

**TOWN OF WESTON - 40B WORK SHOP
FEBRUARY 3, 2015**

I. Statutory and Regulatory Authority

- A. G.L. c.40B, §§20-23 (1969)
- B. 780 CMR 56.00

II. Statutory and Regulatory Minima

A municipality that satisfies any of the following statutory and regulatory exemption thresholds has a right to either deny an application for a comprehensive permit or impose its local regulations on the approval and the decision shall be considered consistent with local needs.

1. Ten Percent Affordable Housing Exemption:
10% of the Town's total housing stock is part of the subsidized housing inventory. G.L. c. 40B, §20; 760 CMR 56.03(3)(a).
2. Existing Development Exemption:
Affordable housing land exceeds 1½ % of total land area, excluding government-owned land.) G.L. c. 40B, §20; 760 CMR 56.03(b).
3. New Construction Exemption:
New affordable housing construction land area in the calendar year exceeds .3 of 1% of the total land area. G.L. c. 40B, §20; 760 CMR 56.03(c).
4. Recent Progress: Affordable units created during the prior 12 months exceed 2% of the Town's total housing stock. 760 CMR 56.03(5).
5. Large Scale Project: The Application is for more than a certain number of units, depending on the Town's affordable housing stock. 760 CMR 56.03(6).
6. Related Application: The Application is related to an application for zoning or subdivision approval on the same land made within the prior 12 months. 760 CMR 56.03(7).
7. Planned Production: Certified progress on approved affordable housing planned production. 760 CMR 56.03(4).

A. General Minimum Land Area Safe Harbor – 760 CMR 56.03(1)(a) and 760 CMR 56.03(3)(b).

Under 760 CMR 56.03(1)(a), any “decision by a Board to deny a Comprehensive Permit, or (if the Statutory Minima defined at 760 CMR 56.03(b) or (c) have been satisfied) grant a Comprehensive Permit with conditions, shall be upheld if one or more of the following grounds has been met as of the date of the Project’s application: (a) the municipality has achieved one or more of the Statutory Minima, in accordance with 760 CMR 56.03.(3),” including under 760 CMR 56.03(3)(b), which provides that the Statutory Minima shall be deemed satisfied if SHI Eligible Housing exists in the municipality “on sites comprising more than 1 1/2 % of the total land area zoned for residential, commercial, or industrial use....”” (Emphasis added.)

The method for making the General Land Area Minimum calculation, as required under 760 CMR 56.03(3)(b), is set forth below as it appears in the regulation:

(b) General Land Area Minimum. For the purposes of calculating whether SHI Eligible Housing exists in the city or town on sites comprising more than 1½% of the total land area zoned for residential, commercial, or industrial use, pursuant to M.G.L. c. 40B, § 20:

1. Total land area shall include all districts in which any residential, commercial, or industrial use is permitted, regardless of how such district is designated by name in the city or town's zoning bylaw;
2. Total land area shall include all unzoned land in which any residential, commercial, or industrial use is permitted;
3. Total land area shall exclude land owned by the United States, the Commonwealth or any political subdivision thereof, the Department of Conservation and Recreation or any state public authority, but it shall include any land owned by a housing authority and containing SHI Eligible Housing;
3. Total land area shall exclude any land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the Department of Environmental Protection pursuant to M.G.L. c. 131, § 40A. No other swamps, marshes, or other wetlands shall be excluded;
4. Total land area shall exclude any water bodies;
5. Total land area shall exclude any flood plain, conservation or open space zone if said zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial or industrial use are completely prohibited.
6. No excluded land area shall be counted more than once under the above criteria.

In addition, only sites of SHI Eligible Housing units inventoried by the Department or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, shall be included toward the 1½% minimum. For such sites, that proportion of the site area shall count that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units).

A qualified professional could reviewed the above calculation requirements closely and all necessary plans and GIS data and calculate the total relevant land area within the Town on which SHI Eligible Housing exists, to determine whether this safe harbor exists.

B. Housing Production Plan Safe Harbor – 760 CMR 56.03(1)(b) and 760 CMR 56.03(4).

Under 760 CMR 56.03(1)(a), any “decision by a Board to deny a Comprehensive Permit, ... shall be upheld if one or more of the following grounds has been met as of the date of the Project’s application:” (b) the Department [i.e., DHCD] has certified the municipality’s compliance with the goals of its approved Housing Production Plan, in accordance with 760 CMR 56.03(4). (Emphasis added.)

The first step toward achieving certification status for an HPP is for a municipality to develop an HPP and obtain **approval** for the HPP from DHCD under 760 CMR 56.03(4)(a)-(e). The next step, however, is for the Town to achieve **certification** of the HPP under 760 CMR 56.03(4)(f).

A municipality may request certification of an approved HPP if the Town has increased its number of SHI Eligible Housing units in an amount equal to or great than the Town’s .50% production goal for that calendar year. Once certification is achieved, that the .50% production goal has been achieved, then the certification shall remain in place for one year from its effective date. If the 1.0% production goal is achieved in a calendar year, then the certification remains in place for two years from its effective date.

III. Application Requirements

A. Project Eligibility Application

Under 760 CMR 56.04(2), an application shall include an application for Project Eligibility to the Subsidizing Agency, with a copy to the Chief Executive Officer of the municipality and written notice to the Department, which shall include:

- (a) the name and address of the Applicant;
- (b) the address of the site and site description;
- (c) a locus map identifying the site within a plan of the neighborhood, accompanied by photographs of the surrounding buildings and features that provide an understanding of the physical context of the site;
- (d) a tabulation of proposed buildings with the approximate number, size (number of bedrooms, floor area), and type (ownership or rental) of housing units proposed;
- (e) the name of the housing program under which Project Eligibility is sought;
- (f) relevant details of the particular Project if not mandated by the housing program (including percentage of units for low or moderate income households, income eligibility standards, the duration of restrictions requiring Low or Moderate Income Housing, and the limited dividend status of the Applicant);
- (g) conceptual design drawings of the site plan and exterior elevations of the proposed buildings, along with a summary showing the approximate percentage of the tract to be occupied by buildings, by parking and other paved vehicular areas, and by open areas, the approximate number of parking spaces, and the ratio of parking spaces to housing units;
- (h) a narrative description of the approach to building massing, the relationships to adjacent properties, and the proposed exterior building materials;
- (i) a tabular analysis comparing existing zoning requirements to the Waivers requested for the Project; and
- (j) evidence of control of the site.

B. Application to the ZBA

Under 760 CMR 56.05(2), the submission shall include the following items, in order to be considered a complete application:

Elements of Submission, Filing Fees. The Applicant shall submit to the Board an application and a complete description of the proposed Project. Normally the items listed below will constitute a complete description. Failure to submit a particular item shall not necessarily invalidate an application. The Board shall not require submissions for a Comprehensive Permit that exceed those required by the rules and procedures of Local Boards for review under their respective jurisdictions.

- (a) preliminary site development plans showing the locations and outlines of proposed buildings; the proposed locations, general dimensions and materials for streets, drives, parking areas, walks and paved areas; and proposed landscaping improvements and open areas within the site. An Applicant proposing to construct or rehabilitate four or fewer units may submit a sketch of the matters in 760 CMR 56.05(2)(a) and (c) which need not have an architect's signature. All Projects of five or more units must have site development plans prepared by a registered architect or engineer;
- (b) a report on existing site conditions and a summary of conditions in the surrounding areas, showing the location and nature of existing buildings, existing street elevations, traffic patterns and character of open areas, if any, in the neighborhood. This submission may be combined with that required in 760 CMR 56.05(2)(a);
- (c) preliminary, scaled, architectural drawings. For each building the drawings shall be prepared by a registered architect, and shall include typical floor plans, typical elevations, and sections, and shall identify construction type and exterior finishes;
- (d) a tabulation of proposed buildings by type, size (number of bedrooms, floor area) and ground coverage, and a summary showing the percentage of the tract to be occupied by buildings, by parking and other paved vehicular areas, and by open areas;
- (e) where a subdivision of land is involved, a preliminary subdivision plan;
- (f) a preliminary utilities plan showing the proposed location and types of sewage, drainage, and water facilities, including hydrants;
- (g) the Project Eligibility letter, showing that the Applicant fulfills the requirements of 760 CMR 56.04(1);
- (h) a list of requested Waivers.

The Board may require the payment of a reasonable filing fee with the application, if consistent with subdivision, cluster zoning, and other fees reasonably assessed by the municipality for costs designed to defray the direct costs of processing applications, and taking into consideration the statutory goal of M.G.L. c.40B, §§ 20 through 23 to encourage affordable housing development.

IV. Conduct of the Public Hearing

The comprehensive permit regulations require the Board to distribute a notice of the Application and the list of Waivers to all Local Boards and may provide a full copy of the Application when the Board deems that appropriate. 760 CMR 56.05(3).

The Board is allowed to invite participation at the Public Hearing by any Local Board the Board deems would necessary or helpful to the process. 760 CMR 56.05(3). The Board may seek general input and/or specific input regarding conditions it may want to impose.

A. Regulatory Deadlines

There are a number of regulatory deadlines that the Board should be aware of, unless the develop grants a written extension.

First, the Board shall open the public hearing within 30 days of receipt of a “complete application.” 760 CMR 56.05(3).

Second, the Board must close the public hearing on the Application 180 days after it opens. *Id.* The 180-day period is based on a presumption that the Applicant timely responds to reasonable requests for submission of materials and may be extended by written consent of the Applicant. *Id.*

Third, after the public hearing is closed, the Board must make its decision, by majority vote, within 40 days.

Fourth, once the decision is voted, the Board has 14 days to file the decision with the Town Clerk and forward a copy to the Applicant and to the Department of Housing and Community Development. 760 CMR 56.05(8)(a).

B. Outside Consultants

The Board may employ outside consultants to assist in reviewing the Application. In addition, the Board may request the Applicant to supplement the Application with studies or reports in response to health, safety, environmental, design, open space, planning or other local concerns.

In particular, the comprehensive permit regulations limit the Board’s authority to review the project *pro forma* only after meeting the following preconditions: 1) a consultant review has identified issues with the Application; 2) the Applicant had an opportunity to

modify the original proposal; 3) the Board proposed conditions to mitigate the project's impacts and considered requested waivers; and 4) the Applicant indicated that it did not agree with the Board's conditions and waiver denials because they would render the project uneconomic. Only then may the Board require the *pro forma* and engage a consultant to analyze the Applicant's claim that the Board's conditions and/or waiver denials render the project uneconomic. 760 CMR 56.05(6)(a) and (b).

If, after receiving an application, the Board determines that in order to review that application it requires technical advice in such areas as civil engineering, transportation, environmental resources, design review of buildings and site, and (in accordance with 760 CMR 56.05(6)) review of financial statements that the necessary review services are unavailable from municipal employees, it may employ outside consultants.

The regulations require that, whenever possible the Board shall work cooperatively with the Applicant to identify appropriate consultants and scopes of work and to negotiate payment of part or all of consultant fees by the Applicant. Alternatively, the Board may, by majority vote, require that the Applicant pay a reasonable review fee in accordance with 760 CMR 56.05(b) for the employment of outside consultants chosen by the Board alone.

The Board should not impose unreasonable or unnecessary time or cost burdens on an Applicant. Legal fees for general representation of the Board or other Local Boards shall not be imposed on the Applicant. 760 CMR 56.05(5)(a).

A review fee may be imposed only if:

1. the work of the consultant consists of review of studies prepared on behalf of the Applicant, and not of independent studies on behalf of the Board;
2. the work is in connection with the Applicant's specific Project;
3. all written results and reports are made part of the record before the Board. A review fee may only be imposed in compliance with applicable law and the Board's rules. All fees assessed pursuant to 760 CMR 56.05(5)(b) shall be reasonable in light of:
 - i. the complexity of the proposed Project as a whole;
 - ii. the complexity of particular technical issues;
 - iii. the number of housing units proposed;
 - iv. the size and character of the site;
 - v. the projected construction costs;
 - vi. fees charged for similar consultants and scopes of work in the area.

As a general rule, the Board may not assess any fee greater than the amount which might be appropriated from town or city funds to review a project of similar type and scale in the town or city.

The Board's rules shall set out procedures for inviting proposals by qualified outside consultants, and for the deposit of review fees in a special municipal account. The Board's rules may provide that if the Applicant fails to pay the review fee within the stated time period, the Board may deny the Comprehensive Permit. Any unspent excess in the account, including accrued interest, shall be reimbursed to the Applicant upon the issuance of the Board's decision or withdrawal of the application.

An administrative appeal from the selection of the outside consultant may be lodged within 20 days of the consultant's selection, with the city council or town board of selectmen. The grounds for such an appeal shall be limited to claims that the consultant selected has a conflict of interest or does not possess the minimum, required qualifications. The minimum qualifications shall consist either of an educational degree in or related to the field at issue or three or more years of practice in the field at issue or a related field. The required time limits for action upon an Application by the Board shall be extended by the duration of the administrative appeal. In the event that no decision on the appeal is made by the city council or the town board of selectmen within one month following the filing of the appeal, the selection made by the Board shall stand.

C. Waivers from Local Requirements and Regulations.

The Applicant may request Waivers, as listed in its application or as may subsequently arise during the hearing, and the Board shall grant such Waivers as are Consistent with Local Needs and are required to permit the construction and operation of the Project.

Zoning waivers are required solely from the "as-of-right" requirements of the zoning district where the project site is located; there shall be no requirement to obtain waivers from the special permit requirements of the district.

If a Project does not request a subdivision approval, waivers from subdivision requirements are not required (although a Board may look to subdivision standards, such as requirements for road construction, as a basis for required project conditions, in which case the Applicant can seek Waivers from such requirements).

D. Decision Standards

Whether the Board may approve the Application with conditions or deny the Application is governed in the first instance by whether or not the Town has met the statutory minimum of low and moderate income housing or satisfied other comprehensive permit "safe harbors", as set forth in set forth in G.L. c. 40B, §20 and 760 CMR 56.03.

Unless there is evidence that the Town has achieved one or more of the other comprehensive permit safe harbors, then there is a presumption that a substantial Housing Need outweighs Local Concerns. 760 CMR 56.07(3)(a).

The effect of the presumption, that a substantial Housing Need (i.e., that regional affordable housing need when considered with the number of Low Income Persons in the municipality affected) exists that outweighs Local Concerns may be rebutted; but only if it can be proven that there is a valid health, safety, environmental, design, open space or other Local Concern that outweighs the regional affordable housing need (760 CMR 56.07(2)(b)(2) or unless existing municipal services or infrastructure is inadequate and the installation of adequate services is not technically or financially feasible (760 CMR 56.07(2)(b)(4)) and financial feasibility may be considered only where there is evidence of unusual topographic, environmental or other physical circumstances that make installation of the needed service prohibitively costly.

However, the Board may approve the Application with conditions, so long as the conditions imposed do not render the project uneconomic and are consistent with local needs or if the Applicant proves to the Board (with a peer reviewed pro forma) that the condition or conditions would render the project uneconomic, the Board still may impose the conditions but only if the conditions imposed are required to serve a Local Concern that outweighs the regional need for affordable housing. 760 CMR 56.07(2)(b)(3).

Please note that applications often present complex issues that require in-depth factual analysis, with the assistance of technical and legal consultants.