

**AND YOU THOUGHT YOU WERE DONE WHEN YOU ISSUED THE PERMIT
Everything You Always Wanted To Know About MassHousing's Post-Permit
Implementation Of The New England Fund Guidelines...***

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I. Background

In February 2003, the Department of Housing and Community Development issued long awaited "Guidelines for Housing Programs in Which Funding is Provided Through a Non-Governmental Entity" (the "Guidelines"). Regulatory changes in late calendar year 2002 set the stage for the issuance of these Guidelines. Essentially, the Guidelines create a system of public administration for the implementation of the Housing Appeal Committee's decision in Stuborn concluding that for purposes of Chapter 40B, the Federal Home Loan Bank of Boston is a subsidy agency authorized legislatively that performs a governmental function and which is supervised by a federal agency (the Federal Housing Finance Board).

These 2002 regulations and the Guidelines which followed grew directly out of the aftermath of the Stuborn decision. In the immediate post-Stuborn era, the new-found ability of member banks to issue 40B site approval letters led to accusations that a "wild west" atmosphere prevailed. DHCD issued a call for greater supervision of the site approval letter process by the FHLBB. The FHLBB declined, and the controversy ultimately ended in the suspension of the New England Fund program. Legislative proposals to amend, suspend, dissect or destroy Chapter 40B were playing out against the backdrop of this administrative controversy.

In the midst of this tumult, MassHousing agreed to serve as a "Project Administrator" of the Chapter 40B approval process. Under the Guidelines, "the role of the project administrator is to facilitate and guide projects developed in conjunction with non-governmental entities. ... [T]he role of the project administrator is not intended to supercede the jurisdiction of the Housing Appeals Committee or be a substitute for decisions more appropriately made as part of a negotiation between a developer and a municipality. It is intended rather that the project administrator facilitate a process that benefits and serves the needs of both the municipality and the developer" (emphasis added).

In the nearly 20 months since the formulation of the Guidelines, the project administration process has slowly gathered its "sea legs" and begun to move ahead. Developers will undoubtedly contend the process is too slow and municipalities may suggest that the west has not yet been won.

What follows is intended to be a good faith effort to answer some of the most frequently asked questions about the Guidelines and the implementation of the Guidelines by MassHousing, currently the only designated Project Administrator as of the date of these materials.

* but weren't sure you wanted to ask

To the extent that the responses indicate an explicit policy of MassHousing or of DHCD, the source of that policy is indicated. In other instances, the Guidelines may represent a programmatic approach by MassHousing in processing applications and in dealing with recurring issues. In still other cases, these remarks may represent the good faith efforts of the presenters to assist both developers and municipalities in anticipating MassHousing's initial responses to frequently asked questions. Accordingly, these materials should not be cited as authority for the views outlined herein, and the rapidly changing nature of law and policy in this area compels that current independent verification be obtained for all propositions contained herein.

II. **Frequently Asked Questions About Site Approval**

The purpose of the site approval is not to supplant the full discussion of issues of local concern in the public hearing process before the ZBA (whether or not these issues are specifically included in the site approval letter). The expert advice and peer reviews which a town can obtain during a public hearing, and which are not possible or appropriate for MassHousing to oversee, allow for full and open evaluation of issues.

Prior to an application for site approval, MassHousing encourages developers to meet early and often with local officials. In some cases we have seen great strides achieved in these preliminary meetings particularly where a local housing partnership is involved. In others, such meetings are impractical due to the recalcitrance of one or both of the two parties. In any event, after a site approval application is filed MassHousing will always solicit municipal comment based on a 30-day timeframe which has been extended in particularly meritorious cases.

In many instances, local officials include comment letters from a number of local boards and concerned citizens. Because the Guidelines "are intended to establish a process to ensure a fair and open negotiation, and quality of construction," important municipal comments are typically identified as an item that the developer must be prepared to address in the hearing that will follow. In addition, state issues beyond the scope of Chapter 40B's "local override," such as state wetlands law requirements, are specifically identified as being beyond the realm of the site approval letter process, but instead are specifically identified as having an independent vitality.

What are the essential findings for the issuance of a site approval letter?

In order for a site approval letter to issue, the following core findings are required:

- a. The proposed project appears generally eligible under the requirements of the housing program, subject to final review of eligibility and to final approval (see below); and
- b. The proposed housing design and land use plan are generally appropriate for the site and site location; and
- c. The proposed project appears financially feasible within the housing market in which it will be situated (based on comparable sales figures); and

- d. An initial pro-forma has been reviewed, and the project appears financially feasible on the basis of estimated development costs; and
- e. The proposed financing is reasonable, and profit is properly limited; and
- f. The developer is financially responsible and meeting the general eligibility standards of the program(s).

These are the same findings that must be made at the final approval stage for the project as permitted. Final approval is required for all projects for which site approval was issued after July 22, 2002.

How much density is too much for purposes of the site approval review process?

MassHousing currently adheres to a guideline, in home ownership projects, of eight units per acre or four times the allowable zoning in the vicinity of the site, whichever is greater. Rental project density is generally greater. I would emphasize that this guideline is truly a guideline, and certain sites, for example transit-oriented development sites, merit densities far in excess of this guideline. In a number of jurisdictions, such as California, additional subsidy for transit-oriented development is only available if densities exceed 20 units per acre. In any event, the guidelines will continue to guide, but not be a hard and fast determinate of density. Other important factors to be considered will certainly include municipal reaction and quality of design and, of course, whether the proposal constitutes adaptive reuse or construction on previously undeveloped land.

What are the determining factors when an application for site approval is denied?

It is impossible to determine grounds for denial other than on a case-by-case basis. In order to provide some form of guidance, however, two recent denials are illustrative. In the case of the first denial, the proposal was located in the midst of an industrially zoned and industrially developed area. In the second, the site exhibited visible wetlands and flooding challenges, was demonstrably inconsistent with the surrounding area, and was also inconsistent with the goals of the town's housing master plan. While site topography and site conditions are major factors in any determination to deny an application, each site must be viewed as a whole and be carefully balanced. The peculiarities of each site are the fundamental reason for requiring an on-site visit.

What is MassHousing's approach to the five-acre minimum lot size rule for elderly developments under M.G.L. c. 151B?

This area has generated a surprisingly large amount of controversy and is the subject of ongoing discussions between potential developers and the MCAD. For purposes of an application filed for MassHousing financing, MassHousing takes the position that, under our enabling statute, elderly housing encompasses housing for "older persons" (individuals older than 55 years of age) meeting the requirements of federal fair housing laws and, therefore, a MassHousing-financed 40B project with age restrictions in compliance with federal fair housing laws would constitute a state-aided housing development for the elderly, not subject to the five-acre minimum lot size requirement. In addition, although MassHousing's status as project administrator under the

Guidelines is not specifically authorized in our statute, in DHCD's opinion the definition of elderly housing in the MassHousing enabling act is properly applied by MassHousing to determine whether housing, which is being aided by federal funds through NEF and for which MassHousing is project administrator, is elderly housing under Chapter 151B. The final interpretation of M.G.L. c. 151B is ultimately a question for MCAD.

May a municipality sue to enjoin MassHousing from issuing a site approval letter or challenge the validity of a site approval letter that has already been issued?

As is the case with a number of issues regarding the implementation of the Guidelines, appellate courts in the Commonwealth have not spoken to this issue. However, on July 27, 2004, Judge Nickerson of the Superior Court issued a Memorandum of Decision and Order indicating that the Town of Norwell's petition for certiorari seeking the review of a project eligibility letter by MassHousing. Judge Nickerson indicated: "MHFA is not adjudicatory body which has an integral role in the Chapter 40B permitting process but instead is a lender."

The court also determined that because MassHousing was not an adjudicatory agency, certiorari was not appropriate because a judicial or quasi-judicial proceeding had not taken place. In addition, the court found that the other two prongs required for certiorari (lack of all other reasonably adequate remedies and substantial injury or injustice arising from the proceeding) were also lacking due to the availability of appeals to the HAC and/or the Superior Court and the absence of a substantial wrong or injustice. In addition, declaratory relief was not available to the town because the facts at hand presented "no actual controversy."

III. Frequently Asked Questions About Final Approval

As noted above, prior to issuance of a building permit for a comprehensive permit project, final approval is required by the subsidizing agency for projects for which a site approval was issued after July 22, 2002. The Guidelines require the developer to submit to the Project Administrator updated plans and a signed regulatory agreement "in the form prescribed by the Project Administrator which shall ensure compliance with program requirements and the requirements of these guidelines."

Procedurally, in order to satisfy the above-quoted requirement without unduly delaying a project after the comprehensive permit was issued, MassHousing initially conditioned final approval on the town's execution of the form Regulatory Agreement which included a conflict provision stating that the Regulatory Agreement controlled in the event of any inconsistency with the comprehensive permit. Recently, in lieu of the town's execution of the Regulatory Agreement, MassHousing has required as a condition to final approval that the town modify specific conditions of the comprehensive permit to conform to the program requirements.

In reviewing the comprehensive permit as issued, MassHousing seeks to strike a balance between protecting the legitimate interests of the municipality in preserving affordable housing and not unduly restricting the rights of the developer, or even more importantly the future homeowners or their ability to obtain financing. That being said, we realize that the ZBA and developer are free to negotiate additional terms, such as increased affordability. In general, we

have no objection to additional terms as long as they do not conflict with the requirements of the statute, regulations and Guidelines and as long as they are separately enforced.

The following are common conditions in comprehensive permits that are inconsistent with the program regulatory requirements and MassHousing's current position on these conditions.

Condition: The term of affordability is described as "in perpetuity" or for an absolute number of years.

MassHousing position: The Supreme Judicial Court decided in Zoning Board of Appeals of Wellesley, et al. v. Ardemore Apartments Limited Partnership, et al., 436 Mass. 811 (2002), in a case involving a rental project, that if a comprehensive permit is silent as to the term of affordability then the affordability restriction continues for so long as the project is noncompliant with local zoning. The application of the Ardemore decision to the home ownership world, particularly the condominium home ownership area, presents a significant source of disagreement, one that perhaps could have been anticipated. At present, secondary mortgage market financing requirements prohibit affordability restrictions from surviving a foreclosure of an individual unit. Based upon the Housing Appeals Committee's decision in Delphic Associates, LLC v. Hudson Board of Appeals (No. 02-11, December 23, 2002), MassHousing currently believes that it is an uneconomic condition for a municipality to require, in a comprehensive permit, that affordability restrictions exist in perpetuity irrespective of foreclosure. MassHousing continues to work with both the local organizations and secondary mortgage market entities in an effort to develop new approaches to this problem. In addition, MassHousing believes that the provision of enhanced notice should assist in making losses of units to foreclosure less likely.

In home ownership projects, MassHousing requires the term of affordability to be explicitly subject to the limitations set forth in the MassHousing form of deed rider. The deed rider allows affordability to lapse in two situations. The first is in the event of a foreclosure by an institutional mortgagee holding a first priority mortgage on the affordable unit, for the reasons stated above. The second is in the event an income eligible buyer cannot be found upon resale of an affordable unit. The second situation arises only after the monitoring agent, the town and the buyer fail to locate an eligible buyer and the town chooses not to purchase the unit. We have objected to a requirement that, after these procedures are exhausted, the affordable unit be sold at the Maximum Resale (below market) Price to anyone but subject to the affordability restrictions because (i) the established procedures adequately protect the town; (ii) the town receives the "windfall" amount (the difference between the market price and the Maximum Resale Price) for its affordable housing fund; and (iii) the unit, not being occupied an income eligible buyer, would not constitute affordable housing countable on the town's 40B inventory.

Condition: Local preference is stated as an absolute percentage of the affordable units.

MassHousing position: Under the Guidelines, local preference is allowed, but must be subject to compliance with state and federal fair housing laws. We consider compliance with the lottery procedure set forth in the Guidelines to be DHCD policy on how to comply with fair housing requirements.

For rental projects involving tax credits, tax exempt bonds or HUD/HFA insurance, we require the comprehensive permit to include the following: “The Owner shall implement the Local Preference to the extent permitted under applicable legal requirements, the requirements of applicable subsidy programs, and the requirements set forth below and shall maintain a waiting list of qualified Local residents and their families for such preferential admissions.

Notwithstanding anything to the contrary in the foregoing, the units to be rented to low-income persons under the federal Low-Income Tax Credit program, the federal Tax-Exempt Bond program, and HUD/HFA Risk Sharing program shall be for the “use of the general public” within the meaning of Treasury Regulations Section 1.42-9 or any successor provision. As provided therein, such units must be rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (“HUD”) (24 CFR subtitle A and chapters I through XX). See HUD Handbook 4350.3 (or its successor). To the extent that any such legal restrictions shall allow rental in accordance with the Local Preference set forth above, the Owner shall follow procedures for implementing such preference applicable to developments receiving a comprehensive permit as promulgated from time to time by the Massachusetts Department of Housing and Community Development. In renting such units, the Owner may accept persons who are directly referred by the local Housing Authority and who meet the leased housing wait list eligibility criteria for Section 8 project based rental assistance vouchers, and who otherwise comply with the requirements for admission as set forth herein.” Practically, this means that a local preference cannot be implemented in a rental development without HUD’s consent.

Condition: “Total Development Costs” is often negotiated to be lower than what the MassHousing policy would allow (or a “contribution” to the town’s affordable housing fund is added as a condition).

MassHousing position: Section 12 of the Guidelines explicitly describes how to calculate profit and limited dividends; the Guidelines and the HAC regulations also defer to the policies of the Project Administrator (or subsidizing agency) for determination of what constitutes a “reasonable return” for a 40B developer to be considered a “limited dividend” organization.

It has been MassHousing’s longstanding policy to allow reasonable, arm’s length profits to related party contractors in the calculation of Total Development Costs, and not to count these profits as part of the profit limitation imposed on the developer. Essentially, MassHousing views the provision of related party services as being separate from the allowable developer profit distribution. Developer-related entities should be compensated for providing necessary development services. Reasonable profit and fees (consistent with industry standards) may be earned by entities involved in, for example, marketing and construction activities. While project management expenses (overhead) are recognizable, a separate project management fee would be inappropriate.

With respect to land value (an essential element of both TDC for home ownership projects and initial equity for rental projects), an independent appraisal is required under the Guidelines in order to determine the allowable acquisition cost. Consistent with MassHousing policy, “allowable acquisition costs shall not be unreasonably greater than the current appraised fair

market value under existing zoning without a comprehensive permit in place.” At the outset, MassHousing was only requiring appraisals when an issue existed with respect to land valuation that was evident at the outset of the site approval process. Experience has shown the additional expense of the appraisal will tend to answer more questions and shorten the process. However, under MassHousing’s land acquisition value policy (applicable to 40B and non-40B projects alike), the maximum permissible acquisition value which can be included in total development costs is the LESSER of the as-is appraised value or the purchase price of the land and improvements in the last arm’s length transaction, if any, within the last three years, plus certain improvements and carrying costs since acquisition.

Condition: Income eligibility is often negotiated to be lower than the required 80% for all or a portion of the affordable units.

Condition: The number of affordable units is often negotiated to be greater than the required 25% of the total units in the development.

Condition: The Maximum Initial Sale Price is often negotiated to be lower than what the MassHousing/DHCD pricing policy would allow (based on HUD median income of household size of appropriately sized household for the size of the unit).

MassHousing position: We have not objected to these conditions because they increase affordability without compromising the rights of the affordable buyers. We have, however, also taken the position that our responsibility as Project Administrator is only to ensure that the minimum program requirements are met, so that, for example, if an additional number of moderate income units is negotiated, the town will need to make its own arrangements to regulate such units.

Condition: MassHousing financing is required (or New England Fund is specifically rejected as a financing source).

MassHousing position: Under Stuborn, the New England Fund is an appropriate source of financing for comprehensive permit projects. MassHousing financing is not required. At present the Guidelines, which are intended to implement the Stuborn decision with an appreciable amount of public oversight, allow only the use of New England Fund financing when financing is provided through a non-governmental entity.

Condition: Condo fees for affordable units are based on the unrestricted market value of the unit.

MassHousing position: The condominium documents should state that the percentage interest of each unit should be based on the restricted value of the unit so long as the restrictions are in place. In the long run, the lower percentage share will tend to preserve affordability of the unit by making it easier for the owner to pay living expenses and avoid foreclosure. The original condominium documents can state that, in the event the restrictions no longer apply, the percentage interests will automatically change (much like a contemplated change to percentage interest in the event of the addition of a subsequent phase of the condominium)

IV. **Who Sets The Policy?**

MassHousing is serving as DHCD's sanctioned Project Administrator. MassHousing will follow specific policy direction that is set forth in the Guidelines. To the extent that the Guidelines are "silent on a particular matter, the policy of the project administrator will prevail." If a relevant policy of a project administrator changes, the project administrator needs to submit the proposed policy change to DHCD for its review and approval, and a new policy will not take effect under the Guidelines until DHCD has issued that approval.

One of the most concrete examples of policy "mismatch" in the early months of the Guidelines came from differing approaches to calculating the initial maximum sale price for affordable home ownership units and determining the "appropriate-sized household" for the unit. This distinction was of critical importance in administering lotteries and determining who would be income eligible for a lottery. As this discrepancy was identified, DHCD and MassHousing discussed and reviewed the policy in question and MassHousing has agreed to follow DHCD's policy approach. In the rental context, other subsidy programs commonly require consideration of household size in determining eligibility for a particular unit.