Chapter 40B Handbook for Zoning Boards of Appeal

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ABOUT THIS HANDBOOK

The "Local 40B Review and Decision Guidelines", published in 2005 by the Massachusetts Housing Partnership (MHP), was the first practical guide for zoning boards of appeals. In 2008, the Department of Housing and Community Development (DHCD) revised Ch. 40B regulations and created state guidelines for Chapter 40B projects. DHCD's guidelines were revised again in 2012 and 2014. This second edition updates the original publication and incorporates DHCD's regulation and guideline changes. This handbook was reviewed by and reflects input from all four state subsidizing agencies: DHCD, MassHousing, MassDevelopment and MHP. MHP takes full responsibility for its content.

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CHAPTER 1

Introduction

G.L. c. 40B, §§ 20-23 – known as Chapter 40B or the Comprehensive Permit Law – is a state law that was enacted in 1969 to facilitate construction of low- or moderate-income housing. It establishes a consolidated local review and approval process (known as a "comprehensive permit") that empowers the zoning board of appeals (ZBA) in each city and town to hold hearings and make binding decisions that encompass all local ordinances or bylaws and regulations. In certain circumstances, the ZBA's comprehensive permit decision may be appealed to the Massachusetts Housing Appeals Committee (HAC), which has the power to affirm, modify, or overturn local decisions. Comprehensive permit applications are subject to unique rules and are typically far more complex than any other matters that come before a ZBA. This handbook is a resource for ZBA members, other local officials, and any other interested people who want to understand the comprehensive permit process and achieve the best possible results when new affordable housing is proposed in their community. Additional information can be found in the Chapter 40B Regulations (760 CMR 56.00 et seq.) and the Guidelines for G.L. c.40B Comprehensive Permit Projects and the Subsidized Housing Inventory published by the Massachusetts Department of Housing and Community Development (**DHCD**) ("Chapter 40B Guidelines"), both of which can be found online at http://www.mass.gov/hed/.

Why this Handbook?

In 2005, the Massachusetts Housing Partnership (MHP) released a similar publication entitled, "Local 40B Review and Decision Guidelines." Co-authored by MHP Executive Director Clark Ziegler and Attorney Edith M. Netter, with input from an advisory panel, the guidelines made recommendations for managing the comprehensive permit process and provided technical assistance for reviewing a developer's pro forma, a financial analysis of project development costs, anticipated revenues, and the developer's net financial return. For at least three reasons, the ZBA's job today is – or should be – a little less complicated.

- First, the Chapter 40B Regulations were overhauled in February 2008, clarifying the roles and responsibilities of housing subsidizing agencies, ZBAs, developers, and others, and providing explicit authority for DHCD to issue enforceable program guidelines.
- Second, pursuant to the 2008 regulations, DHCD has produced and periodically updated a set of Chapter 40B Guidelines that provide administrative guidance for comprehensive permit projects, the Local Initiative Program (LIP), the Subsidized Housing Inventory (SHI), affirmative fair housing marketing and resident selection plans, and related matters.
- Third, in 2010, the Supreme Judicial Court issued a key decision in *Zoning Board of Appeals of Amesbury vs. Housing Appeals Committee*, further clarifying the ZBA's role and limiting the conditions a ZBA can impose in a comprehensive permit to the types of conditions that city or town boards typically impose on special permits and other local approvals, e.g., building construction and design, siting, planning and zoning, public health, public safety, and environmental protection.

In light of all that has changed since 2005, MHP has decided to publish new local review guidelines that reflects these and other changes.

Along with the other state housing subsidizing organizations – DHCD, MassHousing, and MassDevelopment – MHP approaches technical assistance to cities and towns as a supporter of appropriate low- or moderate-income housing development. As a result, this handbook promotes a constructive view of the comprehensive permit process. It encourages ZBAs to carefully review a project's impact and negotiate for the best developments they can get for their communities. MHP is acutely aware that managing the comprehensive permit process can be challenging for ZBAs and their administrative staff. Low- or moderate-income housing often sparks objections from residential and non-residential neighbors, and in most cases the proposed housing involves a higher density than the development pattern found in surrounding neighborhoods. However, communities have largely controlled the make-up of their population by the choices they have made to control housing growth. Introducing different types of housing opens doors to a more diverse population, and sometimes it is fear of difference that triggers opposition. Nevertheless, the statute clearly intends to allow low- or moderate-income housing in places where it otherwise would not be built.

Stages of a Chapter 40B Project

There are five "stages" for every Chapter 40B development. They include:

- Project Eligibility (Site Approval) (Subsidizing Agency)
- Comprehensive Permit Process (ZBA, and if appealed, Housing Appeals Committee)
- Final Approval (Subsidizing Agency)
- Construction and Occupancy (Subsidizing Agency)
- Post-Occupancy Oversight (Subsidizing Agency)

While this handbook focuses on the comprehensive permit process, it also covers Project Eligibility because developers cannot apply for a comprehensive permit unless they have received a written Project Eligibility determination from one of the four subsidizing agencies. The community also has a role during the Project Eligibility review process, but ultimately the subsidizing agency that receives the developer's application is responsible for making the determination.

All of the other stages – Final Approval, Construction and Occupancy, and Post-Occupancy Oversight – are overseen primarily by the subsidizing agency. Municipal roles and responsibilities that arise during these stages are outlined at the end of Section 4.

Chapter 40B: Regional Planning, Regional Need

Many people do not realize that "Chapter 40B" is more than the Comprehensive Permit Law. Chapter 40B is actually the regional planning statute in Massachusetts – that is, the same statute that established regional planning agencies like the Metropolitan Area Planning Council (MAPC). The Comprehensive Permit Law is part of regional planning for an important reason: its purpose is to ensure that low- or moderate-income housing is available in all market areas by overriding regulatory barriers that make housing expensive to build. In effect, Chapter 40B places all communities on the same playing field when it comes to regulating housing for low- or moderate-income people. That objective is accomplished with a consolidated permitting process that gives the ZBA authority to waive zoning and other local requirements that would impede the creation of low- and moderate-income housing. Chapter 40B promotes regional distribution of low- or moderate-income housing by preventing individual cities and towns from blocking it with exclusionary zoning.

Awareness of fair and affordable housing needs in regional terms is not limited to Chapter 40B. The majority of federal housing assistance programs use percentages of **Area Median Income** or **AMI,** a figure based on median household income in metropolitan and non-metropolitan areas, as the basis for setting housing program income limits. The use of an *area* median accounts for differences in wealth

between cities and towns and recognizes that housing prices have an impact on the choices available to homeowners and renters about where they will live in relation to jobs, services, schools, and so on. In Massachusetts, housing units eligible for the **Chapter 40B Subsidized Housing Inventory** (SHI) must be affordable to households with incomes not exceeding 80 percent of AMI for the HUD region in which the units will be located. For example, SHI Eligible units in the metropolitan Boston area, which includes all Boston neighborhoods as well as many other communities around Boston, must be affordable to the same low- or moderate-income households – meaning the units must be sold or rented in the same price range – regardless of whether the units are in affluent or working-class communities. This promotes housing choice for low- or moderate-income households within the region.

Median income divides the income distribution into two equal parts: one-half falling below the median income and one-half above the median. Each year, the U.S. Department of Housing and Urban Development (HUD) estimates the median family income for an area and adjusts that amount for different family sizes so that family incomes may be expressed as a percentage of the area median income. For example, a family's income may equal 80 percent of the area median income, a common maximum income for HUD programs and the maximum for low or moderate income units on the Ch. 40B SHI.

What does a Comprehensive Permit include?

Under Chapter 40B, the ZBA has authority to grant all of the approvals that would otherwise trigger separate applications under local bylaws or ordinances. The ZBA also has authority to grant waivers of local requirements if requested by the developer and necessary to construct the proposed project. The ZBA's mechanism for taking these actions is a single comprehensive (all-encompassing) permit, the purpose of which is to expedite the approval process and facilitate construction of low- or moderate-income housing. The ZBA's jurisdiction includes zoning, subdivision regulations, and other types of local bylaws or ordinances and regulations, e.g., a local historic district bylaw, earth removal, storm water management, or local wetlands regulations. However, the ZBA does not have the authority to waive state requirements. Therefore, the Conservation Commission retains jurisdiction when a project requires permits under the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40. Similarly, the Board of Health still acts as the permitting authority under Title V of the State Environmental Code, 310 CMR 15.00.

The Housing Appeals Committee Appeals Process

Chapter 40B gives the **Housing Appeals Committee** (HAC) authority to adjudicate appeals arising from the ZBA's denial or conditional approval of comprehensive permits. However, the HAC's discretion to overturn local decisions applies only to cases involving a city or town that has not met its regional fair-share obligations under the statute. If the city or town meets one of the statutory minima, the HAC is required to uphold the decision as "consistent with local needs." The **statutory minima** include:

- If the number of low or moderate income housing units in the community exceeds 10 percent of the total number of housing units reported in the most recent federal (decennial) census; or
- If low or moderate income housing has been developed on sites comprising 1.5 percent or more of the total land area in the community zoned for residential, commercial or industrial use; or
- If the comprehensive permit application before the ZBA would lead to construction of low or moderate income housing on sites comprising more than 0.3 of 1 percent of the total land area in the

community zoned for residential, commercial or industrial use or ten acres, whichever is larger, in one calendar year.

As discussed below, additional regulatory safe harbors apply based on certain actions taken by a community to make progress toward meeting the statutory minima.

If a community does not meet one of the statutory tests described above, then **"consistent with local needs"** means balancing the regional need for affordable housing against local health, safety, open space, and site and building design concerns. These concerns must be valid, compelling, and documented. Over time, the HAC has established high standards for a ZBA to demonstrate consistency with local needs: demonstration of verifiable local concerns about the health and safety of residents of the proposed housing, the surrounding neighborhood, or the community as a whole; and serious building and site design deficiencies that cannot be rectified with conditions of approval; and establishment that the local requirements imposed by the ZBA are essential for protecting these public health, safety, design or environmental or open space concerns. These standards are very difficult to meet. If the HAC overturns the ZBA's denial of the permit, the ZBA must then issue a permit to the applicant, subject to instructions in the HAC decision about conditions that may be contained in the permit. Thus, the ZBA loses any leverage it might have had to get a better development for the community.

By contrast, when a ZBA approves a permit with conditions and the developer appeals, the HAC's standards of review initially are quite different. In these cases, the developer has the burden of showing that the ZBA's conditions, viewed in their entirety, make the project **uneconomic**. If the developer can prove that point, the community then has to show that the *conditions* are consistent with local needs: reasonable in view of the regional need for low- or moderate-income housing, and necessary to protect valid health and safety concerns or to create a project that fits better with its surroundings in terms of site and building design, open space, and the natural environment.

In addition, the ZBA can only impose requirements that are clearly under its purview. For example, the ZBA cannot impose requirements that exceed what is generally imposed on other types of residential development, or that address a pre-existing condition affecting the municipality generally, or that are disproportionate to the impact of the project on the community. In other words, low- or moderate-income housing cannot be "singled out." If the HAC agrees with the developer, it will strike the comprehensive permit conditions that make the project uneconomic but leave the rest of the permit intact. If the HAC disagrees with the developer, the ZBA's decision will be upheld as written.

Developer profit from Chapter 40B projects has been the subject of dispute for a long time. To resolve these disputes and establish clearer standards for pro forma review, DHCD has updated the Chapter 40B regulations by adding more specific definitions for "uneconomic" and related terms such as "return on total cost" and "net operating income." DHCD has also issued administrative guidance. The issue of whether conditions make a project uneconomic will only be considered if the developer appeals the ZBA's approval of a permit with conditions.

Subsidized Housing Inventory

The Chapter 40B SHI is DHCD's list of low- or moderate-income housing units in each city and town. It can be found on the DHCD website.

In rental developments meeting certain thresholds of affordability, the SHI includes the market-rate units as well as the affordable units.

Most towns have some types of modestly priced housing, such as small, post-war single-family homes, multi-family units, apartments with low monthly rents, or summer cottages converted for year-round occupancy. These units stay affordable as long as the market will allow. However, affordable units created under Chapter 40B remain affordable to low- or moderate-income households even when

home values and rents appreciate during robust market conditions. The units retain their affordability under a deed restriction that lasts for many years, if not in perpetuity. Both types of modestly priced housing meet a variety of needs. However, the market determines the price of unrestricted affordable units while a recorded legal instrument regulates the price of Chapter 40B deed restricted units. Any household (regardless of income) may purchase or rent an unrestricted unit, but only a low- or moderate-income household may purchase or rent a Chapter 40B deed restricted unit.

Housing units generally qualify for listing in the SHI if they are subsidized under an eligible subsidy program, subject to an affordable housing restriction that controls sale prices or rents and limits occupancy of the units to income-eligible households, and made available to income-eligible people on a fair, open basis in accordance with an **affirmative fair housing marketing and resident selection plan (AFHMP).** Although comprehensive permits and public housing authority developments account for most units on the SHI, there are other ways to produce **SHI Eligible Housing**. For example, some communities have created low- or moderate-income units with inclusionary zoning, by issuing special permits, or by using **Community Preservation Act** (CPA) funds to acquire older homes and resell them to low- or moderate-income homebuyers, subject to a deed restriction that keeps the units affordable over time. These kinds of initiatives typically result in units added to the SHI if approved through the **Local Initiative Program (LIP)** as "Local Action Units" (LAUs).

In addition, some communities have adopted overlay districts under **Chapter 40R** that encourage creation of low- or moderate-income units within the overlay district by requiring the inclusion of affordable units in most private projects and by allowing development of multifamily housing as-of-right or through a limited plan review process. In other communities, particularly where multi-family housing is permitted as of right, low- or moderate-income units may be developed without the need for a comprehensive permit.

While DHCD asks all communities to review and verify their SHI biennially, local officials can submit requests to add units at any time. As a result, the SHI summary posted on DHCD's website may not always be current, but a list that identifies all of the units of which DHCD has been made aware and that are currently included on the SHI can be obtained upon request from DHCD.

When a ZBA grants a comprehensive permit, the new low- or moderate-income units become eligible for the SHI as of the date the ZBA's decision is filed with the city or town clerk.[1] The timing for SHI eligibility can be critically important to a ZBA that anticipates denying a comprehensive permit. This is because in addition to the statutory meaning of "consistent with local needs," the Chapter 40B regulations create some **safe harbor** options that allow a ZBA to deny a comprehensive permit without risk of its decision being overturned by the HAC. These safe harbor tools are intended to recognize a community's efforts to create low- or moderate-income housing, so in most cases they create some breathing room. Access to the safe harbor provisions depends, in part, on the number of units listed on or eligible for listing on the SHI as of the date of the developer's comprehensive permit application. (See **Safe Harbors** for additional guidance.)

[1] Once added to the SHI, the units will remain there as long as additional timeframes for issuance building permits and certificates of occupancy have been met.

CHAPTER 2

What Makes a Difference?

Most of this Handbook focuses on the Chapter 40B technical requirements that ZBAs really need to know. It identifies and emphasizes the most important points in the statute, the Chapter 40B Regulations, and DHCD's Comprehensive Permit Guidelines. Requirements matter, but practical aspects of managing the comprehensive permit process belong in this Handbook, too. Here are some "lessons learned" from Massachusetts communities that have had constructive experiences with Chapter 40B.

1. A strong chairperson can help the ZBA, the applicant, and the neighborhood.

It could be the ZBA's elected chairperson or a chair pro tem designated for a particular case, but having an experienced ZBA member conduct the public hearing almost always makes the comprehensive permit process run smoothly. It can be challenging to keep the public hearing moving forward and focus the ZBA's attention on public health and safety, project design, and valid planning and open space issues. Good organizational and communication skills, experience working with city or town staff and consultants, and a commitment to basic fairness will go a long way toward making the comprehensive permit process manageable for all concerned. It is important to remember that while developers and their consultants understand how the permitting process works, many abutters do not. Seemingly basic public hearing protocols are not always intuitive for people, e.g., allowing the developer to make a presentation before the neighbors have a chance to speak. A strong, experienced chair anticipates the kinds of questions that residents may have and addresses them at the outset.

2. Get professional support for the ZBA.

The timeline for comprehensive permits differs from that of other permits ZBAs typically administer. Often, neither the ZBA nor their administrative staff know the Chapter 40B deadlines for certain actions (**see Chapter 4, Critical Timelines**), let alone the Chapter 40B regulations or recent case law. In addition, comprehensive permits often trigger more opposition than other types of development applications, so the public hearing process can be very challenging.

Any ZBA that has received a comprehensive permit application is eligible to request help from **MHP's Chapter 40B Technical Assistance Program**. MHP has a pre-qualified list of consultants who work with ZBAs around the state at the request of cities and towns. Communities can select a consultant from the list or ask MHP to choose a consultant for them. This program is paid for with Project Eligibility application fees from all four of the subsidizing agencies, so communities do not have to pay the consultants (except when a community seeks an unusually high level of participation from them. MHP contracts with the consultant, up to $15,000 for a ZBA participating in the program for the first time and $10,000 for a ZBA that previously participated. The consultant can help the ZBA with a range of tasks, depending on the ZBA's needs, such as:

- Procuring peer review consultants;
- Advising the ZBA, other municipal boards and committees, city or town staff, and the public on Chapter 40B requirements and policies;
- Researching technical questions at the ZBA's request;

- Coordinating the project review schedule;
- Gathering comments from city or town staff;
- Attending work sessions;
- Drafting the ZBA's decision, and so forth.

Some communities do not need an outside consultant because they already have knowledgeable staff in the planning department and the staff have time to help the ZBA. Others rely on town counsel or the city solicitor to help the ZBA. However, the developer cannot be required to pay for the municipal attorney's time to attend Chapter 40B public hearings or provide general Chapter 40B advice to the ZBA, and that cost is not covered by the MHP contracts. Whether the ZBA chair, the ZBA's consultant, or a town department head drafts comprehensive permit decision, it should be reviewed by the municipal attorney before the ZBA signs it and files it with the city or town clerk. (This is true for other types of permits, too.)

3. Provide comprehensive permit training for the ZBA.

Many aspects of the comprehensive permit process are similar to what ZBAs already do for other types of petitions, but the differences that do exist can be troublesome for inexperienced ZBA members. For example, most ZBAs know the statutory timelines for variances, special permits and appeals, but since comprehensive permits are not that common, it is easy to make a procedural error, e.g., by failing to open the public hearing within 30 days of the application date or failing to file the decision with the city or town clerk within 40 days of the hearing date. (**See Chapter 4, Critical Timelines** for additional guidance.) In addition, while there are matters the ZBA can regulate, others fall within the exclusive purview of the Subsidizing Agency. The differences can be confusing, especially since some items controlled by the Subsidizing Agency are also application requirements under the law. Furthermore, despite decisions of the HAC and the courts, and despite what the Chapter 40B regulations say, there is often pressure on ZBAs to reduce the number of units a developer can build based on a review of the developer's preliminary pro forma. However, ZBAs need to understand that they can only require a developer to reduce the size of a proposed development in limited circumstances.

Sources of Training and Technical Assistance

Massachusetts Housing Partnership Chapter 40B Technical Assistance Program

Massachusetts Department of Housing and Commuity Development Annual Chapter 40B Conference

Citizen Planner Training Collaborative

Town Counsel or City Solicitor

There are several sources of Chapter 40B training available to ZBAs. DHCD organizes a statewide Chapter 40B conference every year, usually in the fall. The conferences include "basic" training, legal updates, and special sessions on topics of interest, such as planning for affordable housing or working with peer review consultants. MHP provides Chapter 40B training for ZBAs that have received a comprehensive permit application, and on a regional basis for ZBAs regardless of whether they have an application before them. From time to time, the Citizen Planner Training Collaborative (CPTC) also provides Chapter 40B training at the annual CPTC conference in March, or in the fall if requested by the regional planning agencies. This Handbook can be used as a "stand-alone" resource or as a supplement to any of the trainings mentioned here.

ZBAs should not be advocates for affordable housing any matter that comes before them, and they also should not be categorically opposed to comprehensive permits. However, they do need to understand that Chapter 40B puts the regional need for low- or moderate-income housing ahead of other concerns unless there is overwhelming evidence to the contrary.

4. Hire peer review consultants to advise the ZBA on technical matters, and coordinate with the Conservation Commission or Board of Health to share peer reviewers as appropriate.

The ZBA will probably need help to evaluate the technical issues associated with each comprehensive permit application. This is usually accomplished by hiring peer review consultants unless the community has qualified staff to review the developer's plans and the staff have time to participate. Even in communities that have qualified and available staff, it often makes sense to engage peer review consultants and have the consultants coordinate their reviews with municipal staff, as necessary. It can be particularly important for the ZBA to have consultants on board in the event that the developer or other interested parties appeal the comprehensive permit decision. (See **Chapter 4, Hiring Consultants** for additional guidance.)

If a comprehensive permit project requires an Order of Conditions under G.L. c. 131, § 40 (Wetlands Protection Act) and needs waivers from a local wetlands bylaw or wetlands protection district (zoning) requirements, the ZBA and Conservation Commission should work cooperatively and hire the same peer reviewer. Having one environmental consultant making recommendations about a project can help to avoid conflicts between boards and ensure that developers provide appropriate mitigation.

5. Encourage the developer to meet with neighbors before the public hearing and outside the public hearing process to address neighborhood concerns, wherever possible.

While the ZBA cannot discuss a comprehensive permit application outside the public hearing, nothing prevents the developer from trying to work with abutters to address valid neighborhood concerns. Sometimes it is easier to resolve disagreements between the parties in an informal setting, which in turn can help the ZBA bring the public hearing to a close within the 180-day timeframe imposed by DHCD's Chapter 40B Regulations. (See **Chapter 4, Critical Timelines** for additional guidance.)

CHAPTER 3

Project Eligibility

Long before the ZBA receives a comprehensive permit application, the community knows it is coming because the developer has to comply with a state-imposed pre-qualification process that includes notification to the Chief Elected Official (usually the mayor or board of selectmen). The Chapter 40B regulations prescribe the process that developers must follow in order to pursue a comprehensive permit. Unless it satisfies the regulatory prerequisites, a developer does not have standing to apply for a comprehensive permit and the ZBA should not grant one. Among the prerequisites: evidence that the developer is an eligible organization and a housing Subsidizing Agency has found the project to be "fundable." The developer must have site control, too. The mechanism for meeting these and other pre-qualification requirements is known as a **Project Eligibility (PE)** determination, sometimes called **Site Approval**. Authority to make a PE determination lies exclusively with the agencies that administer housing subsidy programs: in most cases, MassHousing, MHP, DHCD, or MassDevelopment. PE matters to the developer, but it also matters to the ZBA because a PE determination establishes some critically important presumptions in favor of the project.

Project Eligibility Application

For developers, entry to the comprehensive permit process begins with a PE application to one of the Subsidizing Agencies. The application forms differ by agency, but all of them include these basic components:

- Site location and description;
- A locus map and photographs of the surrounding area;
- The proposed buildings and approximate number units by size (number of bedrooms, floor area) and type (ownership or rental);
- The name of the housing program under which a PE determination is sought;
- Preliminary development pro forma;
- Relevant project details, such as the percentage of low or moderate income units, income eligibility standards, the duration of the proposed affordable housing restrictions, and whether the applicant is a non-profit, public agency, or **limited dividend organization**;
- Conceptual site plan, elevation drawings, and basic site development calculations, e.g., approximate impervious coverage, approximate open areas, number of parking spaces, and average parking spaces per unit;
- Description of the approach to architectural massing and exterior building materials, and how the proposed buildings relate to adjacent properties;
- A list of proposed waivers of zoning requirements and all other relevant local bylaws, ordinances, and regulations; and
- Evidence of control of the site (usually a purchase and sale agreement or deed).

In January 2014, all four subsidizing agencies entered into an "Interagency Agreement Regarding Housing Opportunities for Families with Children," which generally requires at least 10 percent of the units in comprehensive permit developments to have three or more bedrooms. The purpose of the Interagency Agreement is to protect families with children from housing discrimination in the production of affordable and mixed-income housing under Chapter 40B. Thus, developers have to report the proposed percentage of three-bedroom units in their PE applications and later, they have to document compliance with the policy when they seek Final Approval from one of the subsidizing agencies (after the comprehensive permit has been issued).

Local Comment Period

After receiving a PE application, the Subsidizing Agency notifies the Chief Elected Official and schedules a site visit. The notification letter starts the clock for a 30-day comment period for the city or town. At this point, the Chief Elected Official should post the notice and PE application on the community's website and seek comments from municipal boards and departments. Making the documents available on the city or town website will ensure that interested residents can have access to the information so they can comment if they wish.

The federal Fair Housing Act prohibits discrimination because of:

- *Race*
- *Color*
- *Religion*
- *National origin*
- *Sex*
- *Disability (physical and mental impairments)*
- *Familial status (presence of children)*

In addition to these groups, the Commonwealth of Massachusetts prohibits discrimination on the basis of:

- *Gender identity*
- *Sexual orientation*
- *Genetic information*
- *Ancestry*
- *Age*

Although it may not be possible to coordinate the comments process, the Chief Elected Official should try to act as a clearinghouse for comments on the PE application. The comment period provides an opportunity for elected officials to lead a constructive conversation about Chapter 40B and organize a coherent response for the community. It is important to remember that Subsidizing Agencies want to encourage low- and moderate-income housing development, so it is unrealistic to expect them to issue a denial simply because the community objects to a proposed development. There are occasional exceptions, e.g., a Subsidizing Agency's deference to a community that has taken significant steps to increase the supply of affordable housing. For most cities and towns, the most constructive approach is to focus on matters that clearly fall within the scope of a PE determination. The Subsidizing Agency's decision criteria are listed in 760 CMR 56.04, and they include:

- that the proposed project appears generally eligible under the requirements of the housing subsidy program;
- that the site of the proposed project is generally appropriate for residential development, taking into consideration information provided by the municipality or other parties regarding municipal actions previously taken to meet affordable housing needs, such as inclusionary zoning, multifamily districts adopted under M.G.L. c.40A, and overlay districts adopted under M.G.L. c.40R, (such finding, with supporting reasoning, to be set forth in reasonable detail);
- that the conceptual project design is generally appropriate for the site on which it is located, taking into consideration factors that may include proposed use, conceptual site plan and building

massing, topography, environmental resources, and integration into existing development patterns (such finding, with supporting reasoning, to be set forth in reasonable detail);

- that the proposed project appears financially feasible within the housing market in which it will be situated (based on comparable rentals or sales figures);
- that an initial pro forma has been reviewed, including a land valuation determination consistent with DHCD's guidelines, and the project appears financially feasible and consistent with DHCD's guidelines for Cost Examination and Limitations on Profits and Distributions (if applicable) on the basis of estimated development costs;
- that the applicant is a public agency, a non-profit organization, or a limited dividend organization, and it meets the general eligibility standards of the housing program; and
- that the applicant controls the site, based on evidence that the applicant or a related entity owns the site, or holds an option or contract to acquire such interest in the site, or has such other interest in the site as is deemed by the subsidizing agency to be sufficient to control the site.

The Chief Elected Official should reach out to the local housing partnership or housing trust about the housing needs that the proposed project could meet and the degree to which the project advances the goals of the community's housing plan (if one exists). In addition, the Planning Board should be asked to weigh in on the project's relationship to the city or town master plan if the plan is current and actively being implemented.

Subsidizing Agency Decision

The Subsidizing Agency will issue a decision after the close of the local comment period. The time needed to make a decision varies by agency and the project's consistency with the determination and findings required in the Chapter 40B regulations. The developer, the Chief Elected Official, and the ZBA receive a copy of the PE determination.

CHAPTER 4

The Hearing Process

This section focuses on the ZBA's public hearing and decision procedures of Chapter 40B. While the procedures are similar to those associated with special permits, there are significant timeline differences (see **Critical Deadlines,** next page). For example, failing to hold the public hearing within 30 days of receiving a comprehensive permit or filing the ZBA's decision with the city or town clerk from the close of the public hearing are both grounds for constructive approval. In such cases, the developer may ask the HAC to approve the application as submitted. The HAC may do so or approve the permit with conditions. In addition, comprehensive permits require plan review tasks that ZBAs may not do very often. As a result, ZBAs usually work more closely with municipal staff and consultants on comprehensive permits than other types of applications.

Safe Harbors

For purposes of Chapter 40B, "safe harbor" refers to conditions under which a ZBA's decision to deny a comprehensive permit will qualify as **consistent with local needs** and not be overturned by the HAC, provided the conditions were met prior to the date that the comprehensive permit was filed with the ZBA. The safe harbors include:

STATUTORY MINIMA[1]

- The number of low or moderate income housing units in the city or town is more than 10 percent of the total number of housing units reported in the most recent federal (decennial) census;
- Low or moderate-income housing exists on sites comprising 1.5 percent or more of the community's total land area zoned for residential, commercial or industrial use;[2]
- The comprehensive permit before the ZBA would lead to construction of low or moderate income housing on sites comprising more than 0.3 of 1 percent of the community's total land area zoned for residential, commercial or industrial use, or 10 acres, whichever is larger, in one calendar year.

ADDITIONAL SAFE HARBORS CREATED BY REGULATION

DHCD has certified that the community complies with its affordable housing production goal under its approved **Housing Production Plan.**[3]

- The community has met DHCD's "recent progress" threshold (760 CMR 56.03(1)(c) and 56.03(5)). This means that within the last 12 months, the community has created new SHI units equal to or greater than 2 percent of the total year-round housing units reported in the most recent federal census. The recent progress threshold can be helpful to a community that does not have a DHCD-approved Housing Production Plan.
- The project before the ZBA is a project that exceeds DCHD's definition of a "large" project under 760 CMR 56.03(1)(d), where the definition of "large" project varies by the size of the municipality (see 760 CMR 56.03(6)):

[1] Further requirements are described under 760 CMR 56.03.

[2] DHCD is developing guidance for communities to determine whether they meet the 1.5 percent threshold.

[3] See 760 CMR 56.03(1)(b) and 56.03(4), and Housing Production Plan guidelines at www.mass.gov/hed/community/40b-plan/housing-production-plan.html.

Critical Deadlines for Chapter 40B Comprehensive Permits

Days	Deadline	Action Required	Authority
7	No later than **7 days** from the date on which the comprehensive permit application is received by the ZBA	Distribute the application to other boards and municipal departments and request their comments	G.L. c. 40B, § 21, and 760 CMR 56.05(3)
14	**14 days** before the public hearing date	Publish notice of the public hearing (publish twice; the second during the week following the first notice)	G.L. c. 40A, § 11
30	No later than **30 days** from the date on which the comprehensive permit application is received by the ZBA	Open the public hearing	G.L. c. 40B, § 21; 760 CMR 56.05(3)
15	No later than **15 days** from the opening of the public hearing	If applicable, give written notice to the developer and DHCD that the ZBA believes it can deny the permit on one or more "Safe Harbor" grounds (see **Safe Harbors**), along with the factual basis and documentation for its position	760 CMR 56.05(3); 760 CMR 56.03(8)
15	No later than **15 days** from the date of the ZBA's written notice	If applicable, the applicant must challenge the ZBA's "safe harbor" by providing written notice to DHCD and the ZBA, along with any supporting documentation	760 CMR 56.03(8)
30	No later than **30 days** from receipt of the applicant's appeal	DHCD must make a determination after reviewing the materials provided by the applicant and the ZBA.	760 CMR 56.03(8)
20	No later than **20 days** from the date of DHCD's decision on a "safe harbor" appeal	The applicant or ZBA may appeal DHCD's decision by filing an interlocutory appeal with the HAC and the ZBA's public hearing must be stayed until the conclusion of the appeal.	760 CMR 56.03(8); 760 CMR 56.05(9)(c)
180	Within **180 days** from the opening of the public hearing	The ZBA must close the public hearing unless the applicant has agreed in writing to an extension	760 CMR 56.05(3)
40	No later than **40 days** from the close of the public hearing	The ZBA must render a decision based on a majority vote of the board and file its written decision with the city or town clerk	G.L. c. 40B, § 21; 760 CMR 56.05(8)(a)
20	No later than **20 days** from the date the decision is filed with the city or town clerk	If the ZBA denies a comprehensive permit or approves it with conditions unacceptable to the applicant, the applicant must file an appeal with the HAC; other aggrieved persons must appeal to either the Land Court or Superior Court.	G.L. c. 40B, § 22; and G.L. c. 40A, § 17; 760 CMR 56.05(9)

- In a community with 7,500 or more year-round housing units: a comprehensive permit application for more than 300 housing units or a number of units equal to 2 percent of the community's total units, whichever is greater. For example, in a community with 10,000 units, the "large project" cap is 300 units, but in a community with 20,000 units, the cap is 400 units.
- In a community with 5,001 to 7,499 year-round housing units: a comprehensive permit application to build more than 250 housing units.
- In a municipality with 2,500 to 5,000 year-round housing units: a comprehensive permit application to build more than 200 housing units.
- In a town with less than 2,500 year-round housing units: a comprehensive permit application to build a number of units equal to 6 percent of all housing units in the municipality. For example, in a community with 2,000 year-round units, a "large project" application would be 120 units.
- The community received another application to develop the same site within the previous 12 months (760 CMR 56.03(7)), e.g., the developer sought a special permit or subdivision approval for a nonresidential project or market-rate housing at the same site.

As noted in the Critical Deadlines chart, within 15 days of opening the public hearing, the ZBA must notify the applicant (with a copy to DHCD) if the ZBA believes it can deny the comprehensive permit because the community has met a statutory minimum or qualifies under another safe harbor provision. The developer has the option to challenge the ZBA's assertion that a safe harbor has been met. DHCD will issue a decision that may be subsequently appealed to the HAC.

Comprehensive Permit Application

Just as the state Zoning Act requires ZBAs to adopt administrative regulations (G.L. c. 40A, § 12), Chapter 40B requires the ZBA to adopt rules for the conduct of comprehensive permit proceedings. DHCD's Chapter 40B regulations can be relied upon for local practice (760 CMR 56.05), but each ZBA should adopt and publish its own rules consistent with DHCD's regulations. The local rules should include an application form, fee schedule, and the procedures the ZBA will follow to hire consultants (as required by G.L. c. 44, § 53G). The application form should be clear about what the ZBA needs, bearing in mind that comprehensive permit developers do not have to submit detailed plans. In addition, the fee schedule must be reasonably similar to the fees the community charges for other types of residential development applications, e.g., subdivisions or developments requiring a special permit. DHCD's regulations identify the following basic submission requirements.

- Preliminary site development plans with the locations and outlines of proposed buildings; the proposed locations, general dimensions, and materials for streets, drives, parking areas, walks and other paved areas; and proposed landscaping improvements. Any project of five or more units must have a site plan stamped by a registered professional architect or engineer.
- An existing conditions report on the proposed site and the surrounding areas.
- Preliminary, scaled architectural drawings prepared by a registered architect, with typical floor plans, elevations, and sections, including construction type and finishes.
- Tabulation of proposed buildings by type, size, and footprint, impervious coverage, and open space, including percentage of tract to be occupied by buildings, parking and paved vehicular areas.
- A preliminary subdivision plan, if the project involves a subdivision.
- A preliminary utilities plan (water, wastewater, drainage, and storm water management facilities).

- The Project Eligibility Letter (PEL) issued by the Subsidizing Agency.
- A list of requested waivers from local ordinances or bylaws and regulations.

Examples of how to apply the regulations to practical experience can be found on the opposite page. Most of the elements listed under Existing Conditions and Proposed Conditions are required for a complete PE Application to MassHousing. The existing conditions and project information submission requirements for MassHousing's PE process can be found in Appendix 7.3. They are a useful guide for ZBAs to consider incorporating in local comprehensive permit submission requirements. Nevertheless, it is important to remember that not every application will need all of the information listed here, especially small projects or projects that do not involve construction in or near wetland buffer areas. Application requirements should be reasonable and relate rationally to the scope of the ZBA's review.

There are many positive examples of a ZBA and developer negotiating site design changes, the result being a comprehensive permit issued on terms the developer could accept. It is very difficult to conduct this kind of negotiation if the ZBA has required the developer to submit detailed civil engineering plans as part of the original comprehensive permit application. A detailed engineering review should not occur until the ZBA and the developer have agreed upon basic project design.

From Application to Public Hearing

As soon as the ZBA receives a comprehensive permit request, the application and plans should be sent to boards and departments that usually participate in the development review process. Since the ZBA acts in place of municipal boards whose local regulations would normally apply, obtaining comments from them is critical for the ZBA to reach an informed decision and craft appropriate conditions of approval. The following boards, commissions, and departments should receive a copy of the comprehensive permit application and be asked to attend the public hearing in addition to providing written comments:

- Planning Board
- Conservation Commission
- Board of Health
- Design Review Board (if one exists)
- Housing Partnership or Affordable Housing Trust
- Board of Water or Sewer Commissioners
- Department of Public Works
- Police Department
- Fire Department
- Building Inspector
- Historic District Commission (if the site is located in a local historic district under G.L. c. 40C)
- Economic Development and Industrial Commission (if site is located in an industrial area).

Remember! The public hearing must open within 30 days of the ZBA's receipt of a comprehensive permit application.

Suggestions from Civil Engineers with Comprehensive Permit Experience

Janet Carter Bernardo, P.E., LEED AP, from Horsley Witten Group recommends that developers provide the following information to the ZBA:

Existing Conditions Plan, drawn to scale, including all of the following, where applicable:

- Property lines with approximate dimensions
- Easements within and immediately adjacent to property
- Topography at 2-foot contours
- Mapping of soils from USDA soil surveys
- Subsurface soil and groundwater conditions
- Wetland Protection Act, Regulated Resource Areas with buffer zones
- Perennial and intermittent streams
- Depiction of existing vegetation (limits of woodlands, grasslands, etc.)
- NHESP Priority and Estimated Habitats
- Limits of 100-year Flood Plain
- Surface Water Protection Areas
- Existing roadways and structures including those within 100 feet of property boundaries
- Utilities (water, sewer, gas, electric)

Proposed Conditions Plan, drawn to scale, including where applicable:

- Building footprints
- Parking spaces (delineated), including accessible spaces
- Access roadway and/or driveway
- Profile of roadway
- Sidewalks, walkways, and curbing
- Retaining walls
- Tabulation of proposed buildings, impervious area, and open space
- Proposed topography at 2-foot contours
- Limit of work
- Landscaped areas
- Open space and recreation area(s)
- Storm water management including culverts, conveyance system, and treatment facilities
- Pre-development and post-development watershed catchment areas
- Utilities (water, sewer, gas, electric)
- Subsurface Wastewater Disposal in compliance with Title 5
- Regulated Resource Area mitigation
- Erosion and sedimentation controls
- Snow storage areas
- Preliminary architectural drawings to scale: locations and outlines of proposed buildings
- Applicable construction details developed with sufficient clarity to describe the activity

Narrative, including:

- Description of project
- Storm water Management Report (in compliance with the Massachusetts Stormwater Handbook, at minimum)
- Soil Evaluation Report
- Verification that appropriate infrastructure is available or obtainable (specifically water and sewer), with sufficient capacity to support the project
- Traffic study, where applicable

Joe Peznola, Director of Engineering at Hancock Associates, Inc., adds the following guidance. Joe has taught Chapter 40B training courses for MHP.

- The ZBA, city/town staff, and potential opponents should **identify and focus on real project issues** and impacts as early in the review process as possible. They should try to resolve each issue in a logical, efficient manner that recognizes the "critical path" nature of steps in the housing development process.
- The ZBA should delay commissioning peer reviews or requesting additional or more detailed information if larger issues that may affect the configuration of the project are unresolved.
- **Once the larger "project changing" issues are defined, the ZBA should request additional information from the developer**, e.g., more complete preliminary plans that will give the ZBA sufficient information to make an informed decision and properly condition an approval on matters that fall within the ZBA's jurisdiction. This could include preliminary drainage calculations demonstrating the developer's approach to complying with MassDEP storm water regulations, grading plans on sites with challenging topography, and more advanced preliminary plans that address challenging utility design such as shared septic systems.
- At this point in the process, the developer should be working from a complete existing conditions survey showing all site details, regulatory resource areas, and available utility information.
- **The ZBA should not hesitate to ask for graphics that help to clarify height, massing, setbacks, and overall relationship to neighbors.**

Chapter 40B does not describe a specific procedure for conducting the public hearing. However, most ZBAs conduct a comprehensive permit public hearing by following the same protocol that applies to any other type of public hearing on a proposed development. The protocol is summarized below and it can serve as a checklist for use by ZBA chairs and chairs *pro tem*. (Straightforward task checklists can be especially helpful to first-time chairs.) Most boards require a complete presentation by the applicant, followed by an opportunity for board members, other local officials, and the public to ask questions. During this process the issues of greatest concern and any need for additional information can be identified.

Basic Public Hearing Protocol

- Open the hearing and read the public hearing notice.
- Introduce the ZBA members sitting on the case, including any associate member appointed pursuant to G.L. c. 40A, § 12.
- Explain public hearing "basics" so the applicant and public can anticipate how the ZBA will conduct the hearing and know what to expect along the way. (Some ZBAs have a short "code of conduct" poster at the front of the hearing room as a reminder, and also as an aid to people who arrive after the hearing has opened). If the ZBA customarily ends meetings at a certain time, the public should be told at the outset so they are not surprised later.
- Read correspondence into the record. (If town staff or members of boards that submitted comments are in the hearing room, acknowledge them.)
- Invite the developer to present the project.
- After the developer's presentation, give ZBA members time to ask questions.
- Open the hearing to questions and comments from the public. Some ZBAs routinely set time limits on individual comments; others take a less formal approach and hold off on imposing time limits unless it becomes necessary. The board needs to strike a balance between providing enough time for people to be heard and avoiding needless repetition. Also, some questions from the public may need to be deferred until the ZBA receives peer review reports. For this reason, it makes sense to let abutters know as soon as possible what the ZBA's project review schedule will be.
- Schedule a site visit. Note that site visits should be open to the public, but they are not a "meeting" under the Open Meeting Law as long as the ZBA does not deliberate during the visit. See the Attorney General's Open Meeting Law Guide for more information.
- Decide on a date to continue the public hearing (assuming it does not open and close on the same night), in consultation with the developer. Though some comprehensive permit hearings can be completed in one evening, most proposed developments need several sessions. For example, developers will often propose some changes to their original plans in response to concerns raised during the hearing. Furthermore, developers can use time between hearing sessions to obtain additional information for the ZBA and have informal discussions with city or town staff, consultants, or abutters to the site. Hearing continuances and extensions of the decision deadline must be approved in writing by the applicant and filed with the city or town clerk.

If the ZBA believes it can deny the comprehensive permit because the community meets one of the statutory minima or qualifies under one of the other "safe harbor" provisions, it makes sense to provide written notice to the developer the first night of the public hearing. **The notice must be given within 15 days of opening the public hearing**, and usually the ZBA knows before the hearing begins whether the community is in a position to exercise the safe harbor option.

Some other seemingly minor tasks help the ZBA and staff manage the hearing process and maintain records of the proceedings. For example, there should always be a sign-in sheet near the entrance to the meeting room. Having a written record of names and addresses helps the ZBA's administrative assistant prepare accurate minutes.

Public Hearing Schedule and Technical Reviews

As early as possible, the ZBA needs to identify the key issues associated with each project, determine whether peer review consultants will be needed, and develop a schedule that will allow the board to close the hearing within 180 days. The 180-day deadline in the Chapter 40B regulations can be extended if the developer agrees, and usually the developer will agree if substantial progress has been made. However, ZBAs should not start the public hearing assuming that an extension will be granted at some point in the future. If the ZBA develops a tight project review schedule and the developer responds to reasonable information requests from the ZBA and peer review consultants, 180 days should be enough time to complete the hearing process.

The workload of ZBAs varies widely across the state. ZBAs that serve as special permit granting authority for several types of applications can be booked ahead for many weeks; others meet on a more limited or an as-needed basis. For ZBAs that tend to have a full docket on regular meeting nights, it usually works best to schedule special meetings to conduct the public hearing for a comprehensive permit. That way, more routine matters and small projects will not have to compete for meeting time with a potentially larger, more controversial application.

Once the ZBA determines the issues it needs to focus on, the procurement process for technical (peer) review consultants should proceed unless in-house staff can provide support to the board. Peer review should focus on important issues that are appropriate for the ZBA to consider. These are typical peer review services for comprehensive permit projects:

- **Traffic:** Where the issue of traffic is properly before the ZBA, it is often the first application component to be scheduled for discussion at a public hearing. The peer review consultant typically reviews the developer's traffic impact and access study, the proposed plan for vehicular and pedestrian circulation, and connectivity to adjacent roads, sidewalks, public pathways, and bicycle facilities.

- **Site civil engineering:** Site/civil peer review usually involves assistance from a registered professional engineer to review the developer's site plan and proposed cuts and fills, earth removal, storm water management, water and wastewater infrastructure, and proposed waivers from local bylaws/ordinances and regulations, to the extent necessary to support the ZBA's decision.

- **Environmental impact:** For projects involving waivers of a local wetlands bylaw and/or a local wetlands conservancy district, a wetlands scientist should be hired to review the application and its impact on wetlands, vernal pools, groundwater and surface water quality and to make recommendations to the ZBA in consultation with the Conservation Commission.

- **Design review:** Architectural peer review typically includes a review by a registered professional architect of the proposed buildings, their relationship to and impact on surrounding areas, and architectural design, e.g., conceptual design drawings of the site plan, exterior elevations of all sides of the proposed building(s), floor plans, landscaping and outdoor lighting plan, open spaces, and

where applicable, outdoor amenities. The architect's approach to peer review may be guided by the design review criteria in Handbook: Approach to Chapter 40B Design Reviews (2011) prepared for the four subsidizing agencies by The Cecil Group.

The developer is responsible for the reasonable cost of peer reviews necessary to evaluate matters that are properly before the ZBA. To comply with G.L. c. 44, § 53G, the ZBA's regulations should include basic procurement and contracting procedures, provide for a (limited) appeal process if the developer disputes the selection of a particular consultant, explain when the escrow account will need to be replenished, and provide for return of unused escrow funds to the developer. Each peer review consultant should have a written contract with a scope of work and prescribed deliverables. The ZBA should not ask the consultant to commence work until the developer has provided the necessary funds. Furthermore, the developer should be told that a delay in funding will mean a delay in peer review services and potentially a delay in completing the public hearing process. This protects the ZBA chair from having to assume the role of a collection agent. The ZBA chair should review a draft of the consultant's report or ask municipal staff to read the draft and work with the consultant to complete the review. Whenever possible, the peer reviewer should incorporate staff comments or work with staff to resolve differences of opinion.

The ZBA cannot require the developer to pay for new studies. For example, it is not appropriate to require the developer to pay for a fiscal impact study or for a consultant whose task will be to redesign the developer's project.

It is also not appropriate to require the developer to pay for a consultant to review matters not before the ZBA. For example, if no approvals under a local wetlands bylaw are being requested, it is not reasonable to ask the developer to pay the cost of a wetlands scientist. The ZBA's role is to review the developer's application. If the application is missing information the ZBA needs in order to reach a decision, the ZBA should ask the applicant to provide additional information (narrative, data, plans, as appropriate) about valid local concerns that are within the ZBA's jurisdiction.

Work Sessions

The ZBA must conduct both the public hearing and its deliberations in public. However, this does not necessarily preclude "work sessions," or informal meetings that supplement the public hearing process. Many ZBAs have found work sessions productive and beneficial. If a ZBA decides to conduct work sessions, no more than one ZBA member should participate, though other ZBA members may attend as observers. The work session should include a Chapter 40B consultant or the municipal attorney (or both), key municipal staff, and representatives of other boards and commissions, along with the developer's team. Work sessions should address technical issues only, e.g., engineering, traffic, and design. The ZBA member who participates in a work session should report on the discussions at the next public hearing.

If the ZBA is uncomfortable with the concept of a work session or if the municipal attorney recommends against it, another option is for the city or town's professional staff and the ZBA's consultant to meet with the developer and report the discussions to the ZBA at the next session of the public hearing. Furthermore, work sessions can be (and often are) conducted as open meetings; they do not have to be a "closed door" activity. An important difference between a public hearing and a public meeting

is that while both involve public notification requirements, a public meeting gives people the right to observe, but not necessarily the right to speak.

Municipal attorneys do not always agree about the appropriateness or legality of work sessions, or whether a work session constitutes a meeting under the Open Meeting Law. The ZBA should check with the city solicitor or town counsel before scheduling a work session.

Negotiations

One of the advantages of Chapter 40B is that projects can be negotiated. ZBAs frequently try to negotiate reductions in density or the scale of proposed buildings, architectural design changes, housing types and unit sizes, open space and outdoor recreation amenities, landscaping, and off-site mitigation such as connecting nearby sidewalks to improve pedestrian safety. Sometimes ZBAs negotiate for more low- or moderate-income units, especially in homeownership developments where the increase would directly benefit the community's Subsidized Housing Inventory (SHI).

In communities with an active housing partnership or similar committee, developers should meet with them early on, well before filing a comprehensive permit application with the ZBA. Informal review and negotiation by the housing partnership can benefit the community and certainly the developer. It usually leads to a smoother and more productive process when the comprehensive permit application is filed with the ZBA. Still, the negotiations process should not end when the public hearing begins. Since ZBAs will likely find it difficult to conduct negotiations while also trying to decide a case in a public hearing, responsibility for continued negotiations often falls to a qualified municipal employee, the housing partnership, or some other local official.

There is no obligation to negotiate with a ZBA, yet clearly, the developer wants the ZBA's approval and a permit that is not burdened with excessive conditions. If the ZBA's only objective is to reduce density, the negotiations may not go very far. From the developer's perspective, density is critical for the feasibility of the project. A more productive approach would be to focus on qualitative ways to improve a project. Developers will want to know all of the issues the ZBA wants to negotiate before agreeing to any significant project changes.

There is no obligation to negotiate with a ZBA, yet clearly, the developer wants the ZBA's approval and a permit that is not burdened with excessive conditions. If the ZBA's only objective is to reduce density, the negotiations may not go very far. From the developer's perspective, density is critical for the feasibility of the project. A more productive approach would be to focus on qualitative ways to improve a project. For example, changing the roof form from gabled to mansard can achieve a modest reduction in the height of a structure without sacrificing stories (and therefore units). Reducing off-street parking requirements could be approved subject to an agreement that the project will include a playground suitable for older children or a reserve parking area built with porous pavers. Developers will want to know all of the issues the ZBA wants to negotiate before agreeing to any significant project changes.

Pro forma Review

If the ZBA requests project changes and the developer refuses because the changes would make the project uneconomic, the ZBA may hire a peer review consultant at the developer's expense to review the developer's pro forma. It makes no sense to evaluate the pro forma before the ZBA has identified its concerns and the developer has had a chance to respond. Developers want the comprehensive permit for which they have applied, so usually they will try to accommodate reasonable changes. If

the developer can accept all of the conditions the ZBA plans to impose, there is no reason to evaluate a pro forma at all.

In the past, ZBAs tried to use pro forma peer reviews to determine if a project would remain financially feasible with a reduction in the number of units. This is an example of a practice that was never really correct to begin with, and it is not permitted under the Chapter 40B Regulations that DHCD adopted in 2008. **Today, the Chapter 40B Regulations specifically prohibit reviewing "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." (760 CMR 56.05(6)(a)(4)) Reducing the density of a comprehensive permit development should be based on valid planning considerations, design deficiencies, or environmental impacts.**

If the developer claims that conditions the ZBA wants to impose will make the proposed project uneconomic, the ZBA may subject the developer's pro forma to an independent peer review. The review should be consistent with policies of the Subsidizing Agency and, as applicable, Part IV of DHCD's Chapter 40B Guidelines. Key definitions to be used in making an uneconomic determination can be found in **Appendix B.**

Matters Reserved for Subsidizing Agencies

Recent case law and changes to the Chapter 40B Regulations have helped to distinguish aspects of comprehensive permits that belong with the ZBA and those reserved for Subsidizing Agencies. As with any other type of development, local jurisdiction includes the physical and operational aspects of a project and its impact on public health and safety and environmental design. In general, conditions of approval that involve these interests are appropriate for a comprehensive permit, assuming they are based on local requirements, customarily apply to other types of housing development in the community, and do not make the proposed project uneconomic.

By contrast, the Subsidizing Agency controls other matters. The following are examples of matters that fall within the purview of the Subsidizing Agency:

- Determination of Project Eligibility
- The affirmative fair housing marketing plan and procedures for selecting tenants or homebuyers
- The regulatory agreement or use restriction that controls affordability and program requirements
- Financial feasibility, cost examination and profit limitation
- Type of subsidy
- The location of low or moderate income units within a development.
- Local Preference

The ZBA may ask a developer to consider other types of conditions, e.g., that tenant selection will be subject to a local preference policy, but whether local preference is allowed at all in a project will be subject to the Subsidizing Agency's review and approval, taking into account Fair Housing requirements. Moreover, DHCD's Chapter 40B Guidelines place the burden on the city or town – not on the developer – to document the need for local preference.

Local preference means that local residents and others with a connection to the community may receive an advantage during the lottery for initial occupancy that is used to select buyers or renters for

new affordable housing units. Under DHCD's current policies, local preference categories must consist of the following:

- Current residents of the city or town: People living in the community at the time of application for the lottery. (The applicants must be *current* residents. They cannot be former residents, such as people who grew up in the town but subsequently moved away, or non-resident relatives of current residents.)
- Municipal employees
- Employees of local businesses (businesses located in the city or town)
- Households with children attending the community's schools, such as METCO students or participants in the "School Choice" program.

Preference cannot be limited to people who have lived, worked, or had children attend the community's schools for some minimum period of time. Preference eligibility is based solely on a person's residence, employment status, or school enrollment at the time of the lottery for initial occupancy.

DHCD's Chapter 40B Guidelines provide advice on how to make a case for local preference. To obtain approval from the Subsidizing Agency, the community needs to meet three requirements:

1. There is a documented need for the local preference. Examples: local residents are on the waiting list for subsidized rental housing, or the community has a large percentage of renters with severe housing cost burden (paying an excessive share of their income for rent and basic utilities), and the local preference pertains to a rental development.
2. The proposed percentage of local preference units is reasonable in relation to local and regional housing needs. (However, local preference is never allowed to exceed 70 percent of the affordable units in a project).
3. The proposed local preference plan will not have a disparate impact on people in classes protected under the federal Fair Housing Act.

Preparing the case for local preference is rarely a task that involves the ZBA, but the ZBA should know what is required before making local preference a condition of comprehensive permit approval. Toward that end, the ZBA should seek input from the local housing partnership or housing trust, if one exists, or the planning department. In all cases, a local preference requirement should be conditioned "to the extent permitted under applicable law" and made subject to review by the Subsidizing Agency.

Waivers

Chapter 40B allows developers to request and ZBAs to grant waivers from local bylaws or ordinances and regulations. For zoning, the only waivers the developer is required to identify are those involving requirements on "as-of-right" development in the district where the site is located. Special permit requirements do not apply because special permits are voluntary on a developer's part and discretion-

ary on the part of the approval authority. Waivers of subdivision regulations are not required unless a project involves a subdivision of land under G.L. c.41, §81L, unless as-of-right requirements in the zoning ordinance cross-reference the Planning Board's subdivision regulations. Other waiver requests that typically appear in comprehensive permit applications involve local (non-zoning) wetland bylaws and supplemental Title V rules where they exist.

Once the developer and ZBA agree on a proposed plan (including negotiated changes, if any), the ZBA should grant the waivers requested by the developer. **It is the developer's responsibility to identify the waivers needed in order to build the project. As a rule, the ZBA should not grant what is commonly known as a "plan waiver," or a blanket waiver to accommodate conditions that may be apparent on the developer's plan but not specifically identified in a list of waivers requested by the developer.** As efficient as a general plan waiver may sound, unless the application identifies the specific waivers needed, it can be very difficult for the building official to apply and interpret later when the developer submits final plans in anticipation of filing a building permit application. Instead, the ZBA should approve the specific waivers requested by the developer and, in conditions of approval, indicate that if the developer identifies a need for additional waivers later, the ZBA will entertain a request for minor modification of the comprehensive permit if the additional waivers are substantially consistent with the approved plans. Taking this approach reserves appropriate control over the extent of waivers granted by the ZBA, but at the same time gives the developer reasonable certainty that other waivers, if needed, will be granted in a timely manner. (See **Modifications,** below.)

Decision

The ZBA must issue a decision on a comprehensive permit within 40 days of the public hearing. The decision must be approved by a simple majority of the ZBA members sitting on the case. The decision must be filed with the city or town clerk, and once it is filed, a 20-day appeal period ensues. An aggrieved developer files an appeal with the HAC. Other parties seeking to challenge approval of a comprehensive permit file their appeal in the Superior Court or Land Court pursuant to G.L. c. 40A, § 17.

DENIAL

Chapter 40B authorizes a ZBA to approve as proposed, approve with conditions, or deny a comprehensive permit application. The HAC will not overturn local denial of a comprehensive permit if the city or town meets one of the **statutory minima** or another safe harbor under the Chapter 40B regulations. Except for these circumstances, however, the HAC has generally not supported denials if the ZBA could have granted a comprehensive permit with reasonable conditions to protect health, safety, open space, and site and building design concerns. Accordingly, ZBAs should view denial of a comprehensive permit as a "last resort" measure to be taken only when there is no practical way to approve the project with conditions.

APPROVAL WITH CONDITIONS

The best interests of the community and the developer are served when the ZBA issues a decision agreeable to both. A comprehensive permit resulting from reasonable compromise usually means increased local control, decreased costs (fewer delays, legal costs, and consulting fees), and better housing. The ZBA may impose conditions to eliminate or mitigate the adverse impact of a proposed project, e.g., relocating an entrance onto a public road when the original entrance did not provide adequate sight distance.

To facilitate open communications with the developer and ensure that the public understands what the ZBA intends to do, the ZBA should draft preliminary conditions of approval and provide them to the developer while the public hearing is still open. Developers do not have to respond, but usually they do because they want a comprehensive permit that will allow them to build housing. The ZBA should also ask the building commissioner to review the draft decision and provide comments and suggestions. It is important to remember that when the developer is ready to start construction, ad-

ministration of the comprehensive permit will fall to the building inspector. It makes sense to verify that the ZBA's decision is specific and clear enough for the building inspector to interpret, apply, and enforce it.

If the ZBA and applicant cannot reach agreement, the ZBA needs to ensure that the conditions it plans to impose will withstand review by the HAC. The decision must have carefully developed findings of fact that are supported in the record by testimony from qualified professionals (peer review consultants and municipal staff). For appeal to the HAC of an approval with conditions, the developer has the burden of proving that one or more of the ZBA's conditions makes the project uneconomic. If the developer satisfies this requirement, the burden shifts to the ZBA to show that the conditions are consistent with local needs. In these cases, the HAC's duty is to balance the regional need for affordable housing with the degree to which the project threatens public health or safety or the environment, or is seriously deficient in terms of site and building design or provision of open space.

FORMAT

There is no required format for a comprehensive permit decision, but typically it contains the following components:

- **Procedural History**: a summary of the application, location of the site, basic statutory and regulatory requirements (e.g., hearing dates, notification dates, the Subsidizing Agency's PE determination date, identification of ZBA members sitting on the case), and a summary of the key issues raised during the hearing as well as the applicant's response.
- **Governing Law:** Citation of Chapter 40B and the requirements it imposes on the municipality and the applicant.
- **Findings of Fact**: The ZBA's factual determinations on matters within the scope of the statute (e.g., the city or town's progress toward achieving the statutory minima, how the project addresses local concerns and why the ZBA's decision is consistent with local needs)
- **Decision**: A statement that the application is approved, approved with conditions, or denied.
- **Conditions**: Assuming an approval, the conditions section is the heart of the decision. It will eventually be used by the building official as a checklist to determine whether the developer has met all of the requirements for a building permit and later, a certificate of occupancy. As such, the conditions must be written clearly and succinctly, they must describe actions that can be measured in "yes" or "no" terms, and they cannot include requirements for further review or approval by the ZBA.

  The conditions section of the permit is usually divided into four parts: conditions that address **basic legal requirements** (e.g., the identity of the applicant and holder of the permit, the number and percentage of low-income units, the duration of the deed restriction, titles and dates of the plans that comprise the approved plans under the permit, etc.), **conditions that must be met prior to issuance of a building permit**, conditions that must be met **prior to issuance of a certificate of occupancy**, and **general conditions**. The developer should send a draft of the conditions to the subsidizing agency for review before they are finalized.

  In addition, the ZBA's decision should provide for **ongoing monitoring of the development once the Subsidizing Agency's monitoring role has ended.** Conditions that address future monitoring and the applicant's responsibility (if any) will help to ensure that affordable units remain affordable and eligible for the SHI.

- **Signature Page**
- **Exhibits:** typically, a list of approved waivers and a list of all pertinent documents of record on file with the ZBA.

Comprehensive Permit Modifications

The Chapter 40B Regulations provide for two types of modifications the developer may request after the ZBA has granted a comprehensive permit: an insubstantial change and a substantial change. (760 CMR 56.05(11)). The ZBA has 20 days to determine and notify the developer/applicant whether a requested change is substantial. If it is insubstantial, the change is deemed approved. A substantial change follows the same basic timelines as the original permit: a public hearing must be held within 30 days of the ZBA's determination, and the ZBA must file its decision with the city or town clerk within 40 days of the hearing. Under DHCD's Chapter 40B Regulations, changes such as an increase of 10 percent or more in building height or number of units generally qualify as substantial modifications (760 CMR 56.07(4)).

Post-Comprehensive Permit Procedures

Developers receiving a comprehensive permit have several more steps to complete in order to build their projects and remain in compliance with Chapter 40B. This section provides a brief overview of the remaining stages of a Chapter 40B development.

FINAL APPROVAL

The Final Approval process is the Subsidizing Agency's responsibility and it occurs after the ZBA has issued a comprehensive permit. Final Approval serves several purposes.

The Subsidizing Agency needs to confirm that the project still qualifies under the Project Eligibility (Site Approval) criteria described earlier in this handbook. Projects do change during the permitting process, not only due to negotiations with the ZBA, but also because of conditions associated with other permits and approvals, e.g., an Order of Conditions from the local Conservation Commission under G.L. c. 131, § 40, a Groundwater Discharge Permit issued by the Department of Environmental Protection, or a determination under the Massachusetts Endangered Species Act (MESA). The Subsidizing Agency also needs to consider a ZBA's request for a local preference and to confirm that other conditions of the comprehensive permit are consistent with applicable laws, including the requirements of the applicable subsidy program.

The Final Approval process includes review and approval of the affordable housing restriction that will govern the project. The affordable housing restriction is enforceable under G.L. c. 184, §§ 31-32 and its purpose is to keep units affordable over time.

Other matters covered during Final Approval include securing the developer's acknowledgement of the cost certification requirements that will have to be met once the project is built and occupied. In addition, the developer will be required to enter into a Regulatory Agreement with the Subsidizing Agency. The Regulatory Agreement is a recorded, legally enforceable contract that lays out the financial, limited dividend, affordability, monitoring, and other requirements the developer will have to meet for the duration of the Subsidizing Agency's oversight of the project. Before the Regulatory Agreement is executed, the ZBA will be asked to sign an acknowledgement that compliance with the Regulatory Agreement will be sufficient for compliance with the affordability conditions and other applicable requirements of the comprehensive permit. The Regulatory Agreement should provide for continued monitoring of the project's affordability requirements once the Subsidizing Agency's role has ended (typically thirty years, for a rental project).

CONSTRUCTION AND OCCUPANCY

Building construction should not commence until the Subsidizing Agency has granted Final Approval and the Regulatory Agreement has been recorded with the Registry of Deeds. Once the Subsidizing

Agency has granted Final Approval, the developer can apply for a building permit to begin construction of the project. Many communities have different pre-construction procedures for large or complicated projects, and it is common to require developers to attend a pre-construction conference with the building inspector, representatives of the police, fire, water, and sewer departments, and other municipal departments that have construction inspection and sign-off requirements.

During the construction period, the developer will begin to market the affordable units under an **affirmative fair housing marketing and resident selection plan (AFHMP**) approved by the Subsidizing Agency. The overriding purpose of the AFHMP is to provide for outreach to protect classes of people under Fair Housing laws who may be less likely to apply for the housing (including because of the housing location) and to ensure that they have an equal opportunity to apply for and purchase or rent the affordable units. If local preference has been approved by the Subsidizing Agency for any units in the development, it will be carried out in accordance with the AFHMP.

POST-OCCUPANCY REQUIREMENTS

When the project is finished and occupied, the Subsidizing Agency will assume responsibility for monitoring compliance with the affordable housing restriction and Regulatory Agreement. The monitoring process differs by housing type.

- **Homeownership developments**: there is typically a third-party monitoring agent under contract with the Subsidizing Agency (usually MassHousing, except that for Local Initiative Program developments, the Subsidizing Agency is DHCD). The monitoring agent's role is to review the AFHMP, monitor the initial sales, and determine substantive compliance with the affordable housing restriction. On an ongoing basis, the monitoring agent oversees unit resales, monitors requests for refinancing and capital improvements by the affordable unit owners, and provides annual reports about the project's overall compliance with the affordable housing restriction.
- **Rental developments**: the monitoring agent reviews the AFHMP, monitors the lottery and tenant selection process for the affordable units, reviews the income eligibility documentation obtained by the lottery agent, and reviews initial rents and leases. On an annual basis, the monitoring agent reviews household income documentation obtained by the property manager and the affordable unit leases in order to certify to the Subsidizing Agency that the affordable units are occupied by income-eligible tenants.

CHAPTER 5

Planning for Affordable Housing

Planning is a powerful tool for shaping the future of cities and towns. In Massachusetts, a state law directs Planning Boards to prepare a comprehensive master plan for their communities. The master plan should include several components, including housing. However, many Massachusetts communities have old master plans that bear little relationship to conditions on the ground today. Some communities still have no master plan at all, and there is no penalty for failing to have one. Moreover, there is no requirement for communities to adopt zoning consistent with their master plans, so even when a plan is relatively new, it may have limited usefulness for guiding growth and change.

Planning for low- or moderate-income housing should be integrated with the city or town master plan. Doing so can help communities identify the best locations for multifamily housing, plan for the public improvements that will be needed to guide development toward those locations, and plan for adequate facilities to accommodate household and population growth. With realistic zoning for multifamily housing and inclusionary housing requirements, communities can create low- or moderate-income housing without Chapter 40B comprehensive permits. In addition, adopting and implementing a master plan with effective and implemented strategies for housing affordability and that have actually produced SHI Eligible Housing, may provide justification for a ZBA if it denies a comprehensive permit that is plainly inconsistent with the plan. The HAC has occasionally upheld such denials if the plan was legitimate, up to date, and actively used to manage growth and change and produce SHI Eligible Housing.[1]

Housing Production Plans

Even without a master plan, communities can strategize to create a variety of housing, including low- or moderate-income housing, by preparing a housing plan. Though not directly within the ZBA's purview, a housing plan can go a long way toward helping communities reach one of the statutory minima and gain more local control over comprehensive permits. Since Chapter 40B's purpose is create housing for low- or moderate-income people, a housing plan that is aligned with the statute's mission can help to accomplish three objectives:

1. To communicate the community's goals to developers and housing subsidy programs;

Residents of Brookline comment on draft goals for Brookline's Chapter 40B Housing Production Plan (2016).

[1] For guidance, see the following HAC decisions: *Hanover R.S. Limited Partnership v. Andover Zoning Board of Appeals*, No. 12-04 (2014); *28 Clay Street Middleborough, LLC v. Middleborough Board of Appeals*, No. 08-06 (2009), or *Stuborn Ltd. Partnership v. Barnstable Board of Appeals*, No. 98-01 (2002).

2. To create a policy framework for the ZBA's review of comprehensive permit applications and for town boards and commissions that provide comments to the ZBA;
3. To educate residents, business owners, and others about local and regional housing needs and the community's part in helping to meet those needs.

A Housing Production Plan is not merely a "shield" against unwanted comprehensive permit developments. Instead, it is an opportunity for communities to lay out a coherent, realistic strategy for creating more low- or moderate-income housing.

DHCD provides some incentives for communities to develop and implement housing plans. By creating a Chapter 40B Housing Production Plan that receives DHCD approval, a community may be able to work toward the 10 percent statutory minimum at a pace it can control. A plan that addresses DHCD's requirements should include the following components:

- **Housing needs analysis** that considers needs at all market levels but particularly the needs of very-low, low-, moderate-, and middle-income households. The analysis also considers the impact of regional population growth on demand for affordably priced housing and how the community can provide for its fair share of that demand. In addition, the needs analysis should identify local barriers to housing development – such as regulatory or infrastructure barriers – and discuss the community's plans to mitigate those barriers.
- **Goals, which are both numerical and qualitative.** The goals should include the community's low- and moderate-income housing targets and the types of housing that will be needed in order to provide suitable units for households priced out of the market.
- **An implementation plan with achievable strategies to increase the supply of SHI Eligible Housing and other housing to address regional needs.** DHCD expects communities to look at all types of potential strategies: identifying locations that would be appropriate for higher-density housing, adopting zoning for multifamily housing, approving comprehensive permits; making surplus town property available for housing development, and pursuing other options such as creating Chapter 40R overlay districts

Once it has an approved Housing Production Plan, the community that meets an annual (or a biennial) target for creating new low- or moderate-income units becomes eligible for a certification of compliance from DHCD. **During the certification period, the ZBA may deny a comprehensive permit and its decision will not be overturned by the HAC.** (Housing Production Plan certification is one of several "safe harbor" provisions in DHCD's Chapter 40B regulations. See **Chapter 4, Safe Harbors** for more information.) The housing production targets are based on the number of year-round units reported in the community's most recent decennial census. The minimum threshold for a one-year certification is new low- or moderate-income units equal to 0.5 percent of the community's year-round housing; for a two-year certification, it is 1 percent. The units must have been created within the same calendar year as the date of the community's certification request to DHCD. More information about the Housing Production Plan and certification targets can be found on DHCD's website at http://www.mass.gov/hed/community/40b-plan/.

CHAPTER 6

Chapter 40B Resources

MASSACHUSETTS HOUSING PARTNERSHIP

Chapter 40B Technical Assistance Program
http://www.mhp.net/community_initiatives/programs/chapter_40B.php
Contact: Laura Shufelt, Community Assistance Manager
617-330-9944 or lshufelt@mhp.net

CITIZENS HOUSING AND PLANNING ASSOCIATION

Chapter 40B
https://www.chapa.org/chapter-40b

MASSHOUSING

Chapter 40B Site Approval
https://goo.gl/avEe41
Contact: Greg Watson, AICP
Manager of Comprehensive Permit Programs
617-854-1880 or gwatson@masshousing.com

MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Chapter 40B Planning
http://www.mass.gov/hed/community/40b-plan/
Contact: Phil DeMartino, Program Manager
617-573-1357 or phillip.demartino@state.ma.us
Comprehensive Permit Information
http://www.mass.gov/hed/economic/eohed/dhcd/legal/comprehensive-permit-guidelines.html

HOUSING APPEALS COMMITTEE

http://www.mass.gov/hed/community/40b-plan/hac.html

MASSDEVELOPMENT

Housing Programs
http://www.massdevelopment.com/who-we-help/housing/
Contact: Tony Fracasso SVP, Housing Finance
617-330-2000 or afracasso@massdevelopment.com

Appendix A. Glossary

Where the following terms are used in this Handbook, they have the following meanings unless the context clearly calls for a different interpretation. In most cases, these definitions are based on G.L. c. 40B, § 20, or DHCD's Chapter 40B Regulations or the Chapter 40B Guidelines.

Affirmative Fair Housing Marketing Plan: plan for the marketing of SHI Eligible Housing, including provisions for a lottery or other resident selection process, consistent with guidelines adopted by the Department, and providing effective outreach to protected groups underrepresented in the municipality. The plan shall prohibit unlawful discrimination on the basis of race, creed, color, sex, age, disability, familial status, marital status, sexual orientation, gender identity, national origin, veteran/military status, public assistance recipiency, or any other legally protected category in the leasing or sale of SHI Eligible Housing.

Chapter 40B Technical Assistance Program: a program administered by the Massachusetts Housing Partnership to assist Zoning Boards of Appeal in processing Chapter 40B comprehensive permit applications.

Chapter 40R: G.L. c. 40R (2004 Mass. Acts 149, § 92), a state law that provides for overlay districts with variable densities for residential development and multi-family housing by right (subject to site plan review). At least 25 percent of the units in a Chapter 40R district have to be affordable to low- or moderate-income people.

Community Preservation Act (CPA): G.L. c. 44B (2000 Mass. Acts 267), the Community Preservation Act, allows communities to establish a Community Preservation Fund for open space, historic preservation, and community housing by imposing a surcharge of up to 3 percent on local property tax bills. The state provides matching funds (or a partial match) from the Community Preservation Trust Fund, generated from Registry of Deeds fees.

Consistent with Local Needs: the community has satisfied one of the Chapter 40B statutory minima or one of the "safe harbor" grounds in DHCD's Chapter 40B Regulations; or local requirements imposed on a comprehensive permit project are reasonable in view of the regional need for low and moderate income housing, provided the local requirements are applied the same way to subsidized and market-rate housing.

Housing Appeals Committee: A five-member body that adjudicates disputes under Chapter 40B. Three members are appointed by the Director of DHCD, one of whom must be a DHCD employee. The governor appoints the other two members, one of whom must be a city councilor and the other a selectman.

Limited Dividend Organization: any entity which proposes to sponsor a Project under Chapter 40B; and is not a public agency or a nonprofit; and is eligible to receive a Subsidy from a Subsidizing Agency after a Comprehensive Permit has been issued and which, unless otherwise governed by a federal act or regulation, agrees to comply with the requirements of the Subsidizing Agency relative to a reasonable return for building and operating the Project.

Local Initiative Program (LIP): a program administered by DHCD that provides technical assistance in lieu of a cash subsidy to allow low or moderate income units that are financed without a Federal or State cash subsidy to be placed on the Subsidized Housing Inventory.

Low or Moderate Income Housing: any units of housing for which a Subsidizing Agency provides a subsidy under any program to assist the construction or substantial rehabilitation of low or moderate income housing, as defined in the applicable federal or state statute or regulation, whether built or op-

erated by any public agency or non-profit or limited dividend organization. Absent a specific subsidy program definition, "low or moderate income housing" means a household whose maximum income does not exceed 80 percent of area median income, adjusted for household size.

Project Eligibility: a determination by a Subsidizing Agency that a Project satisfies the jurisdictional requirements of 760 CMR 56.04(1).

SHI Eligible Housing: any unit of Low or Moderate Income Housing, or other housing units in a project as may be defined in DHCD's Chapter 40B Guidelines, or any other housing unit allowed under DHCD's Guidelines if the unit is subject to an affordable housing restriction and affirmative fair marketing plan, and regardless of whether the unit received a subsidy.

Site Approval: see Project Eligibility.

Subsidized Housing Inventory: DHCD's official list of low or moderate income housing units by city or town.

Subsidizing Agency: any agency of state or federal government that provides a subsidy for the construction or substantial rehabilitation of low or moderate income housing. If the Subsidizing Agency is not an agency of state government, DHCD may appoint a state agency to administer some or all of the responsibilities of the Subsidizing Agency.

Subsidy: assistance provided by a Subsidizing Agency to assist the construction or substantial rehabilitation of Low or Moderate Income Housing, including direct financial assistance; indirect financial assistance through insurance, guarantees, tax relief, or other means; and non-financial assistance, including in-kind assistance, technical assistance, and other supportive services. A leased housing, tenant-based rental assistance, or housing allowance program shall not be considered a Subsidy.

Uneconomic: any condition imposed by a Board in its approval of a Comprehensive Permit, brought about by a single factor or a combination of factors, to the extent that it makes it impossible (a) for a public agency or a nonprofit organization to proceed in building or operating a Project without financial loss, or (b) for a Limited Dividend Organization to proceed and still realize a reasonable return in building or operating such Project within the limitations set by the Subsidizing Agency on the size or character of the Project, 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 unit sizes proposed by the Applicant. See 760 CMR 56.02, 56.05(8)(d) and the definitions above for Amount, Applicable 10-Year U.S. Treasury Rate, Minimum Return on Total Cost, Net Operating Income, Return on Total Cost, and ROTC Threshold Increment.

Use Restriction: a deed restriction or other legally binding instrument in a form consistent with the DHCD Guidelines and, in the case of a Project subject to a Comprehensive Permit, in a form also approved by the Subsidizing Agency, which meets the requirements of the Guidelines.

Appendix B. Development Pro forma Review
Uneconomic Conditions: Regulatory Terms

Amount: means, as used in the definition of Reasonable Return at 760 CMR 56.02(c) and (d) with respect to profit to the Developer or payment of development fees from the initial construction of the Project, the greater of (i) such profit or fees expressed as a dollar amount; (ii) such profit or fees expressed as a percentage of total development costs, or (iii) with respect to the payment of development fees from the initial construction of the Project only, the maximum total developer fee payable to the Developer pursuant to a formula established by the Subsidizing Agency under its regulations or guidelines for the Project Subsidy, expressed either as a dollar amount or a percentage of total development costs.

Applicable 10-Year U.S. Treasury Rate: means the interest rate for 10-year notes as published by the U.S. Treasury on the later of the date of (a) the Project Eligibility Application, (b) if applicable, a revised pro forma is submitted to the Board, or (c) if applicable, on appeal to the Housing Appeals Committee, the date of the Pre-Hearing Order.

Minimum Return on Total Cost: means a Return on Total Cost that is less than the sum of the ROTC Threshold Increment and the Applicable Ten-Year U.S. Treasury Rate, which shall be the minimum return necessary to realize a reasonable return from the operation of a Project for purposes of determining whether a condition imposed by a Zoning Board in its approval of a Comprehensive Permit results in a Project being Uneconomic.

Net Operating Income (NOI):- means rental income less operating expenses and replacement reserves assuming a vacancy rate determined by the Subsidizing Agency; all rents, vacancy rate, operating expense and replacement reserve estimates shall be based upon the date used to determine the Applicable 10-year U.S. Treasury Rate.

Return on Total Cost (ROTC):- means, in calculating Reasonable Return, projected NOI of a Project, divided by the projected total development cost (including development fees and overhead).

ROTC Threshold Increment: means a percentage determined by the Department and confirmed or modified annually based upon an analysis of current real estate market data. As of December 2014, the ROTC Threshold Increment is 450 basis points.

Uneconomic: means any condition imposed by a Board in its approval of a Comprehensive Permit, brought about by a single factor or a combination of factors, to the extent that it makes it impossible (a) for a public agency or a nonprofit organization to proceed in building or operating a Project without financial loss, or (b) for a Limited Dividend Organization to proceed and still realize a reasonable return in building or operating such Project within the limitations set by the Subsidizing Agency on the size or character of the Project, 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 unit sizes proposed by the Applicant. See 760 CMR 56.02, 56.05(8)(d) and the definitions above for Amount, Applicable 10-Year U.S. Treasury Rate, Minimum Return on Total Cost, Net Operating Income, Return on Total Cost, and ROTC Threshold Increment.

Appendix C. MassHousing Project Eligibility Application Excerpts

Existing Conditions and Project Information Submission Requirements

Note: Here are excerpts from MassHousing's application requirements for existing conditions and project information submission. These can be a useful guide for ZBAs to consider incorporating in local comprehensive permit submission requirements.

REQUIRED ATTACHMENTS RELATING TO EXISTING CONDITIONS AND SITE INFORMATION (SECTION 2)

2.1 Existing Conditions Plan

Please provide a detailed Existing Conditions Plan showing the entire site, prepared, signed and stamped by a Registered Engineer or Land Surveyor. Plans should be prepared at a scale of 1" = 100' or 1" = 200' and should include the following information:

a. Reduced scale locus map

b. Surveyed property boundaries

c. Topography

d. Wetland boundaries (if applicable)

e. Existing utilities (subsurface and above ground)

f. Natural features including bodies of water, rock outcroppings

g. Existing easements and/or rights of way on the property

h. Existing buildings and structures, including walls, fences, wells

i. Existing vegetated areas

j. Existing Site entries and egresses

Please provide one (1) set of full size (30"x40") plans along with one (1) set of 11x17 reproductions and one (1) electronic set of plans. Please note that MassHousing cannot accept USB flash drives.

2.2 Aerial Photographs

Please provide one or more aerial photograph(s) of the site (such as those available online) showing the immediate surrounding area if available. Site boundaries and existing site entrance and access points must be clearly marked.

2.3 Site/Context Photographs

Please provide photographs of the site and surrounding physical and neighborhood context, including nearby buildings, significant natural features and land uses. Please identify the subject and location of all photographs.

2.4 Documentation Regarding Site Characteristics/Constraints

Please provide documentation of site characteristics and constraints as directed including available narratives, summaries and relevant documentation including:

- Flood Insurance Rate Map (FIRM) showing site boundaries
- Wetlands delineation
- Historic District Nomination(s)
- By-Right Site Plan (if available)

MassHousing will commission, at your expense, an "as-is" appraisal of the site in accordance with the Guidelines, Section B (1). Therefore, if there is a conceptual development plan which would be permitted under current zoning and which you would like the appraiser to take into consideration, or if permits have been issued for alternative development proposals for the site, please provide two (2) copies of a "by-right" site plan showing the highest and best use of the site under current zoning, and copies of any existing permits. These will assist the appraiser in determining the "as is" value of the site without any consideration being given to its potential for development under Chapter 40B.

REQUIRED ATTACHMENTS RELATING TO PROJECT INFORMATION (SECTION 3)

3.1 Preliminary Site Layout Plan(s)

Please provide preliminary site layout plans of the entire Site prepared, signed and stamped by a registered architect or engineer. Plans should be prepared at a scale of 1" =100' or 1" =200', and should show:

- Proposed site grading
- Existing lot lines
- Easements (existing and proposed)
- Access to a public way must be identified
- Required setbacks
- Proposed site circulation (entrances/egresses, roadways, driveways, parking areas, walk
- ways, paths, trails)
- Building and structure footprints (label)
- Utilities (existing and proposed)
- Open space areas
- Schematic landscaping and screening
- Wetland and other restricted area boundaries and buffer zones

3.2 Graphic Representations of Project/Preliminary Architectural Plans

Typical floor plans

Unit plans showing dimensions, bedrooms, bathrooms and overall layout

Exterior elevations, sections, perspectives and illustrative lending

3.3 Narrative Description of Design Approach

Provide a narrative description of the approach to building massing, style, and exterior materials; site layout, and the relationship of the project to adjacent properties, rights of way and existing development patterns. The handbook called Approach to Chapter 40B Design Reviews prepared by the Cecil Group in January 2011 may be helpful in demonstrating the nature of the discussion that MassHousing seeks in this narrative.

3.4 Tabular Zoning Analysis

Zoning analysis in tabular form comparing existing zoning requirements to the waivers that you will request from the Zoning Board of Appeals for the proposed project, showing required and proposed dimensional requirements including lot area, frontage, front, side and rear setbacks, maximum building coverage, maximum lot coverage, height, number of stories, maximum gross floor area ratio, units per acre, units per buildable acre; number of parking spaces per unit/square foot and total number of parking spaces (proposed and required).

Completed Sustainable Development Principles Evaluation Assessment Form

To view this form, go to Page 30 of the MassHousing Comprehensive Permit Application