



## MEMO

September 28, 2005

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To: Internal Request, Federal Reserve Bank of Boston  
From: Darcy Rollins, Policy Analyst  
Re: **The Nonprofit Role in Monitoring Affordability of 40B Housing Units in Massachusetts**

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### Executive Summary

In an August 19th email to Robert Tannenwald, you asked about nonprofit involvement in monitoring and preserving affordability of units built under 40B; this memo responds to that inquiry.

Developers are eligible for 40B if they use approved federal, state and non-governmental funding sources. In general, governmental funding sources have established monitoring and regulatory systems. Non-governmental and quasi-governmental approved funding sources – primarily the Federal Home Loan Bank of Boston (FHLBB)'s New England Fund (NEF) and MassHousing's HousingStarts program – require additional oversight and engage nonprofit organizations in monitoring and enforcing affordability requirements. Under regulatory guidelines established by the Department of Housing and Community Development (DHCD) and implemented by MassHousing, non-profit organizations monitor and enforce long-term deed restrictions limiting resale values, ensure that developers take a reasonable profit, conduct a fair housing lottery, and oversee the continued affordability of rental units. The Citizens Housing and Planning Association (CHAPA) is the state's primary monitoring agent.

### Background

40B encourages affordable housing production through local comprehensive permits for affordable housing developers and a state appeals process for affordable developments obstructed at the local level. Developers qualify for 40B provisions if they use approved governmental (federal and state) and non-governmental sources. Approved governmental sources include federal and state affordable housing programs, such as Section 8, HOME, and the LIHTC. In general, these sources have established mechanisms for monitoring a development's eligibility and ensuring preservation of affordable units over the term of the funding provided.

In the last decade two non-governmental funding sources were approved for 40B developments. A 1999 decision by the Housing Appeals Committee (HAC) added the FHLBB's NEF to the list of approved funding sources. The NEF provided member financial institutions with advances to support housing and



community development initiatives that benefit moderate-income households and neighborhoods. Established in 1990 and operational until 2002, the fund required at least 25 percent of the housing developed serve households earning less than 80 percent area median income (AMI); developers also had to guarantee long-term use restrictions. While the fund was suspended in 2002, member banks continue to provide funding along the same guidelines as established by NEF.

MassHousing's HousingStarts program is another approved quasi-governmental 40B funding source. HousingStarts offers competitive construction financing for developers of condominiums and single family homes that provide a minimum of 25 percent of the units to first-time homebuyers earning at or below 80 percent AMI.

Including NEF funding as a qualified funding source increased the number of applications for comprehensive permits under 40B. NEF lacked monitoring and evaluation systems and most municipalities where NEF-funded developments were located had not established standards for low to moderate income housing. Nor did they have the resources to monitor and enforce the affordability requirements of NEF themselves. The increased usage of comprehensive permits, coupled with a lack of regulatory oversight, prompted DHCD to develop guidelines and regulations for developers using NEF under 40B. The guidelines for the Housing Starts program, which was developed after NEF, mimic those created for NEF.

### **Guidelines**

The DHCD guidelines designate a project administrator, which has the responsibility of determining initial project eligibility and granting final approval for developments using NEF or HousingStarts funding. MassHousing is the established public administrator for both programs.

The project administrator ensures that the proposed development meets the following general requirements during the predevelopment and construction phases:

- 1) That 25 percent of the units must be affordable to households earning a maximum of 80 percent AMI.
- 2) That the affordable units be subject to long term use restrictions enforceable through a regulatory agreement with the project administrator.
- 3) That the affordable units must be marketed through a fair and equitable process.

### **Determining Project Eligibility**

In determining project eligibility, the project administrator must review the proposed project's design, its ability to meet the established affordability requirements, the financial feasibility of the project, and the financial responsibility of the developer. The project administrator may request revisions or amendments to the proposed development to meet eligibility requirements. If eligibility is determined, the project administrator issues a determination of project eligibility letter, which is provided to the potential funding source. Once funding is secured, a developer may apply for a comprehensive permit from the Zoning Board of Appeals with jurisdiction over the proposed development.



Following the issuance of the comprehensive permit but prior to construction, the developer is required to submit revised, preliminary plans to the project administrator that reflect any amendments due to the financing arrangements or the comprehensive permit approval process. These documents are used by the project administrator in determining whether or not to grant the proposed development final approval.

### **Final Approval**

In determining whether to grant final approval, the project administrator must confirm that the proposed development conforms to established design, construction and environmental standards. In addition, regulatory agreements are established between the developer and project administrator regarding income limits, affordability, resale restrictions, the implementation of the housing lottery, and management and operation of housing units.

As part of the approval process, the developer and the project administrator enter into regulatory agreements governing the management of the property and its future affordability. All developers using NEF or HousingStarts are required to provide long-term deed restrictions that restrict the sale price of homeownership units for a minimum of 30 years. This deed rider is recorded when the unit is completed and defines purchaser/renter eligibility, and the initial sale price and resale limits of owner occupied units. Final approval also includes regulatory agreements about monitoring and evaluation of affordability post-construction.

### **Monitoring Agent Responsibilities**

DHCD guidelines require that the final regulatory agreement between the developer and project administrator include an “effective monitoring and enforcement” program, which is in practice accomplished under contract with a designated monitoring agent. Monitoring agents must be a public, quasi-public or private entity experienced in affordable housing operation. While the selection of the monitoring agency is the decision of the developer and of the town, MassHousing exercises oversight in the decision because the agency is identified during the final approval process.

The monitoring agent is primarily responsible for three areas:

#### 1. The housing lottery process.

Monitoring Agents are responsible for reviewing and approving initial sale or rental prices of affordable units. As part of this process, the agent reviews and approves the developer’s marketing and outreach plan, including all applicable attachments, to ensure a fair and equitable housing lottery process. Following the lottery, the agent income-certifies all lottery winners prior to lease-up or closing. The agent provides the developer with a notarized certification of eligibility that is recorded with the deed rider at the buyers’ closings.

#### 2. Enforcing affordability after re-sale and for rental units, generally.

The monitoring agent is responsible for enforcing the requirements of the long-term restrictions established under the deed-rider required for all affordable homeownership units developed under NEF or HousingStarts. Anyone wishing to sell a deed-restricted unit must contact and employ the services of the agent, who ensures that the eligibility requirements and resale limits of



the deed are followed. In addition, the agent has broad responsibility to monitor the on-going affordability of rental units.

### 3. Ensuring reasonable developer profit.

The agent is also responsible for ensuring that the developer's profit on the development is reasonable. When the project is complete, the agent completes a cost-certification of the developer's financial audit and sends a final report to the town on the project.

Monitoring agents charge a fee for their services. While towns or local public housing authorities have served as monitoring agents, in practice CHAPA is the most commonly-established monitoring agent. CHAPA reports that the organization is currently monitoring 122 projects in 62 communities.

### **Sources:**

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Email correspondence. Citizens Housing and Planning Association staff. August 29, 2005

