



Chapter 40B Permitting and Litigation

Housing Affordability Initiative

MIT Center for Real Estate

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Executive Summary

This study investigates the “life histories” of Chapter 40B comprehensive permit applications made to towns between 1999 and 2005 in the Boston, Massachusetts metro area, with a special focus on litigation that accompanies this process. While nearly 90% of the applications to Zoning Boards of Appeal (ZBAs) in our sample result in a comprehensive permit, only 55% of the projects had obtained building permits by the first quarter of 2007. Overall, developers appeal 26% of all applications to the Housing Appeals Committee (HAC), the administrative court established by 40B legislation to hear developer appeals of ZBA decisions. At least 12% of all applications are involved in litigation elsewhere in the Massachusetts legal system. Nevertheless, many comprehensive permits are negotiated in a timely manner between developers and towns. For over 200 projects that are approved by a Zoning Board of Appeals (ZBA) and not challenged by a developer at the HAC, the average hearing time before the ZBA is just 7 months. Even for this subset of projects, however, only 69% have started construction. We conclude that a variety of other factors may be holding up these projects.

While Chapter 40B was probably never intended to be the only way to permit multi-family housing development in mainly suburban locations, most participants in the market agree that this is the primary manner by which this is achieved. The 1969 law allows developers to override local zoning if they agree to set sell or rent 25% of the housing units at prices that are affordable to moderate income households and if the town’s subsidized housing count represents less than 10% of the town’s total housing stock. Because the affordable units cost more to build than they will return in either price or rent, additional market rate units awarded to projects provide the implicit subsidy required to engage private (and sometimes public and non-profit) developers in the production of housing for moderate income households (those households

making between 50 and 80% of Area Median Income). How many units of market rate housing are required to subsidize the affordable units is a non-trivial issue that often becomes a point of contention, among other project characteristics, between towns and developers. Parties besides the town ZBAs and developers may also contest the development project by requesting to intervene in HAC cases or by initiating litigation in other courts.

For all of these reasons, it is important to understand the 40B comprehensive permitting process, and little has been done to date to capture just how this game is being played between developers, towns and other parties like abutters and conservancy groups. This being the case, we conducted a thorough step-by-step inspection of the 40B permitting process for a large sample of projects in the Boston metro area.

To do so, we surveyed 145 towns in the Boston, Massachusetts metropolitan area Boston and followed up with a major effort over 9 months to both confirm and collect additional data at town offices. This process yielded data for 113 towns, 95 of which had at least one 40B application during the period 1999-2005. For 17 towns responding to the survey and reporting zero applications during this time period, 7 appear to exceed the 10% threshold that exempts them from Chapter 40B for the sample period. Of the towns from which no data was acquired, only one (Lowell) is over the 10% threshold for more than 2 years of the 7 year study period.¹

The research focuses on several points in the permitting process. It begins with the developer's application to the local Zoning Board of Appeals (ZBA), or in the case of a Local Initiative Program (LIP) application, to the town's board of selectmen. In particular, we observe 369 total applications made to 96 towns. Following the application, we document the ZBA's decision. Most (78%) of the applications are approved in some form, and just 4% of applications withdraw before a ZBA decision.² Another 6% were in hearings before the ZBA or were pending a ZBA decision at the time of data collection. To be sure, approved comprehensive permits may not match certain key aspects of the developer's initial proposal. The number of units, either market

¹ One of the non-respondents crossed the 10% threshold in 2003 and 3 others in 2004.

² We do not count applications that are withdrawn, modified and resubmitted to the ZBA in the count of withdrawn cases. In the overall sample, we only count these withdrawn and resubmitted applications one time, that is, as a single application.

rate or affordable, may be changed. Also, permits often come with a list of additional conditions that the applicant must adhere to. However, just 12% of all applications are denied in their entirety.³

The next point of interest in the life history of these projects is whether or not the ZBA decision is appealed by the developer to the Housing Appeals Committee (HAC). If a permit is approved by the ZBA, only 18% of the permits are challenged by developers at the HAC. On the other hand, 90% of all ZBA denials are appealed. While denials imply that no permit was issued by the ZBA, we find that nearly two-thirds of these appeals ultimately result in comprehensive permits. Projects that were first approved by the ZBA and then appealed result in modifications to the ZBA permit over 80% of the time. If appealed, we find that on average the process takes an additional 17 months to resolve the dispute beyond the point in time of the ZBA decision.

We also gather information on whether litigation occurs outside of the HAC, through litigation in either the Land Court, Superior Court, or ultimately, the Supreme Judicial Court of Massachusetts. As mentioned, we found evidence of other forms of litigation in about 12% of the applications. Breaking this number down, evidence of other litigation is found in about 7% of the applications that are not appealed to the HAC, while appealed projects are involved in other litigation nearly 30% of the time. We think that these statistics should be treated as minimum frequencies, since information on litigation was only reported if a town answered the survey or if our researchers were able to locate related documents in town files. While it is quite difficult to identify all 40B litigation in a variety of court systems, we view this topic as ripe for future research.

The final point of focus is on whether or not the developer of a permitted project has pulled a building permit. This serves to document whether or not the project has at least begun construction, although we acknowledge that sometimes projects may fail part way through construction or are otherwise not be completed. As mentioned, only 55% of the applications

³ Of course, the decision to approve versus deny will affect which party bears the burden of proof if the decision is appealed to the HAC. Generally speaking, in the case of an approval, the developer must prove why the ZBA's decision renders the project "uneconomic." In the case of a denial, the ZBA must bear the burden of proof as to why a "valid local concern" exists to deny.

which receive a ZBA decision in the sample result in a building permit by the first quarter of 2007. Even for applications that were approved by the ZBA and unchallenged by the developer at the HAC, the rate of a building permit being pulled is only 69%. Some of these projects are relatively new, having just received ZBA permits in the last 2 years. For others we find evidence of other litigation. Anecdotally, it is suspected that the recent downturn in the housing market may be causing projects to be put on hold as well. In other cases, the permitted land is sold to another developer which may also result in delays.

Overall, we assess that developers and towns are making 40B work. Further research is warranted to investigate the rate of construction of 40B projects and the extent of litigation in other courts besides the HAC. The nature of these cases, who brings them, and the impact of litigation on the timing of projects may provide insight into the ultimate efficacy of the Chapter 40B comprehensive permitting process.