

MEMORANDUM

TO: Jesse Geller, Chair, Brookline Zoning Board of Appeals
FROM: Judi Barrett
RE: Real Estate Pro forma Review
DATE: October 26, 2016
CC: Alison Steinfeld, Maria Morelli

The purpose of this memo is to explain the use of pro forma review under Chapter 40B.

A developer has the right to appeal to the state Housing Appeals Committee (HAC) if the Board of Appeals decides to (a) deny the permit or (b) approve the permit with conditions that would make the project “uneconomic,” or financially infeasible. The statutory definition of “uneconomic” is as follows:

[A]ny condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government on the size or character of the development or on the amount or nature of the subsidy or on the tenants, rentals and income permissible, and without substantially changing the rent levels and units sizes proposed by the public, nonprofit or limited dividend organizations.

To the extent possible, the Board needs to avoid imposing conditions that would make the profit from a comprehensive permit development too low for financing purposes and too high for programmatic purposes (meaning in excess of subsidizing agency guidelines). Each agency’s programs and requirements differ somewhat, and each deal is different, too. As a result, the conditions one project can absorb may not work for another project. For this and other reasons, it is really important for the Board to have an independent pro forma review by a knowledgeable industry expert – *if* a pro forma review is even needed at all. In my experience, the pro forma review often leads to unintended and unwanted consequences, and ultimately backs both town boards and applicants into a corner that is difficult to escape.

There is an enduring myth that a board of appeals may not, or should not, allow more units than an applicant absolutely must have in order to have a feasible project. That is not what the law says, but many people believe it. Prior to 2008, it was fairly common for boards to insist on a pro forma review at, or close to, the outset of the comprehensive permit process. This practice changed – or was intended to change – following DHCD’s issuance of new Chapter 40B regulations in February 2008. The change occurred for several reasons, not the least of which was that a very early focus on financial feasibility distracted the board’s attention from

the local concerns that regulatory bodies usually consider. They are the same local concerns we have discussed from time to time over the past several months:

- Health
- Safety
- Environmental
- Design
- Open Space
- Planning

Today, the process envisioned in the regulations is quite different. Clearly the Board does not have to give developers more than they need to build a project, but the Board has to weigh many interests – and often competing interests – in deciding how to act on a comprehensive permit, and density is only one of them. This is precisely why the Board should focus on valid local concerns, communicate its priorities to the applicant, and see how the applicant responds *before* calling for a pro forma review. If the applicant responds by proposing any desired changes, the Board and applicant should continue to negotiate for a better development, i.e., one that is mutually beneficial. The applicant may also respond by providing additional technical information that requires the Board to rethink its position, but this can also be an effective path to site plan revisions. It is very possible (and usually my experience) that through reasonable negotiation, the Board and applicant will arrive at an acceptable project plan without triggering the pro forma review process. The outcome may not be everything you want, but between what the applicant originally asked for and what the permit ultimately grants, there is room to negotiate.

That said, if the applicant claims the Board's requests will make the project uneconomic and further negotiations lead nowhere, the Board has the right to request an independent pro forma review. Usually this happens when the Board decides that it will not approve a significant waiver requested by the applicant, e.g., the applicant seeks a waiver to allow more density or a higher floor area ratio than the maximum allowed by zoning. In such instances, the applicant will submit a real estate pro forma for the project including the change(s) requested the Board, and almost always, the pro forma will support the applicant's position. The Board already has two well-qualified analysts under contract, so you would refer the applicant's pro forma to one of them – just as you have referred traffic studies to a traffic consultant – and the peer reviewer will return with a report.

Please remember: the purpose of the review is to determine whether conditions the Board wants to impose or waivers the Board refuses to grant will make the proposed project infeasible. The conditions must be limited to valid local concerns. The Board cannot require the applicant to change a project to some other subsidy program, build smaller or family “unfriendly” units, build age-restricted units, replace low-income units with moderate-income units, or make other types of project changes that would lead to a substantially different *type* of project than the one the applicant has proposed. Similarly, the Board cannot ask the peer review consultant to opine on these options or others that differ from the

applicant's plan. Furthermore, the Board cannot ask the peer reviewer to run several scenarios in order to figure out how many units can be removed from the project before the estimated profit will be too low.

The real estate pro forma review must account for the financial policies and programs of the subsidizing agency that issued the Project Eligibility (PE) letter. The peer reviewer will examine the pro forma for accuracy, reasonableness of the assumptions the developer used to estimate income and expenses, and consistency with the subsidizing agency's requirements. (What you or I consider acceptable profit may not be consistent with an agency's underwriting criteria.) The examination for reasonableness usually requires the peer review consultant to check some of the developer's assumptions with Town staff or other consultants, e.g., site construction costs, market-rate rents or sale prices, and so forth. Ultimately, the reviewer's report will advise whether the applicant's pro forma reasonably reflects the feasibility of the project as revised by the Board's intended conditions. The report may include an adjusted pro forma prepared by the reviewer. A well-done review can be an educational process for everyone, but it comes with some hazards.

If the independent review confirms that the Board's conditions will not make the project infeasible, the Board can decide whether to impose them – but the applicant will most likely push back. As with other aspects of the Chapter 40B projects before you, the pro forma review will probably lead to some “back and forth” between the Board, the Board's consultants, the applicant, and the applicant's consultants. It is not something that will be resolved and closed out in one hearing. Abutters sometimes hire a consultant, too, which means the Board may find itself with one independent review – that of the peer reviewer – and two “motivated” reviews, one from the applicant and the other from opponents of the project. It is, at best, a messy process. (Note: the Board cannot require the applicant to rebut a pro forma analysis submitted by other interested parties.)

More disconcerting, however, is this: if the peer reviewer concludes that the Board's conditions *will* make the project uneconomic, it will be very difficult for you to continue negotiating with the applicant. Your position could be weakened considerably. Since the crux of Chapter 40B is the suspension of regulatory barriers that make low- or moderate-income housing infeasible to build, the Board needs to do what it can to avoid an economics problem. Better to negotiate and focus on those “valid” local concerns listed above and specifically recognized in the statute. However, I concede that it is not always possible to negotiate, especially with applicants who view the Chapter 40B comprehensive permit as an outright entitlement. It is not.

If the applicant finally says he cannot accept a particular condition, move on to other issues and do your best to obtain concessions. It may be that despite all of the Board's best efforts, you will eventually need to move to a pro forma review process for one or more of the comprehensive permit developments currently before you. Before you do, consider whether you have enough independent, unbiased, verifiable evidence to show that the changes you want (which the applicant objects to) outweigh the regional need for affordable housing.