TOWN OF EASTHAM
BOARD OF SELECTMEN
WORK SESSION AGENDA
Thursday, November 12, 2015
3:00 p.m.

Location: *Council on Aging Meeting Room*

1. 40B Training/Discussion

Upcoming Meetings

Monday, November 16, 2015	*5:00 p.m.*	*Regular Session*
Tuesday, November 17, 2015	*3:00 p.m.*	*Additional Session*
Wednesday, November 18, 2015	*3:00 p.m.*	*Work Session*

40B Training Handouts

From the Meeting

Thursday

November 12, 2015

40B DEADLINES:

7 Days: From receipt of Application. ZBA must distribute the application and waiver list to all local agencies and invite comment. 760 CMR 56.05(3)

30 Days: From receipt of Application. ZBA must open PH on the application (unless there is a written extension of this deadline). Use the notice requirements under G.L. c.40A, §11. See, G.L. c.40B, §21.

Constructive grant may result if PH not opened within 30 days. Open PH even if application appears "incomplete," to avoid costly litigation.

15 Days: From initial opening of the PH. ZBA must determine if a safe harbor exists (760 CMR 56.03(1)) and give written notice to Applicant and DHCD. 760 CMR 56.05(3). Procedure: 760 CMR 56.03(8).

15 Days: From receipt by applicant of safe harbor claim. Applicant must challenge the ZBA's safe harbor claim to DHCD. 760 CMR 56.03(1).

30 Days: From receipt of applicant's safe harbor challenge. DHCD must decide the safe harbor challenge or the claim is granted. 760 CMR 56.03(8).

180 Days: From opening of the PH. ZBA must close the PH, presuming Applicant provided all necessary materials, unless an extension exists.

40 Days: From close of the PH. ZBA must render the decision, unless there is an extension by the Applicant.

14 Days: From making the decision. ZBA must file decision with Town Clerk.

20 Days: From filing of ZBA's decision with Town Clerk. Deadlines to appeal. Abutter appeal under G.L. c.40A, §17. (760 CMR 56.05(9)(a)) Applicant appeal under G.L. c.40B, §22. (760 CMR 56.05(9)(b) or (c))

20 Days: From receipt of insubstantial modification request. ZBA must determine, reduce determination to writing, notify the Applicant; or a constructive grant results. 760 CMR 56. 05(11) (a) and (b).

20 Days: From determination of substantiality. Applicant must object to the determination and give notice whether it elects to continue before ZBA and preserve right to appeal to the HAC after a decision on the merits is made or to appeal the determination directly to the HAC.

30 Days: From determination a modification is substantial. ZBA must open PH on the substantial modification request. 760 CMR 56.05(11)(c).

TOWN OF EASTHAM
COMPREHENSIVE PERMIT (G.L. c. 40B) INFORMATION
KOPELMAN and PAIGE, P.C. – NOVEMBER 12, 2015 WORKSHOP

I. Statutory and Regulatory Authority

A. G.L. c.40B, §§20-23 (1969); G.L. c.40A, §11
B. 780 CMR 56.00

II. Statutory and Regulatory Minima – "Safe Harbors"

A municipality that satisfies any of the following statutory and regulatory exemption thresholds has a right to either deny an application for a comprehensive permit or impose its local regulations on the approval and the decision shall be considered consistent with local needs:

1. Ten Percent Affordable Housing Exemption:
   10% of the Town's total housing stock is part of the subsidized housing inventory. G.L. c. 40B, §20; 760 CMR 56.03(3)(a). **2,632 x 10% = 264**
   The Town has **50** SHI units or **1.9%,** as of December 5, 2014.

2. Existing Development Exemption:
   Affordable housing land exceeds 1½% of total land area, excluding government-owned land.) G.L. c. 40B, §20; 760 CMR 56.03(b).

3. New Construction Exemption:
   New affordable housing construction land area in calendar year exceeds .3 of 1% of the total land area. G.L.c.40B,§20; 760 CMR 56.03(c).

4. Recent Progress: Affordable units created during the prior 12 months exceed 2% of the total housing stock. 760 CMR 56.03(5): **53 units.**

5. Large Scale Project: The Application is for more than a certain number of units, depending on the Town's affordable housing stock. 760 CMR 56.03(6)(c). An application for more than **200 units.**

6. Related Application: The Application is related to an application for zoning or subdivision approval on the same land made within the prior 12 months. 760 CMR 56.03(7).

7. Planned Production: Certified progress on approved affordable housing planned production. 760 CMR 56.03(4). The Town's 2010 HPP expired 8/16/15. **It is strongly recommended the HPP be renewed.**
   (One year safe harbor, if .5% SHI achieved: 14 units.)
   (Two year safe harbor, if 1% SHI achieved: 27 units.)

General Minimum Land Area Safe Harbor
760 CMR 56.03(1)(a); 760 CMR 56.03(3)(b).

Under 760 CMR 56.03(1)(a), any "decision by a Board to deny a Comprehensive Permit, or (if the Statutory Minima defined at 760 CMR 56.03(b) or (c) have been satisfied) grant a Comprehensive Permit with conditions, shall be upheld if one or more of the following grounds has been met as of the date of the Project's application: (a) the municipality has achieved one or more of the Statutory Minima, in accordance with 760 CMR 56.03.(3)," including under 760 CMR 56.03(3)(b), which provides that the Statutory Minima shall be deemed satisfied if SHI Eligible Housing exists in the municipality "on sites comprising more than 1 1/2 % of the total land area zoned for residential, commercial, or industrial use...." (Emphasis added.)

Under 760 CMR 56.03(8)(a), the process for raising a safe harbor is for the board to provide written notice to the Applicant and DHCD within 15 days of the opening of the public hearing on the 40B application of the assertion of the safe harbor claim and the factual basis for the claim. The Applicant then has 15 days to challenge the claim to DHCD and DHCD has 30 days to render a decision, with the Board having the burden of proof. Any failure by DHCD to act is deemed a determination in favor the municipality.

The regulation provides as follows:

56.03(8) Procedure for Board Decision.

(a) If a Board considers that, in connection with an Application, a denial of the permit or the imposition of conditions or requirements would be consistent with local needs on the grounds that the *Statutory Minima* defined at 760 CMR 56.03(3)(b or c) have been satisfied or that one or more of the grounds set forth in 760 CMR 56.03(1) have been met, it must do so according to the following procedures. Within 15 days of the opening of the local hearing for the Comprehensive Permit, the Board shall provide written notice to the Applicant, with a copy to the Department, that it considers that a denial of the permit or the imposition of conditions or requirements would be consistent with local needs, the grounds that it believes have been met, and the factual basis for that position, including any necessary supportive documentation. If the Applicant wishes to challenge the Board's assertion, it must do so by providing written notice to the Department, with a copy to the Board, within 15 days of its receipt of the Board's notice, including any documentation to support its position. The Department shall thereupon review the materials provided by both parties and issue a decision within 30 days of its receipt of all materials. The Board shall have the burden of proving satisfaction of the grounds for asserting that a denial or approval with conditions would be consistent with local needs, provided, however, that any failure of the Department to issue a timely decision shall be

deemed a determination in favor of the municipality. This procedure shall toll the requirement to terminate the hearing within 180 days.

The method for making the General Land Area Minimum calculation, as required under 760 CMR 56.03(3)(b), is set forth below as it appears in the regulation:

(b) General Land Area Minimum. For the purposes of calculating whether SHI Eligible Housing exists in the city or town on sites comprising more than 1½% of the total land area zoned for residential, commercial, or industrial use, pursuant to M.G.L. c. 40B, § 20:

1. Total land area shall include all districts in which any residential, commercial, or industrial use is permitted, regardless of how such district is designated by name in the city or town's zoning bylaw;
2. Total land area shall include all unzoned land in which any residential, commercial, or industrial use is permitted;
3. Total land area shall exclude land owned by the United States, the Commonwealth or any political subdivision thereof, the Department of Conservation and Recreation or any state public authority, but it shall include any land owned by a housing authority and containing SHI Eligible Housing;
3. Total land area shall exclude any land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the Department of Environmental Protection pursuant to M.G.L. c. 131, § 40A. No other swamps, marshes, or other wetlands shall be excluded;
4. Total land area shall exclude any water bodies;
5. Total land area shall exclude any flood plain, conservation or open space zone if said zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial or industrial use are completely prohibited.
6. No excluded land area shall be counted more than once under the above criteria.

In addition, only sites of SHI Eligible Housing units inventoried by the Department or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, shall be included toward the 1½% minimum. For such sites, that proportion of the site area shall count that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units).

A qualified professional could reviewed the above calculation requirements closely and all necessary plans and GIS data and calculate the total relevant land area within the Town on which SHI Eligible Housing exists, to determine whether this safe harbor exists.

Housing Production Plan Safe Harbor
760 CMR 56.03(1)(b) and 760 CMR 56.03(4)

Under 760 CMR 56.03(1)(a), any "decision by a Board to deny a Comprehensive Permit, ... shall be upheld if one or more of the following grounds has been met as of the date of the Project's application:" (b) the Department [i.e., DHCD] has ***certified*** the municipality's compliance with the goals of its approved Housing Production Plan, in accordance with 760 CMR 56.03(4). (Emphasis added.)

The first step toward achieving certification status for an HPP is for a municipality to develop an HPP and obtain approval for the HPP from DHCD under 760 CMR 56.03(4)(a)-(e). The next step, however, is for the Town to achieve ***certification*** of the HPP under 760 CMR 56.03(4)(f).

A municipality may request certification of an approved HPP if the Town has increased its number of SHI Eligible Housing units in an amount equal to or great than the Town's .50% production goal for that calendar year. Once certification is achieved, that the .50% production goal has been achieved, then the certification shall remain in place for one year from its effective date. If the 1.0% production goal is achieved in a calendar year, then the certification remains in place for two years from its effective date.

III. 40B Comprehensive Permit Application

A. Project Eligibility Application

Under 760 CMR 56.04(2), an application shall include an application for Project Eligibility to the Subsidizing Agency, with a copy to the Chief Executive Officer of the municipality and written notice to the Department, which shall include:

(a) the name and address of the Applicant;

(b) the address of the site and site description;

(c) a locus map identifying the site within a plan of the neighborhood, accompanied by photographs of the surrounding buildings and features that provide an understanding of the physical context of the site;

(d) a tabulation of proposed buildings with the approximate number, size (number of bedrooms, floor area), and type (ownership or rental) of housing units proposed;

(e) the name of the housing program under which Project Eligibility is sought;

(f) relevant details of the particular Project if not mandated by the housing program (including percentage of units for low or moderate income households, income eligibility standards, the duration of restrictions requiring Low or Moderate Income Housing, and the limited dividend status of the Applicant);

(g) conceptual design drawings of the site plan and exterior elevations of the proposed buildings, along with a summary showing the approximate percentage of the tract to be occupied by buildings, by parking and other paved vehicular areas, and by open areas, the approximate number of parking spaces, and the ratio of parking spaces to housing units;

(h) a narrative description of the approach to building massing, the relationships to adjacent properties, and the proposed exterior building materials;

(i) a tabular analysis comparing existing zoning requirements to the Waivers requested for the Project; and

(j) evidence of control of the site.

B. Application to the ZBA

Under 760 CMR 56.05(2), the submission shall include the following items, in order to be considered a complete application:

Elements of Submission, Filing Fees. The Applicant shall submit to the Board an application and a complete description of the proposed Project. Normally the items listed below will constitute a complete description. Failure to submit a particular item shall not necessarily invalidate an application. The Board shall not require submissions for a Comprehensive Permit that exceed those required by the rules and procedures of Local Boards for review under their respective jurisdictions.

(a) preliminary site development plans showing the locations and outlines of proposed buildings; the proposed locations, general dimensions and materials for streets, drives, parking areas, walks and paved areas; and proposed landscaping improvements and open areas within the site. An Applicant proposing to construct or rehabilitate four or fewer units may submit a sketch of the matters in 760 CMR 56.05(2)(a) and (c) which need not have an architect's signature. All Projects of five or more units must have site development plans prepared by a registered architect or engineer;

(b) a report on existing site conditions and a summary of conditions in the surrounding areas, showing the location and nature of existing buildings, existing street elevations, traffic patterns and character of open areas, if any, in the neighborhood. This submission may be combined with that required in 760 CMR 56.05(2)(a);

(c) preliminary, scaled, architectural drawings. For each building the drawings shall be prepared by a registered architect, and shall include typical floor plans, typical elevations, and sections, and shall identify construction type and exterior finishes;

(d) a tabulation of proposed buildings by type, size (number of bedrooms, floor area) and ground coverage, and a summary showing the percentage of the tract to be occupied by buildings, by parking and other paved vehicular areas, and by open areas;

(e) where a subdivision of land is involved, a preliminary subdivision plan;

(f) a preliminary utilities plan showing the proposed location and types of sewage, drainage, and water facilities, including hydrants;

(g) **the Project Eligibility letter**, showing that the Applicant fulfills the requirements of 760 CMR 56.04(1);

(h) a list of requested Waivers.

The Board may require the payment of a reasonable filing fee with the application, if consistent with subdivision, cluster zoning, and other fees reasonably assessed by the municipality for costs designed to defray the direct costs of processing applications, and

taking into consideration the statutory goal of M.G.L. c.40B, §§ 20 through 23 to encourage affordable housing development. The fee must be established before the application is received.

C. 40B Public Hearing

The comprehensive permit regulations require the Board to distribute a notice of the Application and the list of Waivers to all Local Boards and may provide a full copy of the Application when the Board deems that appropriate. 760 CMR 56.05(3).

The Board is allowed to invite participation at the Public Hearing by any Local Board the Board deems would necessary or helpful to the process. 760 CMR 56.05(3). The Board may seek general input and/or specific input regarding conditions it may want to impose.

1. Regulatory Deadlines

There are a number of regulatory deadlines that the Board should be aware of, unless the developer grants a written extension.

First, the Board shall open the public hearing within 30 days of receipt of a "complete application." 760 CMR 56.05(3).

Second, the Board must close the public hearing on the Application 180 days after it opens. Id. The 180-day period is based on a presumption that the Applicant timely responds to reasonable requests for submission of materials and may be extended by written consent of the Applicant. Id.

Third, after the public hearing is closed, the Board must make its decision, by majority vote, within 40 days.

Fourth, once the decision is voted, the Board has 14 days to file the decision with the Town Clerk and forward a copy to the Applicant and to the Department of Housing and Community Development. 760 CMR 56.05(8)(a).

2. Outside Consultants

The Board may employ outside consultants to assist in reviewing the Application. In addition, the Board may request the Applicant to supplement the Application with studies or reports in response to health, safety, environmental, design, open space, planning or other local concerns.

In particular, the comprehensive permit regulations limit the Board's authority to review the project *pro forma* only after meeting the following preconditions:

1. a consultant review has identified issues with the Application;
2. the Applicant had an opportunity to modify the original proposal;

3. the Board proposed conditions to mitigate the project's impacts and considered requested waivers; and
4. the Applicant indicated that it did not agree with the Board's conditions and waiver denials because they would render the project uneconomic.

Only then may the Board require the *pro forma* and engage a consultant to analyze the Applicant's claim that the Board's conditions and/or waiver denials render the project uneconomic. 760 CMR 56.05(6)(a) and (b).

If, after receiving an application, the Board determines that in order to review that application it requires technical advice in such areas as civil engineering, transportation, environmental resources, design review of buildings and site, and (in accordance with 760 CMR 56.05(6)) review of financial statements that the necessary review services are unavailable from municipal employees, it may employ outside consultants.

The regulations require that, whenever possible the Board shall work cooperatively with the Applicant to identify appropriate consultants and scopes of work and to negotiate payment of part or all of consultant fees by the Applicant. Alternatively, the Board may, by majority vote, require that the Applicant pay a reasonable review fee in accordance with 760 CMR 56.05(b) for the employment of outside consultants chosen by the Board alone.

The Board should not impose unreasonable or unnecessary time or cost burdens on an Applicant. Legal fees for general representation of the Board or other Local Boards shall not be imposed on the Applicant. 760 CMR 56.05(5)(a).

Review Fees. A review fee may be imposed only if:

1. the work of the consultant consists of review of studies prepared on behalf of the Applicant, and not of independent studies on behalf of the Board;

2. the work is in connection with the Applicant's specific Project;

3. all written results and reports are made part of the record before the Board. A review fee may only be imposed in compliance with applicable law and the Board's rules. All fees assessed pursuant to 760 CMR 56.05(5)(b) shall be reasonable in light of:

i. the complexity of the proposed Project as a whole;

ii. the complexity of particular technical issues;

iii. the number of housing units proposed;

iv. the size and character of the site;

v. the projected construction costs;

vi. fees charged for similar consultants and scopes of work in the area.

Amount of Fee. As a general rule, the Board may not assess any fee greater than the amount which might be appropriated from town or city funds to review a project of similar type and scale in the town or city.

Consultant Procedure. The Board's rules shall set out procedures for inviting proposals by qualified outside consultants, and for the deposit of review fees in a special municipal account. The Board's rules may provide that if the Applicant fails to pay the review fee within the stated time period, the Board may deny the Comprehensive Permit. Any unspent excess in the account, including accrued interest, shall be reimbursed to the Applicant upon the issuance of the Board's decision or withdrawal of the application.

An administrative appeal from the selection of the outside consultant may be lodged within 20 days of the consultant's selection, with the city council or town board of selectmen. The grounds for such an appeal shall be limited to claims that the consultant selected has a conflict of interest or does not possess the minimum, required qualifications. The minimum qualifications shall consist either of an educational degree in or related to the field at issue or three or more years of practice in the field at issue or a related field. The required time limits for action upon an Application by the Board shall be extended by the duration of the administrative appeal. In the event that no decision on the appeal is made by the city council or the town board of selectmen within one month following the filing of the appeal, the selection made by the Board shall stand.

3. Waivers from Local Requirements and Regulations.

The Applicant may request Waivers, as listed in its application or as may subsequently arise during the hearing, and the Board shall grant such Waivers as are Consistent with Local Needs and are required to permit the construction and operation of the Project.

Zoning waivers are required solely from the "as-of-right" requirements of the zoning district where the project site is located; there shall be no requirement to obtain waivers from the special permit requirements of the district.

If a Project does not request a subdivision approval, waivers from subdivision requirements are not required (although a Board may look to subdivision standards, such as requirements for road construction, as a basis for required project conditions, in which case the Applicant can seek Waivers from such requirements).

4. Decision Standards

Whether the Board may approve the Application with conditions or deny the Application is governed in the first instance by whether or not the Town has met the statutory minimum of low and moderate income housing or satisfied other comprehensive permit "safe harbors", as set forth in set forth in G.L. c. 40B, §20 and 760 CMR 56.03.

Unless there is evidence that the Town has achieved one or more of the other comprehensive permit safe harbors, then there is a presumption that a substantial Housing Need outweighs Local Concerns. 760 CMR 56.07(3)(a).

The effect of the presumption, that a substantial Housing Need (i.e., that regional affordable housing need when considered with the number of Low Income Persons in the municipality affected) exists that outweighs Local Concerns may be rebutted; but only if it can be proven that there is a valid health, safety, environmental, design, open space or other Local Concern that outweighs the regional affordable housing need (760 CMR 56.07(2)(b)(2) or unless existing municipal services or infrastructure is inadequate and the installation of adequate services is not technically or financially feasible (760 CMR 56.07(2)(b)(4)) and financial feasibility may be considered only where there is evidence of unusual topographic, environmental or other physical circumstances that make installation of the needed service prohibitively costly.

However, the Board may approve the Application with conditions, so long as the conditions imposed do not render the project uneconomic and are consistent with local needs **or** if the Applicant proves to the Board (with a peer reviewed pro forma) that the condition or conditions would render the project uneconomic, the Board still may impose the conditions but only if the conditions imposed are required to serve a Local Concern that outweighs the regional need for affordable housing. 760 CMR 56.07(2)(b)(3).

Please note that applications often present complex issues that require in-depth factual analysis, with the assistance of technical and legal consultants.

Insubstantial Modification Requests
760 CMR 56.05(11)

- Within 20 days, the Board shall met, make a determination of substantiality and notify the Applicant of the determination; and, if substantial, notice and open a public hearing on the proposed change within 30 days of the determination

- If the Board misses any portion of the 20 day deadline (including notifying the application of the determination), the permit shall be deemed modified to incorporate the change.

- Use the criteria set forth under 760 CMR 56.07(4) to determine substantiality

  - Generally, substantial changes are: 760 CMR 56.07(4)(c)

    1. Increase in more than 10% of the height of the buildings
    2. Increase in more than 10% of the number of units
    3. Reduction in land by more than 10% in excess of any decrease in units
    4. Change in unit time (townhouses, single-family, garden apartments, single-family, high-rise)
    5. Change from one form of housing tenure to another (rental to ownership and under 55 to over 55)

  - Generally, **in**substantial changes are: 760 CMR 56.07(4)(d)

    1. Reduction in housing units
    2. Decrease of less than 10% in floor area of the units
    3. Change in bedroom count of not more than 10%
    4. Change in color or style of the materials to be used
    5. Change in financing program to be used

- A permit lapses in 3 years. 760 CMR 56.05(12)

  - Unless there is an appeal (3 year deadline is tolled during the appeal for the comprehensive permit and any other permit or approval required for the project)
  - Except for good cause once it becomes final
  - Unless the ZBA sets a later date
  - Unless an extension is requested and granted
  - "An extension may not be unreasonably denied or denied due to other Projects built or approved in the interim.
  - "Extension of a permit shall not, by itself, constitute a substantial change pursuant to 760 CMR 56.07(4)."

- Look for changes in circumstances, though, that might require the need for a PH

Subsidized Housing Inventory ("SHI") Criteria
760 CMR 56.03(2)

- DHCD maintains the SHI: 760 CMR 56.03(2)(a)

- Units count toward the SHI at the earliest of: 760 CMR 56.03(2)(b)

  - The date when the comprehensive permit is filed with the municipal clerk's office;
  - The date when the last appeal for the CP is fully resolved;
  - The date when the building permit issues for the CP units that are eligible;
  - The date when the occupancy permit issues for the CP units that are eligible
  - Local Action Units count when building or occupancy permits issue.

- Units on the SHI lapse if: 760 CMR 56.03(2)(c)

  - If one year elapses between issuance of the comprehensive permit and the building permit;
  - If 18 months elapses between issuance of the building permit and the occupancy permit
  - The comprehensive permit lapses
  - The affordability restriction lapses

- If a project is phased: 760 CMR 56.03(2)(c)

  Then the entire project will be eligible as set forth above, provided that each phase has at least 150 units and the time between the phases is not more than 15 months and each phase contains the same portion of SHI eligible units.

All low- and moderate-income units developed through LIP and meeting all regulatory requirements are eligible for inclusion on the Subsidized Housing Inventory (SHI).

G. L. c. 40R SMART GROWTH **Enacted in 2004**

A 40R development is allowed for "eligible locations" which are defined under G.L. c.40R, §2 as: areas near transit stations (including bus and ferry terminals), areas of concentrated development, areas that by virtue of their infrastructure, transportation access, existing underutilized facilities and/or location make the location highly suitable for residential or mixed use smart growth zoning districts.

40R Incentive payments are available as follows, subject to appropriation, provided that a Smart Growth District is adopted by a 2/3rds vote and the development is approved and built.

Under 40R, §9(a), Zoning Incentive Payments are available, again subject to appropriation and adoption of a smart growth district and approval and construction of a project, for "new construction," which is defined under G.L. c.40R, §2 as excluding those units which could have been constructed under the underlying zoning:

Units	Incentive Payment
Up to 20	$ 10,000
21-100	$ 75,000
101-200	$200,000
201-500	$350,000
501 or more	$600,000

Under 40R, §9(b), density bonus payments of $3,000 per units are available.

40S Smart Growth Cost Reimbursement for "eligible students," subject to appropriation. Adopted 2005

Eligible student:

A child living in a new smart growth development enrolled as of the prior year in a district or charter school K-12 and attends a residential or other school pursuant to special education requirements. Provided via the community's cherry sheets.

Funds received under G.L. c.40R should be escrowed and not used until construction of the project starts because, if construction does not start within three years of the day the funds are paid, then the community is required to repay all of the funds to the trust fund from which the funds issued, as required under G.L. c.40R, §13. As a result, a community may wish to consider adopting a provision that requires that any 40R project that is permitted should be required to begin construction within three years of receipt of the 40R funds by the Town or the permits shall lapse.

LOCAL ACTION UNITS:

DHCD's Guidelines provides as follows:

Local Action Units (LAU) reflect a program component that gives communities the opportunity to include housing units on the state's Subsidized Housing Inventory (SHI) that are being built **without a Comprehensive Permit but that meet LIP criteria and are suitable for inclusion in LIP.** Such units must be built pursuant to a local action such as a zoning provision, a condition of a variance or special permit issued by the planning board or zoning board of appeals, an agreement between the town and a Developer to convert and rehabilitate municipal buildings into housing, the donation of municipally-owned land, or the use of local funds to develop or write down housing units.

While communities are developing many innovative strategies to expand their supply of affordable housing, only units meeting the following criteria will be approved as LAU and, as a consequence of their inclusion in LIP, be added to the SHI for the community:

a. they have resulted from city or town action or approval;

b. they meet the requirements for SHI eligibility as set forth at Section II.A of these Guidelines; and,

c. except for the requirements related to receiving a Comprehensive Permit, **they otherwise meet the requirements for LIP units set out in Section II of the LIP Guidelines.**

II. MEASURING PROGRESS TOWARDS LOCAL GOALS

A. Subsidized Housing Inventory

1. Project Eligibility Criteria

A Project or other unit(s) of Low or Moderate Income Housing shall be eligible to be included on the SHI consistent with the provisions of 760 CMR 56.03(2) and with the following requirements.
a. Eligible Subsidy Programs

The housing programs listed in Appendix II.1 are considered eligible subsidy low or moderate-income housing programs for purposes of G.L. c.40B, §§ 20-30, 760 CMR 56.00.[1] Such programs are eligible if they are administered through a Subsidizing Agency; in the case of federal or local programs not administered through a Subsidizing Agency, projects must generally receive a Project Eligibility Letter through DHCD's Local Initiative Program ("LIP") or receive LIP Local Action Unit ("LAU") approval.[2]

1 This listing does not provide a conclusive indication as to whether any housing development or housing unit is within the statutory definition of low- or moderate-income housing, though this listing is used by DHCD in making such determinations. Such determinations are subject to review by the Housing Appeals Committee in the context of formal appeals concerning particular housing proposals.

2 Exceptions apply for locally administered CDBG and HOME rehabilitated housing units.

b. Affordability – Household Income

In order for a household to be eligible to rent or purchase a restricted unit the household's income shall not exceed 80% of the AMI. A Subsidizing Agency may establish lower thresholds for its programs.

c. Affordability - Household Assets

The Subsidizing Agency may establish, for its housing programs, asset limitations for eligible households. In the absence of such provisions, eligible households shall be subject to the following asset limitations:

(1) For age-restricted homeownership Projects, household assets shall not exceed $275,000 in value, including equity in a dwelling (to be sold). (Note: For New England Fund, Housing Starts, and the Local Initiative Program, this asset limit applies for projects which applied for a determination of project eligibility on or after February 22, 2008. For such projects which applied for a determination of project eligibility prior to that date, then-existing program asset limits apply.)

(2) For non-age restricted homeownership units, household assets shall not exceed $75,000 in value.

(3) For rental units, the greater of the following will be added to income: the income derived from the assets or an imputation of value calculated in a manner consistent with HUD requirements in place at the time of marketing.

(4) If a potential purchaser divests him/herself of an asset for less than full and fair cash value of the asset within two years prior to application, the full and fair cash value of the asset shall be included for purposes of calculating eligibility.

For a detailed description of assets and the treatment of such in determining eligibility, please refer to HUD's "Occupancy Requirements of Subsidized Multifamily Housing Programs"; Handbook 4350.3, Chapter 5, and Appendix II.2, "Additional Guidance on Income". In the event of any conflict between the Handbook and the explicit requirements of these Guidelines or of a Subsidizing Agency (e.g. rules regarding owning a residence at the time of application), the requirements of the Subsidizing Agency and these Guidelines, in that order, shall take precedence over the Handbook.

d. Housing Cost

Generally, the housing program, through its statutory basis, regulations, or guidelines establishes the maximum monthly housing cost. In the absence of such a provision, the following provisions shall apply:
(1) Rental -- monthly housing costs (inclusive of utilities) shall not exceed 30% of monthly income for a household earning 80% of area median income, adjusted for household size. If there is no city trash collection, a trash removal allowance shall be included. If the utilities are separately metered, they may be paid by the tenant and the maximum allowable rent will be reduced to reflect the tenants' payment of utilities, based on the area's utility allowance. Developers should secure the amount of the current Section 8 utility allowance for the specific unit size and type from the local/regional housing authority.

(2) Assisted Living Facility – ALFs shall be treated as rental housing.

(3) Homeownership

(a) Down payment must be at least 3% of the purchase price, at least half of which must come from the buyer's funds unless the Eligible Subsidy Program permits a smaller down payment.

(b) Mortgage loan must be a 30-year fully amortizing mortgage for not more than 97% of the purchase price with a fixed interest rate that is not more than 2 percentage points above the current MassHousing interest rate (www.masshousing.com).

(c) Monthly housing costs (inclusive of principal, interest, property taxes, hazard insurance, private mortgage insurance and condominium or homeowner association fees) shall not exceed 38% of monthly income for a household earning 80% of area median income, adjusted for household size.

(4) Continuing Care Retirement Communities – CCRs shall be treated as homeownership units.

(a) Entry Fee -- Any requisite entrance fee policy must be reasonable, taking into account that many otherwise eligible households may not have owned a home previously, and therefore the value of their Household Assets may be limited. A policy that sets a minimum entry fee for such households at a figure that is equivalent to 10% down payment on a homeownership unit for which a household at 80% of area median income, adjusted for household size, would be eligible, shall be deemed to be reasonable. **Note: Resident selection for the Affordable Units must comply with the requirements of a lottery or other fair and equitable procedure approved by the Subsidizing Agency (see Section III, Affirmative Fair Housing Marketing Plan), and without regard to the amount of their assets.**

(b) Monthly fees – generally may not exceed 35% of household income plus an allowance for meals, if provided.

(c) Health care reserve fund – to the extent required, such fund must be reasonable and must be held for the benefit of the household for the exclusive purpose of paying for acute and skilled nursing care. The health care reserve fund shall be funded prior to determining whether a household has sufficient resources for the entrance deposit and shall be excluded from calculation of assets for the purposes of determining asset eligibility.

e. Use Restriction

All Use Restrictions must meet the following minimum standards:

(1) Runs with the land and recorded at the appropriate registry of deeds or filed with the appropriate land court registry district for a term that shall be not less than 15 years for rehabilitated housing units and not less than 30 years for newly created units.[3]

3 Newly created units includes units that were converted from a prior use (e.g., commercial or public use) into housing units

(2) Identifies the Subsidizing Agency and monitoring agent, if applicable.

(3) Effectively restricts occupancy of Low and Moderate Income Housing to Income Eligible Households. A Use Restriction may require that an Income Eligible Household must have a lower percentage of area median income than 80%.

(4) Requires that tenants of rental units and owners of homeownership units shall occupy the units as their domiciles and principal residences.

(5) Provides for effective administration, monitoring, and enforcement of such restriction.

(6) Contains terms and conditions for the resale of a homeownership unit, including definition of the maximum permissible resale price, and for the subsequent rental of a rental unit, including definition of the maximum permissible rent.

(7) Subjects the units to an Affirmative Fair Housing Marketing and Resident Selection Plan for approval by the Subsidizing Agency and consistent with the guidelines in the following Section III, as may be amended from time to time, for the term of the restriction.

f. Affirmative Fair Housing Marketing and Resident Selection Plan

(1) For Projects that received a determination of Project Eligibility on or after March 1, 2014, the Project is in compliance with the Bedroom Mix Policy as set forth in the "Interagency Agreement Regarding Housing Opportunities for Families with Children"; see, http://www.mass.gov/hed/docs/dhcd/hd/fair/familyhousinginteragencyagreement.pdf.

(2) The affordable housing units shall be subject to an Affirmative Fair Marketing and Resident Selection Plan that, at a minimum, meets the requirements set out in the following Section III, Affirmative Fair Housing Marketing Plan.

2. Unit Eligibility Criteria

a. General

Regardless of the zoning or permitting mechanism utilized, all affordable housing units that meet the criteria outlined in Section II.A.1 shall be eligible for inclusion on the SHI at the earliest of the following:

(1) For units that require a Comprehensive Permit under M.G.L. c.40B, §§ 20 through 23, or a zoning approval under c.40A or completion of plan review under M.G.L. c.40R, the date when

(a) the permit or approval is filed with the municipal clerk, notwithstanding any appeal by a party other than the Board, but subject to the time limit for counting such units set forth at 760 CMR 56.03(2)(c), or

(b) on the date when the last appeal by the Board is fully resolved.

(2) When the building permit for the unit is issued.

(3) When the occupancy permit for the unit is issued.

(4) When the unit is occupied by an Income Eligible Household and all the conditions of 760 CMR 56.03(2)(b) have been met (if no Comprehensive Permit, zoning approval, building permit, or occupancy permit is required.)

b. Rental & Assisted Living Facility

(1) General - In a rental or ALF development, if at least 25% of units are to be occupied by Income Eligible Households earning 80% or less than the area median income, or alternatively, if at least 20% of units are to be occupied by households earning 50% or less of area median income, and meet all criteria outlined in Section 1, (Emphasis Added) then all of the units in the rental development shall be eligible for inclusion on the SHI. In determining the number of units required to satisfy either percentage threshold, fractional numbers shall be rounded up to the

nearest whole number (e.g.: in a 51 unit development, one would restrict 13 units in order to meet the 25% standard).

If fewer than the aforementioned percentages of units in the development are so restricted, then only the units that meet the requirements of Section II.A.1 shall be included.
(2) Accessory Apartments - shall be eligible for inclusion in the SHI provided they meet the requirements of Section VI, Local Initiative Program.

(3) Tenants Who Become Over-Income: If, after initial occupancy, the income of a tenant of an affordable unit increases and exceeds the maximum allowable income at the time of annual income determination, such a Update in income shall not affect the treatment of the Project or the unit with respect to the SHI provided that the Owner is in compliance with the related provisions of the affordability restriction. If the affordability restriction does not address the matter of over-income tenants, then such a change in income shall not affect the treatment of the Project or the unit with respect to the SHI provided that either (i) the tenant's income does not exceed 140% of the maximum allowable income, or (ii) the owner rents the next available unit as an affordable unit to an eligible tenant pursuant to the terms. If, after initial occupancy, the income of a tenant of an affordable unit increases and exceeds 140% of the maximum allowable income at the time of annual income determination, then at the expiration of the tenant's lease term, the rent restrictions will no longer apply to the tenant.

c. Homeownership

Only the units that meet the requirements of Section II.A.1 shall be eligible for inclusion in the SHI.

d. Continuing Care Retirement Communities (CCRCs)

With respect to the independent living units in a CCRC, only those that meet the requirements of Section II.A.1 shall be eligible for inclusion in the SHI.

e. Long-Term Subsidized Housing for Individuals with Developmental or Mental Health Disabilities

All Group Home units in each community as reported every two years to the DHCD by the Department of Mental Health (DMH) and the Department of Development Services (DDS) shall be eligible to be included on the SHI. Please note that Group Home units serving clients of the DMH and DDS are subject to privacy restrictions, but the number of such units in each community which are eligible will be included on the SHI as provided to DHCD by the respective departments.

f. Housing Rehabilitation Units

Housing units that are rehabilitated through a program funded through the Community Development Block Grant (CDBG) or HOME program are eligible to be included on the SHI and that meet the requirements of Section 1 above (excluding the mortgage loan standards). Information on individual grant recipients will remain confidential.
(May 2013 Update: insertion of language on over-income tenants.)

3. Household Eligibility Criteria

a. Rental -- Unless otherwise required or permitted by an Eligible Subsidy Program, if any household member owns a residential property, the property must be sold before the household enters into a lease for a unit. For age-restricted units, the Subsidizing Agency may allow a grace

period, to be determined on a case-by case basis in the sole judgment of the Subsidizing Agency, for a household to sell a residential property after entering into a lease for a unit.
b. Homeownership In addition to meeting the requirements for qualifying a Project or dwelling unit for the SHI under Section II.A, the household shall not have owned a home within three years preceding the application, with the exception of: (1) displaced homemakers, where the displaced homemaker (an adult who has not worked full-time, full-year in the labor force for a number of years but has, during such years, worked primarily without remuneration to care for the home and family), while a homemaker, owned a home with his or her partner or resided in a home owned by the partner; (2) single parents, where the individual owned a home with his or her partner or resided in a home owned by the partner and is a single parent (is unmarried or legally separated from a spouse and either has 1 or more children of whom the individual has custody or joint custody, or is pregnant); (3) households where at least one household member is 55 or over; (4) households that owned a principal residence not permanently affixed to a permanent foundation in accordance with applicable regulations; and (5) households that owned a property that was not in compliance with State, local or model building codes and that cannot be brought into compliance for less than the cost of constructing a permanent structure.
c. Individuals who have a financial interest in the development and their families are not eligible for affordable units. Therefore, affordable units leased or sold to individuals who have a financial interest in the development or a Related Party, or to their families, shall not be eligible. For the purposes of this Section II.A.3, "financial interest" shall mean anything that has a monetary value, the amount of which is or will be determined by the outcome of the Project, including but not limited to ownership and equity interests in the Developer or in the subject real estate, and contingent or percentage fee arrangements; but shall not include third party vendors and contractors. 4. Application to Include Units on the SHI a. A community may request units be included on the SHI at any time by submitting a "Requesting New Units Form" with supporting documentation. The "Requesting New Units Form" is available at: http://www.mass.gov/dhcd/
b. With respect to rehabilitation units, only, the party administering the grant locally is responsible for submitting the necessary information. The request form, "Housing Rehab Units Only Form" is available at http://www.mass.gov/dhcd/.
c. Requests to add new units and suggested corrections to the SHI may be submitted with supporting documentation, in writing, by the municipality, a developer, or a member of the public to: Department of Housing & Community Development Office of General Counsel 100 Cambridge Street, Suite 300 Boston, MA 02114-2524 Attention: Subsidized Housing Inventory. d. All submissions will be reviewed and revised SHI percentages will be published online at: http://www.mass.gov/dhcd.

5. Expiration

a. If a Comprehensive Permit or zoning approval lapses permanently, the units become permanently ineligible for the SHI.

b. Generally, units shall no longer be eligible for inclusion on the SHI upon expiration or termination of the Use Restriction. However, if the affordability has been preserved by operation of law or other means that effectively meets the standards for a Use Restriction set out above in Section II.A.1.e, then upon review of the relevant documentation, the Department, in its sole discretion, may determine that the units remain eligible for inclusion in the SHI.

c. Homeownership Opportunity Program (HOP) resale controls are intended to be in effect in perpetuity. If an eligible purchaser cannot be located for a HOP affordable unit and the resale controls lapse in accordance with the program, the unit shall continue to be counted. Likewise, provided that the requirements relating to the resale of the unit contained in the Use Restriction have been observed, then housing units that are subject to a Use Restriction that survives foreclosure and that is approved by Fannie Mae and DHCD shall count on the SHI for the full term of the restriction, even if the unit is occupied by an ineligible household.

6. Time Lapses

As set forth in 760 CMR 56.03, units shall be removed from the SHI upon any of the following events:

a. If more than one year elapses between the date of issuance of the Comprehensive Permit or zoning approval under M.G.L. c.40A or completion of plan review under M.G.L. c.40R, as that date is defined in 760 CMR 56.03(2)(b.1), and issuance of the building permit, the units will become ineligible for the SHI until the date that the building permit is issued.

b. If more than 18 months elapse between issuance of the building permits and issuance of the certificate of occupancy, the units will become ineligible for the SHI until the date that the certificate of occupancy is issued.

c. Notwithstanding the foregoing, if a Comprehensive Permit or zoning approval permits a project to be constructed in phases, and provided that (i) each phase contains at least 150 units, (ii) each phase contains the same proportion of SHI Eligible Housing units as the overall project, and (iii) the projected average time period between the start of successive phases does not exceed 15 months, then the entire project shall remain eligible for the SHI so long as the phasing schedule set forth in the permit approval continues to be met.

d. If more than one year elapses between the date of issuance of the Comprehensive Permit or zoning approval under M.G.L. c.40A or completion of plan review under c.40R, as that date is defined in 760 CMR 56.03(2)(b.1), and final resolution of any pending appeal by a party other than the Board, the units will become ineligible for the SHI until the date that the last appeal is fully resolved.

7. Biennial Updates

The SHI shall be updated by DHCD once every two years, or more frequently if information is provided by the municipality or otherwise received and verified by DHCD. With respect to the continuing eligibility of LIP units (§VI, LIP) DHCD may rely upon the verification and certification by the municipality or its agent.