

Warrant Article 26—Fossil Fuel Free (FFF) Incentivization via Special Permits 4.9.21

Frequently Asked Questions

How does WA26 as a special permit requirement interface with existing section 9.04?

WA26 is designed to fit seamlessly into the existing special permit framework in the Zoning By-Law. When reviewing a special permit application, the Board of Appeals needs only task if the project includes a “new building” or “significant rehabilitation” under the definitions of the WA and whether the proposal includes new fossil fuel infrastructure. If the answer to both questions is “yes” a special permit applicant is entitled to the special permit just as before, but it would be granted with a condition.

Are all special permit applications subject to WA26?

No, WA26 applies only to “new buildings” and “significant rehabilitations” as defined in the Article. If a special permit applicant does not intend to erect a new building or renovate 75% of the area of a residential structure, WA26 does not apply.

Further, WA26 applies only to **new** fossil fuel infrastructure. If a proposed renovation does not require replacing existing heating infrastructure, or installing new fossil fuel infrastructure, WA26 does not apply.

Can a special permit be issued with the condition that it expires?

M.G.L. c. 40A §9, provides that special permits may impose conditions relating to time as follows:

Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law, and shall be subject to general or specific provisions set forth therein; and **such permits may also impose conditions, safeguards and limitations on time or use.**

Is this really an incentive, or is it a mandate in disguise?

WA26 is an incentive. Nothing in WA26 requires that an applicant install FFF infrastructure in order to receive a special permit. *M.G.L. c.40A* gives the Town the authority to place conditions on special permits. Rather than exercising this

power to limit all special permits, WA26 uses the Town's zoning and permitting power to encourage applicants to choose FFF infrastructure over natural gas in order to gain the benefit of a freely transferable and non-expiring permit. In this way, it is similar to a Lexington Zoning Bylaw, which limited the permissible height of certain buildings with FF infrastructure, which the Attorney General's Office recently approved.

WA26 works by providing property owners with a series of meaningful choices, while rewarding the decision to build with FFF infrastructure for larger projects. The property owner may choose to pursue a by-right use or structure. If no special permit is required, then WA26 is inapplicable. If the applicant does decide to pursue a project for which a special permit is necessary, there are again two choices: First, the applicant may pursue a new construction or significant rehabilitation, to which WA26 is applicable. Alternatively, the applicant may pursue renovations that do not qualify as significant rehabilitation, so that WA26 will not be applicable. Ultimately, if the property owner has chosen to pursue a project to which WA26 is applicable, the property owner may choose to install FFF infrastructure, in order to gain the benefit of a permit that does not expire; or to install natural gas infrastructure, resulting in a permit with the expiration and transferability conditions of WA26.

Does WA26 violate *M.G.L. c.40A* by regulating materials and methods of construction?

WA26 does not regulate materials or methods of construction. Rather, its provisions are analogous to those upheld by the Massachusetts Appeals Court in *Wildstar Farm, LLC v. Plan. Bd. of Westwood*, 81 Mass. App. Ct. 1114 (2012) (unpublished disposition). In that case, the Court held that the Town of Westwood's authority to require sprinkler systems in certain buildings was not preempted by Chapter 40A, in part because sprinkler systems are not a method of construction, notwithstanding their inclusion in the State building code. Based on the *Wildstar* decision, it is clear that HVAC and hot water systems and infrastructure are not immune from regulation by a Zoning By-law.

Is a special permit application to add a dormer or other slight modification to a nonconforming structure subject to WA26?

Generally, no. For residential structures, WA26 applies **only** where 75% of the gross floor area of the structure is affected by the renovation. In the event that WA26 does apply to a special permit for a nonconforming structure or use, the conditions described in WA26 may be applied to the special permit only if the Board of Appeals determines they are necessary to satisfy the "not substantially more detrimental" standard set forth in *M.G.L. c.40A. §6*.

Is WA26 retroactive or does it ever apply to existing fossil fuel infrastructure?

No. WA26 does not apply to any existing fossil fuel infrastructure. Even if a special permit applicant proposes a “new building” or “significant rehabilitation,” there is no requirement to remove or modify any existing infrastructure. WA26 applies only to the proposed installation of new fossil fuel infrastructure. Future compliance with the requirements of an expiring or non-transferrable special permit requires only that the fossil fuel infrastructure that was new at the time the special permit was first granted be disconnected.

What happens if my special permit under WA26 expires?

The holder of an expiring special permit has two options: The preferred option is that fossil fuel infrastructure be disconnected at or prior to expiration of the special permit. Alternatively, WA26 allows for an indefinite number of one-year renewals of a previously granted, expiring special permit. WA26 is drafted to provide flexibility both for the Board of Appeals and applicants to ensure that Brookline moves towards sustainable development, but does so in a way that ensures that the Town’s residents have a variety of choices in the manner in which the Article’s requirements are satisfied.

Do the definitions in WA26 amend those already in the Zoning By-Law?

The definitions used in WA26 rely on some defined terms from Article 2 of the Zoning By-Law, but these new definitions are intended to be used only in the application of WA 26.

Can a special permit be tied to a person and not the property?

It is not uncommon to grant a special permit that is personal to the applicant rather than running with the land. This frequently arises where special circumstances support the need to condition the permit in a way that prevents the structure or use from going on in perpetuity without further review. WA26 provides an option for individuals who wish to build or renovate a residential structure, with new fossil fuel infrastructure, and keep it in their family. This option is intended as an alternative to an expiring special permit, while ensuring that the property will be made FFF if it is sold outside of the family.

Does WA26 create separate standards for large and small buildings?

No. WA26 applies the same baseline requirements to all buildings, regardless of floor area, but §__.03 provides a specific exception for certain piping in certain larger buildings. Specifically, the construction or replacement of piping used to produce potable or domestic water in large buildings of over 10,000 sf is not subject to the requirements of WA26 if the Engineer of Record certifies that no commercially available electric water heater can meet the building's hot water demand for less than 150% of the installation or operational costs, compared to a conventional fossil-fuel hot water system.

Not all projects in large buildings will fall within this specific exception because, for example, an electric water heater may be as cost-effective as a natural gas system. If it is, the conditions of WA26 apply the same as they would to projects in smaller buildings.

Is providing a detailed cost comparison for a waiver an undue burden on every project?

While an expert opinion may, as a practical matter, be necessary to obtain a waiver, it is important to remember the steps that would occur prior to requesting a waiver in the first place. An applicant requesting a waiver must be proposing a "new building" or "significant rehabilitation," that requires a special permit, and must have determined that new fossil fuel infrastructure is necessary to meet the design specifications for that construction. An applicant having arrived at the point of requesting a waiver will have already employed an architect, engineer or contractor who is familiar with the proposal, and should be readily able to demonstrate to the Board of Appeal's satisfaction that the avoidance of new fossil fuel infrastructure is not feasible.

How will WA26 affect the Board of Appeals' review of 40B projects?

The standard for a waiver of the FFF requirement in WA26 is designed to be substantially the same as what is required for a waiver under *M.G.L. c. 40B*, and its implementing regulations. If FFF infrastructure would be "uneconomic" under Chapter 40B and entitled to a waiver by the Board of Appeals, so too would a waiver of the FFF condition be appropriate if it would be infeasible or would limit the number of affordable units in a project.