



Commonwealth of Massachusetts
**DEPARTMENT OF HOUSING &
COMMUNITY DEVELOPMENT**

Deval L. Patrick, Governor ♦ Timothy P. Murray, Lt. Governor ♦ Aaron Gornstein, Undersecretary

**Summary of Recent Amendments to the Ch.40B Regulation
(April 30, 2012)**

DHCD has finalized the process commenced in 2009 to make several amendments to the ch.40B regulations. These changes address the 2008 SJC decision in *Woburn* and several other cost certification matters.

"Reasonable Return": The draft regulatory change by DHCD considered in the November 2009 proposed 2 changes to the definition of "Reasonable Return."

- **Ownership & Continuing Care:** DHCD proposed to increase the minimum return permitted for ownership developments. The final regulation re-affirms the existing policy of defining reasonable return for such projects as not less than 15% and not more than 20% return.
- **Woburn:** The draft regulation mirrored the guidance implemented by DHCD after the *Woburn* decision, which created a rebuttable presumption that a project was uneconomic if a local zoning board reduced the number of units in a project by more than 5%. The burden of proof in those circumstances would shift to the zoning board to show a developer could still achieve a reasonable return. The final regulation takes a different approach, focused on a new definition of "Reasonable Return". The regulation defines a reasonable return for four situations: a general standard for ownership projects or continuing care retirement communities, as described above; a general standard for rental projects; a standard for cases in which a developer proposes a return from the outset that is lower than the applicable general standard; and a standard for cases in which the zoning board requires a decrease in the number of units without linking it to a valid local concern.

With respect to In the fourth standard, the *Woburn* situation, the regulation provides that if the conditions imposed that lead to unit reduction are not related to a "valid...Local Concern", then the profit calculated prior to the imposition of the conditions is the measure of reasonable return.

Miscellaneous Cost Certification Matters: The amendments incorporate several matters of existing practice and/or policy into the regulations.

- DHCD will maintain a database that tracks the status of all 40B projects with respect to compliance with cost certification submissions.
- Cost certifications will be submitted "under the pains and penalties of perjury"
- Municipalities can review and comment on cost certifications and the Subsidizing Agency for the project shall consider any inaccuracies in the cost certification identified by the municipality during its review.

In addition, DHCD is amending its Guidelines to delete the numerical density ranges found in Part IV, as these were a distraction from the general import of the design discussion.