

Peter:

Below, I address the four concerns that you listed in your email about Pelham's ZBA 40B regulations:

1. Section 3.8: requested exemption shall include an analysis of each requirement for which each exception is sought, the location on the plans...and *a complete explanation of why each exception is required to keep the project from becoming uneconomic*. It is premature in the application to address the economic impact of the project and its design, see next item.
2. Section 3.9: requirement for a financial pro-forma to be submitted with the application. Please see 760 CMR 56.05 (6)(a) which states:

A Board may request to review the pro forma or other financial statements for a Project only after the following preconditions have been met:

 - i. other consultant review has been completed;
 - ii. the Applicant has had an opportunity to modify its original proposal to address issues raised;
 - iii. the Board has had an opportunity to propose conditions to mitigate the Project's impacts and to consider requested Waivers; and
 - iv. the Applicant has indicated that it does not agree to the proposed condition(s) or Waiver denial(s) because they would render the Project uneconomic. A Board may not conduct review of a pro forma in order to see whether a Project would still be economic if the number of dwelling units were reduced, unless such reduction is justified by a valid health, safety, environmental, design, open space, planning, or other local concern that directly results from the size of a project on a particular site, consistent with 760 CMR 56.07(3).
3. Section 3.10: requested application details far exceed requirements of 760 CMR 56.05 (2) and far beyond the ZBA application requirements for other permits. As noted in 56.05 (2) "The Board shall not require submissions for a Comprehensive Permit that exceed those required by the rules and procedures of Local Boards for review under their respective jurisdictions."
4. Section 3.12: Statement of impact on municipal facilities and services: appears to be wholly inconsistent with 760 CMR 56.05 (2): "The Applicant shall submit to the Board an application and a complete description of the proposed Project. Normally the items listed below will constitute a complete description. Failure to submit a particular item shall not necessarily invalidate an application. The Board shall not require submissions for a Comprehensive Permit that exceed those required by the rules and procedures of Local Boards for review under their respective jurisdictions.
5. Section 6 Review Criteria. I have serious concerns with language in every sub-section. While much of this language may be appropriate in a master plan or other planning guidance, the entire section appears to be inconsistent with 760 CMR 56.05 (1) which states (emphasis added): "The Board shall adopt rules, not inconsistent with M.G.L. c. 40B, §§ 20 through 23, for the conduct of its business and shall file a copy of said rules with the city or town clerk. Such rules shall be consistent with the purpose of M.G.L. c. 40B, §§ 20 through 23 *to provide a streamlined permitting process that overcomes regulatory barriers to the development of Low or Moderate Income Housing.*"

You commented that given that Pelham's regulations

were adopted after public presentations of the Amethyst Brook Apartments project, the regulations appear to be a direct response to the project, and formulated to present hurdles specifically to this project. Below is a short list of items in the Pelham regulations that I believe are inconsistent with or greatly in excess of the 40B regulations.

Here is a brief history of the adoption of the regulations. Since Pelham's ZBA has never dealt with a 40B application, I sought help from our town counsel, who proposed regulations that he had developed for another community, making changes so that it said "Pelham" rather than the town for which they had been developed. At my request, he came to the ZBA to conduct a workshop to help the Board understand both the process and our role in the 40B process. I made it clear that we were to focus on 40B applications and hearings in general, and not on your expected application. During the workshop, both the attorney and the ZBA members adhered to that principle.

As the minutes for that evening state:

[A]fter attorney Whitten had departed, the ZBA then discussed the draft of the comprehensive permit regulations that Attorney Whitten had suggested. After making some minor amendments dealing with salt treatments, fertilizers, pesticides, and herbicides, the ZBA voted unanimously to adopt the regulations, which are appended to these minutes.

The ZBA made these amendments because the entire town is a watershed district (Pelham's Zoning Bylaws, §125-8.1), in contrast to the town for which our town counsel wrote the regulations. Thus these minor amendments (asking for plans for maintaining and treating driveways and parking areas) are town-specific rather than project-specific. Please let me know if any of these additions are inconsistent with CMR regulations.

Your first two points regarding Sections 3.8 and 3.9 have to do with the timing of providing financial information, not to whether you need to provide the ZBA with the information before the ZBA's decisions related to approval and conditions are finalized. While there will probably be requests for waivers and potential conditions where providing such information before all the preconditions listed in 760 CMR 56.05 (6)(a) have been met would reduce the number of hearing sessions, I will propose to the ZBA that we change the language of those regulation sections.

Your third point asserts that the requested application details in Section 3.10

far exceed requirements of 760 CMR 56.05 (2) and far beyond the ZBA application requirements for other permits. As noted in 56.05 (2) "The Board shall not require submissions for a Comprehensive Permit that exceed those required by the rules and procedures of Local Boards for review under their respective jurisdictions."

If your assertion means that what we are asking under Section 3.10 is beyond what we ask for applicants under 40A, then please note the parenthetical expression that describes the limited conditions under which the list of requested details is required: "if applicants request a waiver to exceed the number of dwelling units stipulated in §125-9.2(B)(2)." Note that under 40A, no special permits can be granted that waive the number of dwelling units stipulated in §125-9.2(B)(2). Instead, a variance is required. As Section 10 of 40A states, ZBAs can only grant variances from the terms of its town's bylaws if they find:

owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures . . . and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.

Since when considering applications for variances, ZBAs must consider exactly the kinds of details that are listed in 3.10, Section 3.10 only applies to applications that would otherwise require variances, it does not ask for details beyond what ZBAs would ask under 40A.

However, since you quote 760 CMR 56.05 (2) in your list of concerns about both Section 3.10 and 3.12, you may be implying that Pelham's 40B regulations require submissions "that exceed those required by the rules and procedures of Local Boards for review under their respective jurisdictions." If you are asserting that any particular item requested under Sections 3.10 or 3.12 is beyond the authority of ZBAs' jurisdiction, please (1) specify which items in these sections are beyond the authority of ZBAs' jurisdiction and, for each item specified, (2) provide legal justification supporting your assertion that that item is indeed beyond the authority of ZBAs' jurisdiction.

Your final concern starts out focusing on language in Section, but doesn't cite any language. Furthermore, the substance of this concern seems to be about rules, and the key and final sentence states that:

Such rules shall be consistent with the purpose of M.G.L. c. 40B, §§ 20 through 23 to provide a streamlined permitting process that overcomes regulatory barriers to the development of Low or Moderate Income Housing."

My understanding is that the essence of the streamlined permitting process is that rather than seeking separate approvals from some committees and boards, the 40B process calls for the ZBA to consolidate the process and resolve any potential incompatible requirements or restrictions. Please either (1) cite a provision in Section 6 that violates the notion of delegating to the ZBA most of the required approvals, or (2) provide legal justification that providing a streamlined permitting process calls for excluding any of the criteria listed in Section 6.

Your 40B application seeks a variety of waivers of our town bylaws, each of which was supported by at least two-thirds of those who voted for them. Since Pelham's ZBA only seeks to require items that are relevant to your project, the ZBA will waive any requirement for submitting a particular item in your application if it is convinced that our request for that item either goes beyond the authority of ZBAs' jurisdiction, or is irrelevant to your project.

Cordially,

Jeff