

**TOWN OF ACTON**  
**ACTON COMMUNITY HOUSING CORPORATION**  
**Frequently Asked Questions about Chapter 40B**

**What is Chapter 40B?**

Also known as the [Comprehensive Permit Law, Chapter 40B](#) was enacted in 1969 to help address the state-wide shortage of affordable housing by reducing barriers created by local zoning and other local restrictions. Its goal is to encourage the production of affordable housing in all communities throughout the Commonwealth.

Chapter 40B is a state statute which enables local Zoning Boards of Appeals (ZBA) to approve affordable housing developments under flexible rules if at least 20-25% of the proposed units have long-term affordability restrictions. The affordable single-family homes, apartments and condominiums are reserved for those who make 80% or less of the median household income for the area. Most of the residents in the affordable apartments and homeownership units earn less than \$70,000 per year.

In recent years, the state has issued additional guidelines regarding development under Chapter 40B. In 2007, extensive guidelines were issued to provide specific procedures for conducting audits after the developments have been completed and for reviewing these audits when they are submitted to the state. In 2008, the Massachusetts [Department of Housing and Community Development](#) (DHCD) issued new regulations for Chapter 40B that fold all previous regulations covering development guidelines, the Housing Appeals Committee, and the Local Initiative Program (LIP) into a single, revised set of regulations. In 2014, additional changes were made.

<http://www.mass.gov/hed/docs/dhcd/legal/comprehensivepermitguidelines.pdf>

**What types of housing can be included in a 40B development?**

In Acton, comprehensive permits were used to construct apartments for seniors at Windsor Green and Sachem Way (properties owned and managed by the Acton Housing Authority) as well as private rentals, single-family homes, and condos in 20 different locations around the town. The Old High School was also rehabbed into 15 affordable apartments with a comprehensive permit.

In most cases today, Chapter 40B developments are a mix of market rate and affordable single-family homes, apartments or condominiums. Affordable Housing can include housing for a variety of age groups and family styles: students, singles, couples, families and seniors. Housing units can be new or existing, homeownership or rental, single or multifamily, group homes or accessory apartments and many other variations.

**How does a development qualify for a Comprehensive Permit under Chapter 40B?**

New development proposals must include a percentage of affordable housing units mixed in with any market rate units, and must be indistinguishable on the exterior from market rate housing. In a homeownership development, at least 25% of the units in the development must be sold to households

with incomes of 80% or less of the area median income (AMI). Sale prices must be restricted to affordable levels. In a rental development, at least 25% of the units must be restricted to moderate-income households earning 80% or less of Area Median Income (AMI), or at least 20% of the units must be restricted to low-income households those earning 50% or less of AMI.

Applicants (whether for-profit or nonprofit) must also agree to restrict their profit to a maximum of 20% in for-sale developments and 10% per year for rental developments unless indicated otherwise in the subsidy program or the Comprehensive Permit.

Most importantly, the property has to be restricted with a deed rider ensuring that the property will remain affordable with each sale and resale. Affordability restrictions must run at least 30 years but most often in perpetuity for new construction.

### **How and when do units count toward the State's 10% affordable housing requirement?**

DHCD maintains a [Subsidized Housing Inventory](#) (SHI) of every community's deed restricted affordable housing units. This inventory must be updated by the communities every 2 years. The current housing inventory can be found at <http://www.mass.gov/hed/docs/dhcd/hd/shi/shiinventory.pdf>

Only units listed on Acton's Subsidized Housing Inventory (SHI) count towards the State's 10% affordable housing goal. In order to be included on Acton's SHI, they must meet the following requirements:

Units must be part of a "subsidized" development built or operated by a public agency, non-profit, or limited dividend organization;

- The development must be subsidized under an eligible state or federal housing subsidy program. The so-called subsidy is generally in the form of technical support and is not financial.
- In a homeownership development, those units which are deed-restricted for sale to moderate-income households (80% or less of AMI) can be included on the SHI. In rental housing consistent with the requirements of a Comprehensive Permit, all units in the development, including the unrestricted/market rate units, can be included in the SHI.
- The development must be subject to a regulatory agreement and monitored by a public agency or non-profit organization; and
- Developers must meet fair and affirmative marketing requirements, as defined in the [Comprehensive Permit Guidelines](#).

Each bed in a [Department of Mental Health](#) (DMH) and [Department of Development Services](#) (formerly, DMR) group home will also be included in a community's SHI, each bed is counted as one unit.

**Why can't the town count existing low-cost housing toward its affordable housing numbers?**

Older, existing homes and condos are not necessarily occupied by lower income households. Even when lower cost units are occupied by low and moderate income households, without use restrictions to regulate long-term affordability there is no assurance that they will continue to be affordable.

**How much affordable housing do we currently have?**

The State mandates that 10% of every community's housing inventory should be affordable. DHCD tracks the progress of each community on the State Housing Inventory. As new affordable units are approved, the Town notifies the DHCD to update the State Housing Inventory.

Acton's current housing inventory is 8,500 units of housing based on the 2010 US census. Of those units in 2018, 569, or 6.71%, qualify as affordable.

**What is the mandated sale price of an affordable housing unit in Acton and who is eligible?**

Below are the income eligibility guidelines for the Boston area, which includes Acton, for 2015. These are the maximum income limits for buyers of affordable units. Buyers may not have assets in excess of \$75,000, unless it is an age-restricted development, and must be first-time homebuyers with some exceptions.

Household Size:	1 Person	2 People	3 People	4 People
80% of AMI				
(2018):	\$56,800	\$64,900	\$73,000	\$81,100
\$107,800				

Income limits are updated every fiscal year by the Department of Housing and Urban Development (HUD). To be considered affordable, housing must be priced so that a qualifying household will spend no more than 30-33% of their annual income on housing. Calculations of affordability must include consideration of interest rates, related fees, real estate taxes, insurance, condominium fees and other factors. In 2018 affordable sales included \$226,000 for a 3-bedroom single family home and \$200,000 for a 2-bedroom attached townhouse.

**What control does the Town have over development created under Chapter 40B?**

The Acton Community Housing Corporation, the Planning Department, the Board of Selectmen and other town boards and officials work with developers to offer preliminary input to the project prior to submittal of the formal application to the state and ultimately the ZBA.

The Zoning Board of Appeals (ZBA) is the permit granting authority under Chapter 40B of the Massachusetts General Laws. The ZBA may place conditions and requirements on many aspects of the project such as height, density, site plan, utility improvements, or long-term affordability. This is provided these conditions do not make the development economically unfeasible for the developer.

The ZBA cannot deny a comprehensive permit outright, unless the community is certified as complying with its Housing Production Plan, or if at least 10% of all housing units in the community are on the Subsidized Housing Inventory.

It is important to note that the developer must still obtain various permits required by state statutes, such as state highway access permits, wastewater disposal permits (Title 5), and a local building permit. State regulations and statutes, such as all building codes, remain fully in effect under the comprehensive permit.

Developments created under Chapter 40B are also subject to the State Wetlands Protection Act, which is locally administered by the Acton Conservation Commission. An applicant may ask the ZBA to waive the local Wetlands Protection Bylaw in its entirety or to waive sections of the Bylaw. Those sections of the local bylaw that are not waived by the ZBA and all applicable sections of the State Wetlands Protection Act are then administered by the Acton Conservation Commission.

### **How does a developer qualify for Chapter 40B?**

To qualify for Chapter 40B, a development proposal must first be approved by a state or federal subsidized agency, such as [MassHousing](#), [MassDevelopment](#), the [Department of Housing and Community Development](#) (DHCD), or the U.S. [Department of Housing and Urban Development \(HUD\)](#).

The subsidizing agency will review the proposed project design and financial information, and consider any comments received, and may then issue a site eligibility letter. At that point, the applicant can proceed to apply for a Comprehensive Permit from the Zoning Board of Appeals

Applicants (whether for-profit or nonprofit) must agree to restrict their profit to a maximum of 20% in for-sale developments and 10% per year for rental.

### **How Does the Local Review Process Work?**

The Acton Community Housing Corporation (ACHC) has been designated by the Board of Selectmen to act as the "first stop" for interested developers of affordable housing. The ACHC will conduct an initial review of the proposed development concept and work closely with Town boards and committees that oversee related issues. The ACHC will primarily concentrate its review upon issues of affordability, rather than assume responsibility for analyzing such issues as infrastructure, site planning, historic preservation, and environmental considerations, which are best addressed by existing boards and committees charged with those responsibilities.

The ACHC uses the guidance of the Town's Comprehensive Permit Policy, adopted by the Board of Selectmen and the Planning Board in 2006. <http://ma-acton.civicplus.com/DocumentCenter/Home/View/114>. ACHC also uses the Housing Production Plan approved by the Board of Selectmen and the Planning Board in 2015. <http://www.acton-ma.gov/DocumentCenter/View/3239>.

This is a list of the steps that should be taken by each developer:

#### First Meeting with the ACHC

The purpose of this meeting is to introduce the project with a conceptual design.

#### Introductory Meeting with Department Heads and Water District

If the ACHC approves the conceptual plan, the developer will meet with at a department heads within one month of submittal of the conceptual plan.

#### Development of Preliminary Plans

Following comments by the ACHC and departments, the developer should prepare preliminary plans that incorporate these comments

#### Public Participation

ACHC supports soliciting community input relevant to the proposed project.

#### ACHC Meeting with Developer

The ACHC will meet with the developer at least one more time to discuss concerns that have arisen to discuss project trade-offs.

#### Presentation to the Board of Selectmen

The preliminary plans and the project description should be presented to the Board of Selectmen.

#### Formal application to state subsidizing agency

To qualify for Chapter 40B, a development proposal must first receive a letter of project eligibility under a state or federal housing program.

#### Formal Application to the Zoning Board of Appeals for a Comprehensive Permit

Once the state project eligibility agency has submitted a letter of site eligibility to the developer, the formal application will be made to the Zoning Board of Appeals with a hearing scheduled within 30 days.

### **What is the process followed by the Zoning Board of Appeals?**

Upon issuance of the site eligibility letter from the subsidizing agency, a formal application to the Zoning Board of Appeals is submitted by the applicant. The Zoning Board of Appeals is the permit granting authority under Chapter 40B of the Massachusetts General Laws, to hear and act on applications for low and moderate-income housing. The Zoning Board of Appeals is authorized to apply more flexible standards than the strict local zoning by-law requirements and other local rules and bylaws. It is important to note that State statutes and regulations, such as the Wetlands Protection Act, Title 5, and all building codes, remain fully in effect under the comprehensive permit.

The Zoning Board of Appeals officially notifies the applicable local boards and requests their comments and recommendation on the proposal. Within thirty days of the receipt of the application, the Board of Appeals will hold a series of public hearings to consider all aspects of the application. Abutters to the property will be notified by mail of the initial hearing. The Chairman of the ZBA is responsible for the proper conduct of the hearing.

When necessary, the Zoning Board of Appeals will engage the services of one or more consultants to review the project, at the applicant's expense. These consultants may review traffic, safety, parking, wastewater treatment or other environmental studies. It is important to note that the consultants hired by the ZBA represent the town. Outside consultants often provide information that assists parties in reaching consensus on a design that meets the applicant's economic needs while satisfying the Town's needs for protection of public safety, natural resources, and neighborhoods. The town's consultants will offer their comments and concerns. The proponent's consultants will address those comments and concerns. This process is a back and forth dialog that often results in changes to the original plans that will hopefully make the project better for all involved.

Generally, neighbors are appropriately concerned about the impact of comprehensive permit projects. It is important to note that the objective of the early hearings is to understand site characteristics, neighborhood issues, public safety issues, and the applicant's general concept for the development, and generally, public comment is restricted. There is ample time in the hearing process for residents and abutters to the project to comment.

Although oral public comment is invited by the board during designated times, the public is invited to comment at any time, in writing, by sending letters to the ZBA's office. Those letters become a matter of public record. At any time during the hearing process, the public is invited to review any and all public records pertaining to the project. These records include, but are not limited to, all site plans and schematics, all correspondence between the Peer Review Team and the proponent, traffic plans, environmental plans, all public comment letters, and any other document that has been submitted to the ZBA to be included in the public record. Copies of records are available upon request for a fee, but may be reviewed at Town Hall for free.

The public hearing typically continues for several months while concerns are explored and addressed. After the review is complete and the hearing is closed, the ZBA has forty days to issue a decision unless such time period is extended by written agreement of the Board and the applicant.

### **What does the ZBA issue for a decision?**

The ZBA has several options. They may:

- approve the project as submitted;
- approve the project with conditions or change; or,
- deny a comprehensive permit as not consistent with local needs (only under certain conditions).

The ZBA may impose conditions, safeguards, and/or limitations as part of its approval of any application.

If the application is approved, a Comprehensive Permit is issued. The applicant must still obtain various permits required by state statutes, such as wetlands protection, state highway access permits, and a local building permit. The comprehensive permit allows the applicant to fill out one application to

streamline the review process by local boards – it does not allow the developer to circumvent important environmental and safety regulations.

If the ZBA rejects the affordable housing development, or imposes conditions that the applicant believes makes the project economically infeasible, the applicant may appeal the decision to the [State Housing Appeals Committee \(HAC\)](#) within 20 days of the ZBA's filing. The HAC must render a decision within 30 days of the conclusion of the hearing. The HAC may overrule the local decision unless it is determined that the proposed development presents serious health or safety concerns that cannot be mitigated

Generally, a ZBA can deny a project as being inconsistent with local needs only in communities where 10% or more of the year-round housing meets the statute's definition of low and moderate income housing or where low and moderate income housing exists on sites comprising at least 1.5% of the municipality's total land area zoned for residential, commercial, or industrial use.

### **Who can appeal and how does the Appeals Process work?**

If the ZBA approves the comprehensive permit, any person aggrieved may appeal within the 20 day time period to the court as provided in M.G.L. c. 40A, § 17.

If the ZBA rejects the affordable housing development, the applicant can appeal the decision to the State Housing Appeals Committee (HAC), which can overrule the local decision unless the project presents serious health or safety issues that cannot be mitigated. Typically concerns about impact on traffic, schools, community services, taxes, neighborhood aesthetics or abutting home values are not considered by the HAC.

The applicant's right to appeal is only available in communities that have not met the standards and goals of the 40B statute. To prevent the possibility of appeal to the HAC, the municipality must have at least 10% of its total housing stock qualifying under the state's definition of low or moderate income housing.

Acton, like the vast majority of other municipalities, has not met these goals and therefore we are subject to the HAC appeal process.

The HAC attempts to balance the need for additional affordable housing, local community needs, and the economic feasibility of the project. A decision of the HAC may be appealed to Superior Court.

### **When does the Zoning Board of Appeals have the right to deny a Comprehensive Permit application?**

A community may deny a comprehensive permit:

- When low or moderate income housing in the community is equal to or greater than 10% of the community's year round housing stock.
- When the development is too large for the community in which it is proposed. For the town of Acton, the guidelines state that any development over 300 units can be rejected as too large.

- When a developer has proposed a different project and been denied for the same land within the last 12 months. This regulation was introduced to make it more difficult for developers to use 40B as a threat to force a change in zoning, a variance or a special permit.
- When a community has a DHCD-approved affordable housing plan and has permitted the construction of low or moderate income housing. The quantity of low or moderate-income housing that is permitted will determine the length of time during which the community may deny comprehensive permit applications;
  - 1/2 % of total year round housing units (42) = 1 year off
  - 1 % of total year round housing units (85) = 2 years off
- A community that has approved 3 or more comprehensive permits of 20 units or more in the preceding 12 months may deny the next application for a comprehensive permit.
- The community has been certified as in Safe Harbor by DHCD after producing housing at a rate of 0.5% (43 units) to 1.0%(85 units) of the total housing units.

**What does the term Safe Harbor mean?**

The term ‘safe harbor’ is used in the 40B context to mean that the decision of the ZBA to deny a Comprehensive Permit (or grant with conditions) would be upheld if the community has met any of the ‘safe harbor’ conditions.

**How does a community reach Safe Harbor?**

A municipality can achieve safe harbor in the following manner:

- a) the municipality has achieved one or more of the Statutory Minima, 10% housing units on the SHI or 1.5% land area;
- b) DHCD has certified the municipality's Housing Production Plan;
- c) the municipality has made recent progress toward the Statutory Minima, creating greater than 2% of the municipality (170 units for Acton) during the 12 months prior to Comprehensive Permit application;
- d) the project is a large project, greater than 300 units;
- e) a related application has previously been received.

**How does the town get certified?**

A municipality may request that the Department certify its compliance with an approved HPP if it has increased its number of SHI eligible units by 0.5% (43 for Acton) **in a calendar year** for a one-year safe harbor, or by 1% (85 for Acton) for a two-year safe harbor. The certification date starts when the qualifying units are eligible for the SHI. Acton currently has 6.71% on the SHI, numerator (affordable units) of 569 and denominator (total housing units) of 8,475.

For units created through a Comprehensive Permit under M.G.L. c.40B, the units are counted on the SHI when the permit or approval is filed with the municipal clerk. These units will ‘lapse’ off the SHI, if the

building permit has not been issued within 12 month after the zoning permit, or if the occupancy permit is not issued within 18 months of the building permit. If the units lapse, and then are reinstated, they retain the earliest SHI eligibility date – that is the permit date.

**How does the Town deny a Comprehensive Permit when in Safe Harbor?**

Once Acton has a certified HPP, Acton can deny any 40B application. Only LIP 40B applications would be accepted at this point to manage the developer risk. If developers are aware of an impending HPP Certification, they may try to accelerate filing their 40B application with the ZBA. Since 40B applications must have a Project Eligibility Letter from MassHousing or DHCD before a ZBA application could be filed, the Town always has notice of pending developments.

**If the applicant receives a Comprehensive Permit, can they sell the project to another developer?**

An applicant can transfer a Comprehensive Permit to another person or entity prior to substantial completion of the project. The applicant is required to receive written confirmation from the Subsidizing Agency that the transferee meets the requirements of the law. In addition, the applicant must provide written notice to the Zoning Board of Appeals of the proposed transfer. After substantial completion, a Comprehensive Permit shall be deemed to run with the land.

**Can the applicant make changes to the project after they receive the comprehensive permit?**

If an applicant wants to change the details of the project as approved by the Zoning Board of Appeals, it must notify the ZBA in writing, describing any proposed change. Within 20 days the Board must determine whether it believes the change substantial or insubstantial, and notify the Applicant of the decision.

If the change is determined to be insubstantial or if the Board fails to notify the applicant by the end of such 20-day period, the Comprehensive Permit is automatically modified to incorporate the change.

If the change is determined to be substantial, the Board will hold a public hearing within 30 days of its determination and issue a decision within 40 days of termination of the hearing. It is important to note that only the changes in the Project will be discussed at the hearing. This is not a re-opening of the entire permit, and the Chair will limit discussion to the proposed changes only. An Applicant shall have the right at any time to withdraw its request for a change.

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