The Processes and Standards for 40B Housing

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Many residents now understand that Chapter 40B allows the state to issue special permits that override Town zoning for housing projects where 25% of the units built are "affordable" (meaning rented or sold to those who earn 80% of the Area Median Income). What residents may not understand is the process by which Chapter 40B projects get approved and why, despite its efforts, Plymouth has not been able to prevent such housing.

The Approval Process

The 40B process begins with a developer filing an application for preliminary approval (normally a Project Eligibility or Site Approval letter) showing that its project generally meets the requirements of a state or federal subsidy program. This does not require final designs or complete details but only sufficient detail to satisfy the approving authority that the project appears to fall within the general parameters of its program. Once preliminary approval is granted, an application containing the eligibility letter and basic development plans is filed with the local zoning board of appeals seeking approval of a permit to construct the proposed building(s). If approved by the zoning board of appeals (becoming a so-called "friendly 40B" project), the developer files confirmation with the approving authority and proceeds as with any other project. But if rejected, the developer may appeal the decision to a state body called the Housing Appeals Committee (HAC).

The HAC consists of five members; three appointed by the Massachusetts Secretary of Communities and Development (one of whom must be an employee of Department of Housing and Community Development), and two appointed by the Governor (a city councilor and a selectman). The HAC that reviews project appeals and decides whether the need for affordable housing where the project is being proposed overrides local planning and zoning concerns. If so, it issues a special permit which supersedes the local zoning board of appeals and directs the issuance of a building permit. A decision by the HAC may then be removed by either side (or an interested party as defined by law) to the Superior Court and appealed thereafter.

The Applicable Standards for Opposing a 40B Project

It is important to note that Plymouth has opposed every 40B appeal to the HAC. And in each instance, Plymouth's position has been rejected. That is because under the applicable legal standards (discussed below) Plymouth cannot establish that its zoning and community needs supersede the need for affordable housing. In this Plymouth is not alone:

Since the HAC established new evidentiary standards (upheld by the courts in 2016), no 40B application approved by the HAC in a municipality with less than 10% affordable housing has been overturned on the grounds that other community interests take precedence.

A. The Standards Applied by the HAC

The standard that is used by the HAC (and upheld by the courts) is that ***if less than ten percent of a municipality's total housing units are subsidized low- and moderate-income housing units, there is a legal presumption that the need for such housing outweighs other local concerns***. *See* 760 CMR 31.07(1)(e); Board of Appeals of Hanover v. H.A.C., 363 Mass. 339, 367, 294 N.E.2d 393, 413 (1973). Being close to 10% is not enough to overcome this presumption.[1]

Adding to the difficulty in opposing such housing projects is the standard of proof mandated by the HAC in order to even present a challenge. As described in Eisai, Inc. v. Housing Appeals Committee, 89 Mass.App.Ct. 604 (2016), the HAC applies a four-factor test which requires that project opponents demonstrate:

1. The extent to which the proposed housing is in conflict with or undermines a municipality's specifically stated planning interest;

2. The importance of that specific planning interest, under the facts presented, measured, to the extent possible, in quantitative terms;

3. The quality and effectiveness of the municipality's overall master plan (or other planning documents or efforts) and the extent to which it has been implemented, in which the housing element must not only promote affordable housing but to be given significant weight; and

4. The amount [and type] of affordable housing that has resulted from affordable housing planning.

In plain language, this means that those opposing 40B projects have to provide specific, quantifiable data to the HAC showing not only that the proposal is overly detrimental to other planning efforts but that absent the proposal the needed affordable housing will be built through existing processes in a timely manner.[2]

B. The Standards Applied by the Courts

The remedy for objecting to a decision of the HAC is to seek judicial review. However, the standard of review applied by the courts makes overturning an HAC decision next to impossible.

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[1] In 2016, the Town of Andover rejected a proposal to build a 248-rental-unit project as being inconsistent with decades of planning and economic development strategies. At the time Andover had reached a 9.3% affordable housing level. The HAC reversed that decision and ordered Andover to issue the Comprehensive Permit. That decision was upheld by both the Superior Court and Appeals Court, noting that absent 10% affordable housing the immediate affordable housing need superseded all other planning considerations.

[2] Notably, both the Plymouth Community Master Plan and Housing Production Plan state that Plymouth seeks to achieve at least 10% affordable housing.

First, the court's review is limited to determining whether the HAC's decision was arbitrary, capricious, contrary to the law, and whether the rights of any party have been prejudiced. *See* Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC, 464 Mass. 166 , 172 (2013), *citing* G. L. c. 30A, § 14(7). That means a court reviewing a 40B permit approval may **not** substitute their judgment for that of the HAC, even if it disagrees with the decision, or thinks it is ill advised.

Second, the only substantive ground[3] on which a decision of the HAC may be overturned is if the approved project poses a specific threat to health or safety. Challenges to projects based on general concerns, such as impeding economic development, loss of open space, excess traffic, or burden on facilities and services, have been summarily rejected by the courts.

Third, any claim of a health or safety threat must be supported by "substantial evidence". The courts have confirmed that this is intended to place a "heavy burden borne by a local board that denies a comprehensive permit application' to prove 'a specific health or safety concern of sufficient gravity to outweigh the regional housing need.'" Zoning Bd. of Appeals of Holliston v. Housing Appeals Comm., 80 Mass. App. Ct. 406 , 414-415 (2011) (citation omitted). And once again, in considering these claims, a court must "give 'due weight to the experience, technical competence, and specialized knowledge of the [HAC], as well as to the discretionary authority conferred upon it,' G. L. c. 30A, § 14(7), and we 'apply all rational presumptions in favor of the validity of the administrative action.'" Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm., 464 Mass. 38 , 43 (2013), *quoting* Middleborough v. Housing Appeals Comm., 449 Mass. 514 , 524 (2007). The courts "may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm., 385 Mass. 651 , 657 (1982).

Expenses and Damages Awards

Given the legal presumptions in favor of proposed 40B projects, the evidentiary standard to even present an opposition, and the level of deference given to the HAC, absent an extreme circumstance the hurdles to opposing a 40B project are essentially insurmountable. Accordingly, those seeking to prevent them tried a new tactic – delay. The thought was that if a developer was forced to incur legal expense and wait to be able to commence it would dissuade them from ultimately proceeding.

To prevent such actions, as part of M.G.L. c. 40A, the Zoning Act, the state included provisions to discourage challenges to 40B projects. Under this statute, adopted in 2020, courts may award damages and expenses (such as court costs, discovery costs, expert witness costs, and legal fees) to a developer defending a legal challenge to a 40B approval. Such awards may be granted if the court finds specific harm to the developer (such as increased expenses or carrying costs) **or intangible to the public interest**.

[3] As opposed to legal grounds, such as a failure to follow procedure.

Additionally, under M.G.L. c. 40A, sec. 17, courts are allowed to require surety or cash bonds of up to $50,000 from those challenging the approval of 40B special permits if there is a concern the appealing party does not have the assets to pay a costs/damages award.

Conclusion

There is no question that Plymouth needs affordable housing, and that the state's one-size-fits-all 40B solution isn't the answer. Plymouth doesn't need housing that's merely called affordable, it needs housing that actually is affordable. But as Plymouth has not yet achieved a 10% affordable housing level (it is currently at 7.2%), it simply cannot successfully challenge a proposed 40B project on the grounds that it would be generally harmful to the community. So, rather than engage in expensive tactics that have no chance of success, let's work on creating an environment that encourages the type of housing that best suits our community.

**** This analysis has been prepared as a general overview for informational purposes. It may not be used as legal guidance by any person(s) for any specific circumstance. This analysis represents only the views of the author in their individual capacity, and not as a representative or official of the Town of Plymouth.***