

**FROM:** TOWN OF CHARLTON

ZONING BOARD OF APPEALS

**TO:** TOWN OF CHARLTON

**PUBLIC NOTICE TO THE BOARDS AND DEPARTMENTS OF THE TOWN**

18.5.1 Referral to Other Agencies

Mass. Gen. L. ch. 40B, §21 states that upon receipt of an application, a board of appeals **"shall forthwith notify each such local board, as applicable, of the filing of such application by sending a copy thereof to such local boards for their recommendations."** A "local board" is defined as "a city or town board of survey, board of health, board of subdivision control appeals, planning board, building inspector, or the officer or board having supervision of the construction of buildings or the power of enforcing municipal ordinances or by-laws, or city council or board of selectmen."<sup>i</sup>

18.7.3.1 Consistency with Local Needs

760 CMR 31.06(5) establishes that the board may show that its decision to deny or approve with conditions was consistent with local needs by proving that one of the statutory minima set forth in Mass. Gen. L. ch. 40B, §20 has been met. Requirements or regulations shall be deemed "consistent with local needs" when:

- (1) low or moderate income housing exists which is in excess of ten percent of the housing units reported in the latest decennial census of the city or town or on sites comprising one and one-half percent or more of the total land area zoned for residential, commercial or industrial use or,
- (2) the application would result in construction of such housing on sites comprising more than three-tenths of one percent of the municipality's land area (or ten acres, whichever is larger), in any one calendar year.

**In effect, the board may use compliance with one of the statutory minima as an affirmative defense. Failure to meet any of the minima forecloses the board's defense that its decision is consistent with local needs as a matter of law.**

The **board of appeals has the burden** of proving consistency with local needs.<sup>ii</sup>

760 CMR 31.04 contains a detailed methodology for the computation of these minima. HAC decisions or case law have decided a number of issues:

- \* a project which will cause the municipality to exceed the ten percent minimum by a reasonable number is nonetheless within the jurisdiction of the HAC;<sup>iii</sup>
- \* proposed units not yet authorized by a building permit cannot be counted toward the ten percent minimum by the board;<sup>iv</sup>
- \* units created by an incentive provision in the local ordinance or by-law do not count;<sup>v</sup>
  
- \* if a site is larger than ten acres, and the municipality has not met its burden, the first ten acres are under HAC jurisdiction.<sup>vi</sup>

EOCD maintains a "Subsidized Housing Inventory," periodically updated, indicating each municipality's status under chapter 40B. 760 CMR 31.04(1) provides that the latest EOCD inventory is presumed accurate, unless the data is rebutted by a party.

**Only twenty-two of the 351 cities and towns in the Commonwealth meet the statutory ten percent standard.<sup>vii</sup>**

Even when the municipality cannot demonstrate satisfaction of one of the statutory minima, its denial or approval with conditions may nonetheless be "consistent with local needs." Mass. Gen. L. ch. 40B, §20 provides that requirements and regulations imposed to effect a denial or approval with conditions shall be considered consistent if it is reasonable in view of:

- \* the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected; and
  
- \* the need:
  - to protect the health and safety of the occupants of the proposed housing or of the residents of the city or town,
  
  - to promote better site and building design in relation to the surroundings, or
    - to preserve open spaces; and

\* if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing.

**Proof that a municipality has failed to satisfy one of the statutory minima creates a reputable presumption that the regional housing need outweighs local health, safety, design or planning concerns.<sup>viii</sup>**

Where the municipality successfully rebuts the presumption, the HAC applies a balancing test.<sup>ix</sup> The weight of the regional need for housing "will be commensurate with the proportion of the city or town's population that consists of low income persons."<sup>x</sup> The weight of the local planning concern "will be commensurate with the degree to which the natural environment is endangered, the degree to which the design of the site and the proposed housing is seriously deficient, the degree to which additional open spaces are critically needed in the city or town, and the degree to which the local requirements and regulations bear a direct and substantial relationship to the protection of such local concerns."<sup>xi</sup>

**Boards of appeals denying or approving comprehensive permits with conditions almost invariably fall back on well-worn planning arguments as a justification. Almost as invariably, the HAC rejects such contentions. Some of the local concerns which have been repeatedly adjudicated before the HAC include:<sup>xii</sup>**

- \* school crowding;<sup>xiii</sup>
- \* drainage;<sup>xiv</sup>
- \* traffic;<sup>xv</sup>
- \* sewers;<sup>xvi</sup>
- \* water provision;<sup>xvii</sup>
- \* noise;<sup>xviii</sup>
- \* site accessibility;<sup>xix</sup>
- \* inconsistency with local plans;<sup>xx</sup>
- \* environmental degradation;<sup>xxi</sup>
- \* open space;<sup>xxii</sup>
- density.<sup>xxiii</sup>

For all practical purposes, the burden of proof for the board of appeals is set forth in 760 CMR 31.07(2) (b). The natural environment must be "endangered"; design of the site or

the proposed housing must be "seriously deficient"; open spaces must be "critically needed." Only in the rare case will local planning concerns outweigh the regional housing need. In such cases, the board's decision to deny or approve a comprehensive permit with conditions which render the project uneconomic will be upheld by the HAC.<sup>xxiv</sup>

**1 If no local rules have been adopted, the most recent model rules promulgated by the HAC govern the matter. See 760 CMR 31.02(3) (a). The model rules adopt the requirements of 760 CMR 31.02(2) for application submittals.**

**NOTE:**

**ADDITIONAL INFORMATION YOUR BOARD MAY REQUIRE IN COMPLYING WITH THIS STATUE CAN BE FOUND AT THE ZONING BOARD OF APPEALS OFFICE.**

**OR ON THE INTERNET AT:**

<http://mass-cd.sociallaw.com>

<http://state.ma.us>

<http://state.ma.us/dhcd/ch40b>

Chapter 18. COMPREHENSIVE PERMITS	2
18.1 Introduction	2
TABLE 18.1	4
18.1.1 Home Rule Challenge	4
18.1.2 Spot Zoning Challenge	5
18.2 Legislative History	10
18.3 Administrative Rules	14
18.4 Application for Comprehensive Permit	18

18.4.1	Fees	20
18.4.2	Eligible Applicants	20
18.4.2.1	Standing to Apply	21
18.4.2.2	Control of the Site	22
18.4.2.3	Mixed Projects	22
18.4.2.4	Limited Dividend Organizations	23
18.4.2.5	Local Initiative Program	23
18.5	Board Action	31
18.5.1	Referral to Other Agencies	31
18.5.2	Notice	32
18.5.2.1	Contents of Notice	33
18.5.2.2	Publication of Notice	35
18.5.2.3	Posting of Notice	35
18.5.2.4	Mailing of Notice	36
18.5.2.5	Waiver of Notice and Special Notice	39
18.5.2.6	Renewed Notice	39
18.5.3	Public Hearing	40
18.5.3.1	Time Limits	40
18.5.3.2	Quorum	41
18.5.3.3	Conducting the Hearing	42
18.5.3.4	Site Visits	43
18.5.3.5	Closing the Hearing	44
18.5.4	Decision of the Board of Appeals	45

18.5.5 Constructive Approval	46
18.6 Appeal of Board Decision	57
18.7 HAC Action	60
18.7.1 Intervention in HAC Appeal	60
18.7.2 Modification of Project Pending HAC Review	61
18.7.3 HAC Decision	62
18.7.3.1 Consistency with Local Needs	62
18.7.3.2 Uneconomic Conditions	67
18.7.3.3 Applicability of State Regulations	70
18.7.4 HAC Remedies	71
18.8 Appeal of the HAC Decision	84
18.8.1 Scope of Review	84
18.9 Lapse of Comprehensive Permit	86
18.10 Eminent Domain and Comprehensive Permits	88

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i See Mass. Gen. L. ch. 40B, §20 and 760 CMR 30.02, which contains a broader definition of "local board."

ii 760 CMR 31.06(5). See also Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm., 15 Mass. App. Ct. 553, 558 (1983).

iii Zoning Bd. of Appeals of Greenfield v. Housing Appeals Comm., 15 Mass. App. Ct. 553, 561-562 (1983).

iv Id. at 560. Cf. Pioneer Home Sponsors v. Northampton Bd. of Appeals, HAC decision, April 1, 1975. Under a different regulation the HAC held that 192 units contracted for by the Northampton Housing Authority, 12 days after applicant filed with

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the board of appeals, which would put the city over the minimum 10% line, did count toward the statute's goal, and that the board decision was therefore consistent with local needs.

v *Auburndale Gardens v. Newton Zoning Bd. of Appeals*, HAC decision, January 23, 1975, at 4. But see infra §18.4 (regarding local initiative units).

vi *Board of Appeals of Maynard v. Housing Appeals Comm.*, 370 Mass. 64, 67-68 (1976).

vii By EOCD's reckoning in 1990, the following cities and towns have met their burden for affordable housing:

Amherst	Greenfield	Milford
Boston	Holbrook	New Bedford
Brockton	Holyoke	North Adams
Cambridge	Lawrence	Northampton
Chelsea	Lowell	Orange
Fall River	Lynn	Springfield
Gardner	Malden	Upton
Worcester		

viii *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 367 (1973). See also 760 CMR 31.06 and 760 CMR 31.07(1)(e).

ix If the HAC does not conclude that the board's decision is based on a valid local concern, it does not reach the balancing test. See, e.g., *KSM Trust v. Pembroke Zoning Board of Appeals*, HAC decision, November 18, 1991, at 19-20.

x 760 CMR 31.07(2)(a). In determining the regional need, such factors as (1) actual or projected persons in need of such housing, (2) the number of available units, and (3) the number of people on waiting lists for such units are considered to be "reliable indicators." *Bagley v. Illyrian Gardens*, 28 Mass. App. Ct. 127, 132 (1989). See also *Wilmington Arboretum Apartments Assocs. Ltd. Partnership v. Wilmington Bd. of Appeals*, HAC decision, June 20, 1990, at 8.

xi 760 CMR 31.07(2)(b).

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xii The HAC regulations prescribe factual areas in which evidence may be heard if relevant. See 760 31.07(3) and 760 CMR 31.07(4).

xiii See Board of Appeals of Maynard v. Housing Appeals Comm., 370 Mass. 64, 68 (1976).

xiv Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 382 (1973). For HAC decisions reviewing the matter, see Browne v. Walpole Bd. of Appeals, undated HAC decision, at 10; KSM Trust v. Pembroke Zoning Bd. of Appeals, HAC decision, November 18, 1991, at 14-20; Oxford Hous. Auth. v. Oxford Zoning Bd. of Appeals, HAC decision, November 18, 1991; Spencer Livingstone Assocs. Ltd. Partnership v. Medfield Zoning Bd. of Appeals, HAC decision, June 12, 1991, at 16-17; Sheridan Dev. Co. v. Tewksbury Zoning Bd. of Appeals, HAC decision, January 16, 1991; Wilson St. Trust v. Norwood Bd. of Appeals, HAC decision, February 3, 1974. For a HAC decision upholding the board's denial based primarily on drainage concerns, see Todino v. Taunton Bd. of Appeals, HAC decision, February 13, 1974.

xv The lead HAC decision is probably Concord Homeowning Corp. v. Concord Bd. of Appeals, HAC decision, November 19, 1971, at 24, which expresses the following standard of review:

The "existing traffic [must be] sufficiently near (or past) the critical point so that the additional traffic load from the proposed development will raise the traffic impact beyond the safety point."

See also G.P. Affordable Homes Corp. v. Falmouth Bd. of Appeals, HAC decision, November 12, 1991, at 4-6; Spencer Livingstone Assocs. Ltd. Partnership v. Medfield Zoning Bd. of Appeals, HAC decision, June 12, 1991, at 5-8; Sheridan Dev. Co. v. Tewksbury Zoning Bd. of Appeals, HAC decision, January 16, 1991, at 6 (off-site traffic hazards cannot be used a grounds to deny or condition comprehensive permit); Wilmington Arboretum Apartments Assocs. Ltd. Partnership v. Wilmington Bd. of Appeals, HAC decision, June 20, 1990; Saugus Hous. Auth. v. Saugus Bd. of Appeals, HAC decision, October 28, 1985; Forty Eight Co. v. Westfield Zoning Bd. of Appeals, HAC decision, August 23, 1976; Wilson St. Trust v. Norwood Bd. of Appeals, HAC decision, February 13, 1974.

xvi See Board of Appeals of Maynard v. Housing Appeals Comm., 370 Mass. 64, 68 (1976); Board of Appeals of Haverhill v. Housing Appeals Comm., 3 Mass. App. Ct. 754, 755 (1975). For HAC decisions on the matter, see Wilmington Arboretum Apartments Assocs. Ltd. Partnership v. Wilmington Bd. of Appeals, HAC decision, June 20, 1990, at 13-14 (board cannot save sewer capacity for proposed industrial use if application for affordable housing is first in time); Milhaus Trust of Upton v. Upton Bd. of Appeals, HAC decision, July 8, 1975; T/D/B Realty Trust v. Northbridge Bd. of Appeals, HAC decision, August 5, 1974; Woodcrest Village Assocs. v. Maynard Bd. of Appeals, HAC decision, April 22, 1974. In Tetiquet River Village v. Raynham Zoning

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Bd. of Appeals, HAC decision, March 20, 1991, at 9, the HAC upheld a local decision to deny the permit based on serious design questions.

xvii See, e.g., Groton Hous. Auth. v. Groton Zoning Bd. of Appeals, HAC decision, September 19, 1991, at 5-6.

xviii See, e.g., Forty Eight Co. v. Westfield Zoning Bd. of Appeals, HAC decision, August 23, 1976. The proposed affordable housing site was adjacent to industrially used land. The HAC upheld the denial of the comprehensive permit, in part, because the noise level was an "incurably negative factor." Id. at 14-15.

xix See, e.g., Board of Appeals of Maynard v. Housing Appeals Comm., 370 Mass. 64, 68 (1976). For HAC decisions based, in part, on access issues (including access for emergency vehicles), see KSM Trust v. Pembroke Zoning Bd. of Appeals, HAC decision, November 18, 1991, at 20; G.P. Affordable Homes Corp. v. Falmouth Bd. of Appeals, HAC decision, November 12, 1991, at 6; Spencer Livingstone Assocs. Ltd. Partnership v. Medfield Zoning Bd. of Appeals, HAC decision, June 12, 1991; Tetiquet River Village v. Raynham Zoning Bd. of Appeals, HAC decision, March 20, 1991, at 12; Wilmington Arboretum Apartments Assocs. Ltd. Partnership v. Wilmington Bd. of Appeals, HAC decision, June 20, 1990; Saugus Hous. Auth. v. Saugus Bd. of Appeals, HAC decision, October 28, 1985; Methuen Hous. Auth. v. Methuen Bd. of Appeals, HAC decision, July 22, 1985; Auburndale Gardens v. Newton Zoning Bd. of Appeals, HAC decision, January 23, 1975. In Sherwood Estates v. Peabody Bd. of Appeals, HAC decision, April 30, 1982, at 9, the HAC upheld a denial of a comprehensive permit where the grade of the access road to the site exceeded 10% because it was too steep for elderly residents (who may have cardiac problems).

xx See, e.g., Board of Appeals of Melrose v. Housing Appeals Comm., 5 Mass. App. Ct. 838 (1977). The HAC has stated that where a proposal is inconsistent with a master plan (or some similar document) it is a factor to be considered.

Where the Master Plan is totally unrealistic with respect to present land uses or reasonably potential future uses, where there is more than a suspicion that the Master Plan is simply a sophisticated maneuver to perpetuate precisely the abuses which Chapter 774 was designed to eliminate, where the Master Plan is simply an ancient planning exercise, ignored and gathering dust for years, and now dusted off to frustrate housing for which there is a clearly demonstrated need, the Master Plan will not prevail in the weighing process.

Harbor Glen Assocs. v. Hingham Bd. of Appeals, HAC decision, August 20, 1982, at 13. The denial of a permit in this case was upheld by HAC because the master plan had committed 27 acres in Hingham to multi-family housing, and the proposed site was in an area designated for office park use. See also KSM Trust v. Pembroke Zoning Bd. of Appeals, HAC decision, November 18, 1991 (compliance with comprehensive plan);

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Wilmington Arboretum Apartments Assocs. Ltd. Partnership v. Wilmington Bd. of Appeals, HAC decision, June 20, 1990 (Master Plan for Sewers).

xxi See, e.g., G.P. Affordable Homes Corp. v. Falmouth Bd. of Appeals, HAC decision, November 12, 1991, at 12-36; Sheridan Dev. Co. v. Tewksbury Zoning Bd. of Appeals, HAC decision, January 16, 1991 (nitrate degradation of ground and surface water).

xxii See, e.g., Auburndale Gardens v. Newton Zoning Bd. of Appeals, HAC decision, January 23, 1975; Methuen Hous. Auth. v. Methuen Bd. of Appeals, HAC decision, July 22, 1985.

xxiii See, e.g., KSM Trust v. Pembroke Zoning Bd. of Appeals, HAC decision, November 18, 1991, at 13; H.T.C. v. Merrimiac Zoning Bd. of Appeals, HAC decision, March 20, 1991, at 5.

xxiv See, e.g., Hamlet Dev. Corp v. Hopedale Zoning Bd. of Appeals, HAC decision, January 23, 1992 (danger from nearby airfield); Tetiquet River Village v. Raynham Zoning Bd. of Appeals, HAC decision, March 20, 1991, at 9 (inadequacy of sewer design); Brown St. Assocs. v. Attleboro Zoning Bd. of Appeals, HAC decision, March 1, 1983 (drainage); Harbor Glen Assocs. v. Hingham Bd. of Appeals, HAC decision, August 20, 1982 (inconsistency with Master Plan); Berkshire East Assocs. v. Huntington Bd. of Appeals, HAC decision, June 1, 1982 (fire protection); Sherwood Estates v. Peabody Bd. of Appeals, HAC decision, April 30, 1982 (grade of access road); Forty Eight Co. v. Westfield Zoning Bd. of Appeals, HAC decision, August 23, 1976 (noise, propane gas storage); Todino v. Taunton Bd. of Appeals, HAC decision, February 13, 1974 (drainage issues).