

## **Frequently Asked Questions Concerning Comprehensive Permits**

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As Foxborough residents are aware, the Town has or will receive and be required to consider separate requests to construct residential developments that include so-called “affordable housing.” These requests seek the grant of “comprehensive permits” from the Town’s Zoning Board of Appeals (the “ZBA”) in accordance with the requirements of Massachusetts General Laws Chapter 40B, Sections 20-23, and the regulations that have been promulgated at 760 CMR 56.00 *et seq.*

Requests of this nature are not new to Foxborough. The ZBA has considered and approved several such requests in past years. Such approvals when combined with other housing units that are on the Subsidized Housing Inventory (the “SHI”) maintained by the Massachusetts Department of Housing and Community Development (the “DHCD”) have resulted in 878 residential units being deemed income-restricted affordable of the 6,853 total residential units in Foxborough – 12.8% of the total.

What is different from previous comprehensive permit requests, however, is the fact that Foxborough has exceeded what is known as its “statutory minima” – that is, it has met the standards set forth in Chapter 40B, Section 20, and in 760 CMR 56.03(3), of having more than 10% of the Town’s housing stock counted as low- or moderate-income under the SHI. Additionally, the comprehensive permit that is proposed for the property situated at 119 Morse Street is Foxborough’s first under the Local Initiative Program (the “LIP”).

The ZBA’s consideration of a comprehensive permit application is part of a lengthy and detailed process that commences with a project eligibility application to DHCD or other agency that may be subsidizing the project. In the case of the proposed LIP request, the project eligibility letter that was issued by DHCD followed consideration by Foxborough’s Board of Selectmen. Favorable determination of project eligibility authorizes the developer to then proceed with the comprehensive permit request. As reflected in its consideration of previous such matters, the ZBA takes a deliberate, analytical and somewhat methodical approach to the complex issues and unique circumstances that each application presents. Assuming ZBA approval of a requested application, further review and approval by the subsidizing agency then is required before any building permits authorizing construction of the proposed development may issue.

To provide a measure of clarity to the various issues and matters that concern comprehensive permits, the ZBA has developed the “frequently asked questions” and responses that follow. These do not represent the entirety of the questions that one may ask concerning this subject – it is far more complex and detailed than what has been prepared. Notwithstanding, the ZBA believes that the information contained in the following pages will be of benefit to those who may desire to further their understanding of the comprehensive permit process.

1. *Why are Massachusetts municipalities required to consider and grant comprehensive permits?*

Chapter 40B of the Massachusetts General Laws contains four sections that were enacted in 1969 to facilitate the construction of low- and moderate-income housing in Massachusetts cities and towns. These sections and the detailed regulations at 760 CMR 56.00 *et seq.* that have been promulgated by DHCD establish a review and approval process that grants the zoning board of appeals in each Massachusetts municipality with the authority and power to consider and issue a permit – known pursuant to applicable law as a “comprehensive permit” but frequently and colloquially referenced as a “40B permit” – that encompasses all local ordinances, bylaws, rules and regulations that pertain to the specific project.

2. *What is the purpose or objective of these statutory sections and regulations?*

The comprehensive permit statutes and regulations encourage the development of affordable housing in Massachusetts by providing requirements to ensure that such housing is available in all market areas. The objective is that every municipality share in the regional need for affordable housing by having at least 10% of its year-round residential units available to low- and moderate-income households. This objective, in part, is accomplished by authorizing a city or town’s zoning board of appeals to waive zoning and other municipal requirements that otherwise would restrict or prohibit the development of such housing.

3. *What is the Subsidized Housing Inventory?*

The SHI is DHCD’s list of low- or moderate-income housing in each Massachusetts city or town. Housing units generally qualify for such listing if they are subsidized under an eligible subsidy program, are subject to restrictions concerning sale or rental prices, and are available to income-eligible households. Housing that is provided pursuant to an approved comprehensive permit and that is available under public housing authority developments typically comprise most of the residential units on the SHI.

4. *What is the Local Initiative Program?*

The LIP is a housing program that was established by DHCD to assist municipalities and developers with the development of low- or moderate-income housing and the maintenance and preservation of such housing. The program supports two types of housing programs – (i) Local Action Units, which are developed through a city or town’s zoning or permit issuance process, and (ii) Local Initiative Projects, which are developed through Chapter 40B’s comprehensive permit process. A Local Initiative Project requires the written support of the pertinent municipality’s chief executive officer. The proposed Morse Street development is a Local Initiative Project. In that respect, the project has been endorsed by the majority vote of the Town’s Board of Selectmen.

5. *Is a board of appeals required to approve a LIP comprehensive permit application because it is supported by a town's Board of Selectmen?*

The LIP's purpose is to encourage the development of low- or moderate-income housing. The program's premise is that the pertinent city or town and the developer desiring to construct the proposed housing development will work together to develop a project that meets the community's affordable housing needs. In this respect, DHCD expects that local municipal officials will act in good faith and that local support for housing proposed under an LIP will not be unreasonably withheld. Notwithstanding, because LIP comprehensive permit applications are under the jurisdiction and purview of a board of appeals, that entity is responsible for determining whether a specific project warrants approval.

6. *If 10% or more of a city or town's housing includes residential units that are on the SHI does that eliminate such municipality's obligation to consider future comprehensive permit applications?*

Such applications must be considered by the municipality's board of appeals. However, the board may determine that denial of an application is "consistent with local needs" because the city or town's number of low- or moderate-income housing units satisfies the 10% "statutory minima" that is imposed by Chapter 40B. In order to raise this so-called "safe harbor defense" to a comprehensive permit application, the board of appeals must give written notice to the developer and DHCD within 15 days of commencing the public hearing on the application that it believes it can deny the application on this ground. The notice must include the factual basis and documentation for the board's position. If the applicant wishes to challenge the board's position, it must provide written notice and supporting documentation to the board and DHCD within 15 days of the applicant's receipt of the notice. DHCD then has 30 days to determine the issue. That determination can be appealed to the Massachusetts Housing Appeals Committee. A decision by a board of appeals to deny a comprehensive permit application on the basis of this "safe harbor defense" cannot be overturned by the Housing Appeals Committee.

Notwithstanding the fact that a municipality has achieved its "statutory minima" and the ability by its board of appeals to raise this defense, the board in its sole discretion may elect to proceed with a full hearing of the comprehensive permit application and ultimately grant the requested permit. A decision of a board to proceed in this manner is not grounds for an appeal under the procedure discussed in the preceding paragraph.

7. *What does a comprehensive permit include?*

Chapter 40B authorizes a city or town's zoning board of appeals to grant all of the municipal approvals that otherwise would require consideration by and permits from other boards and committees. The board of appeals also is authorized to grant waivers from those provisions of the municipality's zoning and other bylaws that are necessary for development of a proposed project – including, for example and where applicable,

subdivision, historic district, earth removal, storm water and local wetlands regulations. All of this is accomplished by means of the grant of a single, consolidated permit – the comprehensive permit. The authority of the board of appeals in this respect is limited to municipal ordinances, bylaws, rules and regulations – it has no authority to grant a waiver from any state statute, regulation or other requirement.

8. *Why does the authority to grant a comprehensive permit solely rest with a city or town's board of appeals?*

The board of appeals is invested and empowered with authority to grant comprehensive permits pursuant to Massachusetts General Laws Chapter 40B, Section 21. The basis for vesting exclusive authority with the board of appeals is to provide a streamlined process for the consideration of affordable housing applications by eliminating the need for a project's developer to obtain permits that otherwise would be required from other municipal boards and committees.

Though the board of appeals in this respect acts in place of the other municipal entities whose rules and regulations otherwise would apply to a particular residential development, this does not mean that such other boards have no role in the comprehensive permit process. In point of fact, the board of appeals is required by the DHCD regulations to provide a copy of the comprehensive permit application to those local boards and municipal departments that it deems necessary or helpful in reaching an informed decision. These include, without limitation, the city or town's building commissioner, planning board, conservation commission, board of health, department of public works, board of water and sewer commissioners, and police and fire departments. The board in making its decisions is required to consider the recommendations of each of the foregoing, but it is not required to adopt such positions.

In addition to the assistance of other municipal boards and departments, boards of appeals typically are assisted by a technical consultant having expertise with 40B matters, and by peer review consultants that provide advice on traffic, site engineering, environmental impact, design review and other matters relating to a proposed project.

9. *Does the public have the right to comment on the issues presented by a proposed comprehensive permit development?*

Because the consideration of comprehensive permit applications is subject to open meeting requirements, members of the public are permitted to attend the board of appeals hearings and to ask questions and provide comments.

10. *How many residential units in a housing development that is subject to a comprehensive permit must be devoted to low- or moderate-income housing? Who is eligible for such housing?*

A residential development that is to include housing for moderate-income households must devote at least 25% of its residential units to such households. A minimum of 20% of the

residential units must be devoted to low-income households if that is the development's objective.

Eligibility for housing under a comprehensive permit development is restricted to households that earn less than 80% of the Area Median Income ("AMI"). Foxborough is part of the Greater Boston Area as defined by the federal government. Accordingly, housing eligibility for a development in Foxborough that is authorized by means of a comprehensive permit is based on regional incomes and household sizes.

11. *What "time frame" does a board of appeals operate under when considering a comprehensive permit application?*

The board of appeals is required to open the public hearing on the matter not later than 30 days after it has received the comprehensive permit application. Notice of the public hearing must be published 14 days before the public hearing date. The board is required to close the public hearing within 180 days from the date on which it opened. The board must render a decision (based on a majority vote of its voting members) on the matter not later than 40 days after the close of the public hearing. The required time periods for convening a public hearing and rendering a decision may be extended by mutual agreement between the board and the applicant. A written copy of the board's decision must be filed with the city or town clerk within 14 days of it having been rendered.

12. *What is the principal issue that a board of appeals must consider and determine with respect to a comprehensive permit application?*

The central issue in all comprehensive permit applications is "consistency with local needs." The decision that the board of appeals reaches must be "consistent with local needs."

This term "consistent with local needs" is defined in the DHCD regulations at 760 CMR 56.02 to mean either that (i) the municipality has satisfied one or more of the methods to measure progress toward local affordable housing goals that are set forth in the regulations (one of which is attainment of the 10% "statutory minima"), or that (ii) any municipal requirements and regulations that are imposed on a project are reasonable in view of the regional need for low- or moderate-income housing, provided that such requirements are applied in the same manner to subsidized and market-rate housing.

13. *What decisions can the board of appeals render on a comprehensive permit application?*

The board of appeals has authority to grant a comprehensive permit as it has been proposed, deny the application, or approve the application with conditions. With respect to the latter course of action, the conditions that the board imposes must be reasonably related to the proposed housing development. Conditions cannot be imposed that would cause the project to be uneconomic – for example, requiring the developer to incur costs of public infrastructure that are not generally imposed by a local board on those residential developments that are not subsidized by a governmental agency, that address a condition

that generally affects the municipality, that are disproportionate to the impacts that are reasonably attributable to the project, or that reduce the project's units for other than evidence of "local concerns" that are within the board's purview. The term "local concern" is defined in the DHCD regulations to mean the need to protect the health or safety of the occupants of a proposed development or of the city or town's residents, to protect the natural environment, to promote better site and building design, or to preserve open space land areas that have been reserved for outdoor recreational, conservation, scenic or other similar uses by the general public.

14. *Can a board of appeals decision on a comprehensive permit application be appealed?*

An applicant may appeal the denial of a comprehensive permit application, and may appeal an approved permit that contains conditions that the applicant deems unacceptable. Any such appeal must be filed with the Massachusetts Housing Appeals Committee within 20 days of the date on which the board's decision is filed with the city or town clerk. Any person claiming to be aggrieved by the board's decision may within that period file an appeal either with the Massachusetts Land Court or Superior Court.

15. *If the board of appeals approves a comprehensive permit application, can that permit later be modified?*

A developer may request modification of a comprehensive permit that a board of appeals has granted. A board has 20 days to determine whether a requested modification would be substantial or insubstantial. If the board determines that it is insubstantial, the request is approved. If the determination is that that proposed modification is substantial, the board is required to hold a public hearing on the request within 30 days of the date of such determination and issue a decision on such matter within 40 days of the hearing's termination. The DHCD regulations provide examples of modifications that would be substantial or insubstantial. Modifications that the regulations generally deem to be substantial include an increase of more than 10% in the number of approved residential units, an increase of more than 10% in the height of a development's buildings, a reduction in the size of the development's site of more than 10% in excess of any decrease in the number of proposed housing units, a change in building type, and a change in one form of housing tenure to another.