

# OVERVIEW OF CHAPTER 40B

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# PURPOSE

- M.G.L. c.40B §§ 20-23 authorizes the issuance of a single, or comprehensive, local permit issued by the Zoning Board of Appeals, with exemptions from generally applicable local bylaws and regulations.
- The statute was enacted to:
  - Facilitate the construction of low- and moderate-income housing;
  - Avoid perceived long delays in developers' proposals to construct affordable housing;
  - Allow waiver of local zoning by-laws that are not "consistent with local needs."

# STEP 1-PROJECT ELIGIBILITY

- Applicant must obtain a project eligibility letter from a subsidizing agency.
- Minimum project eligibility requirements:
  - Applicant must be a public agency, non-profit organization, or limited dividend organization;
  - Project shall be fundable by subsidizing agency under low- or moderate-income subsidy program; and
  - Applicant shall control the site.
  - See 760 CMR 56.04(1).

# PROJECT ELIGIBILITY LETTER

- The subsidizing agency must make the following general findings:
  - The project appears eligible for a housing subsidy program, the site appears appropriate for residential development, the conceptual project design is appropriate, the project appears financial feasible, initial *pro forma* has been reviewed, the applicant is a qualifying entity, and controls the site.
- A project eligibility letter from the Applicant's subsidizing agency establishes that the eligibility requirements of 760 CMR 56.04(1) have been satisfied, and that the Applicant may proceed to the Zoning Board of Appeals.

## STEP 2: APPLICATION FOR COMPREHENSIVE PERMIT

- Zoning Board of Appeals is the only board with jurisdiction to decide comprehensive permit applications.
- Zoning Board possesses the authority to act for all “local boards,” which is broadly defined to include practically all relevant boards and officials. See 760 CMR 56.02.

## STEP 2: LOCAL HEARING

- The Applicant must file a complete application with the Zoning Board of Appeals.
- This application must contain the items listed in 760 CMR 56.05(2)(a)-(h).
  - Preliminary site development plans;
  - Report on site conditions;
  - Preliminary architectural drawings;
  - Tabulation of buildings and bedroom counts;
  - List of waivers requested.

# PUBLIC HEARING- IMPORTANT MILESTONES

- The filing of the application triggers the following deadlines:
  - 7 days: **The Board shall notify each local board** of application by sending notice of application and copy of list of waivers. The Board shall also **invite participation of each local board as is deemed necessary** or helpful in making decision.
  - 14 days: **Notice of public hearing** is provided pursuant to M.G.L. c.40A § 11.
  - 30 days: **Board shall open its public hearing.**
  - 180 days: **Close hearing** (absent extension agreement with the Applicant).
  - 40 days (after close of the hearing): The Board must vote its decision.
  - 14 days (after vote): File written decision with Town Clerk.

## **PUBLIC HEARING: EARLY ACTION ITEMS**

- Review application materials for completeness.
- Select and hire peer review consultants, and secure funds from the Applicant for placement into § 53G account.
- Solicit comments from Town boards and department.

# GENERAL LEGAL STANDARD APPLICABLE TO 40B APPLICATIONS

- “Consistency with Local Needs” = central issue
- Means either:
  - (a) one or more of the grounds set forth in 760 CMR 56.03(1) have been met, or
  - (b) Local Requirements are reasonable in view of the regional need for Low and Moderate Income Housing, considered with the number of Low Income Persons in the affected municipality and with Local Concerns, and if such Local Requirements and Regulations are applied as equally as possible to both subsidized and unsubsidized housing.

# GENERAL GROUNDS FOR DENIAL OF COMPREHENSIVE PERMIT

- 760 CMR 56.03(1): A Board may deny a comprehensive permit within 15 after opening its public hearing if:
  1. Municipality has achieved one of the Statutory Minima in accordance with 760 CMR 56.03(3):
    - 10% of housing stock in Town is affordable.
    - SHI eligible housing exists on 1.5% of land zoned for residential, commercial or industrial use.
    - An application would result in construction of housing on more than .3 of 1% of the Town's land area or 10 acres, whichever is larger, in 1 year.
  2. DHCD has certified municipality's compliance with its Housing Production Plan per 760 CMR 56.03(4).
  3. Municipality has made recent progress towards Statutory Minima per 760 CMR 56.03(5).
  4. Project is a large project per 760 CMR 56.03(6).
  5. A related application has previously been received per 760 CMR 56.03(7).

## WELLESLEY'S COMPLIANCE WITH STATUTORY MINIMA

- Wellesley cannot currently deny application based on the regulatory criteria of 760 CMR 56.03(1) because:
  - No 10% affordable housing.
  - No certified Housing Production Plan.
  - No recent progress towards statutory minima.
    - Number of SHI eligible housing units created in 12 months prior to receipt of application must be  $\geq 2\%$  of municipality's total housing units.
  - A "large project" is more than 300 units.

## CONSISTENT WITH LOCAL NEEDS

- Absent satisfaction of statutory minima enumerated in 760 CMR 56.03(1), a denial of a comprehensive permit will be deemed “consistent with local needs” if it is reasonable in light of:
  1. The regional need for low- and moderate-income housing / the number of low-income persons in town.
  2. Local concerns—“the need to protect the health and safety of the occupants of the proposed Project or of the residents of the municipality, to protect the natural environment, to promote better site and building design in relation to the surroundings and municipal and regional planning, or to preserve open spaces.”

If such regulations are applied as equally as possible to both subsidized and unsubsidized housing. M.G.L. c.40B § 20.

# WAIVERS FROM LOCAL REQUIREMENTS AND REGULATIONS

- Pursuant to 40B, the Board may waive local requirements and regulations, including zoning by-laws, which are not “consistent with local needs.”
  - See Jepson v. Ipswich Bd. of Appeals, 450 Mass. 81, 90 (2007) (stating 40B only permits the waiver of local requirements, not state laws).
- Zoning waivers are required solely from “as-of-right” requirements of zoning district where project site located. 760 CMR 56.05(7).
  - Special permit requirements are inapplicable to 40B projects.

## WAIVERS FROM LOCAL REQUIREMENTS AND REGULATIONS

- The Applicant must provide a list of all waivers being sought.
- If a waiver is denied, the standard on review will be whether it renders the project “uneconomic.”

# “UNECONOMIC”

- For a public agency or nonprofit organization:
  - Any condition that makes it impossible to proceed in building or operating a project.
- For a Limited Dividend Organization:
  - Any condition that makes it impossible to proceed “and still realize a reasonable return within the limits set by the Subsidizing Agency.”
- See 760 CMR 56.02.

# WAIVERS FROM LOCAL REQUIREMENTS AND REGULATIONS

- When evaluating waiver requests, the Board will be working with bylaws and regulations typically within the jurisdiction of other “local boards.”
- The Board may invite the participation and comment of those other “local boards.”
- See M.G.L. c.40B, §21:
  - “The board shall request the appearance at said hearing of such representatives of said local boards as are deemed necessary or helpful in making its decision upon such application...[and] in making its decision on said application, shall take into consideration the recommendations of the local boards”).

## KEY ISSUES TO ADDRESS DURING PUBLIC HEARING

- Have the comments of the other local boards, departments and officials been adequately addressed by the Applicant?
- Has peer review been completed to the Board's satisfaction?
- What conditions should be imposed in the Decision?
- Do the conditions that the Board intends to impose render the project uneconomic?
- Do the waivers that the Board intends to deny render the project uneconomic?

# BOARD VOTE

- Pursuant to M.G.L. c. 40B § 21, a simple majority vote of the board will suffice for a decision.
- The Board must vote its written decision within forty days after the close of the public hearing, and file its written decision with the Town Clerk within 14 days of that vote.
- In approving application, board may impose conditions with respect to height, site plan, size or shape, or building materials as are consistent with the terms of § 21.

# APPEAL OF DECISION

- The Applicant may appeal a decision directly to the HAC within 20 days after the date of the notice of the decision by the board of appeals.
  - 760 CMR 56.06(g).
- Other aggrieved parties may appeal a denial to Land Court or Superior Court within 20 days after the decision has been filed with the Town Clerk.

## ON APPEAL TO HAC: DENIAL OF A COMPREHENSIVE PERMIT

- If an applicant appeals a denial of a comprehensive permit, it must first prove to HAC “that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern.”

## ON APPEAL TO HAC: CONDITIONAL APPROVAL OF A COMPREHENSIVE PERMIT

- If an applicant appeals a conditional approval of a comprehensive permit, it must first prove to HAC that the challenged conditions “make the building or operation of the Project Uneconomic.”

## ON APPEAL TO HAC: LOCAL CONCERN VS. HOUSING NEED

- After the applicant has made either initial showing, it falls to the Town to demonstrate:
  - (1) that there is “a valid health, safety, environmental, design, open space, or other Local Concern” which supports the denial or condition(s); and
  - (2) that such Local Concern outweighs the Housing Need.
- BUT proof that a municipality has failed to satisfy one of the statutory minima in 760 CMR 56.03(1) creates a rebuttable presumption that “there is a substantial Housing Need which outweighs Local Concerns.” 760 CMR 56.07(3)(emphasis added).

## ON APPEAL TO HAC

- The Housing Appeals Committee (HAC) applies a strong presumption that the need for affordable housing outweighs any local concern.
- Burden of proof: balance regional needs with local housing concerns.
  - Local concern: “means the need to protect the health or safety of the occupants of a proposed Project or of the residents of the municipality, to protect the natural environment, to promote better site and building design in relation to the surroundings and municipal and regional planning, or to preserve Open Spaces.” 760 CMR 56.02.

## CHANGES AFTER ISSUANCE OF COMPREHENSIVE PERMIT

- If the Applicant proposes changes after issuance of a comprehensive permit, the Board must determine whether the changes are substantial.
- For any changes deemed to be substantial, the Board will conduct a new public hearing on the changes to the project.

## AFFORDABLE UNITS AUTHORIZED BY COMPREHENSIVE PERMIT

- The affordable units in an ownership project and all units in a rental project are counted on the Town's SHI upon filing of the comprehensive permit with the Town Clerk.
- These units stay on the SHI provided:
  - The Applicant obtains building permits within 12 months; and
  - The Applicant obtains certificates of occupancy within 18 months after issuance of the building permits.

# QUESTIONS?