may be reviewing the proposal for acceptance.

If the development has impacts on Wetlands (Construction within 100 feet), approval must be sought from The Conservation Commission. The Conservation Commission issues what is known as an "Order of Conditions" to a developer.

The other town board which has its own permitting authority is the Board of Health. They conduct their own plan review process as well, and if satisfied, issue a construction permit.

Each of these three groups, the Planning Board, the Board of Health, and the Conservation Commission conduct their own hearings and site plan reviews of the project. Below is a diagram of this process:



Planning Board - Site Plan Review

The Planning Board conducts the "major" site plan review, however, which includes input from all of the town boards and agencies who have an interest in the development. This

includes police, Fire, Town Engineer, Department of Public Works, Water and Sewer Commission, as well as additional input from the Conservation Commission.

After approval in the Site Plan Review, a construction permit from wiring, plumbing, and building inspector, and the construction permit from the Bd. of Health, a Building Permit may be issued for construction to begin.

Local Housing Partnership

If the town has a Local Housing Partnership (LHP) the developer begins an informal process of working with the partnership committee to come to points of preliminary agreement, before the preliminary subdivision plan is submitted, and before formal ZBA hearings. Depending on the quality of the LHP, this may mean as little as a few meetings with the committee, or site visits and a complete development review. Under MHP guidelines, the developer must show the cooperation of the town in order to receive funding, or proof of an effort to work with an uncooperative town.

The input a community can make at this point is very dependent on the LHP. In some cases, the LHP may contact the abutters and neighbors to testify at a meeting after most of the work has been done, or in other cases invite them to sit in on

meetings or testify informally at the beginning of the process.⁶

If the community has no LHP, and after encouragement by state funding agencies does not form one, the developer applies to the ZBA for a zoning variance, and, in most cases, uses an application for a Comprehensive Permit. In some cases a developer will choose not to apply for a Comprehensive permit initially, hoping to keep relations with the town on a friendly footing.⁷

With or without the Comprehensive Permit process, the community first formally receives notification of a development after a developer has been told the proposal does not correspond to the local zoning regulations, and that relief from zoning will be required.

If the ZBA decision is against the developer, it may be appealed to the Housing Appeals Committee by the developer. the HAC convenes a "conference of counsel" first, and if no agreement is reached, begins normal hearings, which may include testimony by members of the community.

⁶ . Stuart Dash ,LHP Case Study 1989 - LAP/MIT - Leominster

⁷ Interview with Murph Yule 3/89

At this point, the opposing community members have three different avenues of resistance. If the ZBA decision is vacated by the HAC, the town may decide to appeal to the State Supreme Court. If the ZBA comes to agreement with the developer in the conference of counsel and decides to issue a comprehensive permit, or if after the HAC decision it decides to issue the permit, the community may appeal the ZBA decision.

For an appeal of an HAC decision, the aggrieved party must appeal to the Supreme Judicial Court of Massachusetts. If the ZBA decision is being appealed by community members, they may appeal to the District Court Dept., the Superior Court, or the Supreme Judicial Court. Most often the District Court will not be used because it does not provide for a jury trial. At the level of the Superior Court, the community members must be able to assert they are an aggrieved party, and they are litigating an important issue. At the level of the State Supreme Court, there must be "unique issues of law" at stake in an appeal.⁸

For those in opposition to affordable housing, this process presents numerous entry points for jamming the system. Any

⁸ Interview with John Carney 4/89

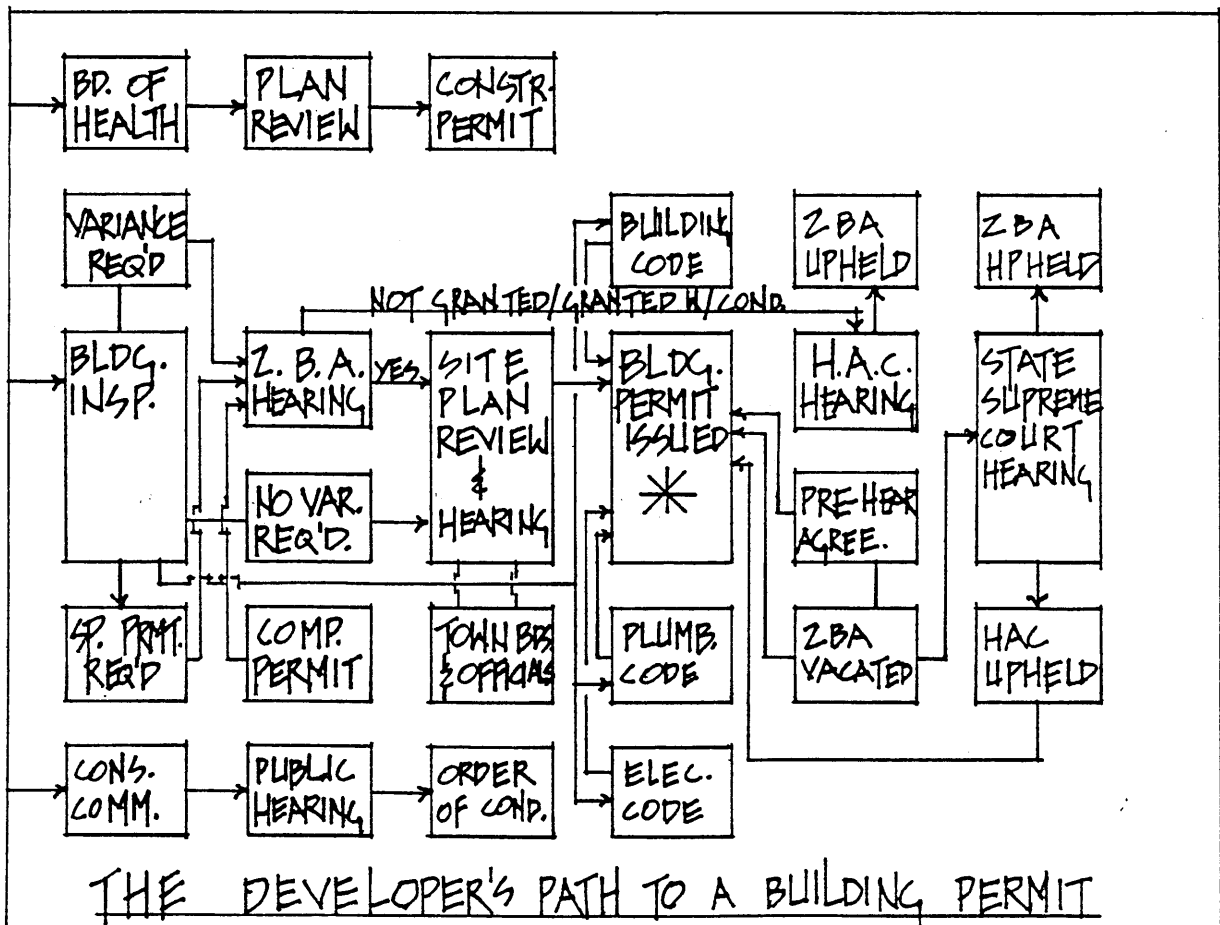
public hearing can be attended and packed with opponents, many boards can be influenced or infiltrated, each level of appeal can be utilized. The opponents have learned how to intervene both legally and illegally, and have consistently been able to find one or more ways to jam the system given the process just described in order to delay, reduce, or stop the development of affordable housing.

The following Chapter will discuss the players in this "jamming," the stakeholders in this process, their motivations and their interests in affordable housing.

CHAPTER 3 - ACTORS IN THE PROCESS

In this section, I will examine the list of the stakeholders and their interests assuming a "quality" affordable housing development is proposed. For each of these actors, I will discuss the relative desirability of establishing, settling or perpetuating an affordable housing conflict, and the motivations for their position.

The stakeholders examined in the following pages are also represented on the chart below. The levels of localness and opposition are represented by distances along the x and y axis respectively:



At the local level, there are a number of different groups and interests which conflict:

Homeowners - The main interests of homeowners are preserving the value in their homes as well as the "quality of life" in their communities. These two interests may coincide as related to the number of children in the schools, the traffic on the roads, or the open space around them.

While the concerns about the "quality of life" may seem absurd to a someone who has a family of four living in a one bedroom apartment and is looking to expand to two bedrooms, in the suburbs it is a standard discussion point. How good are the parks, how peaceful are the roads at night, and how easy is it to park downtown are all considered part of the "quality of life" in the suburbs, and increasingly seen as a matter of "right" in the suburban lifestyle.

While these concerns may be included under standard or innovative planning bylaws, they offer little persuasion in the courts these days, even though the original Supreme Court decision concerning the validity of zoning in general did make the "quality of suburban life" a leading reason for restrictive zoning to be upheld. The motivations behind the

desire to promote open space in suburbs is also questionable:

"A consistent environmental theme against homebuilding is simply the need to save open space. The ideological source for this position is not conservationism, which stresses the wise use of resources, but rather the preservation movement. The open space that local growth opponents want is usually for private preserves, not public parks. Preservationists form effective alliances with other resident groups whose concerns are to protect their own social and tax advantages..... They try to guard well-to-do suburbs against change, and the environment they protect is a local environment their affluent members can afford to enjoy." ¹

Pursuing these interests may also result in intentional or unintentional discrimination based on race, class, ethnicity, or religion. These interests can be difficult to address because issues such as discrimination are considered off limits for discussion, and yet are often the real interest involved. For example, the concern about property values has led to years of discrimination by homeowners who were supported by institutional guidelines such as FHA underwriting manuals which cautioned against "the infiltration of

¹ Bernard Frieden The Environmental Protection Hustle
p.10

inharmonious racial or nationality groups until 1950."²

As noted earlier, another way discrimination may occur is when discussing issues such as the number of bedrooms in an affordable unit. The number of bedrooms may determine if applicants for the unit will be white and elderly (a one bedroom unit) or black with a large family (a three bedroom unit). A suburban homeowner's discussion about preferred site may seem to be about the site itself, but may actually conceal an interest in locating affordable housing in proximity to a less desirable area of town, elementary school, or disamenity, such as a heavily trafficked road.

Surrounding the house and home in American life is a large groups of deeply held fears, interests, and concerns which are not often brought to the surface, yet may provide some insight into the strength of the suburban opposition to affordable housing development. Consultant Robert Engler notes that "the home is where every concern comes in, economic, social, everything." These deeply held feelings include a fear of intimacy of contact, a fear of loss and change of power in the neighborhood and community, and a fear of change in general.

² Berth Lief and Susan Goering The implementation of the Federal Mandate for Fair Housing, Ch. 10 Divided Neighborhoods Gary Tobin, ed.

The combination of these fears and concerns puts the community members "at risk" socially, politically, and economically

As long as there is support in their social network, and there is a perception of significant loss of value and/or quality of life, there are few arguments other than moral ones to make with this group for coming to settlement on an affordable housing development. If there are other parts to the development package which appeal to a homeowner, such as open space provision around the development, there may be more interest in coming to settlement.

Renters - Renters have an interest in preserving their position in the town, in terms of housing and/or social standing. This may lead them to favor a proposal which they benefit from, e.g. one in which a homeownership opportunity is involved in the project. Conversely, if there is no improvement apparent for them in the deal, they may act in similar interests to the homeowners, depending on their identification with specific issues, such as race or ethnic group. For example, the renters in the public housing in the South End of Boston who were asked to integrate their project would likely not find additional affordable housing in the area welcome, with the likelihood of a different population in the area, yet may welcome a homeownership project which

gives preferences to local residents. The use of local preference is an especially popular part of suburban affordable housing plans, and is often seen as disguising the fact that the town does not want new residents.

Large Landowners - Large landowners interested in the development value of their property are likely to find any development positive, although if there is a perception that it will reduce the value of property in the town they will consider the arguments of the homeowners as relevant to their situation. The more the large landowner feels a stake in the town's future, the more likely the consideration given to the larger and most powerful groups in the town, generally the business community and homeowners. If the landowner is a long time member of the town, and has established positive ties to the people and the place, it is possible that a civic minded gesture such as donation of land to a community land trust or the town is possible. Such a donation may be made for open space, or for affordable housing.

On the other hand, the large landowner who is a real estate investor who anticipates having no more ties to the community after the sale of a single parcel may be more inclined to sell to the highest bidder, regardless of purpose.

Residents in Close Proximity to the Site

Homeowners - This group will have the same, but more intense concerns as the homeowners mentioned earlier. It will be a less abstract, more emotional discussion on each of the issues. The family in the next school district will be the family in the next yard, the traffic on the main road in town will be the parking lot out front. Their argument that property values will go down is not easily dismissed, and their interest in the issues of siting and design are more than aesthetic preferences, they are concerned about their financial future.

Renters - The renters in close proximity will have a heightened interest in a development only if their tenure is long term. A short term renter will probably anticipate moving before any development is built. If the renters are long term, issues related to property value will have less sway in discussions, and issues related to fairness/equity between the incoming and resident groups may be more meaningful.

Large Landowners - The large landowners adjacent to a large development will be very positive if the project either increases their property value or reflects positively on it. However, if the project is not replicable on their land, and

in some way diminishes what the options are for selling or developing their land, the reaction will be negative. For instance, if a large landowner considers their land's highest and best use to be for the development of luxury homes on five acre lots, the multifamily affordable units on the next lot can be seen as decreasing the value of that land. Their interest in settling or perpetuating the dispute will hinge on a firm grasp of the outcome, and if it is not very clear, a lot of resources may be put into delaying the project.

Local Businesses - To the extent that the impact on their particular business is positive, local business will support development of affordable housing. Unless a sharp downturn in the viability of their business is clear, it is unlikely the effort will be put in to the conflict. However, this can be affected by factors such as proximity to the site, relationship to community members on one side of the dispute or the other, or type of business. For all community members, there may be crossing sets of interests based on differences between job, home, and cultural interests. For example, a local lumber dealer may welcome homebuilding in general, but live close to a proposed affordable housing site.

Town officials - The town officials may have the most complex set of interests to advance, especially, as is the case in Massachusetts, where there are numerous state incentives and

dis-incentives tied to the provision of affordable housing. Thus, the town official may see a problem for the town if there is a loss of state discretionary grants which would occur if there is no affordable housing plan, may face the "town meeting" expressing only negative reactions to the idea of any possible development. The town officials must operate within the laws of the state and the town, respond to the public opinion in the town, and quite often, are charged with finding a solution, within the context of prevailing laws and available resources. Each of the town boards and agencies has a separate set of concerns, each of which may come into play in an affordable housing development. This group includes Fire, Police, Water Dept., Dept. of Public Works, Planning Board, Board of Selectmen, Zoning Board of Appeals, Town Engineer, Board of Health, and the Conservation Commission.

Local Housing Advocates/CDC's/Non-Profits - Local housing advocates have an intrinsic interest in the provision of affordable housing. The need to justify a position taken socially or professionally may push the local housing advocate to reach for a solution which satisfies a requirement as to a number of units, but which takes too little account of other interests involved. Like the town officials, they have a tightrope to walk. They are members of a town which may be generally opposed to affordable housing, yet they are

personally and/or professionally committed to the provision of affordable housing. If the occupation as housing advocate is not the full time work, there is perhaps less of a need to connect to the other interests involved in the dispute, as their presence in dispute is seen as short term. If their commitment is strong, however, they will be pushed to find an appropriate compromise between the town and the developer. This group is often the source of the committee membership for a Local Housing Partnership.

Local Housing Authority - The local housing authority has an interest in keeping a hand in any affordable housing development which occurs in the town. They have an interest in the provision of affordable housing, but unlike the housing advocate, may be more constrained by the politics and rules of the town government.

Environmental/Open Space Advocates - While this group may also have a hidden agenda based on discrimination, similar to the homeowners (it is in fact often a strongly overlapping group) the interests of this group are some of the most hotly debated in many projects. They are concerned with Environmental issues at the micro level of the site, including septic systems and stormwater runoff, at the meso level of the town, including

issues such as open space, traffic, and town water supplies, and at the macro level of the region or country, including development patterns and pollution generation by traffic, regional aquifers, and the loss of farmland. These interests are generally accounted for at the lower two levels, yet many environmental advocates are indeed "thinking globally, acting locally" which may make it hard to uncover their underlying interests. The local Conservation Commission is the official "arm" of this contingent, and is empowered to issue an "Order of Conditions" if a project is proposed within 100 feet of a wetland resource area.

Regional Stakeholders

Affordable Housing Developer - The developer's interest is to get a project completed while making a minimum of profit. The process of development cannot take so long as to make the costs of carrying the mortgage on the land prohibitive. The developer tries to find the least costly way to satisfy the minimum number of demands regarding the development. Even if the developer does not have an interest in a local reputation, or a financial interest in the project after it is occupied, he/she will have some interest in maintaining a good relationship with the town, to ensure a smooth construction process with all of the necessary cooperation with the town it demands. This relationship is needed for water and sewer hook-

up permits, for assistance from the Dept. of Public Works to assist in such hook-ups, for ongoing cooperation from the building inspector on the inevitable changes in a project, or from any of the many other local boards who must interact with a developer during the construction of a development.

Construction Trades - The construction trades as a whole are delighted with any and all construction activity. The individual workers reserve the right, however, to keep their own counsel regarding the provision of affordable housing. They are the group most closely faced with the conflict of providing housing for lower than market cost to a specific group of people who they may or may not identify with. For example, a white construction worker who has worked all his life to provide housing for his family, noted that he did not like the idea of building below market rate housing for a people he felt would just "destroy it within a year."³ Whether this bears any on the dispute is questionable, whether it affects the quality of the construction is more likely.

The interest in supporting or opposing a development process rests with the larger group, however, and the interests of the particular trade or union will determine the acceptance or

³ Interview - Back of the Hill Townhouse Construction Crew 7/88

rejection of the development.

Banking Industry - The banking industry, like the insurance industry, is in the business of making money by taking careful risks. The affordable housing arena has always presented problems regarding the estimation and control of risk. If there is unexpected and vehement opposition to a project, it may force the developer's financial situation out of control. On affordable units of housing, the loans on the units may be subject to unusual legal entanglements such as resale restrictions, which may limit the possibilities of foreclosure on the property.

Employers - One of the newer interests for affordable housing is in the support from employers who want affordable housing for their employees. The interest is clear for employers, especially those who stand to gain the most from having an adequate affordable housing supply, such as larger employers. This group might include school district looking for affordable housing for teachers, or a large industry for its sales staff and assemblers.

State Stakeholders

Massachusetts Environmental Protection Agency - MEPA has a

mandate to protect the environment based on the national EPA requirements. Its interest is focused on achieving that result within as wide a legal interpretation of the "state permitting of funding function" required for their intervention. Any temperance or guidance outside of its charter must come from input from the various groups in the conflict, whether the local environmental advocates, the town officials, or the state officials. They must work within the political interests of the current government, to a certain extent. As the head official is appointed by the governor, and affordable housing is a key item on the governor's agenda, then the interest in stopping a project on environmental concerns will be softened.

Massachusetts Home Finance Agency - MHFA was empowered to sell both taxable and tax-free bonds to finance a variety of low-cost housing programs. It has a key interface role much like the smaller scale town officials. It is charged by the state to finance housing, and yet must respond to the larger interests of the national mortgage insurers regarding risk analysis, and the perceptions of the New York bond markets for rating their bonds. While as a state agency they may try to respond to a local or statewide political agenda, the foremost need is to keep the requirements of the larger scale financial

and insurance markets at the top of the list. This makes them careful about the quality of their developments, with reviews for project site selection and management an integral part of their financing process. A unique aspect of this process is an ongoing oversight of the financial and management activity of each of the more than 65,000 units of rental housing they have assisted over the past eighteen years.

Executive Office of Communities and Development - EOCD is trying to promote affordable housing, and so, like the local housing agency, would like to see some good numbers go up on the board. Depending on the political climate of the moment, the need to see a specific type of project may also be on their agenda. This may mean for example, that a new program such as the HOP program will be getting higher priority befitting its higher visibility in the government's efforts to provide affordable housing. Involving the local level officials and stakeholders has been an increasingly stated goal of the agencies within EOCD most responsible for their housing programs. EOCD must also guard against "one bad project" ruining its reputation, and so their oversight, like MHFA's, is also substantial. They conduct design reviews of all funded projects and make recommendations for changes in materials, construction, appearance, amenity, and site layout.

Elected Officials - As elected officials, response to their constituency is the primary aim, with the interest in achieving their stated goals/agendas the next in line. At the local level, this may mean strongly opposing an affordable housing project in a specific district. At the state level, from the governor's position, the commitment to affordable housing goes beyond the desire to connect with a constituency, to a need to fulfill a stated goal, with a personal stake in the outcome.

In the next Chapter, a number of techniques for "jamming the system" of affordable housing development will be examined, with reference to these stakeholders, and their interests in the conflict.

CHAPTER 4 - JAMMING THE SYSTEM

By using the knowledge of the intervention points in the development pathway, and knowing which arguments will be effective in which venue, almost any community member, local official, or neighborhood organization may try to alter the course of affordable housing development.

In this chapter, I will examine some of the strategies community members use to oppose affordable housing. I will also look at the strategies that enable community members to influence government officials to oppose the process on their behalf. I will discuss who the actors are, and at what point in the development process they intervene. Examples will be taken from two cases, Saugus Commons in Saugus, and Merrimack Meadows in Tewksbury, and be used to illustrate these four strategies of intervention:

1. Infiltrating and Influencing Local Boards
2. Enlisting Support From State Officials;
3. Exploiting The Power of the ZBA
4. Inventing Arguments For New Venues.

Following the discussion of these strategies, a third case, Mill Valley in Amherst, will be used to examine the impact of this "jammed system" on affordable housing development.

Saugus Commons

One of the more striking occurrences of "jamming the system" occurred in the case of Saugus Commons.

On August 25, 1977, Saugus Commons Associates submitted an application to the Board of Appeals of the Town of Saugus for a Comprehensive Permit to build 266 units of subsidized low and moderate income housing on a 26 acre parcel. Subsidy was to be provided by MHFA. The ZBA voted on October 28, 1977 to deny the permit. From that denial the developer brought the appeal to the Housing Appeals Committee.

This was only the middle of a very long history of this project. The application had originally been submitted to the town in November 1972 as a luxury apartment development. The developer requested changes in the local building code related to fire proofing and construction, and the town meeting voted them in. At this town meeting, sketch plans for the 266 unit development were presented. Shortly thereafter, applications to the planning board for subdivision approval. The building inspector issued a building permit subject to the Conservation Commission approval. The Conservation Commission issued its approval and Order of Conditions on April 26, 1974. There was no difficulty up to this point with any approvals or town boards, as noted in this sworn testimony before the HAC by the then-chairman of the

Planning Board:

Q..Is there anything that the developer has failed to do or builder has complied with as far as the Planning Board is concerned?

A..Not to my recollection.

Q..And you were satisfied with both the drainage and traffic situations when you approved the subdivision plan?

A..That and based on all the testimony we received from public officials in the town whose responsibility it was that these things were done, yes.¹

The situation changed, however, when the developer decided that the market would not support the luxury units. He applied for financing for building the same development as subsidized units. During the subsequent HAC hearing, the developer's engineer delivered sworn testimony on the reception of the affordable housing proposal:

Q..Then did you go to get a building permit, with that (subsidy financing) being the sort of financing for the development?

A..Yes

¹ HAC Transcript "Saugus Commons" Tr.IV p. 139

Q..Did you submit any plans any different from the same building plans that you submitted upon which you had received approval?

A..they were the same plans.

Q..Did you receive the same result that you got when you went down to apply for a conventional permit?

A..No.

Q..What Happened?

A..The Building Inspector refused to issue it and he recited chapter and verse in the Saugus Zoning Bylaw that he could not grant permits because of nuisance laws.²

The developer took this rejection to Land Court to challenge the Saugus ordinance under which the town claimed the development had "nuisance" factors. This ordinance was overturned by the Land Court. The town appealed this decision to the Appeals Court, which, on November 3, 1977 affirmed the Land Court decision. The developer appealed to the HAC just before the Appeals Court decision was issued, still enmeshed in a number of problems in the town.

² HAC Transcript "Saugus Commons" Transcript II p.32

Infiltrating and Influencing Local Boards

Since so much time had elapsed at this point, the developer needed an extension of the Order of Conditions from the Conservation Commission. The Developer sent a letter requesting what had been routine extensions of the Order of Conditions issued by the Conservation Commission. This time, however, the Conservation Commission requested a review of the application:

"The Commission discussed your request....we feel that conditions may have changed since the issuance of the Order, and that your plans and intentions should have a personal review."

At this "personal review" the developers met with the commission and advised them the request for extension was for the same plans which had been approved for extension each year. The Commission voted to deny the request for an extension and instead requested a refiling, a much more lengthy and demanding process. Why did they change their minds?

Each member of the commission said they had never requested a refiling when the plans have remained the same. They each gave different reasons for the request for refiling:

Q..Will you tell me what conditions have changed since the

original issuance of the approval for the Corcoran development other than the financing concerning the project?

A..What conditions have changed?

Q..Yes

A..Well, I am not aware of any of the conditions.³

Ms. H, an assistant non-voting member of the commission testified that the reason for requesting a complete refileing of the development documents (a substantial delay for the developer) was that there were new owners of the abutting property of the development. The previous owners of this property had granted an easement for a drainage culvert to pass through their yard into the Saugus River. The new owners were friends of hers, and knew nothing about the drainage.

However, under cross-examination, Ms. H. testified when the developers won their Land Court case in the summer of 1977, she and her husband composed a letter concerning the proposed development and took it around to neighbors. Her memory of that letter was weak:

Q..What was the letter?

³ HAC Transcript "Saugus Commons" Tr. IV p.109

A..It was more or less that it [the development] was going to the board of appeals.

Q..Did this letter say it was a subsidized project?

A..No.

Q..Did it say there was going to be subsidized housing?

A..No.

Q..Did it say it would be low income housing?

A..No.

Q..Can you remember what the letter said?

A..Not word for word.

Q..Do you remember what the substance of the letter was?

A..We asked the people to join with us to meet with the Selectman at the selectman's meeting.⁴

But the actual letter, as shown in the HAC proceedings and identified as the letter by Ms. H. tells quite a different story, giving an idea of what the interests of Ms.H were, and, therefore, what interests she would undoubtedly be arguing in her role as Conservation Commission member:

"With this new development we face the influx of a thousand people on Main Street.. will markedly affect our already disastrous tax bill... this complex will contain low and

⁴ HAC Transcript "Saugus Commons" Tr. II p.80-87

moderate income housing...it is partially funded by public agencies.... as such it may be (tax) exempt... the addition of a large number of children would be extremely expensive..I think we will all agree that we cannot afford this type of development..."

Her husband was subsequently elected to the board of selectmen, with stopping the housing development a large part of his platform. Ms. H. was asked if she had engaged in similar activity when the non-subsidized development was proposed for the same site:

Q..Now, what did you do to, if anything, to block this project when it was supposed to be a conventional project?

A..I don't think I did anything.

Q..Now, do you expect that there would be more of a density problem when it became a subsidized project as opposed to a conventional project?⁵

The community members on each of the boards in town are all susceptible to this kind of infiltration or influence. The number of hearings and public meetings of each town agency makes it difficult to counteract this kind of steadfast opposition:

⁵ HAC Transcript "Saugus Commons" Tr.II p.84

Q..Did you walk around with him [her husband, running for selectman] circulating a petition to get signatures to bring to the Board of Selectmen so that they would appeal the land court decision?

A..Yes, I did.

Q..You did, so that these matters came to your attention, is that right?

A..Not at that time.

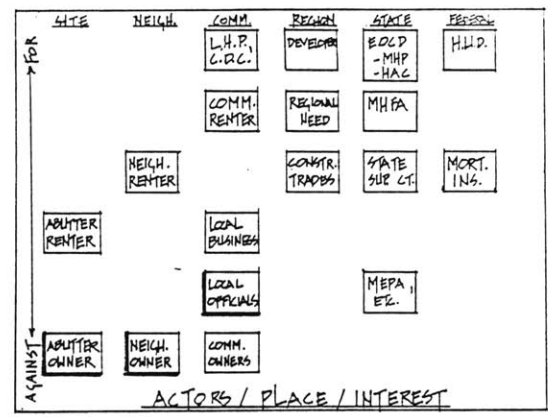
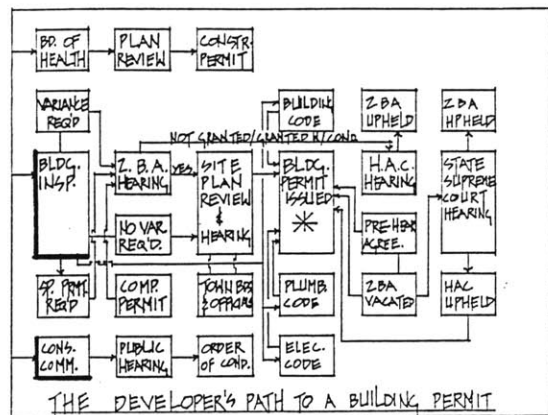
Q..And the matter that came to your attention was that the Corcorans won the case in court and they were actually going to build those 266 units, is that right, and you were going to try and stop it, weren't you?

A..Absolutely⁶

It is clear that this project had opposition from a number of points and actors among the list of stakeholders in the project, however, the switch from a market-rate project to a subsidized project allows us to isolate some of the reasons for local resistance to this project. This switch also caused the developer to not use the Comprehensive Permit process initially, as the approvals were already complete for the project, only the building permit had been needed.

⁶ HAC Transcript "Saugus Commons" Tr. II p.87

Thus the first round of opposition came from the Building Inspector refusing to issue the permit because of "nuisance laws." This might be termed a "desperation attempt" at stopping the project, as the building inspector became the last point of defense for the town, and was forced to think of any excuse to not issue the permit. There is no evidence to show whether he acted alone or not on this decision.



After the developer's winning appeal in the Land Court, Ms. H. geared up for action. She circulated a petition to encourage the town to appeal the Land Court decision, which it did. She brought her opposition into the Conservation Commission. This opposition was much more subtle, and was carefully orchestrated and concealed. It took advantage of the Conservation Commission's independent status to focus the opposition. The motivations of this Commission are intertwined with the three levels of opposing forces in the community. (see chart at right). The process was "jammed" at a number of places by these actions. The first "jam" occurred with

the Building Inspector not issuing a permit, and the courts provided the resulting delay for this strategy. The second "jam" occurred in the Conservation Commission, with subsequent delay at the Housing Appeals Committee. The major actors in this "jamming" strategy included the building inspector who would not issue the permit after the project became subsidized (a local official in the chart at right), the abutter/owner who wanted to know more about the drainage, the Neighborhood owner who was on the Conservation Commission (Ms. H. lived five blocks away from the development,) and the Commission members who joined in the vote to request a refiling (noted as "local officials" on chart). The request for a refiling is a clear tactic of delay, perhaps leading to a restrictive Order of Conditions at a later point.

The autonomy of many of the local officials and boards allows such activities to occur regularly with developments. In this case, it was possible to trace the strong personal opposition of one of the board members, through the activities of taking around the petition. In most cases, however, those personal feelings remain behind the scenes, and are only revealed indirectly through voting patterns, or discussion and argument in hearings. The Comprehensive Permit was meant to override just this type of opposition, where six month delays from one board keep developers from proceeding to the next hearing, where

another delay awaits. This kind of opposition still exists, however, and still manifests itself in similar ways, especially at points where a single person may stop a project with little argument, or a closed-door decisions occurs which cannot be overruled by the HAC, as with the Conservation Commission.⁷

Enlisting Support From State Officials

State agencies and legislators are also subject to community pressure. In the same case, in Saugus, another abutter of the proposed development formed the "Saugus Advisory Group on Traffic Control" and secured the services of a State of Massachusetts Department of Public Works traffic analyst to prepare a traffic analysis for their opposition. This abutter was questioned on how he formed this committee and secured those services:

Q..And referring to the "Saugus Advisory Traffic Committee"...

A..Right

Q..Can you tell us what that is?

⁷ The Conservation Commission comes under the regulation of the Department of Environmental Quality Engineering. The HAC may only overrule the Conservation Commission if DEQE has already ruled on whether there is a legitimate wetlands issue existing sufficient to warrant the denial of an extension.

A..Well, we complained.. When this construction was being proposed, we had complained that we thought the traffic generated onto Main St. was going to be prohibitive, you know, too much traffic on Main Street and we were worried about the traffic generated by this on Main Street and we went to the Board of Selectmen and asked if they could conduct a traffic study.

Q..And how did they decide on your membership?

A..They asked us if we could get a committee together and so we went around to the neighbors and we got a committee together.

Q..And you contacted Mr.S.[the consultant from DPW]

A..We went to Mr. B., Representative B., and asked him.. You know, we had no expertise in this subject at all. We didn't know anything about traffic control. So we went to Representative B. and he suggested that we get in touch with the Dept. of Public works and they suggested that Mr. S. act as liaison for us.⁸

However, it was clear when the work was completed that this was not felt to be appropriate operating procedure for the state DPW, as the consultant was questioned:⁹

⁸ HAC Transcript "Saugus Commons" Tr. V p.178

⁹ HAC Transcript "Saugus Commons" Tr.V p. 49-50

Q..Now, sir, can you help me at all as to the circumstances under which you prepared this report? You told me you were "on touchy ground." Didn't you?

A..Well, my---

Q..No.Didn't you say that?

A..I don't remember saying that.

Q..You don't remember saying that. Well, the cover letter which is next to the exhibit [the traffic report] is from someone name "K." and I can't read the rest of it.

A.."K. K....."

Q..He's your superior?

A..Yes, sir.

Q..and the second paragraph says, "I've instructed Mr. S. in all future endeavors with regard to local matters will be restricted to a review of the materials prepared by other sources." In other words, you're not supposed to do this again, are you?

A..No, sir.

Q..As a matter of fact, you have never done this before, have you?

A..No,sir. Excuse me. Yes, sir, I have done it before.

Q..But you're not supposed to do it again, are you?

A..No,sir.

Q..And that's what the "touchy ground" is all about?

A..Yes, sir

The consultant testified that he was not paid by the committee, but by the DPW, and that he had little knowledge about this "advisory committee:"¹⁰

Q..Were you paid to do this study?

A..I was paid by the Dept. of Public Works.

Q..Were you paid by the citizens group that---

A..No, sir, I was not.

Q..Mr. Q. has what quasi-official capacity, if any, that you understand?

A..Chairman of the Saugus Traffic Advisory Committee.

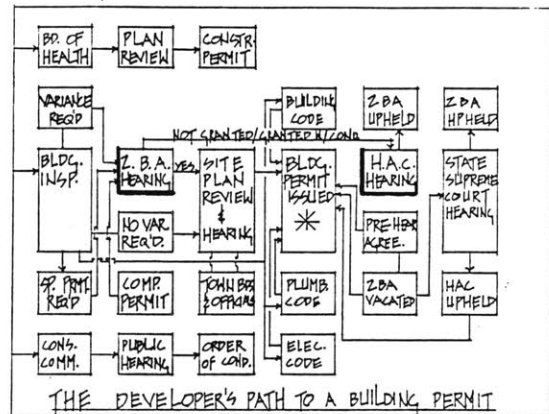
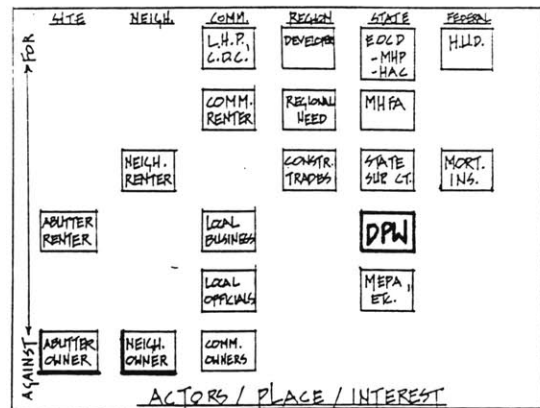
Q..And is that an ad hoc committee that was formed at or about the time this development was proposed, if you know?

A..I don't know sir.

The process was jammed by this strategy at the two places where the traffic studies were presented, the ZBA and the HAC, and where the DPW expert was used as an expert witness by the town, in the HAC hearings. The actors in this strategy included the Abutter who started up the ad hoc committee, the adhoc committee made up of "the neighbors," bringing in a new "one-shot" actor

¹⁰ HAC Transcript "Saugus Commons" Tr.V p.50

to the process, as well as the DPW through their expert, also an unexpected participant. This strategy illustrates the inventiveness and resourcefulness opposition can muster to jam the system. They started off with no funds, no committee, and no real voice in the proceedings. The traffic issues became one of the three issues which were considered by the HAC, and relied on the study done by this DPW expert for the "Saugus Advisory Traffic Committee."



Tewsbury - Exploiting The Power of the ZBA

The next two strategies will be taken from the case of Merrimack Meadows vs. the ZBA of the Town of Tewksbury. The actions of the ZBA created the most significant "jamming" of the system in this case. The actions of the ZBA are typically at center stage in an affordable housing conflict.

At the initial local level of decision-making, the most common occurrence is for a developer to be seeking a zoning variance

from the Zoning Board of Appeals, generally to build more units, at a higher density than would otherwise be allowed. Other variances may also be sought for permission for cluster site design, to reduce frontage or side yard requirements, or any of a host of zoning or subdivision regulations which the developer feels would make the project uneconomical.

As outlined in Section 7 of Massachusetts General Laws 40A (MGL-40A), enforcement of the zoning laws is carried out as follows:

"The inspector of buildings, building commissioner or local inspector, or if there are none, in a town, the board of selectmen, or person or board designated by ordinance or by-law, shall be charged with the enforcement of the zoning ordinance or by-law and shall withhold a permit for the construction, alteration or moving of any building or structure if the building or structure as constructed, altered or moved would be in violation of any zoning ordinance or bylaw;"

If a developer is not using the Comprehensive Permit process, relief from the zoning by-laws may be sought in the form of a special permit, a zoning variance, a zoning amendment, or a direct challenge to the standards of the zoning.

The Variance is allowed upon showing the existence of "unnecessary hardship" which is "peculiar and unique to the land

in question."¹¹ If it were not unique to the land in question, a rezoning would be more appropriate. A Special Permit is allowed in "situations specified or described in the zoning ordinance in the event certain facts are found to exist."¹² More often than not it is a variance which is sought. The appeal process, however, is the same. What may be the basis for this appeal? As outlined in Section 8 of 40A:

"An appeal to the permit granting authority as the zoning ordinance or by-law may provide, may be taken by any person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative officer under the provisions of this chapter, by the regional planning agency in whose area the city or town is situated, or by any person including an officer or board of the city or town, or of an abutting city or town aggrieved by an order or decision of the inspector of buildings, or other administrative official, in violation of any provision of this chapter or any ordinance or by-law adopted thereunder."

Who is this appeal brought before? Again, as specified in 40A, the Zoning Board of Appeals (ZBA) is outlined, including who appoints and confirms the ZBA, how many members there are, and what their terms of office shall be:

"Zoning ordinances or by-laws shall provide for a zoning board of appeals, according to the provisions of this section....The mayor subject to confirmation of the city council, or board of selectmen shall appoint members of the

¹¹. Wright and Wright - Zoning

¹². Wright and Wright - Zoning

board of appeals within three months of the adoption of the [zoning] ordinance or by-law.....Any board of appeal established hereunder shall consist of three to five members....for terms of such length and so arranged that the term of one member shall expire each year."

The powers of the ZBA are listed in 40A as well, and indicate how thoroughly a local ZBA typically controlled development:

"A board of appeals shall have the following powers:

1. To hear and decide appeals in accordance with section eight.[noted above]
2. To hear and decide applications for special permits upon which the board is empowered to act under said ordinance or by-laws.
3. To hear and decide petitions for variances as set forth in section 10.
4. To hear and decide appeals from decisions of a zoning administrator, if any, in accordance with section thirteen and this section.

In exercising the powers granted by this section, a board of appeals may, in conformity with the provisions of this chapter, make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision, and to that end shall have all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of permit."

The ZBA therefore acts on all appeals requested for special permits or variances from developers, and can alter the decision in any way it deems necessary. This is the hold on development which was challenged by 774.

Although the public may be invited to participate in the

approval process at the level of Preliminary Subdivision Plan approval by the Planning Board, it is less formally required than at the ZBA hearings. The requirements for notifying the community of the ZBA hearings are spelled out in Section 15 of 40A:

" The board of appeals shall hold a hearing on any appeal, application or petition within sixty-five days from the receipt of notice by the board of such an appeal, application or petition. The board shall cause notice of such hearing to be published and sent to parties in interest as provided in section eleven."

Parties in Interest

Who are the "parties in interest" who must be notified by mail?

As defined in Section 11 of 40A:

"Parties in Interest" as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner..."

The "parties in interest," often referred to collectively as "abutters," are thus legally given enormous weight and power in any development conflict, insofar as the notice of such a hearing, with perhaps the first details of the development itself, is sent directly to them. They are in position to notify (or form) neighborhood groups and community organizations who

might also be interested in stopping the proposed development. As the community groups have become more sophisticated, the use of neighborhood organizations and community groups has increased. Their presence spreads out the cost of opposition, and increases the impact at all levels of the battle. This impact can also be used to appear to be larger than it actually is:

"A psychological advantage is also present. An organization identified as representing an entire neighborhood community or several communities is likely to be more impressive to the zoning board and planning commission than the appearance of individual citizens representing only their individual interests. The opposition can be inflated in the sense that the community organization can represent itself as speaking on behalf of the entire community even though every member of the community may not be members of the organization, may not oppose the application or even be aware of its existence. Thus, a "pressure group" has been formed which at least claims to represent a large block of votes at election time and can hardly be ignored by elected or even appointed officials.¹³

A Neighborhood group may be an existing one, perhaps organized on the basis of a street, school, or park nearby. It might also be one which has formed specifically around the proposed project. Ironically, a neighborhood group is often organized initially by a developer's invitation to all neighborhood members to meet with them.

¹³ How to Win the Zoning Game , Abrams, p.129

A Community organization may be an existing special interest group such as an environmental organization, or one newly formed around community level issues such as taxes, traffic, or water supply.

The abutters are still the party most likely to be able to prove itself an "aggrieved" party in further appeals in the legal system. An aggrieved party is defined as:

" The status of a person (or organization) to appeal a zoning decision by virtue of the fact that their personal or property rights are adversely affected by said decision."¹⁴

The ZBA hearing is a foundation of participation in American politics. It reflects the heart of the attitudes towards outsiders that townspeople have:

"The entire institution of zoning is based on an emphatic localism that is revealed in several ways. In public hearings or law suits, the issue of standing is paramount, and there has been a "basic unwillingness of the courts to accept that non-residents of a community possess a requisite life, liberty, or property interest" in any other community's zoning laws. As in New Jersey, for any given appeal or variance request often only those whose property is within a certain number of feet of the lot in question have standing at public hearings. Each issue determines the radius of its influence: the assumption is that its radius is definable." (Perin - Everything in its Place)
It is the nature of housing that those looking for or in need of housing have rarely been involved in hearings in which they

¹⁴ How to Win the Zoning Game , Abrams, p. 209

might be supplied with it. There is generally no one but the "hated" developer to advocate for a housing proposal, in any of the town hearings.

Americans look at the ZBA hearing as the first battleground of zoning issues, and it has historically been where the life and death of affordable housing is decided.

Merrimack Meadows vs. Tewksbury Board of Appeals

On April 30, 1987, Merrimack Meadows Corporation submitted an application for a Comprehensive Permit to build a 241 units development containing 25% low and moderate income units on 39 acre parcel of land in Tewksbury. The units were to be financed by MHFA under the guidelines of the HOP program.

On May 18, 1987, the ZBA held a public hearing on the application, received comments in support and opposition to the development and the hearing was closed on the same evening. Part of the testimony against the development included the presentation of a petition with 376 signatures under the following letter:

"As concerned taxpayers of the town of Tewksbury, we, the undersigned, voice our opposition to the comprehensive housing project proposed by the Merrimack Meadows

Corporation. This project is located at the intersection of Andover Street and River Road. Reasons for opposing are as follows: 1) Location (single family homes); 2) Traffic impact; 3) Burden on town services (water, police, fire, schools); 4) property values; 5) Only remaining access to Merrimack River for town residents; 6) Does not fall under the category of snob zoning (1,455 condos in town, many unsold)."

The ZBA requested that the developer meet with the Tewksbury Comprehensive Affordable Housing Committee. The proposal was also submitted to the Planning Board, as well as the Conservation Commission. The developer made a number of concessions to each of these committees, and received their recommendation that the project be approved by the ZBA.

The ZBA met in a deliberative session on June 25, 1987 and voted, four to one, to deny the application. The zoning board did not submit any minutes of this meeting to indicate what comments were offered for the denial. There was no written decision as of July 17th, when the appeal was made to the HAC. Following the initial pleading before the HAC, and the institution of a civil action in Middlesex Superior Court by the developer, a written decision was filed by the board with the Tewksbury Town clerk on July 30. The reasons for denying the

permit were listed as the following:¹⁵

1. That it does not conform to the requirements of General Laws, Chapter 40A
2. The petitioner did not substantiate a hardship financial or otherwise to the property in question.

This action by the ZBA is technically a denial of due process to the developer. However, the courts have been unclear as to what "due process" means at the ZBA.¹⁶ This allows boards to meet in a "deliberative" closed door session, not reveal their discussion, and come out with a decision. Most courts consider a ZBA hearing for a permit an administrative process, and therefore needing to be accompanied by "procedural safeguards."

These safeguards mean that:

"parties at the hearing...are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter - i.e. having had no pre-hearing or ex-parte contacts concerning the question at issue - and to a record made and adequate findings executed."¹⁷

¹⁵ Board of Appeals Decision - Town Clerk Board of Registrars, Tewksbury, Mass. July 30, 1987

¹⁶ Craig Peterson, Claire McCarthy - Handling Zoning and Land Use Litigation p.40

¹⁷ Craig Peterson, Claire McCarthy, Handling Zoning and Land Use Litigation - p.42

The requirements are different in each municipality, however, and so each hearing and process may be quite different. In this case, while the testimony took place in public, if the discussion does not, it is impossible to tell what has influenced the ZBA. One can only infer the influence of the petitions or testimony. It is possible there was some unknown interest which swayed the board, or that there was reasonable agreement on the undesirability of the proposed development.

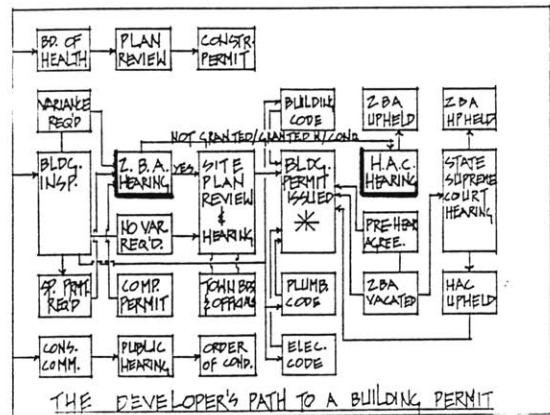
The ZBA also chose to pretend that Chapter 40B, the Massachusetts Law establishing the Comprehensive Permit, did not exist. This is indicated in their reasons for denial, where they cite Chapter 40A instead of 40B, and base their reason on the traditional standard of denying a variance, that there was no "unnecessary hardship" established.¹⁸

The process was "jammed" at the ZBA in this strategy. This left the possibility that the project would be abandoned, which would be what the ZBA would have liked. It did achieve a substantial delay, as the developer was forced to appeal to the HAC.

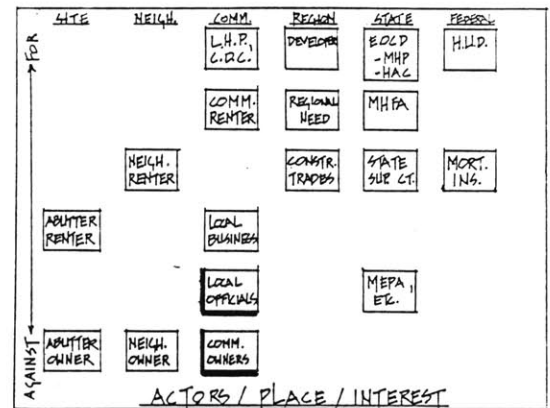
From what can be inferred, the actions to "jam the system" were from two sources, the citizens petition and the ZBA.

¹⁸ Craig Peterson, Claire McCarthy Handling Zoning and Land Use Litigation p.323

Assuming the Citizens petition did have a decisive impact on the ZBA decision, they started as the "source" of the "jam" and the ZBA, responding to their influence, became the new "source."



The citizens were seeking to be seen as significant opposition, and represented themselves in their petition as "concerned citizens of the Town of Tewksbury," which, while not inaccurate, gives their petition



some power in the normal politics of a small town. The ZBA, as it became the source of the jamming, advised the developer to continue on through the system, which took additional time.

While, the absence of any reasons given for the denial is a serious lack of due process for the developer, the only recourse is to the costly and time-consuming courts. While this project was not abandoned as a result of this action by the ZBA, it caused the project to be delayed for almost six months, and forced the developer to hire counsel to take the case to both the Superior Court and the HAC.

Every developer has a project which has been abandoned after a ZBA hearing, where it was felt it was better to limit the loss, and pack up, or where the ZBA decision is brought out from behind closed doors after public testimony.¹⁹ Unfortunately, developers and townspeople alike are used to decisions that take in some public testimony only to emerge shortly thereafter shrouded in mystery.

The Housing Appeals Committee

The case of Tewksbury ZBA vs. Merrimack continued to the Housing Appeals Committee. The HAC process begins with the attorneys for the developer and the town brought together in a "conference of counsel." The members of the community who desire input at the HAC level are represented at this point only through the testimony or other input they have already given at the ZBA hearings. If the HAC begins its hearings on the case, it is a "de novo" hearing, starting from scratch. The hearing takes place in the locality, and while the hearings are less formal than full court proceedings, witnesses are sworn in as and cross-examined. For many community members, this experience is probably an uncomfortable one. The HAC distinguishes participants in the process legally as to whether they are given standing to "intervene" or just giving testimony.

¹⁹ Interview with Gene Kelley 3/89

The community may intervene as outlined in the following manner:

"The committee may allow any person showing that he may be substantially and specifically affected by the proceedings to intervene as a party in the whole or any portion of the proceedings and may allow any other interested person to participate by presentation of argument orally or in writing or for any other limited purpose, as the Committees may order. In determining whether to permit a person to intervene, the Committee shall consider only those interests and concerns of that person which are germane to the issues of whether the requirements and regulations of the city or town make the proposal uneconomic or whether the proposal is consistent with local needs."²⁰

The document goes on to define the party who may intervene:

"Residency is not sufficient to sustain intervention. A taxpayer of the town who claims to be specifically affected by the proceedings in that the grant of a permit may cause an increase in the town's tax rate shall not be allowed to intervene in any manner because, as set forth in 760 CMR 31.05 and 31.06, this is not a statutory concern in the determination of whether a decision is consistent with local needs."²¹

What then might allow a party to intervene? Is being an abutter adequate? An example is given in the same document:

An owner of the land abutting the site of the proposed housing may be specifically and substantially affected by the proceedings. This is a fact must be established by the

²⁰ Procedural Regulations for the Housing Appeals Committee S. 30.04

²¹ Procedural Regulations for the Housing Appeals Committee - 30.04, 3b.

person seeking to intervene. It is possible that a proposed arrangement of the housing may so limit the impact on abutters that they are not specifically affected but are only affected as are other residents of the town. But intervention by an immediate abutter may be justified on the grounds that construction of the proposed housing would result in a diversion of surface water onto the abutter's land and thus create a safety or health hazard. In such case, the abutter must demonstrate that no other party is addressing the issue."

It is thus quite a different matter for the community member to intervene at this stage.

The issues which the HAC will consider are carefully proscribed, they include the consideration of the public health and safety, building design and siting, and the provision of open space, all of which are balanced against the "regional need for low and moderate income housing and the number of low income persons in the city or town."

Any individual or group which can show it is an aggrieved party within these criteria may file a motion to intervene in the HAC proceedings. However, Murray Corman, of the Housing Appeals Committee, notes that giving legal standing to abutters and neighborhood groups would then provide them with a quick and inexpensive avenue for appeal to the state supreme court. He will therefore generally let them testify at HAC hearings, but will rarely give them the status to intervene. Still, they try, hoping to cause any type of delay or question in the process.

Inventing Arguments For New Venues - From the ZBA to the HAC

When the case of Tewksbury vs. Merrimack was brought before the Housing Appeals Committee, more evidence of new ways to "jam the system" emerged. The town based its arguments on the "potentially dangerous" traffic situation which could be caused by the development, even though the ZBA did not consider mention traffic in its delayed decision, noted above.

What the board, or perhaps the lawyer for the board realized, however, was that the HAC was obliged to consider the traffic issue, as traffic qualifies as an issue of "public health and safety" and it was compelled to hear testimony, even if it was new to the case. In an early decision which was critical to the HAC achieving authority, Board of Appeals of Hanover vs. Housing Appeals Committee, the State Supreme Judicial Court, ruling in favor of the HAC, cited HAC's need to "conduct a de novo review of the application:"

"If the Committee is to fulfill its duty to determine whether the board's decision is in fact "reasonable and consistent with local needs" then the committee must be free to consider any evidence relevant to those issues."

("Hanover" p.370)

The town of Tewksbury was allowed to argue its refusal based on

traffic impact, although the member of the Zoning Board of Appeals who also sat on the Affordable Housing Committee does not recall having questioned the developers about traffic at all:

Q..You were present at the Hearings of the Affordable Housing Committee that were held relative to this proposal, weren't you?

A..I was in Attendance for two.

Q..You were the representative for the Zoning Board of Appeals at those?

A..I was one of the representatives of the Zoning Board of Appeals.

Q..You never mentioned traffic at anytime during those hearings, did you, those two hearings that you attended?

A..No²²

The same ZBA member was asked about the ZBA's general requirements for traffic studies, and how it was that a number of large commercial developments have occurred on the same road, but were not asked for detailed traffic studies:

²² HAC Transcript "Merrimack Meadows" Tr.II p.28

Q..To the best of your knowledge, it is not a uniform requirement-- traffic analysis is not required for every 40-B application that comes before you, is that correct?

A..That is correct

Q..It is not required for every Special Permit application that comes before you for, say, commercial development, is it?

A..Not for every one, no.

Q..There have been a large number of commercial developments that have been approved up in the area of North Street and Andover Street in the last two years, isn't that true?

A..That is true.

Q..Have you had a traffic study form the applicants in any of those cases when those applications have been approved?

A..We have received projections, but I would say we have not required traffic studies.²³

The town had approved over 2,000,000 feet of industrial projects impacting the same intersection in 1987, and did not require traffic studies from any of the projects. In attempting to show it was not opposed to affordable housing, the board cited its acceptance of a 168 unit proposal (since withdrawn) on the same

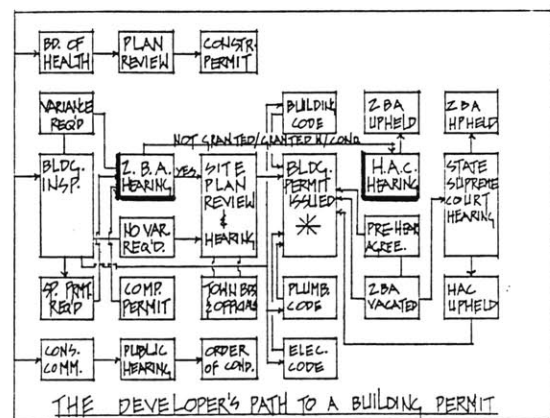
²³ HAC Transcript II p.22

street and leading to the same intersection as Merrimack Meadows, yet they approved this Comprehensive Permit before any traffic study was given to them:

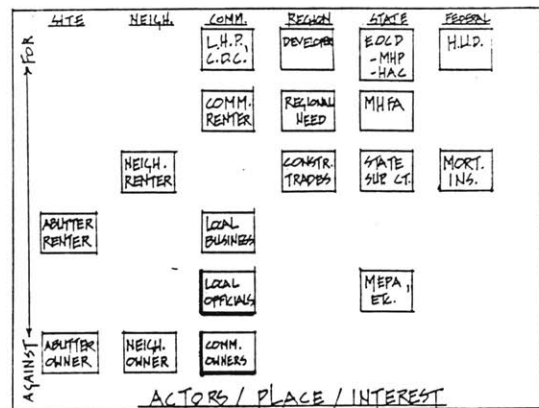
Mr. C. Can you stipulate that the Comprehensive Permit , the document that indicates the issuance of a Comprehensive Permit, contains a certain paragraph, and read it into the record?

Mr. K. I will read it into the record. Reading from the comprehensive Permit from the Town of Tewksbury. Condition No. 6, as set forth in the permit is the applicant should submit a traffic study and plan to the Comprehensive Housing committee to determine the impact of the project on North Street...

The Housing Appeals Committee vacated the ZBA denial, but the opposition had again found a way to jam the system, by bringing in an argument that they had not raised before, but they knew was an acceptable one at the HAC. The citizen petition which most likely swayed the ZBA at the local level would have no effectiveness at the higher level, so the new argument was fabricated. The town had



decided that traffic concerns were the best shot they had at winning a decision in front of the HAC, and even though their case was very weak, it served the purpose of delay.



The determination of housing need made at the HAC hearing found the net housing deficit was determined to be 461 units, with 203 affordable units already in the town. Not noted in the proceedings was the fact that of those 203 units, 190 were elderly or handicapped units.²⁴

Amherst - The Power of Delay

With the lack of success of ZBA denials at the HAC, and the lack of success of subsequent appeals of HAC decisions to the State Supreme Court, rarely are one of the above techniques successful by itself, yet when used in combination, they still create a powerful weapon called "delay". The power of delay is noted in this advice to the community opposition:

"A useful method to ensure sufficient time for preparation is to request a deferral of the meeting or hearing date.....The impact of such a deferral extends beyond the mere additional time afforded to complete the opposition preparation. A deferral or delay will make the applicant's

²⁴ Preliminary EOCD Inventory of Subsidized Housing - 12/1/88

consultant studies that much more untimely and subject to charges of being out-of-date. A deferral may upset the timing of the applicants game plan and development schedule and the applicant's attorney and expert witnesses will have to re-prepare and perhaps encounter problems of conflicting schedules causing further postponements and delay. Delay may have even greater significance in terms of options on land expiring, inability of an applicant to meet contractual or financing obligations, any of which can terminate the entire effort to reclassify the property."

The effects of delay are the most devastating to a developer, and can take unexpected and expensive turns. What is the cost to the production of affordable housing of this assorted "jamming" by members of the community?

Mill Valley vs. Amherst ZBA

On July 30, 1986, Mill Valley Limited Partnership submitted an application to the Zoning Board of Appeals of the Town of Amherst for a comprehensive Permit to build 164 unit development of low or moderate income housing. On October 27, 1986, the ZBA issued a permit, but with twenty-seven conditions. Mill Valley appealed this decision to the HAC, particularly the first condition, which reduced the number of units from 164 to 82. In the HAC decision, it is noted that condition number five is unusual:

"Condition #5 is designed to prevent the developer from tampering with a particular stand of trees. Presumably it was included to screen the project in part from abutters

from whom the real opposition to this project emanated"²⁵

The public opposition to this project came from abutters who described the effect of living nearby a poorly managed apartment complex:

"extensive vandalism, such as uprooted mailboxes and destroyed lawns, result from this great density. The largest complex, Brittany Manor, is poorly managed. the noise level reaches out beyond its borders. The number of police calls as reported by Chief M. is significantly higher than in any other part of town."²⁶

Condition #10 made it clear that the town thought a specific management policy would help the development:

"10. A management plan, including specifications of the resident manager, detailing supervision of the detention ponds and tenant selection procedures, shall be approved by the Board of Appeals prior to occupancy. Low and moderate income tenants shall be selected in the same proportion as the market unit tenants both during initial occupancy and

²⁵ HAC Decision Mill Valley Estates Vs. Amherst ZBA p.28

²⁶ Record of Appeal and Decision Amherst ZBA no.86-69 p.12

during turnover leasing in order to avoid concentration of any income level in one building or groups of buildings in the development."²⁷

The board, in the final conclusions, tied their decision to the negative input about the development they had received in their hearings:

"The introduction of the proposal for this development has brought to the surface extraordinary expressions of resentment and bitterness. The granting of a reduced size proposal should serve to balance the need for subsidized housing against the problems in this area that must be corrected."²⁸

Two aspect of this case relate to this thesis. The first, which will be briefly discussed, is the part in "jamming the system" that this case illustrates. The second is a closer look at the costs of jamming the system.

The opposition in this case was able to express such "extraordinary resentment and bitterness" that the zoning board

²⁷ Board of Appeals Amherst, MA Comprehensive Permit p.2

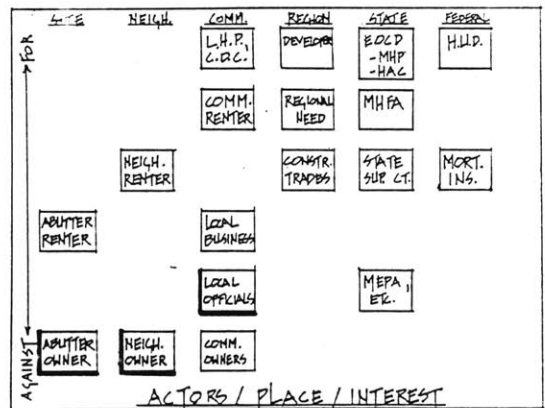
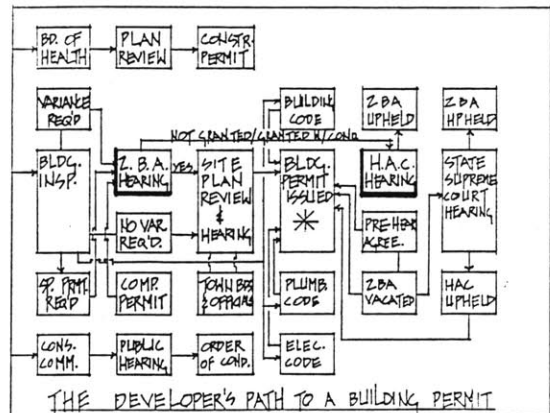
²⁸ Record of Appeal and Decision Amherst ZBA p.12

felt compelled to cut the number of units in half. It was a more evident example of the power of citizens to influence a ZBA decision, as was inferred in Tewksbury. In Amherst the ZBA members had no qualms bringing their discussion to the public.

The ZBA also added 26 other conditions that combined to make the proposal infeasible.

This opposition, brought through the ZBA from the neighbors, was supported to a great extent by the

large landowner who had sold the land to the developer, but who realized too late that the impact on his own apartment houses would be negative²⁹. The full effect was a two year delay for the project. The cost of this delay will be detailed, as these costs bear on each project delayed in a jammed system, and any project operating in system which is subject to such jamming, even if the projects are eventually built.



²⁹ Interview with Shelley Miller 3/89

Shelley Miller of Winn Development noted that the costs of the delays caused by this opposition were "lost opportunity," meaning the associates involved for "three years putting together one project" could not be working elsewhere on another project. Although this is a very real cost, it is hard for most people to conceptualize. When questioned further on the changes which occurred as a direct result of the various delays brought on by the ZBA denial, the costs also included:³⁰

- * \$300,000 in infrastructure costs
- * \$200,000 in legal costs
- * \$150,000 in land costs (after the original two year option had run out, a much less favorable option was taken.)

In order to cover these and other costs, the effect on the development itself were notable:

- * Elimination of the swimming pool - Significant in that "amenities are very important for these projects"
- * Reduction of the first year project management funds by more than 15%

³⁰ Interview with Shelley Miller, 3/89

* When the elimination of units was necessary as part of the final agreement, it was accomplished by eliminating three buildings, as opposed to taking a floor off of each building. This is a notable "loss" for all, as some of the largest concerns of the abutters centered on the height of the buildings and how they blocked the view to the mountains. Because the developers had to save money after the prolonged battle, they chose to eliminate the costly foundation work of extra buildings, rather than reduce the development's height.

The developer was forced to make a more careful assessments of costs, which made the margin for error (and profit, certainly) much tighter. While the developer noted some positive learning in this respect (a careful look at the heating load of the units, and the efficiency of their heating systems allowed them to reduce the estimate for heating costs made by MHFA, for example), the overall impact in this fiscal constraint was negative; higher risk for the developer, and more chances to be stuck with an uneconomic development.

The inevitable changes in a project loom much larger, as the financial cushion grows bare. For example, in Amherst, after construction had begun, the town decided the single sewage pump it had approved was not adequate, and was requiring two larger

pumps (one as a backup) which would add over \$80,000 to the cost of the project. These changes, which might ordinarily be just irritating to a developer, begin to threaten the last remaining profit on the project. The project must remain "beautiful to look at, and well run," beyond the normal market demands, notes Miller, and so the tension of reducing costs is severe.

A consistent pattern of the use of each of the above-listed techniques for stopping, delaying, or reducing the project shows up through looking at projects throughout Massachusetts. When the cumulative impact of any or all of these tactics is brought to bear on a proposed affordable housing project, the effect of this resistance by the abutters/neighborhood groups is a significant problem for the developer.

While these are separated out for discussion, with specific cases identified, it is generally the case that any of the "interested" parties will try any and all of the above tactics, sometimes all on the same development. Additional strategies, such as turning back of a developer solely on the basis of antagonism expressed in a ZBA hearing can also be seen in many instances. These strategies are also part of "jamming the system."

Discussion - The Net Effects

The end results of this kind of resistance make the developers gun shy about developing affordable housing, especially in specific communities, and also force the developers to give themselves a much higher margin for error initially, especially in terms of the time it will take to start construction of the project. Developers are now anticipating an average of three years from application to beginning construction.

The additional time and uncertainty causes a vicious cycle of higher mortgage needs, thus requiring either higher density, which causes more opposition and delay, or higher prices, causing the project to approach the limits of the real estate market. The mortgage is not only carried for a longer period of time by an affordable housing developer, the mortgage must be higher to account for the costs associated with the delay.

These additional costs include higher upfront costs of detailed architectural and engineering plans required by the towns and certainly if the case goes to court. These cost include hiring more experts, sooner than in a normal development, so a developer can ARRIVE with much of the work done that normally would not take place until construction. These are costs few market rate projects have to go through, but almost every subsidized project must face, even given the exact same set of

plans, as in the case of Saugus Commons. The costs ultimately are borne by the development and its residents, the town and its citizens, and the taxpayers of the subsidizing government, whose taxes are subsidizing the extra cost to provide the same number of affordable units.

It does not matter that these actions do not occur on every development. They have occurred often enough that a developer must build these costs into every affordable housing development.

The cost can also be seen in the projects which never get built, where the developer takes a loss and turns to the next project, and as occurs in spite of the legislative blocks to this kind of action. This causes affordable housing to be geographically less widely distributed (concentrated in fewer towns.) Developers get the contentious community's message very clearly, and try to avoid those towns with reputations for acrimonious public displays over affordable housing.

Even the larger institutions are intimidated by this opposition. For the first four years of the existence of MHFA, it was a policy to avoid those towns deemed unreceptive to affordable housing. While this approach to starting up a new program/agency is certainly very realistic, it emphasizes the power of this

resistance, to the point that this resistance is so well known, and so feared, that there is a formal policy to avoid it.³¹

In any town, developers also look for sites which will not stir up debate. This leads them to choose land zoned industrial (North Andover), near highways (Mill Valley in Amherst), airports (Battle Road Farms in Lincoln), or other generally undesirable land uses. While this land may be less expensive because it is marginal, the prospect of less community opposition also guides the developer.³² This marginal location produces housing with one foot in the grave before the first unit is occupied. For example, in Battle Road Farms, the units all have central air conditioning with triple pane windows, an extraordinary amenity, yet also an extraordinary expense, which made the budget extremely tight. This was necessitated by the proximity to the local airport. Beyond the social isolation of the site, the physical reality of the location puts it at a significant disadvantage.

The loss of trust and political will which results from the acrimonious opposition affects each of the parties involved, the developers, community members, local, state, and federal

³¹.MHFA - All in Together

³² Interview with Gene Kelly - 3/89

officials, and perhaps most deeply yet most invisible, the potential residents, the people throughout a region who want affordable housing, and must see the vehement opposition reported in the newspapers as nails in the coffin of housing opportunity.

The need for ample amounts of time, money, and political power to oppose development makes the contrast of many outcomes of community opposition all the more striking. Those communities with a large supply of the financial, personal, and professional resources to fight affordable housing are the ones most likely to keep affordable housing out. This reinforces the extremes of social stratification and inequality of opportunity which is the constitutional basis of affordable housing efforts. Those who can most easily jam the system are still those with the most power and wealth, the resources to spend their own time and buy the time of lawyers and expert consultants.

This chapter has outlined how three different affordable housing development proposals experienced significant delays and restructuring due to community opposition. This opposition worked, to a great extent, by "jamming the system" of the development process. The next chapter will discuss why the stakeholders respond in this way, and suggest a few possible remedies for this problem.

CHAPTER 5 - WHY DOES IT HAPPEN & WHAT ARE SOME REMEDIES?

This chapter will examine the community opposition discussed, and suggest different ways to reduce this opposition. Rather than take each case or strategy as a separate action, I will look at the actions taken as a whole, and examine similarities among the opposition strategies, in order to formulate a more widely applicable remedy.

Influencing Public Officials - Saugus, Tewksbury, and Amherst

In Saugus, the dispute over Saugus Commons did not appear to revolve around the quality of the physical development. The same plans had previously been approved by each of the town boards and officials.

The concern of the abutter as expressed was a very project specific interest, that of the drainage culvert to be routed through their property.

The concerns of the neighborhood may have been represented to a great extent in the letter taken around by Ms. H.. The range of expression in this letter gives some idea of the source of the interests involved. There was a concern about size and number ("a thousand people,") class ("low and moderate income,") taxes ("will affect our disastrous tax bill,") and children ("a large number of children.")

The Conservation Commission either was influenced by, or had previously agreed with much of the concerns of these concerns, and chose to go along with the request for refiling that would further delay the project.

The Building Inspector may have been acting on his own, or may have also been influenced by community members. The network in local communities of local officials, with each other, as well as members of the community, is very tight. In a case with the amount of conflict this one had, it is not hard to imagine the negative communication a building inspector received from others.

The abutter who had what were expressed as traffic concerns also was able to translate these concerns into an alliance with government officials, after asking local officials, he was put in touch with state level officials.

The traffic expert provided by DPW was not unlike the building inspector withholding the permit, or the Conservation Commission voting for a refiling. They were influenced by the concerns expressed by the abutters, the neighborhood, or the community. These concerns were translated by these officials into actions to stop, reduce, or delay the development.

In Tewksbury, there was a similar action of the public board, in this case the ZBA, following the "mandate" of the public, evidently, and taking the petition as a show of community "consensus." The ZBA, in acting on the community concerns in this way, was then forced to bring an argument to the HAC hearings (traffic) which had not been expressed as a concern previously.

In Amherst, the decision by the board to reduce the development by half came about directly as the result of the strong community response. As in Tewksbury, the ZBA was then put in the position of defending its position in court, this time at the HAC.

The concerns are typical of those in many suburban communities. However, they are often not available for discussion in any venue other than the ZBA meeting, where there is often very angry and emotional testimony, but little room for discussion, negotiation and compromise. The only ways for influencing the course of a development appears to the community to be the strategies discussed earlier, all used to obstruct the process, to jam the system.

The actors in each of the cases discussed took similar actions: Discontent by abutters or residents of the neighborhood were

communicated to a government official or board. This discontent was then translated by the board or official into action against the development. While the strategies look different on the surface, it was one or more strategies out of the same "package of actions" that "jammed the system." What can reduce this kind of action?

Paying the Costs of Opposition

One possibility for reducing the opposition of the local boards would address the lack of retribution or cost for such actions, which allows town officials and boards to act with impunity. Many developers would like to see the town, and the town officials, bear some burden for the resistance they put up to a developer. The interest in this by developers was expressed as a desire to see the towns forced to pay court costs if they lost.¹

This is certainly not unprecedented in the legal system. In many law suits, the costs of the process are put into the resolution, whether it is a negotiated settlement, or a final appeal. Government has typically been immune from this kind of action, although more recent court cases are holding towns accountable for their actions, such as the "unfair taking" rulings over

¹ Interview with Gene Kelley - North Stoughton Assoc. 3/89

restrictive zoning by-laws. Until there is a specific precedent in the state for this however, it is unlikely any developer would look to take on the large legal fees involved in such a suit. A Building Inspector or ZBA member would certainly think twice before issuing poorly constructed decisions, however, if the costs could be passed from the developer back to the town. The community response to those cost would more than likely stop much of that action.

Cleaning Up the System

What allows the various government officials to act as they do, without disclosing their reasons, as the ZBA did in Tewksbury, based on questionable ordinances, as the Building Inspector did in Saugus, denying a permit based on all-inclusive "nuisance laws", or as the ZBA did in Amherst, cutting a project in half in an arbitrary fashion?

The ZBA Hearings are historically some of the cloudiest when it comes to applying the rules of due process. However, as noted in the previous chapter, there are standards of procedural due process which ordinarily apply to adjudicatory hearings such as a ZBA hearing. If these standards were clearly defined in both the State Zoning Enabling Act, and in local codes, the kind of actions taken by the Tewksbury ZBA might occur less frequently. There are already adequate "conflict of interest" laws, which

require government officials to declare when they hold an interest in the outcome of a decision they are sitting on, and "sunshine laws" which stipulate the requirements for public access to meetings, and they have broken up much of the mystery of the decision process in many of the local boards. Unfortunately, there is still the potential for much abuse. Making the requirements for these boards more explicit, with fewer options for holding "deliberative" sessions with no minutes, as the ZBA did in Tewksbury, could start to reduce this problem.

However, it is possible the use of the "sticks" of paying court costs, or requiring new layers of operational process will only force the opposition to more of the same extremes, such as becoming a member of a local board to fight a development, or denying permits with no explanations.

If the concerns of the abutters, neighbors, and community are left unresolved, there is every reason to expect them to find more ways to "jam the system." While it is in everyone's interest to make the system operate more openly and fairly, it may also be ignoring the concerns and interest of many. Although these concerns may or may not be well-founded, if they are not handled properly, they have shown an ability to turn up in a new form of opposition strategy.

If this is the case, then, in addition to the "sticks" above, it suggests that a process is needed which would allow the effective participation of the community in the negotiations with the developer.

For the first recommendation, to increase the effective participation of the community in negotiations on a specific project, There already exists a reasonable structure for the to put this into practice, in the form of the Local Housing Partnership.

The Local Housing Partnerships - Project Specific Negotiations

The Local Housing Partnership (LHP) is in the best position to put such negotiations into practice, and be able to go a long way towards breaking down the resistance of communities by:

1. Having the advocates for the housing within the community;
2. Conducting preliminary negotiations and meetings about proposed development in an atmosphere more amenable to discussion than a zoning hearing;
3. Bringing the expertise of the community together to work on affordable housing issues.

The Local Housing Partnerships generally came together in

response to a proposed development, and as such, were initially in a "reactive" mode of operation, where the air of panic and a lack of control dominated.

As many of these LHP's have stayed together, however, they have started to take a "proactive" stance, putting out their own RFP's on land they have procured, establishing guidelines for developers who would like to build affordable housing in the town, and accumulating the expertise it takes to work constructively with all of the parties involved.²

This process is valuable in that it deals with the specific set of concerns of that project. As noted by Murray Corman (as well as Robert Engler and most other housing developers) "even if past abutters are satisfied with a development, new abutters still object vehemently." At the local level, there is little commitment to the ideal of continuity, and more interest in present day needs.

² Stuart Dash, LHP Case Studies - MIT Laboratory of Architecture and Planning - 1989

Assisted Negotiation

In Saugus, there was no place for the abutter to turn to for airing concerns and working them out. The Local Housing Partnership is meant to be this place, in many ways, but must have assistance in conducting the delicate negotiations which occur over emotional issues. The nature of these types of negotiations demands a great deal of care and deliberateness in the process, as it is very difficult to recover from mistakes in such a charged atmosphere. In Marblehead, where the local LHP is conducting negotiations, the initial meeting became a place where tempers too quickly took hold:

"Neighbors of "The Highlands," a proposed 260 units apartment complex off lime st., told developers to "go home" as the plan was outlined last Wednesday night...[the developer] had bad news for the neighbors. "We will be developing this property," he said, "We never came hear to be your saviors."³

The danger of escalation is that it may persist, and it may change the relationship for the worse.⁴ Still, with assisted negotiations which took into account the likelihood of the kind

³ George Derringer Marblehead, Ma Reporter 6/9/89

⁴ Pruitt and Rubin Social Conflict p.112

of emotional responses often heard in affordable housing conflicts, the LHP could very well be where the negotiations take place to that different parties may :

- Communicate concerns
- Educate each other about their interests concerns about the project
- Interact in an atmosphere which is safe, directed, and unpressured
- Take responsibility for agreements, so that they are transferable to the legal context

A project specific assisted negotiation (PSAN) would allow the parties in the dispute to fully participate in the process of negotiating for a specific affordable housing development, and have it occur in an atmosphere which will guard against the pitfalls of confrontation over sensitive issues.

How Could it Start?

There are three major obstacles for the LHP to overcome to be able to have a PSAN. The first obstacle is that the LHP is typically formed around a specific project at its inception, and so is project specific for only one development proposal. As they move along, they gain expertise, but lose the relationship to the specific proposal that is necessary if all interests are

to be represented.

The second hurdle which an LHP will have to overcome is the lack of trained assistance on running the negotiations. The "assisted" part of PSAN is critical for an a project specific negotiation. The complexity and volatility of affordable housing conflicts makes it imperative that it is not attempted without someone used to guiding such negotiations, keeping them safe for all parties while moving them forward to an agreement. The explosiveness of many development conflicts may demand such third party tactics as a cooling off period, or shuttling back and forth between parties, "improving mutual images and laying the groundwork for agreement."⁵

The third significant obstacle for such a negotiation is to insure that it is not a waste of time for the developer, that there is some way to put the "word" of the town on the agreement. The incentives put in place by MHP to listen to the LHP have helped bring them about, but there is additional effort needed to bring about the accountability they need.

In Amherst, the "bitterness and resentment" expressed at the ZBA hearing might have been able to lead to less conflict and less

⁵. Pruitt and Rubin Social Conflict p.136

delay if the parties were able to discuss their interests in a way which could both express their interests and keep the conflict from escalating. The parties might have been able to address the interests of each, rather than settle for the Solomon-type decision of the ZBA to cut the size of the project in half as a solution.

An additional role for the PSAN of an LHP is to play a strong educational role. It is not a new idea in the theory about bringing affordable housing to the suburbs:

"The great opportunity and the best hope for achieving progress in race relations lie with local organizations. Properly organized, they can perform at least some of the following functions. They can:

- * Investigate tensions between groups
- * Bring together leadership
- * Support the ultimate and most important need, education, communication, and cooperation⁶

The third party LHP may have to "teach the disputants how to take the role of the other, to place themselves in the other

⁶ Charles Abrams Forbidden Neighbors p.320

person's shoes, and to understand the issues as the other person might"⁷

The state housing offices must work closely with the towns, and especially their own LHP Committees. These committee must be seen in their communities as having some status at the state level which makes them valuable to the towns. Numerous case exist of such interaction, however, the stories which also stick in the public mind are of times when the rules affected a local resident very negatively, and the LHP could not respond as expected.⁸

The issues that abutters or community groups are not pointless. They just have no place to be aired in the system as it presently is formulated. Without a process which can bring in people's concerns in a positive way, there will always be more ways to "jam the system."

⁷ Pruitt and Rubin Social Conflict p.179

⁸ In a number of interviews with members of LHP committees, there were stories about a local resident who had been disallowed as HOP eligible after having won the lottery. In each case, the people's income had been verified before the drawing, but then a raise put them over the income limit for the particular unit they had been qualified for. These sort of mixups give a very bad name to State Programs, in spite of the good work being done for hundreds of other individuals and families.

Regional Negotiations for Affordable Housing Fair Share

One of the major restraints on social actions is the social and political acceptability for such actions in the community. The actions taken in Saugus would have been less likely to take place if there was a community commitment to affordable housing which had been voted on and accepted in a forum such as a town meeting. While this does not ensure that there will be no opposition, it should be able to reduce the opposition from local boards which took place in Saugus.

A community agreement would also discourage the kind of undercutting of policy which was accomplished with the "lending out" of the liaison from the DPW. The stronger the social censure of this kind of activity, the more people will help to solve the problems of a case, rather than help to bring it down. A community agreement would allow the town boards to act and know they too have a constituency, even in the face of petitions, letters, and signatures. There would also be less of these public expressions of outrage in general.

If community "outcry" becomes just a single abutter response, it make it easier for the ZBA to act fairly. However, if the government officials still find it easier to go along with any significant expression of community concerns, no matter what their level of value, and take on the opposition to a

development, then it will remain difficult to curtail the "jamming."

Why do the local boards take such action? They may feel that they would rather be seen as opposing the development by their constituency and risk the costs of legal fees for the town, than take a stand on their own, and risk an election loss. In fact this is often what happens. At the HAC Conference of Counsel, it is not uncommon for the local officials or their Counsel to state privately that they will accept a specific compromise solution as long as they are not seen as supporting it in their local capacity.⁹

This would suggest that there is another possibility for reducing this jamming which would allow local officials to act in the best interests of the town without fear of electoral reprisals. This would demand that the community feels some "ownership" of the laws which make providing affordable housing in the best interests of the town.

If there is no local consensus on the need and strategies for developing affordable housing, how might such a community commitment come about? The Local Housing Partnerships through

⁹ Interview with Murray Corman 3/89

MHP are one way to encourage a community commitment, and indeed, the demands of MHP and Executive Order 215 both require a community "commitment" to affordable housing.

I would suggest though, that above that community level is an issue which is often taken for granted in Massachusetts but is still problematic: How much affordable housing must each town have? How would they agree on their regional obligation?

Fair Share

The arguments concerning "fair share" support most of the legislation and court decisions having to do with requiring affordable housing in suburban communities. Chapter 774 declares that a Zoning Board of Appeals decision may be vacated if it is not "consistent with local needs." A Massachusetts Superior Court judge noted that the legislation further defines this phrase, and says that it means that "the "consistent with local needs" standard requires both the local board and the [Housing Appeals] Committee to balance the regional need for low and moderate income housing against any objection to the details of the proposed plan." The legislation clearly considered that each town had a regional obligation to affordable housing. This same argument for regional need was used in the Mount Laurel decision to require the suburban towns in New Jersey to each

provide affordable housing, "at least to the municipality's fair share of the present and prospective regional need thereof."¹⁰

There are a number of arguments for having each town take responsibility for a percentage of affordable housing. While these will not be detailed here, they include the theory that only a true dispersal of affordable housing will prevent the "tipping point"¹¹ of low income housing from being a concern in the suburbs, the constitutional arguments of equal treatment, and the Supreme Court's affirmation of the "right to travel" as a constitutional right to "settle and abide."¹²

The Connecticut legislature passed a law which mandated an affordable housing requirement for each municipality in the state. They agreed, however, to allow a pilot program of negotiations to be conducted in two separate regions to allow the towns in each region to come up with their own plan for affordable housing development, using an assisted negotiation process to arrive at such a plan within six months. The two regions have been able, with representatives appointed by the chief elected officials of each of over thirty towns in the two

¹⁰ Mary Sullivan Mann, The Right to Housing p.87

¹¹ Anthony Downs - Opening Up the Suburbs p.131-151

¹² Mary Sullivan Mann, The Right to Housing p.91

regions together, to come up with a "compact" committing each town to specific levels of affordable housing production over the next five years, as well as general agreement over the types of strategies which would qualify for credit toward that goal, and how the units would be counted.

Two benefits could occur out of this type of negotiation in Massachusetts. The largest benefit is that there would be local "ownership" of the percentage of affordable housing seen to be the regional fair share, as opposed to the state mandated 10% presently used. Any project specific negotiation would then take place in the context of a such a "fair share" agreement.

The second benefit is that the inevitable objections of abutters and neighborhood groups would be balanced by the context of commitment in the rest of the town. This community participation would allow many community members to "preview" the development possibilities of affordable housing. They would know before a developer hit town that affordable housing can be well-designed, have stable management, allow a variety of ownership options, and many other details which invariable help the cause of affordable housing, but often are only injected into the process at the point of conflict, when people's listening is not as much for education, but more for confirmation of their existing beliefs.

It will take a concerted effort on the part of the regional negotiation team to make sure that the town is behind the compact, to bring that commitment to their town. However, without local agreement with the basic concept of "Fair Share", it would seem difficult to achieve the backing of the many community members who are only on the fence because they have not been asked to participate.

The combination of these two processes, the regional fair share negotiations, and the use of project specific assisted negotiations by the LHP, would allow the interests and concerns of the community members such as those in Saugus, to be engaged before they "jam the system" instead.

Improving State Actions/Agreeing on the Rules

The third major area where each of these strategies for "jamming the system" gained unnecessary momentum was when there was a lack of agreement on the rules of the game, such as on the state programs which guide the count of 774 units, and determine how the HAC will rule.

In Amherst, there was a large amount of disagreement over the

counting of the units to arrive at 10%. This occurred because no allowance was made for the fact that the nature of a University town in a rural setting throws the housing and population count off considerably. There is no accounting for such unique circumstances in the state system.

The legislation and programs at the state level are numerous and considered very effective. What can be done that might improve the way they handle community opposition? How would that affect the "jamming" discussed earlier?

While the need for the HAC is clear in bringing any affordable housing to most towns, the HAC needs more leeway in deciding what developments are appropriate in the community. The language of the statute, as previously noted, allows the HAC to balance the characteristics of the development with the local and regional need for housing. In many of these cases, the HAC was loathe to let the development pass as designed, but did not feel there was recourse but to vacate the ZBA decision if the parties could not come to some other agreement. However, the HAC must uphold the law, and abide by the rules established by the various government agencies in its decisions, even though they may actually disagree with them.¹³ Combined with appropriate

¹³ Interview with Ed Kelley, HAC 4/89

action by EOCD and MHP, the Housing Appeals Committee could make a wiser choice for the affordable housing community in a number of cases, and often the most contentious ones.

Massachusetts Housing Partnership

The Massachusetts Housing Partnership and EOCD must get together and work out the aspects of the HOP program which are increasing the HAC caseload. The largest grievance towns have with the HOP program is that while all of the units come under the Comprehensive Permit process, only the affordable units are counted towards the 10% of the towns requirement. Towns feel this has allowed developers to come in and propose projects which would otherwise be too dense, and have them passed by the HAC due to their affordable housing content.

MHP should come to an agreement with towns concerning the credit they will receive from EOCD on their 10% requirement. This could take the form of a negotiated percentage or a fixed percentage of the housing units in the development, depending on other factors. At this point, towns are often fighting for more affordable units on each development, just so they will reach 10% sooner, not because it is good policy for the development. This kind of agreement could be one of the benefits of a regional "fair share" consensus.

There are many ways to "jam the system" for those opposed to affordable housing. The first two recommended "sticks" would help make the town officials and boards more careful about their actions on affordable housing proposals. The last three recommendations for coping with this "jamming" however, might reduce the conflict on a great number of the cases, regardless of the opposition tactic used. Instead of trying to anticipate every "jamming" technique, they would establish a process of bringing up the conflict in ways which will allow its satisfactory resolution for all parties, including those in need of affordable housing.

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