

# Working with Chapter 40B: Comprehensive Permit Training

Concord Zoning Board of Appeals  
October 26, 2023



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Primer on Chapter 40B  
Statutory Purposes  
Regional “Fair Share”

## 02 Process Overview

Project Eligibility  
Application to ZBA  
Public Hearing  
Decision

## 03 What's Next?

Post-Comprehensive Permit  
Subsidizing Agency, Local  
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FFHA  
State Policies & Analysis of  
Impediments



# Overview

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# Chapter 40B: regional planning, regional need

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- Chapter 40B: Regional Planning Law
- Sections 20-23: comprehensive permits for low- or moderate-income housing
- Statutory purpose: to ensure that low- or moderate-income housing is available in all market areas by overriding regulatory barriers that make housing expensive to build.
- *The point of the law is that every community will provide a share of the region's needs for affordable housing.*

# Statutory Minima (G.L. c. 40B, § 20)

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## Presumption of unmet need ...

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Less than 10% of year-round housing units, OR

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Less than 1.5% of community's total land area zoned for residential, commercial, or industrial use, OR

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A project involving no more than 0.3% of the total land area zoned in community for residential, commercial, or industrial use or ten acres, whichever is larger

# Safe Harbor Regulations —

- Housing Production Plan — certified
- Recent Progress Toward Housing Unit Minimum
- Review of Large Projects
- Related Applications



# Housing Appeals Committee

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- Has authority to adjudicate developer's appeal if community does not meet statutory minima or a regulatory "safe harbor"
- Consistency with local needs: balancing the *regional need* for affordable housing against *local concerns*: health, safety, open space, design, environmental impact

# What is “Affordable Housing” under Chapter 40B?

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- Counts towards the state’s 10% affordable housing goal for every community
- Affordable to households with income at or below 80% of the area median income (AMI)
- How are income limits determined?  
US Dept. of Housing & Urban Development (HUD)

# What low or moderate incomes?

- FY23 HUD INCOME LIMITS FOR MIDDLESEX COUNTY**

<b>Household Size</b>	<b>Very Low Income (50%)</b>	<b>Extremely Low Income (30%)</b>	<b>Low Income (80%)</b>
<b>1</b>	\$51,950	\$31,150	\$82,950
<b>2</b>	\$59,400	\$35,600	\$94,800
<b>3</b>	\$66,800	\$40,050	\$106,650
<b>4</b>	\$74,200	\$44,500	\$118,450
<b>5</b>	\$80,150	\$48,100	\$127,950
<b>6</b>	\$86,100	\$51,650	\$137,450



# Pre-qualification process

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Application for a comprehensive permit is not valid without Project Eligibility (sometimes called site approval) determination



Jurisdiction: subsidizing agency, mainly -

- MassHousing
- Massachusetts Housing Partnership
- MassDevelopment
- DHCD

# Basic PE process

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# PE application contents

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- Site location and description; maps and photographs
- Proposed buildings and approximate number units
- Preliminary feasibility analysis;
- Basic project details, e.g., percentage of LMI units
- Site plan, elevation drawings
- A list of proposed waivers
- Evidence of site control

# Agency findings

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- Proposed project appears generally eligible under program guidelines;
- Site is generally appropriate for residential development;
- Conceptual project design is generally appropriate for the site;

# Agency findings, cont'd

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- Project appears financially feasible under subsidy program guidelines;
- An initial pro forma has been reviewed, including determinations of land valuation and compliance with DHCD profit limitation guidelines;
- Applicant is an eligible entity;
- Applicant has site control.

# The Permitting Process

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# Comprehensive permit: scope

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- All approvals under *local* regulations, such as:
  - Zoning
  - Subdivision Control
  - Local wetlands, septic system regulations
  - Historic district
  - Scenic roads
- Waivers necessary to allow construction of proposed development

# Comprehensive permit: scope

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- Not within ZBA's purview:
  - Impact on municipal & school facilities available to all residents of the community (but ZBA may consider infrastructure impacts directly related to the project)
  - Number of school-age children
  - Fiscal impact studies
  - Marketing plan or tenant/homebuyer selection criteria
  - Profit monitoring
  - Market study

# These things really help the ZBA

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1. Strong chairperson
2. Professional support, e.g., town planner, MHP Technical Assistance, and access to town counsel whenever needed
3. Set a schedule to meet the 180-day deadline to close the public hearing
4. Engage qualified peer review consultants familiar with Chapter 40B
5. Developer-neighborhood meetings

# Advice ...

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<b>Explain</b>	Explain the process at the outset of the hearing.
<b>Explain</b>	Explain the law and the ZBA's role under the law.
<b>Set</b>	Set basic ground rules, e.g., time limits.
<b>Schedule</b>	Schedule a site visit, and explain relationship to Open Meeting Law.
<b>Set</b>	Set the continuance date - and ideally, set the hearing schedule for the next few months.

## You can reduce some headaches if ...



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- ZBA adopts Chapter 40B administrative rules and regulations substantially consistent with 760 CMR 56.05.
- Regulations include comprehensive permit application form and filing requirements, fees, and basics of the public hearing process.
- Tell the applicant how to apply, the information you need, and how you will process the application once you receive it.

# Tips

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- Focus ZBA review process on:
  - Design
    - Buildings
    - Site plan
  - Public safety
  - Public health
  - Environmental impact: for waivers of local regulations, which ones can be accommodated, and which are essentially deal-breakers? What makes them deal-breakers?
  - How to make the project better where possible

# 40B Application Submission Requirements

- Preliminary Plans
- Existing site conditions and locus map
- Preliminary, scaled, architectural drawings
- Tabulation of proposed buildings by type, size and ground coverage
- Preliminary subdivision plan (if applicable)
- Preliminary utilities plan
- List of requested waivers



**Critical Deadlines for Chapter 40B Comprehensive Permits**

Days	Deadline	Action Required	Authority
<b>7</b>	No later than <b>7 days</b> from the date on which the comprehensive permit application is received by the ZBA	Distribute the application to other boards and municipal departments and request their comments	G.L. c. 40B, § 21, and 760 CMR 56.05(3)
<b>14</b>	<b>14 days</b> before the public hearing date	Publish notice of the public hearing (publish twice; the second during the week following the first notice)	G.L. c. 40A, § 11
<b>30</b>	No later than <b>30 days</b> from the date on which the comprehensive permit application is received by the ZBA	Open the public hearing	G.L. c. 40B, § 21; 760 CMR 56.05(3)
<b>15</b>	No later than <b>15 days</b> from the opening of the public hearing	If applicable, give written notice to the developer and DHCD that the ZBA believes it can deny the permit on one or more "Safe Harbor" grounds (see <b>Safe Harbors</b> ), along with the factual basis and documentation for its position	760 CMR 56.05(3); 760 CMR 56.03(8)
<b>15</b>	No later than <b>15 days</b> from the date of the ZBA's written notice	If applicable, the applicant must challenge the ZBA's "safe harbor" by providing written notice to DHCD and the ZBA, along with any supporting documentation	760 CMR 56.03(8)
<b>30</b>	No later than <b>30 days</b> from receipt of the applicant's appeal	DHCD must make a determination after reviewing the materials provided by the applicant and the ZBA.	760 CMR 56.03(8)
<b>20</b>	No later than <b>20 days</b> from the date of DHCD's decision on a "safe harbor" appeal	The applicant or ZBA may appeal DHCD's decision by filing an interlocutory appeal with the HAC and the ZBA's public hearing must be stayed until the conclusion of the appeal.	760 CMR 56.03(8); 760 CMR 56.05(9)(c)
<b>180</b>	Within <b>180 days</b> from the opening of the public hearing	The ZBA must close the public hearing unless the applicant has agreed in writing to an extension	760 CMR 56.05(3)
<b>40</b>	No later than <b>40 days</b> from the close of the public hearing	The ZBA must render a decision based on a majority vote of the board and file its written decision with the city or town clerk	G.L. c. 40B, § 21; 760 CMR 56.05(8)(a)
<b>20</b>	No later than <b>20 days</b> from the date the decision is filed with the city or town clerk	If the ZBA denies a comprehensive permit or approves it with conditions unacceptable to the applicant, the applicant must file an appeal with the HAC; other aggrieved persons must appeal to either the Land Court or Superior Court.	G.L. c. 40B, § 22; and G.L. c. 40A, § 17; 760 CMR 56.05(9)

# Critical 40B deadlines

# CRITICAL

# Internal review process

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- Local boards and officials that typically review and have some authority to approve development plans, such as:
  - Conservation Commission
  - Planning Board
  - Board of Health
  - Design Review Board
  - Affordable Housing Committee or Housing Partnership
  - DPW, Police, Fire - i.e., professional staff

# Technical review

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- Typical services: site/civil, stormwater, traffic, wetlands, building design
- Procurement process should be outlined in ZBA's administrative rules
- Technical review is *review*, not new studies commissioned by the town
- Paid for by developer

# Waivers

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- Applicant must identify waivers of local regulations needed to build the proposed project.
- Waiver request should be reasonably specific and clear, i.e., no “umbrella” waivers.
- ZBA decision should provide for post-permit process for addressing additional waivers that may be identified when the applicant prepares detailed plans and construction drawings.

# Work Sessions

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- Informal discussions with applicant, usually to understand and resolve technical issues
- Outside the public hearing, but may be conducted as an open meeting
- No quorum
- **Check with town counsel**



# Pro forma review

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- No “automatic” pro forma review
- **Negotiate, negotiate, negotiate ...**
- If the applicant says the project will be made uneconomic because the ZBA denies a waiver request or asks for significant changes, the ZBA may seek a pro forma review by independent peer review consultant (at applicant’s expense)

# Local preference

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Preference cannot be limited to people who have lived, worked, or had children attend the community's schools for some period of time.

Preference eligibility is based solely on a person's residence, employment status, or school enrollment at the time of the lottery for initial occupancy.

Board may request up to 70% local preference, subject to subsidizing agency approval. It is not guaranteed! This topic is best handled by the local housing partnership or housing trust, not the ZBA.

# Decision

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- The Board's options under Chapter 40B:
  - Denial
  - Approval with conditions
  - Approval "as is"
- Big difference between *denial* and *approval with conditions that could make the project uneconomic!*

# Typical decision structure

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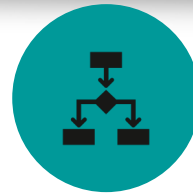
PROCEDURAL  
HISTORY



GOVERNING  
LAW



FINDINGS OF  
FACT



DECISION



CONDITIONS



EXHIBITS



ONGOING MONITORING  
AGREEMENT

What's Next?  
Post-Comprehensive Permit Process

# What happens next?

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## Subsidizing Agency

- Final Approval
- Regulatory Agreement, Deed Riders (if ownership), and Monitoring Agreement
- Lottery, fair housing and local preference
- Eligibility of owners/tenants
- Limited Dividend Restriction and Cost Certification

## ZBA/Municipality

- Final engineering and architectural plans accompany application for a building permit
- Inspections during construction
- Cost certification review (not approval)
- Lapse of the permit
- Transfer of the Comprehensive Permit
- Changes to Permit – substantial or insubstantial

# Fair Housing Considerations

# Fair Housing

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To “count” on the SHI, affordable housing must be made available to all income-eligible people in a large area – at least the area used to set income limits.

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Housing must be offered for sale or rent under a state-approved Affirmative Fair Housing Marketing Plan.

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Some “local preference” may be allowed.

# Key Concepts

Chapter 40B exists to address regional housing needs and regional disparities in meeting those needs

Passage of Federal Fair Housing Act in 1968 and Chapter 40B in 1969 was not a coincidence

Chapter 40B functions as a “check” on local requirements that make affordable housing infeasible to build

Massachusetts has implemented several Fair Housing policies to further the purposes of Chapter 40B

# State AI Findings (2013)

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“Most analysts agree that an adequate housing supply can help stabilize prices and enhance affordability ... [but there are] widespread barriers to multifamily housing, town homes, single family houses on small lots, and accessory apartments in owner-occupied homes.”

“Proliferation of age restricted development, and not the production of housing for younger families – unless permitted under the state’s affordable housing statute, M.G.L. Chapter 40B – raise serious civil rights concerns.”

“DHCD will institute a policy related to Subsidized Housing Inventory (“SHI”) eligibility to address the imbalance of age-restricted housing versus housing for families with children.”

# Policy Response (2014)

## INTERAGENCY AGREEMENT: Regarding Housing Opportunities for Families with Children (2014)

“Consistent with the AI ... at least 10% of the units in affordable developments funded, assisted, or approved by a State Housing Agency shall have 3+ bedrooms . . . To the extent practicable, the three bedroom or larger units shall be distributed proportionately among affordable and market rate units.”



## **Local Initiative Program Policy Regarding Restrictions on Children in Age-Restricted 55+ Housing (2-18)**

- “Families with children ... face particular barriers in accessing affordable housing across the Commonwealth.”
- “DHCD’s practice is not to approve affordable units under LIP or LAUs in age-restricted housing if selection or occupancy policies, special permits or other zoning approvals, or underlying zoning would exclude persons 18 years of age or younger ...”



# Questions?

## Working with Chapter 40B