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MEMORANDUM

To: Board of Selectmen
Town Manager/Administrator
Planning Board
Board of Appeals
Building Commissioner

From: Barbara J. Saint André

Date: April 18, 2008

Re: New State Regulations Governing Comprehensive Permits

Effective February 22, 2008, the Department of Housing and Community Development (DHCD) issued new regulations governing comprehensive permits and the Local Initiative Program. They are found at 760 CMR 56.00. The regulations contain sweeping changes from the prior regulations. Despite many thoughtful and extensive comments from municipal groups such as the Massachusetts Municipal Association objecting to the continued erosion of local home rule by DHCD and the Housing Appeals Committee, and public statements by DHCD that the new regulations are intended to help address complaints raised by cities and towns under the comprehensive permit process, the regulations contain numerous instances where the home rule rights of cities and towns are further eroded.

A complete review of all of the changes made in the new regulations is beyond the scope of this memorandum. It will highlight many of the changes that most directly affect cities and towns, particularly the extensive new sections that dictate how local boards of appeal must conduct their public hearings on comprehensive permit applications.

In addition, DHCD on March 26, 2008 issued new Guidelines for comprehensive permit projects and the Subsidized Housing Inventory. A review of the Guidelines is beyond the scope of this memorandum, but they should also be reviewed for a full understanding of the numerous changes effectuated by the Regulations.

I. 56.02 DEFINITIONS

The Regulations amend many definitions and add many more. Without exhaustively reviewing all of the changes, here is a summary of some of the more significant changes. Refer to the Regulations for the full text of these definitions.

Housing Production Plan (new) – This refers to an affordable housing plan adopted by the city or town and approved by DHCD.

Income eligible household (new) – 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 DHCD in its Guidelines.

Limited dividend organization (revised) – Allows use of subsidies from a Subsidizing Agency, no longer limited to state and federal subsidies.

Local requirements and regulations (revised) – Limits local legislative, regulatory, or other actions that may be considered by the Board to those in effect on the date of the application to the Board.

Local concern (revised) – Adds “municipal and regional planning” to list of local concerns that the Board may consider.

“Low or moderate income housing” (revised) – Eliminated a very long and confusing definition. The new definition means 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 by federal or state statute or regulation. The new definition adds that, if the applicable statute or regulation does not define low or moderate income housing, it will be defined as housing restricted to Income Eligible Households.

Project (new) – Allows a development to include not just affordable housing, but also ancillary commercial, institutional, or other non-residential uses, so long as they are designed to “complement the primary residential use” and “help foster vibrant, workable, livable, and attractive neighborhoods consistent with applicable local land use plans”. It is not clear what “local land use plans” refers to. The recent SJC case (Jepson v. Zoning Board of Appeals of Ipswich, 450 Mass. 81 (2007)) which allowed ancillary commercial use in a 40B project required that the commercial use be an allowed use in the applicable Zoning District. The Regulations do not contain this requirement.

SHI Eligible Housing (new) – Defines what units will be included in the SHI, which determines if a municipality meets its 10% goal. Includes any unit of Low and Moderate Income Housing, other units in a Project as defined by the Guidelines, and other units allowed by the Guidelines provided it is subject to a Use Restriction and Affirmative Fair Marketing Plan.

Subsidy (revised) – Broadens the definition of what is considered a subsidy to include such “subsidies” as indirect financial assistance through insurance, guarantees, tax relief or other means; in-kind assistance, supportive services. But leased housing, state rental assistance or housing allowance programs are not subsidies.

Subsidizing agency (revised) – Allows Subsidizing Agencies that are not state agencies if DHCD appoints a state agency to administer some or all of the Subsidizing Agency

responsibilities. Even more important, provides that the Subsidizing Agency is responsible for enforcing compliance with Regulations and Guidelines relative to Affirmative Fair Marketing Plan, Cost Examination, Project Eligibility, Subsidies, and Use Restrictions. This is part of the DHCD determination to prevent cities and towns from exercising any role in these issues; municipalities are supposed to rely on the Subsidizing Agencies, a process which has not been a great success so far from the point of view of many cities and towns.

II. 56.03: METHODS TO MEASURE PROGRESS TOWARD LOCAL AFFORDABLE HOUSING GOALS.

This section brings together from various places in the old regulations, with substantial modifications, the full range of conditions that, if met, can allow a board of appeals to deny or condition a comprehensive permit as inconsistent with local needs.

A decision by a ZBA to deny a comprehensive permit, or grant with conditions, shall be upheld if one or more of the following grounds has been met. Note that the new regulations require that the grounds must have been met as of the date of the project application, not the date of the Board's decision, as under prior regulations, despite the two recent Supreme Judicial Court decisions upholding the date of the ZBA decision as an appropriate time at which to determine if a city or town has met its 10% affordable housing goal. 56.03(1). This is one of many examples of where DHCD is attempting to extend its jurisdiction to cities and towns even after they have reached their minimum affordable housing goal established by chapter 40B. The grounds on which the Board may deny or condition a comprehensive permit, and the Board's decision will be beyond review by the HAC, are:

- The municipality has achieved one or more of the statutory minima (10% of housing units are affordable, or 1.5% of land area zoned for commercial, industrial, and residential use is used as the site of affordable housing);
- DHCD has certified the municipality's compliance with the goals of its approved Housing Production Plan;
- the municipality has made recent progress toward the statutory minima under 56.03(5);
- the project is a large project as defined by 56.03(6);
- a related application has previously been received as set forth in 56.03(7).

a. 56.03(2) Subsidized Housing Inventory (SHI)

Section 56.03(2) is a new addition that incorporates the DHCD's procedures for counting and maintaining the SHI. Under subsection (a), the DHCD has the broad discretion to include in the SHI affordable units developed under not only c. 40B, but any affordable unit so long as such units are subject to a use restriction and an affirmative fair marketing plan.

Subsection (b) details when an affordable unit is eligible to be counted on the SHI. Units requiring a comprehensive permit, zoning approval under chapter 40A or completion of plan review under chapter 40R will be counted on the date the permit or approval is filed with the

municipal clerk if no appeal is filed, or on the date the last appeal is fully resolved. Additionally, units will be counted when a building permit or occupancy permit is issued. If a unit does not require permit or zoning approval, occupancy by income eligible household will make the unit count toward the SHI.

Subsection (c) sets forth lapse conditions that disqualify units for the SHI. Units will be ineligible if:

- If more than one year lapsed between issuance of comprehensive permit, zoning approval, or plan review and issuance of building permit, units ineligible until building permit;
- If more than 18 months lapse between issuance of building permit and issuance of certificate of occupancy, units ineligible until certificate of occupancy;
- If either comprehensive permit or zoning approval lapse permanently, units permanently ineligible.

Comprehensive or zoning approval permits for projects to be constructed in phases will not lapse provided that each phase has at least 150 units, each phase contains the same proportion of affordable units as the overall project, and the average time period between the start of each phase does not exceed 15 months.

Use restrictions under subsection (c) may be enforced by an agency of the municipality for units not subject to a comprehensive permit. Otherwise, use restrictions must be enforced by the holder of the use restriction. Initially, that will be the subsidizing agency during the initial term of the restriction. After the initial term, the holder may be a local public or quasi-public agency or other entity approved by DHCD. 56.05(3). When a use restriction expires, the unit will not count toward the SHI, unless a new use restriction has been imposed.

Subsections (d) and (e) require at least biennial updating of the SHI by DHCD and requires municipalities to submit certified information on the affordable units every two years.

b. 56.03(8) Procedure for Board Decision

If the Board of Appeals intends to deny an application or impose conditions based on having met any of the statutory criteria above, the Board must follow the new procedures set forth in Section 56.03(8). The steps of the procedure are as follows:

1. ZBA must provide written notice to the applicant and DHCD within 15 days of the opening of its public hearing that it considers a denial of the permit or imposition of conditions would be consistent with local needs, the grounds that it believes has been met, and the factual basis for its position, including any documentation.
2. Comprehensive permit applicants that wish to contest the Board's finding must provide written notice to DHCD, with a copy to the Board, within 15 days of receipt of the ZBA notice, providing any supporting documentation.

3. DHCD will review materials from ZBA and applicant within 30 days of receipt of appeal and issue a binding decision. If DHCD fails to issue a decision within 30 days, it will be deemed a constructive approval of the ZBA position.
4. Either the ZBA or Applicant can appeal the DHCD decision to the HAC within 20 days.

The new requirement that the Board's public hearing terminate within 180 days of the date of the opening of the public hearing is tolled during this process. If the ZBA does not follow this procedure, it waives its right to deny a permit on any of the grounds set forth in Section 56.03(a). The ZBA has the burden of proving they have met requirements 56.03(1) for denying or conditioning permit.

II. 56.04: Project Eligibility; Other Responsibilities of Subsidizing Agency

This section brings together and clarifies provisions relating to the statutory responsibility of the subsidizing agency for the project eligibility determination, final approval, and cost examination. It strips the local boards of any authority to review programmatic issues such as marketability, eligibility for affordable units, and reviewing developer profits.

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

Subsection (1)-(4) revises the old 31.01(1)-(4), and explains the procedure for an applicant to receive a determination of project eligibility from a subsidizing agency before the applicant can file a comprehensive permit application with the ZBA or file an appeal with the HAC. The notable changes to these subsections are as follows:

- Expands the items a subsidizing agency must consider when determining appropriateness of site for residential development. Subsidizing agency must take into consideration "information provided by the municipality or other parties regarding actions previously taken to meet affordable housing needs, such as inclusionary zoning, multifamily district adopted under c. 40A, and overlay districts adopted under c. 40R." 56.04(4).
- When subsidizing agency is determining whether conceptual design is appropriate, new considerations are imposed including building massing, topography, environmental resources, and integration into existing development patterns. 56.04(4).
- Subsidizing agency review of pro forma must find that land valuation is consistent with DHCD guidelines and that the project is consistent with DHCD cost examination guidelines and limitations on profits and distributions. 56.04(4).
- Requires that Local Initiative Project site approval applications must be submitted by the Chief Executive Officer of the city or town. 56.04(2).
- Allows local boards to attend the site visit conducted during the 30 day review period. 56.04(3). The regulations do not explicitly require the subsidizing agency to notify the city or town as to when the site visit is to take place. When the

municipality is notified of the 30 day review period, if there is no notice as to the date of the site visit, you should inquire of the subsidizing agency.

b. 56.04(5) Impact of Substantial Changes on Determination of Project Eligibility

Subsection (5) is a new procedural addition regarding proposed substantial changes for projects that have received Project Eligibility. The procedural steps for substantial changes to projects that have received Project Eligibility are as follows:

1. Applicant notifies subsidizing agency in writing of proposed substantial changes, with a copy to DHCD, the Chief Executive Officer of the city or town, and the board of appeals.
2. Subsidizing agency has 15 days to determine if the changes are substantial with regard to project eligibility requirements.
3. If changes are substantial, subsidizing agency “shall ordinarily” defer any review (unless municipal CEO or applicant requests otherwise) until the ZBA has issued a comprehensive permit, or denied the application and applicant has filed appeal. At that point subsidizing agency will reaffirm, amend, or deny its determination of project eligibility.

c. 56.04(6) Conclusive Nature of Project Eligibility Determination

Subsection (6) is a revision of the old section 31.01(5). The old regulation allowed the ZBA, the HAC, or a party to challenge the applicant’s adherence to the project eligibility requirements *on any grounds*. The new regulation allows the ZBA, at any time, or the HAC, during an appeal, to challenge applicant’s adherence to the project eligibility requirements *only upon grounds of substantial change*.

The new language 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).” Any challenge will be decided by the subsidizing agency under 56.04(5), and the ZBA hearing or HAC appeal may be stayed until such challenge is decided.

d. 56.04(7) Final Approval of Project Eligibility

Subsection (7) is a revision of the old section 31.09(3). Following the issuance of comprehensive permit, subsidizing agency shall issue final approval of the project to the applicant. The new regulation adds two additional minimum requirements to the subsidizing agency’s issuance of final written approval of project eligibility. Now, final written approval must:

- Reaffirm each of the project eligibility requirements
- Confirm that the proposed use restriction is in a form approved by DHCD (new)

- Verify that the applicant has committed to comply with cost examination requirements and that the subsidizing agency has secured “adequate financial surety” to insure completion of the cost of examination (new)

e. 56.04(8) Cost Examination

Subsection (8) incorporates, with new additions, provisions formerly found in section 45.04(9)-(10). This subsection only applies to developers that are Limited Dividend Organizations. In addition, the profit limitation of “reasonable return” is to be defined by the subsidizing agency in accordance with DHCD guidelines. Limited Dividend Organizations are subject to the following limitations:

- With respect to rental projects and homeownership projects, profits are limited to reasonable return relative to total development cost. Upon initial occupancy of rental units, distributions shall not exceed a reasonable return relative to developer’s equity in the project.
- Applicant or subsequent developer must submit detailed financial statement prepared by a certified public accountant to the subsidizing agency in a form and upon a schedule determined by DHCD guidelines. Also, DHCD must establish guidelines for verification of the financial statements, and enforcement actions in the event of non-compliance.
- Any excess funds shall be paid over to the subsidizing agency or the municipality as determined solely by the subsidizing agency’s program requirements and terms of the regulatory agreement.

IV. 56.05: LOCAL HEARINGS

This section sets forth requirements for the conduct of the local hearing, despite the lack of authority under chapter 40B for DHCD to regulate local hearings. The new regulations now seek to force all boards to conform to DHCD’s mandates as to submission of applications, hearings, decisions, and post-decision provisions, despite the explicit authority granted to ZBA’s under Chapter 40B §21 to adopt their own rules. Local boards should nevertheless be sure to carefully review the new DHCD regulations on local hearings.

a. 56.05(1) Local Rules

Subsection (1) is a revision of the old section 31.02(3), and continues the requirement that ZBA’s adopt local rules for conduct of comprehensive permit hearings. This subsection adds language allowing ZBA’s to seek non-binding opinions from DHCD on consistency of their local rules with chapter 40B. This subsection provides that, if the ZBA does not adopt and file rules, the ZBA must conduct business according to 760 CMR §56.05. Even with the new DHCD regulations, local boards are recommended to adopt and file their own local rules and regulations regarding chapter 40B applications, to supplement the statutory and regulatory provisions.

b. 56.05(2) Elements of Submission/Fees

Subsection (2) is a revision of the old section 31.02(2), and describes the procedure an applicant must follow when submitting a comprehensive permit application to the ZBA. The changes are as follows:

- Deletes language allowing HAC to determine if an item not listed in this regulation should have been submitted to the ZBA or should be submitted to the HAC. In substitution, the new language prohibits ZBA's from requiring submissions that exceed requirements under rules and procedures of local boards for review under their respective jurisdictions.
- Deletes requirement for architect's signature on preliminary architectural drawings.
- Allows ZBA to require a reasonable filing fee if consistent with other fees assessed by the municipality while taking into consideration the statutory goal of encouraging affordable housing.

c. 56.05(3) Conduct of Board Hearing

Subsection (3) is a new regulation adapted from Model Local Rules. The regulation now purports to require the followings:

- Within 7 days of receiving a completed application, the ZBA must send a copy of the application and list of waivers to all "Local Boards", apparently as defined by DHCD regulations rather than chapter 40B. Boards should be sure to include a provision in their local rules that requires an applicant to file ample copies of the application and waivers to allow the ZBA to send out copies to all appropriate local boards.
- Hearings must close within 180 days of the date the hearing is opened, unless applicant consents in writing to extend.
- 30 day deadline for opening hearing starts upon receipt of "complete" application
- Allows ZBA to stay the commencements of a hearing if three or more comprehensive permit applications are concurrently undergoing hearings and the total number of housing units in those pending projects exceeds the numerical threshold for a "large project" under 56.03(6).

d. 56.05(4) Scope of ZBA Hearing

Subsection (4) is an adaptation of the old section 31.05 and 31.06. This regulation states that decisions of the ZBA must be consistent with local needs. The board is not to address matters in the hearing that are beyond its jurisdiction under the Act "that lie solely within the authority of the subsidizing agency."

e. 56.05(5) Consultant Review

Subsection (5)(a) is a new provision adapted from Model Local Rules regarding the ZBA's authority to employ outside consultants to obtain advice and review services not available from municipal employees. The ZBA should adopt local rules that govern the use of outside consultants. Under the DHCD regulations, the ZBA is to "work cooperatively" with Applicant to select consultants or by majority vote require Applicant to pay a "reasonable fee" for cost of employing consultants. Subsection also states that the ZBA should not impose "unreasonable or unnecessary" time or cost burdens on an applicant. "Legal fees" for general representation of the Board or other boards, according to the Regulations, may not be charged to the applicant as consultant fees.

Subsection (5)(b) codifies Model Local Rules 4.02 and 4.04 regarding reviewing fees, including the type of work that can be charged to review fees and ways to ensure the review fee amounts are reasonable. Subsection (5) also adds language consistent with Model Local Rule 4.05 and 4.07:

- Requires 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 ZBA to adopt rules that allow ZBA to deny comprehensive permits if the applicant fails to pay a review fee within the stated time period.
- Requires ZBA's to return an unspent excess to the applicant upon issuance of the ZBA decision or withdrawal of the application.

f. 56.05(6) Local Review of Financial Statements

Subsection (6) is a new regulation adapted from the 2005 guidelines issued by the Massachusetts Housing Partnership. The regulation sets forth the procedure for the review of pro formas or other financial statements. A ZBA may review a pro forma or financial statement only after the following preconditions are met:

- Other consultant review is complete;
- Applicant has opportunity to modify original proposal to address issues raised;
- ZBA has opportunity to propose conditions to mitigate the project's impacts and to consider requested waivers;
- Applicant has indicated it does not agree to the proposed condition(s) or waiver denial(s) because they would render the project uneconomic. A condition that limits density must be justified by valid health, safety, environmental, design, open space, planning, or other local concerns.

This subsection also specifies that ZBA's cannot review a pro forma in order to determine if the project would still be economic if the number of units were reduced.

g. 56.05(7) Waivers from Local Requirements and Regulations

This section specifies that zoning waivers are only required from "as of right" requirements, not from special permit requirements. Waivers from subdivision requirements are

unnecessary if the applicant is not seeking a subdivision approval, but the ZBA may look to subdivision standards as a basis for required project conditions.

h. 56.05(8) ZBA Decisions – Conditions; Uneconomic Conditions

This subsection is a revision of the old section 31.08(2), and modifies the old section in two ways:

- Adds language forbidding ZBA's 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 the DHCD guidelines.
- Specifies that ZBA cannot delay or deny an application on the grounds that a state or federal approval has not been obtained. However, ZBA's can condition application approval on the securing of such approval.

Subsection (d) adds new language stating that ZBA's cannot impose any conditions on comprehensive permits that would render the project uneconomic. Specifically, a board cannot require applicants to pay for off-site public infrastructure or improvements if not usually imposed on unsubsidized housing. However, subsection (d) does state that a condition will not be considered uneconomic if it would modify the nonresidential elements of a project to ensure that such nonresidential elements are consistent with the applicable provisions of the current municipal zoning code.

i. 56.05(10) Enforcement of Permit

Subsection (10) revises the old section 31.09 by adding a limiting phrase. Subsection (10) limits the types of plans ZBA's can require after presented with a comprehensive permit application, by requiring the ZBA to issue all necessary permits and approvals upon presentation of the comprehensive permit and subsequent more detailed plans "to the extent reasonably required relative to the local permit in question."

j. 56.05(12) Finality, Transfers, and Lapse of Comprehensive Permit

Subsection (12) revises the old section 31.08. Subsection (12)(a) adds language that allows applicants to proceed with construction at their own risk if a comprehensive permit is granted by the ZBA or HAC despite a "legal appeal".

Subsection (12)(b) revises requirements for transfers of comprehensive permits. Revisions include:

- New requirement that subsidizing agency confirm that transferee meets project eligibility requirements.
- Deletes old requirement for prior written approval by ZBA or HAC, and substitutes a requirement for written "notification" to the ZBA or HAC.

- New language stating that transfers alone will not constitute a “substantial change.”

Subsection (12)(c) revises the old requirement that comprehensive permits automatically lapse if construction has not begun within three years of date comprehensive permit became final.

- Adds “except for good cause” to automatic lapse requirement.
- Tolls the three year time period for time required to “pursue or await the determination of any appeal on any other state or federal permit or approval required for the project.”
- Drops language allowing ZBA or the HAC to set expiration date of less than three years.

k. 56.05(13) ZBA Enforcement of Use Restrictions

Subsection (13) is a new addition and specifies that a subsidizing agency is initial holder of use restriction with sole right and obligation to enforce it during the initial term. It requires subsidizing agency to give CEO of municipality written notice of pending expiration of subsidy at least six months in advance. After expiration of the subsidy, the holder of the use restriction must provide for monitoring and enforcement of the use restriction, either by doing it themselves or contracting out those functions. Monitors can charge reasonable fees as allowed under the DHCD guidelines and must respond to reasonable municipal requests for information on the status of project monitoring and enforcements.

This is only a brief outline of some of the many changes in the Regulations. This memorandum does not address, for example, any of the changes in the Regulations relative to the HAC appeal process. If you receive a chapter 40B application, you will want to become familiar with all of the new Regulations, as well as the new Guidelines.