

CITY OF NEWTON
LAW DEPARTMENT
INTEROFFICE MEMORANDUM

DATE: February 22, 2024
TO: Zoning Board of Appeals
FROM: Jonah Temple, Deputy City Solicitor
RE: Chapter 40B Safe Harbor Status

As Newton reached Chapter 40B safe harbor status for the first time on January 8, 2024, this memorandum sets forth initial guidance on the implications of this milestone for the Zoning Board of Appeals (ZBA) moving forward. More information on how the safe harbor is calculated can be found in the January 4, 2024 Safe Harbor Status memo [here](#). Additional guidance will be provided at the time of the next comprehensive permit application.

1. Chapter 40B and the “Housing Unit Minimum” Safe Harbor

Chapter 40B is a state law that facilitates the construction of affordable housing by removing obstacles and streamlining the permitting process for development projects that include a minimum amount of affordable housing. The law establishes a consolidated local review and approval process that authorizes the ZBA to issue a “comprehensive permit” encompassing all local ordinances and regulations. Chapter 40B gives the ZBA authority to waive zoning and other local permitting requirements for such projects. To qualify for a comprehensive permit, 25% of the units in a proposed project must be affordable up to 80% AMI or 20% of the units must be affordable up to 50% AMI.

Chapter 40B also allows municipalities to invoke various safe harbors if they are providing their fair share of affordable housing. Once a safe harbor has been met, it allows the ZBA to deny a comprehensive permit application as “consistent with local needs” and that decision will not be appealable to or overturned by the Housing Appeals Committee.

The City of Newton recently reached the Housing Unit Minimum safe harbor, achieved when a municipality’s housing units eligible for inclusion on the state’s Subsidized Housing Inventory (SHI) exceed 10% of its total housing units.

The City’s attainment of safe harbor status does not prohibit the filing of future comprehensive permit applications with the ZBA. Nor does it deprive the ZBA of the ability to grant additional comprehensive permits. Chapter 40B still requires that the ZBA deliberate about whether to impose or override local zoning laws regardless of whether the City has satisfied its minimum affordable housing obligation. Therefore, even if the City has met a safe harbor, comprehensive permit applications may still be submitted to the ZBA and the ZBA must determine whether to

invoke the safe harbor within 15 days of opening a public hearing and then proceed with the public hearing.

2. No Impact on Pending Applications

The City's attainment of safe harbor status is based on the City's calculation on the date that a comprehensive permit application is filed with the ZBA. Currently there are three comprehensive permit applications pending in front of the ZBA: 529 Boylston Street, 41 Washington Street, and 78 Crafts Street. Because the City had not reached the safe harbor at the time those applications were filed, the ZBA could not have and did not invoke safe harbor status. This means that the City's recent achievement of safe harbor status has no impact on the ZBA's ongoing review of those projects.

3. Recalculation of Safe Harbors for Next Application

The safe harbor calculations are not static and routinely fluctuate. Housing properties are routinely added and removed from the City's list of SHI eligible housing units in accordance with the regulations and guidelines issued by the Massachusetts Executive Office of Housing and Livable Communities (HLC)—previously known as the Department of Housing and Community Development (DHCD). Because the relevant inquiry is whether the City is at safe harbor status on the date an application is filed with the ZBA, the first step upon the filing of the next comprehensive permit application will be for staff to update the City's safe harbor calculation based on the current state of SHI eligible housing units at the time of filing. As that calculation fluctuates based on several factors, it is possible the City may not be at safe harbor status when the next comprehensive permit application is filed.

4. Procedure to Invoke the 40B Safe Harbor

When the next comprehensive permit application is filed, the ZBA will schedule and open a public hearing within thirty days as it normally does. Prior to the public hearing, staff will update the City's safe harbor calculations and present them in a memo to the ZBA. If a safe harbor has been reached, at the start of the first public hearing, the ZBA should vote on whether to invoke safe harbor status. The determination is up to the discretion of the ZBA. A vote to invoke the safe harbor means that the ZBA believes that denial of the comprehensive permit would be consistent with local needs because it has reached a safe harbor. However, this vote does not act as an actual denial of the comprehensive permit. Following this vote, the ZBA will continue its review of the proposed project. Continuing to review the project on the merits does not preclude the ZBA from ultimately denying the application on the basis of safe harbor status.

5. Appeal of Safe Harbor Status

If the ZBA votes to invoke safe harbor status, following the first public hearing staff will prepare and send written notice of that determination to the applicant. That notice will include the data used by the City to calculate the safe harbor and all supporting documentation. The applicant can challenge the ZBA's assertion of the safe harbor by filing an appeal with HLC within 15 days.

HLC will review the materials provided by both parties and issue a decision. During this process, the ZBA has the burden of proving that the City has met the safe harbor.

After HLC issues its decision, either the ZBA or the applicant can appeal the decision to the Housing Appeals Committee, the HLC's adjudicatory body. That appeal will be heard and determined through an evidentiary hearing in accordance with the Committee's procedural regulations. During this appeals process, the ZBA's hearing on the comprehensive permit is stayed until the conclusion of the appeal.

6. Review of Application after Invoking Safe Harbor Status

If the applicant chooses not to appeal the ZBA's safe harbor determination, or if the safe harbor determination is upheld on appeal, the ZBA has significant discretion in reviewing the application. The ZBA may exercise its discretion to apply local zoning regulations and deny the comprehensive permit application without risk of the denial being overturned on appeal by the Housing Appeals Committee. At the same time, the ZBA also retains discretion to override or waive local zoning laws and issue the comprehensive permit after a safe harbor has been reached.

The review criteria for the ZBA does not change based on attainment of a safe harbor. The ZBA must still review the project to determine whether imposition of the City's local regulations is "consistent with local needs." This requires the ZBA to balance the regional need for affordable housing with the local concerns impacted by the proposed project.

Without safe harbor status, there is a presumption that the need for affordable housing outweighs local concerns—meaning there is a presumption that imposition of local zoning laws is *inconsistent* with local needs and should be waived through issuance of a comprehensive permit. After safe harbor status that presumption disappears. However, even after safe harbor status is reached, the ZBA may still decide that, based on the continued need for affordable housing, imposition of local zoning laws would still be inconsistent with local needs. Such a determination would allow the ZBA to grant a comprehensive permit after attainment of safe harbor status.

Therefore, the ZBA's review of a project after attaining safe harbor status will consider the same matters as it has under its traditional review: health and safety issues, site and building design, and preservation of open space. The practical difference is that review under safe harbor status gives the ZBA significant control over the project that it would not otherwise have under its review prior to safe harbor status. Because the ZBA has the discretion to deny the project based on safe harbor status, the ZBA has greater ability to require modifications or place conditions on the project if it decides to issue a comprehensive permit. If the ZBA ultimately decides to approve the project with conditions, it can do so without concern of whether those conditions make the project uneconomic. Even if the conditions make the project uneconomic, those conditions will be allowed because they will be conclusively presumed to be consistent with local needs.

Ultimately, regardless of safe harbor status, the ZBA retains discretion to decide whether or not to impose local zoning requirements.

7. Frequently Asked Questions

Can the filing of a comprehensive permit application be timed to a period when the City briefly drops below safe harbor status?

Technically, yes. If the City is below safe harbor status at the time the application is submitted, then the safe harbor does not apply to that project. However, prior to filing an application with the ZBA, applicants must first go through a month's long application and approval process with a subsidizing agency and be issued a determination of Project Eligibility. The subsidizing agency's approval of project eligibility expires after two years.

What happens if a comprehensive permit application is filed when the City is below the safe harbor, but the proposed project has more units than is needed to reach the safe harbor?

If the City has not achieved a safe harbor at the time of the application, then the ZBA cannot invoke safe harbor status and the project must be reviewed under the traditional standards for a comprehensive permit. The impact that project will have on future safe harbor calculations is irrelevant.

Can a Chapter 40B comprehensive permit application go to the City Council for approval? Who decides if the City Council or the ZBA reviews a 40B project?

Applications for comprehensive permits under Chapter 40B are within the exclusive jurisdiction of the ZBA. Chapter 40B gives the ZBA sole authority to issue a comprehensive permit for projects that contain the law's minimum required amount of affordable housing. This authority allows the ZBA to waive zoning requirements and other local regulations for such projects. Projects seeking a comprehensive permit under Chapter 40B cannot go before the City Council for approval.

It is up to landowners and developers to decide whether to seek approval of a multi-family project pursuant to a comprehensive permit issued by the ZBA or through a special permit issued by the City Council. There are many differences in project requirements and review process for comprehensive permits compared to special permits. For instance, comprehensive permit projects have greater affordability requirements and can request the waiver of zoning requirements, while special permit projects must comply with the City's zoning regulations and meet the affordable requirements set forth in the inclusionary housing provisions of the City's zoning ordinance.

How often does the City need to recalculate the SHI?

Every time a comprehensive permit application is filed with the ZBA.

Does the State need to certify that the City has met the safe harbor designation?

No, the state does not need to certify that the City has met the safe harbor designation in order for the ZBA to invoke the safe harbor. However, as set forth above, the state, either through HLC or the Housing Appeals Committee, will need to confirm the City's safe harbor calculation if it is challenged by an applicant.

Are there specific timelines for the ZBA approval process for a 40B project?

The ZBA is required to open the public hearing no later than 30 days from the date the comprehensive permit application is filed with the ZBA. If the ZBA believes it can deny the permit on safe harbor grounds, it must give written notice to the developer and HLC no later than 15 days from the opening of the public hearing. For this reason, the ZBA's decision whether to invoke safe harbor status and provide such written notice must be made at the first public hearing. Within 180 days from the opening of the public hearing, the ZBA must close the public hearing, and within 40 days from the close of the public hearing the ZBA must render a decision and file its written decision with the City Clerk. (In comparison, there is no time limit for the City Council to close a public hearing on a special permit application.)

Some of these 40B deadlines may be extended with the written agreement of the applicant. The same deadlines will apply regardless of safe harbor status, provided that an appeal of the ZBA's safe harbor determination will toll the 180-day deadline to close the public hearing.