Commonwealth of Massachusetts
DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT
Mitt Romney, Governor ◆ Kerry Healey, Lt. Governor ◆ Jane Wallis Gumble, Director

Memorandum

To: Local Officials and Housing Colleagues
From: Jane Wallis Gumble, Director
Subject: Monitoring of Chapter 40B Developments
Date: April 27, 2006

On behalf of the Department of Housing and Community Development I would like to clarify some questions that have arisen about the role that local boards and organizations may undertake in monitoring approved Chapter 40B developments.

The Comprehensive Permit Law (M.G.L. Chapter 40B) provides for the issuance of comprehensive permits by zoning boards of appeal (ZBAs) to public agencies, nonprofit organizations and limited dividend organizations for the purpose of developing low- and moderate-income housing. In granting a permit, the ZBA may impose reasonable conditions that address planning and land use concerns (such as building height, number of units, site layout, environmental mitigation, etc.) Further guidance on ZBA decisions is available on DHCD's web site (www.mass.gov/dhcd/components/hac) and in the Massachusetts Housing Partnership's Local 40B Review and Decision Guidelines (www.mhp.net/40B).

The rules that allow a developer to qualify for a comprehensive permit are established and regulated by the applicable federal or state "subsidizing agency." For most 40B developments that subsidizing agency will be MassHousing, DHCD, the Massachusetts Housing Partnership, or MassDevelopment. (In the case of projects subsidized by the New England Fund of the Federal Home Loan Bank of Boston, MassHousing acts as project administrator under the Guidelines for Housing Programs in which Funding is Provided Through a Non-Governmental Entity (NEF Guidelines) (http://www.mass.gov/dhcd/ToolKit/default.htm) and effectively undertakes the same role as a subsidizing agency.)

In order to comply with regulations, the subsidizing agency must ensure that the developer will be a limited dividend organization through execution of a regulatory agreement. In addition, the subsidizing agency must be satisfied that development costs and fees are reasonable and within program limits (which is verified through a cost certification upon the development's completion), that housing is sold or rented to income and asset-qualified households in compliance with fair housing laws, that sales prices for homeownership units or monthly rental

costs are within program limits, and, in the case of rental housing, that annual dividends from the operations are within program limits.

It is the responsibility of the subsidizing agency to monitor and enforce the aforementioned requirements that are imposed on the development. Monitoring of 40B projects is performed either by the subsidizing agency or by an organization under contract to the subsidizing agency called a monitoring agent.* If local organizations are willing and able to perform some or all of those monitoring functions they may submit their qualifications to the subsidizing agency for approval. A subsidizing agency may establish minimum qualifications and performance standards for local monitoring agents, and it is within the subsidizing agency's discretion whether to utilize local monitoring agents. Indeed, because the subsidizing agency is accountable for adhering to Chapter 40B statutory, regulatory, and program requirements, it must ensure that the monitoring agent has the capacity to perform those tasks well with no conflicts of interest.

Zoning boards of appeal may not under any circumstance impose conditions in a comprehensive permit that impinge on the regulatory responsibilities of the subsidizing agency. Accordingly, ZBAs should not impose any conditions that specify how cost certification, project monitoring, or the sale or rental of affordable units is to be performed, or by whom those tasks will be performed during the period the subsidizing agency retains regulatory oversight. If local officials have specific concerns about state oversight of 40B developments, we are fully prepared to address them directly.

Municipalities have the right to be informed that the subsidizing agencies are fulfilling their 40B monitoring and enforcement responsibilities. ZBAs may obtain such documentation from the subsidizing agencies (e.g., copies of cost certifications and annual monitoring reports as approved by the subsidizing agency in accordance with program requirements) and the state subsidizing agencies will be responsive to all such inquiries from municipalities. Moreover, with regard to rental developments, given that many comprehensive permits impose affordability requirements in perpetuity, municipalities should appropriately document the affordability requirements that extend beyond the term of the subsidizing agency's regulatory agreement. A municipality may want to hire a monitoring agent to monitor affordability during this time period with the cost of such agent to be paid by the owner of the 40B rental development. If you have further questions about the role of communities or local organizations in regulating or monitoring 40B developments I encourage you to consult your own local counsel, to contact the appropriate subsidizing agency, and to utilize free consulting services available through the Massachusetts Housing Partnership for the review of any pending applications for comprehensive permits.

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* Monitoring agents were designated as part of the local review and approval process for New England Fund projects initiated prior to August 2002. For New England Fund projects initiated thereafter, the NEF Guidelines allow, but do not require, the Project Administrator to use a Monitoring Agent.