

## Chapter 40B — A Primer

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**What is Chapter 40B?** This Massachusetts law allows developers to override local zoning if a municipality has failed to create sufficient affordable housing as defined by the state's Department of Housing and Community Development (DHCD). 40B projects must have either 25% of their units affordable to households earning 80% of Area Median Income (AMI), or 20% of units affordable at 50% of AMI.

A municipality has three ways to regain power to reject or modify 40B proposals without danger of being overruled on appeal to the DHCD's Housing Appeals Committee (HAC). One is to ensure that 10% of the municipality's total housing units (anything from a studio to a mansion counts as one housing unit) are listed on the DHCD's Subsidized Housing Inventory (SHI) as subsidized and affordable. For built-out communities like Newton, it's almost impossible to get to 10% because the total number of units is increasing at a faster pace than those that "count" towards the 10%.

The second option, achieved and recently invoked by Newton, is ensuring that 1.5% of the municipality's total developable land is comprised of sites containing SHI-eligible housing. The third way involves a municipality making what the DHCD deems sufficient progress towards achieving the 10% units standard according to benchmarks on a DHCD staff-approved Housing Production Plan (HPP).

**Why was Chapter 40B enacted?** Formerly known as the "Anti-Snob Zoning Act", 40B was enacted in 1969, passing by only one vote. The goal of some who advocated for the law was to provide housing for returning Viet Nam veterans and to change the balance of socioeconomic diversity in the suburbs by overriding local zoning laws, such as minimum lot size, that can result in properties that are exclusionary by price. Others wanted to retaliate against suburban liberals who were seen as being responsible for the Racial Imbalance Act of 1965 that led to mandatory busing to integrate Boston's public schools. (See Paul K. Stockman, Note, Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing, 78 Va.L.Rev. 535, 550 (1992).

**Has Chapter 40B worked?** Chapter 40B has overwhelming coercive power over municipalities. So after forty-six years of 40B, one might expect that most of the state's 351 cities and towns would have achieved either the 10% of units or the 1.5% of land area standard, and that Massachusetts would be a leader in housing affordability. The DHCD and its HAC are adversarial in their approach to municipalities and abutters, and rule in favor of developers 75%-80% of the time. The law is designed to make it difficult for municipalities to reach the 10% or 1.5% standards, and the vast web of regulations and guidelines promulgated by DHCD

bureaucrats have made it even more difficult in recent years. Fewer than 60 of the 351 communities have currently secured “safe harbor” via the 10% units standard, and Newton, Stoneham and Waltham are among the handful maintaining “safe harbor” invocations of the 1.5% land area standard, a standard that DHCD seems strangely reluctant to recognize.

Instead of becoming a leader, under 40B, Massachusetts has fallen to the bottom in housing affordability rankings of the 50 states. 75% to 80% of the units built in 40B projects are not affordable, but expensive, market-rate units. Under 40B, public monies are diverted from maintaining and improving public housing projects for the people who live in them, and instead used to support the DHCD bureaucracy and subsidize private developers to produce mostly non-affordable units.

Massachusetts remains one of the most expensive states in terms of the cost of housing, and 40B’s upward pressure on land prices is part of the problem. In desirable areas like Newton, 40B projects can actually displace vulnerable, lower-income renters and result in the demolition of naturally affordable housing, to make way for 40B-enabled market-rate units – as is the case at Court Street in Newtonville. Developers throughout the state use 40B to obtain Comprehensive Permits, or they threaten (sometimes implicitly) to use 40B to obtain Special Permits that allow them to build far more units on any given property than they could do by right under that municipality’s local zoning ordinance. That pushes up the value of the land, with ripple effects on nearby land/home prices.

**Has DHCD Exercised Adequate Oversight of Chapter 40B?** In the mid-to-late 2000’s, former Massachusetts Inspector General Gregory Sullivan conducted extensive reviews of a sample of 40B projects and discovered that developers frequently flip properties several times through different entities to inflate land costs and allow for a higher profit under the DHCD’s regulations. Sullivan found extensive evidence of fraud, calling 40B “a pigfest”, and estimated a loss of up to \$100 million to cities and towns due to fraud and lack of oversight – problems which remain today.

**Can 40B’s Problems Be Fixed?** More than 70 bills have been introduced at the Statehouse over the years in an effort to reform 40B. Most haven’t made it out of committee, blocked by politicians aligned with the development industry. Frustration with a lack of reform, and 40B’s negative impacts on local planning, fiscal resources and quality of life, led to a grassroots movement to repeal 40B through a statewide ballot question in 2010. A coalition of developers, law firms, financial institutions, and paid professional housing consultants, advocates and administrators outspent 18-to-1 the Repeal-40B volunteers. The pro-40B side’s massive media campaign to protect the 40B development process resulted in a narrow 52% to 48% victory for 40B’s supporters, and a defeat for Massachusetts’ struggling cities and towns and their residents.

**The following resources are listed & linked at: [www.newtonvillagesalliance.org/chapter-40b](http://www.newtonvillagesalliance.org/chapter-40b)**

*Adult Supervision Required: The Commonwealth of Massachusetts's Reckless Adventures with Affordable Housing and the Anti-Snob Zoning Act.* Jonathan D. Witten, Boston College Environmental Law Review, 2008.

<http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1036&context=ealr>

*The Cost of Developing Affordable Housing: At What Price?* Jonathan D. Witten, Boston College Environmental Law Review, 2003. <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1174&context=ealr>

**Inspector General's Reports on 40B:**

<http://www.mass.gov/ig/publications/reports-and-recommendations/chapter-40b-publications/chapter-40b-publication-listcontainer>

**Inspector General testimony at the Mass Statehouse - October 2007**

Part 1: <https://www.youtube.com/watch?v=XXJx-hMr6mA> - "Cost certification under 40B has been virtually non-existent"

Part 2: <https://www.youtube.com/watch?v=CSNjgU6Xp-k> - Examples of 40B developer fraud. "This 40B scandal represents one of the biggest abuses in state history in my opinion, in terms of dollars and lack of oversight."

**Op-Ed by State Sen. Robert Hedlund** – 9/2008

<http://northofboston.wickedlocal.com/article/20080926/News/309269983>

**Greg Sullivan Interview w/State Sen. Robert Hedlund** – 10/2009

<https://www.youtube.com/watch?v=McLxbl1d5CA>

**Efforts to Reform or Repeal 40B: Repeal 40B Materials** [www.newtonvillagesalliance.org/chapter-40b](http://www.newtonvillagesalliance.org/chapter-40b)

**Failed Strategies Report** <http://www.betternotbigger.org/pdf/Failed%20Strategies%20New%20Directions.pdf>

**Not In My Backyard** - Documentary by repeal advocates. <https://vimeo.com/15708304>

**40B Administration: Department of Housing and Community Development Housing Appeals Committee**

<http://www.mass.gov/hed/economic/eohed/dhcd/> <http://www.mass.gov/hed/community/40b-plan/hac.html>

**40B Statewide:** SHI, by city and town, as of 12/5/2014 - This listing is updated by DHCD every two years. "SHI Units" are those that "count" toward meeting the 10% unit, or 1.5% land area threshold, and include the market rate units in rental 40B developments. "Total Development Units" include also the market rate units in ownership (condo) 40B developments, which do not count. <http://www.mass.gov/hed/docs/dhcd/hd/shi/shiinventory.pdf>

**40B in Newton: Newton SHI** (Newton's list & DHCD's list) [www.newtonvillagesalliance.org/chapter-40b](http://www.newtonvillagesalliance.org/chapter-40b)

Achievement of the 1.5% standard <http://www.newtonvillagesalliance.org/chapter-40b-the-1.5-standard.html>

[http://www.newtonvillagesalliance.org/uploads/2/6/2/6/26263417/kkg\\_tab\\_post\\_40b\\_1.5\\_column.pdf](http://www.newtonvillagesalliance.org/uploads/2/6/2/6/26263417/kkg_tab_post_40b_1.5_column.pdf)

**M.G.L. Ch.40B** (S.20-23) <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVII/Chapter40B/Section20> 760

CMR 56 – DHCD's regulations. <http://www.mass.gov/hed/economic/eohed/dhcd/legal/regs/760-cmr-56.html>