

CHAPTER 40B COMPREHENSIVE PERMIT OVERVIEW

PRESENTATION TO:
THE TOWN OF SHERBORN
ZONING BOARD OF APPEALS
PLANNING BOARD



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September 15, 2016

Comprehensive Permit Background

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- Enacted in 1969
- MGL Chapter 40B Sections 20-23 (the Law)
- 760 CMR 56.00 (the Regulations)
- Affordable housing
 - Less than 80% Area Median Income (AMI)
 - For Sherborn (Boston-Cambridge-Quincy HMFA¹) 80% AMI for:
 - 1-person household: \$51,150
 - 2-person household: \$58,450
 - 4-person household: \$73,050

¹HMFA - HUD Metro Fair Market Rents Area
– These numbers change every year

Comprehensive Permit Background

(continued)

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- Allows ZBAs to approve housing development under streamlined process if at least 20-25% of units are long-term affordable (30+ years)
- 10% of each municipality's year-round housing stock must be affordable (State mandate)
 - This information is kept on the Town's Subsidized Housing Inventory (SHI)
 - As of December 2014, Sherborn was at 2.3%²
 - Similar-sized communities (Total Housing Units/Percent on SHI):
Brimfield (1,491 /5.4%), Brookfield (1,491 /2.8%),
Dover (1,950/0.9%), Wellfleet (1,550/2.2%),
Wenham (1,404/8.7%), West Brookfield (1,578/3.6%)
- Exemptions by meeting short term goals (Safe Harbor) – to be discussed later

² Will likely be updated in December 2016

Comprehensive Permit Background

(continued)

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- Empowers the ZBA to grant all local approvals necessary for the project after consultation with relevant Boards and Committees as part of one permit
- The Comprehensive Permit does **not** waive other local, state, and federal permitting requirements such as:
 - Building Permit
 - State highway access permits
 - Wastewater disposal permits (Title 5)
 - State building code requirements
 - State Wetlands Protection Act (Local Con Com reviews)

Subsidized Housing Inventory

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- Maintained by Department of Housing and Community Development (DHCD)
- Total housing units are based off of US Decennial Census
 - ▣ May meet 10% requirement in 2019 and not in 2020, with no loss of affordable units
- Individual communities are responsible for reporting SHI figures to DHCD
 - ▣ Municipality should notify DHCD when new units are added
 - ▣ Inventory must be updated by municipality every two years

How Units are Counted

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- For homeownership units, at least **25%** must be sold to those with incomes less than **80% AMI**
- Rental units
 - ▣ At least **25%** must be rented to those with incomes less than **80% AMI**;
or
 - ▣ At least **20%** must be rented to those with incomes less than **50% AMI**
- Units must be restricted with a deed rider, with affordability restrictions running for *at least* **30 years**
- Applicants must agree to restrict profits to max of 20% for homeownership developments and 10% per year for rental developments
- **Only affordable homeownership** units count towards City's 10%
- **All units** in **rental** development count towards City's 10%

Abilities of the ZBA

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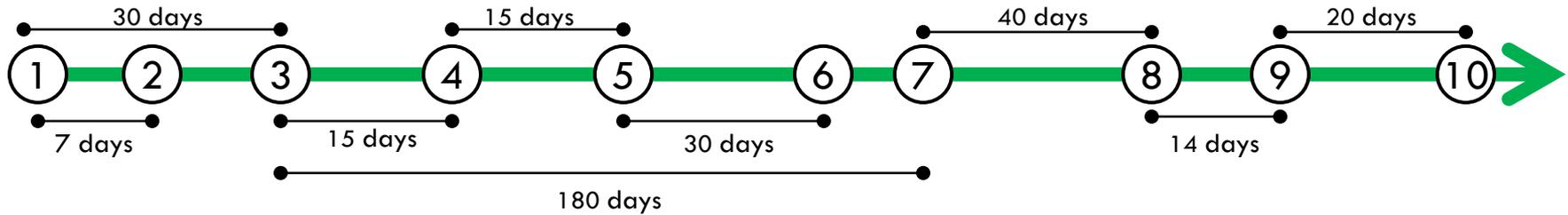
- May use more flexible standards than provided for in Zoning Bylaw and **can** waive other local requirements
- May work with the Applicant before or during the process to negotiate the design of the project – but be aware of open meeting laws
- May work cooperatively with the Applicant to identify appropriate consultants and scopes of work, and to negotiate payment of part or all of consultant fees
- By majority vote, may require the Applicant to pay a reasonable review fee for outside consultants chosen by the Board alone
- Shall not address matters in the hearing that are beyond its jurisdiction under 40B Law and Regulations and that lie solely within the authority of the Subsidizing Agency
 - ▣ Examples: project eligibility or funding eligibility

40B Process

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- Applicant applies for determination of project eligibility with subsidizing agency
- Applicant submits application to ZBA
- ZBA notifies local departments, boards, committees, commissions
- ZBA holds public hearings
- ZBA issues decision
- Applicant applies for building permit or appeals to Housing Appeals Committee (HAC)

Timeline



①

Comprehensive Permit Application Date (Day 0)

②

ZBA Distributes Application to Local Boards/Committees/Departments

③

Initial Public Hearing Must Be Held

④

ZBA to Determine Whether to Deny Based on Statutory Minima/Safe Harbor

⑤

Date By When Applicant Must File Response to DHCD

⑥

DHCD Must Issue Decision

⑦

Public Hearing Must Close

⑧

ZBA Must Render Decision

⑨

Date By When ZBA Must File Decision With Town Clerk

⑩

Date By When Applicant May File Appeal with HAC

Timeline: Status and Next Steps

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- Hearing Opened – **November 1, 2016***
- Halfway Point (90 Days) – **February 1, 2017**
- Hearing to be Closed (180 Days) – **May 1, 2017**
 - Unless Applicant has provided written consent to extend
- ZBA Decision to be Rendered – **June 12, 2017**
 - 40 Days after close of Public Hearing
- Decision Filed with Sherborn Town Clerk – **June 26, 2017**
- Applicant Filing Deadline for Appeal to HAC – **July 17, 2017**
 - Applicant may file appeal with HAC if they feel the ZBA wrongly denied or imposed requirements that make the Project “uneconomic”
 - As long as municipality has not met Statutory Minima or Safe Harbor requirement

Decision of the ZBA

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- The ZBA may:
 - Approve the application as submitted
 - Approve the application with conditions with respect to site plan, height, size, shape or building materials that address matters of Local Concern
 - As long as these requirements do not make the project “uneconomic”
 - May be appealed by applicant to HAC if municipality does not meet Statutory Minima or Safe Harbor requirements (Sherborn does not meet)
 - Deny the application
 - Must show that the denial is Consistent with Local Needs
 - May be appealed by applicant to HAC if municipality does not meet Statutory Minima or Safe Harbor requirements (Sherborn does not meet)

Local Needs/Local Concern

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- **Consistent with Local Needs** means:
 - ▣ The conditions imposed on the Project can be considered reasonable when weighed against the State-established regional need for affordable housing, the number of low-income persons within the Town, and the Local Concerns
- **Local Concern** means the need to:
 - ▣ Protect the health or safety of the occupants of a proposed project or the residents of the municipality
 - ▣ Protect the natural environment
 - ▣ Promote better site and building design in relation to the surroundings and municipal and regional planning
 - ▣ Preserve open spaces

Statutory Minima – The Town’s Leverage

760 CMR 56.03(3)

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- Comprehensive Permit applications may be denied by ZBA, without applicant’s right to appeal to HAC, if project is determined to not be “Consistent with Local Needs” **and** municipality meets any of the below:
 - 10% of total housing units are affordable – **Not met**
 - SHI-eligible housing exists on 1.5% of the total land area zoned for residential, commercial, or industrial use – **Not met**
 - The application before the ZBA would result in the construction of SHI-eligible housing on sites comprising more than 0.3% of the Town’s land area or ten acres, whichever larger, within one calendar year – **Not met**

Safe Harbor

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- Comprehensive Permit applications may be denied by ZBA, without applicant's right to appeal to HAC, when project is not Consistent with Local Needs and one of the following benchmarks are reached :
 - The municipality has achieved one or more of the Statutory Minima (760 CMR 56.03) – **Not met**
 - DHCD has certified the municipality's compliance with the goals of its approved Housing Production Plan (760 CMR 56.03(4)) – **Not met**
 - The municipality has made recent progress towards the Statutory Minima (760 CMR 56.03(5)) – **Not met**
 - The project is a large project (760 CMR 56.03(6)) – **Potential**
 - A related application has previously been received (760 CMR 56.03(7)) – **Not applicable**

Safe Harbor

(continued)

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- The municipality has achieved one or more of the Statutory Minima (760 CMR 56.03)
 - ▣ Refer to Slide 11, Statutory Minima
- DHCD has certified the municipality's compliance with the goals of its approved Housing Production Plan (760 CMR 56.03(4))
 - ▣ A municipality may request certification of compliance if it has increased the number of SHI-eligible units by more than or equal to its 0.50% production goal for that calendar year
 - ▣ Certification is for one year from effective date
 - ▣ If municipality increased units by 1.0% in calendar year, certification is for two years

Safe Harbor

(continued)

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- The municipality has made recent progress towards the Statutory Minima (760 CMR 56.03(5))
 - The number of SHI-eligible housing units created during the 12 months prior to the date of the Comprehensive Permit application, established as *occupied, available for occupancy, or under permit* as of the date of the Applicant's initial submission to the ZBA, is equal to or greater than 2% of the municipality's total housing units.
- The project is a large project (760 CMR 56.03(6))
 - The proposed project involves construction of more than 300 housing units or more than 2% of the total housing units in the municipality, whichever is greater (for municipalities with greater than 7,500 total housing units)

Safe Harbor

(continued)

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- A related application has previously been received within 12 months of a Comprehensive Permit application and any of the following (760 CMR 56.03(7)) :
 - The date of filing of an application for a variance, special permit, subdivision, or other approval of a project related to construction on the same land that was principally non-residential, or residential with fewer than 10% SHI-eligible units (Not 40B eligible)
 - Any date during which such an application was pending before a local permit granting board
 - The date of final disposition of such an application (including all appeals)
 - The date of withdrawal of such an application

Crafting Conditions

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- The ZBA may condition approval to ensure the health, welfare, and safety of residents
- The HAC is the authority on whether the conditions comply with the 40B regulations
- Example Conditions (HAC Decision No. 2009-07, Norwell/Simon Hill):
 - Proposed single-access roadway is longer than allowed by zoning. The ZBA conditions approval to limit the length of this roadway citing emergency access concerns affecting a large number of units. HAC upheld this condition as a valid Local Concern.
 - Native plant species required as landscaping. Upheld by HAC due to Applicant's inability to prove condition would contribute to adverse economic impact.
 - ZBA conditioned the project on the installation of water quality monitoring wells along property line. HAC struck this condition, as ZBA did not provide a valid Local Concern outweighing the need for affordable housing. The Applicant is, however, required to comply with state and federal drinking water requirements.

Housing Appeals Committee (HAC)

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- If the ZBA denies or imposes conditions to the Comprehensive Permit, the Applicant may appeal the decision to the HAC if municipality **does not** meet Statutory Minima or Safe Harbor requirements
- The Applicant has the burden of proof:
 - ▣ That the project is eligible
 - ▣ The conditions render the project “uneconomic”
 - ▣ The local requirements and regulations have not been applied as equally to subsidized and unsubsidized housing
- The ZBA has the burden of proof:
 - ▣ That the decision was consistent with Local Needs
 - ▣ There is a valid Local Concern which outweighs the Housing Need
 - ▣ If condition is due to adequacy of municipal services/infrastructure, that the installation of municipal services/infrastructure adequate to meet Local Needs is not technically or financially feasible

Housing Appeals Committee (HAC)

(continued)

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- The HAC shall render a decision which may:
 - Vacate denial and direct ZBA to issue Comprehensive Permit
 - Direct ZBA to remove conditions so as to make Project economic
 - Direct ZBA to modify conditions to make Project economic
 - Uphold decision by ZBA

Housing Appeals Committee (HAC)

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- If the ZBA denies or imposes conditions to the Comprehensive Permit, the Applicant may appeal the decision to the HAC if municipality **does not** meet Statutory Minima or Safe Harbor requirements
- The Applicant has the burden of proof:
 - That the project is eligible
 - In the case of denial, with respect to only those aspects of the Project which are in dispute, that the proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of local concern
 - In the case of approval with conditions, that the conditions render the project “uneconomic”
 - In the case of either denial or approval with conditions, that the local requirements and regulations have not been applied as equally to subsidized and unsubsidized housing
 - In the case of denial or approval with conditions, that the preventative or corrective measures have been proposed which will mitigate the Local Concern, or an alternative means of protecting the Local Concerns

Housing Appeals Committee (HAC)

(continued)

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- The ZBA has the burden of proof:
 - That the decision was consistent with Local Needs
 - Statutory Minima or Safe Harbor requirements met
 - In the case of denial, that there is a valid Local Concern which supports the denial and that the Local Concern outweighs the Housing Need
 - In the case of approval with conditions, that there is a valid Local Concern which supports the conditions, and that the Local Concern outweighs the Housing Need
 - In the case of denial or approval with conditions, if decision is due to adequacy of municipal services/infrastructure, that the installation of municipal services/infrastructure adequate to meet Local Needs is not technically or financially feasible

Housing Appeals Committee (HAC)

(continued)

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- Uneconomic is **generally** accepted as:
 - Rental Projects
 - Return on Total Cost (ROTC) is at least 4.5% higher than the 10-year US Treasury Bill rate
 - Example: If US Treasury Bill rate is 3.00%, any conditions rendering the ROTC lower than 7.5% is “uneconomic”
 - Sale Projects
 - Any conditions rendering the “Developer’s Fee” to fall below 15% of the total development costs

Housing Appeals Committee (HAC)

(continued)

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- The HAC shall render a decision which may:
 - ▣ Vacate denial and direct ZBA to issue Comprehensive Permit
 - ▣ Direct ZBA to remove conditions so as to make Project economic
 - ▣ Direct ZBA to modify conditions to make Project economic
 - ▣ Uphold decision by ZBA

Local Preference

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- Towns may implement a local preference requirement to be administered by the Developer
 - Maximum allowed is 70% of the affordable units
- Requirements for Town:
 - Demonstrate the need for local preference
 - Justify the extent of the local preference
 - Demonstrate that the proposed local preference will not have disparate impacts on protected classes
- Allowable preference categories
 - Current residents
 - Durational requirements such as how long an applicant has lived/worked in the area are not permitted.
 - Municipal employees
 - Employees of local businesses
 - Households with children attending the locality's schools

Local Preference/Lottery

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- Lottery Process (from DHCD Comprehensive Permit Guidelines)
 - ▣ Developer Administered
 - ▣ Should include two (2) pools
 - Local preference pool
 - Open pool
 - ▣ The percentage of minority local resident households in the local preference pool should not be less than the percentage of minorities in the surrounding HUD-defined area
 - If not, the Developer is to rank minority candidates (in order of drawing) in open pool and then add to the local pool in order of their ranking
 - ▣ Residents should be included in both pools

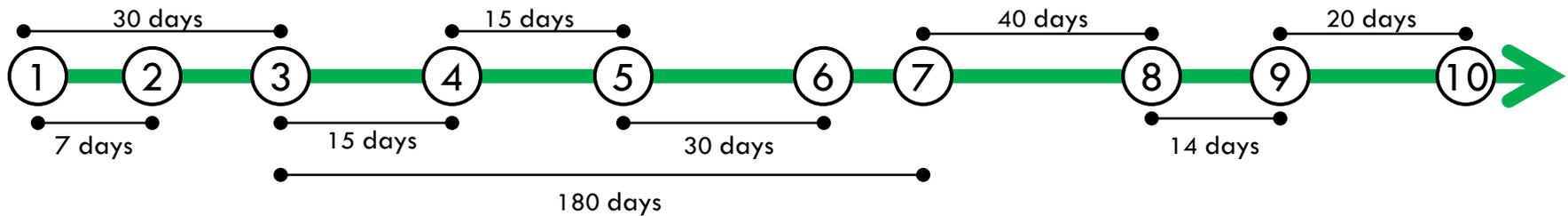
Definitions

(760 CMR 56.02)

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- **Consistent with Local Needs** means either that (a) one or more of the grounds set forth in 760 CMR 56.03(1) have been met, or (b) Local Requirements and Regulations imposed on a Project 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.
- **Housing Need** means the regional need for Low and Moderate Income Housing considered with the number of Low Income Persons in the municipality affected.
- **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. See 760 CMR 56.07(3)(c through g).
- **Uneconomic** means any condition imposed by a Board in its approval of a Comprehensive Permit, brought about by a single factor or a combination of factors, to the extent that it
 - makes it impossible for a public agency or a nonprofit organization to proceed in building or operating a Project without financial loss; or
 - makes it impossible for a Limited Dividend Organization to proceed and still realize a reasonable return in building or operating such Project within the limitations set by the Subsidizing Agency on the size or character of the Project, or on the amount or nature of the Subsidy or on the tenants, rentals, and income permissible, and without substantially changing the rent levels and unit sizes proposed by the Applicant. See 760 CMR 56.05(8)(d).
- **Waiver** means an exception from a use, dimensional, or other restriction of local requirements and regulations, granted to a Project through a Comprehensive Permit. See 760 CMR 56.05(7).

Timeline



①

Comprehensive Permit Application Date (Day 0)

November 1, 2016

②

ZBA Distributes Application to Local Boards/Committees/ Departments

November 8, 2016

③

Initial Public Hearing Must Be Held

December 1, 2016

④

ZBA to Determine Whether to Deny Based on Statutory Minima/Safe Harbor

Not Applicable

⑤

Date By When Applicant Must File Response to DHCD

Not Applicable

⑥

DHCD Must Issue Decision

Not Applicable

⑦

Public Hearing Must Close

May 1, 2017

⑧

ZBA Must Render Decision

June 12, 2017

⑨

Date By When ZBA Must File Decision With Town Clerk

June 26, 2017

⑩

Date By When Applicant May File Appeal with HAC

July 17, 2017



BEALS + THOMAS

Civil Engineers | Landscape Architects | Land Surveyors | Planners | Environmental Specialists

QUESTIONS

