

40B Housing Production Update

Prepared by Citizens' Housing and Planning Association
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What is Chapter 40B?

Chapter 40B is a state statute that enables local Zoning Boards of Appeals (ZBAs) to approve affordable housing developments under flexible rules if at least 20-25% of the units have long-term affordability restrictions. Also known as the Comprehensive Permit Law, Chapter 40B was enacted in 1969 to make affordable housing more widely available throughout the state by reducing unnecessary barriers created by local approval processes, local zoning, and other restrictions.

Chapter 40B encourages communities to make at least 10% of their year-round housing affordable to low and moderate income households (generally those with incomes at or below 80% of area median income). It provides the tools to do this by authorizing more flexible zoning for subsidized developments. It also allows developers of subsidized housing to appeal to the state Housing Appeals Committee to overturn adverse local zoning decisions in communities that have not met the 10% goal. Communities become "appeal-proof" if they meet that goal (or an alternate threshold of devoting 1.5% of their land area to such housing). They can also become temporarily appeal-proof (1-2 years) if they have made recent progress by approving a large development or adding units pursuant to a state-approved housing production plan.

Chapter 40B Accomplishments

Since 1973, when the legality of the statute was upheld by the state Supreme Judicial Court, Chapter 40B has played a major role in expanding the supply of affordable and mixed income housing across the state and especially in suburban and rural communities where zoning is usually more restrictive (e.g., large lot size requirements and limits on multi-family development).

Chapter 40B has helped to produce hundreds of affordable housing developments that could not have been built under traditional zoning approaches. Developments built using comprehensive permits (CPs) include housing for the elderly and people with disabilities, single-family subdivisions that include affordable units for town residents, multifamily rental housing developments, and mixed-income condominiums.

Chapter 40B has also spurred many communities to adopt other ways to zone for affordability through inclusionary zoning, the creation of overlay districts and special permits for affordable housing, and to develop housing production plans that identify municipal sites that can be used for affordable housing. As of November 1, 2008, 83 communities had state-approved plans developed under the Chapter 40B "planned production" regulation.

As of November 2008:

- Nearly 1,000 developments with 53,800 units have been built or are under construction using "comprehensive permits", including over 28,000 affordable units.
- Over 140 developments with over 9,400 units (including over 2,500 affordable units) have been granted permits but have not yet begun construction.
- Fifty-five (55) of the state's cities and towns have met or surpassed the 10% goal, up from 23 in 1997.

- All but 33 of the state’s 351 cities and towns now have subsidized housing (those 33 are mostly small, rural towns that collectively contain less than 0.6% of the state’s year round housing).

Communities at or Near 10%

As of September 2008, according to DHCD’s Subsidized Housing Inventory and updates:

- Fifty-five (55) communities had met the 10% goal--including two that approved projects since early September--which is more than double the number (23) in 1997. A total of 67 municipalities were appeal proof as of late October 2008, including cities and towns that have met the 1.5% land area threshold (3) or are making substantial progress using a housing production plan (9). Some towns that have recently met the 10% goal include: Amesbury, Bedford, Burlington, Canton, Concord, Danvers, Franklin, Georgetown, Hadley, Holbrook, Hudson, Lexington, Mansfield, Marlborough, Natick, Peabody, Pembroke, Quincy, Raynham, Stockbridge and Ware.
- Thirty two (32) more communities are at 8% or 9% and are likely to reach the 10% threshold in the near future, including: Abington, Andover, Braintree, Clinton, Dartmouth, Hanover, Haverhill, Ipswich, Lakeville, Lincoln, Littleton, Orleans, Wenham, Westborough and Westwood. There are another 51 communities at 6% or 7%.
- One hundred and sixteen (116) communities are within 100 units of the 10% threshold (of which as few as 25% need to be affordable if created as mixed income rental housing).

	Total	Total Appeal Proof	Appeal Proof (met 10% or land area threshold)	Temporarily Appeal Proof
Communities above 10%	55	55	55	
Communities at 9-9.99%	17	3	1	2
Communities at 8-8.99%	15	3	1	2
Other Communities		6	1	5
Total >8%	87	67	58	9

Total Production Under Chapter 40B

Since 1970, over 53,800 units have been created (built or in construction) using over 960 comprehensive permits, at an average project size of 52 units¹. About 70% of the units are rental (37,500) and approximately 30% are ownership (16,300) units. They include over 28,400 units for households below 80% of median income (including 23,900 rental and 4,500 ownership units). This represents over one-half of the total number of units produced.

Another 140+ developments have been granted comprehensive permits for over 9,000 units (about 2,700 affordable) but have yet to begin construction, for reasons ranging from having just been recently approved to difficult conditions in the housing and capital markets. About 30 more developments (approximately 2,700 affordable units) are under appeal at the Housing Appeals Committee or in the courts.

Comprehensive Permit Projects Built or Pending as of November 1, 2008²

	Total Projects	Total Units	SHI Units ³	Affdbl Units	Total Rental ⁴	Affdbl Rental	Total Own	Affdbl Own
Total Built*	965	53,803	42,221	28,440	37,526	23,907	16,277	4,533
Not yet started**	141	9,242	5,423	2,687	4,332	1,436	4,910	1,251
Total	1106	63,045	47,644	31,143	41,858	25,343	21,187	5,784
% Affordable of Total built				52.9%		63.8%		27.8%

*Completed or in construction **Comprehensive permit approved, not in litigation

Recent Production (1999-2008)

Use of Chapter 40B has risen in the past decade as a result of two factors: (1) increasingly restrictive zoning that has made its use more necessary; and (2) the introduction of new financing programs, such as the New England Fund, that has spurred the production of mixed income housing without the need for conventional state and federal subsidies. These developments rely on a strong market rate component to achieve financial feasibility and the vast majority involve no state or federal taxpayer dollars.

- Over half of the 1,089 developments approved since 1972 and likely to move forward (and 48% of the 948 developments built or underway) were approved after 1998.
- Between 1998 and 2002, **82%** of all new production of affordable housing units in communities below the 10% threshold was the direct result of 40B and this trend has continued, with 40B accounting for 71% of the new units added to the Subsidized Housing Inventory in Greater Boston (excluding Boston) between 2003 and 2006.
- A 2007 study found that about 34% of all housing production and nearly 80% of all rental housing produced in Greater Boston between 2002 and 2006 (excluding the City of Boston) was directly attributable to Chapter 40B.
- The overwhelming majority of the comprehensive permit developments built or started in the past decade have been located in suburban communities (cities have also expanded their affordable inventory but do not generally use Chapter 40B because their local zoning is more flexible). This has led to a major increase in the number of communities that have added affordable units in the past decade.

Size and Tenure of Projects Permitted

The average number of units authorized per comprehensive permit has been just under 56 (40 for ownership developments and 67 for rental developments).

Comprehensive Permit Projects Built or In Construction as of November 1, 2008

	Total Projects	Total Units	Affdbl Units	Total Rental	Affdbl Rental	Total Own	Affdbl Own	Average Project Size
Rental Developments ⁵	554	37,201	23,591	37,110	23,591	0	0	67
Ownership Developments	384	15,394	4,321	0	0	15,394	4,321	40
Mixed Tenure	27	1,208	528	325	316	883	212	45
Total	965	53,803	28,440	37,435	23,907	16,277	4,533	56

Types of Housing Developments and Household Types Assisted

The 965 developments built or in construction as of November 2008 include over 28,400 affordable units (reserved for households with incomes at or below 80% of area median income and priced affordably). Just over half of those units are reserved for elderly and/or disabled households, with the remaining 46% available to all age groups.

- Over 14,700 (52%) are reserved for elderly and disabled households or for households with at least one member aged 55 or above
- Over 600 (2%) are reserved for special populations (homeless, developmentally disabled, etc.)
- Over 13,000 (46%) are for families and individuals of all ages

Projects using these 965 permits include:

- 252 state public housing developments (authorized by 196 permits, some covering multiple developments), including housing for elders, people with disabilities, and families.
- Over 350 homeownership developments for first-time buyers in over 140 communities, including over 50 Habitat for Humanity homes.
- Over 375 private rental developments, including over 115 apartment developments and assisted living facilities for the elderly and disabled in 85 communities, and 164 rental developments for families and individuals in 92 communities.
- Of these 965 developments, 138 were permitted under the Local Initiative Program in 80 communities.

Geography of Chapter 40B Developments

The 965 developments built with a comprehensive permit are widely dispersed. Currently, 238 of the state's 351 cities and towns have at least one development built using Chapter 40B, including almost every suburb in Greater Boston. Another 18 communities have approved developments that have not yet begun construction and four more communities are currently reviewing applications.

Types of Developers Using Comprehensive Permits

Chapter 40B restricts the use of comprehensive permits to public agencies (including housing authorities), non-profits and limited dividend developers (developers who agree to limit their profits on a development in accordance with the rules of the subsidy program they are using). Since 1972, housing authorities have developed about one quarter (23.3%) of comprehensive permit developments built to date, non-profits have developed 18% and limited dividend developers have developed about 58% (including developers selected by municipalities specifically to create affordable housing on town-controlled property). Limited dividend developers have been the primary developers of affordable ownership units, developing 92% of such units to date.

Comprehensive Permits Projects by Developer Type

Developer Type	Total CPs	Total Units	Affdbl Units	Affdbl Rental U	Affdbl Owner U	% of All CP	% of Total U	% of Aff U	% of Aff HO	% of Aff Rental U
Housing Authority	225	7,126	7,126	7,096	30	23%	13%	25%	1%	30%
Non-Profit	175	5,465	4,873	4,545	328	18%	10%	17%	7%	19%
Limited Dividend	564	41,054	16,299	12,124	4,175	58%	76%	57%	92%	51%
Accessory Apt Prog*	1	158	158	158	0	0%	0.3%	0.6%	-	1%
Total	965	53,803	28,456	23,923	4,533	100%	100%	100%	100%	100%

*Barnstable Accessory Dwelling Unit program

Site Approval Letter Trends

Before applying to a zoning board for a comprehensive permit, the applicant must obtain a “project eligibility” letter (often referred to as a site approval letter) from the agency that will be subsidizing the development. The subsidizing agency notifies local officials of the proposed project and solicits their comments. It also reviews the proposal to ensure it meets the subsidy program guidelines and appears financially feasible. If a developer’s proposal meets the subsidizing agency’s standards and receives a project eligibility letter, the developer can then apply for a comprehensive permit. Trends in applications for site approval letters provide one indication of likely comprehensive permit activity going forward (though not all applications receive an approval letter and not all developers with an approval letter end up applying for a comprehensive permit).

As the table below details, site approval applications have fallen steadily since 2005. Applications in the first half of 2008 were down by two-thirds from their 2005 peak and down by 50% from 2007. This is largely due to the downturn in the economy and the uncertainty of the financial markets, which is affecting all residential development across the country.

January-June	# of Projects applying for site approval	Total Development Units (TDU) proposed	Affordable Units Proposed	Owner-ship (HO) Projects	Total Units – HO Projects	Affdbl U – HO Projects	Rental Projects	Total U – Rental Projects	Affdbl U - Rental
2005	101	6,492	1,688	85	5,164	1,425	16	1,328	263
2006	68	3,721	1,045	51	2,241	596	17	1,480	449
2007	54	3,852	1,023	38	1,487	454	16	2,365	569
2008	34	1,860	554	18	716	241	16	1,144	313

Housing Appeals

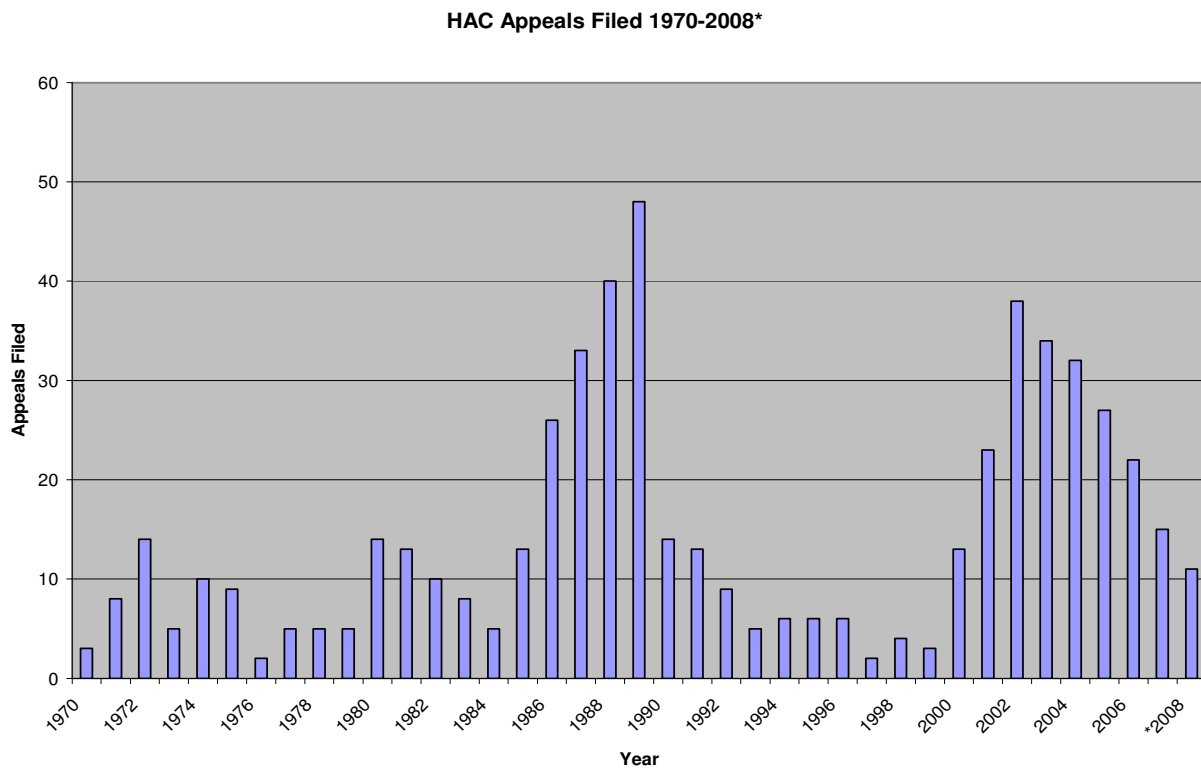
Over the years, the percentage of comprehensive permit applications initially denied at the local level has declined. A 2003 study found that two-thirds of the developments that had been built statewide were approved at the local level and a 2007 study looking at 144 communities in Greater Boston found that 80% of applications filed between 1999 and 2005 were approved at the local level (with less than 20% of those approvals appealed to the HAC).

The majority of cases appealed to the HAC are resolved without a HAC decision. A 2003 study of 415 cases appealed to the State Housing Appeals Committee between 1970 and 2002 found that:

- 69% were either withdrawn or dismissed (45%) or resolved through negotiation (24%).
- Of the 31% of the cases decided by the HAC, the HAC ruled in favor the developer in 84% of cases and in favor of the municipality in 16%.

These percentages have continued to represent the outcomes for cases resolved since 2002.

The number of cases appealed to the HAC is in part a function of the number of applications filed at the local level. An average of 14 appeals a year have been filed (559 total) since 1970. Of those, 58% were filed during two periods in 1986-1989 (147) and 2001-2005 (176). In 2007 and 2008, appeals have fallen back to very modest levels, with 15 filed in 2007 and 11 filed in 2008 (through November 30,2008).



*through 11/30/2008

Regulatory Changes

DHCD has made numerous changes to the Chapter 40B regulations since 2001 and updated and revised the regulations in February 2008 to create a single, comprehensive regulation that codified policies and guidelines that had evolved over the years, including policies established by court rulings and administrative decisions by the Housing Appeals Committee. It also issued comprehensive program guidelines.

The new regulation and guidelines incorporate and update many revisions first developed between 2001 and 2003 as well as procedures established in 2006 and 2007 (smart growth guidelines, MassHousing cost certification and project eligibility guidelines and a DHCD universal deed rider that survives foreclosure). The new regulation is intended to provide more certainty to the review process for all parties, by establishing clear administrative procedures and establishing tighter time frames for local hearings on

comprehensive permit developments. It also requires communities to notify DHCD upfront if they intended to make a decision based on the assumption that they are appeal-proof.

The new guidelines require subsidizing agencies to more extensively review project designs and how they fit into the neighborhood context and town planning efforts. They also make it easier for communities to become temporarily appeal-proof by lowering the number of subsidized housing units they must create each year to demonstrate that they are making progress toward the 10% goal and giving them more flexibility regarding when units first count toward the 10% goal.

Major changes adopted since 2001 are described below, with revisions to date also noted.

- Limiting project size limit 150-300 units, depending on the size of the community unless the ZBA chooses to allow a larger project (the 2008 regulation lowers the threshold in communities with less than 2500 year round units to 6% of year round housing).
- Requiring compliance with extensive audit and cost-certification guidelines regarding the profit limitations imposed on 40B developments.
- Requiring developers to ensure completion of cost-certification through credit, bond, or cash ranging from \$25,000-\$100,000.
- Enabling municipalities 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 municipalities that have hearings underway on three or more projects to defer hearing additional projects if the hearings underway involve a larger number of units.
- 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. Effective in February 2008, this is defined as either: an increase in affordable housing units that is at least 1% of the town's year-round housing units over the previous 12 months or a 0.50% increase plus an approved housing plan over the previous 12 months. (Prior to the 2008 revision, the thresholds were 1.5% and 0.75% respectively.)
- 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. The 2008 revisions also allow towns to add units if the locality has approved a comprehensive permit but issuance is delayed by litigation filed by a party other than the Zoning Board of Appeals.
- 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 (the 2008 regulations require the subsidized agency to take into account "the municipal actions previously taken to meet affordable housing needs...")

- 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 then monitors and oversees the project.
- Updating the subsidized housing inventory every two years (communities can submit changes to DHCD at anytime).

¹ Some comprehensive permits, usually for state public housing, cover several developments on scattered sites.

² This report uses discussions with municipal staff and reviews of public records to track permits and construction status and is subject to change, if new information comes to light or developers modify their plans during construction or prior to actually starting construction. Information on early comprehensive permits also continues to be updated (early data was based on surveys of municipal staff and in some cases has proven incomplete).

³ “SHI” units are the number of total number of units in the development that will count toward the 10% threshold.

⁴ Rental count is adjusted to exclude “non-revenue” units – units used for resident manager offices, community rooms, etc.

⁵ Rental count includes 158 accessory dwelling units approved using 140+ comprehensive permits under the Barnstable Accessory Dwelling Unit program. For simplicity, this program is treated as one project using one comprehensive permit.