

MANAGING CHAPTER 40B

Technical Assistance for Zoning Boards of Appeal

Massachusetts Housing Partnership
Citizen Planner Training Collaborative
Citizens Housing and Planning Association
Updated by Judi Barrett 2017
Content includes CPTC Training (2016) from Katy Lacy, AICP



40B Information Available on the Web

- www.chapa.org
- www.mass.gov/dhcd
- www.masshousing.com
- www.mhp.net

Reviewing the initial application

MHP GRANTS

ELIGIBILITY AND SUBMISSION
REQUIREMENTS

Mass. Housing Partnership (MHP)

- MHP provides technical assistance to local Zoning Boards of Appeal (ZBA)
- Grants up to \$15,000
- Pre-qualified third-party consultants
- To request technical assistance, contact Laura Shufelt at lshufelt@mhp.net or 857-317-8582

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Statutory Minima (G.L. c. 40B, § 20)

- Less than 10% of year round housing units, OR
- Municipalities have less than 1.50% of total land area zoned for residential, commercial, or industrial use, OR
- Project involves 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

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The “Safe Harbors” — Chapter 40B Regulations

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

Critical 40B Application Submission Requirements

Applicants **MUST HAVE** in order to apply!

- Applicant Status: Public Agency, Non-Profit, or Limited Dividend Organization, AND
- Evidence of Site Control, AND
- Project Eligibility Letter from Subsidizing Agency

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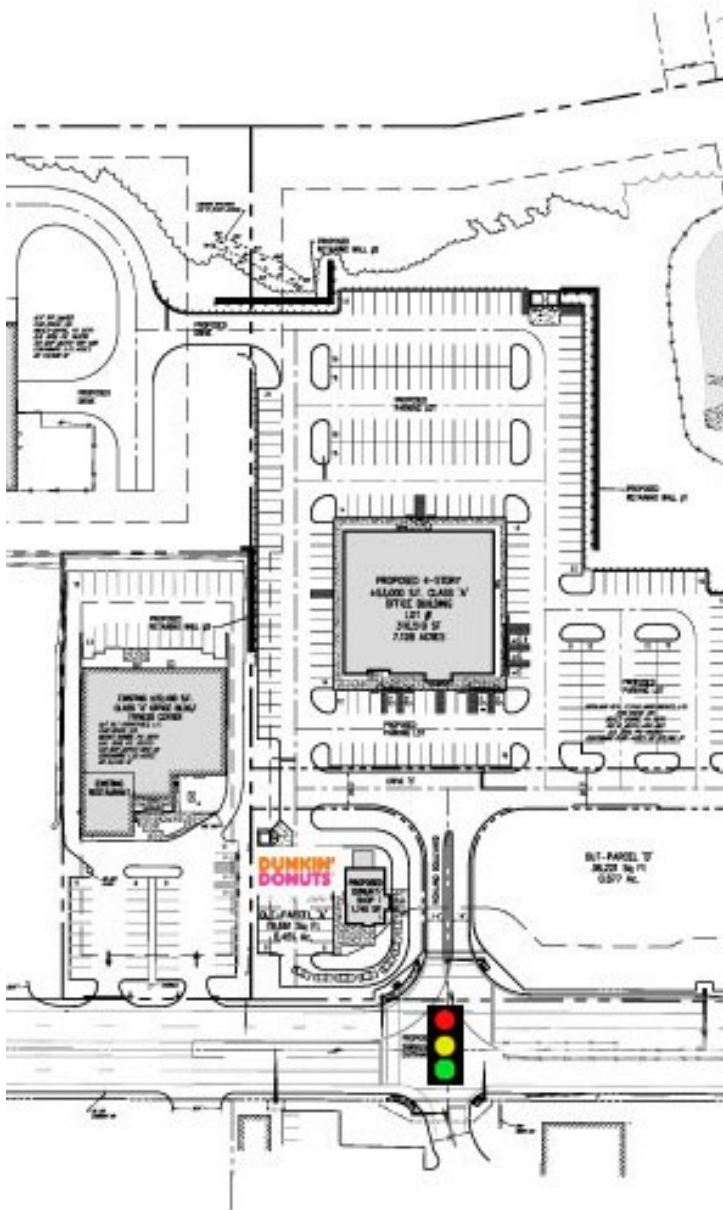
Other 40B Application Submission Requirements

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- Preliminary plans
- Existing site conditions and locus map
- Preliminary, scaled, architectural drawings
- A tabulation of proposed buildings by type, size and ground coverage
- A preliminary subdivision plan (if applicable)
- A preliminary utilities plan
- A list of requested waivers

What does “preliminary plan” mean?

- Good example of preliminary plan contents: MassHousing Project Eligibility Application Existing Conditions & Project Submission Requirements (Appendix C in MHP Chapter 40b Handbook)



Site Plan (Alternate #4)



Noticing and conducting the required public hearing

7/14/30/15/15/30/180/40/20 DAYS

Chapter 40B Performance Requirement Deadlines

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- Distribute Application - 7 Days
- **Notice of Public Hearing – 14 Days**
- **Open Public Hearing - Within 30 days**
 - Safe Harbor Notification - 15 days
 - Applicant's safe harbor appeal period - 15 days
 - DHCD safe harbor response deadline - 30 days
- Close Hearing - 180 days
- **Decision - 40 days**
- **Appeal - 20 days**

A group of people, including men and women of various ages, are standing in a grassy field. They are all looking towards the right side of the frame. In the background, there is a large, modern, multi-story building with a white facade and many windows. The scene is set outdoors with trees and a clear sky in the distance. The overall tone of the image is professional and educational.

Scheduling a Site Visit

- Conduct a site/neighborhood visit early in the review process
- Understand...
 - Site and neighborhood existing conditions
 - The proposed site plan and building design
 - The location of abutters most affected by the proposed development



Retaining Peer Review Consultants

- Employment of outside consultants
- Civil Engineering, Traffic, Architecture
- Financial – **if necessary**
- Review of studies prepared on behalf of the Applicant, **not** preparation of independent studies
- All written results and reports are made part of the record

Securing sufficient project information to make an informed decision

- Focus on the “real” project issues/impacts early in the review process
- Peer review and calls for additional or more detailed information should be delayed, if possible, until major issues are defined
- If needed, request additional information from the Applicant
- Don’t hesitate to ask for graphics that help clarify height, massing, setbacks, and overall relationship to neighbors

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Negotiation and Work Sessions

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- Negotiating with developers is possible
- Work sessions with developers can often be productive after initial more formal public hearings
- Neighbors can be invited to these sessions
- All discussions during the session are advisory in nature
- No decisions can be made
- Comply with Open Meeting Law
- **Check with your Town Counsel**



Balance Regional Housing Needs with Local Concerns



- Health
- Safety
- Environmental
- Design
- Open Space
- Planning
- Other Local Concerns

Planning Standards

Hanover Woods (2014)

- Thresholds:
 1. The plans must be "bona fide," meaning they were legitimately adopted and continue to function as viable planning tools in the town
 2. The plans must promote the creation of affordable housing, and
 3. The plans must have been implemented in the area of the site.

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If yes, yes, and yes, pass “go” and consider . . .

Weighing the Local Planning Concern

Hanover Woods (2014)



Does the local planning concern outweigh the regional need for affordable housing?

- Importance of the planning interest
- Extent to which the project conflicts with or undermines the planning interest
- Amount of affordable housing that has resulted from implementing the town's planning efforts
- Integrity of the planning process



Holding Deliberation Sessions

- Deliberate in a logical and orderly fashion
- Discuss potential conditions
- Review the requested waivers
- Ideally, discuss before closing the public hearing so applicant and public know what to expect

Drafting and issuing the Comprehensive Permit decision

- The ZBA has three decision options
 - Denial
 - Approval as submitted
 - Approval with conditions



Approval with Conditions

- The conditions should not make the Project Uneconomic
- Conditions and/or requirements must be consistent with Local Needs
- The Board may not reduce the number of units for reasons other than evidence of Local Concerns within the Board's purview





Appeal of Decision

- Appeals by the Applicant:
Housing Appeals Committee (HAC)
- Appeals by other parties;
Superior Court or Land Court

ZONING BOARD OF APPEALS OF AMESBURY V. HOUSING APPEALS COMMITTEE—MA. SJC

- Addresses the question of “what is the scope of a local zoning board's authority under 40B
- Defines ZBA's purview vs Subsidizing Agency





What happens next?

FROM COMPREHENSIVE PERMIT TO THE COMPLETED PROJECT

Who does what?

- Comprehensive Permit modifications
- Final Approval
- Construction
- Limited Dividend Monitoring
- Affordability Monitoring

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Comprehensive Permit Modifications: Board of Appeals

- If developer requests changes to the Comprehensive Permit, the Board must determine whether modifications are substantial or insubstantial within **20** days of receiving developer's request

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Final Approval

- Subsidizing Agency's Responsibility
 - Reaffirm Project Eligibility
 - Confirm Use Restriction (for affordability)
 - Make sure Cost Certification requirements have been acknowledged
 - Collect Surety
 - Enter into a Regulatory Agreement

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Regulatory Agreement

- Between the developer and the Subsidizing Agency (and, in the case of LIP, the Municipality)
- Identifies the developer and Affordability Monitoring Agent
- Describes limited dividend and affordability requirements
- Has a term (fixed number of years or perpetuity)





Construction

- **No Final Approval = no building permit!**
- Final engineering and architectural plans come with building permit application
- Site work prior to Final Approval is permitted in accordance with local bylaws

Post Occupancy Responsibilities: Subsidizing Agency

- Limited Dividend Requirement
 - Limits developer profits on 40B developments
 - Process starts 90 days after “substantial completion”
 - Involves Cost Examination and Cost Certification Process
 - Process is different for homeownership and rental projects



Post-Occupancy Responsibilities: Affordability Monitoring Agent

- Rental 40B: Subsidizing Agencies serve as Monitoring Agent for the term of the Regulatory Agreement
- Homeownership 40B:
 - DHCD is the Monitoring Agent for LIP Projects
 - MassHousing uses a network of 3rd-party agents

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Post-Occupancy Responsibilities: Municipality

- Normal and routine regulations and services: **32**
 - Building Code
 - Health/Safety Regulations
 - State Wetlands Protection Act (G.L. c. 131, § 40)
 - Town Bylaws (noise, leash laws, parking)
 - Affordable units assessed at “affordable” prices – meaning their **restricted** value

Post-Occupancy Responsibilities: Municipality

- For pending resales or foreclosures in 40B Homeownership Projects: Town may purchase affordable units through “Municipal Option”
- For 40B Rental Projects, Town initiates plan for ongoing affordability post-Regulatory Agreement (typically 30-year term) per the Comprehensive Permit

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Words of wisdom

SUGGESTIONS TO CONSIDER

A stylized black and white graphic on the left side of the slide. It depicts several people sitting at a curved table. The figures are simplified, with circular heads and rectangular bodies. The person in the foreground is most prominent, facing away from the viewer. Behind them, other figures are partially visible, suggesting a group setting.

Conducting the public hearing

- A strong chairperson can help the ZBA, the applicant, and the neighborhood
- Hearing chair need not be the official chair (may be chair pro tem)
- Whoever chairs should have experience running a hearing and be recognized by everyone as fair and impartial

Professional help



- Get professional support for the Board of Appeals
- Hire peer review consultants, and coordinate with the Conservation Commission or Board of Health to share peer reviewers as appropriate

The applicant and neighbors

- Encourage the developer to meet with neighbors before the public hearing and outside the public hearing process to address neighborhood concerns, wherever possible



Overview of Chapter 40B Fundamentals

- Conclusions
- Questions and Answers

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