

760 CMR 56.00 COMPREHENSIVE PERMIT; LOW OR MODERATE INCOME HOUSING

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56.01 Background and Purpose

The Comprehensive Permit Statute, St. 1969, c. 774, now codified at M.G.L. c.40B, §§20 – 23 (the “Act”), was adopted by the legislature to address the shortage of low and moderate income housing in Massachusetts and to reduce regulatory barriers that impede the development of such housing. Under the Act, the developer of a project that includes a sufficient level of subsidized low and moderate income housing units may apply for a Comprehensive Permit from the local zoning board of appeals (the “Board”). Appeals by developers from decisions of the Board are decided by the Housing Appeals Committee (the “HAC”).

The purpose of , 760 CMR 56.00, is to implement the statutory scheme. 760 CMR 56.00 set forth comprehensive standards and procedures to govern the course of project review, from an initial determination of eligibility by the federal or state agency that is providing a subsidy (the “Subsidizing Agency”), through local permitting review by the Board, to issuance or denial of a Comprehensive Permit, potential appeals to the HAC, and post-permitting procedures. 760 CMR 56.00 also address the Subsidized Housing Inventory, which is maintained by the Department of Housing and Community Development (the “Department”). To achieve these ends, the Department has consolidated materials previously found in several different sets of regulations, and it has codified issues that have been decided by judicial or administrative decisions or are general practice as reflected in policy documents of the Department. 760 CMR 56.00 have further advanced the statutory purposes of the Act by clarifying the procedures of the expedited review process, and by otherwise addressing recurring questions of interpretation.

56.02 Definitions

Act – means M.G.L. c.40B, §§ 20 – 23.

Adjudicatory proceeding – means as defined in M.G.L. c. 30A, § 1.

Affirmative Fair Marketing Plan – means a plan for the marketing of Affordable Housing, including provisions for a lottery or other resident selection process, consistent with guidelines adopted by the Department, and providing effective outreach to protected groups underrepresented in the municipality. The plan shall not permit any discrimination on the basis of race, creed, color, sex, age, disability, familial status, sexual orientation, national origin or any other legally protected category in the leasing or sale of Affordable Housing.

Affordable Housing – means, solely for the purposes of 760 CMR 56.03, (a) any unit of Low or Moderate Income Housing, (b) such other housing units in a Project as may be so defined under the Department's guidelines, and (c) any other housing unit as may be allowed under the Department's guidelines, provided that such housing unit is subject to a Use Restriction and Affirmative Fair Marketing Plan, and regardless of whether or not such unit received a Subsidy.

Applicant – means a public agency, a non-profit organization, or a Limited Dividend Organization that proposes a Project for which it has submitted or intends to submit an application for a Comprehensive Permit to a Board.

Board – means a local Board of Appeals established by M.G.L. c. 40A, § 14, and acting in its capacity to issue a Comprehensive Permit under the powers granted by the Act and 760 CMR 56.00.

Chief Executive Officer – means the mayor in a city and the board of selectmen in a town, unless some other municipal office is designated to be the chief executive officer under the provisions of a local charter.

Committee – means the Housing Appeals Committee, also referred to as "HAC."

Comprehensive Permit – means a permit for the development of Low or Moderate Income Housing issued by a Board pursuant to the Act and 760 CMR 56.00.

Consistent with Local Needs – means either that (a) one or more of the grounds set forth in 760 CMR 56.03(1) have been met, or (b) Local Requirements and Regulations imposed on a Project are reasonable in view of the regional need for Low and Moderate Income Housing, considered with the number of Low Income Persons in the affected municipality and with Local Concerns, and if such Local Requirements and Regulations are applied as equally as possible to both subsidized and unsubsidized housing.

Department – means the Massachusetts Department of Housing and Community Development and its successors, as established and currently existing pursuant to M.G.L. c. 23B and c. 6A.

Developer – means the Applicant or any successor that owns or controls a Project.

Housing Need – means the regional need for Low and Moderate Income Housing considered with the number of Low Income Persons in a municipality.

Housing Production Plan (HPP) – means an affordable housing plan adopted by a municipality and approved by the Department, defining certain annual increases in its number of Low or Moderate Income Housing units. See Section 56.03(4).

HUD – means the U.S. Department of Housing and Urban Development.

Income Eligible Household – means a household of one or more persons whose maximum income does not exceed 80% of the area median income, adjusted for household size, or as otherwise established by the Department in guidelines. For homeownership programs, the Subsidizing Agency may establish asset limitations for Income Eligible Households by statute, regulations, or guideline. In the absence of such provisions, Income Eligible Households shall be subject to asset limitations as defined by the Department in guidelines. A Use Restriction may require that an Income Eligible Household must have a lower percentage of area median income than 80%.

Limited Dividend Organization – means any entity which proposes to sponsor a Project under the Act; and is not a public agency or a nonprofit; and is eligible to receive a Subsidy from a Subsidizing Agency after a Comprehensive Permit has been issued and which, unless otherwise governed by a federal act or regulation, complies with the requirements of the Subsidizing Agency relative to a reasonable return for building and operating the Project.

Local Board – means any local board or official, including, but not limited to any board of survey; board of health; planning board; conservation commission; historical commission; water, sewer, or other commission or district; fire, police, traffic, or other department; building inspector or similar official or board; city council or board of selectmen. All boards, regardless of their geographical jurisdiction or their source of authority (that is, including boards created by special acts of the legislature or by other legislative action) shall be deemed Local Boards if they perform functions usually performed by locally created boards.

Local Concern – means the need to protect the health or safety of the occupants of a proposed Project or of the residents of the municipality, to protect the natural environment, to promote better site and building design in relation to the surroundings and municipal and regional planning, or to preserve Open Spaces. See 760 CMR 56.07(3)(c – g).

Local Requirements and Regulations – mean all local legislative, regulatory, or other actions which are more restrictive than state requirements, if any, including local zoning and wetlands ordinances or by-laws, subdivision and board of health rules, and other local ordinances, by-laws, codes, and regulations, in each case which are in effect on the date of the Project's application to the Board.

Low Income Persons – means all persons who, according to the latest available United States Census, reside in households whose net income does not exceed the maximum income limits for admission to public housing, as established by the Department. The Department's calculation shall be presumed conclusive on the Committee unless a party introduces authoritative data to the contrary. Data shall be authoritative only if it is based upon a statistically valid, random sample or survey of household income conducted in the relevant area since the latest available U.S. Census.

Low or Moderate Income Housing – means any units of housing for which a Subsidizing Agency provides a Subsidy under any program to assist the construction or substantial rehabilitation of low or moderate income housing, as defined in the applicable federal or state statute or regulation, whether built or operated by any public agency or non-profit or Limited Dividend Organization. If the applicable statute or regulation of the Subsidizing Agency does not define low or moderate income housing, then it shall be defined as units of housing whose occupancy is restricted to an Income Eligible Household.

Open Spaces – means land areas, including parks, parkland, and other areas which contain no major structures and are reserved for outdoor recreational, conservation, scenic, or other similar use by the general public through public acquisition, easements, long-term lease, trusteeship, or other title restrictions which run with the land.

Party – means as defined in M.G.L. c. 30A, §1.

Project – mean a development involving the construction or substantial rehabilitation of units of Low or Moderate Income Housing that is eligible to submit an application to a Board for a Comprehensive Permit or to file or maintain an appeal before the Committee. See Section 56.04 for eligibility requirements. A Project may contain ancillary commercial, institutional, or other non-residential uses, so long as the non-residential elements of the Project are planned and designed to (a) complement the primary residential uses, and (b) help foster vibrant, workable, livable, and attractive neighborhoods consistent with applicable local land use plans.

Project Eligibility – means a determination by a Subsidizing Agency that a Project satisfies the jurisdictional requirements of 760 CMR 56.04(1).

Public Housing – means housing owned, operated, or managed by a local housing authority, or leased under the auspices of a local housing authority pursuant to MGL c.121B.

Statutory Minima – means the standards set forth at 760 CMR 56.03(3).

Subsidized Housing Inventory (SHI) – means the list compiled by the Department containing the count of Low or Moderate Income Housing units by city or town. See 760 CMR 56.02(2).

Subsidy – means assistance provided by a Subsidizing Agency to assist the construction or substantial rehabilitation of Low or Moderate Income Housing, including direct financial assistance; indirect financial assistance through insurance, guarantees, tax relief, or other means; and non-financial assistance, including in-kind assistance, technical assistance, and other supportive services. A leased housing, state rental assistance, or housing allowance program shall not be considered a Subsidy for the purposes of 760 CMR 56.00. .

Subsidizing Agency – means any agency of state or federal government that provides a Subsidy for the construction or substantial rehabilitation of Low or Moderate Income Housing. If the Subsidizing Agency is not an agency of state government, the Department may appoint a state agency to administer some or all of the responsibilities of the Subsidizing Agency with respect to 760 CMR 56.00; in that case, all applicable references in 760 CMR 56.00 to the Subsidizing Agency shall be deemed to refer to the appointed project administrator. It shall be the responsibility of the Subsidizing Agency to enforce compliance with provisions of 760 CMR 56.00 and applicable Department guidelines relating to matters including Affirmative Fair Marketing Plans, Cost Examination, Project Eligibility, Subsidies, and Use Restrictions (for the term of the initial Use Restriction; see 760 CMR 56.05(13)). A Subsidizing Agency may delegate its compliance and enforcement obligations to a third party, if the third party meets standards established by the Department in guidelines. The Department reserves the right to ensure that the compliance and enforcement activities of a Subsidizing Agency are satisfactory.

Uneconomic – means any condition imposed by a Board in its approval of a Comprehensive Permit, brought about by a single factor or a combination of factors, to the extent that it (a) makes it impossible for a public agency or a nonprofit organization to proceed in building or operating a Project without financial loss, or (b) makes it impossible for a Limited Dividend Organization to proceed and still realize a reasonable return in building or operating such Project within the limitations set by the Subsidizing Agency on the size or character of the Project, or on the amount or nature of the Subsidy or on the tenants, rentals, and income permissible, and without substantially changing the rent levels and unit sizes proposed by the Applicant. See 760 CMR 56.05(8)(d).

Use Restriction – means a deed restriction or other legally binding instrument in a form approved by the Department, which runs with the land and is recorded with the relevant registry of deeds or land court registry district, and which effectively restricts the occupancy of an Affordable Housing unit to Income Eligible Households during the term of affordability. A Use Restriction shall contain 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. A Use Restriction shall require that tenants of rental units and owners of homeownership units shall occupy the units as their domiciles and principal residences. For enforcement of Use Restrictions, see 760 CMR 56.05(13).

Waiver – an exception from a use, dimensional, or other restriction of local requirements and regulations, granted to a Project through a Comprehensive Permit. See 760 CMR 56.05(7).

56.03 Methods to Measure Progress Toward Local Affordable Housing Goals

(1) A decision by a Board to deny a Comprehensive Permit, or (if the Statutory Minima defined at 760 CMR 56.03(3)(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);
- (b) the Department has certified the municipality's compliance with the goals of its approved Housing Production Plan, in accordance with 760 CMR 56.03(4);
- (c) the municipality has made recent progress toward the Statutory Minima, in accordance with 760 CMR 56.03(5);
- (d) the project is a large project, as set forth in 760 CMR 56.03(6); or
- (e) a related application has previously been received, as set forth in 760 CMR 56.03(7).

For the purposes of this Section 760 CMR 56.03, units of Affordable Housing shall be counted only if they satisfy the requirements for listing on the Subsidized Housing Inventory in accordance with 760 CMR 56.03(2). A Board decision based on one or more of the grounds set forth in 760 CMR 56.03(1) shall be made solely in accordance with the procedure set forth in 760 CMR 56.03(8). Such a denial shall be without prejudice, and it shall not preclude re-filing of the Comprehensive Permit application at a later date.

Notwithstanding the foregoing, a Board may at its sole discretion elect to proceed with the full local hearing, and ultimately to approve a Comprehensive Permit, even though one or more of the above grounds have been met.

(2) Subsidized Housing Inventory

- (a) The Department shall maintain the Subsidized Housing Inventory (SHI) to measure a municipality's stock of Affordable Housing. The SHI is not limited to housing units developed through issuance of a Comprehensive Permit; it may also include Affordable Housing units developed under c.40A, c.40R, and other statutes, regulations, and programs, so long as such units are subject to a Use Restriction and an Affirmative Fair Marketing Plan, and they satisfy the requirements of guidelines issued by the Department.
- (b) Units shall be eligible to be counted on the SHI at the earliest of the following:
 - 1. For units that require a Comprehensive Permit under the Act, or a zoning approval under c.40A or c.40R, the date when (a) the permit or approval is filed with the municipal clerk, provided that no appeals are filed, or (b) on the date when the last appeal 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.)
- (c) Time Lapses. If more than one year elapses between the date of issuance of the Comprehensive Permit or zoning approval under c.40A or c.40R, as that date is defined in 760 CMR 56.03(2)(c.1), and issuance of the building permit, the units will become ineligible for the SHI until the date that the building permit is issued. 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. If a Comprehensive Permit, zoning approval, or building permit lapses permanently, the units become permanently ineligible for the SHI. 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 Affordable Housing units as the overall project, and (iii) the 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) Enforcement and Termination of Use Restrictions. Use Restrictions shall be enforced in accordance with 760 CMR 56.05(13), except that an agency of municipal government may enforce the Use Restriction for a unit not subject to a Comprehensive Permit. Units shall no longer be eligible for inclusion on the SHI upon expiration or termination of the initial Use Restriction, unless a subsequent Use Restriction has been imposed in accordance with the requirements of 760 CMR 56.05(13).
- (e) Municipal Certification. Each municipality shall provide to the Department, once every two years, a statement certified by the Chief Executive Officer, in such form and upon such schedule as may be required by the Department, as to the following matters:
1. the number of Affordable Housing units eligible to be listed on the SHI;
 2. whether any Affordable Housing rental units listed on the SHI are rented to non-Income Eligible Households, or at rents exceeding the maximum permissible rents;
 3. whether any Affordable Housing homeownership units are occupied by a non-Income Eligible Household, or by a household not including the owner;
 4. whether all sales and resales of Affordable Housing homeownership units within the previous two years have been at prices not exceeding the maximum permissible prices to Income Eligible Households;
 5. if the municipality has an approved Housing Production Plan pursuant to 760 CMR 56.03(4), the municipality's conformance with the implementation schedule set forth in the plan; its progress toward the numerical goals of the plan; and any adjustment of the numerical goals required by changes in the baseline number of total housing units in the municipality; and
 6. that all Affordable Housing complies with the Department's guidelines for Affirmative Fair Marketing Plans.
- (f) Biennial Updates. The SHI shall be updated by the Department once every two years, based upon the certified information provided under 760 CMR 56.03(2)(e), or more frequently if information is provided by the municipality. The Department shall administer the SHI in accordance with its own procedures, as set forth in these Regulations and guidelines adopted by the Department.

(3) Computation of Statutory Minima

- (a) Housing Unit Minimum. For purposes of calculating whether the city or town's Affordable Housing units exceed 10% of its total housing units, pursuant to M.G.L. c. 40B, § 20 and 760 CMR 56.00, there shall be a presumption that the latest Subsidized Housing Inventory contains an accurate count of Affordable Housing. In the course of a review procedure pursuant to 760 CMR 56.03(8), a party may introduce evidence to rebut this presumption, which the Department shall review on a case-by-case basis, applying the standards of eligibility for the SHI set forth in 760 CMR 56.03(2).

The total number of housing units shall be that total number of units enumerated for the city or town in the latest available United States Census; provided that evidence that net additional units have been occupied, have become available for occupancy, or are under building permit or that total units have decreased between the latest Census and the date of initial application may be considered by the Department.

- (b) General Land Area Minimum. For the purposes of calculating whether Affordable 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 Metropolitan District Commission or any state public authority, but it shall include any land owned by a housing authority and containing Affordable Housing;
 4. 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;
 5. Total land area shall exclude any water bodies;
 6. 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.
 7. No excluded land area shall be counted more than once under the above criteria.

Only sites of Affordable 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 Affordable Housing units (including impervious and landscaped areas directly associated with such units).

- (c) Annual Land Area Minimum. For purposes of calculating whether the application before the Board would result in the commencement in any one calendar year of construction of Low or Moderate Income Housing on sites comprising more than 0.3 of 1% of the city or town's land area or ten acres, whichever is larger, pursuant to M.G.L. c. 40B, § 20:
1. Total land area of the municipality and the land area occupied by Low or Moderate Income Housing shall be calculated in the manner provided in 760 CMR 56.03(3)(b);
 2. If 0.3 of 1% of total land area is less than ten acres, the minimum for sites occupied by Low or Moderate Income Housing shall be ten acres;
 3. The relevant calendar year shall be the calendar year period of January 1 through December 31 that includes the Applicant's projected date for initiation of construction;
 4. Any Low or Moderate Income Housing for which construction is expected to commence within the calendar year, other than that proposed by the Applicant, must have received a final approval by the Subsidizing Agency prior to the date of the Applicant's initial submission to the Board, in order to be included towards the 0.3 % or ten acres;
 5. Development and construction work in connection with Low or Moderate Income Housing shall be proceeding in good faith to completion insofar as is reasonably practicable, in order for such housing to be included towards the 0.3% or ten acres minimum.
 6. For purposes of this section 760 CMR 56.03(3)(c), in calculating the size of the sites on which commencement of construction of Low or Moderate Income Housing is expected, only the impervious area plus landscaped area of such sites shall be included.

- (d) Evidence regarding Statutory Minima submitted under this section 760 CMR 56.03(3) shall comply with any guidelines issued by the Department.

(4) Housing Production Plans

- (a) A Housing Production Plan (HPP) shall be developed and reviewed in accordance with 760 CMR 56.00 and guidelines adopted by the Department. The HPP shall contain at a minimum the following elements, covering a time period of five years:
 - 1. Comprehensive housing needs assessment;
 - 2. Affordable housing goals; and
 - 3. Implementation strategies.
- (b) Comprehensive housing needs assessment. The HPP must establish a strategic plan for municipal action with regards to housing, based upon a comprehensive housing needs assessment that examines:
 - 1. the most recent available census data of the municipality's demographics and housing stock, together with a projection of future population and housing needs, taking into account regional growth factors, that covers the entire time period of the plan;
 - 2. development constraints and limitations on its current and future needs, and the municipality's plans to mitigate those constraints; and
 - 3. the capacity of the municipality's infrastructure to accommodate the current population and anticipated future growth, including plans for enlargement or expansion of existing infrastructure systems to ensure that both current and future needs are met.
- (c) Affordable housing goals. The HPP shall address the matters set out in the Department's guidelines, including:
 - 1. a mix of types of housing, consistent with local and regional needs and feasible within the housing market in which they will be situated, including rental and homeownership opportunities for families, individuals, persons with special needs, and the elderly;
 - 2. a numerical goal for annual housing production, pursuant to which there is an increase in the municipality's number of Affordable Housing units by at least 0.50% of its total units during every calendar year included in the HPP, until the overall percentage exceeds the Statutory Minimum set forth in 760 CMR 56.03(3)(a).
- (d) Implementation Strategies. The HPP shall address the matters set out in the Department's guidelines, including an explanation of the specific strategies by which the municipality will achieve its housing production goal, and a schedule for implementation of the goals and strategies for production of units, including all of the following strategies, to the extent applicable:
 - 1. the identification of zoning districts or geographic areas in which the municipality proposes to modify current regulations for the purposes of creating Affordable Housing developments to meet its housing production goal;
 - 2. the identification of specific sites for which the municipality will encourage the filing of Comprehensive Permit applications;
 - 3. characteristics of proposed residential or mixed-use developments that would be preferred by the municipality (examples might include cluster developments, adaptive re-use, transit-oriented housing, mixed-use development, inclusionary housing, etc.); and/or
 - 4. municipally owned parcels for which the municipality commits to issue requests for proposals to develop Affordable Housing.
- (e) Review and approval of Housing Production Plans. A HPP shall be adopted by the municipality's planning board, its conservation commission, and its select board or city council, following which the Chief Executive Officer may submit the HPP to the Department for its approval. The Department shall conduct an initial completeness review, and it will notify the municipality of any deficiency and offer an opportunity to remedy the deficiency. Within 90 days after the Department's finding that the HPP is complete, the Department shall approve the HPP if it meets the requirements specified herein; otherwise, it shall disapprove the HPP. The Department shall

notify the municipality of its decision to either approve or disapprove a HPP in writing. If the Department disapproves a HPP, the notification shall include a statement of reasons for the disapproval. If the Department fails to mail notice of approval or disapproval of a HPP within 90 days after its receipt, it shall be deemed to be approved. A municipality that originally submitted a HPP that had been disapproved may submit a new or revised HPP to the Department at any time.

A municipality may amend its HPP from time to time if the Department approves the amendment upon the finding that the amended HPP meets the requirements of 760 CMR 56.00. The Department shall have the discretion to require the full 90-day review process for a major amendment to a HPP. A HPP shall be updated and renewed every five (5) years through the full 90-day review process set forth above, or as the Department may otherwise require. The Department may, at its sole discretion, elect to treat a major amendment as a renewed HPP.

- (f) Certification of municipal compliance. A municipality may request that the Department certify its compliance with an approved HPP if it has increased its number of Affordable Housing units in an amount equal to or greater than its 0.50% production goal for that calendar year. Units shall be counted for the purpose of certification in accordance with the provisions for counting units under the SHI set forth in 760 CMR 56.03(2). Requests for certification may be submitted at any time, and the Department shall determine whether a municipality is in compliance within 30 days of receipt of the municipality's request. If the Department determines the municipality is in compliance with its HPP, the certification shall be deemed effective on the date upon which the municipality achieved its numerical target for the calendar year in question, in accordance with the rules for counting units on the SHI set forth in 760 CMR 56.03(2).

A certification shall be in effect for a period of one year from its effective date. If the Department finds that the municipality has increased its number of Affordable Housing units in a calendar year by at least 1.0% of its total housing units, the certification shall be in effect for two years from its effective date.

(5) Recent Progress Toward Housing Unit Minimum

Recent progress toward a municipality's Statutory Minima shall mean that the number of Affordable Housing units that have been created within the municipality during the twelve months prior to the date of the Comprehensive Permit application is equal to or greater than 2% of the municipality's total housing units, as determined in accordance with 760 CMR 56.03(3)(a).

(6) Review of Large Projects

A large project shall be defined as follows

- (a) in a municipality which has a total number of 7,500 or more housing units as enumerated in the latest available United States Census, the application for a Comprehensive Permit involves construction of more than 300 housing units or a number of housing units equal to 2% of all housing units in the municipality, whichever number is greater; or
- (b) in a municipality which has between 5,000 and 7,500 housing units exclusive, as so enumerated, the application for a Comprehensive Permit involves construction of more than 250 housing units; or
- (c) in a municipality which has between 2,500 and 5,000 housing units inclusive, as so enumerated, the application for a Comprehensive Permit involves construction of more than 200 housing units; or
- (d) in a municipality which has less than 2,500 housing units, as so enumerated, the application for a Comprehensive Permit involves construction of more than 150 housing units or a number of housing units equal to 10% of all housing units in the municipality, whichever number is less.

(7) Related Applications

For the purposes of this subsection, a related application shall mean that less than 12 months has elapsed between the date of an application for a Comprehensive Permit and any of the following:

- (a) the date of filing of a prior application for a variance, special permit, subdivision, or other approval related to construction on the same land, if that application was for a prior project that was principally non-residential in use, or if the prior project was principally residential in use, if it did not include at least 10% Affordable Housing units;
- (b) any date during which such an application was pending before a local permit granting authority;
- (c) the date of disposition of such an application; or
- (d) the date of withdrawal of such an application.

An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.

(8) Procedure for Board Decision under this Section

- (a) If a Board wishes to deny or (if the Statutory Minima defined at 760 CMR 56.03(3)(b or c) have been satisfied) condition an application on the grounds 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 its receipt of an application, the Board shall provide written notice to the Applicant, with a copy to the Department, that it intends to deny the application, the grounds that it believes has been met, and the factual basis for that position, including any necessary supportive documentation. If the Applicant wishes to challenge the denial, 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 that shall be determinative of the issue and binding on both parties. The Board shall have the burden of proving satisfaction of such grounds, 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 open the local hearing within 30 days, and it shall toll the requirement to terminate the hearing within 180 days.
- (b) For purposes of this subsection 760 CMR 56.03(8), the total number of Affordable Housing units in a municipality as of the date of a Project's application shall be deemed to include those in any prior Project for which a Comprehensive Permit had been issued by the Board or by the Committee, and which was at the time of the application for the second Project subject to legal appeal by a party other than the Board, and provided that such prior Comprehensive Permit is subsequently and finally upheld on appeal before the final issuance of the Comprehensive Permit for the second Project.
- (c) If either the Board or the Applicant wishes to appeal a decision issued by the Department pursuant to 760 CMR 56.03(8)(a), that party shall file a written notice of appeal with the Committee within 20 days of its receipt of the decision, with a copy to the other party and to the Department. The appeal shall thereupon be stayed until the conclusion of the Board's hearing of the Project, at which time the appeal may be prosecuted in accordance with the provisions of 760 CMR 56.06 and 760 CMR 56.07, and it shall be consolidated with any other appeal of the Project that may be filed with the Committee.

56.04 Project Eligibility; Other Responsibilities of Subsidizing Agency

- (1) To be eligible to submit an application to a Board for a Comprehensive Permit or to file or maintain an appeal before the Committee, the Applicant and the Project shall fulfill, at a minimum, the following project eligibility requirements:

- (a) The Applicant shall be a public agency, a non-profit organization, or a Limited Dividend Organization;
- (b) The Project shall be fundable by a Subsidizing Agency under a Low or Moderate Income Housing subsidy program; and
- (c) The Applicant shall control the site.

Compliance with these project eligibility requirements shall be established by issuance of a written determination of Project Eligibility by the Subsidizing Agency that contains all the findings required under 760 CMR 56.04(4), based upon its initial review of the Project and the Applicant's qualifications in accordance with 760 CMR 56.04.

(2) Elements of Application. The Applicant shall submit 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 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 percentage of the tract to be occupied by buildings, by parking and other paved vehicular areas, and by open areas, the 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.

In the case of a Local Initiative Project (LIP), the application shall be submitted by the Chief Executive Officer of the Municipality.

(3) Review and Comment Process. Upon receipt of the application, the Subsidizing Agency shall provide written notice to the Chief Executive Officer of the municipality where the Project is located, initiating a 30-day review period of the Project. During the course of the review period the Subsidizing Agency shall conduct a site visit, which Local Boards may attend, and it shall accept written comments from Local Boards and other interested parties. The Subsidizing Agency shall consider any such comments prior to issuing a determination of Project Eligibility. No determination of Project Eligibility shall be issued for a Project before the end of the 30-day review period.

(4) Findings in Determination. A determination of Project Eligibility, to be issued by the Subsidizing Agency after the close of the 30-day review period, shall make the following findings, based upon its review of the application, and taking into account information received during the site visit and from written comments:

- (a) that the proposed Project appears generally eligible under the requirements of the housing subsidy program, subject to final approval under 760 CMR 56.04(7);
- (b) that the site of the proposed Project is generally appropriate for residential development, taking into consideration information provide by the municipality or other parties regarding municipal

actions previously taken to meet affordable housing needs, such as inclusionary zoning, multifamily districts adopted under c.40A, and overlay districts adopted under c.40R (such finding, with supporting reasoning, to be set forth in reasonable detail);

- (c) that the conceptual project design is generally appropriate for the site on which it is located, taking into consideration factors that may include proposed use, conceptual site plan and building massing, topography, environmental resources, and accommodation to existing development patterns (such finding, with supporting reasoning, to be set forth in reasonable detail);
- (d) that the proposed Project appears financially feasible within the housing market in which it will be situated (based on comparable rentals or sales figures);
- (e) that an initial *pro forma* has been reviewed, including a land valuation determination consistent with the Department's guidelines, and the Project appears financially feasible and consistent with the Department's guidelines for Cost Examination (if applicable) on the basis of estimated development costs;
- (f) that the Applicant is a public agency, a non-profit organization, or a Limited Dividend Organization, and it meets the general eligibility standards of the housing program; and
- (g) that the Applicant controls the site, based on evidence that the Applicant or a related entity owns the site, or holds an option or contract to acquire such interest in the site, or has such other interest in the site as is deemed by the Subsidizing Agency to be sufficient to control the site.

The Subsidizing Agency shall provide copies of its written determination of Project Eligibility to the Department and the Chief Executive Officer of the municipality.

(5) Substantial Changes. If an Applicant desires to change aspects of its proposal that would affect the project eligibility requirements set forth at 760 CMR 56.04(1), after it has received a determination of Project Eligibility, it shall notify the Subsidizing Agency in writing of such changes, with a copy to the Department and the Chief Executive Officer of the municipality.

The Subsidizing Agency shall determine within 15 days whether such changes are substantial with reference to the project eligibility requirements. Failure to respond shall be deemed a finding that the change is not substantial. If the Subsidizing Agency finds that the changes are substantial, it shall ordinarily defer any review (except if the Applicant or the Chief Executive Office of the municipality request otherwise) until either the Board has issued a Comprehensive Permit or the application has been denied and the Applicant has lodged an appeal with the Committee, at which time the Subsidizing Agency shall reaffirm, amend, or deny its determination of the project eligibility requirements.

Only the changes affecting the project eligibility requirements set forth at 760 CMR 56.04(1) shall be at issue in such review. In the case of a Comprehensive Permit that is not subject to appeal, such decision may be incorporated into the Subsidizing Agency's final approval issued pursuant to 760 CMR 56.04(7). If the Subsidizing Agency finds that the changes are not substantial and that the Applicant has good cause for not originally presenting such details in its application, the changes shall be permitted if the proposal as so changed meets the requirements of the Act and this section 760 CMR 56.04.

(6) Conclusive Nature of Determination. Issuance of a determination of Project Eligibility shall be considered by the Board or the Committee to be conclusive evidence that the Project and the Applicant have satisfied the project eligibility requirements of 760 CMR 56.04(1). Alleged failure of the Applicant to continue to fulfill any of these project eligibility requirements may be subsequently raised by the Board at any time, with the burden of proof on the Board, or by the Committee during an appeal, in either case solely upon the grounds that there has been a substantial change affecting the project eligibility requirements set forth at 760 CMR 56.04(1). Such challenge shall be decided by the Subsidizing Agency in accordance with the procedure set forth in 760 CMR 56.04(5), and the Board hearing or Committee appeal may be stayed until such challenge is decided.

(7) Final Approval. Following the issuance of a Comprehensive Permit, the Subsidizing Agency shall issue its final written approval of the Project to the Applicant, with a copy to the Board and the Department. Such approval shall, at a minimum:

- (a) reaffirm each of the project eligibility requirements enumerated in 760 CMR 56.04(1);
- (b) confirm that the proposed Use Restriction is in a form approved by the Department; and
- (c) verify that cost examination requirements have been acknowledged, that a commitment has been made by the Applicant to comply with the cost examination requirements defined in 760 CMR 56.04(8), and that adequate financial surety has been secured by the Subsidizing Agency sufficient to ensure completion of the cost examination.

(8) Cost Examination

- (a) Following the issuance of a Comprehensive Permit, a Project for which the Developer is a Limited Dividend Organization shall be subject to the following limitations on reasonable return as determined by the Subsidizing Agency, in accordance with guidelines issued by the Department.
- (b) Rental Projects. For rental housing, distributions to the Developer shall be subject to limitations as follows, in each case to be determined in the manner specified in the Department's guidelines:
 - 1. Distributions from Capital Sources: Payment of fees and profits will be limited to a reasonable return relative to the total development costs.
 - 2. Distributions from Operations: Commencing upon the Project's initial occupancy, distributions shall not exceed a reasonable return relative to the Developer's equity in the Project.
- (c) Homeownership Projects: For homeownership housing, profit to the Developer shall be limited to a reasonable return relative to the total development costs.
- (d) Certification of total development costs: Total development costs, and the determination of qualifying inclusions and exclusions, shall be established by the Applicant or subsequent Developer in a detailed financial statement of all material costs of the project prepared by a certified public accountant and submitted to the Subsidizing Agency in a form and upon a schedule determined by the Department's guidelines. The Department's guidelines shall provide for verification of financial statements, and enforcement actions in the event of noncompliance with 760 CMR 56.04(8).

56.05 Local Hearings:

(1) Local Rules

The Board shall adopt rules, not inconsistent with the Act and 760 CMR 56.00, for the conduct of its business and shall file a copy of said rules with the city or town clerk. Such rules shall be consistent with the purpose of the Act to provide a streamlined permitting process that overcomes regulatory barriers to the development of Low or Moderate Income Housing. The Committee may in the course of an appeal properly before it pursuant to 760 CMR 56.06(1) determine that a particular local rule is consistent or not consistent with the Act and 760 CMR 56.00, but no appeal shall be heard solely for the purpose of determining the validity of a rule, unless the rule is the sole basis for the denial or conditioning of a Comprehensive Permit. (For related requirements applying to Boards, see M.G.L. c. 44, § 53G.)

The Committee shall from time to time prepare model local rules for the benefit of Boards, and serve them upon the Boards by first class mail pursuant to 760 CMR 56.06(6). Rules adopted by a Board shall be presumed consistent with the Act and 760 CMR 56.00 to the extent that they conform to such model rules. A Board may seek non-binding advice from the Department as to whether a proposed set of local rules is Consistent with the Act and 760 CMR 56.00. If a Board does not adopt and file rules, it shall conduct business pursuant to the model rules.

(2) Elements of Submission, Filing Fees

The Applicant shall submit to the Board an application and a complete description of the proposed Project. The items listed below will normally 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 to local requirements and regulations.

The Board may require the payment of a reasonable filing fee with the application, if consistent with subdivision, cluster zoning, and other fees assessed by the municipality, and taking into consideration the statutory goal of the Act to encourage affordable housing development.

(3) Conduct of Board Hearing

Within seven days of filing of the application, the Board shall notify each Local Board of the application by sending such Local Board a copy of the list of waivers required by 760 CMR 56.05(2)(h). Based upon that list, it shall also, within the same seven days, invite the participation of each Local Board as is deemed necessary or helpful in making its decision upon such application by providing such Local Board with a copy of the entire application.

The Board shall open a hearing within thirty days of its receipt of a complete application, and it shall thereafter pursue the hearing diligently. The Board shall open hearings for Projects in the order in which a complete application is filed. A hearing shall not extend beyond 180 days from the date a complete application was filed, presuming that the Applicant has made timely submissions of materials in response to reasonable requests of the Board, except with the written consent of the Applicant.

If the Board wishes to deny an application on one or more of the grounds set forth in 760 CMR 56.03(1), it must do so in accordance with the procedure set forth in 760 CMR 56.03(8), or it shall be deemed to have waived its rights. A Board may stay the commencement of a hearing if three (3) or more Comprehensive Permit applications are concurrently undergoing hearings before the Board, and

the total number of housing units in those pending Projects exceeds the numerical threshold for a large project within that municipality, as set forth in 760 CMR 56.03(6).

(4) Scope of Board Hearing

- (a) General Principle. Consistency with Local Needs is the central issue in all Comprehensive Permit applications before the Board. Not only must all Local Requirements and Regulations applied to the Applicant be Consistent with Local Needs, but decisions of the Board must also be Consistent with Local Needs. The Board shall not address matters in the hearing that are beyond its jurisdiction under the Act and 760 CMR 56.00 and that lie solely within the authority of the Subsidizing Agency.

In the case of the denial of a Comprehensive Permit, the issue shall be whether the decision of the Board was Consistent with Local Needs. In the case of approval of a Comprehensive Permit with conditions or requirements imposed, the issues shall be:

1. first, whether the conditions considered in aggregate make the building or operation of such Project Uneconomic; and
2. second, whether the conditions are Consistent with Local Needs.

A condition which makes a Project Uneconomic will not be removed or modified if as a result of such action the Project would not be Consistent with Local Needs.

- (b) Commentary. In its conduct of a hearing, the Board should make itself aware of the detailed provisions for burden of proof and evidence, set forth in 760 CMR 56.07(2 & 3), that the Committee would apply to the appeal of a Board decision.

(5) Consultant Review

- (a) 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 review of financial statements that is unavailable from municipal employees, it may employ outside consultants. Whenever possible it shall work cooperatively with the Applicant to identify appropriate consultants 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 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.
- (b) A review fee may be imposed only if: (i) 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, (ii) the work is in connection with the Applicant's specific Project, and (iii) 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 this section shall be reasonable in light of: (iv) the complexity of the proposed Project as a whole, (v) the complexity of particular technical issues, (vi) the number of housing units proposed, (vii) the size and character of the site, (viii) the projected construction costs, and (ix) fees charged by similar consultants in the area. 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 similar town or city project.
- (c) 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.

(6) Review of Financial Statements

- (a) A Board may request to review the pro forma or other financial statements for a Project only after the following preconditions have been met: (i) other consultant review has been completed, (ii) the Applicant has had an opportunity to modify its original proposal to address issues raised, (iii) the Board has had an opportunity to propose conditions to mitigate the Project's impacts and to consider requested Waivers, and (iv) the Applicant has indicated that it does not agree to the proposed condition(s) or Waiver denial(s) because they would render the Project uneconomic. A Board may not conduct review of a pro forma in order to see whether a Project would still be economic if the number of dwelling units were reduced. A condition that limits density must be justified by a valid health, safety, environmental, design, open space, planning, or other local concern that directly results from the size of a project on a particular site, consistent with 760 CMR 56.05(4)(c)(3).
- (b) If the Applicant does not agree to some or all of the proposed permit conditions or Waiver denials because they would render the Project Uneconomic, the Board may ask the Applicant to submit a pro forma that has been revised to reflect the additional cost of meeting these conditions and/or denials. The revised pro forma may be subjected to the same consultant review as any other technical information submitted to the Board, in accordance with 760 CMR 56.05(5) and the Board's rules. The Board may then use this information to decide whether to adopt or modify its originally proposed conditions and/or denials. Pro forma review should conform to recognized real estate and affordable housing industry standards, consistent with the policies of the Subsidizing Agency and guidelines adopted by the Department.
- (c) Financial issues that potentially lie within the allowable scope of the Board's review include related-party transactions, the estimated sales price or rental rates of market-rate units, and land acquisition costs, all as described further in the Department's guidelines. Disagreements between the Applicant and the Board's consultant should be resolved in accordance with the Department's guidelines. The Subsidizing Agency has the sole responsibility to establish and enforce reasonable return limitations on the Applicant, as set forth in 760 CMR 56.04(8).

(7) Waivers from Local Requirements and Regulations

The Applicant may request Waivers, either in its application or subsequently 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).

(8) Board Decisions

- (a) The Board shall render a decision, based on a majority vote of the Board, within forty days after termination of the public hearing, unless such time period is extended by written agreement of the Board and the Applicant. The hearing is deemed terminated when all public testimony has been received and all information requested by the Board has been received. In making its decision, the Board shall take into consideration the recommendations of Local Boards. The Board shall forward

a copy of any Comprehensive Permit to the Applicant or its designated representative and to the Department when it is filed in the office of the city or town clerk.

(b) The Board may dispose of the application in the following manner:

1. approve a Comprehensive Permit on the terms and conditions set forth in the application;
2. approve a Comprehensive Permit with conditions with respect to height, site plan, size, shape or building materials that address matters of Local Concern; or
3. deny a Comprehensive Permit as not Consistent with Local Needs if the Board finds that there are no conditions that will adequately address Local Concerns.

(c) Conditions. The Board shall not issue any order or impose any condition that would allow the building or operation of the Project in accordance with standards less safe than the applicable building and site plan requirements of the Subsidizing Agency, or that would deviate from the project eligibility requirements of the Subsidizing Agency, or that would require the Project to provide more Low or Moderate Income Housing units than the minimum threshold required by the Department's guidelines. The Board, in its decision, may make a Comprehensive Permit subject to any of the following conditions or requirements:

1. The grant of the Subsidy by the Subsidizing Agency;
2. Issuance of final approval by the Subsidizing Agency pursuant to 760 CMR 56.04(7);
3. The securing of the approval of any state or federal agency with respect to the Project which the Applicant must obtain before building, provided, however, that the Board shall not delay or deny an application on the grounds that any state or federal approval has not been obtained;
4. Complete or partial waiver ordered by the Board of fees otherwise assessed or collected by Local Boards;
5. Other directions or orders to Local Boards designed to effectuate the issuance of a Comprehensive Permit (including any Waivers) and the construction of the Project, in accordance with 760 CMR 56.05(10)(b); or
6. Any other condition consistent with the Act and with 760 CMR 56.00.

(d) Uneconomic Conditions. The Board shall not issue any order or impose any condition that would cause the building or operation of the Project to be Uneconomic, including a requirement imposed by the Board on the Applicant:

1. to incur costs of public infrastructure or improvements off the project site that (i) are not generally imposed by a Local Board on unsubsidized housing; (ii) address a pre-existing condition affecting the municipality generally; or (iii) are disproportionate to the impacts reasonably attributable to the Project; or
2. to reduce the number of units for reasons other than evidence of Local Concerns within the purview of the Board (see 760 CMR 56.05(4)(e); see also 760 CMR 56.07(3)(c – h) regarding evidence that would be heard by the Committee on an appeal), such as design, engineering, or environmental deficiencies that directly result from the impact of a Project on a particular site.

A condition shall not be considered Uneconomic if it would modify the nonresidential elements of a Project to ensure that such nonresidential elements are consistent with applicable provisions of the current municipal zoning code.

(9) Appeals from Board Decisions

(a) If the Board approves the Comprehensive Permit, any person aggrieved may appeal within the time period and to the court provided in M.G.L. c. 40A, § 17.

(b) If the Board denies the Comprehensive Permit or approves the permit with unacceptable conditions or requirements, the Applicant may appeal to the Housing Appeals Committee as provided in M.G.L. c. 40B, § 22 and 760 CMR 56.06.

(10) Enforcement

- (a) The Board shall have the same power to issue permits or approvals as any Local Board which would otherwise act with respect to an application.
- (b) A Comprehensive Permit issued by a Board, including by order of the Committee pursuant to 760 CMR 56.07(5), shall be a master permit which shall subsume all local permits and approvals normally issued by Local Boards. Upon presentation of the Comprehensive Permit, subsequent more detailed plans (to the extent reasonably required relative to the local permit in question), and final approval from the Subsidizing Agency pursuant to 760 CMR 56.03(7), all Local Boards shall issue all necessary permits and approvals after reviewing such plans only to insure that they are consistent with the Comprehensive Permit (including any Waivers), the final approval of the Subsidizing Agency, and applicable state and federal codes.
- (c) After the issuance of a Comprehensive Permit, the Board may issue such orders as may aid in the enforcement of its decision.

(11) Changes after Issuance of a Permit

- (a) If after a Comprehensive Permit is granted by the Board, including by order of the Committee pursuant to 760 CMR 56.07(5), an Applicant desires to change the details of its proposal as approved by the Board or the Committee, it shall promptly notify the Board in writing, describing such change. Within 20 days the Board shall determine and notify the applicant whether it deems the change substantial or insubstantial, with reference to the factors set forth at 760 CMR 56.07(4).
- (b) If the change is determined to be insubstantial or if the Board fails to notify the Applicant, the Comprehensive Permit shall be deemed modified to incorporate the change.
- (c) If the change is determined to be substantial, the Board shall hold a public hearing within 30 days of its determination and issue a decision within 40 days of termination of the hearing, all as provided in M.G.L. c. 40B, § 21. Only the changes in the proposal or aspects of the proposal affected thereby shall be at issue in such hearing. A decision of the Board denying the change or granting it with conditions which make the housing Uneconomic may be appealed to the Committee pursuant to M.G.L. c. 40B, § 22; a decision granting the change may be appealed to the superior court pursuant to M.G.L. c. 40B, § 21 and M.G.L. c. 40A, § 17.
- (d) The Applicant may appeal a determination that a change is substantial by filing a petition with the Committee within 20 days of being so notified. Such an appeal will stay the proceedings before the Board.
 - 1. If the presiding officer rules that the change is insubstantial, the Comprehensive Permit shall be deemed modified by the Committee.
 - 2. If the presiding officer rules that the change is substantial, he or she shall remand the proposal for a hearing pursuant to 760 CMR 56.05(11)(c).

(12) Finality, Transfers, and Lapses of Comprehensive Permits

- (a) Finality of Permits. A Comprehensive Permit shall become final on the date that the written decision of the Board is filed in the office of the municipal clerk, if no appeal is filed. Otherwise, it shall become final on the date the last appeal is decided or otherwise disposed of, provided however that if a Comprehensive Permit is issued by the Board or the Committee and is subsequently subject to legal appeal, an Applicant may elect to proceed at risk with construction of the Project. A Comprehensive Permit that is issued by constructive grant pursuant to 760 CMR 56.07(5)(d) shall be deemed final upon the expiration of the applicable deadline.

- (b) Transfer of Permits. A Comprehensive Permit may be transferred to a person or entity other than the Applicant, upon written confirmation from the Subsidizing Agency that the transferee meets the requirements of 760 CMR56.04(1)(a) and (b), and upon written notice to the Board and the Committee (in the case of a Project granted a Comprehensive Permit under 760 CMR 56.07). Transfer of a permit shall not, by itself, constitute a substantial change pursuant to 760 CMR 56.07(4).
- (c) Lapse of Permits. If construction authorized by a Comprehensive Permit has not begun within three years of the date on which the permit becomes final except for good cause, the permit shall lapse. This time period shall be tolled for the time required to pursue or await the determination on any appeal on any other state or federal permit or approval required for the Project. The Board or the Committee may set a later date for lapse of the permit, and it may extend any such date. An extension may not be unreasonably denied or denied due to other projects built or approved in the interim.

(13) Enforcement of Use Restrictions

- (a) For Projects receiving a Comprehensive Permit, the Subsidizing Agency shall be the initial holder of the Use Restriction, with the sole right and obligation to enforce it during its initial term. The Subsidizing Agency shall give written notice to the Chief Executive Officer of the municipality at least six months prior to the expiration of the term of the Subsidy. After such expiration, during the balance of the term of affordability the holder may be a local public or quasi-public entity, or other entity approved by the Department.
- (b) The holder(s) of the Use Restriction shall provide for its monitoring and enforcement; they may do so themselves or enter into a contract for monitoring services with an entity experienced in affordable housing operation, although the holders shall retain responsibility for ensuring compliance with the Use Restriction. A contract for monitoring services may charge reasonable fees, as allowed in guidelines issued by the Department. The holder of a Use Restriction shall respond to the reasonable request from the Chief Executive Officer of the Municipality to provide information on the status of its monitoring and enforcement activities.

56.06 Procedural Regulations for Appeals to the Housing Appeals Committee

(1) General Provisions

- (a) Docket. The Committee shall keep a record known as a docket, and shall enter therein all papers relating to every appeal filed pursuant to M.G.L. c. 40B, § 22.
- (b) Office. The principal office of the Committee is c/o the Department.
- (c) Addressing Correspondence. All communications, including pleadings, correspondence, and other documents of any sort shall be addressed to the Housing Appeals Committee, c/o the Department.
- (d) Date of Receipt. All communications, including correspondence, motions and pleadings shall be deemed to be filed or received on the day on which they are actually received in the Department.
- (e) Computation of Time. Computation of any period of time referred to in 760 CMR 56.06 and 760 CMR 56.07 shall begin with the first day following that on which the act that initiates such period of time occurs. The last day of the period so computed is to be included unless it is a day on which the office of the Department is closed, in which event the period shall run until the end of the next following business day. When such period of time, with the intervening Saturdays, Sundays and

legal holidays counted, is five days or less, the said Saturdays, Sundays and legal holidays shall be excluded from the computation; otherwise, such days shall be included in the computation.

- (f) Extension of Time. Except as otherwise specified in the Act, it shall be within the discretion of the presiding officer to extend any time limit for good cause.
- (g) Signatures. Every application, statement, notice, pleading, petition, complaint, motion, brief, memorandum and other document shall be signed by the filing party or by one or more attorneys, in their individual names on behalf of and representing the filing party. This signature constitutes a certificate by the signer that he or she has read the document, that to the best of his or her knowledge every statement contained in the instrument is true, and that it is not interposed for delay.

(2) Parties and Intervention

- (a) Substitution or Succession of Parties. The presiding officer may, on motion, at any time in the course of any proceeding, permit such substitution of parties as justice or convenience may require.
- (b) Intervention. The presiding officer may allow any person showing that he or she may be substantially and specifically affected by the proceedings to intervene as a party in the whole or in any portion of the proceedings. In determining whether to permit a person to intervene, the presiding officer shall consider only those interests and concerns of that person which are germane to the issues of whether the Local Requirement and Regulations make the Project Uneconomic or whether the Project is Consistent with Local Needs. The presiding officer shall not allow a person to intervene if his or her interests are substantially similar to those of any party and no showing is made that one or more of the parties will not diligently represent those interests. Motions to intervene shall be made promptly after the filing of the initial pleading unless good cause for delay is shown. The participation of an intervenor may be limited to the extent and under terms determined in the discretion of the Presiding Officer. Notwithstanding the foregoing, any person shall be allowed to intervene to the extent that he or she would have standing as a person aggrieved to appeal the grant of a special permit in accordance with M.G.L. c.40A, § 17. The presiding officer may require the consolidation of multiple intervenors with substantially similar interests.
- (c) Interested Persons. The presiding officer may allow interested persons to participate in the hearing. Such persons shall be entitled to receive all notices pursuant to 760 CMR 56.06(7)(b) and all other documents pursuant to 760 CMR 56.06(6), but shall be permitted to participate further in the hearing only to the extent and under the terms determined in the discretion of the presiding officer.

(3) Ex Parte Communications

In an appeal proceeding, no person not employed by the Committee shall communicate *ex parte* with any member of the Committee with respect to the merits of that or any other proceeding. In an appeal proceeding, if any *ex parte* communication is directed to any person in violation of the first sentence, the members of the Committee and all other parties shall be immediately informed of the substance of the communication and the circumstances of its receipt; provided that a request for information with respect to the status of an adjudicatory proceeding or with respect to Committee procedures shall not be prohibited by 760 CMR 56.06(3). Nothing in 760 CMR 56.06(3) shall prohibit the Committee from obtaining documents or other information of public record from subsidizing agencies or other public agencies. If any such information forms the basis for Committee action, it shall be officially noticed pursuant to 760 CMR 56.06(8)(b.3) or otherwise made part of the record.

(4) Initial Pleadings

- (a) Contents. An initial pleading, as used herein, shall refer to the statement required in M.G.L. c. 40B, § 22 and shall contain in substance the following:
1. A clear and concise statement of the prior proceedings before the Board, including the date of notice of the decision appealed from.
 2. A clear and concise statement of the appellant's objections to the decision appealed from, and the reasons upon which the appeal is based.
 3. A prayer setting forth the relief sought.
 4. The complete name and address of the appellant for the purpose of service of papers in connection with the appeal.
 5. If the appellant is represented by counsel, the name and address of the attorneys.
 6. A copy of the application and the complete description of the Project submitted to the Board; provided, however, that failure to submit a particular item shall not necessarily invalidate an application, and that upon motion by either party during an appeal, the presiding officer may determine whether such item, or any further item not listed, should have been submitted to the Board or should be submitted to the Committee;
 7. A copy of the written decision of the Board, if available.
 8. The Committee may print or otherwise duplicate forms to be filled out and used as initial pleadings. When such forms are available the Committee may require their use.
- (b) Notification. The Committee shall forthwith transmit the initial pleading to the Board. The Board may, within ten days of receipt of the initial pleading, file a copy of its decision and reasons therefor with the Committee, but shall not be required to do so if a copy received pursuant to 760 CMR 56.06(4)(a.6) accurately represents that decision.
- (c) Answer. Any party may file, but shall not be required to file, with the Committee an answer to the initial pleading within ten days after the service of the document to which the answer is directed.
- (d) Amendments to Pleadings. Leave to file amendments to any pleadings may be allowed in the discretion of the presiding officer.
- (e) Withdrawal of Pleadings.
1. Prior to Commencement of Hearing. A party may withdraw an initial pleading filed with the Committee at any time prior to the commencement of a hearing on such pleading. A notice of withdrawal of the initial pleading shall be filed in accordance with 760 CMR 56.06(6).
 2. After Commencement of Hearing. A party desiring to withdraw an initial pleading after the commencement of hearing on such pleading shall file a motion for withdrawal in accordance with 760 CMR 56.06(5). If any party has an objection thereto, he shall within ten days after receipt of said motion file a statement with the Committee setting forth the reasons for his objection. Such an objecting party shall have a hearing on the motion to withdraw, if at the time of filing it so requests. In the absence of objections or a request for hearing, the motion to withdraw shall be deemed allowed, unless otherwise ordered.
- (f) Fees. A fee shall be paid by the appellant upon the filing of the initial pleading, in an amount to be defined by standing order of the Committee. The fee shall be used to support the operations of the Committee as provided by St. 1989, c. 653, § 4. Fees shall be payable, in full, by check payable to the Massachusetts Department of Housing and Community Development, upon the filing of appeals with the Committee pursuant to M.G.L. c. 40B, §22. Fees may be reduced when, in the judgment of the presiding officer, such action is warranted by special circumstances and is in the public interest. Fees charged to non-profit organizations may be reduced to the extent that the cost of such fees is

not allowed as a mortgageable cost by the Subsidizing Agency. When a reduction is granted, a statement of the reasons therefore will be filed in the record. Any motion for reduction of fees shall be filed with the initial pleading. No initial pleading will be accepted for filing without the minimum fee.

(g) Time for Appeal. An appeal shall be taken within twenty days after the written decision of the Board has been filed in the office of the city or town clerk. An appeal may also be taken if no written decision is filed within forty days after the termination of the public hearing.

(h) Massachusetts Environmental Policy Act (MEPA).

1. No later than 10 days after filing of the initial pleading, the appellant shall file an Environmental Notification Form (ENF) with the Secretary of Environmental Affairs if so required by M.G.L. c. 30, § 62A and 301 CMR 11.03. (Also see 301 CMR 11.05(2).) A copy of the ENF shall simultaneously be served upon the Committee pursuant to 760 CMR 56.06(6). If no ENF need be filed, the appellant may so demonstrate by serving upon the Committee with the initial pleading an advisory opinion obtained from the Secretary of Environmental Affairs pursuant to 301 CMR 11.01(6). (Also see 301 CMR 11.05(3), 301 CMR 11.12(2).)
2. A copy of any notice required pursuant to M.G.L. c. 30, § 62H and 301 CMR 11.14(1) of intention to commence a court action shall simultaneously be served upon the Committee pursuant to 760 CMR 56.06(6).

(5) Motions

(a) General Requirements.

1. Presentation and Opposition to Motions. A party may request of the presiding officer an order or action that may aid in the disposition of the appeal by filing a motion. Motions may be made in writing or orally in the presence of all parties upon leave of the presiding officer. If a hearing on the motion is desired, it shall be requested at the time the motion is filed, and a hearing may be held at the discretion of the presiding officer. Written opposition to a motion shall be filed within 20 days after the motion is filed unless a different time period is provided below. A written reply to the opposition may be filed within 10 days after the opposition is filed. Failure to file a timely opposition may result in a grant of the relief requested by the moving party. In the interest of expediting the hearing on the merits, the presiding officer may deny without prejudice or defer the ruling on any motion until the completion of the hearing. Time periods for the filing of motions and oppositions may be enlarged by the presiding officer for good cause shown.
2. Summary Ruling. The presiding officer may act upon a motion summarily, without awaiting an opposition to the motion, with or without prejudice, in appropriate circumstances, which may include:
 - i. non-adversarial or routine motions;
 - ii. motions having the assent of all non-moving parties;
 - iii. motions the presiding officer determines would unnecessarily consume time without resolving material issues; or
 - iv. motions the presiding officer determines to be insubstantial in view of the established law or facts of the appeal.

(b) Preliminary Motions. Unless the presiding officer issues an order providing otherwise, the following preliminary motions shall be filed within 30 days after the conference of counsel (see 760 CMR 56.06(7)(d.1):

1. motions to require review by the Subsidizing Agency of a substantial change to a Project Eligibility determination, as described in 760 CMR 56.04(6);

2. motions to dismiss raising issues under the presumption described in 760 CMR 56.07(3)(a.8);
3. motions concerning sufficiency of the application under 760 CMR 56.05(2);
4. motions concerning constructive grant of a comprehensive permit pursuant to M.G.L. c. 40B, §21 and 760 CMR 56.07(5)(d);
5. motions to clarify whether the Board's decision is a denial or a grant with conditions.

(c) Procedural Motions. The following motions may be filed at any time:

1. motions to dismiss for failure to prosecute the appeal or comply with an order of the presiding officer or of the Committee;
2. other procedural motions.

(d) Motions for Summary Decision. Any party may move, with or without supporting affidavits and a memorandum of law, for a summary decision in the moving party's favor upon all or any of the issues that are the subject of the appeal. The decision sought shall be made if the record before the Committee, together with the affidavits (if any), shows that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. A summary decision may be made on any issue, even if other issues remain for hearing. Summary decision may be made against the moving party, if appropriate.

An opposition and opposing affidavits may be filed by the opposing party within 30 days of the filing of the motion. A written reply to the opposition may be filed within 10 days after the opposition is filed.

(e) Motions for Directed Decision. Upon a party's submission of prefiled testimony, any opposing party may move for a directed decision in its favor on the ground that upon the facts or the law the original party has failed to prove a material element of its case or defense.

An opposition may be filed by the opposing party within 30 days of the filing of the motion. A written reply to the opposition may be filed within 10 days after the opposition is filed.

(6) Filing and Service

- (a) Filing. For the purpose of proceedings under 760 CMR 56.06 only, filings with the Committee shall be made by first class mail, overnight delivery, or hand delivery. (See 760 CMR 56.06(1)(c).
- (b) Service upon Parties and Other Persons. All pleadings, correspondence, or documents of any sort filed with the Committee by a party, intervener, interested person, or other person shall be served simultaneously by first-class mail, overnight delivery, or hand delivery upon all the parties, interveners, and interested persons.
- (c) Notice of Appearance. Any counsel appearing on behalf of any party, proposed intervener, or proposed interested person and any person appearing pro se shall file with the Committee, prior to the conference of counsel if possible, a notice of appearance, which shall include such counsel's or person's name, mailing address, and telephone number.

(7) Conduct of Hearing

- (a) General Rule. The hearing shall commence within twenty days after receipt of the initial pleading in accordance with M.G.L. c. 40B, § 22.
- (b) Notice of Hearing. The Committee shall notify all parties, interveners, and interested persons designated pursuant to 760 CMR 56.06(2) of a scheduled hearing in any pending matter. Such notifications shall include, but not be limited to, the time, date, place and nature of hearing.

(c) Place of Hearing. All hearings shall be held at Boston in the offices of the Department, unless a different place is designated.

(d) Conferences.

1. Conference of Counsel. The hearing shall commence with a conference of counsel, which shall be held within 20 days after the filing of the initial pleading. The presiding officer shall notify the parties of the time and place of the conference of counsel. Parties or their counsel shall appear prepared to discuss all issues in the case and with full authority to make binding agreements, including commitments as to scheduling, or shall come to the conference with the name of the person from whom authority is required and be able to communicate directly with the person at the time of the conference. The purpose of the conference shall be to:
 - i. discuss settlement, including the use of mediation or other alternative dispute resolution mechanisms;
 - ii. define contested issues on which evidence will be offered;
 - iii. consider the possibility of obtaining stipulations, admissions and agreements which will avoid unnecessary evidence;
 - iv. discuss arrangements for preparation by the parties of a draft pre-hearing order;
 - v. consider any other matters which may aid in the disposition of the appeal.
2. Pre-Hearing Conference. The presiding officer may order the parties to appear for a pre-hearing conference prior to the evidentiary portion of the hearing. Unless preliminary or other motions are pending, the pre-hearing conference shall normally be held within 60 days after the conference of counsel. Parties or their counsel shall appear with full authority to make binding agreements, including commitments as to scheduling, or shall come to the conference with the name of the person from whom authority is required and be able to communicate directly with the person at the time of the conference. The purpose of the conference shall be to:
 - i. finalize and execute a previously drafted pre-hearing order;
 - ii. discuss settlement;
 - iii. define contested issues on which evidence will be offered;
 - iv. consider the possibility of obtaining stipulations, admissions, and agreements that will avoid unnecessary evidence;
 - v. consider any other matters which may aid in the disposition of the appeal.
3. Pre-Hearing Order. Prior to the evidentiary portion of the hearing, the presiding officer may issue a pre-hearing order, which, if possible, shall be drafted jointly by the parties. It may include:
 - i. agreed facts, stipulations, admissions, and other agreements of the parties;
 - ii. a list of the contested issues of fact and law together with the burdens of proof established by 760 CMR 56.07(2);
 - iii. a list of witnesses to be called, including the designation of those who will be offered as expert witnesses, and a brief summary of the testimony of each witness;
 - iv. a list of agreed-upon exhibits;
 - v. a list of contested exhibits, if any;
 - vi. if appropriate, a schedule for filing of prefiled testimony and the amount of time necessary for each party to conduct its case; and
 - vii. any additional matters to facilitate the disposition of the appeal.
4. Teleconferences. The presiding officer may schedule such conferences of the parties by telephone or other electronic means as may aid in the disposition of the appeal.
5. Mediation. At any time during the pendency of the appeal, the presiding officer may order the parties and interested persons to appear for a mediation screening or a mediation

session as part of a dispute resolution program approved by the Committee in accordance with G.L. c. 233, § 23. If so directed, the parties and interested persons shall appear at such a mediation screening or mediation session with full authority to negotiate an agreement to resolve all disputed issues in the appeal. All communications during a mediation screening or mediation session shall be confidential to the extent permitted under G.L. c.233, § 23C.

(e) Conduct of Hearing.

1. Hearing by Committee or Hearing Officer. The hearing shall be conducted before a member of the Committee, before a hearing officer appointed by the Chairman, or before the full Committee.
2. Presiding Officer. The Chairman of the Committee shall determine whether a member of the Committee or a hearing officer shall preside at a hearing and such person shall be designated the presiding officer. If due to illness or other unforeseen circumstances the presiding officer is not able to continue a hearing, the Chairman of the Committee shall appoint another member of the Committee or a hearing officer to preside as needed. The presiding officer shall conduct the hearings pursuant to M.G.L. c. 30A and 760 CMR 56.06 and 760 CMR 56.07. The presiding officer shall have all those powers conferred upon the Committee for the conduct of a hearing, except that he or she shall not be empowered to make any decisions that would finally determine the proceedings, except:
 - i. on motions to dismiss on grounds relating to project eligibility or progress toward local goals or presumptions, pursuant to 760 CMR 56.03, 760 CMR 56.04, and 760 CMR 56.07(3)(a);
 - ii. on motions to dismiss for failure to prosecute the appeal or comply with an order of the presiding officer or of the Committee;
 - iii. with regard to the enforcement of decisions of the Committee; or
 - iv. where such a determination results from agreement or stipulation between the parties.
 In cases in which the presiding officer is not a member of the Committee, he or she shall participate in deliberations of the Committee, but shall not vote.
3. Sworn Testimony. All testimony given shall be under oath.
4. Order of Presentation. In general, the appellant shall present its evidence first, followed by the Board, and then by any other parties. Each party shall be permitted to cross examine each witness following his or her direct examination. The presiding officer shall have discretion to vary the order of presentation, to take witnesses out of turn, to permit the introduction of evidence or cross examination after one or both parties have rested, or to otherwise modify the proceedings or accommodate counsel, whenever such action will facilitate the presentation of evidence or avoid delay.
5. Prefiled Testimony and Other Evidence. In appropriate cases, the presiding officer may order all parties to file the full written text of the testimony of their expert and fact witnesses, including all exhibits to be offered in evidence. All witnesses whose testimony is prefiled shall appear at the hearing and be available for cross-examination or their testimony shall be stricken, unless the parties agree otherwise. The presiding officer shall not permit additional, new oral testimony on direct or re-direct examination from witness whose testimony is prefiled, except upon a showing that such evidence was unavailable or unanticipated at the time the written testimony was filed. The presiding officer may also require the filing of written rebuttal testimony within a reasonable time after the filing of the direct testimony. Prefiled testimony shall be given under oath. Prefiled testimony shall not be required of witnesses compelled to

testify by subpoena. Deadlines for prefiled testimony may be established on a case-by-case basis or by standing order.

6. Conduct. All parties, counsel, witnesses and other persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in the courts of the Commonwealth. Where such decorum is not observed, the presiding officer may take such action as he or she deems appropriate.
 7. Transcript of Record. A stenographic record of the proceedings shall be kept and the Committee shall require a party requesting a copy of the transcript to pay the reasonable costs of preparing said transcripts before the Committee makes the transcript available to the party. Alternatively, the cost may be divided equally among the Committee and each of the parties.
 8. Transcript Corrections. Corrections on the official transcript may be made only to make it conform to the evidence presented at the hearing. Objections to the accuracy of the transcript not raised within thirty days after the transcript is made available to the objecting party shall be deemed waived. Transcript corrections agreed to by the parties may be incorporated into the record, if approved by the presiding officer, at any time during the hearing or after the close of evidence. The presiding officer may call for and approve proposed corrections at any time.
 9. Review of Record by the Committee. The Committee shall render a written decision based upon a majority vote. If a majority of the Committee have neither heard nor read the evidence, the Committee shall comply with M.G.L. c. 30A, § 11(7). The Committee shall not be required to issue a proposed decision unless a party so requests in writing prior to termination of the hearing. A hearing shall be deemed terminated when all transcripts have been approved by the parties and all briefs and memoranda requested by the presiding officer have been filed.
 10. Report of Hearing Officer. Where a hearing officer presides, his or her report of proposed findings of fact and recommended disposition of the appeal shall be submitted to the Committee, but need not be served upon the parties.
- (f) Oral Argument. A party shall have a right before the close of the hearing to argue orally. The presiding officer may in his or her discretion permit additional oral argument at any time after the close of a hearing, provided all parties are given a reasonable opportunity to be heard.

(8) Evidence, Subpoenas

- (a) Evidence. The Committee, as provided in M.G.L. c. 30A, § 11, need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law, except as otherwise provided by any law. The presiding officer shall upon objection of counsel or upon his or her own initiative exclude evidence that is unduly repetitious or cumulative and evidence that is not relevant to issues properly before the Committee as set forth in 760 CMR 56.07.
- (b) Official Notice and Special Evidence.
 1. Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of the Commonwealth, provided that any party shall on timely request be afforded an opportunity to contest the matters of which official notice is to be taken.
 2. The presiding officer may take official notice of general, technical or scientific facts within the Committee's specialized knowledge, provided that any party on timely request be afforded an opportunity to contest such notice; and the presiding officer may upon his or her own initiative call any experts who in his or her judgment will contribute to the Committee's knowledge of

the facts and issues of a case, provided that such experts shall be subject to cross examination by all parties.

3. Official notice in any proceeding also may be taken of any fact alleged, presented, or found in any other agency proceeding, provided that any party shall on timely request be afforded an opportunity to contest such notice.

(c) Objections and Exceptions. Formal exceptions to rulings on evidence and procedure are unnecessary. It is sufficient that a party at the time that a ruling of the presiding officer is made or sought, makes known to the presiding officer the action which it desires taken or objections to such action and its grounds therefor.

(d) Subpoenas. In accordance with M.G.L. c.30A, §12, the presiding officer shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence relating to any matter in question in the proceeding. All parties shall similarly be entitled to the issuance of subpoenas by a notary public or justice of the peace.

(e) Production and View of Objects. A party may file a motion for the production or view of any object which relates to the subject matter of any proceeding that is pending before the Committee. Said motion shall be granted in the discretion of the presiding officer where justice requires.

(9) Depositions and Stipulations

(a) Depositions. The testimony of a witness or of a party may be taken by deposition only upon order of the presiding officer, either upon his or her own initiative or upon motion of a party, and only upon a showing that the witness or party cannot testify at the hearing without substantial hardship. In taking such a deposition, the procedures in Mass.R.Civ.P. 26-31 shall be followed except as modified by order of the presiding officer.

(b) Stipulations. In the discretion of the presiding officer, the parties may, by stipulation in writing filed with the Committee at any stage of the proceeding, or orally made at the hearing, agree upon any pertinent facts in the proceeding. In making its findings, the Committee need not be bound to any such stipulation.

(10) Consolidation and Continuances

(a) Consolidation. The presiding officer, upon his or her own initiative or by motion of a party or other person, may order proceedings involving a common question of law or fact to be consolidated for hearing on any or all of the matters in issue in such proceedings.

(b) Continuances. The presiding officer may, for good cause shown, grant a postponement or a continuance of the hearing.

(11) Briefs and Post-Hearing Procedure

(a) Filing of Briefs. Briefs may be filed by a party or any interested person before or during the course of a hearing or within such time thereafter as the presiding officer shall designate.

(b) Filing of Documents Subsequent to Hearing. The presiding officer may, for good cause shown, allow the parties to file evidentiary documents of any kind or exhibits at a time subsequent to the completion of the hearing, such time to be determined by the presiding officer. If a request for such subsequent filing is granted, the requesting party shall, on or before the date set for filing, send copies of all documents or exhibits that are the subject of the request to all other parties. If such requirement for copies is impracticable, the presiding officer may suspend the above provisions; in such case the Committee shall allow reasonable inspection of the original by all parties.

- (c) Reopening Hearing. At any time prior to the rendering of a decision, the Committee or the presiding officer may, upon their own initiative or upon motion by a party, reopen the hearing for the purpose of receiving new evidence, oral argument, memoranda, briefs, or motions.

(12) Sanctions

If a party or interested person fails to comply with a rule or order issued by the presiding officer, the presiding officer may impose appropriate sanctions, including the imposition of costs, exclusion of evidence, dismissal of a claim or defense, exclusion from the proceeding, and dismissal of the appeal.

56.07 Criteria for Housing Appeals Committee Decisions

(1) Scope of Committee Hearing

- (a) General Principle. Consistency with Local Needs is the central issue in all cases before the Committee. Not only must all Local Requirements and Regulations applied to the Applicant be Consistent with Local Needs, but decisions of the Board and the Committee must also be Consistent with Local Needs.
- (b) Denial. In the case of the denial of a Comprehensive Permit, the issue shall be whether the decision of the Board was Consistent with Local Needs.
- (c) Approval with conditions. In the case of the approval of a Comprehensive Permit with conditions or requirements imposed, the issues shall be:
1. first, whether the conditions considered in aggregate make the building or operation of the Project Uneconomic, and
 2. second, whether the conditions are Consistent with Local Needs.

Commentary. A condition which causes a Project to be Uneconomic will not be removed or modified if as a result of such action the Project would not be Consistent with Local Needs.

(2) Burdens of Proof

Applicant's Case

- (a) The Applicant shall have the burden of proving that it has met the project eligibility requirements of 760 CMR 56.04(1). Such burden shall be conclusively met in accordance with the procedure set forth in 760 CMR 56.04(6), except in the event of substantial change.
- (b) In the case of a denial, the Applicant may establish a *prima facie* case by proving, with respect to only those aspects of the Project which are in dispute, that its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern.
- (c) In the case of an approval with conditions, the Applicant shall have the burden of proving that the conditions make the building or operation of the Project Uneconomic under 760 CMR 56.07(3)(a.8).
- (d) In the case of either a denial or an approval with conditions, the Applicant may prove that Local Requirements and Regulations have not been applied as equally as possible to subsidized and unsubsidized housing. The Applicant shall have the burden of proving such inequality.

Board's Case

- (e) In any case, the Board may show conclusively that its decision was Consistent with Local Needs by proving that one or more of the grounds described in 760 CMR 56.03(1) has been satisfied, in accordance with the procedure set forth in 760 CMR 56.03(8). The Board shall have the burden of proving satisfaction of such grounds.
- (f) In the case of denial, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need.
- (g) In the case of an approval with conditions, relative to which the Applicant has presented evidence that the conditions make the Project Uneconomic, the Board shall have the burden of proving, first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such conditions, and then, that such Local Concern outweighs the Housing Need.
- (h) In the case of either a denial or an approval with conditions, if the denial or conditions are based upon the inadequacy of existing municipal services or infrastructure, the Board shall have the burden of proving that the installation of services adequate to meet local needs is not technically or financially feasible. Financial feasibility may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly.

Applicant's Rebuttal

- (i) In the case of a denial or an approval with conditions, the Applicant shall have the burden of proving that preventive or corrective measures have been proposed which will mitigate the Local Concern, or that there is an alternative means of protecting Local Concerns which makes the project economic.

(3) Evidence

- (a) Presumptions. A determination of Project Eligibility, established in accordance with 760 CMR 56.04 or a determination that a municipality has satisfied one or more of the grounds set forth in 760 CMR 56.03(1), established in accordance with 760 CMR 56.03(8), shall be an irrebuttable presumption. Conversely, proof that a municipality has failed to satisfy any of the grounds described in 760 CMR 56.03(1) shall create a rebuttable presumption that there is a substantial Housing Need which outweighs Local Concerns.
- (b) Balancing. If a municipality attempts to rebut the presumption, set forth in 760 CMR 56.07(3)(a) that there is a substantial Housing Need which outweighs Local Concerns:
 1. the weight of the Housing Need will be commensurate with the regional need for Low or Moderate Income Housing, considered with the proportion of the municipality's population that consists of Low Income Persons;
 2. the weight of the Local Concern will be commensurate with the degree to which the health and safety of occupants or municipal residents is imperiled, the degree to which the natural environment is endangered, the degree to which the design of the site and the proposed housing is seriously deficient, the degree to which additional Open Spaces are critically needed in the municipality, and the degree to which the Local Requirements and Regulations bear a direct and substantial relationship to the protection of such Local Concerns; and
 3. a stronger showing shall be required on the Local Concern side of the balance where the Housing Need is relatively great than where the Housing Need is not as great.

(c) Evidence to be Heard. The Committee will hear evidence only as to matters actually in dispute. Below are examples of factual areas of Local Concern in which evidence may be heard if it is relevant to issues in dispute. These examples are not all inclusive.

(d) Health, Safety, and the Environment. The Committee may receive evidence of the following matters:

1. Structural soundness of the proposed building(s);
2. Adequacy of sewage arrangements;
3. Adequacy of water drainage arrangements;
4. Adequacy of fire protection;
5. Adequacy of the Applicant's proposed arrangements for dealing with the traffic circulation within the site, and feasibility of arrangements which could be made by the municipality for dealing with traffic generated by the Project on adjacent streets;
6. Proximity of the proposed site to airports, industrial activities, or other activities which may affect the health and safety of the occupants of the proposed housing.

(e) Site and Building Design. The Committee may receive evidence of the following matters:

1. Height, bulk, and placement of the proposed Project;
2. Physical characteristics of the proposed Project;
3. Height, bulk, and placement of surrounding structures and improvements;
4. Physical characteristics of the surrounding land;
5. Adequacy of parking arrangements;
6. Adequacy of open areas, including outdoor recreational areas, proposed within the project site.

(f) Open Space. The Committee may receive evidence of the following matters;

1. availability of existing Open Spaces, as defined in 760 CMR 56.02, in the municipality;
2. current and projected utilization of existing Open Spaces and consequent need, if any, for additional Open Spaces, by the municipality's population including occupants of the proposed housing;
3. relationship of the proposed site to any municipal open space or outdoor recreation plan officially adopted by the planning board, and to any official actions to preserve Open Spaces taken with respect to the proposed site by the town meeting or city council, prior to the date of the Applicant's initial submission. The inclusion of the proposed site in any such open space or outdoor recreation plan shall create a presumption that the site is needed to preserve Open Spaces unless the Applicant produces evidence to the contrary;
4. relationship of the proposed site to any regional open space plan prepared by the applicable regional planning agency;
5. current use of the proposed site and of land adjacent to the proposed site;
6. inventory of sites suitable for use as Open Spaces, and available for acquisition or other legal restriction as Open Spaces, in the municipality, provided that the Committee shall admit no evidence of any open space plan adopted only by the local conservation commission or other local body but not officially adopted by the planning board.

(g) Municipal and Regional Planning. The Committee may receive evidence of and shall consider the following matters:

1. a municipality's master plan, comprehensive plan, housing plan, Housing Production Plan, or community development plan;
2. the applicable regional policy plan; and
3. the results of the municipality's efforts to implement such plans.

(h) Evidence Not to be Heard. The following matters shall be within the sole province of the Subsidizing Agency, and the Committee will not hear evidence concerning them except for good cause or as set forth below:

1. Matters relating to Project Eligibility, including the marketing of the Project and the Applicant's ability to finance, construct, or manage the Project, except in the case of an alleged substantial change raised by the Board in accordance with 760 CMR 56.04(6).
2. The financial feasibility of the Project, what constitutes a reasonable return for a Limited Dividend Organization, or whether the Applicant is likely to earn reasonable return, except that evidence may be heard which is directly relevant to the issue of whether conditions would make the Project Uneconomic in accordance with 760 CMR 56.05(6) and (8)(d).
3. Resident selection procedures and other matters relating to Use Restrictions and Affirmative Fair Marketing Plans.
4. The percentage of Low and Moderate Income Housing units within a Project.

(4) Substantial Changes to Project

- (a) **Substantial Changes.** If an Applicant involved in an appeal to the Committee desires to change aspects of its proposal from its content at the time it made application to the Board, it shall notify the Committee in writing of such changes, and the presiding officer shall determine whether such changes are substantial. If the presiding officer finds that the changes are substantial, he or she shall remand the proposal to the Board for a public hearing to be held within 30 days and a decision to be issued within 40 days of termination of the hearing as provided in M.G.L. c. 40B, § 21. Only the changes in the proposal or aspects of the proposal affected thereby shall be at issue in such hearing. If the presiding officer finds that the changes are not substantial and that the Applicant has good cause for not originally presenting such details to the Board, the changes shall be permitted if the proposal as so changed meets the requirements of the Act and 760 CMR 56.00 (760 CMR 56.00).
- (b) **Commentary and Examples.** The statute requires that an Applicant present its application first to a Board before appealing to the Committee. If on appeal to the Committee the Applicant wishes to make changes in its proposal from its content as originally presented to the Board, the Board should have an opportunity to review changes that are substantial. Following are some examples of what circumstances ordinarily will and will not constitute a substantial change of the kind described in 760 CMR 56.07(4)(a).
- (c) The following matters ordinarily will be substantial changes:
 1. An increase of more than 10% in the height of the building(s);
 2. An increase of more than 10% in the number of housing units proposed;
 3. A reduction in the size of the site of more than 10% in excess of any decrease in the number of housing units proposed;
 4. A change in building type (e.g., garden apartments, townhouses, high-rises); or
 5. A change from rental property to homeownership or vice versa.
- (d) The following matters ordinarily will not be substantial changes:
 1. A reduction in the number of housing units proposed;
 2. A decrease of less than 10% in the floor area of individual units;
 3. A change in the number of bedrooms within individual units, if such changes do not alter the overall bedroom count of the proposed housing by more than 10%;
 4. A change in the color or style of materials used; or
 5. A change in the financing program under which the Applicant plans to receive a Subsidy, if the change affects no other aspect of the proposal.

(5) Committee Decisions

- (a) Decision. In accordance with M.G.L. c. 40B, § 22, the Committee shall render a written decision, based upon a majority vote, stating its findings of fact and conclusions, within 30 days after termination of the hearing unless such time has been extended by consent of the applicant.
1. If the Committee finds, in the case of a denial, that the decision of the Board was not Consistent with Local Needs, it shall vacate such decision and shall direct the Board to issue a Comprehensive Permit to the Applicant.
 2. If the Committee finds, in the case of conditions imposed by the Board, that the conditions render the Project Uneconomic and that the conditions are not Consistent with Local Needs, the Committee shall direct the Board to remove any such condition or to modify it so as to make the Project economic.
 3. If the Committee finds, in the case of conditions imposed by the Board, that the conditions render the Project Uneconomic and that the conditions are Consistent with Local Needs, but that the conditions can be modified so as to make the Project economic and to adequately protect health, safety, environmental, design, open space, and other Local Concerns, the Committee shall so direct the Board to modify the conditions.
- (b) Conditions. The Committee shall not issue any order which would allow the building or operation of the Project in accordance with standards less safe than the applicable building and site plan requirements of the Subsidizing Agency. The Committee, in its decision, may make a Comprehensive Permit subject to any of the following conditions or requirements:
1. The grant of the subsidy by the Subsidizing Agency;
 2. Issuance of final approval by the Subsidizing Agency pursuant to 760 CMR 56.03(7);
 3. The securing of the approval of any state or federal agency with respect to the Project which the Applicant must obtain before building, provided, however, that the Committee shall not delay or deny an appeal on the grounds that any state or federal approval has not been obtained;
 4. Complete or partial waiver ordered by the Committee of fees otherwise assessed or collected by Local Boards;
 5. Other directions or orders to Local Boards designed to effectuate the issuance of a Comprehensive Permit (including any Waivers) and the construction of the Project; or
 6. Any other condition consistent with the Act and with 760 CMR 56.00.
- (c) Massachusetts Environmental Policy Act (MEPA). All Projects before the Committee are potentially subject to compliance with the MEPA, M.G.L. c. 30, §§ 61 through 62H.
1. Where no Environmental Impact Report (EIR) is required, no M.G.L. c. 30, § 61 finding shall be required in the Committee's decision. In any such case, however, pursuant to 301 CMR 11.12(2)(b), prior to issuance of a decision, the Applicant may serve upon the Committee pursuant to 760 CMR 56.06(6) the following:
 - i. a Certificate of the Secretary of Environmental Affairs pursuant to 301 CMR 11.06(7) that no EIR is required, or
 - ii. an advisory opinion obtained from the Secretary of Environmental Affairs pursuant to 301 CMR 11.01(6). (Also see 301 CMR 11.05(3), 12(2).)

If neither a Certificate nor an advisory opinion is available, the Committee may rely on evidence or testimony admitted at the hearing or thereafter or on other information contained in the record.
 2. Where an EIR is required and a Single or Final EIR has received a Certificate of the Secretary of Environmental Affairs of compliance pursuant to 301 CMR 11.08(8)(a), the presiding officer may take official notice of the Certificate without prior notice to the parties pursuant to 760 CMR 56.06(8)(2), and shall include in its decision findings as required by M.G.L. c. 30, § 61.

(See 301 CMR 11.01(4)(c), 11.12(5)).

3. Where an EIR is required and the Secretary of Environmental Affairs has not issued a Certificate of compliance pursuant to 301 CMR 11.08(8)(a), the Committee may delay its decision or it may render its decision, pursuant to 301 CMR 11.02 ("agency action"(c)), provided that the decision shall be subject to the following conditions:
 - i. that the Comprehensive Permit shall not be implemented until the Committee has fully complied with MEPA, and
 - ii. that the Committee shall retain authority to modify the decision based upon findings or reports prepared in connection with MEPA.
- (d) Decisions Involving Constructive Grant of Permit. The Committee may determine, upon motion pursuant to 760 CMR 56.06(5)(b) and after hearing, that a Comprehensive Permit has been granted constructively due to failure of the Board to meet one of the deadlines in M.G.L. c. 40B, § 21 or the 180-day deadline for termination of the hearing set forth in 760 CMR 56.05(3). In any such case, the permit shall be deemed granted for the number of housing units proposed in the application to the Board, and the Committee shall impose reasonable conditions upon the permit sufficient to address health, safety, environmental, design, open space, and all other material local concerns.
- (e) Appeal. Any decision of the Committee may be reviewed in the superior court in accordance with the provisions of M.G.L. c. 30A.
- (f) Appeal in MEPA Cases. Judicial review of a Committee decision which does not contain Massachusetts Environmental Policy Act findings, but rather contains the conditions required by 760 CMR 56.08(3)(c), shall not be delayed by such conditions.

(6) Enforcement

- (a) The Board shall carry out an order of the Committee within 30 days of its entry, and, upon failure to do so, the order of the Committee shall for all purposes be deemed the action of the Board.
- (b) The Committee shall have the same power to issue permits or approvals as any Local Board which would otherwise act with respect to an application.
- (c) A Comprehensive Permit issued by order of the Committee shall be a master permit which shall subsume all local permits and approvals normally issued by Local Boards, in accordance with 760 CMR 56.05(10).
- (d) After the issuance of a Comprehensive Permit, the Committee may issue such orders as may aid in the enforcement of its decision. If a party fails to comply with an order issued by the Committee, it may impose appropriate sanctions, including the imposition of costs. Also see 760 CMR 56.06(7)(g).
- (e) The Committee or the Applicant may enforce an order of the Committee in the Superior Court.

56.08 Amendments; Waivers; Transition Rules

- (1) Amendment and Effective Date of Amendments. These rules and regulations may be amended from time to time in accordance with the provisions of M.G.L. c. 30A.
- (2) Waivers from 760 CMR 56.00. The Department or, in the event of an appeal before the Committee, the presiding officer may waive any provision of 760 CMR 56.00 except for 760 CMR 56.02, 760 CMR 56.03, 760 CMR 56.07(2)(c) (e), 760 CMR 56.07(3)(b), and 760 CMR 56.07(5)(a),

when in the judgment of the Department or the presiding officer strict compliance with such provision will result in an undue hardship and will be inconsistent with the purposes of the Act. In the event of such waiver, issued by the presiding officer, he or she shall file with the record of the case a statement of the facts on which such waiver is based. No waiver shall be made if it conflicts with any mandatory provisions of any statute.

(3) Transition Rules.

- (a) 760 CMR 56.00 shall apply to any Project for which no application was filed with the Board prior to the effective date of 760 CMR 56.00, except that 760 CMR 56.04(4) shall not apply to any Project for which a project eligibility determination had been issued by the Subsidizing Agency prior to the effective date.
- (b) 760 CMR 56.00 shall apply to any Project for which an application was filed with the Board prior to the effective date of 760 CMR 56.00, except that 760 CMR 56.03(8), 760 CMR 56.04(4), and the second and third paragraphs of 760 CMR 56.05(3) shall not apply.

REGULATORY AUTHORITY

M.G.L. c.23B; MGL c.40B.