

## **Affordable Housing Study Reports**

<b>5. Major Affordable Housing Legislation in Massachusetts: Chapter 40B – the Comprehensive Permit Law</b>
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When people talk about affordable housing in Massachusetts most of the time they're referring to what's come to be known as Chapter 40B.

### **Background**

In 1969 the Massachusetts legislature took a bold step to bring the housing crisis under control by passing a law then known as Chapter 774 of the Acts of 1969, often referred to as the "anti-snob zoning law." This law, officially titled "An Act Providing for the Construction of Low or Moderate Income Housing in Cities and Towns in which Local Restrictions Hamper Such Construction," amended Chapter 40B of the General Laws and created what we refer to today as the comprehensive permit or Chapter 40B process.

By streamlining the permitting process for qualified developments, 40B was intended to increase the supply and improve the distribution of low- and moderate-income housing throughout the state. This includes both rental housing and housing built to be sold to those with limited incomes. The target is for every community in Massachusetts to have at least 10% of its housing stock be affordable, as defined by the state. 40B also includes an alternative method for determining if a community has reached its affordable housing goal. A little-used provision allows a community to meet its affordable housing goal if 1.5% of its total land area, with some exclusions, is devoted to affordable housing. Because it's the 10% goal that applies to almost all cities and towns in the Commonwealth, that is what will be used for the purposes of this report.

Communities that reach the level of 10% of their housing units in the low to moderate range become exempt from 40B. In those communities that do not meet their affordable housing goal, 40B developments can be proposed, and the comprehensive permit process applied. The Supreme Judicial Court recently ruled that comprehensive permits can continue to be issued even after a municipality has reached its 10% subsidized housing goal.

Chapter 40B created ways to facilitate the development of affordable housing: the comprehensive permit process and the appeals process.

### **The Comprehensive Permit Process**

The comprehensive permit process allows developers to apply to the local Zoning Board of Appeals for a single permit to build housing developments if at least 20-25% of the units have long-term affordability restrictions. This replaces the usual process of getting separate approvals from a variety of local permitting agencies (for example, the Board of Health and the Conservation Commission).

Under the comprehensive permit process the developer can request waivers of zoning and local requirements if it is proved that such waivers are necessary to ensure the economic feasibility of the project. The comprehensive permit process in no way permits the negating of state zoning, health or conservation laws that would endanger the community or its citizens. Developers are required to meet the state building codes, the Wetlands Protection Act, and Title 5, for example.

The law also requires that the development be approved and subsidized by a state or federal housing program, such as those offered by DHCD, the New England Fund, or MassHousing.

**Subsidies.** Subsidies are important for two reasons.

- Only subsidized housing qualifies for the “housing inventory,” which is the official list that establishes whether a community has reached its 10% goal enabling it to deny 40B projects. The Subsidized Housing Inventory is discussed below.
- 40B requires that only a public agency, nonprofit or limited dividend organization with a preliminary subsidy approval can apply for a comprehensive permit to the local Zoning Board of Appeals.

In the late 90s the federal and state governments removed themselves and direct money subsidies from the business of developing affordable housing. The challenge of building affordable housing shifted to the private sector. Few direct money subsidies remain today; rather, subsidies are in the form of loans granted at below-market rates and technical assistance.

**Qualifying for 40Bs.** The comprehensive permit process starts with a development proposal that must be approved and pre-subsidized under a state or federal housing program, such as those offered by DHCD, the New England Fund, or MassHousing.

To qualify as a 40B project, at least 25% of home ownership units must be affordable to lower income households who earn no more than 80% of the area median income. For rental housing, the project can provide 20% of units to households below 50% of median income. Communities can establish a local preference for residents (currently up to 70% of the units). Whether nonprofit or for-profit, developers must agree to restrict their profit to at most 20% in ownership developments and 10% per year for rental developments unless the subsidy program or the comprehensive permit authorizes other factors. Guidelines are set and administered by a regulatory agency like the Department of Housing and Community Development, MassHousing, Mass Housing Partnership, MassDevelopment and the New England Fund.

The developer need only apply to the local Zoning Board of Appeals. The ZBA must open a hearing within 30 days of receiving an application and make a decision within 40 days of closing the hearing. The ZBA notifies and asks for recommendations from other relevant local boards, including, for example, the Planning Board, Board of Health, Conservation Commission, and fire and police departments before deciding whether to issue a comprehensive permit.

### **The Appeals Process**

If a Zoning Board of Appeals denies a project or approves it with limitations that the developer thinks would make the project uneconomic, the developer can appeal to the state Housing Appeals Committee. This appeals process is only open to the developer – not for others who may oppose the project. Denials are upheld if the municipality can show that the development presents a serious health and safety issue that cannot be mitigated. However, in an appeal before the HAC, the burden of proof is on the community to demonstrate that a Chapter 40B project is not consistent with local needs.

The final step in the process, after a comprehensive permit is granted, is that the developer must get written approval from the subsidizing agency before construction can begin.

### **Tracking Affordability: The Subsidized Housing Inventory**

The Department of Housing and Community Development keeps track of affordable housing built under 40B for every community via a Subsidized Housing Inventory. This inventory is the vehicle that establishes whether a community has reached its 10% affordable housing goal. The Subsidized Housing Inventory tracks properties that are built with subsidies that carry deed restrictions on units that are reserved for occupants with incomes below at least 80% of a regional median income. Generally, only properties built with subsidies and that have deed restrictions are counted on the Subsidized Housing Inventory. For that reason, other types of subsidized housing, including those that accept tenant-based federal and state Section 8 certificates and homes purchased with subsidies under a first-time home buyer’s program, are not counted on the Housing

Inventory and thus do not count toward a community's 10% affordable housing goal. And for the same reason, housing units with purchase prices that may be deemed affordable are also not counted if they're not subsidized and do not have deed restrictions.

Affordable housing rental units are counted differently than are affordable ownership units. In rental developments, all units are counted toward meeting a community's 10% affordability goal even though only a minority of the units, which can be as low as 20% of all units, are set aside for low- or moderate-income residents. In ownership developments, only those units that are deed restricted for low- or moderate-income residents, which again can be as few as 20%, are counted. All other units in 40B developments can and usually are rented or sold at market rates.

### **Eligibility**

Eligibility covers two areas – that of the potential renter or buyer and that of the developer.

Potential buyers of subsidized affordable housing are eligible if they have incomes at or below 80% of the median income of the region. For potential renters, most regulatory agencies require income limits at between 30 and 50% of median income for the region. It is this lower income requirement that causes advocates for low-income families to press for adding more rental units.

See Appendix B for more details about income limits for buying or renting affordable housing in Massachusetts.

In most cases today, Chapter 40B developments have both market-rate and affordable homes, apartments or condominiums.

There are also eligibility requirements for developers, which are set by the regulatory agency.

### **Monitoring**

Projects built under chapter 40B are monitored by the state's Department of Housing and Community Development. The Housing Appeals Committee is an administrative law division of the DHCD and/or the project's monitoring agent. Monitoring eligibility requirements for income and project guidelines are important to ensure fairness and reliability.

### **A Controversial Law**

Chapter 40B was enacted amid widespread debate and opposition. Proponents of the law saw it as a way to provide access to the suburbs for people previously denied this opportunity. Opponents saw it as an usurping of local control. Even though many communities have used 40B with much success, opposition continues.

Another paradox of Chapter 40B is that it gives developers tremendous leverage to secure a comprehensive permit in communities that have not achieved their 10% goal and very little leverage in those that have met their goal.

**40B achievements.** Proponents claim that 40B is successful and point to the number of units built under it; it has produced more affordable housing units than any other program

From 1970 to 2006 40B produced 54,373 units in 979 developments statewide. This total includes 36,013 rental units and 18,360 ownership units. Of these, 27,616 affordable homes were reserved for households with less than 80% of median income. Chapter 40B has achieved other milestones. Developments built under 40B are responsible for approximately 30% of all housing production over the past three years and 82% of all new production of affordable housing units over the last five years in those communities below the 10% goal.

Many of the Commonwealth's 351 cities and towns are moving closer to the 10% affordable housing goal.

- 47 communities have reached or exceeded the 10% goal, up from 23 communities in 1997.

- 36 communities are at 8-9% and are likely to reach the 10% goal in the near future.
- 41 communities are at 6-7%.
- 112 communities need fewer than 100 units to reach the 10% goal.
- 82 communities need 100-200 units to reach the 10% goal.

The chart below, by Barry Bluestone, director of the Center for Urban and Regional Policy at Northeastern University, shows the increases in affordable units in Massachusetts from 2002 through 2005. For example, from 2004 to 2005, the number of approved affordable units increased by almost 26%.

Year	Total affordable units	Rental units	Owner units
2002	1,427	1,181	246
2003	1,889	1,379	510
2004	1,997	1,359	638
2005 change from 2004	2,508	1,303	1,205
% 2005 change from 2004	+26%	-4%	+89%

This chart also shows that affordable ownership units are increasing much faster than rentals; that is, ownership not rental has become the development of choice. From 2004 to 2005, affordable ownership units increased 89% while the number of approved rental units decreased by 4%.

During the first 30 years of Chapter 40B developments, from the late 1970s to 2006, approximately 485 comprehensive permits were issued to build almost 28,000 units of housing. That was an average of 16 projects and 933 units annually.

Changes began in 2001. According to DHCD records, in the period between March 2001 and January 31, 2004, some 436 applications were initiated, proposing over 29,000 units. That's an annual average of 160 projects and 10,000 units annually.

These numbers show that there are more units of housing in the 40B pipeline right now (that is, units that developers have proposed but are not yet in construction) than the total number built over the law's history.

Some see the growth in 40B developments as positive while others see it as a concern. Proponents of Chapter 40B say that because it is the only program that produces substantial numbers of affordable housing units in the state, it is a success. They also point out that by increasing the total number of housing units, both affordable and market-rate, 40B will eventually bring down housing prices.

**40B concerns.** The significant increase in the number of 40B projects is exactly why so many communities feel overwhelmed. The 10-fold increase in the use of Chapter 40B to develop housing may be the single most important factor driving the call to reform the law. Although recently the permits have slowed and many developments in the pipeline have been stalled, some still view the increase in 40B permits with alarm.

There are other serious concerns about 40B. These include:

- It overrides local planning and zoning regulations.
- The method of counting the number of affordable housing units and including them in the Subsidized Housing Inventory does not truly reflect the number of affordable units. That's because the methods of counting ownership and rental units towards the 10% goal are inconsistent. Although only 20-20% of units in a 40B rental development may be reserved for low and moderate-income households, all units in these developments are

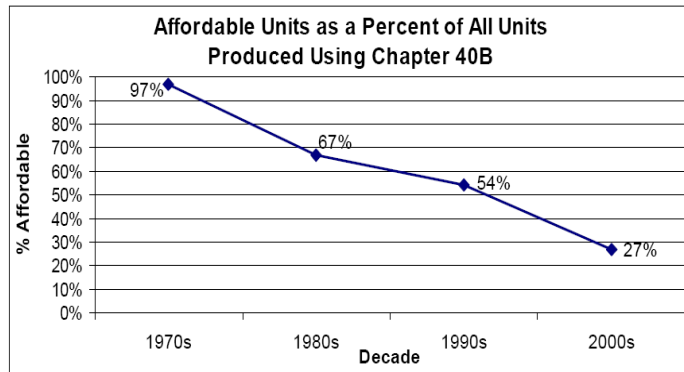
counted as affordable. In contrast, in ownership developments only the affordable units are counted. This causes the statistics on affordable housing to be inflated.

- While some funding increases to the Department of Housing and Community Development have been approved in recent years, the DHCD budget had been cut more than almost any other state agency.
- Current preservation and monitoring requirements allow some loss of affordable units. In addition, some towns have reached their 10% goal only to lose it again due to demolition, “expiring use,” and foreclosures. See Report #11 for how communities are now working to protect affordability.
- The subsidy requirement impedes some developers from entering the affordable housing market.

Other critics claim 40B has failed because in 35 years it has produced fewer than 28,000 affordable housing units, which they claim is equal to about three units a year per municipality in the Commonwealth.

**Ownership vs. rental housing.** Since the 1970s, as the government has removed itself from directly funding affordable housing, there’s been a sharp decrease in affordable units as a percentage of all units produced under Chapter 40B. In addition, more ownership units are being built, affecting those with low and very low income. Rental units, not ownership, can meet the needs of those who need affordable housing the most.

The graph below, from a 2004 report produced by the office of Massachusetts Representative Harriett L. Stanley, shows this dramatic shift.



In the 1970s 97% of all units built under 40B were affordable, were rentals, and they were built under government programs.

By the 1990s the government had opted out and developments were mixed income and the percent of affordable units had dropped to 54%. Most were still rentals.

Today 27% of Chapter 40B units are affordable, they’re mostly ownership and are built primarily by for-profit developers with few government subsidies.

There are several reasons for the shift toward ownership units. The first is the loss of direct federal and state subsidies. Another is the huge appreciation in real estate values over the last 30 years, with single family homes and condos leading the list. In fact, nothing in Chapter 40B limits the sale price of the market rate units that make up 75% of most proposals. That means Chapter 40B can be – and is – used to permit \$800,000 houses built outside of the local zoning code as long as 25% of the units are reserved as affordable. Developers can recoup their expenses and collect

their profits as soon as ownership units are sold. In contrast, owners of rental developments have to wait years to fully earn back their investment.

The fact that more ownership units are being built also impedes a community's ability to reach the 10% goal. That's because of the difference between how rental and ownership units are counted. Currently, the average size of proposed Chapter 40B ownership project is 57 units. If 25% of the units in each project is reserved as affordable, only 14 units count toward the 10% goal. That's not substantial progress for a community that needs hundreds of units to meet its goal. If this were a rental development, all 57 units would be counted toward the 10% goal.

***A streamlined process?*** The comprehensive permit process was designed to reduce the barriers created by local approval processes, zoning, and other restrictions. But projects are sometimes delayed because local Zoning Boards of Appeals take many months (as many as 18) to close the hearings and make a decision. Too, projects are often held up for many years due to suits by both proponents and opponents. Researchers at the Housing Affordability Initiative at the MIT Center for Real Estate collected data on 369 applications for comprehensive permits in 95 municipalities in the greater Boston area from 1999 through 2005. While stating that the "40B process is working," the MIT study also found that in those cases where an appeal is filed, "it takes on average 17 months from the time of the ZBA decision until the appeal is settled, and further issues such as abutters' claims often arise even after the settlement." And this follows an average of 10 months of consideration by the ZBA.

Delays in constructing these projects can increase the builder's costs and the price of market-rate units.

### **Regulatory Changes to 40B**

According to CHAPA (Citizens' Housing and Planning Association):

From 2001-2003, DHCD made 16 regulatory changes to Chapter 40B, including:

- Imposing a project size limit of 150-300 units, depending on the size of the community.
- Enabling a municipality 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.
- Allowing group homes, accessory apartments, locally assisted units, and units funded under the Community Preservation Act to count toward a community's 10% goal.
- Enabling a community to deny a comprehensive permit if that community has made recent progress on affordable housing. This is defined as either: a 2% increase in affordable housing over the previous 12 months or .75% increase plus an approved housing plan over the previous 12 months.
- 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.
- Requiring DHCD and the local chief elected official to be notified when a developer applies to the ZBA.
- 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.

- Mandating that site approval letters contain more extensive, standardized information.
- 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 will then monitor and oversee the project.
- Updating of the subsidized housing inventory every two years (communities can submit changes to DHCD at anytime).

### **Housing Crisis Solved or Not?**

Most supporters and critics of the comprehensive permit process would agree that much more needs to be done to resolve the housing crisis in Massachusetts. According to a 2001 report by the Center for Urban and Regional Policy:

To meet the demand and dampen the cost of housing, it will be necessary to build sufficient numbers of units to account for the natural increase in population as well as to increase the vacancy rate to a more optimal level. Greater Boston needs to add approximately 10,000 new housing units a year simply to keep pace with growth in the number of households and a modest increase in the population. In addition, we need to construct 5,100 additional units a year to raise the vacancy rates. Assuming the current production rate does not decline, *this leaves a production gap of approximately 7,200 new units a year in Greater Boston – a total of 36,000 units above current production levels over the next five years.*

The majority of experts agree that the housing crisis will be solved only when government at all levels, the private sector and the citizens of Massachusetts all agree that yes, we must “provide a decent home and a suitable living environment for every American family”, as the League’s positions puts it. And then we must all work together to meet that need.

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