

# Chapter 40B and the Cost Certification Dilemma

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As many of you know, Mass. General Law Chapter 40B has proven to be an invaluable tool for housing production in Massachusetts. Chapter 40B has been the sole driving force



for affordable housing and a significant force in market housing over the last 10 years. The flexibility afforded under Chapter 40B,

which provides necessary relief from stringent local zoning requirements, and the ability for relatively quick administrative review by the Housing and Appeals Committee (HAC), are critical components to this successful program. Flexibility and expediency are lacking in most other permit programs in Massachusetts. As a result, there have been extraordinary pressures placed on Chapter 40B. Chapter 40B is serving as the permitting vehicle for development projects in ways that were not contemplated decades ago when the statute was first enacted. This over-reliance on Chapter 40B, and the scrutiny that it receives, is now complicating and potentially weakening the program going forward.

There has been tremendous focus, for example, on the cost certification component of Chapter 40B. Cost certification is conducted at project completion to determine whether profits exceed 20 percent of total development costs in for-sale developments (a different threshold is applied rental developments). According to implementing regulations and policy, profits in excess of 20 percent are directed to the local municipality to support more affordable programs (or in the case of rental housing, to further subsidize rents). Cost certification has been a source of accusation by Chapter 40B opponents who argue that builders and developers are pocketing profits that should go to municipal coffers. In this

day of budget belt-tightening, such arguments fuel speculation by municipalities that a huge windfall of cash is waiting to be collected. Furthermore, in response to these arguments, regulators

are often motivated by anti-growth sentiment. A recent jury trial decision in the Middlesex Superior Court involving the town of Chelmsford may provide some limited benefit in this regard. In the

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have become increasingly concerned about cost certification compliance. We should be concerned that there is a rational response to the cost certification dilemma.

The Department of Housing and Community Development (DHCD) has issued new 40B regulations and guidelines to update and revise the regulatory review process. Most of these revisions have been positive in the sense that they codify HAC decisions, appellate court rulings and good practice. An issue of concern, however, regards the requirement for posting a surety at the time of final approval, to ensure cost certification performance. The surety requirements are too stringent and costly, without sufficient flexibility. They potentially cause undue burden to a review process that could impact the utility of Chapter 40B. A second concern is that DHCD is currently reviewing the recently re-codified regulations in the wake of a report issued in June 2009 by the Senate Committee on Post Audit and Oversight. The Chapter 40B program cannot bear too much more complexity and cost. We need to make sure that DHCD does not overreact to problems that are perceived through political bias and misunderstanding.

We also need to encourage DHCD and project administrators to limit municipal intrusion into the cost certification process. Municipalities are ill-equipped to manage such review and

Chelmsford case, the town criticized the cost certification report, arguing that developer's land cost had been improperly calculated. The town argued that the appraisal standards of MassHousing and DHCD did not apply, and that a lower land acquisition value should have been applied by the developer in its cost certification report. The town also argued that the developer breached its regulatory agreement when it failed to cooperate in providing the town with documentation to support the town's inquiry. Fortunately, the jury found in favor of the developer on both counts, correctly limiting the municipality's role in the cost certification process. DHCD and project administrators should continue this course and follow the sentiment of this jury verdict in implementing any new regulations.

Chapter 40B was enacted to thwart snob zoning and encourage affordable housing. The program has been very successful in achieving these goals. We should be ever mindful of regulatory creep that hinders future program success. We should also continue to advocate for other permitting programs that are equally flexible and expedient for housing production. ♦

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