

Rules, Regulations, and Guidelines for Section 9.13 of the Town of Brookline Zoning By-law.

Issued by the Planning Board on 9/2/21.

Section 9.13 (On-Site Fossil Fuel Infrastructure), Paragraph 7 requires that the Brookline Planning Board adopt guidelines for procedures and waivers that will provide the uniform and equitable application of the section. These guidelines shall be taken into consideration by the Planning Board and Zoning Board of Appeals (ZBA) in making special permit decisions subject to Section 9.13.

Terms in italics are defined in Section 9.13 of the Zoning By-law.

I. Applicability of Section 9.13

If all three of the conditions below (1-3) are true for your project, the provisions of Section 9.13 would apply. Note that there are specific exceptions for certain projects under conditions 1 and 3. Projects involving these exceptions are not subject to Section 9.13.

- 1. The project requires a Special Permit. Exceptions to this condition include projects where a Special Permit is required for any of the following situations:
 - a. Solely to increase a pre-existing non-conformity of a single or two-family residence.
 - b. Solely for Section 5.09 (Design Review) of the Zoning By-law.
 - c. Pursuant to, or subject to, the requirements of Section 5.06.4.k (Waldo-Durgin Overlay District) or Section 5.06.4.l (Fisher Hill Special Overlay District)
 - d. For a research laboratory for scientific or medical research, or for a health care use that requires licensure or certification as a health care facility by the Mass Dept. of Public Health.

- 2. The project involves a *New Building* or *Significant Rehabilitation*

- 3. The project involves installation of any amount of new *On-Site Fossil Fuel Infrastructure* that is not needed:
 - a. To replace existing portions of fuel piping that are unsafe (as determined by the Plumbing and Gas Fitting Inspector).
 - b. To fuel a backup generator or cooking appliance.
 - c. In a building with floor areas of at least 10,000 square feet, to produce potable or domestic hot water from centralized hot water systems and the Engineer of Record can certify that no commercially available electric hot water heater can meet the building's hot water demand for less than 150% of installation or operational costs compared to a conventional fossil-fuel hot water system.

II. Options Available to the Applicant

For applicants seeking zoning relief from the ZBA, there are three primary options available for compliance with Section 9.13. The intent of the Section is to incentivize applicants to design projects to be fossil-fuel free and if they do not, be subject to an “expiring” Special Permit. However, it is also recognized that designing a building to be fossil-fuel free is not always possible. As such, there are three options available to any applicant: (A) Design a fossil-fuel free project, (B) design a project with fossil-fuel infrastructure and receive an expiring Special Permit, and (C) seek a waiver from the requirements of Section 9.13.

A. Design a fossil-fuel-free project

A project free of any new *On-Site Fossil Fuel Infrastructure* is not subject to Section 9.13 (see Applicability above). The absence of any new *On-Site Fossil Fuel Infrastructure* must be confirmed by the Building Commissioner or designee.

B. Design a project with *On-Site Fossil Fuel Infrastructure* and receive an expiring special permit

If an applicant, for any reason, chooses to design a project with *On-Site Fossil Fuel Infrastructure*, they may proceed through the permitting process as would typically be the case for projects seeking zoning relief. However, the decision issued by the ZBA will include a condition stating that the decision will expire after 5 years or on January 1, 2030, whichever is later, or that the decision will expire on sale or transfer of the property outside the applicant’s immediate family. Such Special Permit decisions may conditionally be renewed at the time of expiration. See paragraph IV. Expiring Special Permit below for additional information.

C. Seek a waiver

In a few unique circumstances, an applicant may be able to seek and receive a waiver from the requirements of Section 9.13. Being granted a waiver from the requirements of Section 9.13 means that all, or a portion of, an applicant’s project will be allowed to install new *On-Site Fossil Fuel Infrastructure* without being subject to an expiring Special Permit. Note that the ZBA, in considering waiver requests, is required to evaluate whether a “partial” waiver can be granted that resolves the difficulties related to designing a fossil-fuel free building. In other words, applicants that seek a waiver on the grounds that a fossil-fuel free building is financially infeasible may find that the ZBA determines that most of the building can be fossil-fuel free and a waiver is only necessary for a portion of the project to achieve financial feasibility. See paragraph V. Submittal Requirements for documentation required for waiver requests and III. Review Standards and Criteria for more detail on what circumstances might warrant a waiver.

III. Review Standards and Criteria for the Issuance of Waivers

Section 9.13 allows the ZBA to grant waivers to the Section in two very narrow situations: (1) constructing a fossil-fuel-free project is financially infeasible, or (2) constructing a fossil-fuel-free project would lead to a loss of affordable housing (defined as units eligible for inclusion in the Department of Housing and Community Development Chapter 40B Subsidized Housing Inventory). The burden is on the applicant to affirmatively prove that one of these situations is applicable and the ZBA will assess each request on a case-by-case basis. Furthermore, the ZBA may issue waivers

merely for a portion of a project. Applicants must therefore clearly indicate to what extent *On-Site Fossil Fuel Infrastructure* needs to be installed to achieve financial feasibility or to achieve the desired level of affordable housing.

IV. Expiring Special Permits

Where an applicant opts to design a project with On-Site Fossil-Fuel Infrastructure, the applicant will be required to choose between the two following methods of expiration for the Special Permit decision:

- The decision will expire the later of Jan 1, 2030 or five years from the date of Special Permit issuance.
- The decision will expire upon sale or transfer outside the applicant's immediate family.

Once an Expiring Special Permit is issued, its expiration trigger cannot be changed, except that:

- The decision can be modified by the ZBA to be good in perpetuity upon a finding by the Building Commissioner that the applicant has removed, disconnected, or otherwise permanently disabled any *On-Site Fossil Fuel Infrastructure* that was subject to 9.13 at the time the expiring Special Permit was granted.
- It can be extended by the ZBA for up to one year at a time, per Section 9.13.4b.2, through application to the ZBA. Such an application would be reviewed on a case-by-case basis, looking at the circumstances in each case on its own merits.

V. Submittal Requirements

A. Submittals for fossil-fuel-free projects

Applicants who intend to pursue Option A above and design a project that is fossil-fuel-free must submit a document that is signed by the property owner and signed and stamped by the design professional or professional engineer certifying that the project has been designed, and will be constructed, in a manner that avoids the installation of any *On-Site Fossil Fuel Infrastructure* (exceptions notwithstanding). This document must be submitted to the Building Department as part of the application for Plan Review and must also be submitted with any application to the ZBA where Section 9.13 has been cited in the Denial Letter. Additional submittal documents may be required by the Building Department as needed to remain consistent with any adoption of new Building Codes.

B. Submittals for fossil-fuel projects

Projects subject to Section 9.13 that include the installation of *On-Site Fossil-Fuel Infrastructure* need not submit any additional documentation, with the exception of projects seeking a renewal for 1 year as described in Section IV above. For such applications, the applicant must submit a narrative that explains the justification for the continuation of *On-Site Fossil Fuel Infrastructure* and the failure to remove it from the property within the 5-year Special Permit expiration window. The applicant must also provide a justification for the extension of the Special Permit and an explanation on how additional time will facilitate the removal of the *On-Site Fossil Fuel Infrastructure*.

C. Submittals for waiver applications

Applicants who intend to request a waiver from the requirements of Section 9.13 as described in Option C above must submit the following documentation at the time of an application to the ZBA (no additional documentation is required as part of the application for Plan Review):

- A narrative that describes under which exception a waiver is being sought. Section 9.13 allows the issuance of waivers where an applicant can demonstrate that designing a project to be fossil-fuel-free would lead to (1) a financially infeasible project, or (2) a project that represents a loss of affordable housing. The applicant's narrative should identify which situation is applicable and provide an explanation as to why. Furthermore, to demonstrate whether a partial waiver can be granted, the narrative should stipulate what portion of the project the applicant believes must include *On-Site Fossil-Fuel Infrastructure* to achieve financial feasibility or meet the affordable housing targets.
- For applications requesting a waiver due to financial infeasibility, applicants must provide a comparative cost analysis showing the difference in the projected cost of the project if designed *with On-Site Fossil Fuel Infrastructure* as opposed to *without On-Site Fossil Fuel Infrastructure*. The analysis must include an explanation that describes why the applicant considers the differential between the two cost projections to be financially infeasible or impractical. The document must be prepared by a LEED-certified design professional.
- For applications requesting a waiver due to loss of affordable housing, applicants must provide an explanation for why the installation of *On-Site Fossil Fuel Infrastructure* is expected to allow the construction of more affordable units (defined as units eligible for inclusion in the Department of Housing and Community Development Chapter 40B Subsidized Housing Inventory) than would be the case without the installation of *On-Site Fossil-Fuel Infrastructure*.

If the justification is financially based, the applicant must provide supporting documentation similar to the above requirements for waivers due to financial infeasibility.

If the justification is mechanically, architecturally, or technically based, detailed dimensional information must be provided that demonstrates the technical obstacles to designing a fossil-fuel-free building with the same number of affordable units.

If the justification is not financial or technical in nature, appropriate documentation must nonetheless be provided.

VI. Peer Review

In the normal process of deliberating on projects subject to Section 9.13, the Planning Board or ZBA may deem it necessary to engage an outside consultant pursuant to M.G.L., c. 44, §53G to review documentation provided by the applicant and provide a peer review report. The engagement of a peer review consultant shall be at the discretion of the ZBA (or Planning Board if the responsibility has been delegated to it by the ZBA) but the ZBA shall limit the use of peer reviewers to projects of heightened complexity and/or impact on the community. While the decision to engage a peer review consultant shall be made on a case-by-case basis, the following projects may merit peer review:

- Residential or commercial projects containing more than 2 dwelling units and/or more than 5,000 square feet of commercial space that are intended to be fossil-fuel-free may require peer review to ensure that they have been designed in a manner that will avoid the need for *On-Site Fossil Fuel Infrastructure* while maintaining adequate living or operating standards for the proposed use.
- Any project that seeks a waiver from the requirements of Section 9.13 will likely require peer review to assess the accuracy of the applicant's assertion that installation of *On-Site Fossil Fuel Infrastructure* is required for financial feasibility or required to provide the necessary amount of affordable housing.