



Joseph A. Curtatone
Mayor

George J. Proakis
OSPCD Executive Director

CITY OF SOMERVILLE

Office of Strategic Planning & Community Development

TO: Zoning Board of Appeals
FROM: Planning & Zoning Division
DATE: June 3, 2020
RE: MGL Ch 40B Overview

Most cases this Board sees fall under M.G.L. Chapter 40A and thus must follow the procedural requirements of that chapter. The last time the ZBA heard a Comprehensive Permit under M.G.L Chapter 40B was 2012 (the Mystic Pump House at 485 Mystic Valley Parkway). This memo provides a brief overview of the Comprehensive Permit process and how it differs from most cases that come before the Board.

DEFINITIONS

Some relevant definitions from 760 CMR 56.02:

Consistent with Local Needs – means either that:

- (a) one or more of the grounds set forth in 760 CMR 56.03(1) have been met; or
- (b) Local Requirements and Regulations imposed on a Project are reasonable in view of the regional need for Low and Moderate Income Housing, considered with the number of Low Income Persons in the affected municipality and with Local Concerns, and if such Local Requirements and Regulations are applied as equally as possible to both subsidized and unsubsidized housing.

Local Concerns – means the need to protect the health or safety of the occupants of a proposed Project or of the residents of the municipality, to protect the natural environment, to promote better site and building design in relation to the surroundings and municipal and regional planning, or to preserve Open Spaces.

93 Highland Avenue
Somerville, MA 02143
(617-625-6600 ext.2500
TTY: (617) 666-0001
www.somervillema.gov
www.somervillezoning.com

Uneconomic – means any condition imposed by a Board in its approval of a Comprehensive Permit, brought about by a single factor or a combination of factors, to the extent that it:

(a) makes it impossible for a public agency or a nonprofit organization to proceed in building or operating a Project without financial loss; or

(b) makes it impossible for a Limited Dividend Organization to proceed and still realize a reasonable return in building or operating such Project within the limitations set by the Subsidizing Agency on the size or character of the Project, or on the amount or nature of the Subsidy or on the tenants, rentals, and income permissible, and without substantially changing the rent levels and unit sizes proposed by the Applicant

OVERVIEW

M.G.L. Chapter 40B, Sec. 20-23, allows the Zoning Board of Appeals in a municipality to approve a single “Comprehensive Permit” that replaces the need to apply to other boards for local approval and can grant exceptions from local ordinances and regulations where such ordinances and regulations make the development of low- and moderate-income housing Uneconomic.

Municipalities must accept Comprehensive Permit applications unless it meets at least one of a number of standards (statutory minima) set forth in M.G.L. Chapter 40B, Sec. 20. The two most relevant standards for Somerville are:

1. Low- or moderate-income housing units make up at least 10% of the total housing units that exist in a municipality as of the latest federal decennial census.
2. Low- or moderate-income housing units exist on sites that make up more than 1.5% of the total land area zoned for residential, commercial or industrial use.

The Commonwealth of Massachusetts Department of Housing and Community Development (DHCD) determines whether a municipality meets these statutory minima. For the first standard, DHCD relies on the Subsidized Housing Inventory to determine whether a municipality meets the 10% unit requirement. For the second standard, DCHD requires municipalities to create and submit much more detailed documentation that is then used to determine whether the municipality meets the 1.5% land area requirement.

ELIGIBILITY

760 CMR 56.04(1) lists three criteria that an applicant must meet in order to be eligible to apply for a Comprehensive Permit:

1. The applicant must be a public agency, non-profit organization, or limited dividend organization.
2. The project must be fundable, although it would not have to necessarily be funded, by a subsidizing agency.
3. The applicant must have control of the site.

It is the responsibility of the state subsidizing agency (in this case, DHCD) to determine whether an application meets these three eligibility criteria. If a project is found to meet all three criteria, the subsidizing agency can issue a Project Eligibility Letter (PEL) which allows the applicant to then submit a Comprehensive Permit application. It is not within the purview of the local Board to determine whether an applicant is eligible to apply for a Comprehensive Permit.

WAIVERS

One of the key features of the Comprehensive Permit process is the Board's ability to grant the project "waivers" from local ordinances and regulations. The applicant is required to provide a list of requested waivers as part of their application. This list should clearly and specifically indicate all requested waivers; the Board should not grant a "blanket" waiver to cover things the applicant has not specifically identified. Once the Comprehensive Permit has been decided, the applicant is able to request revisions to the waivers list if the need arises and the Board will have an opportunity to review all requests.

THE BOARD'S JURISDICTION

The Board's jurisdiction "includes the physical and operational aspects of a project and its impact on public health and safety and environmental design."¹ The Board's jurisdiction does not include whether or not the project is eligible for a Comprehensive Permit, "the location of low or moderate income units within a development," or the financial feasibility of the project.²

State requirements (e.g., MEPA) are also outside the Board's jurisdiction and cannot be waived by the Board. Similarly, if state law requires that a specific body decide an issue (e.g., the Tree Warden must approve the removal of public shade trees), the Board is unable to grant an applicant's request to waive that process requirement and have the ZBA decide the issue instead.

REVIEW CRITERIA

The primary review criteria for all Comprehensive Permits is whether the proposal is Consistent with Local Needs. If a municipality does not meet one of the statutory minima, then the Board must conduct a balancing test between Local Concerns and the regional need for affordable housing to determine whether the project and any potential conditions are Consistent with Local Needs.

PUBLIC HEARING PROCESS

Chapter 40B sets a faster pace for reviewing applications than Chapter 40A. Under 40B, the Board has 30 days (rather than 65) from the day an application is complete to open a public hearing. Once

¹ Chapter 40B Handbook for Zoning Boards of Appeal, pg. 24

² Chapter 40B Handbook for Zoning Boards of Appeal, pg. 24

the public hearing is opened, the Board then has 180 days to close the hearing and issue a decision, unless extensions are granted by the applicant in writing.

Unlike smaller 40A cases, it is a fairly common practice for Zoning Boards to conduct site visits for Comprehensive Permit cases. Any site visits by the Board need to be advertised as public meetings (or hearings, if testimony will be taken).

CONDITIONS OF APPROVAL

Like any Chapter 40A project, the Board can impose conditions as part of their approval of the Comprehensive Permit. The conditions that the Board can impose are limited to the types of conditions that Boards "typically impose on special permits and other local approvals, e.g., building construction and design, siting, planning and zoning, public health, public safety, and environmental protection."³ However, the conditions cannot require that the applicant come back to the Board for further review and approval at a later time.⁴

MODIFICATIONS / REVISIONS

All modifications or revisions of an approved Comprehensive Permit must be reviewed by the Board. The Board determines whether the change is substantial or insubstantial. If the change is substantial, the Board must hold a new public hearing to discuss and decide on it. If the change is insubstantial, it can be approved without a new public hearing.

APPEALS

Appeals of Comprehensive Permit decisions are heard by the Massachusetts Housing Appeals Committee (HAC). The HAC will evaluate whether a Board's decision was Consistent with Local Needs. If the decision is found to be Consistent with Local Needs, it will be upheld. Otherwise, the HAC can overturn or amend the Board's decision to allow the project to proceed. If the project is denied, the HAC can approve it with whatever conditions the HAC believes are necessary. If the project is approved with conditions, the HAC can remove any conditions that make the project Uneconomic.

ADDITIONAL RESOURCES

In March 2017, the Massachusetts Housing Partnership published a guide to the 40B process for Zoning Boards. The link is here:

<https://www.mass.gov/files/documents/2017/10/18/mhphandbookzoning.pdf>

³ Chapter 40B Handbook for Zoning Boards of Appeal, pg. 1

⁴ Chapter 40B Handbook for Zoning Boards of Appeal, pg. 27