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**Chapter 40B “Nuts and Bolts” Overview
MHP Housing Institute / June 10, 2015**

**OVERVIEW OF THE CHAPTER 40B (M.G.L. c. 40B, §§ 20-23)
APPLICATION, REVIEW, DECISION AND APPEAL PROCESS**

CHAPTER 40B INFORMATION RESOURCES

1. 40B Information Available on the Web

Without a doubt, the best and most current information on Chapter 40B is readily available on the Web. The best sources of Chapter 40B information are:

- Massachusetts Department of Housing and Community Development (DHCD)
www.mass.gov/dhcd
Go to “Community” in top row on home page and then to “Chapter 40B Planning”

The current Subsidized Housing Inventory (SHI) (12/5/14) is available at:
<http://www.mass.gov/hed/docs/dhcd/hd/shi/shiinventory.pdf>

- Housing Appeals Committee (HAC)
<http://www.mass.gov/hed/community/40b-plan/hac.html>
As noted below, you can access a copy of the actual 40B statute, 40B regulations and 40B guidelines at this site.
- MassHousing
www.masshousing.com
Go to “Developers” section on home page and then click on “Comprehensive Permit/40B” (includes the recently developed Project Eligibility Letter application forms for both rental and ownership projects and detailed Cost Certification information/requirements for Home Ownership 40B projects)
- Citizens’ Housing and Planning Association (CHAPA)
www.chapa.org
Go to “Housing Policy” at top of home page and then to “Chapter 40B”

Representative listings of Chapter 40B-related documents available at the DHCD, HAC, MassHousing, and CHAPA websites are provided at the end of this outline.

BE SURE THAT YOU ARE FAMILIAR WITH THE MASSACHUSETTS COMPREHENSIVE PERMIT LAW (M.G.L. c. 40B, §§ 20-23), CHAPTER 40B REGULATIONS (“760 CMR 56.00: COMPREHENSIVE PERMIT: LOW OR MODERATE INCOME HOUSING”) AND “COMPREHENSIVE PERMIT GUIDELINES” (Updated December 2014). THE LAW, REGULATIONS AND GUIDELINES ARE AVAILABLE AT THE REFERENCED HOUSING APPEALS COMMITTEE (HAC) WEB SITE.

2. Information Re: Funding Available for 40B Technical Assistance Advisors to Zoning Boards of Appeals

- Massachusetts Housing Partnership Fund
Contact: Laura Shufelt (lshufelt@mhp.net) (617 330 9944)
http://www.mhp.net/uploads/resources/ch._40b_ta_guidelines.pdf
- In some instances, Applicants have also been willing to provide funding to ZBAs to retain Chapter 40B technical assistance advisors--particularly if they feel that such technical assistance is provided in an objective manner and help's make the review process more efficient.

3. Local 40B Resources: Town Counsel/Staff

4. Zoning Board of Appeals/Staff from Other Towns or Cities/Developers with 40B Experience

5. Peer Review Consultants [See 760 CMR 56.05(5)]

6. 40B Project Visits. For a valuable learning experience, there's nothing like visiting several representative 40B developments similar to the type of development that is being proposed in your community. Call CHAPA, DHCD, MassHousing or MHP for project locations or call ZBAs in nearby towns/cities.

7. Local Comprehensive Permit Decisions. These are public documents and should be available at the ZBA office or Clerk's office. Documents that are part of a public hearing are public documents. One good way to understand the 40B process is to visit a ZBA office and review the complete project file for a 40B project. You can also get a better understanding of the types of conditions that can be included by reviewing some representative recent Comprehensive Permit decisions.

8. Housing Appeals Committee (HAC) Decisions

- HAC decisions from 1971 to the present (4/23/15) are available on the Web at HAC's web site <http://www.mass.gov/hed/community/40b-plan/hac.html>

9. Conferences

- Check out MHP's, DHCD's, MassHousing's and CHAPA's web sites for information on any proposed Chapter 40B conferences or other training sessions. The next scheduled 40B Conference has been scheduled for October 2, 2015. More information on this training will be available in early Fall.

10. Chapter 40B Consultants and Lawyers

GENERAL LEARNING EXPERIENCES FROM PRIOR 40B REVIEWS

1. Conduct a site/neighborhood visit early in the review process and make sure that you understand both site and neighborhood existing conditions, the proposed site plan and building design, and the location of abutters who will be most affected by the proposed development. You may want to ask the applicant to place stakes at the building corners of buildings that are close to neighbors and/or place stakes on the center line of proposed roadways.
2. ZBA, town staff, peer reviewers, and potential opponents should identify and focus on the proposed project's issues/impacts as early in the review process as possible and try to resolve each issue in a logical, efficient manner that recognizes the critical path nature of the respective steps in the housing development process. Sometimes, but rarely, there is a "silver bullet" issue (for example, inadequate soils for a Title 5 septic system or inadequate stopping sight distance) that creates a valid and sustainable argument for a ZBA to deny a proposed 40B project.
3. ZBA's should establish clear agendas for each public hearing session and clearly define any supplemental information that it feels is necessary for the applicant to submit in advance of the next public hearing.
4. If ZBA members have particular concerns about any aspect of a proposed 40B project, they should raise these as early in the review process as possible. Waiting until the end of the public hearing to raise critical issues is not productive.
5. Negotiating with developers is possible and is frequently done. Understandably, developers normally prefer to have "all issues on the table" before initiating serious negotiations
6. Work Sessions with the developer can often be productive after initial more formal public hearings are held--but be sure to get legal advice re: Open Meeting legal requirements. Work Sessions should not be scheduled until there have been a sufficient number of public hearing sessions for everyone to present their concerns about the proposed development. Work Sessions should be held in a public building—not at the applicant's office.
7. ZBAs should get objective and experienced technical assistance advisors and peer reviewers to supplement ZBA members' skills and experience, especially if the current ZBA board members have limited 40B review experience.
8. Density is a relative concept. You need to focus on the particular site characteristics, unit mix, site plan, building type, building design, infrastructure and environmental issues, and phasing plans to meaningfully evaluate density.

**PRIMARY CONCERNS OF ZBA MEMBERS,
OTHER MUNICIPAL BOARDS/DEPARTMENTS OR COMMITTEES,
ABUTTERS/NEIGHBORS, AND
APPLICANT/DEVELOPMENT TEAM MEMBERS**

1. WHEN IS AN APPLICANT ELIGIBLE TO SUBMIT A COMPREHENSIVE PERMIT APPLICATION AND RETAIN THE RIGHT TO APPEAL ANY DECISION TO THE HOUSING APPEALS COMMITTEE (HAC)?

(ANSWER: WHEN MUNICIPALITY HAS NOT SATISFIED ANY OF THE STATUTORY MINIMA DESCRIBED BELOW AND HAS NOT ACHIEVED ANY OF THE SAFE HARBOR PROTECTIONS EXPLAINED IN SECTION 2. BELOW)

APPLICANT CAN SUBMIT IF:

- A. Less than 10% of year round housing units in community are qualified “affordable” units [the methodology for calculating number of qualified affordable units is provided in 760 CMR 56.03 (3) (a)]. Note: DHCD has stated that the 10% standard is to be measured as of the date the Comprehensive Permit application is submitted.
- B. Qualified “affordable” units are located on less than 1.50% of total land area zoned for residential, commercial, or industrial use [methodology for calculating land areas is provided in 760 CMR 56.03 (3)(b)]

Note: Until recently, there have been only a few municipalities who appear to have satisfied this 1.5% “land area” statutory minimum. However, several municipalities recently claimed that they have satisfied this statutory minimum. Those claims were appealed by the respective applicants and DHCD has made a determination in at least three cases (Milton, Stoneham, and Newton), that these three municipalities had **not** satisfied the necessary requirements to meet this statutory minimum. Milton did not appeal the DHCD determination. Stoneham filed an Interlocutory Appeal of the DHCD determination with the Housing Appeals Committee (HAC) and the HAC on May 8, 2015 issued a Proposed Decision and Report of Hearing Officer on Interlocutory Appeal Regarding Applicability of Safe Harbor that **denied** Stoneham’s claims that it was entitled to a safe harbor. A final decision by the full board of the HAC is pending. Newton has appealed the DHCD decision with the HAC and a decision in that case is pending.

- C. The application before ZBA will not result in commencement of construction of qualified “affordable” housing comprising more than 0.3% (three tenths of one percent) of the total land area zoned in community for residential, commercial, or industrial use or ten acres, whichever is larger, in any one calendar year [methodology for calculating annual land area minimum is provided in 760 CMR 56.03 (3)(c)]

2. WHEN IS A MUNICIPALITY ELIGIBLE TO DENY A COMPREHENSIVE PERMIT WITH NO APPEAL RIGHT TO THE HOUSING APPEALS COMMITTEE AVAILABLE TO THE APPLICANT?

(ANSWER: WHEN MUNICIPALITY HAS ACHIEVED ANY OF THE SAFE HARBOR PROTECTIONS EXPLAINED BELOW)

- A. Housing Production Plan (HPP)--under certain circumstances a municipality can deny any Comprehensive Permit application within a defined one or two year period if the municipality has a DHCD-approved Housing Production Plan and is meeting its affordable housing goals [760 CMR 56.03 (4)] or if it has made Recent Progress Toward Housing Unit Minimum [760 CMR 56.03 (5)].

A municipality can also grant Comprehensive Permits even it has satisfied these Planned Production requirements. However, an applicant has no right to appeal any ZBA decision if a municipality has satisfied either the ½ of 1% or 1% HPP standards and has been certified by DHCD. These HPP regulations are complicated. If you need help in understanding them, contact Phillip DeMartino at DHCD (phillip.demartino@state.ma.us).

Guidance on when units become eligible to be listed on the Subsidized Housing Inventory (SHI) are included at 760 CMR 56.03 (2) (b). Units may be dropped from the SHI if there are “time lapses” greater than 12 months between the issuance of the Comprehensive Permit and the issuance of a Building Permit. The conditions under which these units will regain eligibility for relisting on the SHI are included at 760 CMR (2) (c). These conditions are also complicated but Phillip DeMartino can help make them more understandable.

- B. Recent Progress Toward Housing Unit Minimum—even without an approved HPP, if a community has created Subsidized Housing Inventory eligible units equal to or greater than 2% of the municipality’s year round housing units, the ZBA can deny an application for a defined one year period. See 760 CMR 56.03 (5).

NOTE: The list of “Certified Communities” that have been “certified” by DHCD as having satisfied the applicable Safe Harbor requirements discussed above is available at:

<http://www.mass.gov/hed/community/40b-plan/housing-production-plan.html>

A copy of the current list of “Certified Communities” as of May 8, 2015 follows:

**Revised May 8, 2015
Certified Communities**

Effective Date Expiration Date

Chelmsford	6/24/13	6/23/15
Easton	7/25//13	7/24/15
Norwell	10/21/13	10/20/15
Norwood	9/5/13	9/4/15
Stow	7/23/13	7/22/15

If the city or town is certified compliant with its plan, DHCD will notify the chief elected official in writing. Regardless of the date of the certification notice, the certification period will be deemed effective on the date upon which the municipality achieved its numerical target for the calendar year in question (see 56 CMR 56. 03 (2)).

Contact Information: For questions or further information, please call 617-573-1357 or e-mail Phillip.DeMartino@ocd.state.ma.us.

- C. The municipality can also deny Large Projects, as that term is defined in the regulations, without the Applicant having the right to appeal the denial to the HAC. There are limits on the maximum number of units in 40B projects. The limits vary based upon the number of year round housing units in each community based upon the latest decennial census data. See 760 CMR 56.03 (6). The ZBA can deny any 40B project that exceeds these unit limits. See table below:

Total Number of Housing Units in Community (as enumerated in current U.S. decennial census)	Maximum Project Size (ZBA can deny project greater than this size and denial "shall be consistent with local needs." However, ZBA can approve larger projects if it so desires.)
Greater than 7500 units	300 units or 2% of all housing units in municipality, whichever is greater (Therefore, if Year Round Housing Units exceed 15,000, the 2% limit becomes the operative control.
Between 5,000 and 7,500 units	250 units
Between 2,500 and 5,000 units	200 units
Less than 2500 units	6% of all housing units in municipality

- D. Related Applications (Under certain circumstances, a developer can not submit a Comprehensive Permit application within 12 months of the filing of a prior application for a variance, special permit, subdivision, or other approval related to construction on the same land, if that application was for a prior project that was principally non-residential in use, or if the prior project was principally residential in use but did not include at least 10% of its units as Subsidized Housing Inventory Eligible Housing units. Additional information on Related Applications is provided at 760 CMR 56.03 (7).

NOTE: A MUNICIPALITY DOES HAVE THE RIGHT TO APPROVE COMPREHENSIVE PERMIT APPLICATIONS EVEN IF IT HAS SATISFIED ANY OF THE STATUTORY OR SAFE HARBOR REQUIREMENTS. HOWEVER, THE APPLICANT DOES NOT HAVE ANY HAC APPEAL RIGHTS UNDER THESE CIRCUMSTANCES.

CHAPTER 40B PERFORMANCE REQUIREMENT DEADLINES

TIME PERIOD	ACTION
7 DAYS FROM RECEIPT OF CP APPLICATION	<p>Within 7 days of the receipt of the Comprehensive Permit application, the ZBA needs to distribute copies of the Comprehensive Permit application to all Local Boards, departments, and committees (E.g., Planning Board, Conservation Commission, Board of Health, DPW, Affordable Housing Partnership, etc.) If in doubt, it is always better to include any Town entity that might have an interest in the project.</p> <p>The Applicant should be required to provide a reasonable number of copies to simplify this distribution requirement. Each copy must include a copy of the list of Requested Waivers (Exceptions) required by 760 CMR 56.05(2) (h).</p> <p>The ZBA should request in writing that each Local Board review the application and submit written comments by a date certain (preferably no later than the date of the initial public hearing). Unfortunately, this rarely happens and the ZBA often needs to follow-up with each entity to assure that written comments are received.</p> <p>SEE 760 CMR 56.05(3)</p>
NO MORE THAN 14 DAYS FROM RECEIPT OF CP APPLICATION	<p>The initial public hearing must be advertised with proper legal notice and proper notice to abutters such that the initial public hearing can be opened within 30 days of the receipt of a Comprehensive Permit (CP) application by the town.</p> <p>Therefore, the ZBA must place all necessary legal ads and notify all abutters of the initial public hearing in accordance with the normal ZBA public hearing advertising requirements. The Applicant is required to include a certified list of abutters within the application.</p> <p>A second legal notice may be required in some jurisdictions.</p> <p>The initial public hearing must be opened within 30 days of the receipt of a Comprehensive Permit application unless the Applicant gives written permission to hold the initial public hearing at a later date.</p> <p>SEE 760 CMR 56.05(3)</p>

TIME PERIOD	ACTION
<p>30 DAYS FROM RECEIPT OF CP APPLICATION</p>	<p>The ZBA must open the initial public hearing within 30 days of receipt of a Comprehensive Permit application. Even if the ZBA feels that the Comprehensive Permit application is incomplete, some ZBAs take a conservative (and wise) approach and schedule and open the initial public hearing. At the initial hearing, the ZBA can explain why it feels that the Comprehensive Permit application is incomplete, request any additional required information, and with input from Town Counsel, make a decision as to what the appropriate next step should be.</p> <p>Note: A ZBA may stay the commencement of an initial hearing if three or more Comprehensive Permit applications are concurrently undergoing hearings before the ZBA, and the total number of housing units in the pending projects exceeds the numerical threshold for a Large Project within that municipality, as set forth in 760 CMR 56.03(6).</p> <p>SEE 760 CMR 56.05(3)</p>
<p>15 DAYS FROM INITIAL PUBLIC HEARING</p>	<p>Within 15 days of the initial public hearing, the ZBA must make a determination as to whether or not it wants to deny an application on one or more of the grounds set forth in 760 CMR 56.03(1) in accordance with the procedures set forth in 760 CMR 56.03(8). The ZBA must provide written notice to both the Applicant and DHCD.</p> <p>SEE 760 CMR 56.05(3) and 760 CMR 56.03(1) and 760 CMR 56.03(8).</p>
<p>15 DAYS FROM ZBA ACTION</p>	<p>If the Applicant wishes to challenge the ZBA's assertion that it can deny the application on one or more of the grounds set forth in 760 CMR 56.03(1), the Applicant must file its written response with the Massachusetts Department of Housing and Community Development (DHCD) within 15 days of its receipt of the ZBA's notice. The Applicant must also provide the ZBA with a copy of its challenge.</p>
<p>30 DAYS FROM FILING OF APPLICANT'S CHALLENGE</p>	<p>DHCD must issue its decision within 30 days of the receipt of all materials. Any failure of DHCD to issue a timely decision shall be deemed a determination in favor of the municipality.</p> <p>SEE 760 CMR 56.03(8).</p>

TIME PERIOD	ACTION
180 DAYS FROM INITIAL PUBLIC HEARING	<p>Except with the written consent of the Applicant, the public hearing shall not extend beyond 180 days of the initial public hearing. The 180 day limit presumes that the Applicant has made timely submissions of materials in response to reasonable information requests by the ZBA.</p> <p>SEE 760 CMR 56.05(3)</p>
40 DAYS FROM CLOSING OF PUBLIC HEARING	<p>The ZBA must “render a decision” (Denial, Approval, or Approval with Conditions), based on a majority vote of the Board within 40 days of the closing of the public hearing, unless such time period is extended by written agreement of the ZBA and Applicant. The ZBA shall file its decision with 14 days in the office of the city or town clerk and forward a copy to the Applicant or its designated representative, and to DHCD.</p> <p>Note: Although the regulations state that the ZBA needs only to “render a decision” within 40 days, most ZBAs take a conservative approach and file an executed Comprehensive Permit decision within 40 days of the closing of the public hearing.</p> <p>SEE CMR 760 56.05(8).</p>
20 DAYS FROM DATE ZBA DECISION IS FILED WITH TOWN CLERK	<p>If the ZBA denies the permit or approves the permit with conditions or requirements that the Applicant feels make the project “Uneconomic,” the Applicant may appeal the ZBA decision to the Housing Appeals Committee within 20 days after the written decision has been filed in the office of the city or town clerk.</p> <p>SEE 760 CMR 56.05(9)(b) and 760 CMR 56.06(4)(g)</p> <p>If the ZBA approves the Comprehensive Permit, any person aggrieved may appeal within the time period and to the court provided in M.G.L. c. 40A, §17. The court would normally be either the Land Court or Superior Court.</p> <p>SEE 760 CMR 56.05(9)(a)</p>

6. ROLE AND RESPONSIBILITIES OF OTHER MUNICIPAL BOARDS/
DEPARTMENTS OR COMMITTEES

7. LOCAL RULES

8. PUBLIC HEARING FORMAT/CONTINUANCE OF PUBLIC HEARING/PUBLIC
NOTICE

9. ZBA VOTING REQUIREMENTS (MULLIN RULE)

10. CRITICAL 40B APPLICATION SUBMISSION REQUIREMENTS

- A. **Applicant Status: Public Agency, Non-Profit, or Limited Dividend Organization**
- B. **Evidence of Site Control (Deed, Lease, Option, or P&S Agreement)**
- C. **Project Eligibility Letter from Subsidizing Agency (primarily MassHousing, DHCD, Massachusetts Housing Partnership (MHP), and MassDevelopment). The Subsidizing Agency must make the following findings in accordance with 760 CMR 56.04 (4):**
 - (a) that the proposed Project appears generally eligible under the requirements of the housing subsidy program, subject to final approval under 760 CMR 56.04(7);
 - (b) that the site of the proposed Project is generally appropriate for residential development, taking into consideration information provided by the municipality or other parties regarding municipal actions previously taken to meet affordable housing needs, such as inclusionary zoning, multifamily districts adopted under M.G.L. c.40A, and overlay districts adopted under M.G.L. c.40R, (such finding, with supporting reasoning, to be set forth in reasonable detail);
 - (c) that the conceptual project design is generally appropriate for the site on which it is located, taking into consideration factors that may include proposed use, conceptual site plan and building massing, topography, environmental resources, and integration into existing development patterns (such finding, with supporting reasoning, to be set forth in reasonable detail);
 - (d) that the proposed Project appears financially feasible within the housing market in which it will be situated (based on comparable rentals or sales figures);
 - (e) that an initial pro forma has been reviewed, including a land valuation determination consistent with the Department's guidelines, and the Project appears financially feasible and consistent with the Department's guidelines for Cost Examination and Limitations on Profits and Distributions (if applicable) on the basis of estimated development costs;
 - (f) that the Applicant is a public agency, a non profit organization, or a Limited Dividend Organization, and it meets the general eligibility standards of the housing program; and
 - (g) that the Applicant controls the site, based on evidence that the Applicant or a related entity owns the site, or holds an option or contract to acquire such interest in the site, or has such other interest in the site as is deemed by the Subsidizing Agency to be sufficient to control the site. The Subsidizing Agency shall provide copies of its written determination of Project Eligibility to the Department, the Chief Executive Officer of the municipality, and the Board

11. ADDITIONAL INFORMATION OR CLARIFICATION OF SUBMITTED INFORMATION THAT CAN BE REASONABLY REQUESTED FROM APPLICANT DURING THE PUBLIC HEARING (MAKE SURE YOU HAVE SUFFICIENT INFORMATION TO BE ABLE TO MAKE AN INFORMED DECISION.) REMEMBER: THE APPLICANT IS REQUIRED TO SUBMIT "PRELIMINARY" NOT "FINAL" INFORMATION. MORE DEFINITIVE INFORMATION WILL NEED TO BE SUBMITTED AT THE FINAL APPROVAL AND/OR BUILDING PERMIT APPLICATION STAGE.
12. LAND VALUE APPRAISAL BASED UPON EXISTING "BY-RIGHT" ZONING PREPARED BY AN APPRAISER LISTED ON MASSHOUSING'S APPROVED APPRAISER LIST. THIS APPRAISAL IS A REQUIREMENT FOR PROJECT ELIGIBILITY LETTER (PEL) APPLICATION.
13. "PRELIMINARY" VS. "FINAL" INFORMATION AND TIMING OF SUBMISSIONS
14. TIMELY REVIEW OF APPLICATION BY ZBA
15. TIMELY IDENTIFICATION OF "REAL" ISSUES RELEVANT TO A 40B REVIEW
16. TIMELY IDENTIFICATION OF AREAS WHERE PEER REVIEW CONSULTANTS WILL BE REQUIRED. PEER REVIEWERS REVIEW STUDIES PREPARED ON BEHALF OF APPLICANT. PEER REVIEWERS CAN NOT PREPARE INDEPENDENT STUDIES. ALL WRITTEN RESULTS AND REPORTS ARE INCLUDED IN THE PUBLIC RECORD. PEER REVIEW SHOULD BE DELAYED UNTIL CRITICAL ISSUES ARE DEFINED.
17. FINANCIAL REVIEW (PRO FORMA REVIEW). SEE 760 CMR 56.05 (6) FOR DETAILED GUIDELINES ON HOW AND WHEN A FINANCIAL PEER REVIEW CAN BE DONE.
18. REASONABLE RETURN DEFINITION AS ESTABLISHED BY SUBSIDIZING AGENCY AND/OR FINANCING PROGRAM
19. TIMELY PROCUREMENT OF PEER REVIEW CONSULTANTS
20. TIMELY COMPLETION OF PEER REVIEWS
21. COOPERATION AMONG ZBA/DEPARTMENTS/COMMITTEES/APPLICANT
22. OPEN MEETING LAW/CHAPTER 30B PROCUREMENT REQUIREMENTS
23. NEGOTIATION OPPORTUNITIES/PROCESS

24. 40B SUBSIDIZED HOUSING INVENTORY (SHI).

<http://www.mass.gov/hed/docs/dhcd/hd/shi/shiinventory.pdf>

REQUIREMENTS FOR INCLUSION OF UNITS IN SHI:

- A. Units must satisfy all applicable affordability requirements
- B. Units must be subject to a long term use restriction limiting occupancy to income eligible households for a specified period of time (at least thirty years for newly created affordable units and at least fifteen years for rehabilitated units). Most Comprehensive Permit decisions require that the affordable units remain affordable in perpetuity.
- C. Units must be rented/sold in accordance with an approved Affirmative Fair Housing Marketing Plan (AFHMP)

25. DIFFERENCES BETWEEN "RENTAL" AND "OWNERSHIP" 40B DEVELOPMENTS RE: QUALIFYING FOR INCLUSION IN SHI: 100% OF THE AFFORDABLE **AND** MARKET UNITS IN A RENTAL DEVELOPMENT COUNT BUT ONLY THE AFFORDABLE UNITS COUNT IN AN "OWNERSHIP" PROJECT.

26. EXCEPTIONS (AKA WAIVERS) TO ZONING BY-LAWS AND OTHER **LOCAL** RULES BUT NOT TO STATE WETLANDS PROTECTION ACT, STATE TITLE 5 REQUIREMENTS, AND OTHER **STATE** REQUIREMENTS. ZBA CAN NOT GRANT EXCEPTIONS TO ANY APPLICABLE BUILDING CODE REQUIREMENTS.

27. ZBA DECISION ALTERNATIVES

A. DENIAL OF COMPREHENSIVE PERMIT APPLICATION

Not common unless ZBA feels that there is a clear reason to deny based upon statutory minima requirements, Safe Harbor provisions, or local health, safety, environmental, design, open space or planning local concerns that outweigh regional housing needs. Prior to denying a Comprehensive Permit application, the ZBA should consult with its Town Counsel and other advisors to assess the validity and strength of its arguments for denial given the Applicant's likely appeal of the denial to the Housing Appeals Committee (HAC).

B. APPROVAL OF COMPREHENSIVE PERMIT APPLICATION AS SUBMITTED

Rarely, if ever, occurs

C. APPROVAL WITH CONDITIONS

Most common ZBA action in recent 40B history

Conditions should not make the project “Uneconomic.” If Applicant feels that Conditions do so, Applicant is likely to file an appeal with the Housing Appeals Committee (HAC).

D. HOW IS “UNECONOMIC” INTERPRETED BY THE HOUSING APPEALS COMMITTEE?

OVERLY SIMPLIFIED EXPLANATION:

RENTAL PROJECTS

The standard “Economic” benchmark is that a project’s Return on Total Cost (ROTC) must be at least 450 basis points higher than the 10-year Treasury bill rate.

For example, if the applicable 10-year Treasury rate is 2.50%, any ZBA-imposed condition(s) that resulted in the project’s estimated ROTC falling below 7.00% (2.50% + 4.50%) would be considered to make the project “Uneconomic”.

ROTC is calculated by dividing the project’s estimated Net Operating Income (NOI) by the project’s estimated Total Development Cost (TDC). Net Operating Income is the revenue remaining after deducting all Operating Expenses and Replacement Reserves from collected revenue.

For example, if a project’s estimated NOI is \$ 700,000 and the project’s estimated TDC is \$10,000,000, the project’s ROTC would be 7.00%. The ROTC calculation methodology assumes an unleveraged project.

FOR SALE PROJECTS

The standard “Economic” benchmark is that the estimated Developer’s Fee must be at least 15% of the estimated Total Development Cost (not including any Developer’s Fee). Any ZBA-imposed condition(s) that would result in the estimated Developer’s Fee falling below 15% would make the project “Uneconomic”.

The Developer’s Fee is the difference between estimated Total Sales Revenue and estimated Total Development Cost. The Developer’s Fee is then divided by the Total Development Cost. For example, a project has estimated total Sales Revenue of \$11,700,000 and an estimated Total Development Cost of \$10,000,000, resulting in a Development Fee of \$1,700,000 or 17% of Total Development Costs. If the conditions in the

Comprehensive Permit decision would reduce the projected Developer's Fee to less than \$1,500,000, resulting in a Developer's Fee less than 15% of Total Development Cost, those condition(s) would make the project "Uneconomic." (NOTE: The maximum allowable Development Fee is 20% of Total Development Cost.)

***EXPLANATION BASED UPON APPLICABLE EXCERPTS
FROM THE COMPREHENSIVE PERMIT 40B GUIDELINES
AND COMPREHENSIVE PERMIT REGULATIONS:***

GUIDELINES

Definitions

Uneconomic – means any condition imposed by a Board in its approval of a Comprehensive Permit, brought about by a single factor or a combination of factors, to the extent that it makes it impossible (a) for a public agency or a nonprofit organization to proceed in building or operating a Project without financial loss, or (b) for a Limited Dividend Organization to proceed and still realize a reasonable return in building or operating such Project within the limitations set by the Subsidizing Agency on the size or character of the Project, or on the amount or nature of the Subsidy or on the tenants, rentals, and income permissible, and without substantially changing the rent levels and unit sizes proposed by the Applicant. See 760 CMR 56.02, 56.05(8)(d) and the definitions above for Amount, Applicable 10-Year U.S. Treasury Rate, Minimum Return on Total Cost, Net Operating Income, Return on Total Cost, and ROTC Threshold Increment.

Amount – means, as used in the definition of Reasonable Return at 760 CMR 56.02(c) and (d) with respect to profit to the Developer or payment of development fees from the initial construction of the Project, the greater of (i) such profit or fees expressed as a dollar amount; (ii) such profit or fees expressed as a percentage of total development costs, or (iii) with respect to the payment of development fees from the initial construction of the Project only, the maximum total developer fee payable to the Developer pursuant to a formula established by the Subsidizing Agency under its regulations or guidelines for the Project Subsidy, expressed either as a dollar amount or a percentage of total development costs.

Applicable 10-Year U.S. Treasury Rate – means the interest rate for 10-year notes as published by the U.S. Treasury on the later of the date of (a) the Project Eligibility Application, (b) if applicable, a revised pro forma is submitted to the Board, or (c) if applicable, on appeal to the Housing Appeals Committee, the date of the Pre-Hearing Order.

Minimum Return on Total Cost – means a Return on Total Cost that is less than the sum of the ROTC Threshold Increment and the Applicable Ten-Year U.S. Treasury Rate, which shall be the minimum return necessary to realize a reasonable return from the operation of a Project for purposes of determining whether a condition imposed by a Zoning Board in its approval of a Comprehensive Permit results in a Project being Uneconomic.

Net Operating Income(NOI) -- means rental income less operating expenses and replacement reserves assuming a vacancy rate determined by the Subsidizing Agency; all rents, vacancy rate, operating expense and replacement reserve estimates shall be based upon the date used to determine the Applicable 10-year U.S. Treasury Rate.

ROTC Threshold Increment – As of December, 2014, 450 basis points.

REGULATIONS

760 CMR 56.02 Definitions

Reasonable Return - means, as calculated according to guidelines issued by the department, and with respect to

- a. building an ownership project or continuing care retirement community, that profit to the Developer is not more than 20% and not less than 15% of the total development costs;
- b. building a rental project:
 - i. that payment of development fees from the initial construction of the Project is not more than a reasonable fee as determined by the Subsidizing Agency's program limitations and not less than 10% of the total development costs; and
 - ii. that commencing upon the Project's initial occupancy, distributions of profit funded by operating revenues shall not exceed a reasonable rate relative to the Developer's equity in the Project as determined by the Subsidizing Agency's program requirements;
- c. building an ownership project, continuing care retirement community or rental project, for the purpose of determining whether the Project is Uneconomic, that profit to the Developer or payment of development fees from the initial construction of the Project, if an amount lower than the minimum set forth above in (a) or (b), as applicable, has been determined to be feasible as set forth in the Project Eligibility Letter, then such lower amount shall be the minimum; or

d. building an ownership project, continuing care retirement community or rental project, for the purpose of determining whether the Project is Uneconomic, when one or more conditions imposed by the Board decrease the total number of units in a Project, if those conditions do not address a valid health, safety, environmental, design, open space or other Local Concern, then the amount as calculated prior to the imposition of such conditions shall be the minimum, provided that such amount does not exceed the maximum return set forth (a), above, or fall below the minimum set forth in (a), (b) or (c), above, as applicable.

760 CMR 56.05(8)(d) Board Decisions

(d) Uneconomic Conditions. The Board shall not issue any order or impose any condition that would cause the building or operation of the Project to be Uneconomic, including a requirement imposed by the Board on the Applicant:

1. to incur costs of public infrastructure or improvements off the project site that:
 - a. are not generally imposed by a Local Board on unsubsidized housing;
 - b. address a pre-existing condition affecting the municipality generally; or
 - c. are disproportionate to the impacts reasonably attributable to the Project; or
2. to reduce the number of units for reasons other than evidence of Local Concerns within the purview of the Board (see 760 CMR 56.05(4)(e); see also 760 CMR 56.07(3)(c – h) regarding evidence that would be heard by the Committee on an appeal), such as design, engineering, or environmental deficiencies that directly result from the impact of a Project on a particular site.

If a proposed nonresidential element of a Project is not allowed by-right under applicable provisions of the current municipal zoning code, a condition shall not be considered Uneconomic if it would modify or remove such nonresidential element.

28. CONDITIONS THAT ARE APPROPRIATE TO INCLUDE IN A COMPREHENSIVE PERMIT DECISION: A MASSACHUSETTS SUPREME JUDICIAL COURT (SJC) DECISION IN THE ZONING BOARD OF APPEALS OF AMESBURY V. HOUSING APPEALS COMMITTEE , SJC-10637, September 3, 2010 ADDRESSES THIS ISSUE:

“This court concluded that the scope of a local zoning board's authority under G.L. c.40B § 21, to impose conditions on the issuance of a comprehensive permit to construct low or moderate income housing is limited to the types of conditions that the various local boards, in whose stead the local zoning board acts, might impose, i.e., matters of clear local concern, such as building construction and design, siting, zoning, health, and safety; thus, insofar as a local zoning board's conditions on the issuance of a comprehensive permit to construct low or moderate income housing included requirements that went to matters such as, inter alia, project funding, regulatory documents, financial documents, and the timing of sale of affordable units in relation to market rate units, those conditions were subject to challenge as ultra vires of the board's authority under § 21. [755-758]

This court concluded that the Housing Appeals Committee (committee) of the Department of Housing and Community Development, in reviewing conditions imposed by a local zoning board on the issuance of a comprehensive permit to construct low or moderate income housing, is authorized in the first instance to review and strike conditions that are not within the local zoning board's power to impose or that otherwise intrude impermissibly into areas of direct programmatic concern to State or Federal funding and regulatory authorities, separate from any analysis of whether such conditions render the project "uneconomic" as that term is defined in G.L. c.40B, § 20 [758-763]; thus, the committee was within its power to strike or modify by summary decision conditions imposed by a local zoning board that concerned matters properly within the regulatory responsibility of State housing agencies or State and Federal funding and supervising agencies, and not of local concern [763-765].”

All ZBAs and their Town Counsels should familiarize themselves with this Amesbury decision. The decision is available at:

www.masscases.com/cases/sjc/457/457mass748.html

29. APPEAL VENUE FOR APPLICANT: HOUSING APPEALS COMMITTEE (HAC)

APPEAL VENUE FOR OTHER AGGRIEVED PARTIES: SUPERIOR COURT OR LAND COURT

AN APPEAL OF AN HAC, SUPERIOR COURT OR LAND COURT DECISION MAY ULTIMATELY BE DECIDED BY THE MASSACHUSETTS SUPREME JUDICIAL COURT (SJC), AS WAS THE CASE IN THE AMESBURY DECISION.

30. POST COMPREHENSIVE PERMIT DECISION REQUIREMENTS:

A. "FINAL APPROVAL" BY SUBSIDIZING AGENCY (SUBSIDIZING AGENCY MUST REVIEW ANY DIFFERENCES IN PROPOSED PROJECT SINCE ITS ISSUANCE OF A PROJECT ELIGIBILITY LETTER (PEL) AND THE PROJECT AS APPROVED IN THE COMPREHENSIVE PERMIT DECISION. SUBSIDIZING AGENCY MUST REAFFIRM FINDINGS THAT WERE REQUIRED FOR ISSUANCE OF PEL. FINAL APPROVAL INCLUDES, BUT IS NOT LIMITED TO, THE SUBSIDIZING AGENCY'S REVIEW OF THE COMPREHENSIVE PERMIT CONDITIONS, AFFIRMATIVE FAIR HOUSING MARKETING PLAN, LOTTERY PLAN, EVIDENCE OF FINANCING COMMITMENT, REGULATORY AGREEMENT, AND MONITORING AGREEMENTS.

B. FINAL ENGINEERING AND ARCHITECTURAL PLANS FOR BUILDING PERMIT APPLICATION

C. COST CERTIFICATION DOCUMENTS

31. CHANGES IN PROPOSED DEVELOPMENT FOLLOWING DECISION. SEE 760 CMR 56.05 (11)

A. Substantial Change or Insubstantial Change

IMPORTANT: ZBA MUST RESPOND (MAKE A DETERMINATION AS TO WHETHER THE REQUESTED CHANGE IS A SUBSTANTIAL OR INSUBSTANTIAL CHANGE) WITHIN 20 DAYS. OTHERWISE, THE REQUESTED CHANGE IS DEEMED APPROVED.

32. INSPECTIONS DURING CONSTRUCTION PERIOD

33. LIMITED DIVIDEND RESTRICTIONS AND COST CERTIFICATION

34. LOTTERY, FAIR HOUSING, LOCAL PREFERENCE

35. INCOME, ASSET AND FIRST-TIME HOMEBUYER STATUS REQUIREMENTS FOR AFFORDABLE UNITS

36. REGULATORY AGREEMENT

37. MONITORING SERVICES AGREEMENT (TENANT OR HOMEOWNER ELIGIBILITY COMPLIANCE)

38. DEED RIDER (FOR HOME OWNERSHIP PROJECTS)

39. TRANSFER OF COMPREHENSIVE PERMIT. SEE 760 CMR 56.05 (12) (b)

40. LAPSE OF COMPREHENSIVE PERMIT. SEE 760 CMR 56.05 (12) (c)

41. TIME LAPSES AND EFFECT ON BEING ABLE TO INCLUDE UNITS IN SUBSIDIZED HOUSING INVENTORY (760 CMR 56.03 (2) (c))

SPECIFIC CHAPTER 40B PROJECT REVIEW ISSUES

1. SITE CONTROL
2. QUALIFICATIONS/EXPERIENCE OF DEVELOPMENT TEAM. FLEXIBILITY AND COOPERATIVENESS OF DEVELOPMENT TEAM.
3. DENSITY AND DESIGN

See: Handbook: Approach to Ch 40B Design Reviews available at:
<http://www.mass.gov/hed/community/40b-plan/handbook-approach-to-ch-40b-design-reviews.html>

4. SCHOOL-AGE CHILDREN / BEDROOM MIX

Although most municipalities and residents are concerned about potential increases in school-age children that could be generated by 40B projects, any potential increase in school-age children is a non-issue from the HAC's perspective.

Given the need for family housing suitable for larger families, the state now requires that all 40B projects (except those projects specifically designed for senior housing or certain special needs populations) must have at least 10% of their units as 3 Bedroom or larger units.

5. WETLANDS/RESOURCE AREA IMPACTS
6. SITE PLAN, BUILDING DESIGN AND LANDSCAPING
(Building massing, building height, exterior building design, ADA compliance, landscaping, screening/buffering , road/sidewalk design, parking, public safety vehicle access, exterior lighting, setbacks, impacts on adjacent and nearby properties, open space, etc.)

7. ENGINEERING
(Storm drainage, sewer, domestic water, fire protection, grading, road design, blasting, erosion control, wetlands protection, wetlands replication, construction specifications, etc.)
8. TRAFFIC SAFETY AND TRAFFIC VOLUME
9. OTHER IMPACTS ON NEIGHBORHOOD/TOWN
10. CONCENTRATION OF AFFORDABLE HOUSING IN CERTAIN NEIGHBORHOODS
11. MITIGATION OFFERED/REQUESTED TO LESSEN ADVERSE IMPACTS
12. PRO FORMA REVIEW (See 760 CMR 56.05(6) for explanation of when and why pro forma reviews should be done)

**REPRESENTATIVE CHAPTER 40B-RELATED DOCUMENTS AVAILABLE AT
DHCD's WEBSITE**

Chapter 40B Planning

Chapter 40B is a state statute, which enables local Zoning Boards of Appeals to approve affordable housing developments under flexible rules if at least 20-25% of the units have long-term affordability restrictions.

- **Comprehensive Permit Information**

M.G.L. Chapter 40B Guidelines - Subsidized Housing Inventory.
CPA Prequalification List, updated monthly.
Cost Certification Guidance and Forms.

- **Handbook: Approach to Ch 40B Design Reviews**

The 40B Design Handbook is a result of a collaborative process of the four Massachusetts housing agencies that are authorized to review and approve site eligibility for Chapter 40B affordable housing developments.

- **Housing Appeals Committee**
- **Housing Production Plan**

Housing Production Plan is a regulation under Chapter 40B that encourages communities to take a proactive approach to affordable housing development.

- **Local Initiative Program (LIP)**

The Local Initiative Program is a state housing program that was established to give cities and towns more flexibility in their efforts to provide low and moderate-income housing.

- **Sale Prices and Rents**

Guidance on calculating 40B affordable sale prices and rents.

- **Subsidized Housing Inventory (SHI)**

The Subsidized Housing Inventory is used to measure a community's stock of low-or moderate-income housing for the purposes of M.G.L. Chapter 40B, the Comprehensive Permit Law. While housing developed under Chapter 40B is eligible for inclusion on the inventory, many other types of housing also qualify to count toward a community's affordable housing stock.

**REPRESENTATIVE CHAPTER 40B-RELATED DOCUMENTS AVAILABLE AT THE
HOUSING APPEALS COMMITTEE (HAC) WEBSITE**

Housing Appeals Committee

The mission of the Housing Appeals Committee is to provide, within the parameters of the comprehensive permit process established by G.L. c. 40B, §§ 20-23, an impartial forum to resolve conflicts arising from the siting of new affordable housing. In doing so, it will carefully balance the need for such housing and legitimate local concerns-planning, environmental, open space, design, health, safety, and other local concerns.

General Information

[Chapter 40 B - Massachusetts Comprehensive Permit Law Overview](#) 

[Chapter 40 B - Massachusetts Comprehensive Permit Law](#)  (M.G.L. c. 40 B, §§ 20-23)

[Regulations - 760 CMR 56.00 \(Comprehensive Permit; Low or Moderate Income Housing\)](#)

[Comprehensive Permit Information and Guidelines](#)

[Handbook: Approach to Chapter 40B Design Reviews](#)  file size 15MB

[Guidelines for Local Review of Comprehensive Permits](#) 

[Massachusetts Comprehensive Permit Law Technical Assistance Guide](#) 

760 CMR 30.00 - Procedural Regulations of the Housing Appeals Committee - Superseded by 760 CMR 56.00

760 CMR 31.00 - Housing Appeals Committee - Criteria for Decisions - Superseded by 760 CMR 56.00

Contact Information

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Werner Lohe, Chairman
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Lorraine Nessar, Docket Clerk
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Housing Appeals Committee - Decisions

All decisions and published rulings of the Housing Appeals Committee are available on searchable databases at Lexis.com, WestLaw.com, Socialaw.com, and LandLaw.com. Decisions from 2012 to 2015 are listed below.

Woburn, Cirsan Realty Trust v.  file size1MB
Committee Decision - 04/23/15

Haverhill, Bradford Holdings, LLC v. 
Ruling - 02/02/15

Wareham, Bartlett Pond Village, LLC v.  file size2MB
Committee Decision - 09/16/14

Westborough, Ansari Builders, Inc. v.  file size1MB
Committee Decision - 09/16/14

Dighton, Bruce, LLC v.  file size2MB
Committee Decision - 05/07/14

Andover, Hanover R.S. Limited Partnership v.  file size7MB
Committee Decision - 02/10/14

Hanover, Hanover Woods, LLC v.  file size1MB
Committee Decision - 02/10/14

Middleborough, Delphic Associates, LLC v.  file size2MB
Ruling - 03/28/13

Lunenburg, Hollis Hills, LLC v.  file size4MB Ruling - 03/25/13

Middleborough, Delphic Associates, LLC v. 
Ruling - 02/27/13

Andover, VIF II/JMC Riverview Commons v.  file size1MB
Committee Decision - 02/27/13

Amesbury, Roger LeBlanc v. 
Committee Decision - 01/14/13

Hingham, Avalonbay Communities, Inc. v. 
Committee Decision - 01/14/13

Medfield, Medfield North Meadows, LLC v.  file size3MB
Committee Decision - 09/10/12

Norwell, White Barn Lane, LLC, v.  file size1MB
Ruling - 06/11/12

**REPRESENTATIVE CHAPTER 40B-RELATED DOCUMENTS AVAILABLE AT THE
MASSHOUSING WEBSITE**

Chapter 40B Site Approval

Disclaimer on Site Approval and Final Approval

The Massachusetts Department of Housing and Community Development (DHCD) issued regulations and guidelines for the Comprehensive Permit Act (Chapter 40B), which became effective as of February 22, 2008. Please see the following DHCD (www.mass.gov/dhcd) links for current Chapter 40B information:

- [Housing Appeals Committee](#)
- [760 CMR 56.00: Comprehensive Permit Regulations](#)
- [Comprehensive Permit Guidelines \(The "Guidelines"\)](#)

Site Approval Applications

Comprehensive Permit Site Approval Applications for rental and homeownership projects are now available as fillable PDFs. The documents require the free [Adobe Reader](#) software (link opens a new window).

- [Site Approval Application - Homeownership](#)
- [Site Approval Application - Rental](#)

For additional information concerning MassHousing Chapter 40B programs, please contact [Gregory Watson](#), Manager of Comprehensive Permit Programs at 617.854.1880

The screenshot displays a sidebar menu with the following sections and links:

- 40B AFFORDABILITY MONITORING**
 - [Access 40B Homeownership Affordability Monitoring materials and information.](#)
- 40B COST CERTIFICATION MATERIALS**
 - [Access 40B Home Ownership Cost Certification materials and information.](#)
- 40B DOCUMENTS**
 - [Comp. Permit Site Approval Application - Homeownership](#)
 - [Comp. Permit Site Approval Application - Rental](#)
 - [40B Compliance Monitoring Spreadsheet](#)
 - [Handbook: Approach to Chapter 40B Design Reviews](#)

REPRESENTATIVE CHAPTER 40B-RELATED DOCUMENTS

AVAILABLE AT CHAPA'S WEBSITE

Looking for 40B and other affordable homeownership lotteries? [Click here.](#)

- [HUD's 2015 Area Median Income Limits – Massachusetts Only – March 23, 2015](#)
- [HUD's 2015 Area Median Income Limits\(link is external\) – March 23, 2015](#)
- [DHCD's Chapter 40B Subsidized Housing Inventory\(link is external\) \(PDF file\) – Updated Monthly](#)
- [2014 MHP 8th Annual Housing Institute CHAPA Presentation – June 12, 2014](#)
- [Chapter 40B Fact Sheet – January, 2014](#)
- [HUD's 2014 Area Median Income Limits:Massachusetts only \(link is external\)– December 20, 2013](#)
- [HUD's 2014 Area Median Income Limits\(link is external\) – December 20, 2013](#)
- [September 2013 40B Training Materials – September 27, 2013](#)
- [Updated Comprehensive Permit \(40B\) Guidelines – May 29, 201](#)
- [September 2012 40B Training Materials – September 27, 2012](#)
- [Link to Massachusetts Department of Housing and Community Development 40B Web \(link is external\)Site\(link is external\)](#)
- [Link to Massachusetts Housing Partnership Web \(link is external\)Site\(link is external\)](#)
- [Overcoming Restrictive Zoning for Affordable Housing in Five States: Observations for Massachusetts](#)
Rachel Bratt, Tufts University
February 2012
- [DHCD Design Guidelines\(link is external\) – March, 2011](#)
- [On the Ground: 40B Developments Before and After\(link is external\)](#)
Alexandra DeGenova, Brendan Goodwin, Shannon Moriarty, and Jeremy Robitaille
Urban and Environmental Policy and Planning, Tufts University
May 2009
- [Reviewing 40B: What Gets Proposed, Approved, Appealed and Built?\(link is external\) \(PDF file\)](#)
Lynn Fisher, Department of Urban Studies and Planning and the Center for Real Estate, MIT
November 2008
- [CHAPA Report: The Faces of 40B: Profiles of Families Living in Affordable Housing \(PDF file\) – June 9, 2003](#)

