

# BERKSHIRE PLANNING TOOLS



*One in a series of “toolbox” items to accompany the Regional Plan for the Berkshires*

**June 2002**

## COMPREHENSIVE PERMITS (CHAPTER 40B)

The Comprehensive Permit Law (commonly known as Chapter 40B) is a potent, and often controversial, tool for affordable housing proponents and developers. This law, sometimes referred to as the Anti-Snob Law, has been used in 172 communities across the Commonwealth to produce over 25,000 housing units since adopted in 1969. So far, the overwhelming majority of units completed through the Comprehensive Permit process have been located in the eastern part of the State and primarily in urban and suburban areas. In fact, of the 217 Comprehensive Permit applications that were filed between March 2001 and May 2002, only one application was filed in Berkshire County. What is important for the future is that compared to all other regions of the state our region has the greatest number of towns without any qualifying 40B housing units. This lack of subsidized housing coupled with the fact that our region has some of the most plentiful expanses of undeveloped (and in many cases unprotected) land at a relatively reasonable cost, leads to the notion that it is probably only a matter of time until Comprehensive Permit applications become more commonplace in Berkshire County. This toolbox item is designed to assist Towns in better understanding the fundamental elements of a Comprehensive Permit and how a Town can effectively prepare for and respond to a Comprehensive Permit application.

### **Intent of the Comprehensive Permit Law**

The official purpose of the Comprehensive Permit Law is to increase the supply and

improve the regional distribution of Low and Moderate Income (LMI) housing by allowing for a limited suspension of existing local regulations that are inconsistent with the construction of such housing. In simplest terms, the Law is intended to provide affordable housing proponents with an effective statutory tool to challenge local permit granting authorities that impose barriers to affordable housing development. For the most part, housing advocates and the State’s Department of Housing and Community Development (DHCD) view the Law as an unqualified success. As mentioned above, tens of thousands of affordable housing units have been developed as a result of the Law. In spite of the Law’s apparent effectiveness in creating new affordable units, many local governments view the Law as a direct challenge to the home-rule doctrine which vests the authority to regulate development at the municipal level. Supporters and critics of the Law also point to isolated cases of unscrupulous developers manipulating the Law to undermine local authorities in an effort to construct large, unwanted housing developments that are geared more toward market rate units than toward affordable housing.

### **Who Can Apply for a Comprehensive Permit?**

There are three types of organizations that are eligible to apply for a Comprehensive Permit; public agencies, not-for-profit agencies, and limited dividend companies. The applying agency must also have a letter of eligibility from

a state or federal housing program before a permit application can be submitted to the local permit granting authority. Data collected from 1970 to 1999 indicates the majority of 40B housing development has been built by limited dividend companies (60%), 28% of the developments were built by public housing authorities and 12% were constructed by not-for-profits.

### **How the Comprehensive Permit Process Works**

The Comprehensive Permit process works by providing eligible affordable housing developers with two key advantages in the local permitting process. These advantages are a streamlined permitting process with a single point of contact, and the right to appeal decisions of the local permit granting authority to the State's Housing Appeals Committee (HAC).

#### *Streamlined Permitting*

While the typical local permitting process requires numerous approvals from various boards, commissions and agencies (such as the Planning Board, Conservation Commission, Building Inspector, Board of Health etc...) for housing development, the Comprehensive Permit provides for "one-stop" permitting. The Zoning Board of Appeals (ZBA) is the primary interface and is vested with ultimate local authority in the Comprehensive Permit Process. It is the responsibility of the ZBA to circulate and solicit any comments or recommendations from other appropriate local boards and/or commissions. The ZBA is required to open a public hearing within 30 days of receipt of an application for a Comprehensive Permit. The hearing is typically continued for a period of several months to allow all potential concerns to be explored and addressed. Once the public hearing has been closed, the ZBA must issue a decision within 40 days. The ZBA has the option to grant the permit, grant the permit with conditions, or deny the permit. Data indicates that the vast majority of comprehensive permits are negotiated at the

local level, i.e. between 1970 and 1999 - 71% of 40B permit applications have been granted by the ZBA. It should be noted that in most cases (53% of all cases) permits were granted with conditions.

#### *Right of Appeal to State*

Historically, about 29 percent of 40B applications are denied by the local permit granting authority. The conventional permit process (for example a building permit or a special permit) typically allows for an appeal to be made to another *local* authority. However, if a 40B permit is denied, or granted with conditions that would make the development too costly to build, the proponent can appeal the ZBA decision to a State appointed body, the Housing Appeals Committee (HAC).

The guiding principle in determining appeals is whether the community's need for LMI housing outweighs other local concerns such as health, safety, environment, design, open space and other concerns. The Comprehensive Permit Law is very clear that if less than 10% of a municipality's housing stock is publicly subsidized, then there is a substantial need for affordable housing that outweighs other local concerns. This principle has been upheld by the State Courts ( Hanover Board of Appeals vs. HAC, 1973).

In essence, jurisdictions that have less than 10% subsidized housing and deny a 40B permit are likely to be overruled on appeal. In the last decade 63% of the decisions that were appealed to the HAC have resulted in favorable outcomes for the housing proponent ( i.e. Comprehensive Permit was ultimately granted, either with or without conditions).

### **How is Affordable Housing Defined by Chapter 40B?**

For a municipality's housing units to qualify toward the 10 percent goal there are four tests that must be met. These tests are:

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- The units must be part of a “subsidized” development that was built or is operated by a public agency, non-profit, or a limited dividend company.
- At least 25% of the units in the development must be income restricted to families with income of less than 80% of the median area income and have rents or sales prices restricted to affordable levels. These restrictions must run for 30 years or longer for new construction and 15 years or longer for rehabilitation projects.
- There must be a regulatory agreement between the developer and the subsidizing agency providing for monitoring and enforcement of restrictions.
- The development must have an Affirmative Action Marketing Plan approved by the subsidizing agency.

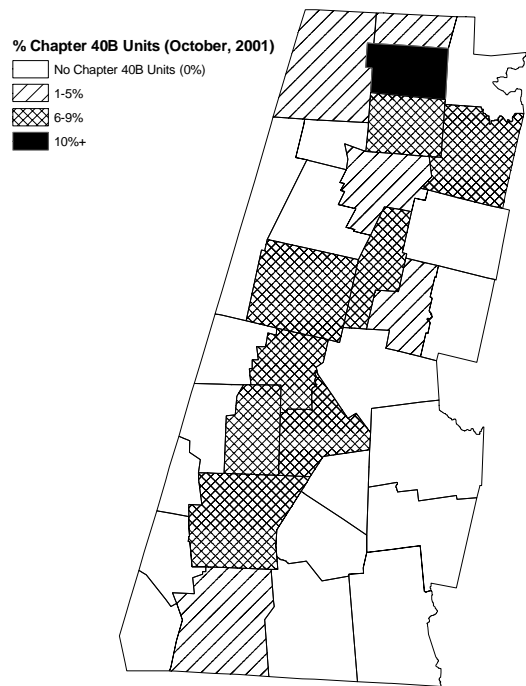
If a housing unit, or development does not meet all four tests, it does not qualify as a 40B unit and cannot be counted toward the 10 percent goal. Even though a town may have a number of housing units that are “affordable” in terms of local market rents, for example manufactured housing, this type of housing does not meet the tests described above and cannot be counted toward the goal. Other types of housing such as military housing, shelters, and institutional housing such as prisons, are also not considered affordable according to 40B. Even some housing subsidy programs such as Section 8 rental vouchers do not qualify because they do not meet all of the four tests.

### Status of 40B in Berkshire County

Of the 32 municipalities in Berkshire County, only the City of North Adams has successfully achieved and, in fact exceeded, the 10 percent housing goal of 40B. This does not mean that a developer could not submit a Comprehensive Permit application in North Adams, but it does mean that any decisions by the local ZBA to

deny a 40B application would be unlikely to be overruled if appealed to the HAC. In contrast to North Adams, there are 18 towns in the County that do not have a single 40B qualifying unit, and another 3 towns that have less than 2% qualifying units. The remaining towns in the County have between 3 and 9% percent of the housing units that qualify under 40B. As a region, 6 percent of the entire year round housing stock is subsidized and qualifies as 40B units, while the remaining 94 percent of the housing units are market units ( see chart found in “What is Affordable Housing” toolbox item). The data

### Status of Chapter 40B in Berkshire County



for this section was excerpted from the MA Department of Housing and Community Development (DHCD) Chapter 40B Housing Inventory, April 2002.

### Why is 40B important to my Community?

As mentioned earlier, to this point very few Comprehensive Permits have been applied for in Berkshire County. This has led to a common misperception, particularly in small rural communities, that 40B applications are not applicable in our region because there is no

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pressing need for affordable housing in small, sparsely populated areas. In fact, recent data and a sub-regional study have shown definitively that there is a strong need for affordable housing in communities of every size and demographic composition.

Perhaps more important is the fact that in many of the sparsely populated communities there are large tracts of undeveloped land that may be acquired relatively inexpensively (relative to the eastern part of the State and neighboring areas of New York). This provides housing developers, particularly from outside the area where land costs are far more expensive, with an attractive incentive. While some small towns in the region may have some land-use protections in place, the Comprehensive Permit provides a determined housing developer with a powerful tool to bypass, or erode, many local regulations. A typical question is, what does a housing developer have to gain economically by constructing affordable housing, even if the land can be purchased relatively cheaply and a permit is likely to be granted? The answer is that the Comprehensive Permit only requires that 25 percent of a housing development be affordable, i.e. the remaining 75 percent can be sold or rented at market rates. So, a developer applying for a Comprehensive Permit could propose a development of 100 units and only 25 would have to be affordable and the remaining 75 could be sold for full-market value.

### **How does a Town prepare for a Comprehensive Permit Application?**

The two best methods of preparing your community to handle a comprehensive permit application are 1) have the ZBA adopt local regulations for handling comprehensive permit applications and; 2) engage in comprehensive planning efforts to encourage and create

affordable housing. An appendix to this toolbox item includes generic model regulations that can be reviewed and customized for use by your local ZBA. There is a second appendix which is legal memorandum prepared by Jason R. Talerman of the law firm of Kopelman and Paige, P.C. which provides a step-by-step outline of what communities can do to prepare for a Comprehensive Permit application and what actions to take once an application has been filed. Communities that are handling a Comprehensive Permit may also be eligible for funding assistance of up to \$10,000 from the Massachusetts Housing Partnership (MHP) to assist the local permit granting authority to review and evaluate the technical aspects of the Permit (see page 6 of the attached legal memorandum for details).

### **Resources**

Citizen's Housing and Planning Association (CHAPA) – [www.chapa.org](http://www.chapa.org)

Housing Appeals Committee  
100 Cambridge Street, Room 1801  
Boston MA, 02202

*Housing for Everyone; Housing Needs, Barriers and Opportunities in South-Central Towns of Berkshire County.* Southern Berkshire Housing Coalition, Community Development Corporation of South Berkshire, Inc. and Community Opportunities Group. May 2002

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Mass. Department of Housing and Community Development (DHCD) – [www.mass.gov/dhcd](http://www.mass.gov/dhcd)

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This publication is one in a series of "toolbox" items to support the Regional Plan for the Berkshires. If you would like to receive additional copies of this or other toolbox items, please contact the Berkshire Regional Planning Commission, 1 Fenn St., Pittsfield, MA 01201 or call (413) 442-1521. Copies of the toolbox items are also available on the web. Visit [www.berkshireplanning.org](http://www.berkshireplanning.org)

**COMPREHENSIVE PERMIT LAW (CHAPTER 40B)  
MODEL REGULATION  
June 2002**

**COMMENTS**

**1:00 Purpose and Context**

These Rules establish procedures for applications to the zoning board of appeals for comprehensive permits granted under the Anti-Snob Zoning Act (Chapter 774 of the Acts of 1969), M.G.L. c. 40B, §§ 20-23. They are required by M.G.L. c. 40B, § 21 and by 760 CMR 31.02. The purpose of that Act and these Rules is to facilitate the development of affordable housing in Massachusetts. Further explanation of the background and purpose is provided in the regulations of the Housing Appeals Committee, 760 CMR 30.01.

These Rules alone are not sufficient to describe comprehensive permit procedures before the zoning board of appeals. They must be read in conjunction with and implemented in a manner consistent with the complete regulations of the Housing Appeals Committee, 760 CMR 30.00 and 31.00 and with the Guidelines for Local Review of Comprehensive Permits, published periodically by the Department of Housing and Community Development. In addition, the Board's general Rules for conduct of hearings under M.G.L. c. 40A apply to comprehensive permit applications. In case of inconsistency or conflict between those general Rules for conduct and these Rules, these Rules shall govern.

**2.00: Definitions**

(a) *Board* means the zoning board of appeals established under M.G.L. c. 40A, § 12.

(b) *Local board* means any local board or official, including, but not limited to any board of survey; board of health; planning board; conservation commission; historical commission; water, sewer, or other commission or district; fire, police, traffic, or other department; building inspector or similar official or board; board of selectmen. All boards, regardless of their geographical jurisdiction or their source of authority (that is, including boards created by special acts of the legislature or by other legislative action) shall be deemed local boards if they perform functions usually performed by locally created boards.

**3.00: Filing, Time Limits, and Notice**

3.01: The application for a comprehensive permit shall consist of: (see note 1)

1. These requirements are restated from 760 CMR 31.02(2).

(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 sections 3.01(a) and 3.01(c), below, which need not have an architect's signature. All structures of five or more units must have site development plans signed by a registered architect;

(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 section 3.01(a), above;

(c) preliminary, scaled, architectural drawings. For each building the drawings shall be signed by a registered architect, and shall include typical floor plans, typical elevations, and sections, and shall identify construction type and exterior finish;

(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) documents showing that the applicant fulfills the jurisdictional requirements of 760 CMR 31.01, that is,

(i) the applicant shall be a public agency, a non-profit organization, or a limited dividend organization,

(ii) the project shall be fundable by a subsidizing agency under a low and moderate income housing subsidy program (see note 2), and

(iii) the applicant shall control the site;

(h) a list of requested exceptions to local requirements and regulations, including local codes, ordinances, by-laws or regulations.

3.02: The application shall be accompanied by a filing fee based upon the number of proposed housing units of:

2. Local Initiative proposals eligible for comprehensive permits pursuant to 760 CMR 45.04 also satisfy this jurisdictional requirement.

(a) for Limited Dividend Organizations - \$9 per unit

(b) for Non-Profit Organizations - \$3 per unit

(c) for Public Agencies and Local - \$0

There shall be no filing fee for any project proposed as a Local Initiative pursuant to 760 CMR 45.00.

3.03: Within seven days of filing of the application, the Board shall notify each local official of the application by sending such official a copy of the list required by § 3.01(h), above. Based upon that list, it shall also, within the same seven days, invite the participation of each local official who has a substantial interest in the application by providing such official with a copy of the entire application. (see note 3) In order to allow review by local officials, the Applicant shall provide the Town Clerk with \_\_\_ copies of the complete application so that the following boards, officials and departments may review the same: *list those boards here*; and one unbound copy for copying purposes. Additionally 11"x17" copies of all plans (with matchlines) shall be made available to the Town Clerk for copying purposes

#### 4.00: Review Fees

4.01: When reviewing an application for, or when conducting inspections in relation to, a comprehensive permit application, the Board may determine that the assistance of outside consultants is warranted due to the size, scale or complexity of a proposed project, because of a project's potential impacts, or because the Town lacks the necessary expertise to perform the work related to the comprehensive permit application. The Board may require that applicants pay a "project review fee" consisting of the reasonable costs incurred by the Board for the employment of outside consultants engaged by the Board to assist in the review of a proposed project.

4.02: In hiring outside consultants, the Board may engage engineers, planners, lawyers, urban designers or other appropriate professionals who can assist the Board in analyzing a project to ensure compliance with all relevant laws, bylaws, and regulations. Such assistance may include, but not be limited to, analyzing an application, monitoring or inspecting a project or site for compliance with the Board's decision or regulations, or inspecting a project during construction or implementation.

4.03: Funds received by the Board pursuant to this section shall be deposited with the municipal treasurer who shall establish a special account for this purpose. Expenditures from this special account may be made at the direction of the Board without further appropriation. Expenditures from this special account shall be made only for services rendered in connection with a specific project or projects for which a

3. The provisions of this section are not literally consistent with M.G.L., c. 40B, s. 21, sentence two. This section is a practical and necessary administrative interpretation of the statutory provision by the Housing Appeals

project review fee has been or will be collected from the applicant. Accrued interest may also be spent for this purpose. Failure of an applicant to pay a review fee shall be grounds for denial of the comprehensive permit application.

4.04: At the completion of the Board's review of a project, any excess amount in the account, including interest, attributable to a specific project shall be repaid to the applicant or the applicant's successor in interest. A final report of said account shall be made available to the applicant or applicant's successor in interest. For the purpose of this regulation, any person or entity claiming to be an applicant's successor in interest shall provide the Board with documentation establishing such succession in interest.

4.05: Any applicant may take an administrative appeal from the selection of the outside consultant to the Board of Selectmen. Such appeal must be made in writing and may be taken only within 20 days after the Board has mailed or hand-delivered notice to the applicant of the selection. The grounds for such an appeal shall be limited to claims that the consultant selected has a conflict of interest or does not process 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 limit for action upon an application by the Board shall be extended by the duration of the administrative appeal. In the event that no decision is made by the Board of Selectmen within one month following the filing of the appeal, the selection made by the Board shall stand.

#### **5.00: Public Hearing and Decision**

5.01: The Board shall hold a public hearing on the application within thirty days of its receipt. It may request the appearance at the hearing of such representatives of local officials as it considers necessary or helpful in reviewing the application. In making its decision, the Board shall take into consideration the recommendations of local officials.

5.02: The Board shall render a decision, based on a majority vote of the Board, within forty days after termination of the public hearing, unless such time period is extended by written agreement of the Board and the applicant. The hearing is deemed terminated when all public testimony has been received and all information requested by the Board has been received.

5.03: The Board may dispose of the application in the following manner: (a) approve a comprehensive permit on the terms and conditions set forth in the application,

(b) deny a comprehensive permit as not consistent with local needs,  
or

(c) approve a comprehensive permit with conditions, including but not limited to height, site plan, size, shape or building materials, that do not render the construction or operation of such housing uneconomic.

**6.00: Appeals**

6.01: If the Board approves the comprehensive permit, any person aggrieved may appeal within the time period and to the court provided in M.G.L. c. 40A, § 17.

6.02: If the Board denies the comprehensive permit or approves the permit with conditions or requirements considered by the applicant to be unacceptable, the applicant may appeal to the Housing Appeals Committee as provided in M.G.L. c. 40B, § 22.

*This model regulation was adapted from information provided by Kopelman and Paige P.C., Boston, MA. For additional information on this model regulation, please contact the Berkshire Regional Planning Commission.*