

# Commonwealth of Massachusetts

## Department of Housing and Community Development



## Chapter 40B: “ Safe Harbor Through Production”



*May 4, 2018*



## Overview



**Statutory Minima** - A ZBA decision to deny or condition a comprehensive permit shall be upheld if one of the following has been met as of the date of the project's application:

**Housing Unit Minimum (10% of total housing units) 760 CMR 56.03 (a)**

- SHI-eligible units > 10% of total housing units.

**General Land Area Minimum (1.5% of total land area) 760 CMR 56.03 (b)**

- Sites of SHI-eligible units (pro-rated for partial sites) comprise >1.5% of the total land area zoned for residential or commercial or industrial use.

**Annual Land Area Minimum (0.3% or 10 acres/year) 760 CMR 56.03 (c)**

- Construction start in any calendar year of Low/Moderate Income Housing on sites comprising larger of >0.3% of land area or 10 acres.



## Overview



### **Statutory Minima - Housing Unit Minimum (10% of total housing units) 760 CMR 56.03 (a)**

**65 communities now above 10%.**

**Fastest way to 10% is via the creation of rental housing:**

- If at least 25% of units are to be occupied by Income Eligible Households earning 80% or less than the Area Median Income (AMI), or alternatively, if at least 20% of units are to be occupied by households earning 50% AMI --- all units count for the SHI.
- Only ownership units that are sold to income eligible household (s) at an affordable price (subject to ongoing restrictions on resale and refinancing ) count.
- In calculating the 10% the denominator is based on the Decennial US Census number of year round housing units. These numbers will be readjusted post 2020 Decennial Census.



# The 1.5 General Land Area Minimum Total Land Area Calculation



## General Land Area Minimum 760 CMR 56.03 (b) - 1.5% of total land area

- Regs were updated in 2008. Key elements:
  - TLA **includes** all districts (zoned & unzoned areas) in which any residential, commercial or industrial use is permitted.
  - TLA **excludes**
    - government land except land owned by a local housing authority containing SHI eligible housing.
    - Land area where all development prohibited by DEP restrictive order, but not other swamps, marshes or wetlands
    - water bodies.
    - flood plain, conservation and open space zones where residential, commercial or industrial uses are completely prohibited.



# The 1.5 General Land Area Minimum Calculation of Numerator



- In calculating whether 1.5% has been achieved, numerator includes only sites on SHI or established as SHI-eligible as of the initial permit application date.
- In general, rules for calculating land area included in 1.5% are consistent with rules for counting units on SHI.
- Proportion of site area that “counts” toward 1.5% includes:
  - area occupied by SHI Eligible units, and
  - impervious/landscaped area directly associated with such units.



# The 1.5 General Land Area Minimum – Seeking Determination



Some things to note:

- DHCD issues an initial decision as to whether 1.5% threshold has been achieved pursuant to regulatory procedure.
- Burden of proof that a community has achieved 1.5% threshold rests with ZBA.
- DHCD has developed written guidance to assist municipalities & developers in calculating whether 1.5% threshold has been achieved.
- Guidance is designed to be implemented by a technical analyst trained in GIS .



## 1.5 General Land Area Minimum – Recent Developments



- Unlike SHI, DHCD does not keep inventory of land area – too many changing variables, complex calculation.
- Only a few communities claimed 1.5% prior to 2008 – DHCD is unaware of any communities that currently qualify.
- Since 2014 several communities have asserted achievement of 1.5% threshold in the context of a Comp Permit Application, including Newton (four times) and Stoneham, Norwood (twice), Milton, Waltham, Arlington and Braintree.
- In each case, DHCD reviewed facts and determined that the community had not achieved the 1.5%.
- Newton, Stoneham, Waltham and Norwood appealed DHCD's ruling to the Housing Appeals Committee (HAC) via an interlocutory appeal. HAC found in favor of the Applicant(s).
- Arlington, and Braintree are pending at HAC.



# The 1.5 General Land Area Minimum – Additional Issues



Some things to note:

- Group Homes – special issues
  - Not addressed in 1969 statute; added as SHI-eligible by regulation.
  - Confidentiality – FIPAA & HIPAA issues. Each “unit” houses a resident of a DDS/ DMH Facility. DHCD does not currently have access to DDS/DMH group home addresses.
  - DHCD has worked with DDS/DMH to develop protocols that would make it possible to obtain square footage to include in land area calculation.





# The 1.5 General Land Area Minimum – New Guidelines



Issued January 17, 2018 (handout)

- Step One/ EMAIL DHCD at [dhcdglamMassMail.State.MA.US](mailto:dhcdglamMassMail.State.MA.US)  
Request most current SHI data.
- DHCD will provide SHI data within 15 days.
- If ZBA plan to invoke the 1.5% they should request Group Home Acreage to be performed via MASSGIS.
- Emails for Group Home contact/ procedure within GLAM Guidelines.
- Appendix B of new Guidelines provides a step by step guide based on fictionalized town called Landborough.
- DHCD has contract for initial 1.5% analysis with Tighe and Bond.



## Other Safe Harbors (not in 40B Statute) - Compliance with Housing Production Plan



- DHCD has recognized by regulation additional grounds on which a ZBA decision to deny or condition a comprehensive permit shall be upheld:
- **Municipal compliance with the goals of an approved Housing Production Plan (760 CMR 56.03(1)(b), 56.03(c) - (f)):**
  - HPP to be developed and reviewed in accordance with 760 CMR 56.03(4) and DHCD guidelines.
  - Plan must include numerical goal for annual housing production, including increase in municipality's SHI eligible housing units by at least 0.50% of total units every calendar year for a 5-year period
  - Safe harbor based on compliance with approved HPP goals.
  - Increasing SHI-eligible units by  $\geq 0.50\%$  total units  $\rightarrow$  1 year safe harbor
  - Increasing SHI-eligible units by  $\geq 1.0\%$   $\rightarrow$  2 year safe harbor
  - Since 2003 over 50 communities have achieved DHCD certification of compliance with HPP goals. Over 100 have plans.



## Other Safe Harbors (not in 40B Statute) - Compliance with Housing Production Plan



<i>ASHLAND</i>	<i>11/29/17</i>	<i>11/28/18</i>
<i>BILLERICA</i>	<i>11/21/17</i>	<i>5/18/18</i>
<i>CHELMSFORD</i>	<i>8/25/17</i>	<i>8/24/18</i>
<i>READING</i>	<i>2/23/17</i>	<i>2/22/19</i>
<i>MARSHFIELD</i>	<i>11/6/17</i>	<i>11/5/19</i>
<i>MEDFIELD</i>	<i>5/23/17</i>	<i>5/22/18</i>
<i>MEDWAY</i>	<i>8/10/17</i>	<i>8/9/19</i>
<i>NORFOLK</i>	<i>12/19/17</i>	<i>12/18/18</i>
<i>SWAMPSCOTT</i>	<i>9/28/17</i>	<i>9/27/18</i>
<i>WESTFORD</i>	<i>8/29/17</i>	<i>8/28/19</i>
<i>WOBURN</i>	<i>8/3/17</i>	<i>8/2/19</i>



## Other Safe Harbors (not in 40B Statute)



- **Recent Progress (760 CMR 56.03(3)(1)(c), 56.03(5)):**  
Creation of SHI eligible housing units  $\geq 2\%$  of total year round housing units within the 12 months prior to Comp Permit filing.
- Arlington 398
- Amherst 192
- Chelmsford 274
- Reading 192
- Watertown 310
- Williamstown 56



## Other Safe Harbors (not in 40B Statute)



- **Large Scale Projects (760 CMR 56.03(1)(d), 56.03(6)):**  
ZBA has discretion to reject projects exceeding thresholds based on # of units or % of total housing units, depending on the size of the community.
- ❖ (a) in a municipality which has a total number of 7,500 or more housing units = 300 housing units cap.
- ❖ (b) in a municipality which has between 5,000 and 7,500 housing units = 250 housing unit cap.
- ❖ (c) in a municipality which has between 2,500 and 5,000 housing units = 200 unit cap.
- ❖ in a municipality which has less than 2,500 housing units, 6% of all housing unit cap.



## Other Safe Harbors (not in 40B Statute)



- **Related Applications (760 CMR 56.03(1)(e), 56.03(7)):**  
ZBA has discretion to reject 40B application if <12 months elapsed since the filing, pendency, final disposition (including appeals) or withdrawal of an application for any approval related to construction on the same land of a prior project (non-residential or < 10% SHI eligible units).
- Also known as a “cooling off period” designed to stop Applicants from turning to 40B immediately if market rate proposal (under 10% SHI units) was denied for same site.



## Procedures for ZBA to invoke a Safe Harbor



- 760 CMR 56.03(8) - “Safe harbor” must be achieved, if at all, before CP filing date.
- Within 15 days of opening the CP hearing ZBA must provide written notice to Applicant with a copy to DHCD describing which safe harbor has been achieved with supportive documentation.
- Applicant has 15 days to challenge Board assertion with corresponding supportive documentation. Copies of all material sent to ZBA and DHCD.
- DHCD has 30 days following receipt of all materials to issue a decision.
- DHCD failure to act within 30 days deemed a decision in favor of ZBA.
- Procedure “tolls” requirement to terminate CP hearing within 180 days.
- Either Board or Applicant can file an interlocutory appeal to Housing Appeals Committee within 20 days of DHCD decision.





- Contact information

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