Local 40B Review and Decision Guidelines

A Practical Guide for Zoning Boards of Appeal
Reviewing Applications for Comprehensive Permits
Pursuant to MGL Chapter 40B

Massachusetts Housing Partnership
and
Edith M. Netter, Esq.

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About the Massachusetts Housing Partnership

The Massachusetts Housing Partnership (MHP) is a quasi-public state agency that provides financing for affordable housing and helps cities and towns increase their supply of affordable housing. MHP has provided technical or financial assistance in more than 300 Massachusetts cities and towns, provided financing for more than 12,000 rental housing units, and has made mortgage financing available through local banks to help more than 8,500 low-income families purchase their first homes.

Clark Ziegler was the principal author of these guidelines at MHP. He has worked for the organization since its inception in 1985 and been Executive Director since MHP was incorporated as a public agency in 1990. Mr. Ziegler has written and spoken extensively on Chapter 40B since the 1980s. He served on the Governor's 40B Task Force in 2003 and chaired a follow-up task force that recommended procedural reforms at the state Housing Appeals Committee. He is also active in town government and has served as Chairman of the Ipswich Finance Committee and as a member of the Town's Growth Management Committee.

About Edith Netter

Edith M. Netter, an attorney and mediator with a background in land use planning, represents public and private sector clients and serves as a mediator/facilitator in land use, affordable housing, real estate development and environmental matters, including Chapter 40B. Ms. Netter is the former editor of *Land Use Law & Zoning Digest*, published by the American Planning Association, practiced land use law with Robinson & Cole, a Connecticut law firm with a national land use law practice and was Assistant Director of the Boston Redevelopment Authority, where she coordinated a citywide rezoning in Boston. Ms. Netter has taught at universities including MIT, UCLA and Harvard and was a Loeb Fellow at Harvard's Graduate School of Design.

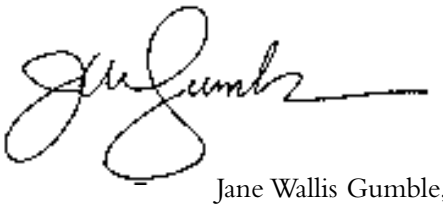
To check for any updates to the these guidelines, or to get additional information regarding Chapter 40B, visit *www.mhp.net/40B.*

FOREWORD

The Comprehensive Permit Law (Chapter 40B of the Massachusetts General Laws) creates a streamlined local review process for the construction of low- and moderate-income housing in Massachusetts.

While Chapter 40B has been one of the single greatest contributors to the supply of affordable housing in the Commonwealth, it is also a complex process and poses a challenge to city and town officials who are trying in good faith to balance local concerns with their responsibilities under the law.

These guidelines were developed by the Massachusetts Housing Partnership to provide clearer guidance to zoning boards of appeal in reviewing applications for comprehensive permits. As the four Massachusetts state agencies that finance affordable housing developed through Chapter 40B, we endorse these guidelines and strongly recommend that city and town officials utilize them to assist in their review of Chapter 40B proposals. While the guidelines are intended primarily for new projects seeking a determination of project eligibility, we also anticipate that the guidelines will prove useful in many cases for projects currently under review.



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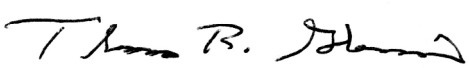

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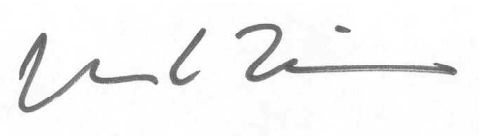

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I. INTRODUCTION

To facilitate the development of low- and moderate-income housing throughout the Commonwealth, Chapter 40B provides a permitting process that is more streamlined than the permitting process for other housing development. Changing regulations and case law over the years have created some uncertainty about how local officials may best respond to applications for comprehensive permits. The objective of these guidelines is to provide balanced advice to local officials to help make sound local permitting decisions pursuant to Chapter 40B.

What is Chapter 40B?

Chapter 40B (also known as the Comprehensive Permit Law) is a state law that encourages the development of low- and moderate-income housing in several ways. First, it provides for the streamlining and consolidation of the local permitting process through the vehicle of comprehensive permits. Second, it allows for appeals from local comprehensive permit decisions by developers of mixed-income housing. Third and perhaps most important, it encourages the provision of affordable housing, which typically is accomplished by developers building more housing units per acre than allowed by local regulations.

Chapter 40B provides that the local zoning boards of appeals (ZBA) must review and make decisions (approve, approve with conditions or deny) on comprehensive permits. The Housing Appeals Committee (HAC) hears appeals from denials and conditional approvals of comprehensive permits in communities that have less than ten percent of their housing affordable to low- and moderate-income households. The purpose of HAC is to ensure that local comprehensive permit decisions are carrying out the Act's mandate - to promote affordable housing without violating the planning goals of local governments.

Critical to an understanding of the comprehensive permit process is the ten percent standard. Chapter 40B encourages communities to have ten percent of their housing available to low and moderate-income households. Communities that do not meet this standard face a heavy burden of demonstrating to HAC why they are denying or conditionally approving a comprehensive permit with conditions the developer considers uneconomic. Communities with more than ten percent of its housing affordable may still accept and grant applications for comprehensive permits, but those permit decisions may not be appealed to the HAC.

When a ZBA denies a comprehensive permit, the sole issue before HAC is whether the decision was consistent with local needs. Consistent with local needs means balancing the regional need for affordable housing with local public health, safety and welfare concerns. HAC regulations establish high thresholds to establish consistency with local needs, including the degree to which the health and safety of occupants or town residents is *imperiled*, the natural environment is *endangered*, the design of the site and the proposed housing is *seriously* deficient, open spaces are *critically* needed, and the local requirements and regulations bear a *direct and substantial relationship* to the protection of [health and safety, design and open spaces]. 760 C.M.R. §31.07(2) (b). There are times when a project cannot be conditioned to ensure that the health and safety is not imperiled or the environment is not endangered. In these instances HAC will uphold a local denial of a proposed project.

If a ZBA approves a permit with conditions the developer considers onerous, the developer's appeal focuses on two questions (a) whether the conditions are uneconomic and (b) whether the conditions are consistent with local needs. The developer bears the burden of proving that the conditions are uneconomic. If the developer can prove that the conditions are uneconomic the community then has to demonstrate that its conditions are consistent with local needs.

What is the Purpose of these Guidelines?

Under Chapter 40B zoning boards of appeal in each city and town are responsible for conducting hearings and making decisions on proposals to construct affordable housing. In towns which have less than ten percent of their housing counted as affordable by the Department of Housing and Community Development, applicants for comprehensive permits may appeal these decisions to HAC.

HAC has published Guidelines for Local Review of Comprehensive Permits, which can be found at *http://www.mass.gov/dhcd/components/hac/GUIDE.HTM*. While the HAC guidelines provide clarity on many aspects of the local 40B review process, the new guidelines presented below are also intended to address issues that have arisen since 1999 when financing from the New England Fund of the Federal Home Loan Bank of Boston (NEF) was deemed by HAC to qualify as a federal subsidy and make developments eligible for comprehensive permits. That decision has changed the manner in which most cities and towns review applications for comprehensive permits. Most significantly, communities began to review project pro formas in order to determine whether projects were financially feasible.

HISTORICAL NOTE: Local ZBAs had authority to review pro formas of 40B applications filed between 1999 and 2002 that used the New England Fund (NEF) program of the Federal Home Loan Bank of Boston as a subsidy. State 40B regulations adopted in 2002 brought oversight of NEF projects under MassHousing. This meant that MassHousing would now issue project eligibility letters for NEF projects and therefore take on the role of pro forma review. As a result, local ZBAs are no longer required to engage in that additional level of financial review.

In 2002 HAC revised its regulations to require that all 40B applications, including NEF applications, must have a project eligibility letter issued by a federal or state subsidizing agency or program administrator. MassHousing is the program administrator for the NEF program. The regulations require that the subsidizing agency or program administrator determine whether the project is financially feasible.

In light of the changes to Chapter 40B in practice and regulation, the guidelines outlined below attempt to assist communities in reviewing comprehensive permit projects in a way that maximizes the opportunity for a successful outcome. A successful outcome could mean a project approval or in appropriate instances, a denial. These guidelines suggest that a negotiated outcome will, in most cases, garner the best result for a community.

While these Guidelines are written from a local perspective, developers should also use them as a guide to preparing for and seeking approval of permits. In those communities that have an affordable housing plan, developers are more likely to meet with community approval if they propose projects that comply with the plan (see PRINCIPLE #1 on page 3).

It is in this context that these guidelines focus on those aspects of Chapter 40B review that are most contentious and/or unclear. These include the roles and responsibilities of local boards, the importance of identifying key issues early in the process, focusing peer review on these key issues, the use of work sessions when conducting negotiations, and pro forma review. These guidelines do not cover all aspects of the ZBA process and are no substitute for obtaining legal advice as needed from a city solicitor or town counsel.

II. LOCAL 40B REVIEW GUIDELINES

A. Community Plans

PRINCIPLE #1: Communities should adopt and implement a local affordable housing plan to guide developers, the zoning board of appeals and HAC.

The purpose of Chapter 40B is to enable the construction of affordable housing where it is needed and could not otherwise be built. One of the best ways to preserve local control is to develop, adopt and implement a local affordable housing plan.

A local affordable housing plan typically identifies housing needs and describes ways to meet these needs. These plans may suggest areas suitable for mixed-income and/or affordable housing (including apartments and townhouses), town-owned land that might be used for housing, zoning bylaw changes to promote affordable housing and other strategies and techniques to achieve a community's affordable housing goals.

There are several ways a local housing plan will help a city or town better manage the comprehensive permit process. First and foremost is a new state initiative known as planned production. Communities have an opportunity to submit an affordable housing plan to the state Department of Housing and Community Development (DHCD) outlining specific measures they plan to take to achieve the 10 percent affordable housing goal in Chapter 40B. Each year that a city or town with an approved housing plan has added affordable housing units equal to 3/4 of one percent of the community's housing stock, that community is deemed to be certified. Any ZBA decision made on an application during the year following the certification cannot be appealed to the HAC by the developer. The Planned Production regulation guidelines can be found at 760 CMR 31.07(1)(i) and the DHCD Guidelines for these regulations can be found at: *www.mass.gov/dhcd/ToolKit/PProd/RegGuide.pdf.*

Adoption of a comprehensive or master plan with a strong housing component may help communities navigate the Chapter 40B process even if their plan is not a DHCD-approved Planned Production plan. For example, HAC has given legal weight to community plans that are legitimately adopted and serve as viable planning tools, when deciding whether to uphold ZBA denials of comprehensive permits. For a recent example of a HAC decision upholding a ZBA's denial of a comprehensive permit on the basis of a community plan see *Stuborn Ltd. Partnership v. Barnstable Board of Appeals*, No. 98-01 (September 18, 2002).

B. Roles and Responsibilities

PRINCIPLE #2: The board of selectmen, mayor or other chief elected official should provide detailed, factual and focused comments to the state housing agency responsible for issuing a project eligibility letter.

Any comprehensive permit application must include evidence that the applicant and the project are qualified to obtain a permit. This takes the form of a project eligibility letter (also known as a site approval

letter) typically issued by one of four state subsidizing agencies: MassHousing, DHCD, the Massachusetts Housing Partnership and MassDevelopment. This letter signifies that the proposed site is generally suitable for the type of housing proposed, that the project is eligible for a public subsidy program that is needed to qualify for a comprehensive permit, and that the project appears to be financially feasible.

Before issuing a project eligibility letter, the subsidizing agency must allow 30 days for the chief elected official (typically the Board of Selectmen or Mayor) to review and provide written comments on the developer's initial proposal. This process is set forth in the HAC's regulations, which can be found at *www.mass.gov/dhcd/regulations/760031.HTM.*

Before submitting written comments on the community's behalf, the Selectmen or other chief elected official should consider soliciting comments from relevant local boards, staff and the public. This is the one opportunity where a city or town's elected leaders play a formal role in the comprehensive permit process. All subsequent decisions relating to the permit application are within the sole purview of the ZBA. If the community's comments are detailed, factual and focused, they are more likely to affect the subsidizing agency's decision on whether and under what conditions to issue a project eligibility letter.

To be effective, the chief elected official's comments should be limited to legitimate municipal planning and public health and safety concerns. Examples of constructive comments might include the relationship between the proposed 40B development and the local affordable housing plan, existing infrastructure (roads, water, sewer), the environment (such as traffic, storm water management, or groundwater quality), or suggestions on how the proposed site or building design might be modified to better fit into the surrounding neighborhood. It is not effective for communities to make comments that go beyond the scope of local review authority under 40B, for example, commenting that a 40B project is opposed by neighbors or would result in increased municipal service costs. None of these are valid legal reasons to condition or deny a comprehensive permit application and therefore the comments will have no effect on a state agency's decision to issue a project eligibility letter.

SPECIAL NOTE REGARDING HOUSING PARTNERSHIPS: A number of cities and towns have appointed housing partnerships or other municipal advisory committees charged with the task of promoting affordable housing. Some communities have made the housing partnership the initial point of contact for all new affordable housing developments, including comprehensive permit applications.

While the views of a housing partnership might carry significant weight within a particular city and town, its recommendations are not binding on the ZBA. Housing partnerships can add the most value to the 40B process when they have preliminary discussions with a developer in an informal setting before a comprehensive permit application is filed. This is an opportunity to make suggestions to the applicant on how a proposal may be modified to better address the town's affordable housing goals and to help the applicant anticipate community concerns that may be raised during formal review by the ZBA. Once the permitting process begins, the housing partnership should submit written comments to the ZBA in the same manner as all other local boards.

The ZBA should not get involved at this stage in the process. ZBA members serve as quasi-judges and must reserve judgment until all of the evidence is presented at the public hearing on the comprehensive permit application.

PRINCIPLE #3: At an early stage in the review process, ZBAs should identify key concerns about the impacts of the proposed 40B development. The earlier the ZBA informs the developer of these concerns, the more likely the developer will be willing and able to address them.

Chapter 40B streamlines the local review process by providing developers with a one-stop local permit, known as a comprehensive permit. While other permitting decisions are made by various local boards charged with administering local bylaws, rules and regulations, Chapter 40B gives the ZBA the responsibility and the legal authority to render a single decision, after taking into account comments made by other relevant local boards. MHP offers assistance with the local review process, by providing grants to ZBAs to hire consultants to assist them with reviewing comprehensive permit projects. These consultants work on the ZBA's behalf; they do not work for MHP.

Special note: If a proposed 40B development is subject to the state Wetlands Protection Act or *state* Title V septic system regulations, separate approval may be required from the local Conservation Commission or Board of Health, which administer these laws. The Conservation Commission and Board of Health do not have any legal authority to enforce local wetlands protection bylaws or local septic regulations that exceed the requirements of state law. All *local* regulations and bylaws are addressed by the ZBA.

Chapter 40B requires that the ZBA commence a public hearing within 30 days of the date the developer submits an application for a comprehensive permit. The ZBA should then solicit written comments from all relevant local boards, determine whether the application is complete, and advise the applicant if additional information is needed to make an informed decision. Early in the public hearing process and in addition to submitting written comments, local boards and committees should consider attending one or more hearings and offering comments on the proposed application. The more participation from local boards, the more informed the ZBA's decision is likely to be.

ZBAs should begin the hearing process by asking the applicant to present the proposed development to the board and the public and solicit public comment on the proposal. After the completion of this initial work, the ZBA should identify, at least on a preliminary basis, the key issues which need further consideration. The sooner key issues are raised, the more quickly the developer has a chance to respond to them.

This is particularly true if a ZBA would like to see the project redesigned. Without a developer's agreement, a project will not be redesigned. On appeal, HAC will not uphold conditions requiring project redesign. HAC will only consider the project before it, not a project as envisioned by a ZBA. On the other hand, if a ZBA raises design issues at an early stage in the process, a developer and the board may reach agreement on a new site plan. In general, as plans become more detailed, it becomes less likely that a developer will revise them. It is too expensive and time-consuming for a developer to do so.

C. Peer-Review

PRINCIPLE #4: ZBAs should carefully manage the timing and scope of peer review in order to maximize its usefulness.

The second phase in the ZBA review process involves technical review, which is usually done by consultants (or peers), and therefore usually called peer review. This review can include civil engineering (typically storm and waste water, and proposed waivers from local bylaws), traffic (including on-site vehicular and pedestrian circulation and off site traffic impacts and potential mitigation), environmental (typically wetlands) and design review of buildings (elevations, floor plans, consistency between affordable and market-rate units) or site design.

Deciding Whether to Employ Staff and/or Consultants

If a town does not have staff or town staff does not have the time or the expertise to review a particular 40B project, the ZBA may hire peer review consultants (with fees to be paid by the developer). A ZBA may enact its own rules for hiring peer review consultants. If a ZBA does not have rules, it must follow the 40B Model Rules and MGL C. 44§53G. Peer review should focus on those issues the ZBA believes are important, which may include: civil engineering and if warranted, traffic and site and/or architectural design, or other local issues.

It is critical that a ZBA, when hiring a consultant, instruct that consultant to stay within the purview of his or her expertise. For example, a consulting engineer should not be asked to determine whether the ZBA has jurisdiction to review an application. The best way to ensure that the consultant does the job that is required is to ask for or draft, and if necessary modify, a proposed scope of services.

If the town has staff, it is advisable that the ZBA ask the consulting reviewer to take staff comments into account. In the event this is not done, the ZBA is left with the difficult situation of deciding which opinion to consider - not a good situation for a board member who might not have the technical expertise to make an informed decision.

Targeting Key Issues and Timing the Peer Review Process

Peer review that focuses on the issues identified by the ZBA as key is more likely to have a positive outcome. Peer review paid for by the developer is limited to review of studies provided by the developer. Of course, this does not preclude the study of additional issues identified by staff or other consultants not paid for by the developer. Peer review should be conducted in stages. The first should include technical issues such as engineering, traffic and design. The second should include pro forma review if the ZBA determines such review is necessary.

Staging the Engineering Review Process

The ZBA should not impose unreasonable or unnecessary time or cost burdens on an applicant. Increased development costs mean less opportunity for the developer to make project changes that increase community benefits or mitigate project impacts.

The ZBA should use especially careful judgment with respect to the timing of engineering review, particularly storm water and wastewater management. Thorough civil engineering is important, but it should not become the primary focus of the ZBA review process to the exclusion of other fundamental concerns. This is particularly true if the ZBA is seeking a change in the site plan and number and location of buildings.

There are many positive examples of a developer and a ZBA reaching consensus on changes in site design and, as a result, the ZBA has issued a comprehensive permit on terms the developer can accept. Yet it is difficult or impossible to have those discussions if the ZBA has already required the developer to complete detailed civil engineering (and pay for the ZBA's peer review of that work) based upon the original permit application. If there appears to be any reasonable likelihood that the developer will change the design of a project, the ZBA should hold off on detailed engineering review until the ZBA and the developer have agreed upon project design.

Ensuring Payment of Consultants

It is critical for the ZBA to establish a scope of services and a fee for the consultant and for the developer to place the required sum in an escrow account, to be paid by the ZBA to the consultant upon receipt of an invoice. The ZBA should not ask the consultant to commence work until the developer has provided the necessary funds. A ZBA should indicate to an applicant that a delay in funding this account means a delay in the peer review process. This protects the ZBA chair from having to assume the role of a collection agent.

ZBAs should not ask the developer for an amount of money that has no relationship to actual fee proposals made by the peer review consultant or consultants. The process works better if there is a scope of services and a fee for proposed work, which the ZBA requires an applicant to advance.

D. Pro Forma Review

PRINCIPLE #5: If a ZBA decides that pro forma review is appropriate, it should be done *after* the ZBA has proposed conditions on a permit and the applicant indicates that the conditions would make the project uneconomic.

If a ZBA conducts a pro forma review it should do so only after other peer review has been completed, the developer has had an opportunity to modify its original proposal to address issues raised, the ZBA has had an opportunity to propose conditions to mitigate the project's impacts, and the developer does not agree to the proposed conditions and indicates they would render the project uneconomic. It makes no sense to evaluate the pro forma before the ZBA has had an opportunity to indicate its concerns and the developer has a chance to respond to them. Usually the developer will at the very least make some changes to the project. Evaluating a pro forma that does not reflect these changes is an unnecessary exercise. There is no reason to critically evaluate a pro forma at all if the developer has agreed to accept most or all of the ZBA's proposed conditions.

If the developer does not agree to some or all of the proposed conditions, the ZBA may ask the developer to submit a pro forma revised to reflect the additional cost of meeting these conditions. The revised

pro forma may then be subjected to the same peer review as any other technical information submitted to the board. The ZBA may then use this information to decide whether to adopt or modify its originally proposed conditions.

Some communities request peer review of pro formas in order to see whether a project will still be economic if the number of dwelling units is reduced. This position is not supported by HAC or court decisions. A condition that limits density must be supported by other rationales, such as serious planning or design deficiencies or environmental impacts that directly result from the size of a project on a particular site. If the ZBA grants a permit, but arbitrarily reduces the size of the proposal, it is likely that the HAC will consider the decision a denial.

PRINCIPLE # 6: Pro forma analysis of developer-requested waivers from local bylaws is not necessary unless the developer argues that a denial of a waiver makes the project uneconomic.

Chapter 40B allows developers to request and ZBAs to grant waivers from local bylaws. Zoning waivers are from the "as-of-right" requirements of the zoning district where the site is located. They are not from the special permit requirements of the district or from other districts where multi-family uses are permitted by right or by special permit. If a project does not propose a subdivision, waivers from subdivision requirements are not required (although some ZBAs look to subdivision standards, such as requirements for road construction, as a basis for required project conditions). Other typical requested waivers are from a community's general (non-zoning) bylaws, including wetland bylaws and board of health rules.

ZBAs should not consider waiver requests until it is clear that the project plan is either agreed upon or the developer has informed the ZBA that he or she will not agree to changes sought by the ZBA and the plan is therefore final for purposes of comprehensive permit review. This is the stage in the review process where the community should consider whether to grant or deny a request for waivers. The waiver request is now final, so the ZBA is not wasting its time and resources.

Once a ZBA and a developer agree on a proposed plan, the ZBA should grant those waivers that are necessary to build the project in accordance with the plan. For example, if the agreed-to plan indicates a 10' reduction in required side yard set backs, the ZBA should grant the side yard setback waiver necessary to ensure that the plan can be built (as opposed to a blanket waiver from the side yard setback requirements). There is no need to ask the developer to list the financial impact of a denial of a requested waiver or for the ZBA to request a peer review of its financial impact. If the developer and the ZBA cannot agree upon a plan, the ZBA review of waivers should be in light of a plan that it *would* find acceptable (assuming there is such a plan.) Once again, the specific waivers necessary to build the plan should be granted.

PRINCIPLE #7: Pro forma review should conform to recognized real estate and affordable housing industry standards.

If ZBA review of a development pro forma becomes necessary it should always be consistent with the policies of the subsidizing agency and with prevailing industry standards as set forth in the Appendix to these guidelines.

The disagreements about pro formas that arise most frequently involve related-party transactions (e.g., where the developer is also the general contractor or marketing agent) and the ZBA believes that the developer is charging too much, the estimated sales price of market-rate units (where the ZBA believes the revenue from sales or rentals is undervalued), land acquisition costs (where the ZBA believes the purchase price exceeds fair market value) and profits (where the ZBA believe the profits are excessive).

After referring to the standards listed in the Appendix and using them as a basis for agreement, if no agreement is forthcoming, then for those items for which the developer and the town's peer review consultant disagree and the variances are larger than 10%, the parties should hire a neutral financial consultant to resolve the dispute by choosing between the high and the low estimates. This approach serves to encourage the developer and the peer review consultant to make realistic estimates in the first place. The town and the developer should use the midpoint for items with variances of less than 10 percent.

The following are the issues that arise most frequently, each of which is addressed in more detail in the Appendix:

Related-Party Transactions

The issue raised in the context of related-party transactions is whether the developer is paying fees for services by related parties that exceed what would be charged on an arm's length basis in the ordinary course of business.

Sales Price/Rent of Market-rate Units

A community may believe the prices or rents of the market-rate units that the developers shows in the pro forma are too low and do not reflect market conditions.

Land Acquisition Costs

An issue often highlighted is the land value line item in the pro forma. The basic rule for valuing land is addressed in the Appendix to these guidelines. The value should relate directly to the as-is value of the site under current zoning and should not be artificially inflated as a result of the extra value provided by a comprehensive permit or a non-arm's length conveyance between related parties.

Profits

It is the responsibility of the federal or state housing agency that issues the project eligibility letter and conducts the final subsidizing agency review of a 40B project — not the responsibility of the ZBA — to establish and enforce reasonable limitations on the developer's profit. In the case of housing developed for sale, that profit limitation is enforced through a final cost certification after the units have been built and sold. In the case of rental housing, it is enforced both through cost certification and through a regulatory agreement that limits annual dividends paid to investors. If the ZBA examines line items, it must apply the subsidizing agency's standards in determining whether permit conditions would render a project economically infeasible.

E. Engage in Negotiations

PRINCIPLE #8: Negotiating density, design and conditions can lead to successful outcomes

Encourage the Applicant to Modify the Project

Any developer who applies for a comprehensive permit is entitled to a public hearing and decision by the ZBA on the merits of the project as originally proposed. The developer is under no legal obligation to modify or redesign the project in response to community concerns. However, the 40B process works best where projects are not cast in stone and a developer is willing to modify the project in order to address community priorities and mitigate negative impacts. It is quite typical for an applicant to modify a project to address technical concerns that arise during engineering review (e.g., changing the location of buildings to improve storm water management). Many 40B developers also find it in their best interest to redesign a project in response to concerns or constructive suggestions raised by the ZBA.

Under 40B anything that is reasonably related to the project and its impacts is negotiable. Subjects for negotiation include density, unit and site design, housing type, amount and location of open space and recreational facilities, and landscaping. When ZBAs negotiate density they should first consider whether good building and site design might be at least as important as the number of units in a project. Infrastructure concerns such as roads, storm and wastewater systems and water delivery and supply are often also negotiated. Communities also negotiate for additional affordable units, prices of the affordable units and contributions for affordable housing plans.

Identify a Preliminary List of Conditions for Approval

Most health and safety-related project impacts can be mitigated by conditions. It makes sense, therefore, for the ZBA to suggest permit conditions for consideration by the developer. The most effective and cost-efficient approach is to negotiate with the developer to see whether agreement on the proposed conditions can be reached. Agreement on conditions gives the community, not the HAC or the courts, the final word on the proposed development.

The ZBA should submit a preliminary list of conditions to a developer at an open public hearing. While the applicant is not under any legal obligation to respond to this list of conditions, it is almost certainly in his or her best interest to do so.

If agreement is not reached, it is important to ensure that the ZBA's conditions can be supported by technical and/or planning analysis *and* that detailed, factual findings for the conditions are listed in the decision. Findings for conditions imposing density limits that have not been agreed upon are of critical legal importance. In *Settlers Landing Realty Trust v. Barnstable Board of Appeals*, No. 01-08 (Sept. 22, 2003) the HAC ruled that an arbitrary reduction in density could be tantamount to a denial. HAC has determined that there must be a "sufficient logical connection" drawn in the decision between the findings and the reduction in the number of dwelling units.

In a HAC appeal from a *conditional approval*, a developer has the burden of proving that a condition is uneconomic. If the developer cannot meet this burden HAC will usually uphold the condition. If a developer can meet this burden, the ZBA then must demonstrate that the condition is consistent with local needs. When determining whether a decision is consistent with local needs, the HAC balances the regional need for affordable housing with the degree to which the health and safety is imperiled, the natural

environment is endangered, the design of the site and the proposed housing is seriously deficient, open spaces are critically needed and whether the local requirements and regulations bear a direct and substantial relationship to the protection of [health and safety, design and open spaces]. 760 C.M.R. §31.07(2)(b).

ZBA conditions that are in direct conflict with requirements of the subsidizing agency are unlikely to be upheld upon appeal.

In a HAC appeal from a *denial* (including cases where HAC determines based on particular facts and circumstances that a conditional approval is tantamount to a denial), the town has the burden of proving that its decision is consistent with local needs. This is a difficult burden to meet.

SPECIAL NOTE REGARDING FORMAL PROCESS VS. NEGOTIATION: Many issues, including density, project design and additional affordability, can be negotiated. The greatest opportunities to reach agreement occur when the ZBA has identified key issues early in the review process and has used informal work sessions to maintain an ongoing line of communication with the applicant. If agreement cannot be reached, the ZBA may *only* address the proposal that has been submitted (and in some cases modified) by the applicant when it comes time to render a decision. The ZBA may not redesign the project or arbitrarily reduce the size of the project.

Consider Work Sessions to Clarify Technical Differences

The ZBAs must conduct all hearings and deliberations on 40B applications in public. This does not necessarily preclude informal discussions outside of the public hearing. Many cities and towns find that these work sessions offer a constructive approach to achieving successful outcomes.

If a ZBA chooses to conduct work sessions, no more than one ZBA member should participate and should be accompanied by a consultant with expertise in Chapter 40B (available at no cost through the Massachusetts Housing Partnership) and/or by counsel. It is also helpful to include the town planner (if your community has a planner) and other relevant municipal staff and/or representatives of other city/town boards in the work sessions.

Work sessions should be limited to discussions concerning technical issues such as those concerning engineering, traffic and financial review. The participants may discuss site or building design alternatives so long as they don't negotiate project redesign. The ZBA member that participates in a work session should report on the discussions at a public hearing.

Some attorneys state that these meetings, even if only one ZBA member participates, must be posted as open meetings. Lawyers generally agree that if more than one ZBA member participates, notice of the meeting should be published and the meeting should be conducted in public.

Ultimately each city or town needs to determine how its own process will be conducted. Will any discussions be conducted in closed meetings, or will everything occur in a public forum? The ultimate arbiter of this decision is the town counsel or city solicitor, who often will seek advice from the county's district attorney.

F. ZBA Renders a Final Decision

PRINCIPLE 9: If the applicant does not agree to all of the ZBA's preliminary conditions, reconsider whether the disputed conditions are necessary and then render a final decision that is likely to be upheld.

Unless the ZBA and developer are in agreement, the ZBA must make a judgment call that balances the added value of each disputed permit condition with the added risks that the developer will appeal and the ZBA's decision will be overturned. Once the ZBA has issued its decision, the developer must then decide whether to incur the additional time and expense of taking an appeal to HAC. If the ZBA has done its homework and followed these guidelines its decision is likely to be upheld upon appeal.

SPECIAL NOTE REGARDING APPEALS: As local comprehensive permit decisions have become more thoughtful and more sophisticated, and as 40B regulations have changed, HAC has shown greater deference to the decisions made by ZBAs. Today communities have much more influence over what does and doesn't get built through Chapter 40B.

PRINCIPLE 10: Do not deny a comprehensive permit application unless (A) state regulations explicitly authorize this, or (B) there are health and safety impacts that cannot be mitigated by conditions

Chapter 40B allows the ZBA to deny an application for a comprehensive permit if a city or town can demonstrate that more than 10 percent of its housing stock is subsidized low- *or* moderate-income housing or if such housing has been built on more than 1-1/2 percent of the community's developable land area or if the application before the ZBA would result in the commencement in any one calendar year of construction of such housing on sites equaling three tenths of one percent (0.3%) of the total land area. Unless there is a factual disagreement about whether these requirements have been met, these denials will be upheld by HAC.

Recent HAC regulations outline several other circumstances where communities may deny comprehensive permit applications without any significant risk of being overturned:

- When the project exceeds a maximum size (ranging from 150 units in small communities to 300 units in larger ones).
- Where the Department of Housing and Community Development has approved a community's affordable housing production plan and has certified that the community has approved low- and moderate-income units during the previous 12 months totaling at least 0.75% of the community's housing stock pursuant to that plan.
- During a 12-month cooling off period after a development proposal that does not include affordable housing has been made on the same site.

Outside of these carefully delineated safe harbors there are *very few* circumstances under which ZBA denials of comprehensive permits have been upheld. As a general matter, a denial will not be upheld on appeal if a comprehensive permit could have been granted with conditions adequate to protect public health, safety and welfare.

APPENDIX:

STANDARDS FOR DETERMINING WHETHER PERMIT CONDITIONS MAKE A 40B DEVELOPMENT UNECONOMIC

As noted in the *Local 40B Review and Decision Guidelines*, it is not always necessary or appropriate for a zoning board of appeals to review the financial pro forma for a proposed 40B development. In situations where a pro forma review does become necessary, the following standards should be applied.

A. STANDARDS APPLICABLE TO ALL DEVELOPMENTS

Determining Land Value

The allowable acquisition value of a site for purposes of Chapter 40B is the fair market value of the site excluding any value relating to the possible issuance of a comprehensive permit (the As-Is Market Value) at the time of submission of the request for a project eligibility letter plus reasonable and verifiable carrying costs (Reasonable Carrying Costs) from that date forward.

Reasonable Carrying Costs may not exceed 20% of the As-Is Market Value of the site unless the carrying period exceeds 24 months from the date of application for a project eligibility letter. This carrying period shall terminate on the date that the documents for the Construction Loan are signed or when actual construction commences, whichever is sooner. Applicants must at all times, after issuance of the project eligibility letter, use diligent efforts in pursuing the development.

If the applicant has site control through an option or purchase and sale agreement, Reasonable Carrying Costs may include (but are not necessarily limited to) non-refundable option fees and extension fees paid to the seller in addition to the purchase price. If the applicant owns the property, Reasonable Carrying Costs may include (but are not necessarily limited to) property taxes, property insurance, and interest payments on acquisition financing. All Reasonable Carrying Costs must be documented by the submission of independent, verifiable materials (such as cancelled checks, real estate tax bills, etc.).

With the adoption of a uniform, appraisal-based Land Acquisition Value Policy (the "Uniform Land Value Policy") by all issuers of project eligibility letters, it becomes unnecessary and duplicative for the ZBA to commission an appraisal of its own. Under the Uniform Land Value Policy any appraisal under Chapter 40B, while paid for by the applicant, shall be commissioned by (and name as the client) the agency reviewing the application for a project eligibility letter. These agencies shall maintain a list of approved appraisers and may augment, reduce or alter the list of approved appraisers as they deem necessary or appropriate. All approved appraisers shall be, at a minimum, a General Real Estate Appraiser certified by the Commonwealth of Massachusetts and shall submit Self-Contained Appraisal Reports to the subsidizing agencies in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP). In order for any appraisal to be deemed valid, it must have be reviewed and accepted by the agency issuing the site approval letter.

A reasonable rate of return on a proposed development must be determined from the As-Is Market Value of the site even though the amount paid for the site may be more or less than the As-Is Market Value. This approach is consistent with how the subsidizing agency will require the site to be valued in the calculation of total development costs set forth in the final cost certification of the project.

EXCEPTION FOR SMALL PROJECTS WITH COMMUNITY SUPPORT: Upon written request of the chief elected official, the subsidizing agency may waive the appraisal requirement for proposed developments of 20 units or less where the applicant submits satisfactory evidence (such as a local tax assessment, limited appraisal, or opinion of value from a licensed real estate broker) that reasonably supports the acquisition cost. The purpose of such a waiver is to relieve the cost burden for smaller developments that are sponsored or supported by the local community where the reasonableness of the acquisition cost is not at issue.

As is the case in all 40B developments a complete appraisal using the methodology described above will be conducted in conjunction with the closing of the financing on each of these small projects and will also be required at cost certification.

Unit Construction Costs

Hard construction costs should be carried on a square foot basis (including the contractor's general requirements[1], general overhead, profit and bond). Outline specifications for the units (including any proposed differences between market and affordable units) should be provided, if requested, to support the cost estimate. Additional costs for common areas, facilities and equipment should be provided with sufficient quantity and unit cost information for a general review.

Hard Cost Contingency

A contingency factor applied to the estimate of hard construction costs (including site development costs but excluding acquisitions costs) should not exceed 5% for new construction and 10% for rehabilitation.

Soft Cost Contingency

A contingency factor applied to all projected soft costs (excluding real estate commissions on the sale of the units), should not exceed 5%, except for smaller developments where lenders may require a higher percentage.

Site Development Costs

These costs are site specific and estimates tend to be more preliminary than other cost categories. Such costs should be broken out with quantities and unit prices provided, if applicable and reasonable, with estimates for the following categories:

Roads (including utilities in the roads)

On-site Septic system

On-site water system

Blasting allowance

Rough grading/site preparation

Landscaping

Utility connections

[1] As commonly used in construction accounting, builder's overhead is a portion of the costs incurred by the builder or general contractor to operate their business (such as office and administrative expenses) that is not attributable to any one job. General requirements are project-specific expenses (such as on-site supervision, field offices, temporary utilities, and waste removal) that support the job as a whole rather than specific work items. Builder's profit is the difference between the total cost of construction (including builder's overhead and general requirements) and the amount paid to the builder/contractor.

Identities-of-Interest Construction Managers or General Contractors

Each developer must identify the existence of an identity of interest with any other party to the project. An identity of interest might, for example, be a developer who is also the general contractor. In projects where an identity of interest exists between the developer and the general contractor, the maximum allowable builder's profit and overhead and general requirements should be calculated as follows:

- Builder's profit — 6 percent of construction costs
- Builder's overhead — 2 percent of construction costs
- General requirements — 6 percent of construction costs

If a developer or related entity makes a loan to the project, interest may only be recognized on developer contributions that exceed 20% of total development costs. Any such loans should be evidenced by a note or mortgage and receive interest no higher than the rate established by the primary construction lender on the project.

General

The pro forma presentation of projected development costs, sales revenues (if applicable), and developer profit should follow the format used by MassHousing in its application form for a project eligibility letter. Additional line items may be added, if necessary, such as marketing and lottery costs, development consultants, and developer's overhead.

If there is an identity of interest not specifically addressed in this appendix, fees for services by related parties should not exceed amounts that would otherwise be paid for such services on an arm's length basis in the ordinary course of business.

All of the line items in the pro forma, including construction cost, sales proceeds and rents, where appropriate, should be estimated in current dollars at the time of submission of the request for a Project Eligibility Letter to avoid speculation about future construction costs, sales prices, and/or rents.

Resolution of Disputed Costs

Real estate industry and affordable housing industry standards should be the basis for reviewing pro forma line items. Many of these standards are listed in this Appendix. After referring to the standards listed in the Appendix and using these as a basis for agreement and no agreement is forthcoming, then for those items for which the developer and the town's peer review consultant disagree and the variances are larger than 10%, the parties should hire a neutral financial consultant to resolve the dispute by choosing either the high or the low estimate. This approach serves to encourage the developer and the peer review consultant to make realistic estimates in the first place. The town and the developer should use the midpoint for items with variances of less than 10 percent.

B. STANDARDS APPLICABLE TO FOR-SALE DEVELOPMENTS ONLY

Developer Overhead

Developer overhead reflects the expenses of the applicant administering and managing the project during the permitting, financing, construction, marketing and cost certification phases and is not a component of allowable developer fee/profit. The allowable developer overhead costs for cost certification purposes (without need of supporting documentation) should be as follows:

TOTAL PROJECT SIZE	ALLOWABLE DEVELOPER OVERHEAD
Up to 4 units	$20,000 (fixed amount)
5 - 20 units	$4,000/unit for units 1-20
21 - 100 units	$80,000 plus $2,000/unit for units 21-100
101 - 150 units	$240,000 plus 1,000/unit for units 101-150
151+ units	$290,000 plus $500/unit for units above 150

Note: If overhead tasks typically performed by a developer are provided by development consultants or other third parties, the Development Overhead allowance should be reduced accordingly.

Commissions - Market Units

Commissions on the sales of the market units should not exceed 6%. If there is an identity of interest between the development entity and the brokerage agency, the fee on the sales of the market units should not exceed 5%. All advertising costs must be included within the commissions. The cost of model homes may be treated as a separate marketing cost.

Marketing/Lottery Costs - Affordable Units

The maximum allowable fee, including lottery costs, should be the greater of $20,000 or 3% of the sum of actual affordable unit sales prices.

Project Revenues

A. AFFORDABLE UNITS

The average target sales price of the affordable units should be established based on income limits published for the applicable Metropolitan Statistical Area by the U.S. Department of Housing and Urban Development (HUD). Unless otherwise required by the housing subsidy program, Maximum Qualifying Income should be set at 80% of area median income at the household size that corresponds to the number of bedrooms in the unit, as follows:

0 BR unit = 1 person household

1 BR unit = 2 person household

2 BR unit = 3 person household

3 BR unit = 4 person household

4 BR unit = 5 person household

The maximum household size allowed for age-restricted projects should be a 3 person household.
Target sales prices for affordable units should be determined as follows:

- Maximum monthly housing cost is 30% of the Maximum Qualifying Income divided by 12 months.
- From that maximum monthly housing cost, deduct estimated real estate taxes, property insurance costs, realistic condo fees, mandated home owner association dues, and private mortgage insurance (PMI). The remainder is the monthly amount available to service a mortgage.
- Divide that amount by applicable mortgage loan constant based on current mortgage loan interest rates plus 50 basis points (to allow for estimated fluctuations before the time of sale) for a 30-year term, fixed interest rate mortgage loan with 0 points and 0 closing costs. The quotient is the maximum supportable mortgage.
- Divide the maximum supportable mortgage by .95 to arrive at target sales price (which allows for a maximum 5% down payment).

B. MARKET UNITS

Estimated sale prices by unit type should be supported by a market study which identifies recent sales prices of comparable units provided from an MLS listing or alternative. The market study should be conducted at the time of submission of the request for a Project Eligibility Letter.

Uneconomic Standard

A for-sale project should be considered uneconomic if the Return on Total Cost is less than 15% (i.e., if projected sales proceeds exceed development costs by less than 15%). Developer overhead expenses and payment for services rendered by the developer or related parties should only be included in total development costs to the extent allowed by these standards.

Profit may be more variable for projects with public capital subsidies such as the federal HOME program. In those cases the projected profit should be consistent with other subsidized home ownership developments with similar characteristics that have already been permitted and built.

This standard is appropriate for most, but not necessarily for all situations. If the ZBA or the 40B applicant proposes to apply an uneconomic standard outside the range of this standard, they should demonstrate that the alternative standard is reasonable, consistent with real estate industry norms, and has been used in practice for other developments with similar characteristics that have been successfully financed, built and sold. The sole purpose of the uneconomic standard is to help the ZBA assess whether proposed permit conditions are likely to be upheld on appeal. A developer may always choose to proceed with a 40B development that appears to be uneconomic if the subsidizing agency, in the normal course of its review and approval, finds that the developer has the capacity and the financial resources to successfully complete the project.

Projected profits on for-sale developments are estimates, not actual results, and the minimum profit level needed to make a project economically feasible may change over time in response to changing market conditions. If a ZBA is acting in good faith and grants a permit with conditions that provide a reasonable rate of return, an experienced developer of for-sale housing is far more likely to accept that conditional permit than to assume the additional delays, costs and uncertainties associated with an appeal.

C. STANDARDS APPLICABLE TO RENTAL DEVELOPMENTS ONLY

Developer Overhead and Fee

Developer overhead and fees are necessary project expenses that should not be considered as a component of developer profit. Accordingly, an 8 percent allowance for developer fees and overhead should be included in the pro forma for purposes of estimating rates of return and determining whether a project is uneconomic. If developer fees and overhead in excess of 8 percent are allowed by the applicable subsidized housing program(s) they should not be included as a development cost when estimating the project's rate of return.

Project Revenues

A. AFFORDABLE UNITS

Estimates of annual rental revenue should be based on the following methodology:

The monthly rental rates for the affordable units, including normal utilities (heat, hot water, water, cooking fuel and electricity, or reasonable allowances for same) should be established such that the average rent should equal no more than 30% of gross income for a household earning 80% of Area Median Income, unless otherwise required by the housing subsidy program, based on the appropriate household size per number of bedrooms per unit, as outlined below:

0 BR unit = 1 person household

1 BR unit = 2 person household

2 BR unit = 3 person household

3 BR unit = 4 person household

4 BR unit = 5 person household

B. MARKET UNITS

Estimates of annual rental revenue for market-rate units should be supported by a recently completed market study of comparable developments within the market area of the proposed development. Such market study should be prepared by a qualified market analyst or appraiser.

Uneconomic Standard

There are several methods used by real estate professionals to calculate estimated rates of return on rental housing developments. The simplest method of calculating expected return is known as *Return on Total Cost* (ROTC). The ROTC is the projected net operating income (NOI) of the property in the first year of stabilized occupancy divided by its projected total development cost (TDC) calculated in accordance with these standards.

A more sophisticated method of calculating expected return is the *Internal Rate of Return* (IRR). The IRR incorporates all expected cash inflows and outflows over the expected life of the investment (acquisition and development costs, operating costs, rental income, and future sale) and generates a rate of return that may be compared to returns on stocks and bonds. An IRR analysis is particularly sensitive to assumptions about annual growth in net operating income, the year in which the property is assumed to be sold, and the future value of the property at the time of sale.

A third methodology is *Return on Equity* (ROE), typically calculated as a "cash-on-cash" return. A cash-on-cash ROE is calculated by dividing projected cash flow after debt service in the first year of stabilized occupancy by the developer's total equity investment in the project. ROE is generally not an appropriate measure of return for purposes of Ch. 40B because ROE is highly sensitive to differences in project financing assumptions across projects, which makes valid comparisons difficult.

What is a reasonable rate of return for 40B rental developments?

In most situations, an ROTC analysis[2] will allow a ZBA to make a reasonable and informed assessment of whether proposed permit conditions would render a 40B rental development uneconomic. A projected ROTC of at least 2-1/2 to 3-1/2 percent above the current yield on 10-year Treasury notes is generally required to fairly compensate capital investors for the risks associated with permitting, construction, and operations.

When the IRR approach[3] is used, an expected IRR at least 6-1/2 percent above 10-year Treasury rates is generally required to fairly compensate capital investors for the risks associated with permitting, construction, and operations.

[2] Note on ROTC analysis: For purposes of this analysis the acquisition cost should be the As-Is Market Value without the comprehensive permit in place and the value of anticipated public capital subsidies (Low Income Housing Tax Credits, HOME, etc.) should be deducted from total development cost. The projected development costs and projected operating income and expenses should otherwise be determined as set forth in these Guidelines.

[3] Note on IRR analysis: Whenever an IRR analysis is used by the ZBA it should be an "unlevered" IRR based on the net cash flow available to pay lenders and investors after all project expenses have been met. For purposes of this analysis the acquisition cost should be the As-Is Market Value without the comprehensive permit in place. Anticipated public subsidies and subordinate loans (including future repayment obligations) should be included in the analysis. The projected development costs and projected operating income and expenses should be determined as set forth in these Guidelines. Annual growth in Net Operating Income (NOI) should be no less than the imputed rate of inflation from long-term Treasury yields. A sale of the property should be assumed in year 10 at a residual value equal to the projected year 11 NOI divided by a current market-based cap rate minus 3% costs of sale.

Using either the ROTC or IRR approach, rates of return may be more variable for projects with tax credits or other capital subsidies. In those cases the projected rate of return should be consistent with other subsidized rental developments with similar characteristics that have already been permitted and built.

These standards are appropriate for most, but not necessarily for all situations. If the ZBA or the 40B applicant proposes to apply an "uneconomic" standard outside the range of these standards they should demonstrate that the alternative standard is reasonable, consistent with real estate industry norms, and has been used in practice for rental developments with similar characteristics that have been successfully financed and built. The sole purpose of the "uneconomic" standard is to determine when and how a developer may appeal the issuance of a comprehensive permit to the Housing Appeals Committee. A developer may always choose to proceed with a 40B development that appears to be uneconomic if the subsidizing agency, in the normal course of its review and approval, finds that the developer has the capacity and the financial resources to successfully complete the project.

Rates of return calculated by any method are estimates, not actual results, and the relationship of minimum investment returns to Treasury rates may change over time in response to changing market conditions. If a ZBA is acting in good faith and grants a permit with conditions that provide a reasonable rate of return, an experienced rental housing developer is far more likely to accept that conditional permit than to assume the additional delays, costs and uncertainties associated with an appeal.

In connection with the methodology described above, estimated development costs should include (but not be limited to) the following:

A. Annual Operating Costs

Estimates of annual operating costs should be comparable to projects of similar size and type, preferably from a recognized lender on market-rate and/or mixed-income housing developments. Particular attention should be given to areas where there may be an identity-of-interest (e.g., property management fees) or miscellaneous fees for required services, such as trash removal or covered parking (if there is no surface parking option) which may increase the rent/cost burden on tenants in the affordable units. The projected cost for any such line item should fall within industry standards.

B. Vacancy / Bad Debt Allowances & Annual Trending Assumptions

These assumptions should conform to the underwriting guidelines of the affordable housing program being used. If requested by the board of appeals, questions relating to such underwriting guidelines or assumptions will be responded to in writing by the subsidizing agency.

C. Finance fees, Credit Enhancement Fees, Lender Fees & Operating

Estimates of these costs should conform to the underwriting guidelines of the affordable housing program being used.

D. Construction Loan Interest Rate, Term and Loan-to-Value (or Cost) Ratio

These costs should conform to the underwriting guidelines of the affordable housing program being used.