

# WORKING WITH THE MASSACHUSETTS AFFORDABLE HOUSING LAW

Citizen Planner Training Collaborative  
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Primer on Chapter 40B  
Statutory Purposes  
Regional “Fair Share”

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Public Hearing

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Post-Comprehensive  
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Subsidizing Agency, Local  
Responsibilities

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## Fair Housing Awareness

FFHA  
State Policies & Analysis of  
Impediments



# WHAT IS CHAPTER 40B?

## The Commonwealth's regional planning law

- In 1969, the legislature added the affordable housing part (Sections 20-23) to address *regional* housing disparities
- The affordable housing law assumes communities have met their regional "fair share" if at least 10% of their housing stock is affordable to low-income people and subsidized by a federal or state program



# STATUTORY MINIMA (G.L. C. 40B, § 20)

## Presumption of unmet need ...

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



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



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





## WHAT DOES IT MEAN IF A TOWN IS BELOW 10%?

Developers applying for comprehensive permits are *presumed* to need (and qualify for) waivers of local regulations

ZBA's jurisdiction narrowly defined by "local concerns" identified in the statute.

ZBA must balance regional need for affordable housing against local concerns ... law presumes regional need is paramount



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## WHAT DOES IT MEAN IF A TOWN IS ABOVE 10%?

Developers applying for comprehensive permits may need waivers but are not automatically eligible for them

ZBA's jurisdiction still defined by statutory "local concerns," but may require compliance with local regulations to address some/all concerns

Town has more control over future development because developer cannot appeal to the HAC



# THE “SAFE HARBORS” — CHAPTER 40B REGULATIONS

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



# WHAT IS “AFFORDABLE HOUSING”?

- 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 INCOMES ARE AT OR BELOW 80% AMI?

## FY21 HUD INCOME LIMITS FOR NORFOLK COUNTY

Household Size	Very Low Income (50%)	Extremely Low Income (30%)	Low Income (80%)
1	\$47,000	\$28,200	\$70,750
2	\$53,700	\$32,200	\$80,850
3	\$60,400	\$36,250	\$90,950
4	\$67,100	\$40,250	\$101,050
5	\$72,500	\$43,500	\$109,150
6	\$77,850	\$46,700	\$117,250

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# PROJECT ELIGIBILITY

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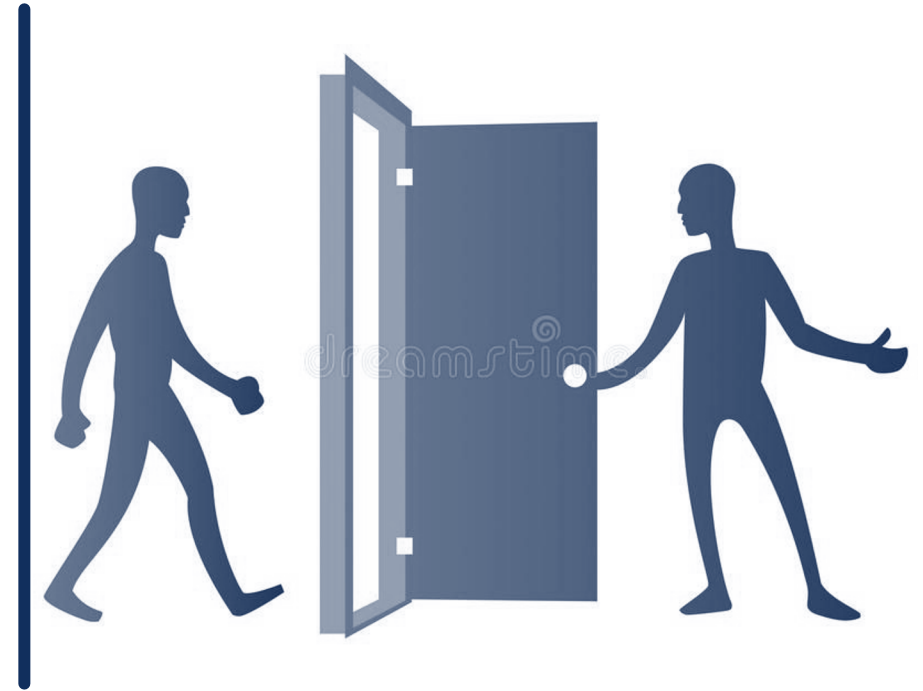
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# PROJECT ELIGIBILITY

- Application to subsidizing agency
- Notification to local officials; site visit
- Review process
  - Appraisal
  - Standards of review (next slide)
- Agency is not a permitting authority
- Project eligibility decision: opening (or closing) the door



## **SUBSIDIZING AGENCY RESPONSIBILITIES**

1. Is the project eligible under subsidy program guidelines?
2. Is site generally appropriate for residential development?
3. Is conceptual project design generally appropriate?
4. Does proposed project seem feasible, given comparable rents and sale prices?
5. Is it feasible, given land valuation, profit limitations, program requirements?
6. Is applicant eligible?
7. Does the applicant have site control?

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# PROJECT ELIGIBILITY: LOCAL RESPONSIBILITIES

- Site visit
- Town comment period
  - Town departments (ideally, meet with the developer)
  - Boards with development review & permitting experience, e.g., Planning Board, Conservation Commission, Health Department, Public Works
  - Focus on PE regulatory standards and valid local concerns
- Select Board transmits city/town comments to subsidizing agency



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# CHAPTER 40B PERMIT PROCESS

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## RENTAL, OR HOMEOWNERSHIP?

- MAJOR DIFFERENCES!
  - For rental developments with 25% affordable units for low-income households *or* 20% for very-low-income households, ALL units count on the SHI, including market-rate units.
  - For ownership developments, only affordable units count.
  - It's the developer's project ... ***developer decides.***

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# COMPREHENSIVE PERMIT: SCOPE

- Board of Appeals has jurisdiction over all approvals under *local* regulations, such as:
  - Zoning
  - Subdivision Control
  - Local wetlands, septic system regulations
  - Historic district
  - Scenic roads
- Has authority to grant waivers necessary to allow construction of proposed development





## **COMPREHENSIVE PERMIT: SCOPE**

- *Not within ZBA's purview:*
  - Impact on municipal & school facilities available to all residents of the community
  - Fiscal impact studies
  - Tenant/homebuyer selection
  - Profit monitoring
  - Market study

## **CRITICAL 40B APPLICATION SUBMISSION REQUIREMENTS**

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Applicant Status: Public Agency, Non-Profit, or Limited Dividend Organization

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Evidence of Site Control

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Project Eligibility Letter (PEL) from Subsidizing Agency

# 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



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# WHAT A PRELIMINARY PLAN SHOULD TELL YOU

- Does the application include enough information for the Board to determine that the project is:
  - Feasible?
  - Appropriate for its context? Sensitive to surrounding uses?
  - Can be constructed without creating adverse public health and public safety impacts on the surrounding neighborhood?



# 40B PERMIT TIMELINE

## 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)

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## THE PUBLIC HEARING

- Fair, thorough, *evidence-based* hearing process is essential for a defensible decision
- 40B hearing must be conducted the same as any other permit process
- 40B projects cannot be treated differently than other types of development
- Town departments and boards have *technical review* role
  - Planning, conservation, health, public works
  - Police, fire, building inspector
- ZBA engages peer review consultants for independent assessment of the project





# HOW CAN OTHER BOARDS HELP THE ZBA?

## SOME EXAMPLES

- Planning Board – plan review? Zoning or subdivision waivers? Master plan consistency?
- Affordable Housing Trust or Partnership – relationship to local housing needs? Site consistency with HPP? Impact on progress toward 10%?
- Fair Housing Committee or Commission – equity review?
- Conservation – waivers of local wetlands bylaw? Stormwater management? Work with same peer review consultant to maximize consistency between wetlands and ZBA review process.
- Board of Health – Title V?
- Design Review Board – building design, setbacks, massing, scale?
- Potential roles for other boards, e.g., Historical Commission, Commission on Disability.



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## HOW CAN TOWN DEPARTMENTS HELP THE ZBA?

- Focus on technical issues that fall within the ZBA's purview
- Is the plan and application documentation adequate?
- Qualifications of developer's team?
- Prior experience with applicant?
- Participate in work sessions with the developer if requested by the ZBA
- Provide timely public information (ZBA web page is a great start!)



# RETAINING PEER REVIEW CONSULTANTS

Employment of  
outside consultants

Review of studies  
prepared on behalf of  
the Applicant, not of  
independent studies

All written results and  
reports are made part  
of the record



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# SECURING SUFFICIENT PROJECT INFORMATION TO MAKE AN INFORMED DECISION

- ZBA should ...
  - Focus on the “real” project issues/impacts early in the review process
  - Identify major issues as early in the process as possible
  - Request additional information from the Applicant where necessary
  - Request graphics that help clarify height, massing, setbacks, and overall relationship to neighbors



# FINANCIAL PRO FORMA REVIEW

*May* be necessary, and only allowed after:

1. Other peer reviews have been completed;
2. Developer has had an opportunity to modify proposal to address Board's concerns;
3. The Board has had an opportunity to propose conditions to mitigate the Project's impacts and consider requested waivers; and
4. Applicant claims conditions the Board plans to impose will make project uneconomic.



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# FINANCIAL PRO FORMA REVIEW

- Applicant can be asked to submit pro forma showing additional cost of meeting Board conditions. The revised pro forma may be subjected to peer review.
- Pro forma review should conform to recognized real estate and affordable housing standards, consistent with policies of the subsidizing agency and DHCD guidelines.

***General advice: avoid if possible.***





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# BALANCE REGIONAL HOUSING NEEDS WITH LOCAL CONCERNS

*What are “local concerns” under 40B?*

- Health
- Safety
- Environmental
- Design
- Open Space
- Planning
- Other Local Concerns (related to physical development of the site)



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# DECISION

- 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!



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## APPEAL OF ZBA DECISION

- Appeals by the Applicant are made with the Housing Appeals Committee (HAC)
- Appeals for other parties are made with Superior Court or the Land Court.



# SUMMARY OF ROLES & RESPONSIBILITIES

Subsidizing Agency	Select Board	Town Departments	ZBA
<ul style="list-style-type: none"><li>• Determination of Project Eligibility</li><li>• Focus on:<ul style="list-style-type: none"><li>▪ Applicant Status</li><li>▪ Evidence of Site Control</li><li>▪ Project is financeable</li></ul></li><li>• Final Approval (after ZBA process)</li><li>• Ongoing compliance</li></ul>	<ul style="list-style-type: none"><li>• 30-day review and comment period once PEL is forwarded by Subsidizing Agency<ul style="list-style-type: none"><li>○ Site Visit</li><li>○ Write letter with comments on project</li></ul></li><li>• Ensure adequate Town department support and resources for ZBA review process</li></ul>	<ul style="list-style-type: none"><li>• Comment on technical issues within ZBA's review purview: written comments or testimony at hearing</li><li>• Facilitate peer review</li><li>• Participate in work sessions with developer (if requested by ZBA)</li><li>• Help ZBA manage documentation and provide public information</li></ul>	<ul style="list-style-type: none"><li>• Conduct technical permit application review</li><li>• Solicit feedback and guidance from peer reviewers</li><li>• Solicit public comment at hearings</li><li>• Weigh regional housing needs with local concerns</li><li>• Prepare and vote on Decision</li></ul>



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# WHAT'S NEXT? POST-COMPREHENSIVE PERMIT PROCESS

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# MANAGING THE COMPREHENSIVE PERMIT

## 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
- Lapse of the permit
- Transfer of the Comprehensive Permit
- Changes to Permit – substantial or insubstantial



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# FAIR HOUSING CONSIDERATIONS

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# 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.





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## 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)

**"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."**



# POLICY RESPONSE (2018)

## 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 ..."

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## 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.”





## STATE AI: ACTION STEPS

“The DOJ and the Massachusetts Office of the Attorney General (“AGO”) can also play an important role in initiating enforcement actions and providing opinions regarding local zoning decisions that conflict with federal or state statutes or constitutional principles.”

Result: Fair Housing “caution” comments about zoning bylaw amendments submitted for review by 13 towns.



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# QUESTIONS?

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