

# Housing Advisory: HAC Rules that Town Can Claim Chapter 40B Planned Production Safe Harbor as of Date It Grants Permit, Not Date of DHCD Certification

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In its first decision addressing the commencement date of the one-year “planned production” safe harbor, the Housing Appeals Committee (HAC) has ruled that the Town of Bourne could rely on the safe harbor provision to block a proposed Chapter 40B development, despite the fact that Bourne had not yet asked the Department of Housing and Community Development (DHCD) to certify its compliance with the Town’s Housing Production Plan. The HAC decision reversed a determination by DHCD that Bourne could not rely on the safe harbor provision because it delayed its certification request to DHCD.

Chapter 40B allows developers to seek a comprehensive permit from local zoning boards for housing developments that include affordable housing. The statute has drawn criticism from municipalities that claim it unfairly limits local control over development decisions. To ease these concerns, DHCD issued regulations in 2003 creating certain “safe harbors” in which towns can deny or place conditions on comprehensive permits with no threat of appeal.

Under new 2008 regulations that expanded these safe harbors, towns may qualify for the “planned production” safe harbor if DHCD approves the town’s Housing Production Plan and the town then approves new affordable housing units equal to 0.5% of its existing housing stock. Once a municipality approves a project that it believes qualifies it for the planned production safe harbor, it must apply to DHCD for certification of its compliance with its Housing Production Plan. Any municipality that qualifies for this safe harbor is free to deny any Chapter 40B applications for the next 12 months. But DHCD’s regulations are less than clear about the point in the process at which the one-year safe harbor protection arises: the town’s approval of the new housing, or DHCD’s certifying that the town has created enough housing to entitle it to protection. The HAC decision in the Bourne case resolved that issue, at least until the courts consider the question.

Under the 2008 regulations, zoning boards that plan to claim a safe harbor must do so within 15 days of opening a public hearing on a comprehensive permit application. This allows the prospective developer to appeal to DHCD early in its permit process for a determination of whether a municipality qualifies for a safe harbor. The developer or municipality may then file an expedited interlocutory appeal of DHCD’s decision to HAC.

The Bourne case was the first such appeal decided by HAC. When Chase Developers applied for a comprehensive permit on June 3, 2008, the Town of Bourne claimed that the Town was in the planned production safe harbor because on April 28, 2008, it had approved another project that

would create sufficient affordable housing to meet the 0.5% threshold. But when Chase filed its application, Bourne had not even requested, much less received, DHCD's certification of its compliance with its earlier-approved Housing Production Plan. So Chase invoked the new procedure to request a ruling from DHCD that the Town had not yet sailed into the safe harbor. DHCD agreed with the developer. When the Bourne Zoning Board of Appeals appealed, HAC overturned DHCD's decision and ruled in favor of the Town.

HAC noted that the language of the regulation emphasizes that a certification becomes effective on the date a municipality *achieves* its numerical target. It therefore ruled that even though the town had requested certification of its compliance with the plan after receiving the new developer's application for a comprehensive permit, the certification was effective as of the date the town reached its numerical target, in this case April 28, 2008. HAC was not concerned that the developer might not know about the potential availability of the still-unclaimed planned production safe harbor when applying for the permit, as the developer would be notified about the town's reliance on a safe harbor provision before extensive proceedings were conducted. HAC also rejected the developer's argument that the approved units that allowed Bourne to meet its 0.5% threshold would not be developed within the year, noting that whether the units would lose their eligibility a year later had no bearing on their eligibility during that one-year period.

The Bourne decision contains one small victory for developers. In a similar appeal in late 2008, a different town represented by the same lawyer argued that a town's one-year safe harbor ran from the date of the town's request to DHCD for certification, or maybe even the later date that DHCD acted on that request. Under that theory, a town could obtain more than one year's protection simply by withholding its certification request until the next developer appeared with a comprehensive permit application. In that case, in which Paul Wilson and Jonathan Cosco of Mintz Levin represented the developer, DHCD did not reach the question of when the safe harbor arose, because it found that the town was not entitled to the safe harbor in the first place. See Mintz Levin's [Housing Advisory dated Sept. 23, 2008](#). In Bourne, HAC stated clearly that although the town can file its request for certification whenever it wants, the one-year safe harbor period begins on the date that the town granted the permit that put it over its 0.5% threshold.

As a result of the decision, developers trying to determine if a town can claim this safe harbor can no longer rely on the published list of towns that DHCD has certified as having created sufficient units under a DHCD-approved housing plan; they will also need to find out if the town has recently granted a permit but not yet sought certification. Sophisticated developers have long done such due diligence, but the Bourne decision does create a trap for the unwary.

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