Chapter 40B

How to Effectively Manage a Comprehensive Permit Application in 2016

Daniel C. Hill

Hill Law

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Legal Standards

- Under Chapter 40B, developers may seek a "comprehensive" permit from the local zoning board of appeals in lieu of separate approvals from every other town board, commission and official that would otherwise have jurisdiction over the project.
- A significant function of the statute is to empower the zoning board to waive any local bylaw, regulation, policy or procedure that would render the construction of the project "uneconomic."
- State or federal laws are preserved - not waived by 40B.

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Legal Standards - Presumption

- The primary responsibility of the zoning board under Chapter 40B is to consider whether and to what extent local bylaws and regulations should be applied to a proposed project. In doing so, it must weigh the need for affordable housing against the need to protect the environmental, public health, safety, and planning interests.
- In cities and towns that have not met one of the statutory benchmarks for affordable housing, there is a legal presumption that the need for affordable housing outweighs local concerns. This presumption can be rebutted, but precedent from our courts informs us that the evidence needed to rebut the presumption must: (1) be grounded in scientific fact; and (2) present an unmitigatable public health, safety, environmental, or planning concern.

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Legal Standards - the Public Hearing

- The function of the Zoning Board's public hearing is to collect evidence from the developer, town officials, the Board's own consultants, and the general public that could assist the Board in determining whether the proposed project presents any public health, safety, environmental, or planning concerns, and if so, whether they are dire enough to justify a denial, or alternatively, can be adequately mitigated through conditions.

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Legal Standards - Board's Options

- The Board has two options with respect to a Chapter 40B application:

  (1) Approval with Conditions; or

  (2) Denial.

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Legal Standard - Denial

With a Denial, if the Developer appeals to the state Housing Appeals Committee ("HAC"), the Board's decision will be upheld automatically if the Town has reached one of the affordable housing benchmarks or "safe harbors" under Chapter 40B:

(1) Housing Unit Minimum (10% of housing units are in SHI)

(2) General Land Area Minimum (1.5% of land area is occupied by A.H.)

(3) Annual Land Area Minimum (application would result in the construction of A.H. on sites comprising more than .3% of the total land area, or 10 ac., whichever is greater)

(4) Housing Production Plan (town has created new A.H. units comprising .5% of total housing units in one year)

(5) Large Project Cap (250 units for a town that has 5,000 - 7,500 total housing units)

(6) Related Applications (Project Site was the subject of a development application within 12 months prior to the filing of the 40B application.

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Legal Standard - Denial

- ✓ To base a decision on the Town reaching a benchmark or having a safe harbor, the Board must invoke this defense within 15 days of opening its public hearing (November 25, 2016).

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Legal Standard -Approvals

- An integral part of the 40B process is the developer's ability to get waivers from restrictive local bylaws and regulations, in order to build more housing units than would be other permissible under conventional rules
- The 40B Quid Pro Quo is that developers can get waivers to build more housing, but must set aside a certain percentage of the housing as affordable.
- Further, the statute imposes a limit on how much profit developers can make, ensuring that developers do not experience a windfall at the expense of a town's rational land use regulations.
- Finally, the statute places the evidentiary burden on the developer to prove that the Board's refusal to grant waivers, of the Board's imposition of conditions, renders the project "uneconomic."
- The essence of the statute, therefore, is that developers can seek and obtain waivers they need to build a housing project that contains a percentage of affordable housing, but only to the extent the waivers are necessary to make the project economically viable.

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Reviewing the Project Economics

- Since the standard of review for an Approval is whether the conditions or waiver denials render the project "uneconomic," zoning boards have an opportunity to review the economics of the project during the public hearing.
- The applicable regulation, 760 CMR 56.05(6), provides:

> **If the Applicant does not agree to some or all of the proposed permit conditions or Waiver denials because they would render the Project Uneconomic, the Board may ask the Applicant to submit its pro forma, in form satisfactory to the Subsidizing Agency, and revised as necessary to reflect the additional cost of meeting these conditions and/or denials. The revised pro forma may be subjected to the same consultant review as any other technical information submitted to the Board, in accordance with 760 CMR 56.05(5) and the Board's rules.**
>
> **The Board may then use this information to decide whether to adopt or modify its originally proposed conditions and/or denials. Pro forma review should conform to recognized real estate and affordable housing industry standards, consistent with the policies of the Subsidizing Agency and guidelines adopted by the Department.**

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Reviewing the Project Economics

- The Board may never get to the stage of reviewing the Developer's pro forma if:

  (a) the Board determines that the Project is not capable of being approved even with conditions; or

  (b) the Developer consents to the conditions the Board is proposing to impose on an approval decision.

- In an appeal, the burden is on the *Developer* to prove that the Board's decision makes the project uneconomic.

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Legal Standards - Approval

- Even if the Board's conditions or waiver denials are deemed "uneconomic" to the Project, the conditions/waiver denials will be upheld on appeal if:

  (a) the Board can invoke a 40B benchmark or safe harbor; or

  (b) the legitimate, science-based public health, safety, environmental or planning concerns that justify the conditions/waiver denials ("local concerns") outweigh the need for affordable housing. See, *Reynolds*.

- In the case of (a), the benchmark/safe harbor must be invoked within 15 days of the opening of the public hearing.
- In the case of (b), the burden is on the Board to rebut the presumption that the need for affordable housing is more important.

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Managing the Application

The Roadmap:

1. Has the Town met a 40B Benchmark or have a 40B Safe Harbor (760 CMR 56.03)?
2. Has the Developer satisfied the eligibility requirements (760 CMR 56.04)?
3. Is the Application complete (760 CMR 56.05(2))? See also, Grafton 40B Rules, Sect. 3.
4. Review the Project's conformity with all local bylaws and regulations and determine what waivers are necessary.
5. Retain peer review consultants were necessary or appropriate to advise the Board on conformity with technical requirements, and whether waivers would give rise to local concerns.

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Managing the Application

The Roadmap:

6. Solicit feedback and opinions from other local boards and officials on issues related to waiver requests and public health, safety, environment or planning generally.
7. Collect evidence on project impacts and local concerns and evaluate whether conditions could mitigate concerns.
8. If project could be approved with conditions, propose conditions to Developer and potentially review project economics (pro forma)
9. Issue decision.

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Managing the Application

Rules for Conducting the Hearing:

1. Hearing must be opened with 30 days of filing of complete application (760 CMR 56.05(3))
2. Hearing must comply with all public notice and hearing requirements under the Zoning Act (Ch. 40A)
3. Hearing must be closed within 180 days of filing of complete application (760 CMR 56.05(3))
4. Board must make a decision on the application within 40 days of closing the hearing, and file a written decision with detailed findings with the Town Clerk.
5. To retain peer review consultants, Board must follow G.L. c. 40, s. 53G. Developer must make deposit for consultant fees in a peer review account. Developer can object to peer reviewer selection based on disqualification or conflict of interest. (760 CMR 56.05(5).
6. Board's conditions cannot regulate "programmatic" elements of the project, such as the affordable housing lottery, or the affordability restrictions.

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Managing the Application

Initial Tasks (Month One):

1. Determine whether the Town met a 40B Benchmark or have a 40B Safe Harbor (760 CMR 56.03).
2. Determine whether Developer satisfied the eligibility requirements (760 CMR 56.04).
3. Determine whether Application complete under Grafton 40B Rules, Sect. 3, and all fees paid.
4. Identify initial need for peer review consultants and solicit proposals/contracts.
5. Distribute application to all relevant town boards, commissions and officials for comment.

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Managing the Application

B. Project Eligibility

Chapter 40B regulation, 760 CMR 56.04(1), provides:

(1) **Project Eligibility**. To be eligible to submit an application to a Board for a Comprehensive Permit or to file or maintain an appeal before the Committee, the Applicant and the Project shall fulfill, at a minimum, the following project eligibility requirements:

(a) The Applicant shall be a public agency, a non-profit organization, or a Limited Dividend Organization;

(b) The Project shall be fundable by a Subsidizing Agency under a Low or Moderate Income Housing subsidy program; and

(c) The Applicant shall control the site.

Compliance with these project eligibility requirements shall be established by issuance of a written determination of Project Eligibility by the Subsidizing Agency that contains all the findings required under 760 CMR 56.04(4), based upon its initial review of the Project and the Applicant's qualifications in accordance with 760 CMR 56.04.

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