

## HOUSING FACT SHEET ON CHAPTER 40B

The State's Affordable Housing Zoning Law

Source: Citizens' Housing and Planning Association, October 2009

### What is Chapter 40B?

Chapter 40B is a state statute, which enables local Zoning Boards of Appeals (ZBAs) to approve affordable housing developments under flexible rules if at least 20-25% of the units have long-term affordability restrictions. Also known as the Comprehensive Permit Law, Chapter 40B was enacted in 1969 to help address the shortage of affordable housing statewide by reducing unnecessary barriers created by local approval processes, local zoning, and other restrictions.

The goal of Chapter 40B is to encourage the production of affordable housing in all cities and towns throughout the Commonwealth. The standard is for communities to provide a minimum of 10% of their housing inventory as affordable. A total of 51 cities and towns have now met the 10% standard and three more have met the land area standard. Another 8 have met short-term planned production goals.

For those communities that still fall below those thresholds, a 40B development can be proposed (communities above the 10% threshold can still accept 40B development proposals at their choice). Many communities have used Chapter 40B to successfully negotiate the approval of quality affordable housing developments. The program is controversial, however, because the developer (nonprofit organizations or limited-dividend companies) has a right of appeal in communities that are below 10% or that are not temporarily appeal proof pursuant to a housing production plan if the local zoning board rejects the project or imposes conditions that are uneconomic.

Since its inception, Chapter 40B has been responsible for the production of affordable housing developments that in most cases could not have been built under traditional zoning approaches. Developments built through Chapter 40B include church-sponsored housing for the elderly, single-family subdivisions that include affordable units for town residents, multifamily rental housing developments, and mixed-income condominium or townhouse developments.

### What Has Chapter 40B Accomplished?

Over 56,000 units in over 1,000 developments have been built under 40B statewide since the early 1970s or are in construction (an average size of less than 53 apartments or homes per development). This total includes approximately 29,000 affordable homes reserved for households below 80% of median income.

Of the over 56,000 units, over 39,000 are apartments and almost 17,000 are homeownership units. The level of production is higher than any other single housing program available in the commonwealth.

There has been significant progress at the local level in recent years:

- a. Between 2002-2006, approximately 34% of all housing production in Greater Boston (excluding the City of Boston) was directly attributable to Chapter 40B, including nearly 80% of all rental housing production.
- b. Between 1998 and 2002, 82% of all new production of affordable housing units in communities below the 10% threshold was the direct result of 40B. This trend has continued

with 40B accounting for 71% of the new units added to the Subsidized Housing Inventory in Greater Boston (excluding Boston) between 2003 and 2006.

c. Currently, 51 communities have exceeded the 10% threshold, up from 24 in 1997. Some towns that have recently exceeded the 10% threshold include: Amesbury, Bedford, Burlington, Canton, Concord, Danvers, Franklin, Georgetown, Hadley, Holbrook, Hudson, Lexington, Mansfield, Marlborough, Peabody, Pembroke, Quincy, Raynham, Stockbridge and Ware.

d. Currently, 40 communities are at 8% or 9% - up from 17 in 2001- and are likely to reach the 10% threshold in the near future, including: Abington, Andover, Billerica, Braintree, Brookline, Clinton, Dartmouth, Hanover, Haverhill, Ipswich, , Littleton, Maynard, Orleans, Wenham, Westborough, and Westwood. There are another 53 communities at 6% or 7%, up from 52 in 2001.

e. At present, 117 municipalities only need to produce or preserve less than 100 units to reach the 10% threshold.

f. Chapter 40B has encouraged many cities and towns to form affordable housing committees to plan and implement a local strategy to build affordable housing in their community and has prompted almost 90 communities to develop affordable housing plans under the 2003 “planned production” regulation and the 2008 housing production plan regulation.

**Who is Served by Chapter 40B Housing Developments?**

In most cases today, Chapter 40B developments are communities with market rate and affordable homes, apartments or condominiums. The market rate units often serve middle-income singles, seniors and families who make between 100% and 150% of the area median income.

The affordable apartments/condominium and homes are reserved for seniors or families who make less than 80% of median household income for the area and generally are priced at 70% of median or below. Most of the residents in the affordable apartments and homes earn less than \$50,000 per year. Typical occupations include: health care (nurses, medical assistants, therapists, dental assistants); educators (teachers, counselors); retail employees; construction trades (carpenters, plumbers, electricians); office management and administrative staff; financial services (bookkeepers, payroll managers, accounting); human services; and other occupations critical to our state’s workforce.

Additionally, a significant portion of the homeowners are retirees. Below are the guidelines for the Greater Boston area:

**Income Eligibility for Affordable Units in Boston Metropolitan Statistical Area**

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2009 Median Income for a Family of 4 - \$90,200

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	1 PERSON	2 PERSON	3 PERSON	4 PERSON
80% of median	\$46,300	\$52,950	\$59,550	\$66,150

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### **How Does a Development Qualify Under Chapter 40B?**

To qualify for Chapter 40B, a development proposal must first receive a letter of project eligibility under a state or federal housing program, such as MassHousing, MassDevelopment, the Department of Housing and Community Development, or the U.S. Department of Housing and Urban Development. At least 25% of the units must be affordable to lower income households who earn no more than 80% of the area median income (Alternatively, for rental housing, the project can provide 20% of the units to households below 50% of median income.) Towns are allowed to establish a local preference for residents (currently, up to 70% of the units can be for local preference). Developers (whether for-profit or nonprofit) must also agree to restrict their profit to a maximum of 20% in for-sale developments and 10% per year for rental developments (unless indicated otherwise in the subsidy program or the comprehensive permit).

After a project has been determined to be eligible, the developer can submit an application for a comprehensive permit to the local Zoning Board of Appeals (ZBA). The ZBA is empowered to grant all local approvals necessary for the project after consulting with other relevant boards, such as the Planning Board, and the Board of Health. This results in a more streamlined review process at the zoning board, although it typically involves a number of hearing sessions. State regulations, such as the Wetlands Protection Act, Title 5, and all building codes, remain fully in effect under the comprehensive permit. Therefore, the local Conservation Commission will review the project regarding compliance with the state's Wetlands Protection Act.

In addition to the streamlined process, the Zoning Board of Appeals is authorized to apply more flexible standards than the strict local zoning by-law requirements. For example, a local zoning code may require two acres of land for each house or prohibit multifamily housing entirely. Under Chapter 40B, the developer can request and the Zoning Board of Appeals can approve a project with greater density, thereby making it financially feasible to develop affordable housing. ZBAs can also require projects to have a greater number of affordable units.

### **How Does the Local Review Process Work?**

A developer acting under Chapter 40B submits a single application to the Zoning Board of Appeals. The zoning board notifies the applicable local boards and requests their recommendations. Within thirty days of the receipt of the application, the zoning board begins a public hearing, which lasts up to six months.

The zoning board must issue a decision within forty days after ending the public hearing. The zoning board may approve the application as submitted, it can approve the project with conditions or changes, or it can deny the application altogether. If the board denies the application or imposes "uneconomic" conditions, the developer may appeal the decision to the Housing Appeals Committee if the project is in a community that is below 10%. The developer must still obtain various permits required by state statutes, such as wetlands protection, state highway access permits, and a local building permit.

### **Do Communities Have Control Over the Proposed Development?**

Zoning boards and other town officials often work with developers to modify the project. Furthermore, the zoning board may include conditions and requirements on any aspect of the project such as height, density, site plan, utility improvements, or long-term affordability--provided these conditions do not make the development economically unfeasible.

Over the past several years, the Massachusetts Housing Partnership has provided extensive technical assistance and support to more than 100 local ZBAs to help them with project review and

negotiations with developers. Zoning Boards can also require developers to pay fees to help fund review of the application.

### **How Does the Appeals Process Work?**

If the ZBA rejects the affordable housing development, the developer may be able to appeal the decision to the State Housing Appeals Committee (HAC), which can overrule the local decision unless the proposed development presents serious health or safety concerns that cannot be mitigated. This right of appeal is only available in communities where less than 10% of the year-round housing meets the statute's definition of low and moderate income housing or where low and moderate income housing exists on sites comprising less than 1.5% of the municipality's total land area zoned for residential, commercial, or industrial use.

The combination of flexible rules and a right of appeal has meant that the vast majority of Chapter 40B proposals are negotiated at the local level and approved by the local board of appeals. Issues such as density, buffer zones, conservation areas, and infrastructure improvements are typical items for negotiation. For those proposals that go to the State Housing Appeals Committee, the record has generally been in favor of allowing reasonable projects to move forward.

A 2007 study found that 80% of applications filed between 1999 and 2005 were approved at the local level. The majority of the cases appealed to the Housing Appeals Committee are resolved without a decision. A 2003 study of 415 cases appealed to the Housing Appeals Committee found that 69% were either withdrawn, dismissed, or resolved through negotiation; this trend has continued.

### **How Do Units Count Toward the State's 10% Affordable Housing Goal?**

- 1) They must be part of a "subsidized" development built or operated by a public agency, non-profit, or limited dividend organization.
- 2) At least 25% of the units in the development must be income restricted to families with incomes of less than 80% of median and have rents or sale prices restricted to affordable levels. These restrictions must run at least 30 years.
- 3) The development must be subject to a regulatory agreement and monitored by a public agency or non-profit organization.
- 4) Owners must meet affirmative marketing requirements.

### **What Regulatory Changes Have Been Made to Chapter 40B in Recent Years?**

DHCD has made numerous changes to the Chapter 40B regulations since 2001 and updated and revised the regulations in February 2008 to create a single, comprehensive regulation that codified policies and guidelines that had evolved over the years, including policies established by court rulings and administrative decisions by the Housing Appeals Committee. It also issued comprehensive program guidelines.

The new regulation and guidelines incorporate and update many revisions first developed between 2001 and 2003 as well as procedures established in 2006 and 2007 (smart growth guidelines, MassHousing cost certification and project eligibility guidelines and a DHCD universal deed rider that survives foreclosure).

The new guidelines require subsidizing agencies to more extensively review project designs and how they fit into the neighborhood context and town planning efforts. They also make it easier for communities to become temporarily appeal-proof by lowering the number of subsidized housing units they must create each year to demonstrate that they are making progress toward the 10% goal and giving them more flexibility regarding when units first count toward the 10% goal.

Major changes adopted since 2001 are described below, with revisions to date also noted:

- a. Limiting project size limit 150-300 units, depending on the size of the community unless the ZBA chooses to allow a larger project (the 2008 regulation lowers the threshold in communities with less than 2500 year round units to 6% of year round housing).
- b. Requiring compliance with extensive audit and cost-certification guidelines regarding the profit limitations imposed on 40B developments.
- c. Requiring developers to ensure completion of cost-certification through credit, bond, or cash ranging from \$25,000-\$100,000.
- d. Enabling municipalities to reject a 40B application if a developer submitted an application for the same site for a non-40B development within the previous 12 months.
- e. Allowing municipalities that have hearings underway on three or more projects to defer hearing additional projects if the hearings underway involve a larger number of units.
- f. Allowing group homes, accessory apartments, locally assisted units, and units funded under the Community Preservation Act to count toward a community's 10% goal.
- g. Enabling a community to deny a comprehensive permit if that community has made recent progress on affordable housing. Effective in February 2008, this is defined as either: an increase in affordable housing units that is at least 1% of the town's year-round housing units over the previous 24 months or a 0.50% increase plus an approved housing plan over the previous 12 months. (Prior to the 2008 revision, the thresholds were 1.5% and 0.75% respectively.)
- h. Allowing units to count on the subsidized inventory as soon as a comprehensive permit is issued rather than having to wait until a building or occupancy permit is issued. The 2008 revisions also allow towns to add units if the locality has approved a comprehensive permit but issuance is delayed by litigation filed by a party other than the Zoning Board of Appeals (ZBA).
- i. Requiring DHCD and the local chief elected official to be notified when a developer applies to the ZBA.
- j. Requiring a 30-day comment period for communities from the time a 40B application is filed. The subsidizing agency must consider the community's comments when issuing a site letter.
- k. Mandating that site approval letters contain more extensive, standardized information (the 2008 regulations require the subsidized agency to take into account "the municipal actions previously taken to meet affordable housing needs...")
- l. Requiring developers who want to access financing from the New England Fund to obtain a site approval letter from a state agency. The state agency then monitors and oversees the project.
- m. Updating the subsidized housing inventory every two years (communities can submit changes to DHCD at anytime).

