

40B, the Town of Nahant, and Military Housing

Update 12/10/2017

1. Purpose

This analysis attempts to answer four questions: What exactly is 40B?; Where does Nahant, going into 2018, stand relative to its requirements?; To what degree would the inclusion of affordable housing in previously proposed Bass Point solution alter the town's current standing with respect to 40B requirements?; and, to what degree Local Preference might be accommodated in a 40B selection process?

What exactly is 40B?

Commonly referred to as 40B because of its inclusion in Chapter 40B of the Massachusetts statutes, the "***Comprehensive Permit Act***" (Act) was enacted almost a half century ago in 1969 as sections 20-23 inclusive of said chapter, which by the way, and of some significance, is entitled "Regional Planning". This Act is intended to address the lack of low and moderate income housing and to facilitate the construction of affordable housing by reducing local regulatory barriers that historically impeded the development of such housing.

The Act overrides local zoning regulations and streamlines local permitting process. The developer of a project that includes sufficient units of subsidized low and moderate income housing may apply for a Comprehensive Permit from the local zoning board of appeals. Should a local board deny the Comprehensive Permit, appeals by developers from such "denied" decisions by the local ZBA are then decided by the Housing Appeals Committee. Since the need for "affordable regional housing" has been deemed to override local concerns, denials by local ZBA's are typically voided and the courts allow such projects to proceed despite local opposition.

The Act is implemented via the MA Code of Regulations (760 CMR 56.00) which addresses recurring questions of interpretation of the statute by, for example, setting the procedures for expedited process and defining the statutory minima for housing goals.

The CMR also provides certain safe harbor conditions that allow a local board's denial of a Comprehensive Permit application to be upheld. The complete regulations are best viewed on the web at:

<http://www.mass.gov/hed/economic/eohed/dhcd/legal/regs/760-cmr-56.html>

What is a Safe Harbor?

A decision by a local board to deny a comprehensive permit "shall be upheld" if one or more of the following conditions are met:

- a. *Town has achieved one of the Statutory Minima*
- b. *DHCD has certified the town's compliance with the goals of the town's approved Housing Production Plan*

c. Town has made recent progress toward the Statutory Minima

d. The project is a large project

The statutory minima for affordable housing require that either 10% of a municipality's total housing units or 1.5% of the land area in residential, commercial, and industrial zones is devoted to affordable housing.

There are two types of safe harbors; permanent and temporary. Meeting a statutory minimum grants a permanent safe harbor refuge. The other safe harbors, e.g., compliance with the goals of an approved Housing Production Plan or demonstrated progress towards achieving the statutory minima, are temporary.

2. Where does Nahant Stand Relative to 40B's requirements?

a. Nahant Status of 10% Unit Minimum – A 114 unit shortfall

Nahant stands well short of the 10% threshold, coming in at only 3%. Quantitatively Nahant has 1,612 total housing units while having only 48 affordable units. By definition, the affordable units are given by the DHCD's subsidized housing inventory (SHI) and the total units (year round) are defined by the latest federal census.

The shortfall is 114 affordable units. Put in perspective, the town has spent a decade trying to add just 7 units. If successful, the town would still be 107 units short. But wait, the 21 more units of housing would require another 2.1 units of affordable, so the town would then be 109 units short.

See Appendix 1 for definitions, calculations and methodology.

b. Nahant Status of 1.5% Land Area Minimum – Almost nine acres short

Nahant stands well short of the required land area minimum as well. Taken from town data in the Assessor's office, the town has 590.4 acres of total qualifying land in residential, commercial and industrial areas diminished by 122 acres of excludable land (Egg Rock/US Government, Short Beach, etc.) for a net of 467 acres for the total land area calculation.

Currently, the land area devoted to affordable housing is only 2.55 acres and the shortfall is 4.4 acres, i.e., 194,523 sq. ft. To put this amount of land area shortfall in perspective, it is larger than ½ the size of East Point and almost the size of the cemetery. This shortfall also represents almost 20 standard R2 10,000 foot lots.

It is undetermined how much land might be added to the numerator of this calculation by proposed affordable land additions at Bass Point. Certainly two house lots, but due to methodology, the final calculation is beyond this analysis as to what is and what is not attributable, but it is believed the Town would remain substantially short.

See appendix 2 for methodology and calculations.

c. ***What is Compliance with the goals of a Housing Production Plan (HPP)?***

This safe harbor is not available to Nahant as it has no such plan. However if the Town did have an approved Housing Production Plan, it could achieve short term safe harbor status by demonstrating on an annual basis that it is creating affordable units on an on-going basis.

A municipality may request that the Department certify its compliance with an approved HPP if it has increased its number of SHI Eligible Housing units in an amount equal to or greater than its 0.50% of its total units for that calendar year, i.e., it's "Annual Production Goal". ***In Nahant's case the annual production goal would represent eight units per year.*** (Note: The town has only specified seven units at Bass Point). A temporary safe harbor would protect the town from any new proposal for 365 days from the date the town achieved its numerical target for the year in question.

So what is a Housing Production Plan? In short:

A Housing Production Plan must include a strategic plan for municipal action with regards housing that includes;

- i. ***A Comprehensive Housing Needs Assessment*** that examines local demographics and housing stock, future population and housing needs, regional growth factors, development constraints and limitations on its current and future needs, and the municipality's plans to mitigate those constraints
- ii. ***Affordable Housing Goals*** that include an increase in the municipality's number of SHI Eligible Housing units by at least 0.50% of its total units during every calendar year included in the HPP, until the overall percentage exceeds the Statutory Minima. Goals must include an explanation of the specific strategies by which the municipality will achieve its housing production goal and a schedule for implementation of the goals and strategies for production of units, including all of the following strategies, to the extent applicable:
- iii. ***Implementation strategies*** must include an explanation of the specific strategies and a schedule for implementation of the goals and strategies for production of units. The Town must identify:
 - zoning districts or geographic areas in which it proposes to modify current regulations for the purposes of creating SHI Eligible Housing developments to meet its housing production goal;
 - specific sites for which the town will encourage the filing of Comprehensive Permit applications;

- town owned parcels for which the town commits to issue requests for proposals to develop SHI Eligible Housing; and
- participation in regional collaborations addressing housing development.

A municipality may request that the Department certify its compliance with an approved HPP if it has increased its number of SHI Eligible Housing units in an amount equal to or greater than its 0.50% production goal for that calendar year.

d. Recent Progress toward Housing Unit Minimum.

This temporary safe harbor could apply in the absence of a Housing Production Plan; however it would require adding 32 units in a given year.

Recent means that in the twelve months prior to the application date of a Comprehensive Permit by a developer, the number of affordable units added to the SHI is equal to or greater than 2% of the town’s total housing units. Hence, “progress” would require that 32 units of affordable housing be added in that prior year.

e. The project is a large project.

This temporary safe harbor could apply to Nahant should the application for a Comprehensive Permit involve construction of a number of “eligible” (sic) housing units equal to 6% of all housing units in the municipality. This would be a minimum of 96 units for Nahant and imply a 386 unit project with 25% (96 units) being eligible.

3. Would inclusion of 25% affordable units in Bass Point Redevelopment project alter the Town’s standing relative to 40B requirements?- In a word, “NO”.

The foregoing indicates that no relief could be gained in this regard either on a unit or land area basis.. Certainly no permanent safe harbor could be obtained and, as it now stands, no temporary safe harbor could be gained. Theoretically, should the town first develop and gain approval for a Housing Production Plan and then by adding eight units per year, the town could gain a one year period in which it could deny future Comprehensive Permits.

4. What Local Preference might be accommodated in a selection process for affordable units?¹

When asked at special town meeting on September 26th 2016, special town counsel responded “*Yes there can be local preference to the extent the law permits.*” This highly qualified answer deserves interpretation.

1: Sourced from the “[Affirmative Fair Housing Marketing and Resident Selection Plan Guidelines](#)” published by the MA Department of Housing and Community Development”, (the Department, DHCP).¹

First of all, Local Preference applies only to a maximum of 70% of the affordable units, rounded down. Thus for the seven affordable units proposed at Bass Point, only four would be available to those qualifying for Local Preference. The other three would be open to any (and all) affordable-housing-eligible applicant, regardless of residency.

A lottery for the four units would begin with applicants drawn from a Local Preference Pool and if those numbers were less than the number of units the drawing would then extend to the Open Pool, also called General Pool, of all applicants. Local preference candidates would also be entered into the Open Pool so that they would have a shot at the three “non local preference” units.

Local Preference Defined

Local Preference definition goes beyond what one might initially think and includes non-residents. It includes, without regard to length of residency, current residents; non-resident municipal employees as well as employees of local businesses; and non-resident households with a child attending local schools.

Also Local preferences must not deny admission of non-local residents that are protected under state and federal civil rights laws. Fair housing laws must be followed and the entrants into the Local Preference lottery must reflect the demographic make up of the surrounding HUD-defined Metropolitan Statistical Area (MSA). Nahant belongs to the “Boston-Cambridge-Quincy, MA-NH MSA – 14460” MSA which includes much of eastern Massachusetts, with cities such as Boston, Cambridge, Lynn, Quincy, Salem and Chelsea as well as numerous suburban towns.

The statistics for our MSA reflects show a minority makeup of 27% while Nahant Census Data shows our town to be 96.5% white.² Consequently, our Local Preference Pool would need to reflect that same makeup as the overall MSA.

The town will have to increase the size of the local preference pool by moving minority applicants into the local preference pool to ensure it reflects the racial/ethnic balance of the HUD MSA. The town might also have to admit other protected classes of persons who may be negatively affected by the local preference.

The Lottery Process

- 1) First, the lottery agent will ensure that the Local Preference Pool adequately reflects the region in its makeup. This is done by holding a lottery of non local preference minority candidates and those representing other protected classes and adding them to the local preference pool until such representation is achieved.
- 2) Secondly, applications are randomly drawn and listed in the order drawn, i.e., a rank list. However, a first drawn application might not be entitled to a housing unit. For *“in order to make the best use of the limited affordable housing resources, household size*

²Minority statistics: Census bureau data presented in Appendix 3.

should be appropriate for the number of bedrooms in the home” ’ and “minimum household standards are established”. Bass Point design guidelines for single family homes call for three bedroom units, and by law those must be filled by households generally comprised of four people, but allowing three persons in certain circumstances.

3) Thusly, drawn applications are assigned a preference ranking for purposes of awarding units.

First preference is given to those households who can “make the best use” and so household size comes into play. One occupant is required per bedroom. Husband and wife (or partners) are generally required to share a bedroom. Since the design guidelines specify three bedrooms for the single family homes and two bedrooms for the multi-family condos, first preference will be given to families with children such that, generally, there are one or more children in each bedroom with one or more parents occupying a bedroom.

Second preference will be given to households requiring (per first preference) the number of bedrooms in the unit minus one, based upon first preference criteria. This means multiple children in at least one bedroom.

Third preference is per above, but minus two bedrooms

4) The Lottery Agent will work down the rank list to the first household on the list that is of appropriate size for the largest units available, and so on. Once all larger units have been assigned, the Lottery Agent will follow the same procedure for assigning smaller units.

5) The remaining three units will be awarded by processing the Open Pool in the same manner.

6)

The Affirmative Fair Marketing Plan

A 40B project requires an affirmative Fair Marketing Plan to help ensure a large applicant pool. Units will be advertised heavily and included in on-line databases. Some relevant details as to the scope of the marketing are included in Appendix 4.

Summary

So there you have it. In summary, the number of affordable units is only four, the local preference pool is expanded beyond local residents, and larger households will have priority.

Appendix 1
Nahant Status of 10% Unit Minimum – A 114 unit shortfall

DHCP statistics are found at

https://www.mass.gov/files/documents/2017/10/10/shiinventory_0.pdf

Department of Housing and Community Development
 Chapter 40B Subsidized Housing Inventory (SHI) as of September 14, 2017

Community	2010 Census Year Round Housing Units	Total Development Units	SHI Units	%
Nahant	1,612	48	48	3.0%

Accordingly,	1 %	16.1 units
	2 %	32.6 units
	6%	96.9 units
	.5%	8.06 units

Nahant stands well short of the 10% threshold, coming in at only 3%. Quantitatively Nahant has 1,611 total housing units while having only 48 affordable units. By definition, the affordable units are given by the DHCD's subsidized housing inventory (SHI) and the total units are defined by the latest federal census.

The shortfall is 114 affordable units. Put in perspective, the town has spent a decade trying to add 7 units. If successful, the town would still be well over 100 units short.

Actual census data found at

<https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>

Appendix 2 Land Area Calculations

General Land Area Minimum. For the purposes of calculating whether SHI Eligible Housing exists in the city or town on sites comprising more than 1½% of the total land area zoned for residential, commercial, or industrial use, pursuant to M.G.L. c. 40B, § 20:

1. Total land area shall include all districts in which any residential, commercial, or industrial use is permitted, regardless of how such district is designated by name in the city or town's zoning by law;
2. Total land area shall include all un-zoned land in which any residential, commercial, or industrial use is permitted;
3. Total land area shall exclude land owned by the United States, the Commonwealth or any political subdivision thereof, the Department of Conservation and Recreation or any state public authority, but it shall include any land owned by a housing authority and containing SHI Eligible Housing;
4. Total land area shall exclude any land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the Department of Environmental Protection pursuant to M.G.L. c. 131, § 40A. No other swamps, marshes, or other wetlands shall be excluded;
5. Total land area shall exclude any water bodies;
6. Total land area shall exclude any flood plain, conservation or open space zone if said zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial or industrial use are completely prohibited.
7. No excluded land area shall be counted more than once under the above criteria.

Only sites of SHI Eligible Housing units inventoried by the Department or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, shall be included toward the 1½% minimum. For such sites, that proportion of the site area shall count that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units).

Annual Land Area Minimum. For purposes of calculating whether the application before the Board would result in the commencement in any one calendar year of construction of Low or Moderate Income Housing on sites comprising more than 0.3 of 1% of the city or town's land area **or ten acres, whichever is larger**, pursuant to M.G.L. c. 40B, § 20:

NAHANT DATA

Three assessor’s parcels are identified as owned by the Nahant Housing Authority. The Spindrift parcel at 194 Nahant Road includes housing at Lafayette Terrace and there are two parcels on Spring Road. Parcels total 2.55 acres in size.

Parcel ID	Use Code	MA Code	Acres	40B Excluded on = YES	40B Excluded Land	Street No.	Street	Owner #1
17-0-51	970	9	1.07897	N	0	194	NAHANT RD	NAHANT HOUSING AUTH
12B-0-39A	970	9	0.83563	N	0	39	SPRING RD	NAHANT HOUSING AUTH
12B-0-39C	970	9	<u>0.63694</u>	N	<u>0</u>	75	SPRING RD	NAHANT HOUSING AUTH
Total Nahant Acres			590.435		122.58749	Excludable Acres based on Yes in 40B Excluded column – Foot note 1		
			<u>122.587</u>					
Total Land for Calculation			467.848		2.55154	Affordable Parcels Size		
1.5% threshold,								
2.55/467.8			7.01771		4.47	Acres short		
					43,560	Sq. Ft. in Acre		
					-194.546	Sq. Ft. of shortfall – footnote 2		
					10,000	R2 lot size		
					20	Standard R2 house lots short		

Footnotes:

1. Detail not shown but total exclusion based upon being owned the United States, the Commonwealth or any political subdivision thereof, the Department of Conservation and Recreation or any state public authority, but not including any land owned by a housing authority and containing SHI Eligible Housing; exclusion also includes parcels where development is prohibited
2. Shortfall would be further exacerbated by more informed calculation of SHI footage, which for this example has included the entirety of the three parcels. However, a refinement would remove vegetative areas that separate Spring Road parcels from the golf course to the degree they occupy SHI parcels.
3. Negligible, but Bear Pond should be removed from Total Land.

Appendix 3 Nahant Demographics

Source Data: The Census Bureau

https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml

Total population	3,410	100.0
One Race	3,386	99.3
White	3,290	96.5
Black or African American	16	0.5
American Indian and Alaska Native	3	0.1
Asian	58	1.7
Asian Indian	10	0.3
Chinese	15	0.4
Filipino	1	0.0
Japanese	4	0.1
Korean	3	0.1
Vietnamese	1	0.0
Other Asian [1]	24	0.7
Native Hawaiian and Other Pacific Islander	0	0.0
Native Hawaiian	0	0.0
Guamanian or Chamorro	0	0.0
Samoan	0	0.0
Other Pacific Islander [2]	0	0.0
Some Other Race	19	0.6
Two or More Races	24	0.7
White; American Indian and Alaska Native [3]	4	0.1
White; Asian [3]	6	0.2
White; Black or African American [3]	2	0.1
White; Some Other Race [3]	4	0.1
Race alone or in combination with one or more other races: [4]		
White	3,313	97.2
Black or African American	21	0.6
American Indian and Alaska Native	10	0.3
Asian	65	1.9
Native Hawaiian and Other Pacific Islander	5	0.1
Some Other Race	23	0.7
HISPANIC OR LATINO		
Total population	3,410	100.0
Hispanic or Latino (of any race)	52	1.5
Mexican	5	0.1
Puerto Rican	12	0.4
Cuban	3	0.1
Other Hispanic or Latino [5]	32	0.9
Not Hispanic or Latino	3,358	98.5
HISPANIC OR LATINO AND RACE		
Total population	3,410	100.0
Hispanic or Latino	52	1.5
White alone	33	1.0
Black or African American alone	1	0.0
American Indian and Alaska Native alone	0	0.0
Asian alone	0	0.0
Native Hawaiian and Other Pacific Islander alone	0	0.0

Some Other Race alone	14	0.4
Two or More Races	4	0.1
Not Hispanic or Latino	3,358	98.5
White alone	3,257	95.5
Black or African American alone	15	0.4
American Indian and Alaska Native alone	3	0.1
Asian alone	58	1.7
Native Hawaiian and Other Pacific Islander alone	0	0.0
Some Other Race alone	5	0.1
Two or More Races	20	

Total population	3,410	100.0
One Race	3,386	99.3
White	3,290	96.5
Black or African American	16	0.5
American Indian and Alaska Native	3	0.1
Asian	58	1.7
Asian Indian	10	0.3
Chinese	15	0.4
Filipino	1	0.0
Japanese	4	0.1
Korean	3	0.1
Vietnamese	1	0.0
Other Asian [1]	24	0.7
Native Hawaiian and Other Pacific Islander	0	0.0
Native Hawaiian	0	0.0
Guamanian or Chamorro	0	0.0
Samoan	0	0.0
Other Pacific Islander [2]	0	0.0
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American Indian and Alaska Native alone	3	0.1
Asian alone	58	1.7
Native Hawaiian and Other Pacific Islander alone	0	0.0
Some Other Race alone	5	0.1
Two or More Races	20	

Percent Racial/Ethnic Minority by MSA/County

Barnstable Town MSA	8.6%
Boston-Cambridge-Quincy, MA MSA	27.0%
Pittsfield MSA	9.4%
Providence-New Bedford-Fall River, MA MSA	14.4%
Springfield MSA	25.5%
Worcester MSA	19.3%
Dukes County	13.7%
Nantucket County	19.5%

Source: U.S. Census Bureau, Census 2010

Appendix 4
Elements of Affirmative Marketing Plan

a. Advertisements should be placed in local and regional newspapers, and newspapers that serve minority groups and other groups protected under fair housing laws. Notices should also be sent to local fair housing commissions, area churches, local and regional housing agencies, local housing authorities, civic groups, lending institutions, social service agencies, and other non-profit organizations.

b. Affordable units in the Boston Metropolitan Statistical Area (MSA) must be reported to the Boston Fair Housing Commission's Metrolist (Metropolitan Housing Opportunity Clearing House). Such units shall be reported whenever they become available (including upon turnover).

c. Accessible4 units must be listed with MassAccess (see <http://www.chapa.org> or <http://www.massaccesshousingregistry.org>) whenever they become available (including upon turnover).

4 Note: The owner or other person having the right of ownership shall, in accordance with M.G.L. c. 151B, §4(7A), give at least fifteen days' notice of the vacancy of a wheelchair accessible unit to the Massachusetts Rehabilitation Commission. Said statute also requires the owner or other person having the right of ownership to give timely notice that a wheelchair accessible unit is vacant or will become vacant to a person who has, within the past 12 months, notified the owner or person or person having the right of ownership that such person is in need of a wheelchair accessible unit.

d. Affordable rental and affordable ownership units, whether or not they are accessible, must also be listed with MassAccess whenever they become available (including upon turnover). Where applicable, all MassAccess data input fields relating to accessible and adaptable status and accessibility features must be completed. Available affordable ownership units must also be listed with the Massachusetts Affordable Housing Alliance website (see <http://www.mahahome.org> or <http://www.massaffordablehomes.org>).

e. Marketing should also be included in non-English publications based on the prevalence of particular language groups in the regional area. To determine the prevalence of a particular language by geographical area, see for example http://www.lep.gov/demog_data/demog_data.html.

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f. All marketing should be comparable in terms of the description of the opportunity available, regardless of the marketing type (e.g., local newspaper vs. minority newspaper). The size of the advertisements, including the content of the advertisement, as well as the dates of the advertising unless affirmative advertising occurs first, should be comparable across regional, local, and minority newspapers.

g. All advertising and marketing materials should indicate resident selection by lottery or other random selection procedure, where applicable.

h. All advertising should offer reasonable accommodations in the application process.

i. Advertisements should run a minimum of two times over a sixty day period and be designed to attract attention. Marketing of ownership units should begin approximately six months before the expected date of project occupancy.

j. Pursuant to fair housing laws,⁵ advertising/marketing must not indicate any preference or limitation, or otherwise discriminate based on race, color, disability, religion, sex, familial status, sexual orientation, gender identity, national origin, genetic information, ancestry, children, marital status, or public assistance reciprocity. This prohibition includes phrases such as “active adult community” and “empty nesters”. Exceptions may apply if the preference or limitation is pursuant to a lawful eligibility requirement.

k. All advertising and marketing materials portraying persons should depict members of classes of persons protected under fair housing laws, including majority and minority groups as well as persons with disabilities.

l. The Fair Housing logo () and slogan (“Equal Housing Opportunity”) should be included in all marketing materials. The logo may be obtained at HUD’s website at: <http://www.hud.gov/library/bookshelf11/hudgraphics/fheologo.cfm> .