



MASSACHUSETTS CHAPTER 40B REFORM: MAKING AFFORDABLE HOUSING “AFFORDABLE” TO COMMUNITIES

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“Chapter 40B.” “The Comprehensive Permit Law.” “Anti-Snob Zoning.” However it is referred to, this law encouraging the construction of low and moderate-income housing generates strong feelings, both positive and negative. While seen by supporters as a “powerful and innovative tool to create affordable housing”¹ in a state plagued by a lack of such opportunity, detractors argue that the law prevents suburban and rural communities from having control over controversial and unpopular projects.

Facing such complaints, as well as a number of bills filed with the Legislature seeking to weaken the provisions of Chapter 40B, the Governor established a Task Force to review the statute and its impacts, and to make recommendations to improve the law. The Task Force reaffirmed the need to increase the supply of housing, and proposed a number of modifications to the existing law to mitigate legitimate impacts on municipalities.² This article describes the basic framework of the existing law, and then discusses certain of the Task Force proposals.

MGL c. 40B §§20-23, The Comprehensive Permit Law

Chapter 40B is designed to assist the creation of affordable housing by streamlining the local permitting (and

appeals) process. Once a project is approved by a state or federal subsidy program, a single application is filed with the local zoning board of appeals in lieu of separate applications to other local bodies, such as the planning board, historical commission, water and sewer commission, and fire and police departments.³ The zoning board notifies, and seeks input from, the appropriate other local boards, and then holds a public hearing. If a majority of the zoning board members find that local concerns are properly addressed in the application, it can issue a single *comprehensive* permit which subsumes all local permits and approvals normally issued by other boards.

If the comprehensive permit is denied, or granted with conditions which would make building uneconomic, the applicant may appeal to the state Housing Appeals Committee. The general principle governing HAC appeal hearings is that the local restrictions imposed must be “consistent with local needs.”⁴ The statute defines this consistency as reasonable in view of the local need for low and moderate income housing, as well as the need to protect the health and safety of residents, to preserve open spaces, and other local concerns.⁵

Importantly, if less than ten percent of the community’s total housing units are “affordable” to families with incomes below 80% of the median income in a region, there is a *presumption* that there is a substantial housing need which outweighs other local concerns.⁶ In that case, the

HAC can order the issuance of the comprehensive permit. Of appeals that resulted in a decision by the HAC, 84 percent of the rulings were in favor of the developer.⁷ It is this track record that causes many to feel that Chapter 40B interferes with local autonomy and local planning.

Possibility of Reform

The Governor’s Task Force recognized the fear of 40B projects on the part of local communities, the confrontational nature of the process, and housing affordability “crisis” which ex-

ists and which is seen as evidence of the failure of Chapter 40B. While regulatory changes have been made in recent years to improve the system, the Task Force made a series of recommendations to mitigate these problems while preserving the law as an effective tool to create affordable housing.⁸ In addition to some technical improvements, these recommendations fall under certain broad categories:

Consistency and Equity

- Because Chapter 40B units have been granted zoning relief, count such units more equitably towards a town’s 10% goal (for example, by including all rental units in a project in which at least 25% of the units are affordable).

- Consider including manufactured housing (i.e., mobile homes) as an affordable housing opportunity.

Local Capacity and Technical Assistance

- Limit the number of Chapter 40B proposals a community must review

Of appeals that resulted in a decision by the HAC, 84 percent of the rulings were against the local ZBA.

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at any one time.

- Establish a fund to provide assistance to towns reviewing Chapter 40B proposals, for example, by providing consultants which give zoning boards of appeal the confidence to negotiate project conditions that represent good outcomes for the town and developer.

Improving the Process

- Establish procedures to solicit municipal and public comment when a proposal is first submitted to a subsidizing agent, rather than once the “final” proposal is presented to the zoning board of appeals.

Community Impact and Needs

- Consider revising the State Zoning Act to encourage “smart growth” and facilitate housing development in proximity to services, utilities and transportation.
- Establish density guidelines appropriate for the site on which the project is located.
- Create a “growth aid” fund through which the state would provide compensation for incremental school costs of educating additional children associated with the creation of affordable housing.
- Allow contiguous communities the opportunity to collaborate to share the costs and benefits of housing growth through “housing regions.”

Discussion and Conclusions

Chapter 40B was enacted in 1969. Since then, 34% of all affordable housing units constructed in Massachusetts have been built using comprehensive permits, accounting for nearly 30,000 units. A significant portion of these units would not have been built without the law. And yet, Massachusetts still faces a large affordability problem that threatens the state’s economic vitality.⁹

The current law is hindered by a

feeling that it operates on a “one size fits all” basis, with the Housing Appeals Committee usurping local control based on a single housing statistic. Significantly, in 2001 and 2002, the Department of Housing and Community Development (which oversees Chapter 40B) began to address this by promulgating regulatory changes which not only increase the units counted as affordable (to now include housing that serves the Department of Mental Health / Department of Mental Retardation, as well as accessory apartments serving low or moderate income households), but also permit zoning boards to deny permits if the scale of the project is too large for the community or if the community has a housing plan certified by the DHCD and has produced a certain number of affordable housing units under that plan. In addition, communities can reject a project if a developer submitted an application for the same site for a non-40B project within the prior twelve months. This limits the possibility that developers use Chapter 40B as a “threat” to gain approval of large market-rate developments.

The Task Force’s recommendations should make the construction of affordable housing less contentious in smaller communities. Additional resources would assist towns in evaluating and responding to proposals. Also, towns would have the opportunity to influence proposals at the outset, when design changes can be made more easily.

Perhaps more significantly, a reformed Chapter 40B would encourage “smart growth.” The density of development would be managed, with a focus on cluster development around community service and transportation hubs. This goal would be furthered by the possibility of housing

regions, through which two or more towns which inevitably share the burden of development could also share the benefit, allocating housing units in another community to its housing goal.

The recommendations, and DHCD regulatory changes, also broaden the units which are counted towards the housing goal. This will help towns manage their growth. Towns can continue to deny comprehensive permits on issues of drainage, access and fire protection, as well as inconsistency with a town’s master plan. Thus, it is critical that a town have a coherent, and up-to-date, master plan in place.

Most would agree that Massachusetts faces an affordable housing problem. To date, though, some feel that the costs of Chapter 40B have outweighed the benefits, overwhelming local boards which are faced with the task of learning the law and then evaluating a large development, and overwhelming communities with developments of vastly higher density than would otherwise be allowed. The Task Force’s proposals will balance the need for the creation of affordable housing throughout the state, while preserving a community’s resources and ability to guide its own growth. Hopefully these recommendations are considered when legislation to amend Chapter 40B is introduced and debated.

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1. “Chapter 40B Task Force Findings and Recommendations, Report to Governor Mitt Romney, May 30, 2003,” (hereinafter, “Report”) page 15.
2. *Id.* at pages 2-3.
3. MGL c. 40 § 21. Note that the local conservation commission and board of health retain their appropriate jurisdiction.
4. MGL c. 40 § 23.
5. MGL c. 40 § 20.
6. 760 CMR 31.07(1)(e).
7. Cynthia McCormick, “Plan Softens 40B’s impact,” *Cape Cod Times*, June 10, 2003.
8. *Report*, pages 26-39.
9. *Id.* at page 15.