SENATE DOCKET, NO. 1325 FILED ON: 1/14/2009

# SENATE . . . . . No. 646

## The Commonwealth of Massachusetts

**In the Year Two Thousand Nine**

An Act Relative to 40B Cost Certification..

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Chapter 40B of the General Laws, as appearing in the 2006 Official Edition, is hereby amended by striking out sections 20 through 23 in their entirety and inserting in place thereof the following:

Section 20. The following words, wherever used in this section and in sections 21 to 23B, inclusive, shall, unless a different meaning clearly appears from the context, have the following meanings:—

"Allowable Acquisition Cost", the as is fair market value of land under existing zoning, without taking into account the probability of obtaining a variance, special permit, other zoning relief or the benefit of a comprehensive permit, as of the date of submittal of a site eligibility application. The allowable acquisition cost shall not exceed the most recent arm's length purchase price.

"Allowable Development Related Expenses", documented reasonable, necessary and actual development related costs associated with designing, planning, constructing, marketing

and selling/renting a housing development. These costs include, but are not limited to, the allowable acquisition cost; site preparation costs; related permitting costs; project financing costs; contractor and subcontractor construction costs, project monitoring costs and brokers commissions.

"Certified Cost and Income Statement", a written statement audited by a independent, certified accounting firm qualified by the department pursuant to this chapter, in a form as determined by the department, prepared by a developer, or its attorneys, accountants or other agents, following the completion of a development, itemizing the development's expenditures and income.

"Consistent with local needs", requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of 10 per cent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use; (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or 10 acres, whichever is larger, in any one calendar

year; provided, however, that land area owned by the United States, the commonwealth or any political subdivision thereof, or any public authority shall be excluded from the total land area referred to above when making such determination of consistency with local needs; (3) a developer with an equity interest in the development has been barred from applying for or obtaining a comprehensive permit under paragraph (f) of section 23B; or (4) the proposed density of the project is more than four times the density of the underlying zoning, or more than eight units per acre, whichever is greater.

"Department", the department of housing and community development, or any successor agency.

"Developer", a person holding an equity interest in a limited dividend organization that holds and exercises a permit pursuant to sections 20 through 23B.

"Development", a low or moderate income housing development permitted under sections 20 through 23B.

"Development-related Income", any revenue derived from the development project, including but not limited to, the sale or rental of housing units; the sale of raw material from the development site such as timber, loam and other soils; the sale of existing structures or related building materials on the site; any benefits from the granting of easements or licenses to the site; and, discounts, credits and rebates received from suppliers and subcontractors as part of the development process.

"Homeownership Development", a development that consists of single- or multi-family housing units for sale.

"Immediate Family", the spouse of a developer, and their parents, children, brothers, sisters, sons-in-law, daughters-in-law, aunts, uncles, nieces and nephews.

"Local Board", any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen.

"Low or moderate income housing", any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization.

"Monitoring Agent", an agency qualified by the department, which may include the city or town in which the development is located or the local housing authority, to provide oversight, administration and enforcement of the regulatory agreement and the reasonable return allowed. A subsidizing agency shall not act as monitoring agent.

"Profit", the net income, after all allowable development-related expenses, derived from the sale of housing units and from any other development-related income sources.

"Reasonable Return", the allowable profit earned through the construction and/or operation of a development as may be determined by the applicable federal or state statute or by the applicable subsidizing agency. For a homeownership development the projected profit shall be no less than 10 percent and no more than 20 percent of allowable development costs. For a rental development the annual dividend, commencing on the development's initial occupancy and each year thereafter, and shall be no more than 10 percent of the owner's investment in the

development, shall consist of the difference between the audited actual capitalized value of the development and the sum of any debt secured by the development.

"Related Party", the immediate family of a developer, or any entity in which the developer or his immediate family has at least a five percent financial interest.

"Related Party Transactions", a development-related transaction between a developer and a related party.

"Rental Development", a development that consists of single- or multi-family housing units for rent.

"Substantial Completion", the earlier of: (a) the date on which construction is sufficiently complete so that all of the units in the development are eligible for final occupancy permits under the state building code, or (b) the date on which at least 50% of the units in the development are eligible for final occupancy permits under the state building code and at least three years have elapsed from the date on which the comprehensive permit became final.

"Uneconomic", any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government on the size or character of the development 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 units sizes proposed by the public agency, nonprofit or limited dividend organizations.

Section 20A. The department shall be responsible for the administration and enforcement of sections 20 through 23B of this chapter. Its powers and duties shall include, but not be limited to, the following:

Promulgating regulations relative to the operation and enforcement of sections 20 through 23B;

Reviewing certified cost and income statements filed under section 23A;

Qualifying monitoring agents and maintaining a list of qualified monitoring agents;

Verifying that monitoring agents are fulfilling oversight obligations;

Qualifying independent appraisers and maintaining a list of qualified independent appraisers for use by boards of appeals to determine the allowable acquisition cost of land;

Qualifying certified public accounting firms to audit certified cost and income statements and maintaining a list of qualified certified public accounting firms; and

Imposing and enforcing sanctions for violations of sections 20 through 23B.

Section 21. Any public agency or nonprofit or limited dividend organization proposing to build low or moderate income housing may submit to the board of appeals, established under section 12 of chapter 40A, a single application to build such housing in lieu of separate applications to the applicable local boards. All applications to any state or municipal body, including any financial information, made under sections 20 through 23B shall be made under the pains and penalties of perjury. The board of appeals shall forthwith notify each such local board, as applicable, of the filing of such application by sending a copy thereof to such local boards for their recommendations and shall, within 30 days of the receipt of such application,

hold a public hearing on the same. The board of appeals shall request the appearance at said hearing of such representatives of said local boards as are deemed necessary or helpful in making its decision upon such application and shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section. The board of appeals, in making its decision on said application, shall take into consideration the recommendations of the local boards and shall have the authority to use the testimony of consultants. The board of appeals shall also have access to all financial details of the development, including, but not limited to, any documents from the subsidizing agency regarding the development. The board of appeals shall adopt rules, not inconsistent with the purposes of this chapter, for the conduct of its business pursuant to this chapter and shall file a copy of said rules with the city or town clerk. The provisions of section 11 of chapter 40A shall apply to all such hearings. The board of appeals shall render a decision, based upon a majority vote of said board, within 40 days after the termination of the public hearing and, if favorable to the applicant, shall forthwith issue a comprehensive permit or approval. Any negotiated agreements between the board of appeals and a developer shall be documented in the comprehensive permit, which shall be binding and enforceable by the board of appeals and shall supersede any regulatory or monitoring agreements with a subsidizing agency. Upon issuance or approval of a comprehensive permit by the board of appeals, the board of appeals may require a developer to post a bond or escrow funds in an amount no more than five per cent of total projected allowable development costs. If said hearing is not convened or a decision is not rendered within the time allowed, unless the time has been extended by mutual agreement

between the board and the applicant, the application shall be deemed to have been allowed and the comprehensive permit or approval shall forthwith issue. Any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section 17of chapter 40A.

At the time of application to the board of appeals, the developer shall provide a reasonable fee to the board of appeals to cover the cost of an independent appraisal of the land by a qualified appraiser chosen by the board of appeals from a list maintained by the department. The appraisal shall be conducted using the Uniform Standards of Professional Appraisal Practice. The appraisal shall determine the allowable acquisition cost of the land, which shall be used for the purpose of calculating total development costs and profit. The transfer of a comprehensive permit from one party to another shall not affect the allowable acquisition cost of the land. Also at the time of application, the developer shall disclose to the board of appeals the existence of any known related party transactions that will occur in the course of development. After the application has been made, the developer shall notify the board of appeals in writing within 14 days of a change in related-party transactions.

Upon approval of a development, either by the board of appeals or by a decision of the housing appeals committee, the city or town where the development is located shall chose a qualified monitoring agent for the purpose of cost monitoring of the development from a list maintained by the department.

Section 22. Whenever an application filed under the provisions of section 21 is denied, or is granted with such conditions and requirements as to make the building or operation of such housing uneconomic, the applicant shall have the right to appeal to the housing appeals

committee in the department for a review of the same. During the appeal the burden of proof shall at all times be on the applicant to demonstrate the imposition of uneconomic conditions and requirements. Such appeal shall be taken within 20 days after the date of the notice of the decision by the board of appeals by filing with said committee a statement of the prior proceedings and the reasons upon which the appeal is based. The committee shall forthwith notify the board of appeals of the filing of such petition for review and the latter shall, within 10 days of the receipt of such notice, transmit a copy of its decision and the reasons therefor to the committee. Such appeal shall be heard by the committee within 20 days after receipt of the applicant's statement. A stenographic record of the proceedings shall be kept and the committee shall render a written decision, based upon a majority vote, stating its findings of fact, its conclusions and the reasons therefor within 30 days after the termination of the hearing, unless such time shall have been extended by mutual agreement between the committee and the applicant. Such decision may be reviewed in the superior court in accordance with the provisions of chapter 30A.

Section 23. The hearing by the housing appeals committee in the department shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was reasonable and consistent with local needs and, in the case of an approval of an application with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs. In making its decision the committee shall review the financial details of the development including, but not limited to, the allowable acquisition cost of the land, development related income, and the allowable development expenses, to determine if the decision of the board or the conditions and requirements imposed by the board make the

construction or operation of such housing uneconomic and whether they are consistent with local needs. If the committee finds, in the case of a denial, that the decision of the board of appeals was unreasonable and not consistent with local needs, it shall vacate such decision and shall direct the board to issue a comprehensive permit or approval to the applicant. If the committee finds, in the case of an approval with conditions and requirements imposed, that the decision of the board makes the building or operation of such housing uneconomic and is not consistent with local needs, it shall order such board to modify or remove any such condition or requirement so as to make the proposal no longer uneconomic and to issue any necessary permit or approval; provided, however, that the committee shall not issue any order that would permit the building or operation of such housing in accordance with standards less safe than the applicable building and site plan requirements of the federal Housing Administration or the Massachusetts Housing Finance Agency, whichever agency is financially assisting such housing. Decisions or conditions and requirements imposed by a board of appeals that are consistent with local needs shall not be vacated, modified or removed by the committee notwithstanding that such decisions or conditions and requirements have the effect of making the applicant's proposal uneconomic.

The housing appeals committee or the petitioner shall have the power to enforce the orders of the committee at law or in equity in the superior court. The board of appeals shall carry out the order of the housing appeals committee within 30 days of its entry and, upon failure to do so, the order of said committee shall, for all purposes, be deemed to be the action of said board, unless the petitioner consents to a different decision or order by such board.

Section 23A. (a) Within 180 days of substantial completion of a development, or within 120 days of the sale of the last housing unit in the development, whichever occurs first, the developer shall prepare and sign, under the pains and penalties of perjury, a certified cost and

income statement, and submit the statement to the department. Such statement shall be audited by a qualified, independent certified public accounting firm chosen by the city or town where the development is located from a list maintained by the department. If at the time of the certified cost and income statement less than 100 percent of the total number of housing units in the development have been sold, the certified cost and income statement shall include the development's costs and income as of the date of the statement, and supplement said statement quarterly until the development has been fully sold.

(b) The certified cost and income statement shall itemize every project expense in excess of $100, and itemize all development-related income, including all sales of housing units. The certified cost and income statement shall state the total income, expenses and profit of the development. The department shall promulgate regulations governing the preparation and completion of a certified cost and income statement which shall, at a minimum, include the following:

(i) identification of all related party transactions, and for each such transaction, document how the costs incurred, or income derived, from the transaction does or does not exceed reasonable industry standards for the cost incurred or income derived from the transaction. All direct and indirect costs due to related party transactions must be included, as well as all related party overhead, profit and general conditions;

(ii) for homeownership developments, copies of the HUD settlement statements for the sale of all housing units in the development;

(iii) when income from the sale of a housing unit is significantly less than fair market price for the housing unit, the fair market value of the unit, shall be used in determining the income derived from the unit regardless of the actual income realized in the transaction; and

(iv) the allowable acquisition cost of acquiring the land for the development as determined by the independent appraisal required under section 21. Any amount paid in excess of the allowable acquisition cost shall be allowable only to the extent that the current owner can document that the party which sold the land performed services that would otherwise be includable in an allowable line item.

(c) Profits that exceed the applicable reasonable return as determined by a certified cost and income statement shall be deposited with the municipality in which the development is located and may be used for affordable housing, or for infrastructure, public safety and education needs created by the development.

(d) The developer, the chief elected official or board of a municipality may request the department in writing to perform an audit of a certified cost and income statement of a development. The department shall within 30 days of its receipt of the request notify the developer, the chief elected official or board of its decision whether to perform the audit. The developer, the chief elected official or board aggrieved by a decision not to perform an audit may request an adjudicatory hearing before the department. If no such request is timely made, the determination whether to perform an audit shall be deemed assented to. If a timely request is received, the department shall, within a reasonable time, act upon such request. All adjudicatory proceedings before the department shall be conducted in accordance with all provisions of chapter 30A governing the conduct of adjudicatory hearings.

(e) Any person aggrieved by a determination made following an audit may request an adjudicatory hearing before the department. If no such request is timely made, the determination whether to perform an audit shall be deemed assented to. If a timely request is received, the department shall, within a reasonable time, act upon such request. All adjudicatory proceedings before the department shall be conducted in accordance with all provisions of chapter 30A governing the conduct of adjudicatory hearings.

(f) Any person aggrieved by a final decision of the department in an adjudicatory proceeding held pursuant to this section may obtain judicial review thereof pursuant to the provisions of chapter 30A.

Section 23B. (a) It shall be a violation of this chapter for certified cost and income statements to misrepresent or misstate the profit of a development. The certified cost and income statement shall be filed under the pains and penalties of perjury. It shall also be a violation of this chapter if all related party transactions are not identified at substantial completion. In addition to any civil penalties and sanctions that may be imposed under this section, a developer of a development that the department determines earned profits that exceed the applicable reasonable return shall be personally liable for the amount by which the profit exceeds the reasonable return plus interest and penalties, payable to the subject municipality in accordance with paragraph (c) of section 23A.

(b) A penalty shall be assessed against a developer who does not submit a timely certified cost and income statement. Such penalty shall be one percent of the total projected development costs for certified cost and income statements which are late by more than one week; an additional four percent of total projected development costs for certified cost and income

statements which are late by more than 90 days; and an additional five percent of total projected development costs for certified cost and income statements which are late by more than 180 days. These penalties shall be paid to the municipality in accordance with paragraph (c) of section 23A. Developers with outstanding certified cost and income statements shall not be allowed to apply for a comprehensive permit in the commonwealth until such time as the outstanding certified cost and income statements are submitted.

(c) In the event that the department determines that a developer has violated a provision of this chapter or the regulations of the department, the department shall:

bring specific charges with respect to the developer;

(ii) notify such developer, and provide to the developer an opportunity to defend against such charges through an adjudicatory proceeding in accordance with sections 10 and 11 of chapter 30A; and

(iii) keep a record of the proceedings.

(d) A determination by the department to impose a civil monetary penalty under this section shall be supported by a statement setting forth:

(i) the amount of profits in excess of the reasonable return or violation of any provision of this chapter or the regulations of the department; and

(ii) the sanction imposed, including a justification for that sanction.

(e) If the department finds, based on all of the facts and circumstances, that a developer has violated a provision of this chapter or the regulations of the department, the department may assess a civil penalty in an amount not to exceed five percent of the total development costs of

the development as determined by the department following an audit, and in any case of intentional or knowing conduct, including reckless conduct, not to exceed eight percent of said total development costs. The department's decision may be appealed pursuant to chapter 30A. The provisions of this paragraph may be enforced by suit in the superior court. In the event that a developer does not appeal the department's decision to assess a civil penalty, and the department brings an action in superior court to enforce a penalty imposed under this chapter, and the department prevails in such action, the superior court shall award the department its reasonable costs and attorneys fees.

(f) In the case of intentional or knowing conduct, including reckless conduct, a developer who has been assessed a civil penalty for a development in which the profit exceeded 30 per cent of the total allowable development costs of the development shall be permanently barred from applying for or obtaining a comprehensive permit under this chapter. A decision to deny a comprehensive permit to an applicant in which such a developer has any equity interest shall be deemed consistent with local needs for purposes of this chapter. For the purposes of this paragraph, "developer" shall include a natural person holding at a least five percent financial interest in any organization that holds an equity interest in limited dividend organization found in violation of this paragraph.

(g) If the department imposes a civil penalty, in accordance with this section, it shall report the sanction to:

(i) any appropriate state regulatory authority;

(ii) any appropriate prosecutorial authority;

(iii) the chief elected official or board of any municipality affected by the violation committed by the developer; and

(iiv) the public

The information reported under this paragraph shall include:

(i) the name of the sanctioned person;

(ii) a description of the sanction and the basis for its imposition; and

(iii) such other information as the department deems appropriate.

(h) All civil penalties assessed under this section shall be deposited with the subject municipality in accordance with paragraph (c) of section 23A, after deducting the department's reasonable costs and attorneys fees incurred in the enforcement of this chapter.

(i) Any person who knowingly makes any materially false or inaccurate statement in any application, certified cost and income statement, or statement which said person submits to the department or board of appeals, or in testimony in any adjudicatory proceeding before the department, or who knowingly tampers with, alters, destroys, or disturbs any financial records of a development so as to avoid liability for excess profits or penalties under this chapter shall be punished by imprisonment in the state prison for not more than five years, or imprisonment in the house of correction for not more than two and one-half years, or by a fine of not more than $10,000, or by both such fine and imprisonment.

(j) The superior court department of the trial court shall have jurisdiction to enjoin violations of, or to grant such additional relief as it deems necessary or appropriate to secure compliance with, the provisions of sections one through eleven, inclusive, or of any regulation,

license, or order issued or adopted thereunder, upon the petition of the department or the attorney general.