

The Hearing Process



This section focuses on the ZBA's public hearing and decision procedures of Chapter 40B. While the procedures are similar to those associated with special permits, there are significant timeline differences (see **Critical Deadlines**, next page). For example, failing to hold the public hearing within 30 days of receiving a comprehensive permit or filing the ZBA's decision with the city or town clerk from the close of the public hearing are both grounds for constructive approval. In such cases, the developer may ask the HAC to approve the application as submitted. The HAC may do so or approve the permit with conditions. In addition, comprehensive permits require plan review tasks that ZBAs may not do very often. As a result, ZBAs usually work more closely with municipal staff and consultants on comprehensive permits than other types of applications.

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Safe Harbors

For purposes of Chapter 40B, "safe harbor" refers to conditions under which a ZBA's decision to deny a comprehensive permit will qualify as **consistent with local needs** and not be overturned by the HAC, provided the conditions were met prior to the date that the comprehensive permit was filed with the ZBA. The safe harbors include:

STATUTORY MINIMA¹

- The number of low or moderate income housing units in the city or town is more than 10 percent of the total number of housing units reported in the most recent federal (decennial) census;
- Low or moderate-income housing exists on sites comprising 1.5 percent or more of the community's total land area zoned for residential, commercial or industrial use;²
- The comprehensive permit before the ZBA would lead to construction of low or moderate income housing on sites comprising more than 0.3 of 1 percent of the community's total land area zoned for residential, commercial or industrial use, or 10 acres, whichever is larger, in one calendar year.

ADDITIONAL SAFE HARBORS CREATED BY REGULATION

DHCD has certified that the community complies with its affordable housing production goal under its approved **Housing Production Plan**.³

- The community has met DHCD's "recent progress" threshold (760 CMR 56.03(1)(c) and 56.03(5)). This means that within the last 12 months, the community has created new SHI units equal to or greater than 2 percent of the total year-round housing units reported in the most recent federal census. The recent progress threshold can be helpful to a community that does not have a DHCD-approved Housing Production Plan.
- The project before the ZBA is a project that exceeds DCHD's definition of a "large" project under 760 CMR 56.03(1)(d), where the definition of "large" project varies by the size of the municipality (see 760 CMR 56.03(6));

¹ Further requirements are described under 760 CMR 56.03.

² DHCD is developing guidance for communities to determine whether they meet the 1.5 percent threshold.

³ See 760 CMR 56.03(1)(b) and 56.03(4), and Housing Production Plan guidelines at www.mass.gov/hed/community/40b-plan/housing-production-plan.html.

Critical Deadlines for Chapter 40B Comprehensive Permits

Days	Deadline	Action Required	Authority
7	No later than 7 days from the date on which the comprehensive permit application is received by the ZBA	Distribute the application to other boards and municipal departments and request their comments	G.L. c. 40B, § 21, and 760 CMR 56.05(3)
14	14 days before the public hearing date	Publish notice of the public hearing (publish twice; the second during the week following the first notice)	G.L. c. 40A, § 11
30	No later than 30 days from the date on which the comprehensive permit application is received by the ZBA	Open the public hearing	G.L. c. 40B, § 21; 760 CMR 56.05(3)
15	No later than 15 days from the opening of the public hearing	If applicable, give written notice to the developer and DHCD that the ZBA believes it can deny the permit on one or more "Safe Harbor" grounds (see Safe Harbors), along with the factual basis and documentation for its position	760 CMR 56.05(3); 760 CMR 56.03(8)
15	No later than 15 days from the date of the ZBA's written notice	If applicable, the applicant must challenge the ZBA's "safe harbor" by providing written notice to DHCD and the ZBA, along with any supporting documentation	760 CMR 56.03(8)
30	No later than 30 days from receipt of the applicant's appeal	DHCD must make a determination after reviewing the materials provided by the applicant and the ZBA.	760 CMR 56.03(8)
20	No later than 20 days from the date of DHCD's decision on a "safe harbor" appeal	The applicant or ZBA may appeal DHCD's decision by filing an interlocutory appeal with the HAC and the ZBA's public hearing must be stayed until the conclusion of the appeal.	760 CMR 56.03(8); 760 CMR 56.05(9)(c)
180	Within 180 days from the opening of the public hearing	The ZBA must close the public hearing unless the applicant has agreed in writing to an extension	760 CMR 56.05(3)
40	No later than 40 days from the close of the public hearing	The ZBA must render a decision based on a majority vote of the board and file its written decision with the city or town clerk	G.L. c. 40B, § 21; 760 CMR 56.05(8)(a)
20	No later than 20 days from the date the decision is filed with the city or town clerk	If the ZBA denies a comprehensive permit or approves it with conditions unacceptable to the applicant, the applicant must file an appeal with the HAC; other aggrieved persons must appeal to either the Land Court or Superior Court.	G.L. c. 40B, § 22; and G.L. c. 40A, § 17; 760 CMR 56.05(9)

- In a community with 7,500 or more year-round housing units: a comprehensive permit application for more than 300 housing units or a number of units equal to 2 percent of the community's total units, whichever is greater. For example, in a community with 10,000 units, the "large project" cap is 300 units, but in a community with 20,000 units, the cap is 400 units.
- In a community with 5,001 to 7,499 year-round housing units: a comprehensive permit application to build more than 250 housing units.
- In a municipality with 2,500 to 5,000 year-round housing units: a comprehensive permit application to build more than 200 housing units.
- In a town with less than 2,500 year-round housing units: a comprehensive permit application to build a number of units equal to 6 percent of all housing units in the municipality. For example, in a community with 2,000 year-round units, a "large project" application would be 120 units.
- The community received another application to develop the same site within the previous 12 months (760 CMR 56.03(7)), e.g., the developer sought a special permit or subdivision approval for a nonresidential project or market-rate housing at the same site.



As noted in the Critical Deadlines chart, within 15 days of opening the public hearing, the ZBA must notify the applicant (with a copy to DHCD) if the ZBA believes it can deny the comprehensive permit because the community has met a statutory minimum or qualifies under another safe harbor provision. The developer has the option to challenge the ZBA's assertion that a safe harbor has been met. DHCD will issue a decision that may be subsequently appealed to the HAC.

Comprehensive Permit Application

Just as the state Zoning Act requires ZBAs to adopt administrative regulations (G.L. c. 40A, § 12), Chapter 40B requires the ZBA to adopt rules for the conduct of comprehensive permit proceedings. DHCD's Chapter 40B regulations can be relied upon for local practice (760 CMR 56.05), but each ZBA should adopt and publish its own rules consistent with DHCD's regulations. The local rules should include an application form, fee schedule, and the procedures the ZBA will follow to hire consultants (as required by G.L. c. 44, § 53G). The application form should be clear about what the ZBA needs, bearing in mind that comprehensive permit developers do not have to submit detailed plans. In addition, the fee schedule must be reasonably similar to the fees the community charges for other types of residential development applications, e.g., subdivisions or developments requiring a special permit. DHCD's regulations identify the following basic submission requirements.

- Preliminary site development plans with the locations and outlines of proposed buildings; the proposed locations, general dimensions, and materials for streets, drives, parking areas, walks and other paved areas; and proposed landscaping improvements. Any project of five or more units must have a site plan stamped by a registered professional architect or engineer.
- An existing conditions report on the proposed site and the surrounding areas.
- Preliminary, scaled architectural drawings prepared by a registered architect, with typical floor plans, elevations, and sections, including construction type and finishes.
- Tabulation of proposed buildings by type, size, and footprint, impervious coverage, and open space, including percentage of tract to be occupied by buildings, parking and paved vehicular areas.
- A preliminary subdivision plan, if the project involves a subdivision.
- A preliminary utilities plan (water, wastewater, drainage, and storm water management facilities).