

Chapter 40B - Frequently Asked Questions

What is Chapter 40B?

Also known as the Comprehensive Permit Law, Chapter 40B (<http://www.mass.gov/?pageID=ehedsubtopic&L=3&L0=Home&L1=Community+Development&L2=Chapter+40B+Planning&sid=Ehed>) was enacted in 1969 to help address the state-wide shortage of affordable housing by reducing barriers created by local zoning and other restrictions. Its goal is to encourage the production of affordable housing in all communities throughout the Commonwealth.

Chapter 40B is a state statute which enables local Zoning Boards of Appeals (ZBA) to approve affordable housing developments under flexible rules if at least 20-25% of the proposed units have long-term affordability restrictions. The affordable homes, apartments and condominium are reserved for those who make less than 80% of median household income for the area. Most of the residents in the affordable apartments and homes earn less than \$50,000 per year.

In recent years, the state has issued additional guidelines (http://www.mass.gov/?pageID=ehedterminal&L=3&L0=Home&L1=Community+Development&L2=Chapter+40B+Planning&sid=Ehed&b=terminalcontent&f=dhcd_legal_ch40bguidelines&csid=Ehed) regarding development under Chapter 40B. In 2007, extensive guidelines were issued to provide specific procedures for conducting audits after the developments have been completed and for reviewing these audits when they are submitted to the state. In 2008, the Massachusetts Department of Housing and Community Development (DHCD) (<http://www.mass.gov/dhcd>) issued new regulations for Chapter 40B that fold all previous regulations covering development guidelines, the Housing Appeals Committee, and the Local Initiative Program (LIP) into a single, revised set of regulations. Recently, additional changes have been proposed, but not yet been passed into law.

What types of housing can be included in a 40B development?

In some cases, comprehensive permits were used to construct apartments for seniors (properties owned and managed by a local Housing Authority) as well as private, single-family homes.

In most cases today, Chapter 40B developments are a mix of market rate and affordable homes, apartments or condominiums. Affordable Housing can include housing for a variety of age groups and family styles: students, singles, couples, families and seniors. Housing units can be new or existing, homeownership or rental, single or multifamily, condominium or townhouse, group homes or accessory apartments and many other variations.

How does a development qualify for a Comprehensive Permit under Chapter 40B?

New development proposals must include a percentage of affordable housing units 'mixed-in' with any market rate units, and must be indistinguishable on the exterior from regular market rate housing. In a *homeownership development*, at least 25% of the units in the development must be sold to households with incomes of less than 80% of the area median income (AMI). Sales prices must be restricted to affordable levels. In a *rental development*, at least 25% of the units must be restricted to moderate-income households (earning less than 80% AMI), or at least 20% of the units must be restricted to low-income households (those earning less than 50% AMI). Group homes developed for persons with disabilities as part of Department of Mental Health (DMH) (<http://mass.gov/dmh>) or Department of Mental Retardation (DMR) (<http://mass.gov/dmr>) may also qualify for a Comprehensive Permit.

Applicants (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).

Most importantly, the property has to be restricted with a deed rider ensuring that the property will remain affordable with each sale and resale. Affordability

restrictions must run at least 30 years, although communities may require longer restrictions.

How do units qualify as affordable under Chapter 40B?

DHCD maintains a [Subsidized Housing Inventory](http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinventory.htm) (SHI) of every community's affordable housing units. The SHI lists every community's stock of low or moderate income housing. This inventory must be updated by the communities every 2 years. The current housing inventory can be found at <http://www.mass.gov/Ehed/docs/dhcd/hd/shi/shiinventory.htm>

How do units count toward the State's 10% affordable housing goal?

Only units listed on a Town's SHI count towards the State's 10% affordable housing goal for that Town. In order to be included on the SHI, they must meet the following requirements:

- Units must be part of a "subsidized" development built or operated by a public agency, non-profit, or limited dividend organization;
- The development must be subsidized under a state, federal, or local subsidy program.
- In a homeownership development, those units which are deed-restricted to sale to moderate-income households (less than 80% AMI) can be included on the SHI. Sales prices must be restricted to affordable levels. In rental housing, **all** units included in the subsidized housing development, including those rented at Fair Market Rents, can be included in the SHI.
- The development must be subject to a regulatory agreement and monitored by a public agency or non-profit organization; and
- Developers must meet fair and affirmative marketing requirements, as defined in the [Comprehensive Permit Guidelines](http://www.mass.gov/?pageID=ehedterminal&L=3&L0=Home&L1=Community+Development&L2=Chapter+40B+Planning&sid=Ehed&b=terminalcontent&f=dhcd_legal_ch40bguidelines&csid=Ehed) (http://www.mass.gov/?pageID=ehedterminal&L=3&L0=Home&L1=Community+Development&L2=Chapter+40B+Planning&sid=Ehed&b=terminalcontent&f=dhcd_legal_ch40bguidelines&csid=Ehed).

Each bed in a [Department of Mental Health](#) (DMH) and [Department of Mental Retardation](#) (DMR) group homes will also be included in a community's SHI (one bed is counted as one unit).

Why can't the town count existing low-cost housing toward its affordable housing numbers?

Older, existing homes are not necessarily occupied by lower income households. Census data indicates that almost half (46%) of the state's 232,000 owner-occupied single family homes, mobile homes and condominiums valued below \$200,000 in 2005 were occupied by households with incomes above \$50,000, including 24% by households with incomes above \$75,000.

Even when lower cost units are occupied by low and moderate income households, without use restrictions to regulate long-term affordability there is no assurance that they will continue to be affordable.

How much affordable housing do we currently have?

The State mandates that 10% of every community's housing inventory should be affordable. DHCD tracks the progress of each community on the State Housing Inventory. As new affordable units are approved, the Town notifies the DHCD to update the State Housing Inventory

What is the mandated sale price of an affordable housing unit?

Income limits are updated every fiscal year by the Department of Housing and Urban Development (HUD). To be considered affordable, housing must be priced so that a qualifying household will spend no more than 30-33% of their annual income on housing. Calculations of affordability must include consideration of interest rates, related fees, real estate taxes, insurance, condominium fees and other factors.

What control does the Town have over development created under Chapter 40B?

The Board of Selectmen, the Fair and Affordable Housing Committees, and other town officials often work with developers to offer preliminary input to the project prior to submittal of the formal application to the ZBA.

The Zoning Board of Appeals is the permit granting authority under Chapter 40B of the Massachusetts General Laws. The ZBA may place conditions and requirements on any aspect of the project such as height, density, site plan, utility improvements, or long term affordability. For example, Towns can require that up to 70% of the affordable units are offered to local residents, provided these conditions do not make the development economically unfeasible for the developer.

The ZBA cannot deny a comprehensive permit outright, unless the community is certified as being in compliance with its Affordable Housing Plan, or if at least 10% of all housing units in the community are on the Subsidized Housing Inventory.

It is important to note that the developer must still obtain various permits required by state statutes, such as state highway access permits, wastewater disposal permits (Title 5), and a local building permit. State regulations and statutes, such as all building codes, remain fully in effect under the comprehensive permit.

Developments created under Chapter 40B are also subject to the State Wetlands Protection Act, which is locally administered by local Conservation Commissions. An applicant may ask the ZBA to waive the local Wetlands Protection Bylaw in its entirety or to waive sections of the Bylaw. Those sections of the local bylaw that are not waived by the ZBA and all applicable sections of the State Wetlands Protection Act are then administered by the local Conservation Commission.

How does a developer qualify for Chapter 40B?

To qualify for Chapter 40B, a development proposal must first be approved under a state or federal subsidized housing program, such as [MassHousing](#), [MassDevelopment](#), the [Department of Housing and Community Development \(DHCD\)](#), or the U.S. [Department of Housing and Urban Development \(HUD\)](#).

Applicants (whether for-profit or nonprofit) must agree to restrict their profit to a maximum of 20% in for-sale developments and 10% per year for rental.

How Does the Local Review Process Work?

Step 1: Prior to submitting an application for a comprehensive permit with the ZBA.

In order to submit an application for a comprehensive permit under Chapter 40B, a developer must first apply for a determination of project eligibility with a subsidizing agency, such as [MassHousing](#), [MassDevelopment](#), the [Department of Housing and Community Development](#) (DHCD), or the U.S. [Department of Housing and Urban Development \(HUD\)](#).

Within 10 days of filing an application, the applicant must provide written notice of the application to the Board of Selectmen. The Board of Selectmen and the public may submit comments on this application to the subsidizing agency within a specified timeframe, which is usually 30 days. Most frequently, the subsidizing agency is MassHousing. The process for commenting on the initial application to the subsidizing agency is as follows:

- The Development Review Team (DRT), which is made up the various Town departments involved in permitting and regulating land use, will review the project and provide a report to the Board of Selectmen. The DRT will comment on issues such as road construction, water, and public safety.
- The Fair & Affordable Housing Partnership (FAHP) will review the project in a public meeting, and invite the developer to attend. The FAHP will issue a comment letter to the developer, and provide a copy to the Board of Selectmen. The FAHP will comment on whether a proposal conforms to the Easton Affordable Housing Plan, and other matters related to affordable housing.
- The Board of Selectmen will review the DRT report and any comments from the public or other boards and committees in a public meeting, where residents are encouraged to comment on the development.
- The Board of Selectmen will submit comments to the subsidizing agency (e.g. MassHousing) within 30 days of developer's notification to the town, or request an extension.

The subsidizing agency will review the proposed project design and financial information, and consider any comments received, and may then issue a site eligibility letter from the lender. At that point, the applicant can proceed to apply for a Comprehensive Permit from the Zoning Board of Appeals.

Step 2: A formal application is filed with the ZBA

Upon issuance of the site eligibility letter from the lender, a formal application to the Zoning Board of Appeals is submitted by the applicant. The Zoning Board of Appeals is the permit granting authority under Chapter 40B of the Massachusetts General Laws, to hear and act on applications for low and moderate income housing. The Zoning Board of Appeals is authorized to apply more flexible standards than the strict local zoning by-law requirements. It is important to note that State statutes and regulations, such as the Wetlands Protection Act, Title 5, and all building codes, remain fully in effect under the comprehensive permit.

Step 3: The ZBA notifies local boards

The Zoning Board of Appeals officially notifies the applicable local boards and requests their comments and recommendation on the proposal. The applicant will be asked to meet with other boards and officials (e.g. Fire Chief, Chief of Police, Selectmen, and the “Development Review” team, various members of municipal government including representatives from the Planning Board, Board of Health, School Department, Conservation Commission offices, etc.). Following the meetings the boards and officials are asked to provide written input to the Chairman of the Zoning Board of Appeals. Within thirty days of the receipt of the application, the Board of Appeals will hold a series of public hearings to consider all aspects of the application. Abutters to the property will be notified by mail of the initial hearing.

Step 4: The ZBA holds a series of public hearings

The Chairman of the ZBA is responsible for the proper conduct of the hearing.

When necessary, the Zoning Board of Appeals may engage the services of one or more consultants to review the project, at the applicant’s expense. These

consultants may review traffic, safety, parking, wastewater treatment or other environmental studies. It is important to note that the consultants hired by the ZBA represent the town. Outside consultants often provide information that assists parties in reaching consensus on a design that meets the applicant's economic needs while satisfying the Town's needs for protection of public safety, natural resources, and neighborhoods. The town's consultants will offer their comments and concerns. The proponent's consultants will address those comments and concerns. This process is a back and forth dialog that often results in changes to the original plans that will hopefully make the project better for all involved.

Generally, neighbors are appropriately concerned about the impact of comprehensive permit projects. It is important to note that the objective of the early hearings is to understand site characteristics, neighborhood issues, public safety issues, and the applicant's general concept for the development, and generally, public comment is restricted. There is ample time in the hearing process for residents and abutters to the project to comment.

Although oral public comment is invited by the board during designated times, the public is invited to comment at any time, in writing, by sending letters to the ZBA's office. Those letters become a matter of public record. At any time during the hearing process, the public is invited to review any and all public records pertaining to the project. These records include, but are not limited to, all site plans and schematics, all correspondence between the Review Team and the proponent, traffic plans, environmental plans, all public comment letters, and any other document that has been submitted to the ZBA to be included in the public record. Although not required, it is recommended that interested residents email or call the office prior to a visit in order to receive the best service. Copies of records are available upon request for a fee, but may be reviewed at Town Hall for free.

The public hearing typically continues for several months while concerns are explored and addressed. After the review is complete and the hearing is closed, The ZBA has forty days to issue a decision unless such time period is extended by written agreement of the Board and the applicant.

Step 5: The ZBA issues a decision

The ZBA has several options. They may:

- approve the project as submitted.
- approve the project with conditions or change.
- deny a comprehensive permit as not consistent with local needs (only under certain conditions.)

The ZBA may impose conditions, safeguards, and/or limitations as part of its approval of any application.

If the application is approved, a Comprehensive Permit is issued. The applicant must still obtain various permits required by state statutes, such as wetlands protection, state highway access permits, and a local building permit. The comprehensive permit allows the applicant to fill out one application to streamline the review process by local boards – it does not allow the developer to circumvent important environmental and safety regulations.

If the ZBA rejects the affordable housing development, or imposes conditions that the applicant believes makes the project economically infeasible, the applicant may appeal the decision to the State Housing Appeals Committee (HAC) (http://www.mass.gov/?pageID=eheadterminal&L=3&L0=Home&L1=Community+Development&L2=Chapter+40B+Planning&sid=Ehed&b=terminalcontent&f=dhcd_hac_hac&csid=Ehed) within 20 days of the ZBA's filing. The HAC must render a decision within 30 days of the conclusion of the hearing. The HAC may overrule the local decision unless it is determined that the proposed development presents serious health or safety concerns that cannot be mitigated

Generally, a ZBA can deny a project as being inconsistent with local needs only 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.

Who can appeal and how does the Appeals Process work?

If the ZBA approves the comprehensive permit, any person aggrieved may appeal within the 20 day time period to the court as provided in M.G.L. c. 40A, § 17.

If the ZBA rejects the affordable housing development, the applicant can appeal the decision to the State Housing Appeals Committee (HAC), which can overrule the local decision unless the project presents serious health or safety issues that cannot be mitigated. Typically concerns about impact on traffic, schools, community services, taxes, neighborhood aesthetics or abutting home values are not considered by the HAC.

The applicant's right to appeal is only available in communities that have not met the standards and goals of the 40B statute. To prevent the possibility of appeal to the HAC, the municipality must have 10% of its total housing stock qualifying under the state's definition of low or moderate income housing.

Easton, like the vast majority of other municipalities, has not met these goals and therefore we are subject to the HAC appeal process.

The HAC attempts to balance the need for additional affordable housing, local community needs, and the economic feasibility of the project. A decision of the HAC may be appealed to Superior Court.

When does the Zoning Board of Appeal have the right to deny a Comprehensive Permit application?

A community may deny a comprehensive permit:

- When low or moderate income housing in the community exceeds 10% of the community's year round housing stock.
- When the development is too large for the community in which it is proposed.
- When a developer has proposed a different project and been denied for the same land within the last 12 months. This prevents developers from using 40B as a threat to force a change in zoning, a variance or a special permit.
- When a community has an approved affordable housing plan and has permitted the construction of low or moderate income housing. Depending

on how much low or moderate-income housing is permitted will determine the length of time during which the community may deny comprehensive permit applications;

- 1/2 % of total year round housing units = 1 year off
- 1 % of total year round housing units = 2 years off
- A community that has approved 3 or more comprehensive permits of 20 units or more in the preceding 12 months may deny the next application for a comprehensive permit.

If the applicant receives a Comprehensive Permit, can they sell the project to another developer?

An applicant can transfer a Comprehensive Permit to another person or entity prior to substantial completion of the project. The applicant is required to receive written confirmation from the Subsidizing Agency that the transferee meets the requirements of the law. In addition, the applicant must provide written notice to the Zoning Board of Appeals of the proposed transfer. After substantial completion, a Comprehensive Permit shall be deemed to run with the land.

Can the applicant make changes to the project after they receive the comprehensive permit?

If an applicant wants to change the details of the project as approved by the Zoning Board of Appeals, it must notify the ZBA in writing, describing any proposed change. Within 20 days the Board must determine whether it believes the change substantial or insubstantial, and notify the Applicant of the decision.

If the change is determined to be insubstantial or if the Board fails to notify the applicant by the end of such 20-day period, the Comprehensive Permit is automatically modified to incorporate the change.

If the change is determined to be substantial, the Board will hold a public hearing within 30 days of its determination and issue a decision within 40 days of termination of the hearing. It is important to note that only the changes in the Project will be discussed at the hearing. This is not a re-opening of the entire permit, and the Chair will limit discussion to the proposed changes only. An Applicant shall have the right at any time to withdraw its request for a change.