

Developer Data: What to Know Before Developing a Property Under M.G.L. Chapter 40B

By Christopher P. Yates, Esq.

Even the most experienced property developers can find themselves mired down in the complexities of 40B rules. Delays, litigation and opposition can drive up costs and potentially suspend development for an extended period of time – and time is money. Such problems, however, can be avoided not merely by understanding the law, but by effective pre-planning. A proactive developer can mitigate costly setbacks by knowing the lay of the land, the community, local politics and the competition.

Chapter 40B is not overly complicated. Among other factors, it requires that 10 percent of a town's housing stock be deemed affordable, and it permits developers to work around local zoning bylaws through the Comprehensive Permitting process by making a percentage of the project's units affordable. What is complicated is the reality of developing a property in a town that has not met the 10 percent threshold. Before embarking on a development project that falls under the provisions of 40B, the developer and counsel must obtain and analyze public record data, factor conclusions drawn from those data into the overall likelihood of success in the permit process, and determine associated costs.

The first proactive step is to research how the town has processed and approved or denied previous 40B development projects. The facts of each case must be evaluated. A denial by the town will result in an appeal of that denial to the Massachusetts Housing Appeals Committee. Research reveals that a successful appeal can add two years onto the permit process. Aside from litigation costs, there are all the other holding costs during this time that must be factored into the decision of whether, with such a delay, it would still be worth developing the property. Pre-permit research can reveal the facts of previous denials: were permits denied based on how the town counted already subsidized units, and were permits ultimately granted or denied, and why?

While examining past acts of the local zoning board, this would be the time to:

- examine what other projects are in development;
- determine how they will impact the 10 percent threshold requirement;
- analyze what other projects may be in the pipeline, but are not yet before the board for permitting.

As more developments are approved, and if the 10 percent number is reached by the town, the local zoning board may still approve the Comprehensive Permit, but meeting the 10 percent threshold may limit the right of appeal. This may be a calculated risk but, with more knowledge, it is arguably less risky deciding how to proceed.

It is also essential to know the local history of town and neighbor opposition to properties with affordable housing. There are undoubtedly competing interests and different narratives about affordable housing among developers, the town and the citizens. Debate and finger-pointing about loopholes which skew the number of existing affordable units, and alleged developer misuse of 40B, will undoubtedly result in a time-consuming and costly permitting process. Good faith alone on the part of the developer will not and cannot quiet these debates. A willingness to engage and listen to the opposition not only generates goodwill, but could provide a breakthrough to complete the permitting process.

Too much knowledge is never a bad thing. Time and money spent on the front end of a 40B development could prove to be money well spent. Costly and time-consuming litigation can be avoided with simple proactive measures. The advice of counsel up front can help you avoid the price of counsel after it is too late. **FT**

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