

Summary of Changes to Chapter 40B Regulations
Prepared by Citizens Housing and Planning Association - 2/22/2008

DHCD's new regulation for Chapter 40B (**760 CMR 56.00**) folds all previous regulations relating to the Chapter 40B, the Housing Appeals Committee¹ and the Local Initiative Program² into a single, *revised* regulation. It incorporates and codifies many policies and practices that have evolved over the years as the result of court rulings, Housing Appeals Committee (HAC) decisions, and DHCD guidelines, and makes some changes to recent practices as well. DHCD has also developed new guidelines regarding design, cost examinations and other matters, to supplement this regulation.

The new regulation is divided into eight sections:

- 56.01 Background and Purpose
- 56.02 Definitions
- 56.03 Methods to Measure Progress toward Local Affordable Housing Goals
- 56.04 Project Eligibility; Other Responsibilities of Subsidizing Agency
- 56.05 Local Hearings
- 56.06 Procedural Regulations for Appeals to the Housing Appeals Committee
- 56.07 Criteria for Housing Appeals Committee Decisions
- 56.08 Amendments; Waivers; Transition Rules

The following pages provide a section-by-section summary of the differences between the new regulation and the most recent prior regulations, policies and guidelines.

¹ 760 C.M.R. 30.00 and 760 C.M.R. 31.00

² 760 C.M.R. 45.00

56.02 - DEFINITIONS

The final regulation adds a number of new definitions and revises others. This summary focuses on the key changes and additions and does not list many of the self-explanatory additions (e.g. Affirmative Fair Marketing Plan). *For some definitions, this summary shows the new or revised language in italics to aid the reader.* New and revised definitions of note include the following.

“SHI Eligible Housing” - (new) - refers to units that are eligible for inclusion in the Subsidized Housing Inventory, whether or not they meet definition of “Low or Moderate Income Housing”.

“means, solely for the purposes of 760 CMR 56.03,

(a) any unit of Low or Moderate Income Housing,

(b) such other housing units in a Project as may be so defined under the Department's guidelines, and

(c) any other housing unit as may be allowed under the Department’s guidelines, provided that such housing unit is subject to a Use Restriction and Affirmative Fair Marketing Plan, and regardless of whether or not such unit received a Subsidy.”

“Low or Moderate Income Housing” (revised) – This definition is used to define projects that can use a comprehensive permit. (For that reason, it eliminated the old references to community based housing and accessory apartments and moves limiting language regarding rental assistance to revised definition of “subsidy”). It also specifies that when a subsidizing agency does not define “low or moderate income housing”, then it mean units occupied by “Income Eligible Households” (i.e. $\leq 80\%$ AMI).

“means any units of housing for which a Subsidizing Agency provides a Subsidy under any program to assist the construction or substantial rehabilitation of low or moderate income housing, as defined in the applicable federal or state statute or regulation, whether built or operated by any public agency or non-profit or Limited Dividend Organization. *If the applicable statute or regulation of the Subsidizing Agency does not define low or moderate income housing, then it shall be defined as units of housing whose occupancy is restricted to an Income Eligible Household.*”

“Housing Production Plan (HPP)” – (new) –Refers to locally adopted plan for “Planned Production” which meets new standards set out in the this regulation

“means an affordable housing plan adopted by a municipality and approved by the Department, defining certain annual increases in its number of Low or Moderate Income Housing units. See Section 56.03(4).”

“Income Eligible Household” (new) – Household with income not exceeding 80% of median. Used in connection with use restrictions and definition of “low or moderate income housing”. Different from definition of “Low Income Persons”.

“means a household of one or more persons whose maximum income does not exceed 80% of the area median income, adjusted for household size, or as otherwise established by the Department in guidelines. For homeownership programs, the Subsidizing Agency may establish asset limitations for Income Eligible Households by statute, regulations, or guideline. In the absence of such provisions, Income Eligible Households shall be subject to asset and/or other financial limitations as defined by the Department in guidelines.”

“Low Income Persons” (no change) – Basis for statistics used by the HAC to measure local and regional housing need, when balancing local concerns with regional housing needs.

“means all persons who, according to the latest available United States Census, reside in households whose net income does not exceed the maximum income limits for admission to public housing, as established by the Department. The Department's calculation shall be presumed conclusive on the Committee unless a party introduces authoritative data to the contrary. Data shall be authoritative only if it is based upon a statistically valid, random sample or survey of household income conducted in the relevant area since the latest available U.S. Census.”

“Limited Dividend Organization” – (revised) - updated to reflect new types of subsidies and forms of subsidy administration (i.e. not just subsidy from a state or federal agency)

“means any entity which proposes to sponsor a Project under the Act; and is not a public agency or a nonprofit; and is eligible to receive a Subsidy from a Subsidizing Agency after a Comprehensive Permit has been issued and which, unless otherwise governed by a federal act or regulation, complies with the requirements of the Subsidizing Agency relative to a reasonable return for building and operating the Project.”

“Local Concern” – (revised) – adds “municipal and regional planning” to list of concerns

“means the need to protect the health or safety of the occupants of a proposed *Project* or of the residents of the municipality, to protect the natural environment, to promote better site and building design in relation to the surroundings *and municipal and regional planning*, or to preserve Open Spaces. See 760 CMR 56.07(3) (c – g).”

“Local Requirements and Regulations” – (revised) – limits definition to those “in effect on the date of a Project’s 40B application to the local Board” and adds examples.

“mean all local legislative, regulatory, or other actions which are more restrictive than state requirements, if any, *including local zoning and wetlands ordinances or bylaws, subdivision and board of health rules, and other local ordinances, by-laws, codes, and regulations, in each case which are in effect on the date of the Project’s application to the Board.*”

“Project” - (new) - used instead of “housing” in many parts of the new regulation, recognizes that some 40B developments have ancillary non-residential components.

“means a development involving the construction or substantial rehabilitation of units of Low or Moderate Income Housing that is eligible to submit an application to a Board for a Comprehensive Permit or to file or maintain an appeal before the Committee. See Section 56.04 for eligibility requirements. A Project may contain ancillary commercial, institutional, or other non-residential uses, so long as the non-residential elements of the Project are planned and designed to (a) complement the primary residential uses, and (b) help foster vibrant, workable, livable, and attractive neighborhoods consistent with applicable local land use plans.”

“Project Eligibility” - (new) – subsidizing agency determination that project meets jurisdictional requirements for a comprehensive permit application (fundable under subsidy program, has site approval, site control, etc)

“means a determination by a Subsidizing Agency that a Project satisfies the jurisdictional requirements of 760 CMR 56.04(1).”

“Public Housing” – (revised) – adds language to clarify that it refers to activities under c.121B

“means housing owned, operated, or managed by a local housing authority, or leased under the auspices of a local housing authority *pursuant to MGL c.121B.*”

“Statutory Minima” (new) – Refers to the three statutory thresholds that make communities appeal-proof (10% affordable housing, 1.5% general land area or annual construction starts equal to 0.3% of land area)

“means the standards set forth at 760 CMR 56.03(3)”

“Subsidizing Agency” – (revised – new language shown in italics) – reflects recent practices regarding project administrators, monitoring, and enforcement.

“means any agency of state or federal government *that provides a Subsidy for the construction or substantial rehabilitation of Low or Moderate Income Housing. If the Subsidizing Agency is not an agency of state government, the Department may appoint a state agency to administer some or all of the responsibilities of the Subsidizing Agency with respect to 760 CMR 56.00; in that case, all applicable references in 760 CMR 56.00 to the Subsidizing Agency shall be deemed to refer to the appointed project administrator. It shall be the responsibility of the Subsidizing Agency to enforce compliance with provisions of 760 CMR 56.00 and applicable Department guidelines relating to matters including Affirmative Fair Marketing Plans, Cost Examination, Project Eligibility, Subsidies, and Use Restrictions (for the term of the initial Use Restriction; see 760 CMR 56.05(13)).*”

“Subsidy” (revised – changes shown in italics) – reflects broadening of definition beyond “federal or state housing program”, including through the Local Initiative Program.

“Means *assistance provided by a Subsidizing Agency to assist the construction or substantial rehabilitation of Low or Moderate Income Housing, including direct financial assistance; indirect financial assistance through insurance, guarantees, tax relief, or other means; and non-financial assistance, including in-kind assistance, technical assistance, and other supportive services. A leased housing, state rental assistance, or housing allowance program shall not be considered a Subsidy for the purposes of 760 CMR 56.00.*”

“Use Restriction” (new) – This definition is based on the language in DHCD’s “Notes to the Subsidized Housing Inventory”, but unlike the “Notes” definition (which requires use restrictions of at least 15 or 30 years), does not discuss how long the use restriction must be. Also specifies that use restrictions can require a lower percentage of area median than 80%.

“means a deed restriction or other legally binding instrument in a form consistent with Department guidelines and, in the case of a project subject to a Comprehensive Permit, in a form also approved by the Subsidizing Agency, which runs with the land and is recorded with the relevant registry of deeds or land court registry district, and which effectively restricts the occupancy of an Low and Moderate Income Housing unit to Income Eligible Households during the term of affordability. A Use Restriction shall contain terms and conditions for the resale of a homeownership unit, including definition of the maximum permissible resale price, and for the subsequent rental of a rental unit, including definition of the maximum permissible rent. A Use Restriction shall require that tenants of rental units and owners of homeownership units shall occupy the units as their domiciles and principal residences. A Use Restriction may require that an Income Eligible Household must have a lower percentage of area median income than 80%. For enforcement of Use Restrictions, see 760 CMR 56.05(13)”

56.03 METHODS TO MEASURE PROGRESS TOWARD LOCAL AFFORDABLE HOUSING GOALS” [APPEAL-PROOF GROUNDS]

This section of the regulation addresses thresholds and situations that make ZBA decisions regarding comprehensive permit applications “appeal proof”, and how thresholds are calculated. It:

- makes minor modification to the “large projects” and “related applications” definitions,
- refines the rules regarding when units can be included in the Subsidized Housing Inventory (SHI) count (the starting point for determining whether a decision is appeal proof in most cases), and
- requires ZBAs to follow new procedures before issuing a decision based on the grounds that community is appeal-proof or that project can be denied as a “related application” [see 56.03(8)].

56.03 (1) Situations that Make A Local Decision Appeal-Proof

This section lists the situations that can make a local decision appeal-proof. The basic situations remain unchanged, but the regulation has revised the planned production thresholds has detailed under Section 56.03(4). A ZBA decision to deny or condition an application is appeal-proof if the ZBA demonstrates that at least one of the following situations applies:

- the community has met statutory minima (10% affordable, 1.5% general land area or annual construction on 0.3% of land area) ,
- the community has made “recent progress” (added SHI Eligible Housing units in prior 12 months in a number equal to at least 2% of its total year-round housing),
- the community has a one- or two-year exemption under planned production,
- the application is for a “large project” or
- a “related application” for the site was filed, pending or withdrawn within 12 months of this application.

§56.03(8) - Early DHCD Review before ZBA issues decision based on appeal-proof grounds (new)

The regulation adds a new requirement that ZBAs provide early written notice (within 15 days of the opening of the local hearing for the CP) to the Applicant and to DHCD if they intend to deny or condition permit on the above grounds, stating factual basis for its position and including “any necessary supportive documentation.” ZBA has burden of proof. [§56.03(8) a]

For the purpose of determining whether a community is appeal-proof, ZBAs can count projects with approved CPs that are under legal appeal (but not by ZBA) at the time the current project was filed to be counted toward the 10%.” [§56.03(8) b]

Applicants wishing to appeal must notify ZBA and DHCD in writing within 15 days of receipt of the ZBA notice, and include supporting documentation. If the Applicant appeals, DHCD will review materials from ZBA and Applicant and issue a decision within 30 days of receipt of the Applicants Appeal (failure to issue a decision is a constructive approval of ZBA position). Either the ZBA or Applicant can appeal DHCD’s decision (or failure to act) by filing an interlocutory appeal with the Housing Appeals Committee (HAC) within 20 days of receiving DHCD’s decision.

The requirement that ZBAs terminate the permit hearing within 180 days is tolled pending DHCD’s decision (or the conclusion of the appeal to the HAC).

If a ZBA fails to follow this procedure, it waives its rights to deny a permit on those grounds. “If the Board wishes to deny an application on one or more of the grounds set forth in 760 CMR 56.03(1), it must do so in accordance with the procedure set forth in 760 CMR 56.03(8), or it shall be deemed to have waived its rights.” [§56.05(3)]

56.03 (2) – Subsidized Housing Inventory (SHI)

The new regulation continues to require at least biennial updating of the SHI by DHCD and codifies parts of the current SHI eligibility notes. States purpose of SHI is to measure supply of Affordable Housing (for purposes of 40B thresholds). It doesn't change basic criteria for project eligibility and it still leaves details (e.g. term of use restriction, eligible programs) to SHI guidelines.

It includes new language that addresses 40R approvals, phased projects, delays between building permits and certificates of occupancy, and expiration of use restrictions. It also requires municipalities to submit certified information on their Affordable Housing units every two years.

Changes:

When Units Are Eligible for inclusion in SHI

- **40R (new)** – adds language specifying that units receiving a zoning approval under 40R count when the permit or approval is filed with the municipal clerk, provided that no appeals are filed or when the last appeal is fully resolved. Like CP projects, units temporarily become ineligible if building permit not filed within a year.
- **Certificate of Occupancy Requirement (new)** – specifies that units added to SHI on basis of building permit become temporarily ineligible if certificate of occupancy not issued within 18 months. [§56.03(2)(c)]
- **Special Treatment for Large Phased Projects (new)** – if CP or zoning approval permits a project to be built in phases *and* each phase contains at least 150 units *and* average time between start of each phase is 15 months or less, then entire project remains eligible for SHI “as long as the phasing schedule set forth in the permit approval continues to be met.”
- **Treatment of Projects with Expired Use Restrictions (new)** – adds language specifying that units become ineligible for inclusion on SHI upon expiration or termination of the initial use restriction, unless a subsequent use restriction is imposed. Subsequent use restrictions must meet standards set out in §56.05(3), with the new holder of the use restriction responsible for enforcing and monitoring the new use restriction.
- **Biennial Municipal Reporting Requirement (new)** – DHCD's Subsidized Housing Inventory is based on information submitted to DHCD by each locality. In the past, when DHCD has asked municipalities to review DHCD's current listing of projects, some municipalities have assumed DHCD was proactively collecting information on projects independently. The regulation now includes language that establishes that municipalities are responsible for providing the information to DHCD. [§56.03(2) e]. Specifically, it requires municipalities to submit a statement certified by Chief Executive Officer, in such form and on such schedule as DHCD may require, reporting the number of units eligible to be listed on the SHI.

56.03(3) - Computation of Statutory Minima

The new regulation makes several minor revisions to computation and adds a general requirement that evidence regarding statutory minima comply with any guidelines issued by DHCD.

- **10% affordable housing –**
 - The new regulation revises cut-off date for meeting the 10% standard, basing it on SHI Eligible units as the date of the CP *application* rather than the date of filing of the ZBA decision with the city/town clerk [§56.03(8)(a)]. This makes it consistent with the prior regulation for calculating General Land Area Minimum.

- It continues to define “total housing units” as total units enumerated in latest available Census, and allows but no longer requires DHCD to consider updated information on total units, such as information that net additional units have been developed or are under permit or that total housing units have declined (the prior regulation said “shall” consider). [56.03(3)(a)]
- **General Land Area Minimum (1.5%)**
 - The new regulation adopts the standard already used in the regulations for Annual Land Area, limiting the portion of a site counted to impervious surfaces plus landscaped areas.
 - It pro-rates the portion of site area that counts based on the number of SHI Eligible Housing units (rather than “Low and Moderate Income”), though annual land area continues to use latter. [56.03(3)(b)]
- **Annual Land Area (0.3% of total land area)**
 - The new regulation updates the language regarding when units can be counted. Units only count if they have received final approval by subsidizing agency (vs. a “firm funding commitment” under the old regulation) prior to the filing of the application for the subject CP. Appears to require use of this standard in all cases (omits introductory “ordinarily” used in prior regulation). [56.03(3)(c)]

56.03(4) - Planned Production (“Housing Production Plans”)

The new regulation combines language from both the pre-existing regulation and DHCD guidelines regarding planned production, and makes additional revisions. Overall the changes reduce the number of units communities must produce to be certified for 1-2 years but strengthen the planning requirements.

- It reduces planned production thresholds for certification to 0.5% of total housing units for a one year exemption, 1.0% for two year exemption (down from 0.75% and 1.5%). [§56.03(4)(f)]
- It adds local approval requirements before plan is submitted to DHCD, requiring that the plan be “adopted” by the municipal planning board and select board or city council. (The old regulation/guidelines just required a letter of support from chief elected official). [§56.03(4)(c)]
- It limits the term of an “approved plan” to 5 years. Requires municipalities to submit an updated plan for DHCD review and approval. [§56.03(4)(e)]
- It makes minor revisions to required elements of the housing plan, adding a requirement that the comprehensive needs assessment be based on most recent census data and that the discussion of municipal; infrastructure include future planned improvements. It drops the old requirement that Plans include a discussion of planned use restrictions.
- It requires more extensive discussion of implementation strategies in Plan. Revises regulatory language regarding potential strategies Plan must consider from “shall address one or more of the following, but shall not be limited to” to “including all of the following strategies, to the extent applicable”. Adds “participation in regional collaborations addressing housing development” to the list of potential strategies. Mandates inclusion of a production schedule and numerical goals. [§56.03(4)(c)]

56.03 (5) – Recent Progress

Adds language allowing DHCD to hear evidence on more current data regarding total housing units when community states that they have added Affordable Units equal to at least 2% of total housing.

56.03(6) – Large Projects

Makes modification to definition of “large project” in communities with less than 2,500 housing units, changing it from “over 150 units” to “construction of housing units equal to 6% of all housing units in the municipality.”

56.03(7) – Related Applications

Modifies definition, exempting prior zoning applications for residential projects from definition of “related applications” if they included at least 10% Affordable Housing.

56.04 PROJECT ELIGIBILITY/ OTHER RESPONSIBILITIES OF SUBSIDIZING AGENCY

56.04(1)-(4) - Determination of Project Eligibility (Initial Site Approval)

Applicants cannot file an application for a comprehensive permit until they have received a determination of project eligibility by a subsidizing agency.

- This section describes the findings a subsidizing agency must make in order to grant such a determination, including that the applicant is a public agency, non-profit or limited dividend organization, that it has site control and that the project is fundable under a Low or Moderate Income Housing subsidy program.
- It also lists the information Applicants must submit in their application for such a determination. The mandatory submission list largely follows prior regulation and the requirements of MassHousing Site Approval Checklist, but adds several items which are already required to be included in the CP application to ZBA (e.g. tabular analysis comparing existing zoning requirements to waivers requested for project, narrative description of approach to building massing, relationships to adjacent properties and proposed exterior building materials).

The new regulation:

- Expands the items a Subsidizing Agency must consider, when making finding regarding appropriateness of site for residential development, to include information provided by the municipality or other parties regarding *municipal actions previously taken to meet affordable housing needs, including inclusionary zoning, multifamily districts and 40R overlay districts*
- Spells out items Subsidizing Agency must consider in determining whether conceptual design is generally appropriate for the site (*including “building massing, topography, environmental resources, and integration into existing development patterns”*)
- Specifies that Subsidizing Agency review of pro forma must find that land valuation is consistent with DHCD guidelines and that Project is consistent with DHCD guidelines for Cost Examination and Limitations on Profits and Distributions (if applicable) on the basis of estimated development costs.
- Requires that LIP site approval applications be submitted by the municipal Chief Executive Officer [§56.04(2)].
- Eliminates the language in 31.01(3) regarding site control that refers to 50% or greater interest.
- Specifies that local boards can attend the site visit conducted during the 30 day review period.
- Requires the Subsidizing Agency to provide a copy of its determination of eligibility to DHCD, the chief executive officer of the municipality and the ZBA, as well as to the Applicant.

56.04(5) - Impact of Substantial Changes on Determination of Project Eligibility (New)

The regulation adds new language that allows a Subsidizing Agency to defer re-determination of Project Eligibility in connection with substantial changes to project until the ZBA issues its decision on a CP application, unless Chief Executive Officer of the municipality or Applicant requests otherwise.

- It requires an applicant to notify the Subsidizing Agency and DHCD in writing if he/she wants to change aspects of its proposal that would affect project eligibility requirements after it has received determination of Project Eligibility.
- It then gives the Subsidizing Agency 15 days to determine if the changes are substantial with regard to project eligibility requirements.
- If the Subsidizing Agency finds that the changes are substantial, it “shall ordinarily” defer any review (unless the municipal CEO or applicant requests otherwise) until the ZBA has issued a CP or denied the application and the Applicant has filed an appeal with the HAC. At that point, the Subsidizing Agency will reaffirm, amend or deny its determination of Project Eligibility.
- If the CP was not appealed, the new determination decision may be incorporated into the Final Approval.

56.04 (6) - Conclusive Nature of Project Eligibility Determination (Revision)

The regulation revises the prior regulatory language regarding challenges to Project Eligibility by the local ZBA (or by the HAC during an appeal). It appears to allow challenges only on the grounds that there has been a “substantial change” to the project that affects project eligibility requirements and to leave resolution of the challenge to the Subsidizing Agency, while allowing the ZBA hearing or HAC appeal to be stayed until the challenge is decided.

- The previous regulation [(31.01(2)(f))] stated that “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.”
- The new regulation states that: “Issuance of a determination of Project Eligibility shall be considered by the Board or the Committee to be conclusive evidence that the Project and the Applicant have satisfied the project eligibility requirements of 760 CMR 56.04(1). Alleged failure of the Applicant to continue to fulfill any of these project eligibility requirements may be subsequently raised by the Board at any time, with the burden of proof on the Board, or by the Committee during an appeal, in either case *solely upon the grounds that there has been a substantial change affecting the project eligibility requirements* set forth at 760 CMR 56.04(1). Such challenge shall be decided by the Subsidizing Agency in accordance with the procedure set forth in 760 CMR 56.04(5), and the Board hearing or Committee appeal may be stayed until such challenge is decided.”

56.04 (7) - Final Approval (Project Eligibility) (Revision)

The new regulation adds to requirements in the prior regulations. It continues to require subsidizing agencies to issue a Final Approval after the CP is approved and require the subsidizing agency to reconfirm project eligibility, including financial feasibility before issuing it. Local boards are not required to issue building permit until the Final Approval is issued.

Change: The regulation adds two new required findings for Final Approval:

- That the proposed Use Restriction is in a form approved by DHCD,
- That the applicant has committed to comply with cost examination requirements and that Subsidizing Agency has secured “adequate financial surety” to insure completion of the cost examination.

56.04 (8) - Cost Examination (new)

This section sets out basic parameters for ensuring that profit limitations imposed on limited dividend projects are enforced, while leaving the definition of “reasonable return” to the Subsidizing Agency, “in accordance with” DHCD guidelines.

- It uses language similar to the most recent LIP guidelines, specifying that profits for homeownership projects will be calculated based on distributions from capital sources (fees and profits) and that profits for rental projects will consider distributions from operations relative to the developer’s equity as well.
- It requires the Applicant or subsequent developer to submit a detailed financial statement, prepared by a certified public accountant, to the Subsidizing Agency in a form and upon a schedule determined by DHCD guidelines. It also requires DHCD to establish guidelines to provide for verification of these financial statements and for enforcement actions in the event of non-compliance with these profit limitation and financial reporting requirements.
- Unlike the LIP guidelines, this section applies only to limited dividend organizations, and leaves exact profit limitations (e.g. 10%, 20%) to DHCD guidelines.

56.05 - LOCAL HEARINGS

This section outlines the procedures ZBAs must follow in hearing comprehensive permit applications. The new regulation includes a number of changes. The most noteworthy changes are (1) the addition of a requirement that the hearing be terminated within 180 days of the filing of a complete application (unless the Applicant agrees to waive it) and (2) a provision allowing communities already considering 3 or more CP applications to stay a hearing on additional applications if the total units under consideration meet the definition of a “large project”.

56.05(1) – Local Rules

Continues requirement that ZBAs adopt local rules for conduct of comprehensive permit hearings.

- Adds language allowing ZBAs to seek non-binding opinion from DHCD on consistency of their local rules with Chapter 40B

56.05(2) - Elements of Submission/Fees

The new regulation includes minor language revisions.

- Deletes language allowing the HAC to determine whether an item not listed in this regulation should have been submitted to the ZBA or should be submitted to the HAC. Replaces with language prohibiting ZBAs from requiring submissions that exceed requirements under rules and procedures of local boards for review under their respective jurisdictions
- Drops requirement for architect’s signature on preliminary architectural drawings
- Adds language allowing ZBAs to require a “reasonable filing fee” if consistent with other fees assessed by municipality for subdivisions, cluster zoning, etc. and “taking into consideration” the statutory goal of encouraging affordable housing. (This language is consistent with Model Local Rule 3:02 footnote 4)

56.05(3) - Conduct of Board Hearing

In addition to the previously described new procedure for early DHCD review when ZBA intends to deny a permit on the basis of statutory minima, etc., the new regulation makes several other revisions:

- Adds a new requirement that hearings close within 180 days of CP application filing unless Applicant consents to extend – (“hearing shall not extend beyond 180 days from the date a complete application was filed, presuming that the Applicant has made timely submissions of materials in response to reasonable requests of the Board, except with the written consent of the applicant”)
- Clarifies that 30 day deadline for opening hearing starts upon receipt of “complete” application.
- *Allows ZBAs to stay the commencement of a hearing if three or more CP applications are concurrently undergoing hearings and the total number of housing units in those pending projects exceeds the numerical threshold for a “large project” (i.e. larger of 300 units or 2% of housing in communities with 7,500 total units as of latest Census, 250 units in communities with 5,001-7499 total units, 200 units in communities with 2,500-5000 total units, 150 units or 10% of housing in communities with less than 2,500 units).*

56.05 (4) - Scope of ZBA Hearing

- Adds language stating the principles ZBA should keep in mind in reviewing application. These are similar to HAC review principles – e.g. “consistency with local needs is the central principal.”
- Adds language forbidding ZBAs from addressing matters beyond its jurisdiction under the Act and “that lie solely within the authority of the Subsidizing Agency.”

56.05(5) (a) - Use of Consultants (New)

Adopts principles of Model Local Rules 4.01, allowing ZBAs to employ outside consultants to obtain advice and review services not available from municipal employees and to either work cooperatively with Applicant to select consultants or by majority vote require Applicant to pay a “reasonable fee” for cost of employing consultants. Adds language that:

- ZBAs should not impose “unreasonable or unnecessary” time or cost burdens on an Applicant
- Bans requiring Applicant to pay legal fees for general representation of ZBA or other local boards

56.05(5) (b-c) – Consultant Review Fees (New)

Codifies the principles of Model Local Rules 4.02 and 4.04 regarding review fees, including the type of work that can be charged to review fees and ways to ensure the review fee amounts are reasonable. (It doesn’t include Model Rule 4.03 regarding c.30B procurement for consultant services.)

“(b) A review fee may be imposed only if:

- (i) the work of the consultant consists of review of studies prepared on behalf of the Applicant, and not of independent studies on behalf of the Board,
- (ii) the work is in connection with the Applicant's specific Project, and
- (iii) all written results and reports are made part of the record before the Board.

A review fee may only be imposed in compliance with applicable law and the Board’s rules. All fees assessed pursuant to this section shall be reasonable in light of:

- (iv) the complexity of the proposed Project as a whole,
- (v) the complexity of particular technical issues,
- (vi) the number of housing units proposed,
- (vii) the size and character of the site,
- (viii) the projected construction costs, and
- (ix) fees charged for similar consultants and scopes of work in the area.

As a general rule, the Board may not assess any fee greater than the amount which might be appropriated from town or city funds to review a project of similar type and scale in the town or city.”

Also adds language consistent with Model Local Rule 4.05 and 4.07., that

- Requires that the ZBA rules set out procedures for inviting proposals by qualified outside consultants and for the deposit for review fees in a special municipal account
- Allows ZBAs to adopt rules that allow the ZBA to deny a comprehensive permit if the Applicant fails to pay a review fee within the stated time period
- Requires ZBAs to return any unspent excess to the Applicant upon issuance of the ZBA decision or withdrawal of the application. (This is faster than Model Local Rule, which requires repayment within 30 days of project completion or application withdrawal.)

56.05(5) (d) – Appeal of Consultant Selection

As required by state law (M.G.L., s. 53G), adds language allowing an applicant to administratively appeal the selection of a particular consultant to the Board of Selectmen or City Council, but only on the grounds that consultant has a conflict of interest or lacks “minimum, required qualifications.” Minimum qualifications are defined as “an educational degree in or related to the field at issue or three or more years of practice in the field at issue or a related field.” The appeal must be filed within 20 days of the selection. If the Board or Council does not act on the appeal within one month, the selection shall stand. The time limits for ZBA action on the CP application shall be extended by the duration of the appeal.

56.05(6) - Local Review of Financial Statements (New)

The new regulation adds language specifying circumstances under which ZBAs can review pro formas.

- ZBA can only review *after* they have completed all other consultant reviews, Board has proposed conditions which Applicant has indicated would make project uneconomic.
- ZBA can only request Applicant to provide pro forma that has been revised to reflect additional cost of meeting the proposed conditions and review shall be limited to impact of allegedly uneconomic condition(s) on project financials
- Specifies that ZBAs cannot review a pro forma in order to see if project would still be economic if number of units were reduced.
- Lists “financial issues that potentially lie within the allowable scope of the Board’s review”, including related party transactions, estimated rents and sale prices for market units, and land acquisition costs “all as described further in the Department’s guidelines”.

56.05 (7) - Zoning Waiver Requests (New)

The new regulation specifies that zoning waivers are only required from “as of right” requirements – not from special permit requirements. Waiver from subdivision requirements are also unnecessary if Applicant not seeking subdivision approval.

56.05(8)(c) ZBA Decision – Conditions (Revised)

The new regulation revises the prior regulation 31.08(2) in two ways:

- Adds language forbidding ZBAs from imposing any condition that “would deviate from the project eligibility requirements” of the Subsidizing Agency or that “would require the project to provide more Low or Moderate Income Housing units than the minimum threshold required by” DHCD guidelines.
- Specifies that ZBA cannot delay or deny an application on the grounds that a state or federal approval has not been obtained (ZBAs can condition approval on the securing on such approval)

§56.05(8)(d) - ZBA Decision – Uneconomic Conditions; Non-Residential Elements (New)

The new regulation adds new language, clarifying what constitutes an uneconomic condition, including

- Requiring applicant to pay for off-site public infrastructure or improvements if such are not usually imposed on unsubsidized housing, if they address a pre-existing condition affecting the municipality generally or if they are disproportionate to the impacts attributable to the project.
- Requiring reduction in number of units other than on basis of Local Concerns (health, safety, environment, design etc.) that directly result from impact of project on a particular site

But

- States that a condition shall NOT be considered uneconomic if it would “remove or modify” a “proposed nonresidential element of a Project [that] is not allowed by-right under applicable provisions of the current municipal zoning code.”

56.05(10) - Enforcement of Permit (Revised)

The regulation added a new limiting phrase regarding the types of plans local boards can require (compare to the prior language in 760 CMR 31.09):

- Limits types of plans local boards can require after CP presented, by requiring local boards to issue all necessary permits and approvals upon presentation of the CP and subsequent more detailed plans “*to the extent reasonably required relative to the local permit in question*”

56.05(12)(a) - Finality of Comprehensive Permit – Proceeding At Own Risk (New)

The new regulation retains the prior standard regarding when CPs become final (on date decision is filed in office of municipal clerk, if no appeal filed and otherwise on the date the last appeal is decided or disposed of). Adds language that

- allows Applicants to proceed at own risk during appeals (“if a Comprehensive Permit is issued by

the Board or the Committee and is subsequently subject to legal appeal, an Applicant may elect to proceed at risk with construction of the Project.”

56.05(12)(b) - Transfers of Comprehensive Permits (Revision)

The new regulation revises requirement in 31.08(5) for transfers of CPs, setting separate standards for transfers before and after project completion.

With regard to transfers prior to substantial completion of a project (or phase thereof), it

- adds requirement that Subsidizing Agency confirm the transferee meets Project Eligibility requirements
- drops requirement for prior written approval by ZBA or the HAC, substituting a requirement for “written notification” to ZBA or the HAC instead
- it also strengthens language stating that transfer shall not by itself constitute a “substantial change” by dropping prefatory “ordinarily” that was in the old regulation.

It also contains new language stating that after substantial completion, CP shall be deemed to run with the land.

56.05(12)(c) - Lapse of Permits (Revision)

The new regulation makes some revisions to the prior regulation regarding the requirement that CPs automatically lapse if construction has not begun within 3 years of date CP became final,

- adding “except for good cause” to automatic lapse requirement
- tolling the 3 year time period for time required to “pursue or await the determination on any appeal on any other state or federal permit or approval required for the Project”, and
- dropping language that allowed ZBA or the HAC to set expiration date of less than 3 years (it continues to allow them to set a later date for lapse of permits).

56.05(13) - ZBA Enforcement of Use Restrictions (New)

- Specifies that subsidizing agency is initial holder of use restriction with *sole* right and obligation to enforce it during initial term. Requires subsidizing agency to give CEO of municipality written notice of pending expiration of its “initial term of enforcement” at least 6 months in advance.
- After such expiration, “during the balance of the term of affordability”, the holder of the use restriction can be a local public or quasi-public entity, or other entity approved by DHCD. The holder must provide for monitoring and enforcement of the Use Restriction, either by doing it them selves or contracting out those functions. Monitors can charge reasonable fees as allowed under DHCD guidelines and must respond to reasonable municipal requests for information on the status of project monitoring and enforcement.

56.06 PROCEDURAL REGULATIONS FOR APPEALS TO THE HAC

This section governs how Appeals to the Housing Appeals Committee are to be conducted. The new regulation made only minor changes to the prior regulatory language [760 CMR 30.00].

- Intervenors Revises language, replacing general commentary with requirement that “any person shall be allowed to intervene to the extent that he or she would have standing as a person aggrieved to appeal the grant of a special permit in accordance with M.G.L. c.40A, §17”. Authorizes HAC presiding officer to require consolidation of multiple intervenors with substantially similar interests. [56.06(2)(b)]
- Required Materials for Initial Pleading - adds initial CP application to ZBA to list [56.06(4)(a)]
- Answers to initial pleadings, revises, dropping certain language regarding treatment of answer (i.e. allegations not specifically admitted or deemed denied, new matters in answer are deemed denied, limits on what may be contained in answer). [56.06(4)(c)]
- Amendments to Pleading - revises language making leave to file entirely at discretion of HAC presiding officer. Drops phrase in prior regulation that states “leave to amend shall be freely given

as justice requires”.

- Fees - replaces specific language regarding filing fee amounts and minimum fees with language setting fee as “amount to be defined by standing order” of the HAC. [56.06(4)(f)]
- Preliminary Motions – adds motion to require review of substantial change in Project Eligibility to motions that must be filed within 30 days after conference of counsel, unless presiding officer orders otherwise. [56.06(5)(b)]
- Deadlines for filing motions of opposition to motions for summary decision or to motions for directed decision – shortens timeframes, requiring filing of opposition/opposing affidavits within 30 days (vs. 45), and eliminates requirement to file notice of intention first. [56.06(5)(d-e)]
- Conduct of Hearing – revises notice requirement, dropping requirement for minimum 7 day notice.
- Pre-Hearing Order - adds “list of contested exhibits, if any” to items that can be included [56.06(7)(d)(3)]
- Mediation (new) Adds language allowing the HAC presiding officer to order parties and interested persons to mediation screening or to participate in mediation through HAC-approved dispute resolution program. [56.06(7)(d)(5)]
- Sanctions – Presiding Officer’s powers to impose sanctions for failure to comply with a rule or order revised to allowing sanctioning of “interested persons” as well as parties to the appeal and allowed sanctions expanded to include “exclusion from the proceeding”. [56.06(12)]

56.07 CRITERIA FOR HAC DECISIONS

The new regulation makes minor revisions to prior regulation (760 CMR 31.00).

- Burdens of Proof (Applicant’s Case) – adds language specifying that applicant’s burden of proving “project eligibility” (previously “jurisdictional requirements”) is met conclusively by Subsidizing Agency’s determination of project eligibility except in event of substantial change. [redetermination is also solely province of Subsidizing Agency] [56.07 (2)(a)]
- Evidence – Rebuttable and Irrebuttable Presumptions – revises. Formerly rebuttable findings regarding fundability, site control, housing unit minimum, statutory minima, are now irrebuttable as long as Subsidizing Agency determined Project Eligibility or DHCD made findings as part of process of reviewing proposed denials upfront. [56.07(3)(a)]
- Balancing - when regional housing needs outweighs local concerns Language regarding weight of housing need now gives more weight to regional need, being revised from “commensurate with the proportion of the city or town’s population that consists of low income persons [or regional need alone if few or no low income residents in municipality]” to “commensurate with the regional need for Low or Moderate Income Housing, considered with the proportion of the municipality’s population that consists of Low Income Persons” [56.07(3)(b)]
- Evidence to be heard on Local Concerns
 - language updated - site and building design evidence applied to proposed Project (rather than proposed “housing”) [56.07(3)(e)]
 - evidence to be heard regarding municipal and regional planning expanded to add “the applicable regional policy plan” (as opposed to just municipal plan)
- Evidence Not To Be Heard – expands lists of items not to be considered except for good cause, adding matters relating to Use Restrictions, Affirmative Fair Marketing and the percentage of Low and Moderate Income Housing units within a Project. Re-iterates the matters relating to project eligibility and financial feasibility are sole province of subsidizing agency, except with regard to discussion of uneconomic conditions and substantial changes in project. [56.07(3)(h)]
- Constructive Grants of Permit – adds violation of 180-day deadline for terminating ZBA hearing as grounds for determining permit has been granted constructively [56.07(5)(d)].
- HAC Enforcement Powers – adds language allowing financial sanctions: “If a party fails to comply with an order issued by the Committee, [the HAC] may impose appropriate sanctions, including the imposition of costs. [56.07(6)(d)]

56.08 - AMENDMENTS, EFFECTIVE DATE, WAIVERS, TRANSITION RULES

56.08 (2) - Waivers

HAC is already authorized to waive many regulations (in the event of an appeal before it) if strict compliance would result in undue hardship or be inconsistent with purposes of Act. The new regulation gives DHCD the same authority as well. It also updates list of regulations that cannot be waived (all definitions, all of §56.03 – which covers appeal proof grounds, DHCD review, subsidized housing inventory, planned production, large projects, statutory minima, etc. and HAC decision criteria at 56.07(2)(c)(e), 56.07 (3)(b) and 56.07(5)(a)).

56.08 (3) - Transition Rules

As proposed, the new regulations will apply to any project that files a CP application after the effective date of the new regulations (except that new requirements for Project Eligibility determination will not apply to projects that already received a determination as of the effective date of the new regulations).

In addition, as proposed, all elements of new regulations would apply to any project filed with the ZBA prior to the effective date of the new regulations, except the 180 day ZBA hearing deadline, the ZBA right to defer consideration of an application if already has 3 or more before it, the requirement for upfront DHCD review of ZBA intended denials and new Project Eligibility requirements.