

MEMORANDUM

TO: Jesse Geller, Chair, Brookline Zoning Board of Appeals
FROM: Judi Barrett
RE: 40 Centre Street
DATE: August 26, 2016
CC: Alison Steinfeld, Maria Morelli

I have been asked to address a few comments that have been made in recent meetings for the 40 Centre Street comprehensive permit application.

1. Statutory Minimum and Local Needs

The 10 percent statutory minimum is the primary threshold for determining whether a community has provided its regional fair share of low- or moderate-income housing. It is not simply a jurisdictional requirement that allows a qualified developer to apply for and receive a Project Eligibility Letter (PEL). A PEL may be issued to develop housing in a community that exceeds the 10 percent minimum, and a comprehensive permit may be granted in a community that exceeds the 10 percent minimum. By law, however, if the Board denies a comprehensive permit and the proponent appeals to the Housing Appeals Committee (HAC), there is a legal presumption in favor of the proponent if low-or moderate-income housing makes up less than 10 percent of the community's year-round housing.¹

The explanation of "consistent with local needs" in G.L. c. 40B, § 20 provides for a balancing test that calls on the Board to weigh compliance with local regulations against the regional need for affordable housing. Local regulations "to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, promote better site and building design in relation to the surroundings, or to preserve open spaces" must be applied "as equally as possible to both subsidized and unsubsidized housing." The regional need for low- or moderate-income housing must be considered along with the "number of low income *persons* in the city or town affected" [emphasis added], which in Brookline's case is 30.9 percent of the total population, or approximately 17,285 people.² Why the legislation refers to *persons* instead of *households* is anyone's guess, for households – not people – create demand for housing. Regardless, the household statistics are very similar: 30 percent of all Brookline

¹ "Year-round" is a creature of state regulation. The statute does not separate "year-round" from total housing units (which includes vacation/seasonal units).

² The only official low- or moderate-income population statistics are published by the U.S. Department of Housing and Urban Development (HUD) for the Community Development Block Grant (CDBG) Program. See "FY 2016 Low- or Moderate-Income Summary Data: Local Governments by State, Based on 2006-2010 American Community Survey," available at HUD Exchange.

households have low or moderate incomes, or approximately 7,630 households.³ Available estimates classify 74 percent of Brookline’s low- or moderate-income households (5,600) as housing cost burdened, i.e., households paying more than 30 percent of their gross monthly income for basic housing expenses.⁴ Accordingly, the estimated need for affordably priced housing in Brookline, based solely on *local* conditions, is about 14.9 times greater than the number of units (367) the Town needs to reach the 10 percent statutory minimum.⁵

The Subsidized Housing Inventory (SHI) is the official roster of low- or moderate-income units that meet the requirements of Chapter 40B. The percentage of affordable units on the SHI is the most basic measure of whether a community meets, exceeds, or falls below its 10 percent minimum affordable housing obligation – that is, whether it has done enough to address regional need. Over forty years ago, the Supreme Judicial Court drew this conclusion in *Board of Appeals of Hanover v. Housing Appeals Committee* (1973): “If the regional need for such housing outweighs [valid planning objections to the details of the proposal such as health, site design, and open spaces], the board must override any restrictive local requirements and regulations which prevent the construction of the housing and grant the comprehensive permit . . . the municipality’s failure to meet its minimum housing obligations . . . will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal.”⁶

If an affluent suburb has a smaller percentage of low- or moderate-income residents than the larger metro region of which it is part, this does not mean the community’s minimum obligation is less than 10 percent. Such an interpretation of G.L. c. 40B, § 20 would allow most of Boston’s west suburbs to provide very little affordable housing, but clearly that is not what the Legislature intended. I recommend that the Board focus on qualitative concerns with 40 Centre Street and the other comprehensive permit applications that are currently before you and avoid pursuing creative interpretations that are “not consistent with the purpose of the statute.”⁷ As evidenced by the design review report from Davis Square Architects, the Planning Board’s comments, and testimony from the neighborhood, there seem to be “valid health, safety, environmental, design, open space, planning, or other local concern[s] that warrant consideration by the Board.

2. Municipal Planning and Chapter 40B

In a city or town that has been increasing its supply of affordable housing under a recent, systematically implemented comprehensive plan or master plan, or an affordable housing plan, the board of appeals may be able to sustain the denial of a comprehensive permit if the

³ The only official statistics for low- or moderate-income households (adjusted for household size), are also published by HUD but for the Five-Year Consolidated Plan. See HUD Office of Policy Development and Research, CHAS Data 2009-2013.

⁴ For homeowners, “housing costs” include the monthly cost of a mortgage payment, property taxes, and insurance; for renters, the term includes monthly rent and basic utilities (lights, heat, cooking, hot water).

⁵ According to DHCD, Brookline has 2,254 units on the Subsidized Housing Inventory (SHI), or 8.6 percent of all year-round units in the town.

⁶ *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 365-366 (1973).

⁷ *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, et al., 457 Mass. 748, 761 (2010).

proposed development conflicts with the community's plan. Brookline attempted to make this assertion (among many others) in opposing the Paragon Residential Properties development over a decade ago (the project that eventually became the 68-unit apartment development at 45 Marion Street).⁸ Brookline has not yet acted on the Housing Production Plan that was completed for the Town in July, and as far as we know, the implementation program for Brookline's most recent comprehensive plan ended in 2015.

A handful of communities have survived a comprehensive permit challenge on the basis of a project's inconsistency with local planning. Out of appeals involving planning challenges, beginning with *Harbor Glen Associates v. Board of Appeals of Hingham* (1982), the HAC developed a three-part test for deciding whether a community's planning efforts. From *KSM Trust v. Pembroke* (1991) to *28 Clay Street Middleborough, LLC v Middleborough Zoning Board of Appeals* (2009), the evolving three-part test included the following criteria: (1) if the plan is bona fide (legitimately adopted and continues to function as a viable planning tool; (2) if the plan promotes affordable housing and (3) if the plan has been implemented in the area where the comprehensive permit development has been proposed.

Even when the answer to all three questions is "yes," a project's inconsistency with local planning may not be enough to justify denial of a comprehensive permit or the imposition of requirements that could make the project uneconomic. "The master plan is placed on the town's side of the scale, and the strength of the plan itself, the extent to which it has actually been implemented, and the extent to which it encourages and has resulted in affordable housing all lend weight to the town's argument that local planning concerns with regard to a particular proposal outweigh the regional need for housing."⁹ From there, the HAC would determine the "weight to be given to the master plan as a local concern."¹⁰

The two most recent planning-related HAC decisions involving the Town of Andover and Town of Hanover shed further light on how reliance on a master plan or other plan may be viewed in a comprehensive permit appeal. I had the pleasure of serving as MHP technical assistance consultant to the Andover Board of Appeals and worked closely with the chair, Stephen D. Anderson, Esq., to prepare the Board's decision. While I maintain that Andover was (and still is) the suburban "poster child" for local initiatives to create affordable housing, the HAC did not agree. The four-part test articulated in the HAC's *Andover* decision builds on analysis described in a decision involving the Town of Lunenburg the previous year,¹¹ and it bears repeating:¹²

⁸ See Massachusetts Housing Appeals Committee, *Paragon Residential Properties v. Brookline Zoning Board of Appeals*, No. 04-16 (March 6, 2007).

⁹ Massachusetts Housing Appeals Committee, *KSM Trust v. Pembroke*, No. 91-02 (November 18, 1991); and *28 Clay Street Middleborough, LLC v Middleborough Zoning Board of Appeals*, No. 08-06 (September 28, 2009).

¹⁰ *Zoning Board of Appeals of Lunenburg v. Housing Appeals Committee*, 464 Mass. 38, 48-49 (2013).

¹¹ *Zoning Board of Appeals of Lunenburg v. Housing Appeals Committee*, 464 Mass. 38, 43 (2013).

¹² Massachusetts Housing Appeals Committee, *Hanover R.S. Limited Partnership v. Andover Zoning Board of Appeals*, No. 12-04 (February 10, 2014), 7-8.

1. The extent to which the proposed housing is in conflict with or undermines the specific planning interest.
2. The importance of the specific planning interest, under the facts presented, measured, to the extent possible, in quantitative terms, for instance, the amount of economic cost associated with lost tax revenues, the value of potential jobs forfeited, the amount additional costs incurred, or the nature and extent of environmental loss associated with the proposed housing.
3. The quality of the overall master plan (or other planning documents or efforts) and the extent to which it has been implemented. A very significant component of the master plan is the housing element of that plan (or any separate affordable housing plan). The housing element must not only promote affordable housing, but to be given significant weight, the Board must also show to what extent it is an effective planning tool. That is, typically the Board should at least show that specific, effective action items have been enumerated to encourage the building of affordable housing, that potential sites for affordable housing have been identified, and that town staff or volunteer groups have been assigned responsibility for specific actions and have followed through on those actions. Among the issues to be considered with regard to implementation is whether zoning bylaws have been adopted and regulations promulgated in support of goals established in the master plan.
4. The amount of affordable housing that has resulted from affordable housing planning . . . How many affordable housing units have been constructed? . . . Has the housing plan brought about the construction of a substantial amount of affordable housing to address the community's needs?

I am hardly an expert on Brookline's history of planning and plan implementation, but based on my experience with the Town over the past several months, I believe the Board will find it difficult to make a defensible case for all four parts of the *Andover* test. Clearly, however, this is a matter for the Board and planning staff to decide.