Chapter 40B: “Safe Harbor Through Production”
Statutory Minima - A ZBA decision to deny or condition a comprehensive permit shall be upheld if one of the following has been met as of the date of the project’s application:

Housing Unit Minimum (10% of total housing units) 760 CMR 56.03 (a)
- SHI-eligible units > 10% of total housing units.

General Land Area Minimum (1.5% of total land area) 760 CMR 56.03 (b)
- Sites of SHI-eligible units (pro-rated for partial sites) comprise >1.5% of the total land area zoned for residential or commercial or industrial use.

Annual Land Area Minimum (0.3% or 10 acres/year) 760 CMR 56.03 (c)
- Construction start in any calendar year of Low/Moderate Income Housing on sites comprising larger of >0.3% of land area or 10 acres.
Statutory Minima - Housing Unit Minimum (10% of total housing units) 760 CMR 56.03 (a)

65 communities now above 10%.

Fastest way to 10% is via the creation of rental housing:

- If at least 25% of units are to be occupied by Income Eligible Households earning 80% or less than the Area Median Income (AMI), or alternatively, if at least 20% of units are to be occupied by households earning 50% AMI --- all units count for the SHI.

- Only ownership units that are sold to income eligible household (s) at an affordable price (subject to ongoing restrictions on resale and refinancing ) count.

- In calculating the 10% the denominator is based on the Decennial US Census number of year round housing units. These numbers will be readjusted post 2020 Decennial Census.
Regulations were updated in 2008. Key elements:

- **TLA includes** all districts (zoned & unzoned areas) in which any residential, commercial or industrial use is permitted.
- **TLA excludes**
  - government land except land owned by a local housing authority containing SHI eligible housing.
  - Land area where all development prohibited by DEP restrictive order, but not other swamps, marshes or wetlands.
  - Water bodies.
  - Flood plain, conservation and open space zones where residential, commercial or industrial uses are completely prohibited.
In calculating whether 1.5% has been achieved, numerator includes only sites on SHI or established as SHI-eligible as of the initial permit application date.

In general, rules for calculating land area included in 1.5% are consistent with rules for counting units on SHI.

Proportion of site area that “counts” toward 1.5% includes:
- area occupied by SHI Eligible units, and
- impervious/landscaped area directly associated with such units.
Some things to note:

- DHCD issues an initial decision as to whether 1.5% threshold has been achieved pursuant to regulatory procedure.
- Burden of proof that a community has achieved 1.5% threshold rests with ZBA.
- DHCD has developed written guidance to assist municipalities & developers in calculating whether 1.5% threshold has been achieved.
- Guidance is designed to be implemented by a technical analyst trained in GIS.
1.5 General Land Area Minimum – Recent Developments

- Unlike SHI, DHCD does not keep inventory of land area – too many changing variables, complex calculation.
- Only a few communities claimed 1.5% prior to 2008 – DHCD is unaware of any communities that currently qualify.
- Since 2014 several communities have asserted achievement of 1.5% threshold in the context of a Comp Permit Application, including Newton (four times) and Stoneham, Norwood (twice), Milton, Waltham, Arlington and Braintree.
- In each case, DHCD reviewed facts and determined that the community had not achieved the 1.5%.
- Newton, Stoneham, Waltham and Norwood appealed DHCD’s ruling to the Housing Appeals Committee (HAC) via an interlocutory appeal. HAC found in favor of the Applicant(s).
- Arlington, and Braintree are pending at HAC.
Some things to note:

- **Group Homes – special issues**
  - Not addressed in 1969 statute; added as SHI-eligible by regulation.
  - Confidentiality – FIPAA & HIPAA issues. Each “unit” houses a resident of a DDS/DMH Facility. DHCD does not currently have access to DDS/DMH group home addresses.
  - DHCD has worked with DDS/DMH to develop protocols that would make it possible to obtain square footage to include in land area calculation.
Issued January 17, 2018 (handout)

- Step One/ EMAIL DHCD at dhcdglamMassMail.State.MA.US Request most current SHI data.
- DHCD will provide SHI data within 15 days.
  - If ZBA plan to invoke the 1.5% they should request Group Home Acreage to be performed via MASSGIS.
  - Emails for Group Home contact/ procedure within GLAM Guidelines.
- Appendix B of new Guidelines provides a step by step guide based on fictionalized town called Landborough.
- DHCD has contract for initial 1.5% analysis with Tighe and Bond.
DHCD has recognized by regulation additional grounds on which a ZBA decision to deny or condition a comprehensive permit shall be upheld:

- Municipal compliance with the goals of an approved Housing Production Plan (760 CMR 56.03(1)(b), 56.03(c) - (f)):
  - HPP to be developed and reviewed in accordance with 760 CMR 56.03(4) and DHCD guidelines.
  - Plan must include numerical goal for annual housing production, including increase in municipality’s SHI eligible housing units by at least 0.50% of total units every calendar year for a 5-year period
  - Safe harbor based on compliance with approved HPP goals.
  - Increasing SHI-eligible units by ≥ 0.50% total units → 1 year safe harbor
  - Increasing SHI-eligible units by ≥ 1.0% → 2 year safe harbor
  - Since 2003 over 50 communities have achieved DHCD certification of compliance with HPP goals. Over 100 have plans.
### Other Safe Harbors (not in 40B Statute) - Compliance with Housing Production Plan

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Recent Progress (760 CMR 56.03(3)(1)(c), 56.03(5)): Creation of SHI eligible housing units ≥ 2% of total year round housing units within the 12 months prior to Comp Permit filing.

- Arlington 398
- Amherst 192
- Chelmsford 274
- Reading 192
- Watertown 310
- Williamstown 56
Other Safe Harbors (not in 40B Statute)

- Large Scale Projects (760 CMR 56.03(1)(d), 56.03(6)): ZBA has discretion to reject projects exceeding thresholds based on # of units or % of total housing units, depending on the size of the community.
  - (a) in a municipality which has a total number of 7,500 or more housing units = 300 housing units cap.
  - (b) in a municipality which has between 5,000 and 7,500 housing units = 250 housing unit cap.
  - (c) in a municipality which has between 2,500 and 5,000 housing units = 200 unit cap.
  - in a municipality which has less than 2,500 housing units, 6% of all housing unit cap.
Related Applications (760 CMR 56.03(1)(e), 56.03(7)): ZBA has discretion to reject 40B application if <12 months elapsed since the filing, pendency, final disposition (including appeals) or withdrawal of an application for any approval related to construction on the same land of a prior project (non-residential or < 10% SHI eligible units).

Also known as a “cooling off period” designed to stop Applicants from turning to 40B immediately if market rate proposal (under 10% SHI units) was denied for same site.
Procedures for ZBA to invoke a Safe Harbor

- 760 CMR 56.03(8) - “Safe harbor” must be achieved, if at all, before CP filing date.
  - Within 15 days of opening the CP hearing ZBA must provide written notice to Applicant with a copy to DHCD describing which safe harbor has been achieved with supportive documentation.
  - Applicant has 15 days to challenge Board assertion with corresponding supportive documentation. Copies of all material sent to ZBA and DHCD.
  - DHCD has 30 days following receipt of all materials to issue a decision.
  - DHCD failure to act within 30 days deemed a decision in favor of ZBA.
  - Procedure “tolls” requirement to terminate CP hearing within 180 days.
  - Either Board or Applicant can file an interlocutory appeal to Housing Appeals Committee within 20 days of DHCD decision.
Contact information

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