

Local 40B Review and Decision Guidelines

A Practical Guide for Zoning Boards of Appeal
Reviewing Applications for Comprehensive Permits
Pursuant to MGL Chapter 40B

Massachusetts Housing Partnership
and
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November 2005

ACKNOWLEDGEMENTS

Many thanks to the following individuals who provided advice and feedback during the development of these guidelines:

Howard Cohen, Beacon Residential
Roger Colton, Town of Belmont
Robert Engler, Stockard, Engler & Brigham
Peter Freeman, Esq., Freeman Law Group
Michael Jacobs, MHJ Associates
Al Lima, City of Marlborough
Edward Marchant, EHM/Real Estate Advisor
Tod McGrath, advisoRE LLC and Town of Hingham
Joseph Peznola, Town of Hudson
Ruth Weil, Town of Barnstable

Thanks also to Anne Marie Belrose, Harriett Moss and Sarah Young of the Department of Housing and Community Development; Robert Ruzzo, Nancy Andersen, and Richard Herlihy of MassHousing; and Mark Curtiss, Courtney Koslow and Connie Kruger of the Massachusetts Housing Partnership.

About the Massachusetts Housing Partnership

The Massachusetts Housing Partnership (MHP) is a quasi-public state agency that provides financing for affordable housing and helps cities and towns increase their supply of affordable housing. MHP has provided technical or financial assistance in more than 300 Massachusetts cities and towns, provided financing for more than 12,000 rental housing units, and has made mortgage financing available through local banks to help more than 8,500 low-income families purchase their first homes.

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To check for any updates to the these guidelines, or to get additional information regarding Chapter 40B, visit www.mhp.net/40B.

FOREWORD

The Comprehensive Permit Law (Chapter 40B of the Massachusetts General Laws) creates a streamlined local review process for the construction of low- and moderate-income housing in Massachusetts.

While Chapter 40B has been one of the single greatest contributors to the supply of affordable housing in the Commonwealth, it is also a complex process and poses a challenge to city and town officials who are trying in good faith to balance local concerns with their responsibilities under the law.

These guidelines were developed by the Massachusetts Housing Partnership to provide clearer guidance to zoning boards of appeal in reviewing applications for comprehensive permits. As the four Massachusetts state agencies that finance affordable housing developed through Chapter 40B, we endorse these guidelines and strongly recommend that city and town officials utilize them to assist in their review of Chapter 40B proposals. While the guidelines are intended primarily for new projects seeking a determination of project eligibility, we also anticipate that the guidelines will prove useful in many cases for projects currently under review.



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I. INTRODUCTION

To facilitate the development of low- and moderate-income housing throughout the Commonwealth, Chapter 40B provides a permitting process that is more streamlined than the permitting process for other housing development. Changing regulations and case law over the years have created some uncertainty about how local officials may best respond to applications for comprehensive permits. The objective of these guidelines is to provide balanced advice to local officials to help make sound local permitting decisions pursuant to Chapter 40B.

What is Chapter 40B?

Chapter 40B (also known as the Comprehensive Permit Law) is a state law that encourages the development of low- and moderate-income housing in several ways. First, it provides for the streamlining and consolidation of the local permitting process through the vehicle of comprehensive permits. Second, it allows for appeals from local comprehensive permit decisions by developers of mixed-income housing. Third and perhaps most important, it encourages the provision of affordable housing, which typically is accomplished by developers building more housing units per acre than allowed by local regulations.

Chapter 40B provides that the local zoning boards of appeals (ZBA) must review and make decisions (approve, approve with conditions or deny) on comprehensive permits. The Housing Appeals Committee (HAC) hears appeals from denials and conditional approvals of comprehensive permits in communities that have less than ten percent of their housing affordable to low- and moderate-income households. The purpose of HAC is to ensure that local comprehensive permit decisions are carrying out the Act's mandate - to promote affordable housing without violating the planning goals of local governments.

Critical to an understanding of the comprehensive permit process is the ten percent standard. Chapter 40B encourages communities to have ten percent of their housing available to low and moderate-income households. Communities that do not meet this standard face a heavy burden of demonstrating to HAC why they are denying or conditionally approving a comprehensive permit with conditions the developer considers uneconomic. Communities with more than ten percent of its housing affordable may still accept and grant applications for comprehensive permits, but those permit decisions may not be appealed to the HAC.

When a ZBA denies a comprehensive permit, the sole issue before HAC is whether the decision was consistent with local needs. Consistent with local needs means balancing the regional need for affordable housing with local public health, safety and welfare concerns. HAC regulations establish high thresholds to establish consistency with local needs, including the degree to which the health and safety of occupants or town residents is *imperiled*, the natural environment is *endangered*, the design of the site and the proposed housing is *seriously* deficient, open spaces are *critically* needed, and the local requirements and regulations bear a *direct and substantial relationship* to the protection of [health and safety, design and open spaces]. 760 C.M.R. §31.07(2) (b). There are times when a project cannot be conditioned to ensure that the health and safety is not imperiled or the environment is not endangered. In these instances HAC will uphold a local denial of a proposed project.

If a ZBA approves a permit with conditions the developer considers onerous, the developer's appeal focuses on two questions (a) whether the conditions are uneconomic and (b) whether the conditions are consistent with local needs. The developer bears the burden of proving that the conditions are uneconomic. If the developer can prove that the conditions are uneconomic the community then has to demonstrate that its conditions are consistent with local needs.

What is the Purpose of these Guidelines?

Under Chapter 40B zoning boards of appeal in each city and town are responsible for conducting hearings and making decisions on proposals to construct affordable housing. In towns which have less than ten percent of their housing counted as affordable by the Department of Housing and Community Development, applicants for comprehensive permits may appeal these decisions to HAC.

HAC has published Guidelines for Local Review of Comprehensive Permits, which can be found at <http://www.mass.gov/dhcd/components/hac/GUIDE.HTM>. While the HAC guidelines provide clarity on many aspects of the local 40B review process, the new guidelines presented below are also intended to address issues that have arisen since 1999 when financing from the New England Fund of the Federal Home Loan Bank of Boston (NEF) was deemed by HAC to qualify as a federal subsidy and make developments eligible for comprehensive permits. That decision has changed the manner in which most cities and towns review applications for comprehensive permits. Most significantly, communities began to review project pro formas in order to determine whether projects were financially feasible.

HISTORICAL NOTE: Local ZBAs had authority to review pro formas of 40B applications filed between 1999 and 2002 that used the New England Fund (NEF) program of the Federal Home Loan Bank of Boston as a subsidy. State 40B regulations adopted in 2002 brought oversight of NEF projects under MassHousing. This meant that MassHousing would now issue project eligibility letters for NEF projects and therefore take on the role of pro forma review. As a result, local ZBAs are no longer required to engage in that additional level of financial review.

In 2002 HAC revised its regulations to require that all 40B applications, including NEF applications, must have a project eligibility letter issued by a federal or state subsidizing agency or program administrator. MassHousing is the program administrator for the NEF program. The regulations require that the subsidizing agency or program administrator determine whether the project is financially feasible.

In light of the changes to Chapter 40B in practice and regulation, the guidelines outlined below attempt to assist communities in reviewing comprehensive permit projects in a way that maximizes the opportunity for a successful outcome. A successful outcome could mean a project approval or in appropriate instances, a denial. These guidelines suggest that a negotiated outcome will, in most cases, garner the best result for a community.

While these Guidelines are written from a local perspective, developers should also use them as a guide to preparing for and seeking approval of permits. In those communities that have an affordable housing plan, developers are more likely to meet with community approval if they propose projects that comply with the plan (see PRINCIPLE #1 on page 3).

It is in this context that these guidelines focus on those aspects of Chapter 40B review that are most contentious and/or unclear. These include the roles and responsibilities of local boards, the importance of identifying key issues early in the process, focusing peer review on these key issues, the use of work sessions when conducting negotiations, and pro forma review. These guidelines do not cover all aspects of the ZBA process and are no substitute for obtaining legal advice as needed from a city solicitor or town counsel.

II. LOCAL 40B REVIEW GUIDELINES

A. Community Plans

PRINCIPLE #1: Communities should adopt and implement a local affordable housing plan to guide developers, the zoning board of appeals and HAC.

The purpose of Chapter 40B is to enable the construction of affordable housing where it is needed and could not otherwise be built. One of the best ways to preserve local control is to develop, adopt and implement a local affordable housing plan.

A local affordable housing plan typically identifies housing needs and describes ways to meet these needs. These plans may suggest areas suitable for mixed-income and/or affordable housing (including apartments and townhouses), town-owned land that might be used for housing, zoning bylaw changes to promote affordable housing and other strategies and techniques to achieve a community's affordable housing goals.

There are several ways a local housing plan will help a city or town better manage the comprehensive permit process. First and foremost is a new state initiative known as planned production. Communities have an opportunity to submit an affordable housing plan to the state Department of Housing and Community Development (DHCD) outlining specific measures they plan to take to achieve the 10 percent affordable housing goal in Chapter 40B. Each year that a city or town with an approved housing plan has added affordable housing units equal to 3/4 of one percent of the community's housing stock, that community is deemed to be certified. Any ZBA decision made on an application during the year following the certification cannot be appealed to the HAC by the developer. The Planned Production regulation guidelines can be found at 760 CMR 31.07(1)(i) and the DHCD Guidelines for these regulations can be found at: www.mass.gov/dhcd/ToolKit/PProd/RegGuide.pdf.

Adoption of a comprehensive or master plan with a strong housing component may help communities navigate the Chapter 40B process even if their plan is not a DHCD-approved Planned Production plan. For example, HAC has given legal weight to community plans that are legitimately adopted and serve as viable planning tools, when deciding whether to uphold ZBA denials of comprehensive permits. For a recent example of a HAC decision upholding a ZBA's denial of a comprehensive permit on the basis of a community plan see *Stuborn Ltd. Partnership v. Barnstable Board of Appeals*, No. 98-01 (September 18, 2002).

B. Roles and Responsibilities

PRINCIPLE #2: The board of selectmen, mayor or other chief elected official should provide detailed, factual and focused comments to the state housing agency responsible for issuing a project eligibility letter.

Any comprehensive permit application must include evidence that the applicant and the project are qualified to obtain a permit. This takes the form of a project eligibility letter (also known as a site approval

letter) typically issued by one of four state subsidizing agencies: MassHousing, DHCD, the Massachusetts Housing Partnership and MassDevelopment. This letter signifies that the proposed site is generally suitable for the type of housing proposed, that the project is eligible for a public subsidy program that is needed to qualify for a comprehensive permit, and that the project appears to be financially feasible.

Before issuing a project eligibility letter, the subsidizing agency must allow 30 days for the chief elected official (typically the Board of Selectmen or Mayor) to review and provide written comments on the developer's initial proposal. This process is set forth in the HAC's regulations, which can be found at www.mass.gov/dhcd/regulations/760031.HTM.

Before submitting written comments on the community's behalf, the Selectmen or other chief elected official should consider soliciting comments from relevant local boards, staff and the public. This is the one opportunity where a city or town's elected leaders play a formal role in the comprehensive permit process. All subsequent decisions relating to the permit application are within the sole purview of the ZBA. If the community's comments are detailed, factual and focused, they are more likely to affect the subsidizing agency's decision on whether and under what conditions to issue a project eligibility letter.

To be effective, the chief elected official's comments should be limited to legitimate municipal planning and public health and safety concerns. Examples of constructive comments might include the relationship between the proposed 40B development and the local affordable housing plan, existing infrastructure (roads, water, sewer), the environment (such as traffic, storm water management, or groundwater quality), or suggestions on how the proposed site or building design might be modified to better fit into the surrounding neighborhood. It is not effective for communities to make comments that go beyond the scope of local review authority under 40B, for example, commenting that a 40B project is opposed by neighbors or would result in increased municipal service costs. None of these are valid legal reasons to condition or deny a comprehensive permit application and therefore the comments will have no effect on a state agency's decision to issue a project eligibility letter.

SPECIAL NOTE REGARDING HOUSING PARTNERSHIPS: A number of cities and towns have appointed housing partnerships or other municipal advisory committees charged with the task of promoting affordable housing. Some communities have made the housing partnership the initial point of contact for all new affordable housing developments, including comprehensive permit applications.

While the views of a housing partnership might carry significant weight within a particular city and town, its recommendations are not binding on the ZBA. Housing partnerships can add the most value to the 40B process when they have preliminary discussions with a developer in an informal setting before a comprehensive permit application is filed. This is an opportunity to make suggestions to the applicant on how a proposal may be modified to better address the town's affordable housing goals and to help the applicant anticipate community concerns that may be raised during formal review by the ZBA. Once the permitting process begins, the housing partnership should submit written comments to the ZBA in the same manner as all other local boards.

The ZBA should not get involved at this stage in the process. ZBA members serve as quasi-judges and must reserve judgment until all of the evidence is presented at the public hearing on the comprehensive permit application.

PRINCIPLE #3: At an early stage in the review process, ZBAs should identify key concerns about the impacts of the proposed 40B development. The earlier the ZBA informs the developer of these concerns, the more likely the developer will be willing and able to address them.

Chapter 40B streamlines the local review process by providing developers with a one-stop local permit, known as a comprehensive permit. While other permitting decisions are made by various local boards charged with administering local bylaws, rules and regulations, Chapter 40B gives the ZBA the responsibility and the legal authority to render a single decision, after taking into account comments made by other relevant local boards. MHP offers assistance with the local review process, by providing grants to ZBAs to hire consultants to assist them with reviewing comprehensive permit projects. These consultants work on the ZBA's behalf; they do not work for MHP.

Special note: If a proposed 40B development is subject to the state Wetlands Protection Act or *state* Title V septic system regulations, separate approval may be required from the local Conservation Commission or Board of Health, which administer these laws. The Conservation Commission and Board of Health do not have any legal authority to enforce local wetlands protection bylaws or local septic regulations that exceed the requirements of state law. All *local* regulations and bylaws are addressed by the ZBA.

Chapter 40B requires that the ZBA commence a public hearing within 30 days of the date the developer submits an application for a comprehensive permit. The ZBA should then solicit written comments from all relevant local boards, determine whether the application is complete, and advise the applicant if additional information is needed to make an informed decision. Early in the public hearing process and in addition to submitting written comments, local boards and committees should consider attending one or more hearings and offering comments on the proposed application. The more participation from local boards, the more informed the ZBA's decision is likely to be.

ZBAs should begin the hearing process by asking the applicant to present the proposed development to the board and the public and solicit public comment on the proposal. After the completion of this initial work, the ZBA should identify, at least on a preliminary basis, the key issues which need further consideration. The sooner key issues are raised, the more quickly the developer has a chance to respond to them.

This is particularly true if a ZBA would like to see the project redesigned. Without a developer's agreement, a project will not be redesigned. On appeal, HAC will not uphold conditions requiring project redesign. HAC will only consider the project before it, not a project as envisioned by a ZBA. On the other hand, if a ZBA raises design issues at an early stage in the process, a developer and the board may reach agreement on a new site plan. In general, as plans become more detailed, it becomes less likely that a developer will revise them. It is too expensive and time-consuming for a developer to do so.

C. Peer-Review

PRINCIPLE #4: ZBAs should carefully manage the timing and scope of peer review in order to maximize its usefulness.

The second phase in the ZBA review process involves technical review, which is usually done by consultants (or peers), and therefore usually called peer review. This review can include civil engineering (typically storm and waste water, and proposed waivers from local bylaws), traffic (including on-site vehicular and pedestrian circulation and off site traffic impacts and potential mitigation), environmental (typically wetlands) and design review of buildings (elevations, floor plans, consistency between affordable and market-rate units) or site design.

Deciding Whether to Employ Staff and/or Consultants

If a town does not have staff or town staff does not have the time or the expertise to review a particular 40B project, the ZBA may hire peer review consultants (with fees to be paid by the developer). A ZBA may enact its own rules for hiring peer review consultants. If a ZBA does not have rules, it must follow the 40B Model Rules and MGL C. 44§53G. Peer review should focus on those issues the ZBA believes are important, which may include: civil engineering and if warranted, traffic and site and/or architectural design, or other local issues.

It is critical that a ZBA, when hiring a consultant, instruct that consultant to stay within the purview of his or her expertise. For example, a consulting engineer should not be asked to determine whether the ZBA has jurisdiction to review an application. The best way to ensure that the consultant does the job that is required is to ask for or draft, and if necessary modify, a proposed scope of services.

If the town has staff, it is advisable that the ZBA ask the consulting reviewer to take staff comments into account. In the event this is not done, the ZBA is left with the difficult situation of deciding which opinion to consider – not a good situation for a board member who might not have the technical expertise to make an informed decision.

Targeting Key Issues and Timing the Peer Review Process

Peer review that focuses on the issues identified by the ZBA as key is more likely to have a positive outcome. Peer review paid for by the developer is limited to review of studies provided by the developer. Of course, this does not preclude the study of additional issues identified by staff or other consultants not paid for by the developer. Peer review should be conducted in stages. The first should include technical issues such as engineering, traffic and design. The second should include pro forma review if the ZBA determines such review is necessary.

Staging the Engineering Review Process

The ZBA should not impose unreasonable or unnecessary time or cost burdens on an applicant. Increased development costs mean less opportunity for the developer to make project changes that increase community benefits or mitigate project impacts.

The ZBA should use especially careful judgment with respect to the timing of engineering review, particularly storm water and wastewater management. Thorough civil engineering is important, but it should not become the primary focus of the ZBA review process to the exclusion of other fundamental concerns. This is particularly true if the ZBA is seeking a change in the site plan and number and location of buildings.

There are many positive examples of a developer and a ZBA reaching consensus on changes in site design and, as a result, the ZBA has issued a comprehensive permit on terms the developer can accept. Yet it is difficult or impossible to have those discussions if the ZBA has already required the developer to complete detailed civil engineering (and pay for the ZBA's peer review of that work) based upon the original permit application. If there appears to be any reasonable likelihood that the developer will change the design of a project, the ZBA should hold off on detailed engineering review until the ZBA and the developer have agreed upon project design.

Ensuring Payment of Consultants

It is critical for the ZBA to establish a scope of services and a fee for the consultant and for the developer to place the required sum in an escrow account, to be paid by the ZBA to the consultant upon receipt of an invoice. The ZBA should not ask the consultant to commence work until the developer has provided the necessary funds. A ZBA should indicate to an applicant that a delay in funding this account means a delay in the peer review process. This protects the ZBA chair from having to assume the role of a collection agent.

ZBAs should not ask the developer for an amount of money that has no relationship to actual fee proposals made by the peer review consultant or consultants. The process works better if there is a scope of services and a fee for proposed work, which the ZBA requires an applicant to advance.

D. Pro Forma Review

PRINCIPLE #5: If a ZBA decides that pro forma review is appropriate, it should be done *after* the ZBA has proposed conditions on a permit and the applicant indicates that the conditions would make the project uneconomic.

If a ZBA conducts a pro forma review it should do so only after other peer review has been completed, the developer has had an opportunity to modify its original proposal to address issues raised, the ZBA has had an opportunity to propose conditions to mitigate the project's impacts, and the developer does not agree to the proposed conditions and indicates they would render the project uneconomic. It makes no sense to evaluate the pro forma before the ZBA has had an opportunity to indicate its concerns and the developer has a chance to respond to them. Usually the developer will at the very least make some changes to the project. Evaluating a pro forma that does not reflect these changes is an unnecessary exercise. There is no reason to critically evaluate a pro forma at all if the developer has agreed to accept most or all of the ZBA's proposed conditions.

If the developer does not agree to some or all of the proposed conditions, the ZBA may ask the developer to submit a pro forma revised to reflect the additional cost of meeting these conditions. The revised

pro forma may then be subjected to the same peer review as any other technical information submitted to the board. The ZBA may then use this information to decide whether to adopt or modify its originally proposed conditions.

Some communities request peer review of pro formas in order to see whether a project will still be economic if the number of dwelling units is reduced. This position is not supported by HAC or court decisions. A condition that limits density must be supported by other rationales, such as serious planning or design deficiencies or environmental impacts that directly result from the size of a project on a particular site. If the ZBA grants a permit, but arbitrarily reduces the size of the proposal, it is likely that the HAC will consider the decision a denial.

PRINCIPLE # 6: Pro forma analysis of developer-requested waivers from local bylaws is not necessary unless the developer argues that a denial of a waiver makes the project uneconomic.

Chapter 40B allows developers to request and ZBAs to grant waivers from local bylaws. Zoning waivers are from the “as-of-right” requirements of the zoning district where the site is located. They are not from the special permit requirements of the district or from other districts where multi-family uses are permitted by right or by special permit. If a project does not propose a subdivision, waivers from subdivision requirements are not required (although some ZBAs look to subdivision standards, such as requirements for road construction, as a basis for required project conditions). Other typical requested waivers are from a community’s general (non-zoning) bylaws, including wetland bylaws and board of health rules.

ZBAs should not consider waiver requests until it is clear that the project plan is either agreed upon or the developer has informed the ZBA that he or she will not agree to changes sought by the ZBA and the plan is therefore final for purposes of comprehensive permit review. This is the stage in the review process where the community should consider whether to grant or deny a request for waivers. The waiver request is now final, so the ZBA is not wasting its time and resources.

Once a ZBA and a developer agree on a proposed plan, the ZBA should grant those waivers that are necessary to build the project in accordance with the plan. For example, if the agreed-to plan indicates a 10’ reduction in required side yard set backs, the ZBA should grant the side yard setback waiver necessary to ensure that the plan can be built (as opposed to a blanket waiver from the side yard setback requirements). There is no need to ask the developer to list the financial impact of a denial of a requested waiver or for the ZBA to request a peer review of its financial impact. If the developer and the ZBA cannot agree upon a plan, the ZBA review of waivers should be in light of a plan that it *would* find acceptable (assuming there is such a plan.) Once again, the specific waivers necessary to build the plan should be granted.

PRINCIPLE #7: Pro forma review should conform to recognized real estate and affordable housing industry standards.

If ZBA review of a development pro forma becomes necessary it should always be consistent with the policies of the subsidizing agency and with prevailing industry standards as set forth in the Appendix to these guidelines.

The disagreements about pro formas that arise most frequently involve related-party transactions (e.g., where the developer is also the general contractor or marketing agent) and the ZBA believes that the developer is charging too much, the estimated sales price of market-rate units (where the ZBA believes the revenue from sales or rentals is undervalued), land acquisition costs (where the ZBA believes the purchase price exceeds fair market value) and profits (where the ZBA believe the profits are excessive).

After referring to the standards listed in the Appendix and using them as a basis for agreement, if no agreement is forthcoming, then for those items for which the developer and the town's peer review consultant disagree and the variances are larger than 10%, the parties should hire a neutral financial consultant to resolve the dispute by choosing between the high and the low estimates. This approach serves to encourage the developer and the peer review consultant to make realistic estimates in the first place. The town and the developer should use the midpoint for items with variances of less than 10 percent.

The following are the issues that arise most frequently, each of which is addressed in more detail in the Appendix:

Related-Party Transactions

The issue raised in the context of related-party transactions is whether the developer is paying fees for services by related parties that exceed what would be charged on an arm's length basis in the ordinary course of business.

Sales Price/Rent of Market-rate Units

A community may believe the prices or rents of the market-rate units that the developers shows in the pro forma are too low and do not reflect market conditions.

Land Acquisition Costs

An issue often highlighted is the land value line item in the pro forma. The basic rule for valuing land is addressed in the Appendix to these guidelines. The value should relate directly to the as-is value of the site under current zoning and should not be artificially inflated as a result of the extra value provided by a comprehensive permit or a non-arm's length conveyance between related parties.

Profits

It is the responsibility of the federal or state housing agency that issues the project eligibility letter and conducts the final subsidizing agency review of a 40B project — not the responsibility of the ZBA — to establish and enforce reasonable limitations on the developer's profit. In the case of housing developed for sale, that profit limitation is enforced through a final cost certification after the units have been built and sold. In the case of rental housing, it is enforced both through cost certification and through a regulatory agreement that limits annual dividends paid to investors. If the ZBA examines line items, it must apply the subsidizing agency's standards in determining whether permit conditions would render a project economically infeasible.

E. Engage in Negotiations

PRINCIPLE #8: Negotiating density, design and conditions can lead to successful outcomes

Encourage the Applicant to Modify the Project

Any developer who applies for a comprehensive permit is entitled to a public hearing and decision by the ZBA on the merits of the project as originally proposed. The developer is under no legal obligation to modify or redesign the project in response to community concerns. However, the 40B process works best where projects are not cast in stone and a developer is willing to modify the project in order to address community priorities and mitigate negative impacts. It is quite typical for an applicant to modify a project to address technical concerns that arise during engineering review (e.g., changing the location of buildings to improve storm water management). Many 40B developers also find it in their best interest to redesign a project in response to concerns or constructive suggestions raised by the ZBA.

Under 40B anything that is reasonably related to the project and its impacts is negotiable. Subjects for negotiation include density, unit and site design, housing type, amount and location of open space and recreational facilities, and landscaping. When ZBAs negotiate density they should first consider whether good building and site design might be at least as important as the number of units in a project. Infrastructure concerns such as roads, storm and wastewater systems and water delivery and supply are often also negotiated. Communities also negotiate for additional affordable units, prices of the affordable units and contributions for affordable housing plans.

Identify a Preliminary List of Conditions for Approval

Most health and safety-related project impacts can be mitigated by conditions. It makes sense, therefore, for the ZBA to suggest permit conditions for consideration by the developer. The most effective and cost-efficient approach is to negotiate with the developer to see whether agreement on the proposed conditions can be reached. Agreement on conditions gives the community, not the HAC or the courts, the final word on the proposed development.

The ZBA should submit a preliminary list of conditions to a developer at an open public hearing. While the applicant is not under any legal obligation to respond to this list of conditions, it is almost certainly in his or her best interest to do so.

If agreement is not reached, it is important to ensure that the ZBA's conditions can be supported by technical and/or planning analysis *and* that detailed, factual findings for the conditions are listed in the decision. Findings for conditions imposing density limits that have not been agreed upon are of critical legal importance. In *Settlers Landing Realty Trust v. Barnstable Board of Appeals*, No. 01-08 (Sept. 22, 2003) the HAC ruled that an arbitrary reduction in density could be tantamount to a denial. HAC has determined that there must be a "sufficient logical connection" drawn in the decision between the findings and the reduction in the number of dwelling units.

In a HAC appeal from a *conditional approval*, a developer has the burden of proving that a condition is uneconomic. If the developer cannot meet this burden HAC will usually uphold the condition. If a developer can meet this burden, the ZBA then must demonstrate that the condition is consistent with local needs. When determining whether a decision is consistent with local needs, the HAC balances the regional need for affordable housing with the degree to which the health and safety is imperiled, the natural

environment is endangered, the design of the site and the proposed housing is seriously deficient, open spaces are critically needed and whether the local requirements and regulations bear a direct and substantial relationship to the protection of [health and safety, design and open spaces]. 760 C.M.R. §31.07(2)(b).

ZBA conditions that are in direct conflict with requirements of the subsidizing agency are unlikely to be upheld upon appeal.

In a HAC appeal from a *denial* (including cases where HAC determines based on particular facts and circumstances that a conditional approval is tantamount to a denial), the town has the burden of proving that its decision is consistent with local needs. This is a difficult burden to meet.

SPECIAL NOTE REGARDING FORMAL PROCESS VS. NEGOTIATION: Many issues, including density, project design and additional affordability, can be negotiated. The greatest opportunities to reach agreement occur when the ZBA has identified key issues early in the review process and has used informal work sessions to maintain an ongoing line of communication with the applicant. If agreement cannot be reached, the ZBA may *only* address the proposal that has been submitted (and in some cases modified) by the applicant when it comes time to render a decision. The ZBA may not redesign the project or arbitrarily reduce the size of the project.

Consider Work Sessions to Clarify Technical Differences

The ZBAs must conduct all hearings and deliberations on 40B applications in public. This does not necessarily preclude informal discussions outside of the public hearing. Many cities and towns find that these work sessions offer a constructive approach to achieving successful outcomes.

If a ZBA chooses to conduct work sessions, no more than one ZBA member should participate and should be accompanied by a consultant with expertise in Chapter 40B (available at no cost through the Massachusetts Housing Partnership) and/or by counsel. It is also helpful to include the town planner (if your community has a planner) and other relevant municipal staff and/or representatives of other city/town boards in the work sessions.

Work sessions should be limited to discussions concerning technical issues such as those concerning engineering, traffic and financial review. The participants may discuss site or building design alternatives so long as they don't negotiate project redesign. The ZBA member that participates in a work session should report on the discussions at a public hearing.

Some attorneys state that these meetings, even if only one ZBA member participates, must be posted as open meetings. Lawyers generally agree that if more than one ZBA member participates, notice of the meeting should be published and the meeting should be conducted in public.

Ultimately each city or town needs to determine how its own process will be conducted. Will any discussions be conducted in closed meetings, or will everything occur in a public forum? The ultimate arbiter of this decision is the town counsel or city solicitor, who often will seek advice from the county's district attorney.

F. ZBA Renders a Final Decision

PRINCIPLE 9: If the applicant does not agree to all of the ZBA's preliminary conditions, reconsider whether the disputed conditions are necessary and then render a final decision that is likely to be upheld.

Unless the ZBA and developer are in agreement, the ZBA must make a judgment call that balances the added value of each disputed permit condition with the added risks that the developer will appeal and the ZBA's decision will be overturned. Once the ZBA has issued its decision, the developer must then decide whether to incur the additional time and expense of taking an appeal to HAC. If the ZBA has done its homework and followed these guidelines its decision is likely to be upheld upon appeal.

SPECIAL NOTE REGARDING APPEALS: As local comprehensive permit decisions have become more thoughtful and more sophisticated, and as 40B regulations have changed, HAC has shown greater deference to the decisions made by ZBAs. Today communities have much more influence over what does and doesn't get built through Chapter 40B.

PRINCIPLE 10: Do not deny a comprehensive permit application unless (A) state regulations explicitly authorize this, or (B) there are health and safety impacts that cannot be mitigated by conditions

Chapter 40B allows the ZBA to deny an application for a comprehensive permit if a city or town can demonstrate that more than 10 percent of its housing stock is subsidized low- or moderate-income housing or if such housing has been built on more than 1-1/2 percent of the community's developable land area or if the application before the ZBA would result in the commencement in any one calendar year of construction of such housing on sites equaling three tenths of one percent (0.3%) of the total land area. Unless there is a factual disagreement about whether these requirements have been met, these denials will be upheld by HAC.

Recent HAC regulations outline several other circumstances where communities may deny comprehensive permit applications without any significant risk of being overturned:

- When the project exceeds a maximum size (ranging from 150 units in small communities to 300 units in larger ones).
- Where the Department of Housing and Community Development has approved a community's affordable housing production plan and has certified that the community has approved low- and moderate-income units during the previous 12 months totaling at least 0.75% of the community's housing stock pursuant to that plan.
- During a 12-month cooling off period after a development proposal that does not include affordable housing has been made on the same site.

Outside of these carefully delineated safe harbors there are *very few* circumstances under which ZBA denials of comprehensive permits have been upheld. As a general matter, a denial will not be upheld on appeal if a comprehensive permit could have been granted with conditions adequate to protect public health, safety and welfare.

APPENDIX:

STANDARDS FOR DETERMINING WHETHER PERMIT CONDITIONS MAKE A 40B DEVELOPMENT UNECONOMIC

As noted in the *Local 40B Review and Decision Guidelines*, it is not always necessary or appropriate for a zoning board of appeals to review the financial pro forma for a proposed 40B development. In situations where a pro forma review does become necessary, the following standards should be applied.

A. STANDARDS APPLICABLE TO ALL DEVELOPMENTS

Determining Land Value

The allowable acquisition value of a site for purposes of Chapter 40B is the fair market value of the site excluding any value relating to the possible issuance of a comprehensive permit (the As-Is Market Value) at the time of submission of the request for a project eligibility letter plus reasonable and verifiable carrying costs (Reasonable Carrying Costs) from that date forward.

Reasonable Carrying Costs may not exceed 20% of the As-Is Market Value of the site unless the carrying period exceeds 24 months from the date of application for a project eligibility letter. This carrying period shall terminate on the date that the documents for the Construction Loan are signed or when actual construction commences, whichever is sooner. Applicants must at all times, after issuance of the project eligibility letter, use diligent efforts in pursuing the development.

If the applicant has site control through an option or purchase and sale agreement, Reasonable Carrying Costs may include (but are not necessarily limited to) non-refundable option fees and extension fees paid to the seller in addition to the purchase price. If the applicant owns the property, Reasonable Carrying Costs may include (but are not necessarily limited to) property taxes, property insurance, and interest payments on acquisition financing. All Reasonable Carrying Costs must be documented by the submission of independent, verifiable materials (such as cancelled checks, real estate tax bills, etc.).

With the adoption of a uniform, appraisal-based Land Acquisition Value Policy (the "Uniform Land Value Policy") by all issuers of project eligibility letters, it becomes unnecessary and duplicative for the ZBA to commission an appraisal of its own. Under the Uniform Land Value Policy any appraisal under Chapter 40B, while paid for by the applicant, shall be commissioned by (and name as the client) the agency reviewing the application for a project eligibility letter. These agencies shall maintain a list of approved appraisers and may augment, reduce or alter the list of approved appraisers as they deem necessary or appropriate. All approved appraisers shall be, at a minimum, a General Real Estate Appraiser certified by the Commonwealth of Massachusetts and shall submit Self-Contained Appraisal Reports to the subsidizing agencies in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP). In order for any appraisal to be deemed valid, it must have been reviewed and accepted by the agency issuing the site approval letter.

A reasonable rate of return on a proposed development must be determined from the As-Is Market Value of the site even though the amount paid for the site may be more or less than the As-Is Market Value. This approach is consistent with how the subsidizing agency will require the site to be valued in the calculation of total development costs set forth in the final cost certification of the project.

EXCEPTION FOR SMALL PROJECTS WITH COMMUNITY SUPPORT: Upon written request of the chief elected official, the subsidizing agency may waive the appraisal requirement for proposed developments of 20 units or less where the applicant submits satisfactory evidence (such as a local tax assessment, limited appraisal, or opinion of value from a licensed real estate broker) that reasonably supports the acquisition cost. The purpose of such a waiver is to relieve the cost burden for smaller developments that are sponsored or supported by the local community where the reasonableness of the acquisition cost is not at issue.

As is the case in all 40B developments a complete appraisal using the methodology described above will be conducted in conjunction with the closing of the financing on each of these small projects and will also be required at cost certification.

Unit Construction Costs

Hard construction costs should be carried on a square foot basis (including the contractor's general requirements¹, general overhead, profit and bond). Outline specifications for the units (including any proposed differences between market and affordable units) should be provided, if requested, to support the cost estimate. Additional costs for common areas, facilities and equipment should be provided with sufficient quantity and unit cost information for a general review.

Hard Cost Contingency

A contingency factor applied to the estimate of hard construction costs (including site development costs but excluding acquisitions costs) should not exceed 5% for new construction and 10% for rehabilitation.

Soft Cost Contingency

A contingency factor applied to all projected soft costs (excluding real estate commissions on the sale of the units), should not exceed 5%, except for smaller developments where lenders may require a higher percentage.

Site Development Costs

These costs are site specific and estimates tend to be more preliminary than other cost categories. Such costs should be broken out with quantities and unit prices provided, if applicable and reasonable, with estimates for the following categories:

- Roads (including utilities in the roads)
- On-site Septic system
- On-site water system
- Blasting allowance
- Rough grading/site preparation
- Landscaping
- Utility connections

¹ As commonly used in construction accounting, builder's overhead is a portion of the costs incurred by the builder or general contractor to operate their business (such as office and administrative expenses) that is not attributable to any one job. General requirements are project-specific expenses (such as on-site supervision, field offices, temporary utilities, and waste removal) that support the job as a whole rather than specific work items. Builder's profit is the difference between the total cost of construction (including builder's overhead and general requirements) and the amount paid to the builder/contractor.

Identities-of-Interest Construction Managers or General Contractors

Each developer must identify the existence of an identity of interest with any other party to the project. An identity of interest might, for example, be a developer who is also the general contractor. In projects where an identity of interest exists between the developer and the general contractor, the maximum allowable builder's profit and overhead and general requirements should be calculated as follows:

- Builder's profit — 6 percent of construction costs
- Builder's overhead — 2 percent of construction costs
- General requirements — 6 percent of construction costs

If a developer or related entity makes a loan to the project, interest may only be recognized on developer contributions that exceed 20% of total development costs. Any such loans should be evidenced by a note or mortgage and receive interest no higher than the rate established by the primary construction lender on the project.

General

The pro forma presentation of projected development costs, sales revenues (if applicable), and developer profit should follow the format used by MassHousing in its application form for a project eligibility letter. Additional line items may be added, if necessary, such as marketing and lottery costs, development consultants, and developer's overhead.

If there is an identity of interest not specifically addressed in this appendix, fees for services by related parties should not exceed amounts that would otherwise be paid for such services on an arm's length basis in the ordinary course of business.

All of the line items in the pro forma, including construction cost, sales proceeds and rents, where appropriate, should be estimated in current dollars at the time of submission of the request for a Project Eligibility Letter to avoid speculation about future construction costs, sales prices, and/or rents.

Resolution of Disputed Costs

Real estate industry and affordable housing industry standards should be the basis for reviewing pro forma line items. Many of these standards are listed in this Appendix. After referring to the standards listed in the Appendix and using these as a basis for agreement and no agreement is forthcoming, then for those items for which the developer and the town's peer review consultant disagree and the variances are larger than 10%, the parties should hire a neutral financial consultant to resolve the dispute by choosing either the high or the low estimate. This approach serves to encourage the developer and the peer review consultant to make realistic estimates in the first place. The town and the developer should use the midpoint for items with variances of less than 10 percent.

B. STANDARDS APPLICABLE TO FOR-SALE DEVELOPMENTS ONLY

Developer Overhead

Developer overhead reflects the expenses of the applicant administering and managing the project during the permitting, financing, construction, marketing and cost certification phases and is not a component of allowable developer fee/profit. The allowable developer overhead costs for cost certification purposes (without need of supporting documentation) should be as follows:

TOTAL PROJECT SIZE	ALLOWABLE DEVELOPER OVERHEAD
Up to 4 units	\$20,000 (fixed amount)
5 - 20 units	\$4,000/unit for units 1-20
21 - 100 units	\$80,000 plus \$2,000/unit for units 21-100
101 - 150 units	\$240,000 plus 1,000/unit for units 101-150
151+ units	\$290,000 plus \$500/unit for units above 150

Note: If overhead tasks typically performed by a developer are provided by development consultants or other third parties, the Development Overhead allowance should be reduced accordingly.

Commissions - Market Units

Commissions on the sales of the market units should not exceed 6%. If there is an identity of interest between the development entity and the brokerage agency, the fee on the sales of the market units should not exceed 5%. All advertising costs must be included within the commissions. The cost of model homes may be treated as a separate marketing cost.

Marketing/Lottery Costs - Affordable Units

The maximum allowable fee, including lottery costs, should be the greater of \$20,000 or 3% of the sum of actual affordable unit sales prices.

Project Revenues

A. AFFORDABLE UNITS

The average target sales price of the affordable units should be established based on income limits published for the applicable Metropolitan Statistical Area by the U.S. Department of Housing and Urban Development (HUD). Unless otherwise required by the housing subsidy program, Maximum Qualifying Income should be set at 80% of area median income at the household size that corresponds to the number of bedrooms in the unit, as follows:

- 0 BR unit = 1 person household
- 1 BR unit = 2 person household
- 2 BR unit = 3 person household
- 3 BR unit = 4 person household
- 4 BR unit = 5 person household

The maximum household size allowed for age-restricted projects should be a 3 person household.

Target sales prices for affordable units should be determined as follows:

- Maximum monthly housing cost is 30% of the Maximum Qualifying Income divided by 12 months.
- From that maximum monthly housing cost, deduct estimated real estate taxes, property insurance costs, realistic condo fees, mandated home owner association dues, and private mortgage insurance (PMI). The remainder is the monthly amount available to service a mortgage.
- Divide that amount by applicable mortgage loan constant based on current mortgage loan interest rates plus 50 basis points (to allow for estimated fluctuations before the time of sale) for a 30-year term, fixed interest rate mortgage loan with 0 points and 0 closing costs. The quotient is the maximum supportable mortgage.
- Divide the maximum supportable mortgage by .95 to arrive at target sales price (which allows for a maximum 5% down payment).

B. MARKET UNITS

Estimated sale prices by unit type should be supported by a market study which identifies recent sales prices of comparable units provided from an MLS listing or alternative. The market study should be conducted at the time of submission of the request for a Project Eligibility Letter.

Uneconomic Standard

A for-sale project should be considered uneconomic if the Return on Total Cost is less than 15% (i.e., if projected sales proceeds exceed development costs by less than 15%). Developer overhead expenses and payment for services rendered by the developer or related parties should only be included in total development costs to the extent allowed by these standards.

Profit may be more variable for projects with public capital subsidies such as the federal HOME program. In those cases the projected profit should be consistent with other subsidized home ownership developments with similar characteristics that have already been permitted and built.

This standard is appropriate for most, but not necessarily for all situations. If the ZBA or the 40B applicant proposes to apply an uneconomic standard outside the range of this standard, they should demonstrate that the alternative standard is reasonable, consistent with real estate industry norms, and has been used in practice for other developments with similar characteristics that have been successfully financed, built and sold. The sole purpose of the uneconomic standard is to help the ZBA assess whether proposed permit conditions are likely to be upheld on appeal. A developer may always choose to proceed with a 40B development that appears to be uneconomic if the subsidizing agency, in the normal course of its review and approval, finds that the developer has the capacity and the financial resources to successfully complete the project.

Projected profits on for-sale developments are estimates, not actual results, and the minimum profit level needed to make a project economically feasible may change over time in response to changing market conditions. If a ZBA is acting in good faith and grants a permit with conditions that provide a reasonable rate of return, an experienced developer of for-sale housing is far more likely to accept that conditional permit than to assume the additional delays, costs and uncertainties associated with an appeal.

C. STANDARDS APPLICABLE TO RENTAL DEVELOPMENTS ONLY

Developer Overhead and Fee

Developer overhead and fees are necessary project expenses that should not be considered as a component of developer profit. Accordingly, an 8 percent allowance for developer fees and overhead should be included in the pro forma for purposes of estimating rates of return and determining whether a project is uneconomic. If developer fees and overhead in excess of 8 percent are allowed by the applicable subsidized housing program(s) they should not be included as a development cost when estimating the project's rate of return.

Project Revenues

A. AFFORDABLE UNITS

Estimates of annual rental revenue should be based on the following methodology:

The monthly rental rates for the affordable units, including normal utilities (heat, hot water, water, cooking fuel and electricity, or reasonable allowances for same) should be established such that the average rent should equal no more than 30% of gross income for a household earning 80% of Area Median Income, unless otherwise required by the housing subsidy program, based on the appropriate household size per number of bedrooms per unit, as outlined below:

0 BR unit = 1 person household

1 BR unit = 2 person household

2 BR unit = 3 person household

3 BR unit = 4 person household

4 BR unit = 5 person household

B. MARKET UNITS

Estimates of annual rental revenue for market-rate units should be supported by a recently completed market study of comparable developments within the market area of the proposed development. Such market study should be prepared by a qualified market analyst or appraiser.

Uneconomic Standard

There are several methods used by real estate professionals to calculate estimated rates of return on rental housing developments. The simplest method of calculating expected return is known as *Return on Total Cost* (ROTC). The ROTC is the projected net operating income (NOI) of the property in the first year of stabilized occupancy divided by its projected total development cost (TDC) calculated in accordance with these standards.

A more sophisticated method of calculating expected return is the *Internal Rate of Return* (IRR). The IRR incorporates all expected cash inflows and outflows over the expected life of the investment (acquisition and development costs, operating costs, rental income, and future sale) and generates a rate of return that may be compared to returns on stocks and bonds. An IRR analysis is particularly sensitive to assumptions about annual growth in net operating income, the year in which the property is assumed to be sold, and the future value of the property at the time of sale.

A third methodology is *Return on Equity* (ROE), typically calculated as a “cash-on-cash” return. A cash-on-cash ROE is calculated by dividing projected cash flow after debt service in the first year of stabilized occupancy by the developer’s total equity investment in the project. ROE is generally not an appropriate measure of return for purposes of Ch. 40B because ROE is highly sensitive to differences in project financing assumptions across projects, which makes valid comparisons difficult.

What is a reasonable rate of return for 40B rental developments?

In most situations, an ROTC analysis² will allow a ZBA to make a reasonable and informed assessment of whether proposed permit conditions would render a 40B rental development uneconomic. A projected ROTC of at least 2-1/2 to 3-1/2 percent above the current yield on 10-year Treasury notes is generally required to fairly compensate capital investors for the risks associated with permitting, construction, and operations.

When the IRR approach³ is used, an expected IRR at least 6-1/2 percent above 10-year Treasury rates is generally required to fairly compensate capital investors for the risks associated with permitting, construction, and operations.

² Note on ROTC analysis: For purposes of this analysis the acquisition cost should be the As-Is Market Value without the comprehensive permit in place and the value of anticipated public capital subsidies (Low Income Housing Tax Credits, HOME, etc.) should be deducted from total development cost. The projected development costs and projected operating income and expenses should otherwise be determined as set forth in these Guidelines.

³ Note on IRR analysis: Whenever an IRR analysis is used by the ZBA it should be an “unlevered” IRR based on the net cash flow available to pay lenders and investors after all project expenses have been met. For purposes of this analysis the acquisition cost should be the As-Is Market Value without the comprehensive permit in place. Anticipated public subsidies and subordinate loans (including future repayment obligations) should be included in the analysis. The projected development costs and projected operating income and expenses should be determined as set forth in these Guidelines. Annual growth in Net Operating Income (NOI) should be no less than the imputed rate of inflation from long-term Treasury yields. A sale of the property should be assumed in year 10 at a residual value equal to the projected year 11 NOI divided by a current market-based cap rate minus 3% costs of sale.

Using either the ROTC or IRR approach, rates of return may be more variable for projects with tax credits or other capital subsidies. In those cases the projected rate of return should be consistent with other subsidized rental developments with similar characteristics that have already been permitted and built.

These standards are appropriate for most, but not necessarily for all situations. If the ZBA or the 40B applicant proposes to apply an “uneconomic” standard outside the range of these standards they should demonstrate that the alternative standard is reasonable, consistent with real estate industry norms, and has been used in practice for rental developments with similar characteristics that have been successfully financed and built. The sole purpose of the “uneconomic” standard is to determine when and how a developer may appeal the issuance of a comprehensive permit to the Housing Appeals Committee. A developer may always choose to proceed with a 40B development that appears to be uneconomic if the subsidizing agency, in the normal course of its review and approval, finds that the developer has the capacity and the financial resources to successfully complete the project.

Rates of return calculated by any method are estimates, not actual results, and the relationship of minimum investment returns to Treasury rates may change over time in response to changing market conditions. If a ZBA is acting in good faith and grants a permit with conditions that provide a reasonable rate of return, an experienced rental housing developer is far more likely to accept that conditional permit than to assume the additional delays, costs and uncertainties associated with an appeal.

In connection with the methodology described above, estimated development costs should include (but not be limited to) the following:

A. Annual Operating Costs

Estimates of annual operating costs should be comparable to projects of similar size and type, preferably from a recognized lender on market-rate and/or mixed-income housing developments. Particular attention should be given to areas where there may be an identity-of-interest (e.g., property management fees) or miscellaneous fees for required services, such as trash removal or covered parking (if there is no surface parking option) which may increase the rent/cost burden on tenants in the affordable units. The projected cost for any such line item should fall within industry standards.

B. Vacancy / Bad Debt Allowances & Annual Trending Assumptions

These assumptions should conform to the underwriting guidelines of the affordable housing program being used. If requested by the board of appeals, questions relating to such underwriting guidelines or assumptions will be responded to in writing by the subsidizing agency.

C. Finance fees, Credit Enhancement Fees, Lender Fees & Operating

Estimates of these costs should conform to the underwriting guidelines of the affordable housing program being used.

D. Construction Loan Interest Rate, Term and Loan-to-Value (or Cost) Ratio

These costs should conform to the underwriting guidelines of the affordable housing program being used.

760 CMR 31.00: HOUSING APPEALS COMMITTEE: CRITERIA FOR DECISIONS UNDER MGL c.40B, §§20-23

Section

- 31.01: Jurisdictional Requirements
- 31.02: Local Action Prerequisite
- 31.03: Changes in Applicant's Proposal
- 31.04: Computation of Statutory Minima
- 31.05: Scope of the Hearing
- 31.06: Burdens of Proof
- 31.07: Evidence
- 31.08: Decision and Appeal
- 31.09: Enforcement
- 31.10: Effective Date of Amendments

31.01: Jurisdictional Requirements

(1) To be eligible to submit an application for a comprehensive permit or to file or maintain an appeal before the Committee, the applicant and the project shall fulfill the following jurisdictional requirements:

- (a) The applicant shall be a public agency, a non-profit organization, or a limited dividend organization.
- (b) The project shall be fundable by a subsidizing agency under a low and moderate income housing subsidy program.
- (c) The applicant shall control the site.

(2) Fundability shall be established by submission of a written determination of Project Eligibility (Site Approval) by a subsidizing agency as follows:

- (a) A determination of Project Eligibility (Site Approval) shall include:
 1. the name and address of the applicant
 2. the address of the site and site description;
 3. the number and type (ownership or rental) of housing units proposed;
 4. the name of the housing program under which Project Eligibility (Site Approval) is sought; and
 5. relevant details of the particular project if not mandated by the housing program (including percentage of units for low or moderate income households, income eligibility standards, the duration of restrictions requiring low or moderate income housing, and the limited dividend status of the developer).
- (b) A determination of Project Eligibility (Site Approval) shall make the following findings:
 1. that the proposed project appears generally eligible under the requirements of the housing program, subject to final review of eligibility and to final approval;
 2. that the subsidizing agency has performed an on-site inspection of the site and has reviewed pertinent information submitted by the applicant;
 3. that the proposed housing design is generally appropriate for the site on which it is located;
 4. that the proposed project appears financially feasible within the housing market in which it will be situated (based on comparable rentals or sales figures);
 5. that an initial *pro forma* has been reviewed and the project appears financially feasible on the basis of estimated development costs;
 6. that the developer meets the general eligibility standards of the housing program.
- (c) Within ten days of filing of its application with a subsidizing agency for preliminary approval of a project, the applicant shall serve written notice upon the Director of the Department of Housing and Community Development,

100 Cambridge Street, Suite 300, Boston, MA 02114.

(d) Upon receipt of the application, the subsidizing agency shall provide written notice to the chief elected official of the involved community and a 30-day review period for comments, and it shall consider any such comments prior to issuing a determination of Project Eligibility (Site Approval).

(e) Within ten days of receipt of a written determination of Project Eligibility (Site Approval) from the subsidizing agency, the applicant shall serve a copy of that determination upon the Director of the Department of Housing and Community Development, 100 Cambridge Street, Suite 300, Boston, MA 02114.

(f) After issuance of a determination of Project Eligibility (Site Approval), the project shall be considered fundable unless there is sufficient evidence to determine that the project is no longer eligible for a subsidy.

(g) If project funding is provided through a non-governmental entity, a public or quasi-public entity authorized by the Department shall make the determination of Project Eligibility (Site Approval). The designated entity that issued the Project Eligibility (Site Approval) determination shall administer the project thereafter as specified in program guidelines issued by the Department.

(3) Either a preliminary determination in writing by the subsidizing agency that the applicant has sufficient interest in the site, or a showing that the applicant, or any entity 50% or more of which is owned by the applicant, owns a 50% or greater interest, legal or equitable, in the proposed site, or holds any option or contract to purchase the proposed site, shall be considered by the Board or the Committee to be conclusive evidence of the applicant's interest in the site.

(4) No determination of Project Eligibility or Site Approval shall be issued for a project sooner than 30 days after the filing of its application with the subsidizing agency for preliminary approval of the project. A determination of Project Eligibility or Site Approval shall be for a particular financing program. A change in the program under which the applicant plans to receive financing shall require a new determination. An applicant may proceed under alternative financing programs if the application to the Board or appeal to the Committee so indicates and if full information concerning the project under the alternative financing arrangements is provided.

(5) Failure of the applicant to fulfill any of the requirements in 760 CMR 31.01(1) may be raised by the Committee, the Board, or a party at any time, and shall be cause for dismissal of the application or appeal. No application or appeal shall be dismissed, however, unless the applicant has had at least 60 days to remedy the failure.

31.02: Local Action Prerequisite

(1) In order to appeal to the Committee, an applicant shall have applied to the Board for a comprehensive permit in accordance with M.G.L. c. 40B, § 21 and shall have been denied such permit or shall have been granted such permit with conditions which it alleges make the building or operation of such housing uneconomic.

(2) In order to appeal to the Committee, the applicant shall have submitted to the Board an application and a complete description of the proposed project. The items listed below will normally constitute a complete description. Failure to submit a particular item shall not necessarily invalidate an application. Upon motion by either party during an appeal, the presiding officer may determine whether such item, or any further item not listed, should have been submitted to the Board or should be submitted to the Committee.

(a) preliminary site development plans showing the locations and outlines of proposed buildings; the proposed locations, general dimensions and materials for streets, drives, parking areas, walks and paved areas; and proposed landscaping improvements and open areas within the site. An applicant proposing to construct or rehabilitate four or fewer units may submit a sketch of the matters in 760 CMR 31.02(2)(a) and 31.02(2)(c) which need not have an architect's

signature. All structures of five or more units must have site development plans signed by a registered architect;

(b) a report on existing site conditions and a summary of conditions in the surrounding areas, showing the location and nature of existing buildings, existing street elevations, traffic patterns and character of open areas, if any, in the neighborhood. This submission may be combined with that required in 760 CMR 31.02(2)(a);

(c) preliminary, scaled, architectural drawings. For each building the drawings shall be signed by a registered architect, and shall include typical floor plans, typical elevations, and sections, and shall identify construction type and exterior finish;

(d) a tabulation of proposed buildings by type, size (number of bedrooms, floor area) and ground coverage, and a summary showing the percentage of the tract to be occupied by buildings, by parking and other paved vehicular areas, and by open areas;

(e) where a subdivision of land is involved, a preliminary subdivision plan;

(f) a preliminary utilities plan showing the proposed location and types of sewage, drainage, and water facilities, including hydrants;

(g) documents showing that the applicant fulfills the jurisdictional requirements of 760 CMR 31.01;

(h) a list of requested exceptions to local requirements and regulations, including local codes, ordinances, bylaws or regulations.

The applicant may submit with its initial pleading to the Committee copies of such of these items as may be relevant to its appeal.

(3) Pursuant to M.G.L. c. 40B, § 21, as amended by St. 1989, c. 593, the Board shall adopt rules, not inconsistent with M.G.L. c. 40B, for the conduct of its business and shall file a copy of said rules with the city or town clerk. The Committee may in the course of an appeal properly before it pursuant to 760 CMR 31.02(1) determine that a particular local rule is consistent or not consistent with M.G.L. c. 40B, but no appeal shall be heard solely for the purpose of determining the validity of a rule, unless the rule is the sole basis for the denial or conditioning of a comprehensive permit. (For related requirements applying to Boards, see M.G.L. c. 44, § 53G.)

The Committee shall from time to time prepare model local rules for the benefit of Boards, and serve them upon the Boards by first class mail pursuant to 760 CMR 30.08(1). Rules adopted by a Board shall be presumed consistent with M.G.L. c. 40B to the extent that they conform to such model rules. If a Board does not adopt and file rules, it shall conduct business pursuant to the model rules.

The Board shall forward a copy of any comprehensive permit to the Department when it is filed in the office of the city or town clerk.

31.03: Changes in Applicant's Proposal

(1) Substantial Changes. If an applicant involved in an appeal to the Committee desires to change aspects of its proposal from its content at the time it made application to the Board, it shall notify the Committee in writing of such changes and the presiding officer shall determine whether such changes are substantial. If the presiding officer finds that the changes are substantial, he or she shall remand the proposal to the Board for a public hearing to be held within 30 days and a decision to be issued within 40 days of termination of the hearing as provided in M.G.L. c. 40B, § 21. Only the changes in the proposal or aspects of the proposal affected thereby shall be at issue in such hearing. If the presiding officer finds that the changes are not substantial and that the applicant has good cause for not originally presenting such details to the Board, the changes shall be permitted if the proposal as so changed meets the requirements of M.G.L. c. 40B and 760 CMR 31.00.

(2) Commentary and Examples. The statute requires that an applicant present its application first to a local Board

of Appeals before appealing to the Housing Appeals Committee. If on appeal to the Committee the applicant wishes to make changes in its proposal from its content as originally presented to the Board, the Board should have an opportunity to review changes which are substantial.

Following are some examples of what circumstances ordinarily will and will not constitute a substantial change of the kind described in 760 CMR 31.03(1):

(a) The following matters ordinarily will be substantial changes:

1. An increase of more than 10% in the height of the building(s);
2. An increase of more than 10% in the number of housing units proposed;
3. A reduction in the size of the site of more than 10% in excess of any decrease in the number of housing units proposed;
4. A change in building type (e.g., garden apartments, townhouses, high-rises);
5. A change from rental property to homeownership or vice versa;

(b) The following matters ordinarily will not be substantial changes:

1. A reduction in the number of housing units proposed;
2. A decrease of less than 10% in the floor area of individual units;
3. A change in the number of bedrooms within individual units, if such changes do not alter the overall bedroom count of the proposed housing by more than 10%;
4. A change in the color or style of materials used;
5. A change in the financing program under which the applicant plans to receive financing, if the change affects no other aspect of the proposal.

(3) Changes after Issuance of a Permit.

(a) If after a comprehensive permit is granted by the Board or the Committee, an applicant desires to change the details of its proposal as approved by the Board or the Committee, it shall promptly notify the Board in writing, describing such change. Within 20 days the Board shall determine and notify the applicant whether it deems the change substantial or insubstantial.

(b) If the change is determined to be insubstantial or if the Board fails to notify the applicant, the comprehensive permit shall be deemed modified to incorporate the change.

(c) If the change is determined to be substantial, the Board shall hold a public hearing within 30 days of its determination and issue a decision within 40 days of termination of the hearing, all as provided in M.G.L. c. 40B, § 21. Only the changes in the proposal or aspects of the proposal affected thereby shall be at issue in such hearing. A decision of the Board denying the change or granting it with conditions which make the housing uneconomic may be appealed to the Committee pursuant to M.G.L. c. 40B, § 22; a decision granting the change may be appealed to the superior court pursuant to M.G.L. c. 40B, § 21 and M.G.L. c. 40A, § 17.

(d) The applicant may appeal a determination that a change is substantial by filing a petition with the Committee within 20 days of being so notified. Such an appeal will stay the proceedings before the Board.

1. If the presiding officer rules that the change is insubstantial, the comprehensive permit shall be deemed modified by the Committee.

2. If the presiding officer rules that the change is substantial, he or she shall remand the proposal for a hearing pursuant to 760 CMR 31.03(3)(c).

31.04: Computation of Statutory Minima

(1) Housing Unit Minimum. For purposes of calculating whether the city or town's low and moderate income housing units exceed 10% of its total housing units, pursuant to M.G.L. c. 40B, § 20:

(a) In determining whether the decision of a Board is consistent with local needs, low and moderate income housing units shall be counted as of the date of the filing of the written decision in the office of the city or town clerk

pursuant to 760 CMR 30.06(8). There shall be a presumption that the latest Department of Housing and Community Development Subsidized Housing Inventory contains an accurate count of low and moderate income housing. If a party introduces evidence to rebut this presumption, the Board or Committee shall on a case by case basis determine what housing or units of housing are low or moderate income housing. In examining particular housing developments or units, it shall first be guided by the intent expressed in the regulations governing the program under which the housing is financed (*e.g.*, 760 CMR 45.06 for the Local Initiative Program and 760 CMR 37.10 for the HOP program). It shall also be guided by the latest Department of Housing and Community Development Listing of M.G.L. c. 40B Low or Moderate Income Housing Programs. Housing units shall be counted if they are subject to building permits, available for occupancy, or occupied. In addition, housing units authorized by a comprehensive permit shall be counted when the comprehensive permit becomes final (760 CMR 31.08(4)), provided that any housing units, for which building permits have not been issued within one year of the date when the comprehensive permit becomes final, shall no longer be counted until building permits have been issued. No housing unit shall be counted more than once for any reason. The Department shall update the Subsidized Housing Inventory biennially.

(b) The total number of housing units shall be that total number of units enumerated for the city or town in the latest available United States Census; provided that evidence that net

additional units have been occupied, have become available for occupancy, or are under building permit or that total units have decreased between the latest Census and the date of initial application shall be considered.

(2) General Land Area Minimum. For the purposes of calculating whether low and moderate income housing exists in the city or town on sites comprising more than 1½% of the total land area zoned for residential, commercial, or industrial use, pursuant to M.G.L. c. 40B, § 20:

- (a) Total land area shall include all districts in which any residential, commercial, or industrial use is permitted, regardless of how such district is designated by name in the city or town's zoning bylaw;
- (b) Total land area shall include all unzoned land in which any residential, commercial, or industrial use is permitted;
- (c) Total land area shall exclude land owned by the United States, the Commonwealth or any political subdivision thereof, the Metropolitan District Commission or any state public authority;
- (d) Total land area shall exclude any land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the Department of Environmental Protection pursuant to M.G.L. c. 131, § 40A. No other swamps, marshes, or other wetlands shall be excluded;
- (e) Total land area shall exclude any water bodies;
- (f) Total land area shall exclude any flood plain, conservation or open space zone if said zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial or industrial use are completely prohibited.

Only sites of low and moderate income housing units inventoried by the Department or established according to 760 CMR 31.04(1)(a) as occupied, available for occupancy, or under permit as of the date of the applicant's initial submission to the Board, shall be included toward the 1½% minimum.

(3) Annual Land Area Minimum. For purposes of calculating whether the application before the Board would result in the commencement in any one calendar year of construction of low and moderate income housing on sites comprising more than 0.3 of 1% of the city or town's land area or ten acres, ***whichever is larger***, pursuant to M.G.L. c. 40B, § 20:

- (a) Total land area of the municipality and the land area occupied by low or moderate income housing shall be calculated in the manner provided in 760 CMR 31.04(2);

- (b) If 0.3 of 1% of total land area is less than ten acres, the minimum for sites occupied by low and moderate income housing shall be ten acres;
- (c) The relevant calendar year shall be the calendar year period of January 1 through December 31 which includes the applicant's projected date for initiation of construction;
- (d) Ordinarily any low or moderate income housing for which construction is expected to commence within the calendar year, other than that proposed by the applicant, must have received a firm funding commitment by the subsidizing agency prior to the date of the applicant's initial submission to the Board, in order to be included towards the 0.3 % or ten acres;
- (e) Development and construction work in connection with low or moderate income housing shall be proceeding in good faith to completion insofar as is reasonably practicable, in order for such housing to be included towards the 0.3% or ten acres minimum.
- (f) For purposes of subsection 760 CMR 31.04(3), in calculating the size of the sites on which commencement of construction of low or moderate income housing is expected, only the impervious area plus landscaped area of such sites shall be included.

31.05: Scope of the Hearing

(1) General Principle. Consistency with local needs is the central issue in all cases before the Committee. Not only must all local requirements and regulations applied to the applicant be consistent with local needs, but decisions of the Board and the Committee must also be consistent with local needs.

(2) Denial. In the case of the denial of a comprehensive permit, the issue shall be whether the decision of the Board was consistent with local needs.

(3) Approval with conditions. In the case of approval of a comprehensive permit with conditions or requirements imposed, the issues shall be:

- (a) first, whether the conditions considered in aggregate make the building or operation of such housing uneconomic, and
- (b) second, whether the conditions are consistent with local needs.

Commentary. A condition which makes a project uneconomic will not be removed or modified if as a result of such action the project would not be consistent with local needs.

31.06: Burdens of Proof

Applicant's Case

(1) The applicant shall have the burden of proving that it has met the jurisdictional requirements of 760 CMR 31.01(1).

(2) In the case of a denial, the applicant may establish a *prima facie* case by proving, with respect to only those aspects of the project which are in dispute, that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of local concern.

(3) In the case of an approval with conditions, the applicant shall have the burden of proving that the conditions make the building or operation of the housing uneconomic. That is, the applicant has the burden of proving that,

within the limits set by the subsidizing agency and without substantially changing the rent levels and unit sizes proposed,

- (a) in the case of a public agency or non-profit organization, the conditions make it impossible to proceed in building or operating low or moderate income housing without financial loss,
- (b) in the case of a limited dividend organization, the conditions imposed by the Board make it impossible to proceed in building or operating low or moderate income housing and still realize a reasonable return as defined by the applicable subsidizing agency, or
- (c) alternatively, in either case, the conditions would result in a subsidizing agency refusal to fund. See 760 CMR 31.07(1)(f).

(4) In the case of either a denial or an approval with conditions, the applicant may prove that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing. The applicant shall have the burden of proving such inequality.

Board's Case

(5) In any case, the Board may show conclusively that its decision was consistent with local needs by proving that one of the statutory minima described in 760 CMR 31.04 has been satisfied. The Board shall have the burden of proving satisfaction of such statutory minima.

(6) In the case of denial, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other local concern which supports such denial, and then, that such concern outweighs the regional housing need.

(7) In the case of an approval with conditions in which the applicant has presented evidence that the conditions make the project uneconomic, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other local concern which supports such conditions, and then, that such concern outweighs the regional housing need.

(8) In the case of either a denial or an approval with conditions, if the denial or conditions are based upon the inadequacy of existing municipal services or infrastructure, the Board shall have the burden of proving that the installation of services adequate to meet local needs is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual

topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly.

Applicant's rebuttal

(9) In the case of a denial or an approval with conditions, the applicant shall have the burden of proving that preventive or corrective measures have been proposed which will mitigate the local concern, or that there is an alternative means of protecting local concerns which makes the project economic.

31.07: Evidence

(1) Presumptions. 760 CMR 31.07(1)(a), (b), (c), (e), and (f) shall be rebuttable presumptions; 760 CMR 31.07(1)(d), (g), (h), (i) and (j) shall be irrebuttable presumptions.

(a) Fundability/Project Eligibility or Site Approval - See 760 CMR 31.01(2).

(b) Site Control - See 760 CMR 31.01(3).

(c) Housing Unit Minimum/Subsidized Housing Inventory - See 760 CMR 31.04(1)(a).

(d) Recent Progress Toward Housing Unit Minimum - A decision by a Board to deny a comprehensive permit or grant a permit with conditions shall be consistent with local needs if the municipality has made recent progress toward its housing unit minimum. Recent progress toward its housing unit minimum shall mean that the number of housing units that have been created during the twelve months prior to the date of the comprehensive permit application and that count toward the housing unit minimum described in 760 CMR 31.04(1) is equal to or greater than 2% of the municipality's total housing units. Such a denial shall not preclude re-filing of the application at a later date.

(e) Regional Housing Need/Statutory Minima - Proof that a town has failed to satisfy one of the statutory minima described in 760 CMR 31.04(1) and (2) shall create a presumption that there is a substantial regional housing need which out-weighs local concerns. *Board of Appeals of Hanover v. H.A.C.*, 363 Mass. 339, 367, 294 N.E.2d 393, 413 (1973).

(f) Uneconomic/Agency Refusal to Fund - Proof that the subsidizing agency will not fund the project because of a condition imposed by the Board, that the applicant has requested a waiver of the subsidizing agency requirement that leads to this result, and that the subsidizing agency has denied a waiver, shall create a rebuttable presumption that the condition of the Board makes the project uneconomic.

(g) Large Scale Project - A decision by the Board to deny a comprehensive permit application or grant a permit with conditions shall be consistent with local needs if:

1. in a municipality which has a total number of 7500 or more housing units as enumerated in the latest available United States Census, the application for a comprehensive permit involved construction of more than 300 housing units or a number of housing units equal to 2% of all housing units in the municipality, whichever number is greater; or
2. in a municipality which has between 5,000 and 7,500 housing units exclusive, as so enumerated, the application for a comprehensive permit involved construction of more than 250 housing units; or
3. in a municipality which has between 2,500 and 5,000 housing units inclusive, as so enumerated, the application for a comprehensive permit involved construction of more than 200 housing units; or
4. in a municipality which has less than 2,500 housing units, as so enumerated, the application for a comprehensive permit involved construction of more than 150 housing units.

(h) Related Applications - A decision by the Board to deny a comprehensive permit or grant a permit with conditions shall be consistent with local needs if 12 months has not elapsed between the date of application and any of the following:

1. the date of filing of a prior application for a variance, special permit, subdivision or other approval related to construction on the same land if that application included no low or moderate income housing,
2. any date during which such an application was pending before a local permit granting authority,
3. the date of disposition of such an application, or
4. the date of withdrawal of such an application.

An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.

(i) Planned Production - A decision by the Board to deny a comprehensive permit or grant a permit with conditions shall be consistent with local needs if the municipality has adopted an affordable housing plan approved by the Department pursuant to which there is an increase in its number of low or moderate income housing units (which are eligible for inclusion on the subsidized housing inventory) by at least $\frac{3}{4}$ of 1% of total units every calendar year until that percentage exceeds 10 percent of total units.

1. The affordable housing plan shall be based upon a comprehensive housing needs assessment, which must include an analysis of the most recent decennial census data of the municipality's demographics and housing stock; of development constraints and limitations, as well as of the municipality's ability to mitigate them; and of the municipality's infrastructure.
2. The affordable housing plan shall address the matters set out in guidelines adopted by the Department, including:
 - a. a mix of housing, such as rental and homeownership opportunities for families, individuals, persons with special needs, and the elderly that are consistent with local and regional needs and feasible within the housing market in which they will be situated;
 - b. the strategy by which the municipality will achieve its housing goals established by its comprehensive needs assessment; and
 - c. a description of the use restrictions which will be imposed on low or moderate income housing units to ensure that each unit will remain affordable long term to and occupied by low or moderate income households.
3. The affordable housing plan shall address one or more of the following, but shall not be limited to:
 - a. the identification of zoning districts or geographic areas which permit residential uses which the municipality proposes to modify for the purposes of low and moderate income housing developments;
 - b. the identification of specific sites for which the municipality will encourage the filing of comprehensive permit applications pursuant to M.G.L. c. 40B, section 21;
 - c. characteristics of proposed developments that would be preferred by the municipality (examples might include cluster developments, adaptive re-use, transit-oriented housing, mixed-use development, inclusionary housing, etc.) or
 - d. municipally owned parcels for which the municipality commits to issue requests for proposals to develop low or moderate income housing.
4. Within 90 days after its submission to the Department by a municipality's chief elected official, the Department shall approve the plan if it meets the requirements specified herein, otherwise, it shall disapprove the plan. The Department shall notify the municipality of its decision to either approve or disapprove a plan in writing. If the Department disapproves a plan, the notification shall include a statement of reasons for the disapproval. A municipality that originally submitted a plan that had been disapproved may submit a new or revised plan to the Department at any time. A municipality may amend its plan from time to time if the Department approves the amendment. If the Department fails to mail notice of approval or disapproval of a plan or plan amendment within 90 days after its receipt, the plan or plan amendment shall be deemed to be approved.
5. The Department shall certify annually whether a municipality is in compliance with an approved plan. The Department shall determine whether a municipality is in compliance within 30 days of receipt of the municipality's request for such a certification. If the Department determines the municipality is in compliance with its plan, the certification shall be retroactive to

the date the certification was requested.

6. Units which are created and which are eligible to be counted toward a municipality's low or moderate income housing stock between August 1, 2002 and December 31, 2002 shall be credited toward the municipality's increased low and moderate income housing stock for the first year of planned production, regardless of the date the plan is submitted to or certified by the Department. An approved plan shall take effect for the purpose of the definition of "consistent with local needs" in M.G.L. c. 40B section 20 only when the Department certifies that the municipality has

approved permits resulting in an initial annual increase in its low or moderate income housing units of $\frac{3}{4}$ of 1% of total housing units in accordance with its plan. It is the responsibility of the municipality to request such certification from the Department. If a zoning board of appeals grants a comprehensive permit, the units will be credited toward the municipality's low and moderate income housing when the comprehensive permit becomes final in accordance with 760 CMR 31.04(1)(a). In order for the units authorized under the comprehensive permit to be credited toward the municipality's low and moderate income housing for the duration of the use restriction, the municipality must submit evidence of and certify to the Department that building permits have been issued for those units.

7. Once the Department has made such a certification of initial compliance and subsequent annual certifications of compliance:

- a. The Board may, in its discretion, choose to deny or approve with conditions any comprehensive permit applications for the period of one year from any certification, and such denial or approval with conditions shall be deemed consistent with local needs; or, alternatively,
- b. The Board may, in its discretion, choose to deny or approve with conditions any comprehensive permit applications for the period of two years from any certification, if, in the year for which certification is sought, the municipality has increased its low and moderate income housing stock by at least 1.5% of total housing units.

(j) The bylaws, regulations, and other local requirements which apply in determining whether a comprehensive permit should be granted are those in effect on the date of the application to the Board.

(2) Balancing. If a town or city attempts to rebut the presumption that there is a substantial regional housing need which outweighs local concerns,

- (a) the weight of the housing need will be commensurate with the proportion of the city or town's population that consists of low income persons; if few or no low income persons reside in the city or town, the strength of housing need will consist of regional need alone,
- (b) the weight of the local concern will be commensurate with the degree to which the health and safety of occupants or town residents is imperiled, the degree to which the natural environment is endangered, the degree to which the design of the site and the proposed housing is seriously deficient, the degree to which additional open spaces are critically needed in the city or town, and the degree to which the local requirements and regulations bear a direct and substantial relationship to the protection of such local concerns, and

(c) a stronger showing shall be required on the local concern side of the balance where the housing need is relatively great than where the housing need is not as great.

(3) Evidence to be Heard. The Committee will hear evidence only as to matters actually in dispute. Below are examples of factual areas in which evidence may be heard if it is relevant to issues in dispute. These examples are not all inclusive.

(a) Health, Safety, and the Environment. The Committee may receive evidence of the following matters:

1. Structural soundness of the proposed building;
2. Adequacy of sewage arrangements;
3. Adequacy of water drainage arrangements;
4. Adequacy of fire protection;
5. Adequacy of the applicant's proposed arrangements for dealing with the traffic circulation within the site, and feasibility of arrangements which could be made by the city or town for dealing with traffic generated by the project on adjacent streets;
6. Proximity of the proposed site to airports, industrial activities, or other activities which may affect the health and safety of the occupants of the proposed housing;

(b) Site and Building Design. The Committee may receive evidence of the following matters:

1. Height, bulk, and placement of the proposed housing;
2. Physical characteristics of the proposed housing;
3. Height, bulk, and placement of surrounding structures and improvements;
4. Physical characteristics of the surrounding land;
5. Adequacy of parking arrangements;

6. Adequacy of open areas, including outdoor recre-ational areas, proposed within the building site;

(c) Open Space. The Committee may receive evidence of the following matters;

1. availability of existing open spaces, as defined in 760 CMR 30.02, in the city or town;
2. current and projected utilization of existing open spaces and consequent need, if any, for additional open spaces, by the city or town's population including occupants of the proposed housing;
3. relationship of the proposed site to any city or town open space or out-door recreation plan officially adopted by the planning board, and to any official actions to preserve open spaces taken with respect to the proposed site by the town meeting or city council, prior to the date of the applicant's initial submission. The inclusion of the proposed site in said open space or outdoor recreation plan shall create a presumption that the site is needed to preserve open spaces unless the applicant produces evidence to the contrary;
4. relationship of the proposed site to any regional open space plan prepared by the applicable regional planning agency;
5. current use of the proposed site and of land adjacent to the proposed site;
6. inventory of sites suitable for use as open spaces, and available for acquisition or other legal restriction as open spaces, in the city or town, *provided* that the Committee shall admit no evidence of any open space plan adopted only by the local conservation commission or other local body but not officially adopted by the planning board.

(d) Municipal Planning. The Committee may receive evidence of and shall consider the following matters:

1. a city or town's master plan, comprehensive plan, or community development plan, and
2. the results of the city or town's efforts to implement such plans.

(4) Evidence Not to be Heard. The following matters shall normally be within the province of the subsidizing agency and the Committee will not hear evidence concerning them except for good cause:

(a) Fundability of the project by a subsidizing agency. In order to rebut the fundability presumption in 760 CMR 31.01(2), however, the Board may present evidence as to the status of the project before the subsidizing agency.

- (b) Marketability of the project.
- (c) The applicant's ability to finance, construct, or manage the project.
- (d) The financial feasibility of the project, what constitutes a reasonable return for a limited dividend developer, or whether the applicant is likely to earn reasonable return, except that evidence may be heard which is directly relevant to the issue of whether conditions make the project uneconomic (see 760 CMR 31.06(3)).
- (e) Tenant selection procedures.

31.08: Decision and Appeal

(1) Decision. In accordance with M.G.L. c. 40B, § 22, the Committee shall render a written decision, based upon a majority vote, stating its findings of fact and conclusions, within 30 days after termination of the hearing unless such time has been extended by consent of the applicant.

- (a) If the Committee finds, in the case of a denial, that the decision of the Board was not consistent with local needs, it shall vacate such decision and shall direct the Board to issue a comprehensive permit to the applicant.
- (b) If the Committee finds, in the case of conditions imposed by the Board, that the conditions render the project uneconomic and that the conditions are not consistent with local needs, the Committee shall direct the Board to remove any such condition or to modify it so as to make the proposal economic.
- (c) If the Committee finds, in the case of conditions imposed by the Board, that the conditions render the project uneconomic and that the conditions are consistent with local needs, but that the conditions can be modified so as to make the project economic and to adequately protect

health, safety, environmental, design, open space, and other local concerns, the Committee shall so modify the conditions.

(2) Conditions. The Committee or the Board shall not issue any order which would allow the building or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of the subsidizing agency. The Committee or the Board, in its decision, may make a comprehensive permit subject to any of the following conditions or requirements:

- (a) The grant of a subsidy by a state or federal subsidizing agency;
- (b) Compliance with any requirement imposed by the subsidizing agency;
- (c) A finding by the subsidizing agency that the applicant is a public agency, a non-profit or limited dividend organization, or that the applicant has suitable interest in the proposed site;
- (d) The securing of the approval of any state or federal agency with respect to the proposed housing which the applicant must obtain before building;
- (e) Complete or partial waiver by the Board or the Committee of fees assessed or collected by local boards;
- (f) Other directions or orders to local boards designed to effectuate the issuance of a comprehensive permit and the construction of the approved housing, or
- (g) Any other condition consistent with the statute and with 760 CMR 31.00.

(3) Massachusetts Environmental Policy Act (MEPA). All projects before the Committee are subject to the MEPA, M.G.L. c. 30, §§ 61 through 62H.

(a) Where no Environmental Impact Report (EIR) is required, no M.G.L. c. 30, § 61 finding shall be required in the Committee's decision. In any such case, however, pursuant to 301 CMR 11.12(2)(b), prior to issuance of a decision, the applicant may serve upon the Committee pursuant to 760 CMR 30.08 the following:

1. a Certificate of the Secretary of Environmental Affairs pursuant to 301 CMR 11.06(7) that no EIR is required, or
2. an advisory opinion obtained from the Secretary of Environmental Affairs pursuant to 301 CMR 11.01(6). (Also

see 301 CMR 11.05(3), 12(2).)

If neither a Certificate nor an advisory opinion is available, the Committee may rely on evidence or testimony admitted at the hearing or thereafter or on other information contained in the record.

(b) Where an EIR is required and a Final Environmental Impact Report (FEIR) has received a Certificate of the Secretary of Environmental Affairs of compliance pursuant to 301 CMR 11.08(8)(a), the presiding officer may take official notice of the FEIR without prior notice to the parties pursuant to 760 CMR 30.10(2), and shall include in its decision findings as required by M.G.L. c. 30, § 61. (See 301 CMR 11.01(4)(c), 11.12(5).

(c) Where an EIR is required and the FEIR has not received a Certificate of the Secretary of Environmental Affairs of compliance pursuant to 301 CMR 11.08(8)(a), the Committee may delay its decision or it may render its decision, pursuant to 301 CMR 11.02 (“agency action”(c)), provided that the decision shall be subject to the following conditions:

1. that the comprehensive permit shall not be implemented until the Committee has fully complied with MEPA, and
2. that the Committee shall retain authority to modify the decision based upon findings or reports prepared in connection with MEPA. Board of Appeals of Maynard v. H.A.C., 370 Mass. 64, 67, 345 N.E.2d 382 (1976).

(4) Lapse of Permits. If construction authorized by a comprehensive permit has not begun within three years of the date on which the permit becomes final, the permit shall lapse. The permit shall become final on the date that the written decision of the Board is filed in the office of the city or town clerk if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of. The Board or the Committee may set an earlier or later expiration date and may extend any expiration date. An extension may not be unreasonably denied nor denied due to other projects built or approved in the interim.

(5) Transfer of Permits. No comprehensive permit shall be transferred to a person or entity other than the applicant without the written approval of the Board or the Committee. Transfer of a permit ordinarily will not be a substantial change pursuant to 760 CMR 31.03.

(6) Appeal. Any decision of the Committee may be reviewed in the superior court in accordance with the provisions of M.G.L. c. 30A.

(7) Appeal in MEPA Cases. Judicial review of a Committee decision which does not contain Massachusetts Environmental Policy Act findings, but rather contains the conditions required by 760 CMR 31.08(3)(c) shall not be delayed by such conditions.

(8) Decisions Involving Constructive Grant of Permit. The Committee may determine, upon motion pursuant to 760 CMR 30.07(1)(a) and after hearing, that a comprehensive permit has been granted constructively due to failure of the Board to meet one of the deadlines in M.G.L. c. 40B, § 21. In any such case, the permit shall be deemed granted for the number of housing units proposed in the application to the Board, and the Committee shall impose reasonable conditions upon the permit sufficient to address health, safety, environmental, design, open space, and all other material local concerns.

31.09: Enforcement

- (1) The Board shall carry out an order of the Committee within 30 days of its entry, and, upon failure to do so, the

order of the Committee shall for all purposes be deemed the action of the Board.

(2) The Board and the Committee shall have the same power to issue permits or approvals as any local board which would otherwise act with respect to an application.

(3) A comprehensive permit issued by a Board or by order of the Committee shall be a master permit which shall subsume all local permits and approvals normally issued by local boards. Upon presentation of the comprehensive permit and subsequent detailed plans, and final written approval from the entity which issued the determination of Project Eligibility (Site Approval), all local boards shall issue all necessary permits and approvals after reviewing such plans only to insure that they are consistent with the comprehensive permit, the final written approval, and applicable state and federal codes. Final written approval shall, at a minimum, address each of the matters enumerated in 760 CMR 31.01(2)(a) and 31.01(2)(b). If project funding is provided through a non-governmental entity, the state agency providing the determination of Project Eligibility (Site Approval), shall issue the final approval.

(4) After the issuance of a comprehensive permit, the Committee or Board may issue such orders as may aid in the enforcement of its decision. Also see 760 CMR 30.09(5)(c).

(5) The Committee or the applicant may enforce an order of the Committee in the Superior Court.

31.10: Effective Date of Amendments

760 CMR 31.07(1)(d), 31.07(1)(g), and 31.07(1)(h) shall apply to all applications for comprehensive permits filed after August 31, 2001. 760 CMR 31.07(1)(i) shall apply to all applications for comprehensive permits filed after September 27, 2002. 760 CMR 31.01(2)(g) and amendments to 760 CMR 31.09(3) shall apply to all applications for comprehensive permits that receive determinations of Project Eligibility (Site Approval) dated after July 22, 2002. (Applications for a determinations of Project Eligibility (Site Approval) pursuant to 760 CMR 31.01(2)(g) and submissions of affordable housing plans pursuant to 760 CMR 31.07(1)(i) will not be accepted prior to January 31, 2003.)

REGULATORY AUTHORITY

760 CMR 31.00: M.G.L. c. 23B; MGL c.40B.

▶ **housing appeals committee**



**Guidelines for Local Review of Comprehensive Permits
October 1999**

INTRODUCTION

I. BEFORE THE APPLICATION IS RECEIVED

II. REVIEW OF THE APPLICATION

- A. Project eligibility/site approval
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INTRODUCTION

The Massachusetts Comprehensive Permit Law (Chapter 40B, §§ 20-23 of the General Laws, enacted as Chapter 774 of the Acts of 1969) encourages the construction of affordable housing using locally granted permits. The law enables a local Zoning Board of Appeals (ZBA), in consultation with other local boards and officials, to grant a single permit to an eligible developer proposing state or federally sponsored low or moderate income housing. It also permits the Board to override local requirements and regulations that are inconsistent with affordable housing needs if environmental and planning concerns have been addressed. For instance, the ZBA may permit construction of housing at a density greater than that allowed by local zoning. State requirements may not be overridden.

A developer who is denied a comprehensive permit may appeal the decision of the Zoning Board of Appeals to the state Housing Appeals Committee if less than 10 percent of the community's housing stock is subsidized housing. The developer may also appeal to the Committee if the permit is granted, but with conditions that may render the proposal economically unfeasible.

The Committee encourages settlement through the Affordable Housing Mediation Program of the Massachusetts Office of Dispute Resolution. But if no agreement can be reached, the Committee conducts a new hearing to consider the impact of the proposed housing on local concerns—environmental, health, safety, design, open space, planning, and other concerns.

The Housing Appeals Committee regulations (760 CMR 30 and 31) govern procedures under the Comprehensive Permit Law. Although a number of provisions in the regulations affect local ZBAs, for the most part they do not address local hearings directly. The Committee has also issued Model Local Rules, but they provide only minimum standards for local hearings. These guidelines, therefore, though they do not have the force of law, are intended to supplement the formal regulations and model rules, suggesting procedures for local hearings and discussing common issues that may arise.

Although the comprehensive permit process is similar to other local proceedings in some respects, it is more complicated and requires particularly careful attention from local officials. The purpose of the law is to provide a flexible process, which contrasts markedly with the rigid framework of traditional zoning. If used creatively, the comprehensive permit law can be a powerful mechanism which permits a community to shape housing development to meet its needs. These guidelines attempt to assist municipalities in doing that.

BEFORE AN APPLICATION IS RECEIVED

Guideline 1: Municipal officials should address affordable housing needs and prepare for the submission of a comprehensive permit application before one is received.

Every community in Massachusetts has unmet housing needs. Towns that are prepared are in the best position to respond positively to comprehensive permit applications. Among the steps that can be taken are: establishing a local housing partnership or other local body to address affordable housing issues; preparing a housing needs study; preparing, updating, and implementing a comprehensive plan that addresses affordable housing needs; and undertaking local affordable housing development initiatives.

When possible, a municipality should try to anticipate the filing of a particular comprehensive permit application. The formal process is quite complex, and therefore before the permit application is filed, it is useful for the developer, town officials, and residents to have a common understanding of the process. Informal discussion of the proposal itself may also be valuable.

The comprehensive permit process, like more traditional development permitting processes, can be viewed as a negotiation. But it is even more complex. For any development, a local board must investigate the facts. Under zoning and subdivision procedures, however, the ZBA or planning board then applies existing bylaws and regulations to the facts in a relatively straightforward way. But in considering a comprehensive permit, the Board of Appeals must not only determine the facts, but also consult with other town boards and officials and then decide whether to waive or modify local restrictions. This complicated task can best be undertaken by the Board with the assistance of others.

Ideally, the roles of different boards and individuals in town government should be clarified before the application is filed. At a minimum, this should be done immediately afterward. In particular, the negotiation process is not easily conducted *only* in the public forum of a Board hearing. While respecting the requirements of the Open Meeting Law, it can be of great benefit to the town to designate a town staff person (or a member of a local housing partnership or even a member of another town board) as the town's principal informal contact, facilitator, or negotiator. This person might be the planning director, the town administrator, or even town counsel.

If the Board is not familiar with the Comprehensive Permit Law, it should consult with town counsel or special counsel at its earliest opportunity. In many cases, a lawyer can be helpful not only by educating and advising the Board, but also by anticipating procedural misunderstandings so that the environment remains courteous and constructive. And, conversely, if the process turns more adversarial than collaborative, counsel is essential to protect the town's interests.

REVIEW OF THE APPLICATION

II-A PROJECT ELIGIBILITY/SITE APPROVAL

Guideline 2: The Zoning Board of Appeals should not open the hearing until a site approval/project eligibility letter has been received.

A comprehensive permit application should include a project eligibility letter (sometimes called a site approval letter). This letter, normally issued by a state or federal housing agency to the developer, indicates that a described project on a specific site is eligible under a particular housing subsidy program. Project eligibility does not necessarily mean that the project has received final funding approval. Rather, it indicates that the project has received preliminary approval and is likely to be approved. This protects the community by ensuring that the ZBA will not spend time reviewing a proposal that is unlikely to be realized.

The Massachusetts Department of Housing and Community Development (DHCD) and the Massachusetts Housing Finance Agency (MassHousing) currently issue project eligibility letters for most of the Commonwealth's housing subsidy programs. When a private or non-profit developer submits an application under one of the Commonwealth's housing programs, DHCD or MassHousing staff review the proposal to determine general consistency with program guidelines. They also conduct their own evaluation of the site, including an on-site visit. At the same time, they solicit written comments from the chief elected official of the community in which the housing is proposed. That official may request input from a local housing partnership (if there is one) or other local boards or officials. No formal public hearing is required.

At the end of the comment period, the subsidizing agency prepares an evaluation report, and the local comments are compiled. Based on this information, a letter is issued by DHCD or MassHousing approving, conditionally approving, or rejecting the application. Either an approval or conditional approval letter may form the basis for an application to the ZBA for a comprehensive permit.

Though the number of federal housing subsidy programs for construction of new housing is limited, site approval letters may also be issued by the U.S. Department of Housing and Urban Development (HUD), the U.S. Department of Agriculture Rural Housing Service, and the Federal Home Loan Bank of Boston through its member banks. In addition, DHCD issues project eligibility letters for state programs for public housing.

Many project eligibility letters expire two years after the date of issue, though the developer may request that the housing agency extend the letter. Because the project eligibility letter must specify a particular housing program, if the developer changes housing subsidy programs, a new or updated project eligibility letter is required.

II-B APPLICATION REQUIREMENTS

Guideline 3: The Zoning Board of Appeals should review an application immediately to determine whether it adequately describes the proposed housing.

Contents of the Application

The following should generally be submitted to the ZBA with a comprehensive permit application:

Project Eligibility Letter - A project eligibility/site approval letter from a state or federal housing agency that states that the project has been determined eligible under a particular housing subsidy program;

Evidence of Site Control - Evidence that the developer has control of the property in question: a copy of the deed, purchase and sale agreement, option agreement, or similar documentation;

Preliminary Site Development Plans - Plans showing location and footprints of buildings, as well as roadways, paved areas, open space, and drainage;

Site Conditions Report - A narrative description of site and existing buildings;

Preliminary Drawings - Preliminary architectural drawings, including typical plans and elevations for each building type;

Building Tabulation - A tabulation of the proposed number of buildings, units, and bedrooms per building;

Subdivision Plan - A plan showing the subdivision, if a subdivision is part of the proposal; size and frontages of lots and streets may vary from local requirements, but the drafting of the plan should conform to the technical standards of the municipality, though it need not contain the detail of a definitive subdivision plan;

Utilities Plan - Plans indicating the approximate location of utilities and other infrastructure;

Requested Exemptions - A list of requested exceptions to local bylaws, codes, ordinances, regulations, and fees, including the zoning bylaws and subdivision regulations.

The ZBA has a right to receive complete information from the applicant, and the applicant should normally provide all of the listed material. If significant information is missing from the application, the Board may deny a comprehensive permit or it may open the hearing on the condition that application be completed before the hearing is closed. Both the ZBA and the developer should bear in mind, however, that it is more important to focus not on technicalities, but rather on gathering information related to design issues that are particularly difficult or controversial.

It is common for the ZBA to need additional information after the application is filed or during the course of the local hearing. It is entitled to ask for whatever information is reasonably needed to make a sound decision, bearing in mind that the developer need only submit preliminary plans, not final construction drawings.

A comprehensive permit should be denied for lack of information only if the Board has made a clear written record well in advance of issuing its decision as to exactly what necessary information the applicant failed to provide.

Jurisdictional Requirements

To submit an application for a comprehensive permit, the applicant or project must meet three jurisdictional requirements:

- 1) The developer must be a public agency (often a local housing authority), a non-profit organization, or a limited dividend organization. Typically, a "limited dividend organization" is any organization (a corporation, a partnership, a limited partnership, or even an individual developer) that is willing to enter into a written regulatory agreement with a state or federal housing agency agreeing to limit its profit on the proposed development to a level prescribed by that agency.
- 2) The project must be fundable under a state or federal low or moderate income housing program. A project eligibility letter normally constitutes evidence of fundability. If a developer is considering more than one subsidy program for the project, the application must list each option being considered and must include a project eligibility letter for each. It must also describe all design or project differences under the options.
- 3) The developer must control the site. A deed showing outright ownership, a purchase and sale agreement, an option agreement, or similar documentation typically satisfies this requirement.

Content of Plans and Narratives

Generally, plans and narratives submitted to the ZBA should relate to three areas: existing site conditions, site development, and development impacts and benefits. The actual items necessary will depend on the specifics of the site and the proposal, but the following should be expected:

1) Existing Site and Site Area

Plan(s) - topography and vegetation, open spaces, property lines, existing buildings and structures, existing on-site utilities and infrastructure, existing public and private streets, wetlands and other resource areas and buffers.

Narrative - abutters list; alternative site uses under existing zoning; first level

environmental assessment under Massachusetts General Laws Chapter 21E (if available); identification of any features of historic or archeological significance; identification of any significant natural resource or wildlife habitat. Environmental, historic, and similar narratives need not be more detailed than required by the agencies having primary responsibility in these areas, and it is frequently appropriate that they be less detailed.

2) Proposed Site Development

Plan(s) - all proposed structures including building footprints, roadways, driveways, parking, and drainage structures; typical drawings for each housing type; utilities and other infrastructure; changes in grading/topography, landscaping, and open space; subdivision of land (if applicable).

Narrative - housing program (e.g., Local Initiative Program); housing types and bedroom mix data; proposed affordable/market rate ratios; project density; ground coverage data; proposed landscaping/buffers; G.L. Chapter 21E remedial action (if applicable).

3) Project Impacts

Impacts - on traffic (on-site circulation, entrances and exits, trip generation data, sight and stopping distance, existing and proposed levels of service); on historical, archeological, open space, wildlife habitat, or recreational resource(s); on municipal services (public safety, water supply, sewage treatment); construction impacts (noise, dust, erosion/siltation, potential releases).

II-C REQUESTING ADDITIONAL INFORMATION

Guideline 4: The Zoning Board of Appeals may request information needed to make a decision, but may not require information that is too broad in scope, irrelevant to the specific project, or not required of similar developments.

What the Zoning Board of Appeals Can and Cannot Request

If necessary, the Zoning Board of Appeals may require information beyond what is contained in the application. It may also require analysis of the impact of the proposed development upon natural resources and the built environment both on- and off-site. Examples include requesting information relating to the impact of the proposed development on water supply or wetlands, on infrastructure such as roads and drainage systems, or on municipal facilities, such as water and sewer facilities. The ZBA may request information that relates to the health and safety of both the residents of the dwellings being constructed and the community in general. In some cases, the Board may inquire into additional benefits that the project might provide (in addition to the provision of affordable housing), such as new amenities, infrastructure, or traffic improvements.

In deciding what information to request, the ZBA should use common sense to weigh the burden imposed by the request against the relevance and usefulness of the information. In drawing the line between information necessary to give a full picture of the proposal and information that places an undue burden on the applicant, the Board may request advice and assistance from a local housing partnership or other local and regional boards or agencies. It should also consider the consistency of the request with past requests for projects of similar size.

Some requests for additional information, however, are improper. Examples include:

1) Final Plans - The ZBA may not require final plans before granting the comprehensive permit. Examples include complete engineering plans, final construction plans, and final architectural drawings. (Before construction begins, final plans should be submitted, with the comprehensive permit, to the building inspector for review prior to issuance of building permits.)

2) Irrelevant Information - The Board may not require information that is unimportant or irrelevant to the issues under consideration.

3) Excessively Broad Information - The Board may not require information that, while relevant to the application, is so broad that the applicant must address more than its share of an issue that affects the community at large. For instance, it should not require an applicant to prepare a town-wide hydrogeologic study for a series of municipal supply wells, in lieu of a project-specific study, simply because the development lies within a zone of contribution to a well. It should not require a citywide sewer needs study simply because the applicant proposes to connect to a city sewer system which is already close to capacity. It should not require the applicant to map all wetlands within a wide radius of the site.

4) Unduly Burdensome Information - The Board may not require information from the developer of affordable housing that it would not require or has not required from developers seeking a special permits or variances for market-rate development of similar density, design, and location.

5) Financial information - Review of a developer's financial information and projections is primarily the responsibility of the

subsidizing agency. Therefore, normally the Board may require an applicant to provide only a limited amount of financial information concerning the project. If the Board has serious concerns about the financial soundness of a proposal or suspects that that profits may be excessive, it should consult with the subsidizing agency. Only if it is apparent that these matters are not being addressed by that agency should the Board conduct an independent inquiry.

When the Applicant Will Not Provide Information

While most applicants for comprehensive permits will attempt to comply with requests for additional information, some will decline to do so. If information is not forthcoming in response to an oral request during the hearing, the Board should put the request and the reasons for it in writing well in advance of issuing its decision. If the applicant does not provide the requested information, the Board may either make a decision based on the information available at the close of the hearing or it may deny the application for failure to provide sufficient information.

Non-Traditional Subsidy Programs

Housing programs that have become popular in the 1990s, in particular the Massachusetts Department of Housing and Community Development Local Initiative Program (LIP) and the Federal Home Loan Bank of Boston Affordable Housing Program (AHP) and New England Fund (NEF), differ in some respects from the traditional programs under which affordable housing has been built using comprehensive permits. It is important that municipalities understand the differences.

The role of the chief elected official (CEO)(usually the mayor of a city or the board of selectmen of a town) is greatly enhanced under LIP. For a proposal to receive a project eligibility letter from state officials, an application must be submitted to the state not by the developer, but rather by the CEO of the municipality. Thus, if the developer and the town cannot agree on a mutually acceptable proposal, the proposal cannot become a LIP project eligible for a comprehensive permit. (Under these circumstances, however, the developer may proceed with the project if it receives preliminary approval and a Project Eligibility letter under a different housing subsidy program.) For LIP projects, state officials typically defer to the judgment of local officials more readily than in traditional programs, and thus it is essential that the CEO be involved in all of the details concerning both design and programmatic aspects of the proposal. State officials and the CEO are also jointly responsible for reviewing financial aspects of the proposal and for long-term monitoring. The ZBA should confirm that the CEO in particular is fully cognizant of its responsibilities in these areas. If it appears during the hearing that these issues have not been addressed, the ZBA should consult with the CEO before proceeding, or even, in exceptional circumstances, investigate these issues itself.

In AHP and NEF projects, the CEO has no formal role, but the ZBA itself has increased authority over design, programmatic issues, finances, and monitoring. The ZBA's involvement requires more time, energy, and resources in order to properly address these issues, but it also significantly enhances local control over all

aspects of the development. When the ZBA receives an AHF or NEF application, it should familiarize itself with the Housing Appeals Committee's decision in ***Stuborn Ltd. Partnership v. Barnstable***, No. 98-01 (Mass. Housing Appeals Committee Mar. 5, 1999), which sets out new roles for the Board with respect to these projects.

II-D NOTICE TO OTHER BOARDS AND OFFICIALS

Guideline 5: The Zoning Board of Appeals should send copies of the comprehensive permit application to all relevant local boards and solicit their advice both before and during the hearing process.

Notice

The public hearing procedures followed for comprehensive permit applications are the same as other public hearings held by the ZBA in most respects. A significant difference is that when a comprehensive permit application is filed, the Board must notify any other relevant municipal boards and officials and forward a copy to them. Such boards include the planning board, board of selectmen or city council, conservation commission, board of health, department of public works, fire chief, and police chief. When a project will be located on a town boundary, or will have a significant effect on another town, the adjoining town should be notified as well.

Section 21 of Chapter 40B states that "The board of appeals shall request the appearance at such hearing of such representatives of said local boards... and, in making its decision on said application, shall take into consideration the recommendations of the local boards...." This requirement is sometimes overlooked. Boards may mistakenly believe they have little or no role to play in the comprehensive permit process. But on the contrary, input from local boards and professional staff is critical to sound, well documented permit decisions. Though some boards may choose to put their comments in writing, it is frequently more beneficial to use the process described in the statute, that is, to have a representative of each board attend the ZBA hearing, not as a voting member, but as an advisor.

Boards with State Law Jurisdiction

The Conservation Commission and the Board of Health have separate jurisdictions, which are not subsumed within the comprehensive permit process. They should conduct separate hearings relating to state requirements in their areas (i.e., the Wetlands Protection Act and state "Title 5" septic regulations). However, *local* bylaws or regulations enforced by these boards that are more restrictive than state requirements may be waived by the ZBA if requested by the applicant and if waiver is consistent with local needs (see § IV, below).

Guideline 6: The Zoning Board of Appeals should confer with

counsel on any application for a comprehensive permit, and, in particular, should seek advice on procedural questions and on the drafting of its decision.

The advice of counsel early in the application process can be invaluable. Similarly, it is usually helpful to have town counsel draft or at least review the Board's written decision. If town counsel is unfamiliar with the comprehensive permit process, he or she is encouraged to contact the Housing Appeals Committee for information concerning comprehensive permit procedures. In some instances, the Board may wish to use outside counsel with particular expertise in the comprehensive permit process.

THE HEARING PROCESS

III-A DEADLINES

Guideline 7: Once a comprehensive permit application is received, the Zoning Board of Appeals must advertise and schedule hearings according to strict time requirements.

Deadlines

Upon Receipt of Application - ZBA notifies other boards & forwards copies of application

At least 14 Days before Hearing - ZBA gives public notice of hearing

Within 30 Days of Application - ZBA opens public hearing

Hearing length varies depending on need

Within 40 Days of Close of Hearing - ZBA issues written decision (unless extended by mutual agreement)

Advertisement

As with public hearings conducted by the Zoning Board of Appeals under the Zoning Act, the Board should advertise the comprehensive permit hearing in a local newspaper of general circulation beginning at least 14 days prior to the date of the hearing, notify interested parties, and post a copy of the hearing notice in the city or town hall.

Opening the Hearing

The Zoning Board of Appeals is required to open the public hearing within thirty days of the filing of the application. Care must be taken to open the hearing on time since if the Board fails to convene the hearing within the time limit, a permit may be issued automatically.

If the application is not complete, the ZBA should either (1) open the hearing, note the missing information on the record, and

request the applicant to complete the application or (2) open the hearing and deny the application without prejudice. In the first instance, the Board may choose either to begin review of the project pending further submissions or it may continue (suspend) the hearing until the necessary information is received. In the second case, not only will a new application have to be filed, but the Board will also have to issue notice and open a new hearing at a later date.

Closing the Hearing and the Written Decision

When the Board has received all necessary information and public testimony, it should close the hearing. Within 40 days of termination of the hearing, the Board must render a decision by majority vote; failure to do so may result in automatic issuance of a permit or in an appeal to the Housing Appeals Committee. A written decision should be issued and delivered by certified mail or by hand to the applicant. (A copy of the decision should be filed with the town clerk, and many Boards also record it at the registry of deeds.)

There is no specific form that the written decision must follow. Normally, however, the decision should refer specifically to the architect's or engineer's drawings or plans upon which it is based. (The decision may include a list of all waivers of local requirements being granted, though this may be unnecessary if the plans are sufficiently detailed.) In preparing the decision, the Board may request the participating lawyers to provide draft language.

It is generally unwise for the Board, even with the agreement of the developer to leave any issues for later resolution. On the other hand, it can be helpful to provide procedures for resolving disputes that may arise during construction of the development. Similarly, since it is not unlikely that the owners may desire to make physical or other changes years after construction is completed, a specification of who will review such changes (typically the Board) and what procedures will be followed is advisable.

It is useful to state clearly in the decision that final, detailed construction plans must be submitted, with the comprehensive permit, to the building inspector or other appropriate local authority before construction begins. Similarly, a regulatory agreement between the developer and the subsidizing agency must normally be signed prior to construction.

III-B CONDUCT OF THE HEARING

Guideline 8: At the first hearing, the Zoning Board of Appeals should ask the applicant to make a complete presentation; it should publicly identify any major issues raised by the project; and it should request submission of any necessary additional information.

The Comprehensive Permit Law statute does not describe a specific procedure for conducting the hearing. 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.

The presentation of the proposal is usually made by the applicant and the project's engineer or other technical experts. It is common for a lawyer representing the applicant to make introductory remarks or participate throughout the presentation.

Though some comprehensive permit hearings may be completed in one evening, several sessions are frequently required. Typically, in response to concerns raised during the hearing, modifications in the plans will be proposed. The time between hearing sessions can be used not only to permit the applicant to secure additional information required by the Board, but also for informal discussions between the applicant and municipal employees or others in the community.

Guideline 9: The hearing may be continued for a reasonable period of time with the consent of the applicant or if additional time is needed to address substantive questions.

Once officially opened, the public hearing may be continued (suspended) by the ZBA for a reasonable period of time if the application's complexity necessitates further study, if the Zoning Board requires additional information, or if circumstances have changed.

Time is often a critical element in the development of affordable housing. Communities are in a better negotiating position if the Board moves forward quickly with the hearing process. If the process becomes extended, the developer's carrying costs increase, and the room for negotiation shrinks. Though the Board should not close a hearing before it receives all information necessary to make a sound decision, repeated continuances rarely benefit the community. If the applicant believes that the hearing has been extended so long and unnecessarily that the delay constitutes a constructive denial of the permit, it may appeal to the Housing Appeals Committee.

It is common for applicants to modify their proposals due to changes in circumstances. This may be in response to changing market conditions, subsidy availability, or other factors. These changes may vary widely, involving matters such as reductions or increases in the development's density, reconfiguration of the housing units, or alteration in the target population to be served. If the changes are minor, they can usually be incorporated into the application during the hearing. But if they are so significant that comments received by the ZBA from other local boards and officials are no longer relevant, it may be necessary to extend the hearing. In such cases, it may be useful for the Board and applicant to agree in writing to the terms of the extension.

III-C NEGOTIATION/MEDIATION

Guideline 10: The Zoning Board of Appeals is encouraged to use the local housing partnership or another local official as a negotiator with the developer during the hearing and decision process.

If there is an active local housing partnership or similar public group involved with affordable housing, that group should meet with the applicant before a comprehensive permit application is filed with the Zoning Board of Appeals. Informal review and negotiation by such a group or other local officials is beneficial to both the community and the applicant. It usually leads to a smoother and more productive process when the application is formally submitted to the Board for further review and negotiation. In some cases, an independent mediator may help the parties reach a satisfactory resolution of particularly difficult issues.

Negotiations between the developer and a municipality need not end when the hearing process begins. Negotiation may also continue after the close of the hearing, before a final decision is drafted or voted upon. But since simultaneously negotiating and deciding a case in a public forum is difficult, the discussions are frequently conducted by a town employee, by the local housing partnership, or even by a member of another board. If the ZBA is involved in the negotiations, care must be taken to comply with the Open Meeting Law; the negotiations should be based on information presented during the hearing; and progress reports should be made regularly at public meetings of the Board.

III-D FEES

Review Fees

Guideline 11: The Zoning Board of Appeals should ensure that it has the expertise to review the proposal submitted to it, and may, under some circumstances request or require the developer to pay reasonable costs of consultants.

If the ZBA determines that it requires technical advice in order to properly review an application, it may request the assistance of town staff. If permitted by its rules, and if assistance is not readily available from municipal employees, it may also employ outside consultants. Whenever possible, it should attempt to work cooperatively with the applicant to identify mutually satisfactory consultants. It may request or require that the developer pay part or all of the consultant's fee. Detailed recommendations and procedures for doing so are contained in the Committee's Model Local Rules. Even if its rules do not provide for consultants, the Board may request that the developer pay for such consultants voluntarily.

Municipal Fees

Guideline 12: Municipal fees should be reduced, if possible, to

encourage the development of affordable housing.

Any filing or review fees imposed by the ZBA for the comprehensive permit application, must be part of the duly adopted municipal fee structure. They must be reasonably related to costs incurred by the municipality in reviewing the application, and they may not be higher than fees ordinarily charged for comparable permits (e.g., subdivision approval). Boards are encouraged to keep these fees as low as possible to encourage the development of affordable housing.

ZBAs are also encouraged to waive or reduce other municipal fees that would routinely be applied to the proposed housing (e.g., water and sewer connection fees). In no event may such fees be higher than those that would be assessed to a similar market-rate development.

ZBA DECISION

IV-A CRITERIA FOR DECISIONS

Guideline 13: In reviewing an application, the Zoning Board of Appeals should work to eliminate obstacles to issuance of a comprehensive permit, devising conditions to address local concerns.

In nearly every community in Massachusetts there is a need for affordable housing. Because of the high cost of land and construction, local zoning and other restrictions frequently create barriers (usually unintended) to the development of such housing. The Comprehensive Permit Law expresses a strong public policy in favor of waiving local restrictions, when appropriate, to facilitate the construction or substantial rehabilitation of low and moderate income subsidized housing.

The statute requires that a comprehensive permit be granted when it is "consistent with local needs," and describes a balancing test. That is, on some sites it may be possible to build affordable housing that does not comply with certain local restrictions, but nevertheless has no negative impact on local health, safety, environmental, design, open space, and planning concerns. (Planning concerns include the proposal's consistency with a *bona fide* comprehensive plan that adequately addresses affordable housing issues.) For other sites, the impact on these local concerns may be limited enough so that these concerns are outweighed by the need for low and moderate income housing. In either case, the law requires the Board to waive the local restrictions.

The most practical approach for implementing this public policy in a way that safeguards the interests of the community and its residents is for the Board to approach the comprehensive permit application in a positive manner, assuming that it will be possible to waive certain local restrictions while addressing legitimate local concerns by placing conditions on the permit. It should review the application issue by issue, and at each juncture attempt to

formulate solutions that will permit the project to proceed.

Only if, at the conclusion of the hearing, there are one or more intractable issues for which the Board has been unable to craft workable conditions that mitigate the impact of the development, should the Board deny the permit. If the Board has carefully evaluated the evidence, listened thoughtfully to all perspectives, fully investigated all reasonable solutions, and written a well reasoned decision, it will be in a strong position to defend its conditions or even a denial of the permit to the public and on appeal.

Guideline 14: The Zoning Board of Appeals should assume that its decision is final.

The best interests of the municipality and the applicant are served when the Board issues a decision agreeable to both. If a denial of a permit is appealed, in most cases the final decision of the Housing Appeals Committee or a court will clearly favor one party or the other. Thus, a comprehensive permit resulting from reasonable compromise at the local level usually means increased local control, decreased costs (fewer delays, legal costs, and consulting fees), and better housing. The vast majority of successful affordable housing produced through the comprehensive permit process is developed with locally granted permits.

Delays resulting from appeal can create additional problems. Though a comprehensive permit is issued to a specific applicant, it is transferable. When there are extensive delays, it is not uncommon for financial problems to force the original developer to restructure business aspects of the project. While it may or may not be to the town's advantage to have a new developer take over the project, the uncertainty such changes cause is rarely beneficial.

Whenever a Board issues a permit, it should assume that the development will actually be built under its permit, and should therefore ensure that all important aspects essential to a successful development are addressed.

IV-B CONDITIONS

Guideline 15: The Zoning Board of Appeals should impose conditions on the comprehensive permit to mitigate adverse impacts and improve the development.

In considering conditions that might be imposed on a project, the Zoning Board of Appeals should focus on the health, safety, environmental, design, open space, and planning impacts of the development. The Board may impose conditions either to eliminate or to mitigate the adverse impact of the development. For example, the Board might require that the applicant relocate an entrance onto a public road that does not have adequate sight distances. It might require annual maintenance of a storm water drainage system. Or, if a septic system leaching field must be placed in a particularly

sensitive area, it might require installation of monitoring wells.

In addition, the town may impose conditions that relate to the operation of the project or to the housing benefit that the community receives. The community might require additional units be set aside as affordable units, a longer "lock-in" period, or public access to open space. Any such condition, must, however, be permissible within the constraints of the relevant subsidy program. And conditions must not be imposed in a manner that places additional burdens on an affordable housing development that would not be imposed in similar circumstances upon market-rate housing.

Guideline 16: The Zoning Board of Appeals may not attach conditions to the permit that require further project approvals by local boards, except for technical reviews prior to construction.

A condition may not be imposed that requires the applicant to return to the Zoning Board of Appeals or to any other local board for subsequent reviews and approvals. All relevant local boards and officials should be notified when the comprehensive permit application is received, and their recommendations should be considered before a decision is issued.

Though the comprehensive permit is a master permit that subsumes all local permits and approvals normally issued by local boards and officials, routine technical reviews shortly before or during construction are still necessary. That is, the comprehensive permit is based upon preliminary plans. Therefore, prior to construction the applicant must submit detailed construction drawings to the building inspector to ensure that the final plans are consistent with the comprehensive permit, with local requirements not waived in the permit, and with state and federal codes. A copy of the final, approved plans should also be filed with the Board for record keeping purposes.

Since the comprehensive permit does not exempt the applicant from obtaining approvals required under state laws such as the Wetlands Protection Act, state "Title 5" septic regulations, and the state Building Code (even if such laws are administered by local boards), the developer must secure all such approvals prior to construction.

Finally, the ZBA may not impose conditions that are inconsistent with the guidelines of the subsidizing agency. For example, it may not require that a project include less than the minimum percentage of affordable units required by the subsidy program. Similarly, it may not restrict profit in a manner inconsistent with the guidelines of the housing program.

AFTER THE ZBA DECISION

V-A APPEAL TO THE HOUSING APPEALS COMMITTEE

The denial of a comprehensive permit or the granting of a permit with conditions may be appealed to the state Housing Appeals Committee. A developer wishing to appeal the Board's decision must file an appeal with the Housing Appeals Committee within 20 days after the date of receipt of the Board's written decision. Abutters or other people aggrieved by the issuance of a comprehensive permit may appeal to the Superior Court within the same twenty-day period. (If both the developer and abutters file appeals, the Superior Court will generally not take any action pending completion of the proceedings before the Housing Appeals Committee. Abutters are always permitted to participate in Committee hearings, and under some circumstances are formally recognized as parties.)

If the community has low or moderate income housing in excess of 10% of the housing units reported in the latest decennial census, the appeal will be dismissed. (The appeal will also be dismissed if subsidized housing comprises 1½% or more of the land in the municipality zoned for residential, commercial, or industrial use, though this geographic goal is nearly always harder to achieve than the 10% goal.) Each municipality's progress toward the 10% threshold is calculated by the Department of Housing and Community Development, and is published periodically as the "DHCD Chapter 40B Subsidized Housing Inventory."

The two key issues in defining which units count as low or moderate income housing are: (1) whether the unit was developed under a state or federal housing subsidy program; and, (2) whether there are legal restrictions that ensure long-term affordability, typically either a regulatory agreement or an affordable housing restriction. For rental projects, all units normally count as subsidized units. In homeownership programs, only the deed-restricted, affordable units count. Rental certificates or housing vouchers do not count as subsidized units since the certificate or voucher is not permanently located in a particular municipality and because there is no guarantee of long term affordability. (For more information concerning eligibility of projects and count of units see the notes accompanying the Subsidized Housing Inventory.)

V-B HOUSING APPEALS COMMITTEE HEARING

The Housing Appeals Committee conducts a completely new and independent hearing regarding the proposed housing. The hearing begins with a conference of counsel held in Boston within 20 days of filing of the appeal. The first evidentiary session is scheduled some time later in the town in which the housing is proposed. This permits the Committee or its presiding officer to conduct a site visit at the end of the hearing session. Any remaining hearing sessions are usually held in Boston.

Hearings before the Housing Appeals Committee, are considerably more formal than local hearings. Although they are conducted under relaxed rules of evidence, the parties are represented by counsel and there is formal examination and cross-examination of witnesses. The entire process, culminating with a written decision,

typically takes three months to a year to complete.

The Committee strongly encourages settlement between the developer and the community. The Massachusetts Office of Dispute Resolution maintains a special Affordable Housing Mediation Program to assist in resolving comprehensive permit disputes on appeal to the Committee. The mediation process is voluntary and confidential.

Settlement usually benefits both parties. Expenses are less for both, the developer saves time, and the town achieves greater control over the design of the housing. If negotiations—with or without the assistance of mediation—result in settlement, the parties typically file a stipulation of settlement with the Committee. After review, the Committee issues a simple decision approving the settlement, and remains available to the parties in case any disagreement concerning the terms of the settlement arise.

V-C BURDEN OF PROOF ON APPEAL

When the Board has denied an application, it has the burden of proving on appeal to the Committee that there is a valid health, safety, environmental, design, open space, planning, or other local concern that supports the denial. That is, it must prove—normally through the testimony of expert witnesses—that the proposed project will have a serious adverse effect on the health or safety of the occupants of the project or town residents, that the design of the site or the housing is seriously deficient, or that the development would substantially impair legitimate local concerns in some other way.

In exceptional circumstances, the town may argue that the permit was properly denied due to the inadequacy of municipal infrastructure. In these cases, the Board must prove that unusual topographical, environmental, or other physical circumstances make installation of necessary municipal services technically or financially infeasible.

If the Board approves a project with conditions, the initial burden is on the developer to prove that as a result of the conditions, it is not economically feasible to build or operate the proposed housing. (Alternately, the applicant may prove that local requirements have been applied unequally to the proposal as compared to market-rate development.) Only if applicant proves that the conditions make the project uneconomical does the burden shift to the Board to show that the conditions are consistent with local needs. Thus, the Board is generally in a stronger position when it has approved a comprehensive permit application with conditions that reduce or eliminate adverse impacts than it is when it has denied a project outright.

V-D SUBSTANTIAL CHANGE

After a comprehensive permit has been issued by the Zoning Board of Appeals or the Committee, it is the developer's responsibility to inform the Board if there are any changes in the project, including a change in the funding program. The Board must then decide, within twenty days, whether the change is substantial or not. Typically, changes of a sort that would not have affected the Board's decision are considered insubstantial. For instance, a reduction in the number of housing units proposed is normally an insubstantial change. On the other hand, an increase in the number of housing units proposed or a change from single-family houses to townhouses is a substantial change.

The Board may determine that a change is insubstantial without holding a hearing. Based on such a determination (or if the Board fails to respond to the applicant within 20 days), the permit is deemed modified to incorporate the change. If the Board determines that the change is substantial, it must hold a hearing within 30 days to decide whether to permit the change. At such a hearing only the changes themselves or aspects of the proposal affected by the changes are at issue; the Board may not reconsider unchanged aspects of the project. If the applicant is dissatisfied with the Board's decision, it may appeal to the Housing Appeals Committee. No question concerning a change in the proposal may be brought to the Committee until the Board has reviewed it.

CONCLUSION

Both the use of the Comprehensive Permit Law and attitudes toward it have changed greatly in the thirty years since it was enacted. In the past, it was sometimes viewed as a threat to municipal autonomy. But in nearly every community, awareness of the need for affordable housing has grown. There are many people who, acting individually and collectively, set the tone regarding affordable housing. If these people understand both the potential of the law and its technicalities, it is likely that in their town the comprehensive permit will not be a weapon wielded against them, but rather a tool they can use to shape creative housing development of the highest quality.

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