

Chapter 40B Basics

Presented to the West Newbury Zoning Board of Appeals

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Chapter 40B: Statewide permitting legislation, enacted in 1969

- Chapter 40B enables developers to obtain a single - “comprehensive” - permit from the Zoning Board of Appeals for a residential development.
- ZBA acts on zoning issues raised, but also acts in place of all other local boards that would otherwise review the project.
- Development is usually at greater density than permitted under zoning, and usually requires relief from other local bylaws as well.
- Projects typically a mixture of market-rate and below market rate housing. 40B creates more market rate units than affordable units.

The Statute (G.L. c.40B, ss.20-23) and Regulations (760 CMR 56.00 et seq.)

- Basic principles of supremacy apply: the statute always supersedes regulations and where in conflict, the statute prevails.
- There are several instances of inconsistency between the statute and the regulations that are important to note. Chief among them relates to the Town's assertion of "safe harbor" or "consistent with local needs". To be discussed soon...

The Board's (Local) Comprehensive Rules and Regulations are Important and Relevant

- Local comprehensive rules and regulations allow the Board to guide comprehensive permit applications made to the Town
- The rules and regulations can be detailed and creative, including for example, design guidelines and specific requirements for better projects that are consistent with the Town's overall planning goals.
- The rules and regulations can not be independently appealed to the Housing Appeals Committee (or anywhere else). They have the force of law.

Important Definition 1:

“Consistent with local needs” – meaning

- Important phrase in 40B – used for several purposes
- A municipality is “consistent with local needs” if it meets certain thresholds relating to housing units and housing production. Most common:
 - 10% of city or town housing units are “affordable”*
 - Low or moderate income housing occupies 1.5% of municipality’s land area
 - Municipality is certified as being in compliance with a Housing Production Plan

These are referred to as “safe harbor”

“Consistent with local needs”- significance

- If municipality is “consistent with local needs,” the ZBA may deny a comprehensive permit, or grant it with conditions, and that decision is final as to the applicant.
- If municipality not “consistent with local needs,” applicant has right of appeal to Housing Appeals Committee (discussed later).
- ZBA in a city or town that is “consistent with local needs” may still hear application and grant comprehensive permit.

Important Definition 2:

“Uneconomic” – meaning

- “[a]ny condition brought about by a single factor or combination of factors that makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss or for a limited dividend organization to proceed and still realize a reasonable return...”

First step: “Project Eligibility”

- Developer applies to state development agency (e.g., MassHousing) for Project Eligibility Letter.
- Agency will issue P.E. letter; they are rarely denied.
- MassHousing will request comment from the municipality on the proposed project.
- Once developer has P.E. letter, it may apply to the ZBA for a comprehensive permit – good for two years but MassHousing has routinely extended PE letters indefinitely.

ZBA proceedings and deadlines

- Once comprehensive permit application filed with ZBA, hearing must open within thirty days, or risk constructive grant.*
- Public hearing must close within 180 days, unless extension agreed to by applicant, or risk constructive grant*
- Within 40 days of close of public hearing, ZBA must vote and file a decision with Town/City Clerk.*

*Pursuant to Chapter 53 of the Acts of 2020, permitting deadlines, including for 40B applications, are tolled during the COVID-19 state of emergency.

More....

Assertion of “Safe Harbor” Very Important

- The regulations are in dramatic conflict with the statute here and the Board needs to be very careful.
- Within 15 days of the opening of the public hearing, the Board must assert, if it intends on asserting, the Town’s “consistent with local needs/safe harbor” status.
- Failure to do so will, without further litigation, result in the Board’s waiver of that status even if the Town is “consistent with locals needs”.
- The Board needs to assert “safe harbor” status each and every time an application is filed or the assertion is deemed waived.

More on “Safe Harbor

- There are 3 statutory “safe harbors” and 4 regulatory “safe harbors”:
- Statutory: (1) 10% SHI; (2) 1.5% land area and (3) annual land area (0.3 of 1% or 10 acres)
- Regulatory: (1) Housing Production Plan *and* increase of SHI housing by 0.5%; (2) Increase of SHI housing units by 2% of total housing units; (3) “large project” and (4) “related application”.
- Remember: “safe harbor” is the equivalent of “consistent with local needs”

Waivers to Local Bylaws and Regulations

- One of the most significant part of the ZBA's review and grant of any comprehensive permit.
- Project will typically need relief from provisions of zoning and other local bylaws. Applicant submits "waiver list."
- ZBA should obtain advice from other boards on the waiver requests – e.g., advice from Conservation Commission on whether to waive provision of wetlands bylaw.
- ZBA not required to grant waiver of any bylaw or other local regulations, but may do so if it would be "consistent with local needs."
- ZBA not required to grant waiver of any bylaw or other local regulations if, but for the waiver, the project would not be rendered "uneconomic".

That phrase again –

“consistent with local needs”

- In the context of considering waivers, and also in considering permit conditions, the ZBA must determine whether such waiver or condition is “consistent with local needs.” From G.L.c . 40B, s. 20; a balancing test:

“requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to **protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces.**”

Project Economics

- Unlike a “traditional” development pursuant to the Zoning Act or Subdivision Control Law, for example, the ZBA may inquire as to the projected profit from the development so as to determine whether the conditions the Board wishes to impose, including a reduction in density, renders the project “uneconomic”.
- The Applicant’s project pro forma is an essential ingredient in every comprehensive permit project and the Board has the right to review the same.

Project Review

- The ZBA is empowered to require the payment for third party consultant reviews for any aspect of the project that the Board believes relevant, other than legal services*.
- G.L. c.44, s.53G authorizes such review and prepayment.
- An applicant's right to object to such requirement is limited to the consultant not being qualified or having a conflict of interest.
- The third party consultant(s) are chosen by the ZBA and work for the ZBA, not the applicant. The applicant is required to pay for the consultants' analysis and testimony, but has no control over their work product.

Project Review, continued

- While the regulations limit the ZBA's ability to keep a public hearing open indefinitely, the ZBA should not generally close a public hearing until the Board believes it has obtained all the information, plans, data and analysis needed to render a decision.
- If the Board is forced to close the hearing due to time constraints (e.g, the 180-day deadline is fast approaching) and the Applicant refuses to grant the Board an extension, the Board should include the same in minutes of the Board's meeting and as part of the Board's motion to close the hearing.

ZBA Decision and appeals

- Board may approve the project as submitted; approve the project with conditions; or deny the project.
- If the project is denied, or if the applicant is dissatisfied with the conditions imposed or waivers denied, applicant may appeal to the Housing Appeals Committee (“HAC”), an agency within the Department of Housing and Community Development.
- However, the Applicant has NO rights of appeal to the HAC if the Town is “consistent with local needs”.
- If an abutter or other person having standing is dissatisfied with Board’s grant of a comprehensive permit, the abutter may take an appeal under G.L. c. 40A, s. 17 to Superior Court or Land Court.

ZBA Decision and appeals - continued

- Applicant's appeal at the Housing Appeals Committee is an administrative appeal and will typically be resolved through a hearing.
- HAC may direct the issuance of a comprehensive permit where a ZBA denied it; may remove conditions imposed by the ZBA; or may grant waivers not granted by the ZBA.
- The HAC's decision may be appealed by the Board or Applicant to Superior Court (or Land Court) under G.L. c. 30A. Review is on the administrative record.

ZBA Decision and Appeals - continued

- What happens if an abutter appeals the ZBA's decision under G.L.c . 40A, s. 17, *and* the applicant appeals the decision to the HAC?

The HAC appeal goes first. Only *after* the Applicant's appeal is resolved (including all appeals) does the abutter's appeal move forward.

Thank you!

Questions and discussion