

# **Recommendations to Improve Chapter 40B, the Massachusetts Comprehensive Permit Law**

January 2001

In April 2000, CHAPA established a task force to examine, discuss, and prepare recommendations on several important aspects of Massachusetts' statute known as Chapter 40B, the Comprehensive Permit Law. The task force included for-profit and non-profit developers, municipal planners, community representatives, lenders, local and state officials, legislative staff, housing consultants, and others. Thus, the group's recommendations reflect a broad range of priorities, interests, and concerns.

CHAPA's Chapter 40B Task Force concluded that legislative changes should not be pursued at this time. Rather, current efforts should be focused on changes in administrative policy and procedure that do not expose 40B to political uncertainty. The recommendations from the Task Force cover five areas:

1. Counting units towards the statute's goal that 10% of each municipality's housing stock be affordable to low and moderate income households.
2. Expediting the permitting process
3. Changes to the Local Initiatives Program
4. Education and training needs of municipal officials and the general public
5. Ensuring long-term affordability of the housing units built under Chapter 40B

## **Background**

In 1969, Massachusetts enacted the Comprehensive Permit Law or Chapter 40B to help address the shortage of affordable housing statewide by reducing barriers created by local approval processes and local zoning restrictions. Chapter 40B provides two tools to facilitate the development of subsidized housing:

- (1) It requires all communities to use a streamlined review process, called the comprehensive permit (CP) process, for proposals to develop such housing if requested by the developer, including requests for zoning and other local regulatory waivers.

(2) In most communities where less than 10% of the year-round housing meets the state's definition of low and moderate income housing, a State Housing Appeals Committee can overrule the local decision, if adverse, unless the proposed development presents serious health or safety concerns that cannot be mitigated.

After 30 years, Chapter 40B has led to a significant level of affordable housing development. Department of Housing and Community Development (DHCD) statistics indicate that the number of subsidized units statewide rose by almost 118,000 units between 1970 and 1997 (from 85,621 to 203,260). Approximately 14,600 units were built in communities that previously had no subsidized housing.

The share of the state's affordable housing located outside the largest cities has risen. Whereas the state's 15 largest municipalities, with 32% of the 1990 population, had 69% of the subsidized units statewide in 1972, that share had fallen to 37% by 1997. The number of communities with no subsidized housing fell from 173 to 54 (mostly very small rural communities).

## **The Current Context and Trends**

The Task Force examined Chapter 40B amid the following trends:

(1) *Growing recognition of the lack of affordable housing*: A sharp rise in housing prices throughout the state and an acute shortage of affordable housing have catapulted housing to near the top of the state's agenda. This heightened attention has led to a renewed discussion of the causes of the housing crisis and potential solutions from diverse interests, including: housing organizations, local and state officials, Governor Cellucci, Cardinal Law, and many other business and community leaders.

(2) *Decline in multifamily housing*: The Massachusetts Executive Office and Administration and Finance has reported that Massachusetts ranks 47th out of the 50 states in the number of multi-family building permits issued. We believe that the key contributing factors to the lack of adequate production of new housing are: 1) the cost and complexity of the permitting and approval process. The length of the process combined with the unpredictability of this process raise developers' risks to levels that are barriers to production; and 2) the actual costs of producing housing are so high that subsidies are needed for the production of affordable housing.

(3) *Local Initiatives Program*: While over 40% of Comprehensive Permit (CP) applications filed since 1990 have used the Local Initiatives Program (LIP), interest among developers has begun to wane. LIP can only be used for *Affriendly* CP applications: developers must obtain a letter of support

from the chief elected official before it can submit a CP application. In addition, absent a major local subsidy, LIP only works in communities which have both local support for affordable housing and a housing market that is strong enough that market rate units in a particular development can subsidize the affordable units.

(4) *An increase in Comprehensive Permit proposals:* Over the past year, there has been a significant increase in Chapter 40B development proposals across the state. After a decade of relatively little activity, scores of communities are facing new proposals for both homeownership and rental housing. The New England Fund, a program of the Federal Home Loan Bank of Boston, is now an eligible subsidy program to be used with Chapter 40B projects. Similar to other federal subsidy programs, a developer using NEF does not need a site approval letter from a state agency, such as DHCD or the Massachusetts Housing Finance Agency (MHFA). An increasing number of developers are seeking NEF financing for their 40B developments.

## Counting Units/Length of Affordability

Currently, housing developments must meet four tests to initially be included in the 40B count:

- \_ They must be part of a subsidized project built or operated by a public agency, non-profit or limited dividend organization. (DHCD guidelines list the programs that generally meet the definition of subsidized)
  
- \_ At least 25% of the units in the project must be income-restricted (admission or purchase restricted to households with incomes < 80% of median) and have rents or sale prices restricted to affordable levels and these affordability restrictions (on occupant incomes and rents/sale prices) must run at least 15 years for new construction (5 years for substantial rehabilitation)
  
- \_ The development must be subject to a regulatory agreement (except under subsidy programs such as LIP that do not require a regulatory agreement), and
  
- \_ Owners must meet affirmative marketing requirements.

The number of units in a development that may be included in the count depends on whether a program is rental or ownership. All units in rental developments, including market rate units, count toward the 10% goal. In homeownership developments, only the affordable units (i.e. those meeting income and price restrictions outlined above) are counted.

### 1. Affordability thresholds

*Issue: Should new units with below-market-rate prices that meet all the current criteria except that they serve moderate-income households (for example, 80% to 120% of AMI) count toward the 10%?*

**Recommendation: The affordability threshold of serving households up to 80% of area median income should remain.**

The Task Force believes it is important to continue to focus on the income group with the greatest needs.

## **2. Length of Use Restrictions Governing Affordability**

*Issue: Is the 15 year restriction on affordable units adequate to count in the Subsidized Housing Inventory?*

**Recommendation:** The minimum restriction of 15 years should remain. Municipalities have the option of negotiating longer periods of affordability.

*Issue: Should a comprehensive permit create the presumption that the units remain affordable in perpetuity?*

**Recommendation:** The presumption should be that units will remain affordable in perpetuity, unless the impact at the end of the operating subsidy program causes the development to become uneconomic. A provision should be added to the Housing Appeals Committee regulations indicating that when a comprehensive permit is silent on the length of the affordable housing restriction created, there is a presumption that the restriction will be in perpetuity.

Some communities will need technical assistance to review pro forma submittals. Proposals for long-term affordability need to address monitoring if there is no longer a subsidy program responsible. Localities would have to be responsible for continued monitoring through deed restrictions.

DHCD and MHFA programs were reviewed to determine any negative impact of longer-term affordability restrictions. It was clarified that operating subsidies, not development subsidies, have a bearing on the issue of the economics of long term affordability. It was noted that in *Wellesley v. Aredemore Apartments*, the Superior Court ruled that when a comprehensive permit is silent on the length of the affordable housing restriction created, there is a presumption that the restriction will be in perpetuity.

The committee also noted:

- ⌘ The current minimums for use restrictions are not statutory (i.e. not contained within the Comprehensive Permit statute).
- ⌘ The current requirements vary with the subsidy program. New rental construction is 15 years; rental rehabilitation is 5 years; the HOP program is intended to restrict affordable units in perpetuity.
- ⌘ With current use restrictions, the State sometimes has to pay twice (at initial development and later through preservation programs) to ensure the continued affordability of projects where owners had already profited up front.
- ⌘ The zoning relief given developers is permanent and that land resources are finite and will ultimately be used up. The ability to create affordable housing through new construction is limited.
- ⌘ It is expected that lenders would be open to long-term affordability requirements because their right to foreclose would not be impacted.

### 3. Counting Market Rate Units

*Issue: Should market rate units in both rental and ownership developments count toward the 10% goal?*

The task force did not reach a consensus on this issue. The Subcommittee agreed that the current counting policy is inconsistent, appears arbitrary and is confusing to local officials. The majority argued that the counting of market-rate units as affordable was inappropriate. In addition, if units were treated equally and all market-rate units were counted in both rental and ownership projects, too many communities would meet the 10% goal.

On the other hand, the minority argued that the Comprehensive Permit program should be consistent in its counting methodology. Zoning waivers are granted to the developer for the project as a whole, not just for the affordable units. Counting all units (while maintaining the requirement that at least 25% of the units are affordable) might make the 10% goal more attainable and thereby provide a further incentive to support Comprehensive Permit developments.

**Recommendation:** Continue to count market rate rental units in mixed income developments, but do not count market rate homeownership units towards a community's 10% goal.

#### **4. Counting of private affordable units not created/subsidized under currently accepted programs**

*Issue: Should existing, private affordable units count toward the 10% -- even if they don't meet subsidy program requirements.*

**Recommendation:** Existing or new affordable units created without a State cash subsidy should count in DHCD's inventory toward the 10% goal, provided that these units meet the current criteria for counting affordable units. That is, a regulatory agreement must be in place or put in place to ensure incomes at admission are restricted to households at/or below 80% of median; rents/prices are restricted so as not to exceed 30% of income; units are restricted/reserved for eligible households in perpetuity; and the units are marketed affirmatively. In addition, units should meet housing quality standards. A monitoring process must be established.

A new LIP-like definition of subsidy is needed in order for this recommendation to comply with current statutory requirements. It was suggested that this definition should include state and/or local technical assistance, similar to the technical assistance provided through LIP.

#### **5. Procedures for ongoing counting of units**

*Issue: Questions have been raised about the quality of DHCD's 40B inventory data with regard to the continued eligibility of units once they are added to the 40B inventory (especially with regard to homeownership units under HOP and LIP).*

**Recommendation: Clarify and strengthen procedures that are used to monitor deed restrictions and update the 40B inventory.**

DHCD's Notes to the 40B Inventory include a description of the policy regarding discontinuation, stating that:

Unless the regulations governing the subsidy program provide otherwise, units are counted as low and moderate income housing for the period for which affordability is preserved (lock-in period) as described in the Regulatory Agreement or, if there is no Regulatory Agreement, in the use restrictions or re-sale controls. If an initial lock-in period is extended, the units continue to

be counted during the extended period. If the use restrictions or re-sale controls are released or become void for any reason, the units continue to be counted for the remainder of the lock-in period.®

The notes give two examples of how this policy varies depending on the subsidy program:

A(a) HOP re-sale controls are intended to be in effect in perpetuity. If an eligible purchaser cannot be located for a HOP affordable unit and the re-sale controls lapse the unit continues to be counted. b) Many LIP use restrictions are intended to be in effect in perpetuity. Nevertheless if they lapse, the unit is no longer counted because of the provisions of the program regulations.®

## **6. Counting of tenant-based assistance (Section 8 certificates and vouchers)**

*Issue: Some local officials and legislators have argued that units assisted with tenant-based rental assistance should be included in the 40B count, even though these units do not meet requirements for long-term use restrictions.*

**Recommendation:** Because the subsidy moves with the tenant rather than remains with the unit, the Task Force believes that tenant-based rental assistance should not be included in the 40B count.

## Permitting and Production

Housing production, independent of 40B Comprehensive Permits, includes concerns related to: the overall cost of producing affordable housing; local permitting, local attitudes and the political will needed to overcome obstacles to affordable housing production. The Permitting and Production Subcommittee has tried to identify circumstances and tools for production that can effectively produce affordable housing without needing to bring the powers of Chapter 40B to bear.

The Subcommittee had substantive discussions about the challenges present in the production of affordable. These include zoning barriers, land and construction costs, lack of local acceptance, and the uncertainty of the permitting process. The Subcommittee examined potential solutions, improvements and actions which may be taken to: 1) reduce the upfront risk in permitting affordable housing developments; 2) streamline the process; and 3) better coordinate with the host communities on educational, legal and financial issues.

***Recommendation 1: Track proposed changes to Chapter 40A: The Zoning Act, and advocate for revisions which support affordable housing.***

Chapter 40A, the Massachusetts Zoning Act, was considered by the Subcommittee for possible legislative changes. The Zoning Act describes the authority of municipalities to create and enforce local zoning. The Zoning Act does not explicitly state that municipalities can require the provision of affordable units in development projects, except in cases of Special Permits (Chap. 40A, Section 9). It does not expressly prohibit this type of mandatory inclusionary zoning either. This ambiguity had given many communities pause in adopting inclusionary requirements for fear of legal challenge. Introducing legislation to clarify this issue risks achieving an outcome that may be contrary to the goals of affordable housing production.

Recently, the Legislature amended Chapter 40A to encourage cluster development. An on-going assessment should be made of future opportunities to successfully amend Chap. 40A to further affordable housing objectives. CHAPA appears to be best suited to follow these events on behalf of its members.

***Recommendation 2: Increase education and technical assistance to local communities about affordable housing.***

There was much discussion centered on the need for improved public understanding of affordable housing in general, and housing production in specific. It was recognized that local permitting authorities may often need additional technical assistance in both 40B and non-40B reviews. Developers also may come to the approval process with less than a complete understanding of how permitting boards work at the local level.

The strengthening of Local Housing Partnerships under the guidance of the Massachusetts Housing Partnership is seen as one of the likely vehicles for the delivery of this type of technical assistance.

An Ombudsperson-type position was suggested as a worthwhile local or regional position. The Housing Ombudsperson would be a resource to communities and would serve to help streamline the permitting process.

***Recommendation 3: Assist communities in implementing land use regulations that assist in lowering per unit costs while maintaining aesthetic and environmental standards in keeping with community character***

The continuing escalation of land cost, the high cost of construction, the lack of large easily developed tracts, and the soft costs associated with gaining permit approvals for housing continue to make the production of affordable housing an arduous and expensive endeavor. Technical assistance should be available to communities for fashioning zoning bylaws that encourage the production of affordable housing; negotiating with developers and adopting regulatory agreements that maintain affordability restrictions.

Examples of best practices in land development need to be made known to communities. Alternatives to conventional subdivision lot configurations need to be promoted. Smart growth standards for higher density, mixed-use and compact development, need to be better understood and accepted at the local level.

For projects with affordable units to be realistically produced under local zoning regulations, standards need to be flexible enough to allow less land to be required per unit, attached dwellings, zero lot line, or other site layout plans that use the land more efficiently than traditional subdivision development methods.

Local building code regulations were not identified as having negative cost implications and were not identified as an area in need of reform. However, Massachusetts Department of Environmental Protection (DEP) was perceived to create unnecessary project delays and to add to permitting unpredictability. Administrative remedies to improve the DEP process, particularly regarding adherence to predictable time frames, should be pursued.

***Recommendation 4: Provide standardized information on fiscal impacts of residential development (school costs, traffic impacts, etc.).***

Community members consider the impact data presented by project developers suspect. There are a variety of methodologies underlying the impact assumptions asserted by the various players. It might be helpful to establish commonly accepted standards. Acceptable methods of quantifying impacts, specific to Massachusetts communities may already exist, but if it exists it is not well known or widely available.

It was suggested that housing is often produced without demographic information about who most needs the housing being produced. Some communities have meaningful needs data and some do not. Even where this information is available there may be a mismatch between the needs and the housing that is being proposed. Rather, the type of housing proposed may be based on what is perceived as more easily accepted by the community, or the type of housing produced may be dictated by the availability of funding resources.

***Recommendation 5: The production of family housing often meets more local resistance than elderly housing, and for that reason may require additional incentives either at the state or local level.***

It is clear from historical information, and from the direct experiences of the Task Force participants, that it is much more difficult to gain local acceptance and support for family housing compared to elderly housing. The increased school cost associated with additional housing for low- or moderate-income households is frequently cited. Elderly housing is also less likely to trigger the fears associated with the creation of affordable housing **B** these fears may be implicitly or explicitly racist; may be expressed as fear of people coming from outside the community; unease about effects on property values; or general lack of understanding about what affordable or mixed-income housing actually means.

The Subcommittee discussed ways to facilitate acceptance and production of family housing. One idea was to count 100% of the family units toward the Chapter 40B Account and discount elderly units in some way. It was pointed out that only ownership projects are not counted as 100% affordable, therefore this strategy might not be applicable. Others expressed the opinion that any affordable units produced, elderly as well as family, were needed, especially in light of the near future housing needs of the baby boomers.

It is recognized that the impact of affordable family housing on local school costs is often a significant financial burden on local communities. The issue of school funding and its effect on the acceptance of affordable housing at the local level was discussed. It was decided that systemic solutions to this issue were well beyond the scope of this Task Force. However, it was agreed that it was very important for supporters and providers of affordable housing to form alliances with environmental groups, school groups, service providers, and others.

***Recommendation 6: Work with the Attorney General's Office to explore ways to expedite appeals to Superior Court by abutters of affordable housing land use decisions made either by the local permit granting authority or by the Housing Appeals Committee.***

The role of abutters is not to be underestimated. They represent a large part of the unpredictability of affordable housing production. It was agreed that community residents could often constructively contribute to the review and permitting process, and should be included in appropriate ways. Abutters with the power to litigate unpopular permitting decisions have a great deal of potential impact on housing development. Even after projects have been modified to address the majority, if not all, of neighbor and board concerns, a small minority of abutters can raise project costs or derail a project entirely through the tactic of court litigation.

The Subcommittee discussed a variety of creative ideas for curbing frivolous abutter litigation. Ultimately most of these ideas were dismissed as unrealistic. However, one strategy was agreed on as having merit. This was the idea of working with the Massachusetts Attorney General to establish administrative procedures or other mechanisms that would expedite the resolution of affordable housing permit appeals by abutters. One suggestion was to have the Attorney General file a letter in such cases that would establish a presumption of validity in favor of the local land use decision.

***Recommendation 7: Research and make available information about the outcomes of abutter appeals and cost to abutters of such appeals.***

It was suggested that abutter appeals might be curtailed if data were available from past court cases as to the likelihood of success of such appeals (the assumption being that most local land use decisions are upheld by the courts) and the average cost in legal fees these appeals represent.

***Recommendation 8: Provide additional resources through government programs to assist communities in encouraging the production of affordable housing.***

Equal in importance to a community's will to provide affordable housing is the availability of adequate resources needed to produce affordable housing. It is recognized that Federal and State resources for the production of housing for low-income households has been diminishing over the past decade. The funding that is available is often not adequate to make the housing truly affordable or is not flexible enough to meet the demands of smaller projects or other local conditions.

The trend is to use tax incentives, or limited government funds, to leverage affordable housing production from the private sector. Often local communities need to augment the available financial incentives in order to make a project work, especially in high cost areas. Zoning regulations that increase density may be used in lieu of project funds in some instances, but additional funds such as a local or state Housing Trust may be essential to underwrite the per unit cost sufficiently to reach the targeted population.

***Recommendation 9: Increased government funds should be available and prioritized to assist in funding infrastructure costs that are a result of affordable housing development.***

Costs associated with providing infrastructure improvements and additional municipal services to new residents as a result of affordable housing production should be eligible for government funds such as Community Development Action Grants funds and other funds.

## **Local Initiatives Program**

The Local Initiative Program is a program which was designed and implemented in 1989 by the Executive Office of Communities and Development in response to a legislative directive issued by a special commission. The LIP subcommittee was charged with examining the impact the program has had to date on the development of affordable housing and determining whether the program should remain intact, be modified, or be replaced by a new 40B program.

One impetus for an examination of LIP was the recent Housing Appeals Committee decision finding the Federal Home Loan Bank of Boston's New England Fund program to be an eligible federal subsidy program for purposes of 40B.

Based on a series of meetings, the subcommittee has concluded that the LIP guidelines must be reworked in order for the program to remain a useful competitive tool for future developers of affordable housing. The subcommittee believes that the proposed modifications will revitalize interest in using LIP and will increase LIP's ability to fulfill its mission of expanding the supply of affordable housing in communities throughout the state.

### **1. Reduction in Local Processing of Applications**

Interest in LIP has waned over the last several years as other less complicated programs **B** notably the New England Fund (NEF) -have emerged. Developers perceive that a major drawback to using LIP is the requirement that they obtain formal written local support for proposed projects during the preliminary predevelopment phase. Although Comprehensive Permits are granted by the local Zoning Board of Appeals, a LIP project must first be approved in concept by a series of local and state entities before it is presented to the ZBA. Developers are particularly concerned that they must secure a written sign-off from the Board of Selectmen before submitting a LIP application to the state.

In addition to the processing with the board of selectmen, LIP guidelines require that developers also meet with the Local Housing Partnership, if one exists, to negotiate a satisfactory development program reflecting community concerns. While the Partnership's input is only advisory, the process can be time consuming, particularly if the partnership lacks experience. The developer then must submit a preliminary proposal to the Board of Selectmen for review in order to obtain a letter of support from the chief elected official.

The process of obtaining this letter may become lengthy and costly due to the reluctance of elected officials to support projects at such an early stage. In order to mitigate the selectmen's concerns, the developer often must produce detailed studies on the potential impact the project may have on municipal infrastructure, services, and the environment. Only after the developer has obtained this letter of local support will DHCD consider issuing a site eligibility letter. Only after a site eligibility letter has been issued, may the developer apply for the Comprehensive Permit.

While each of these steps was intended to ensure that the project was locally initiated and that there were ample opportunities for the proposal to be modified to reflect local priorities, the subcommittee feels that the process has become overly burdensome, time-consuming, expensive for developers, and difficult for municipal officials.

As a result, the LIP subcommittee makes the following recommendations:

- a) Developers should have the option of proceeding more rapidly to the Zoning Board of Appeals. The subcommittee is still discussing several ways to expedite this process.
- b) Although the Board of Selectmen should be consulted about proposed projects, they should no longer be required to provide written letters of support at a very early stage in the process.
- c) The Board of Selectmen may appoint a body, such as an LHP, to review LIP project proposals in an advisory capacity. It is hoped that developers will recognize the potential benefits of meeting with such bodies, particularly in communities with strong Partnerships.

## **2. Increased Assistance to Zoning Boards of Appeals**

It is apparent that a reworked LIP and an ongoing NEF program would place a greater burden on Zoning Boards of Appeals. As a result, the capacity of ZBA members to review these proposals must be enhanced in order to ensure that communities receive high quality applications for projects which will be affordable over the long term. Therefore, the LIP subcommittee recommends that:

- a) Increased direct technical assistance be provided to ZBAs to increase their capacity to review projects and understand the 40B and LIP processes.
- b) Sources such as MHP's Technical Assistance Fund should be widely marketed to enable ZBAs to hire outside consultants and housing professionals to assist in the proposal review process.

### **3. Change to Income Guidelines**

LIP income guidelines are categorized only as **Boston Area** or **Outside of Boston Area** despite the fact that there are many variations in median income outside of Boston. The subcommittee recommends that:

- a) The income eligibility of potential purchasers or tenants of LIP units be based on the area median income by county, as used in other DHCD programs such as HOME and CDBG.

### **4. Increase in Eligible Purchase Prices**

In accordance with current LIP guidelines, the maximum purchase price for a LIP unit ranges from \$62,500 to \$100,000, with some exceptions. Subcommittee members reported that these limits were lower than necessary given the availability of soft second mortgages and down-payment assistance programs. Furthermore, an increase in these maximum purchase prices might make a number of projects more feasible. Although these limits have already been raised by \$10,000 in several communities, the subcommittee recommends that:

- a) The maximum eligible purchase prices for LIP units should be increased statewide. A methodology for determining the appropriate degree of increase will be discussed at a later date.

### **5. Change to Unit Design Guidelines**

The existing LIP policy requiring the exteriors of affordable LIP units to be as **indistinguishable as possible** from the market units should be maintained. However, the subcommittee recognizes that in certain affluent communities the difference between the subsidized and non-subsidized sales prices will be significant and that such a requirement may make the project infeasible. Therefore, while the overall guideline should be retained, it is recommended that:

- a) Language should be added to the LIP guidelines authorizing DHCD to make exceptions to the **indistinguishable rule** on a case by case basis.

### **6. Calculation of Land Value/Effect on Profit Calculations**

At present, LIP requires that land values be based on by-right zoning, rather than on the enhanced zoning created through the comprehensive permit. The committee recommends that DHCD reexamine this policy to take into account the developer's holding and transactions costs, such as processing 40B applications, insurance, interest payments, legal fees, demolition, taxes, security and other costs. The committee believes it is reasonable to add 15% to the current land value over a three-year period, with extensions granted on a case-by-case basis.

## **7. Limits on Density**

LIP guidelines currently do not prescribe maximum density standards, although DHCD generally does not encourage projects with density in excess of 12 units/acre. Although some subcommittee members questioned whether a density cap should be established for the program, it was agreed that projects should be evaluated on a case by case basis, with consideration given to each site's particular attributes.

a) The subcommittee recommends that no additional LIP density guidelines need to be established.

## **Education, Training, and Outreach**

There is a tremendous need for a concerted effort to both train the officials who make local decisions in Comprehensive Permit projects and to educate the public at-large about affordable housing in general and Chapter 40 B in particular.

As the rules change, it is important that all parties are aware of their responsibilities and rights. The subcommittee viewed education and training as imperative to making 40B more effective.

### **Technical Training**

Technical training for local officials involved in the Comprehensive Permit process should be done regularly on a regional or sub-regional basis. Towns should be encouraged to bring teams of officials to ensure that multiple officials hear the same information. The training should be in short (no more than 2 hour) sessions. They should focus on the ground rules, process, new programs, best practices, responding to abutters, and frequently asked questions concerning 40B.

The subcommittee suggests that either Massachusetts Housing Partnership Fund or the regional housing agencies be responsible for organizing the seminars, with the Department of Housing and Community Development providing technical staff and support,

### **General Information**

It is important that the general public be educated about the affordable housing crisis in Massachusetts as well as the benefits of the Comprehensive Permit. The subcommittee recommends three avenues for disseminating this information.

- 10 **WGBH B** The public television station has an obligation to respond to local issues identified in their member surveys, and has, in the past, devoted significant airtime to issues such as domestic violence.
2. **Information Packet B** Create packets of information containing a brochure, regulation information, success stories, and other factual information. This packet would be available at town halls and libraries, with an initial display at local libraries to draw attention to it. Local officials would have copies available to send out to interested residents, officials, and abutters. The subcommittee suggests CHAPA prepare the packets.
3. **Website B** A website ([www.40b.com](http://www.40b.com)) should be established with comprehensive information about the Chapter 40B, including best practices, pending applications, HAC decisions, regulations, etc. with links to and from all related agencies.

## **Checklist of Affordability Issues Under Chapter 40B**

Availability of construction funding for affordable housing through the New England Fund, which is not subject to state agency review, is giving rise to new levels of responsibility for municipalities in their consideration, review, documentation and enforcement of such proposed projects.

CHAPA's 40B Legal Subcommittee has considered:

- Current enforcement of affordability requirements
- Potential monitoring of New England Fund projects
- Existing and potential documentation, including regulatory agreement documents
- Periods of affordability of units
- Underlying zoning and comprehensive permit considerations
- Current concerns in home ownership/condominium and rental projects
- Related state and local policy and implementation concerns

We have developed a checklist of affordability parameters. This will aid municipalities in addressing the complex range of issues of affordability for both homeownership and rental affordable housing developments. We have made separate checklists for homeownership and rental projects.

We hope this checklist will be a useful starting point for municipalities and developers seeking to tailor a project to particular subsidy programs. With respect to Chapter 40B projects, it is intended to supplement the Chapter 40B guidelines issued by the Massachusetts Housing Appeals Committee. In any event, it is a working document designed to trigger talking points. It is not intended to be a complete list of affordability parameters.

Although this checklist is principally intended for informing municipalities, including their elected and appointed officials, board and committee members, and employees, we also hope it will be useful for initial discussions between municipal officials and potential developers (and their attorneys) about the development of affordable housing in a particular community.

### **Homeownership Projects**

#### **General Project Information**

10 Who are the parties involved in the project?

- 20 What are the sources of public subsidy?
- 30 What percentage of the units in the project is designated as affordable? Are specific unit types designated as affordable?
- 40 Where are the affordable units located within the project? Are they dispersed throughout the project so that they are indistinguishable from the market rate units? How comparable are the affordable housing units (size, amenities) with the market rate units?
- 50 What is the length of the affordability restriction?

### **Income Restrictions for Buyers**

- 10 Who is eligible to occupy the units (e.g., first-time homebuyer definition, are students eligible)?
- 20 What is the maximum income for a household to be eligible to purchase a unit? Is it adjusted for household size or for number of bedrooms in the unit?
- 30 How is income determined (e.g., three years of tax returns, etc.)
- 40 What is the household asset limit, if any, to be eligible for affordable units?
- 50 Is the development creating opportunities for a range of incomes (e.g., households between 50%-80% of area median income)?
- 60 What geographic area is being use to set income limits? (e.g., HUD definition of area median income, county income, local median income, other?)

### **III. Initial Sales Prices**

- 10 What are the initial sales prices and how are they set?
- 20 Is the sales price being set based on size of the unit (number of bedrooms) or household size? What is the assumption regarding the number of persons per bedroom?

### **IV. Resale Restrictions, Ongoing Buyer Restrictions, and Recapture Provisions**

- 10 What is the formula for determining maximum resale price?

- 20 Does the municipality have an option to purchase or a right of first refusal in the event of a resale?
- 30 What happens if an eligible purchaser who qualifies to buy the unit cannot be found?
- 40 What are the recapture provisions for the municipality should the property need to be sold (as a last resort) for fair market value to a non-income eligible buyer?
- 50 How do you address or anticipate potential foreclosure problems?
- 60 What are the restrictions on additional debt, refinancing, or home equity loans?
- 70 Will the affordability restrictions have the protection of M.G.L. Chapter 184, Sections 31-33? (In some cases, this protection is needed to assure that the restriction will be enforceable against future owners)
- 80 What is the restriction on owners of affordable units being able to rent their units?
- 9. How are capital improvements treated?

#### **V. Developer Restrictions**

- 10 What are the restrictions on developer's fee, profit, equity, etc.?

#### **VI. Selecting Buyers**

- 10 What is the method for selecting buyers (lottery, residency and minority preferences)?
- 20 What are the affirmative marketing requirements?
- 30 What are other fair housing requirements?

#### **VII. Condominium Issues**

- 10 How are condominium fees structured?
- 20 How are affordable buyers treated vs. market rate buyers in terms of voting power and decision making?

## **VIII. Monitoring and Enforcement**

- 10 Is the municipality a party to the regulatory agreement between the developer and the subsidy provider and/or does it have rights to enforce the affordability restrictions?
- 20 Who is responsible for monitoring and enforcement?
- 30 What is the payment for monitoring services? How/when is the payment made?
- 40 What are the reporting requirements of the owner and developer?
- 50 What are the mechanisms for enforcement of the resale and use restrictions?

## **Rental Projects**

### **I0 General Project Information**

- 10 Who are the parties involved in the project?
- 20 What are the sources of public subsidy?
- 30 What percentage of the units in the project is designated as affordable?
- 40 Where are the affordable units located within the project? Are they dispersed throughout the project so that they are indistinguishable from the market rate units? How comparable are the affordable housing units (size, amenities) with the market rate units?
- 5. What is the length of the affordability restriction?

### **II. Income Restrictions for Renters**

- 10 Who is eligible to occupy the units (are students eligible)?
- 20 What is the maximum income eligibility for the project? Is it adjusted for household size or for number of bedrooms in the unit?
- 30 Is the development creating opportunities for a range of incomes (e.g., households below 30% of median income, 30-50% of median income, and 50-80% of median income)
- 40 How is income determined? Are assets counted?
- 50 What is the household asset limit, if any, to be eligible for affordable units?
- 60 What if the tenant's income increases over time?
- 7. What geographic area is being use to set income limits? (e.g., HUD definition of area median income, county income, local median income, other?)

### **III. Initial Rental Prices**

- 10 What are the initial rental prices and how are they set?

20 Is the rent being set based on size of the unit (number of bedrooms) or household size? What is the assumption of number of persons per bedroom?

#### **IV. Developer Restrictions**

10 What are the restrictions on developer's fee, profit, equity, etc.?

20 What is the restriction on the sale of the rental property?

30 Are there restrictions on additional debt or mortgages on the rental property?

#### **V. Selecting Tenants**

10 What is the method for selecting renters (lottery, residency preferences)?

20 What are the affirmative marketing requirements?

30 What are other fair housing requirements?

#### **VI. Monitoring and Enforcement**

10 Is the municipality a party to the regulatory agreement between the developer (and the subsidy provider) and/or have rights to enforce the regulatory agreement?

20 Who is responsible for monitoring and enforcement?

30 What is the payment for monitoring services? How/when is the payment made?

40 What are the reporting requirements of the developer?

50 Does the monitoring agent have a right to inspect the property and the owner's tenant files for compliance?

60 Will the affordability restrictions have the protection of M.G.L. Chapter 184, Sections 31-33? (In some cases, this protection is needed to assure that the restriction will be enforceable against future owners)







