

SENATE No. 705

The Commonwealth of Massachusetts

PRESENTED BY:

Robert L. Hedlund

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act requiring 40B cost certification.

PETITION OF:

NAME:

DISTRICT/ADDRESS:

Robert L. Hedlund

Plymouth and Norfolk

David F. DeCoste

5th Plymouth

SENATE No. 705

By Mr. Hedlund, a petition (accompanied by bill, Senate, No. 705) of Robert L. Hedlund and David F. DeCoste for legislation to require 40B cost certification. Housing.

The Commonwealth of Massachusetts

**In the One Hundred and Eighty-Ninth General Court
(2015-2016)**

An Act requiring 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:

1 SECTION 1. Chapter 40B of the General Laws, as appearing in the 2014 Official
2 Edition, is hereby amended by striking out sections 20 through 23 in their entirety and inserting
3 in place thereof the following:

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

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

12 “Allowable Development Related Expenses”, documented reasonable, necessary and
13 actual development related costs associated with designing, planning, constructing, marketing
14 and selling/renting a housing development. These costs include, but are not limited to, the
15 allowable acquisition cost; site preparation costs; related permitting costs; project financing
16 costs; contractor and subcontractor construction costs, project monitoring costs and brokers
17 commissions.

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

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

35 result in the commencement of construction of such housing on sites comprising more than three
36 tenths of one per cent of such land area or 10 acres, whichever is larger, in any one calendar
37 year; provided, however, that land area owned by the United States, the commonwealth or any
38 political subdivision thereof, or any public authority shall be excluded from the total land area
39 referred to above when making such determination of consistency with local needs; (3) a
40 developer with an equity interest in the development has been barred from applying for or
41 obtaining a comprehensive permit under paragraph (f) of section 23B; or (4) the proposed
42 density of the project is more than four times the density of the underlying zoning, or more than
43 eight units per acre, whichever is greater.

44 “Department”, the department of housing and community development, or any successor
45 agency.

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

48 “Development”, a low or moderate income housing development permitted under
49 sections 20 through 23B.

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

56 “Homeownership Development”, a development that consists of single- or multi-family
57 housing units for sale.

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

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

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

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

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

74 “Reasonable Return”, the allowable profit earned through the construction and/or
75 operation of a development as may be determined by the applicable federal or state statute or by
76 the applicable subsidizing agency. For a homeownership development the projected profit shall

77 be no less than 10 percent and no more than 20 percent of allowable development costs. For a
78 rental development the annual dividend, commencing on the development's initial occupancy
79 and each year thereafter, and shall be no more than 10 percent of the owner's investment in the
80 development, shall consist of the difference between the audited actual capitalized value of the
81 development and the sum of any debt secured by the development.

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

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

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

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

93 "Uneconomic", any condition brought about by any single factor or combination of
94 factors to the extent that it makes it impossible for a public agency or nonprofit organization to
95 proceed in building or operating low or moderate income housing without financial loss, or for a
96 limited dividend organization to proceed and still realize a reasonable return in building or
97 operating such housing within the limitations set by the subsidizing agency of government on the
98 size or character of the development or on the amount or nature of the subsidy or on the tenants,

99 rentals and income permissible, and without substantially changing the rent levels and units sizes
100 proposed by the public agency, nonprofit or limited dividend organizations.

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

104 (a) Promulgating regulations relative to the operation and enforcement of sections 20
105 through 23B;

106 (b) Reviewing certified cost and income statements filed under section 23A;

107 (c) Qualifying monitoring agents and maintaining a list of qualified monitoring
108 agents;

109 (d) Verifying that monitoring agents are fulfilling oversight obligations;

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

112 (f) Qualifying certified public accounting firms to audit certified cost and income
113 statements and maintaining a list of qualified certified public accounting firms; and

114 (g) Imposing and enforcing sanctions for violations of sections 20 through 23B.

115 Section 21. Any public agency or nonprofit or limited dividend organization proposing to
116 build low or moderate income housing may submit to the board of appeals, established under
117 section 12 of chapter 40A, a single application to build such housing in lieu of separate
118 applications to the applicable local boards. All applications to any state or municipal body,

119 including any financial information, made under sections 20 through 23B shall be made under
120 the pains and penalties of perjury. The board of appeals shall forthwith notify each such local
121 board, as applicable, of the filing of such application by sending a copy thereof to such local
122 boards for their recommendations and shall, within 30 days of the receipt of such application,
123 hold a public hearing on the same. The board of appeals shall request the appearance at said
124 hearing of such representatives of said local boards as are deemed necessary or helpful in making
125 its decision upon such application and shall have the same power to issue permits or approvals as
126 any local board or official who would otherwise act with respect to such application, including
127 but not limited to the power to attach to said permit or approval conditions and requirements with
128 respect to height, site plan, size or shape, or building materials as are consistent with the terms of
129 this section. The board of appeals, in making its decision on said application, shall take into
130 consideration the recommendations of the local boards and shall have the authority to use the
131 testimony of consultants. The board of appeals shall also have access to all financial details of
132 the development, including, but not limited to, any documents from the subsidizing agency
133 regarding the development. The board of appeals shall adopt rules, not inconsistent with the
134 purposes of this chapter, for the conduct of its business pursuant to this chapter and shall file a
135 copy of said rules with the city or town clerk. The provisions of section 11 of chapter 40A shall
136 apply to all such hearings. The board of appeals shall render a decision, based upon a majority
137 vote of said board, within 40 days after the termination of the public hearing and, if favorable to
138 the applicant, shall forthwith issue a comprehensive permit or approval. Any negotiated
139 agreements between the board of appeals and a developer shall be documented in the
140 comprehensive permit, which shall be binding and enforceable by the board of appeals and shall
141 supersede any regulatory or monitoring agreements with a subsidizing agency. Upon issuance or

142 approval of a comprehensive permit by the board of appeals, the board of appeals may require a
143 developer to post a bond or escrow funds in an amount no more than five per cent of total
144 projected allowable development costs. If said hearing is not convened or a decision is not
145 rendered within the time allowed, unless the time has been extended by mutual agreement
146 between the board and the applicant, the application shall be deemed to have been allowed and
147 the comprehensive permit or approval shall forthwith issue. Any person aggrieved by the
148 issuance of a comprehensive permit or approval may appeal to the court as provided in section
149 17of chapter 40A.

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

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

165 Section 22. Whenever an application filed under the provisions of section 21 is denied, or
166 is granted with such conditions and requirements as to make the building or operation of such
167 housing uneconomic, the applicant shall have the right to appeal to the housing appeals
168 committee in the department for a review of the same. During the appeal the burden of proof
169 shall at all times be on the applicant to demonstrate the imposition of uneconomic conditions and
170 requirements. Such appeal shall be taken within 20 days after the date of the notice of the
171 decision by the board of appeals by filing with said committee a statement of the prior
172 proceedings and the reasons upon which the appeal is based. The committee shall forthwith
173 notify the board of appeals of the filing of such petition for review and the latter shall, within 10
174 days of the receipt of such notice, transmit a copy of its decision and the reasons therefor to the
175 committee. Such appeal shall be heard by the committee within 20 days after receipt of the
176 applicant's statement. A stenographic record of the proceedings shall be kept and the committee
177 shall render a written decision, based upon a majority vote, stating its findings of fact, its
178 conclusions and the reasons therefor within 30 days after the termination of the hearing, unless
179 such time shall have been extended by mutual agreement between the committee and the
180 applicant. Such decision may be reviewed in the superior court in accordance with the provisions
181 of chapter 30A.

182 Section 23. The hearing by the housing appeals committee in the department shall be
183 limited to the issue of whether, in the case of the denial of an application, the decision of the
184 board of appeals was reasonable and consistent with local needs and, in the case of an approval
185 of an application with conditions and requirements imposed, whether such conditions and
186 requirements make the construction or operation of such housing uneconomic and whether they
187 are consistent with local needs. In making its decision the committee shall review the financial

188 details of the development including, but not limited to, the allowable acquisition cost of the
189 land, development related income, and the allowable development expenses, to determine if the
190 decision of the board or the conditions and requirements imposed by the board make the
191 construction or operation of such housing uneconomic and whether they are consistent with local
192 needs. If the committee finds, in the case of a denial, that the decision of the board of appeals
193 was unreasonable and not consistent with local needs, it shall vacate such decision and shall
194 direct the board to issue a comprehensive permit or approval to the applicant. If the committee
195 finds, in the case of an approval with conditions and requirements imposed, that the decision of
196 the board makes the building or operation of such housing uneconomic and is not consistent with
197 local needs, it shall order such board to modify or remove any such condition or requirement so
198 as to make the proposal no longer uneconomic and to issue any necessary permit or approval;
199 provided, however, that the committee shall not issue any order that would permit the building or
200 operation of such housing in accordance with standards less safe than the applicable building and
201 site plan requirements of the federal Housing Administration or the Massachusetts Housing
202 Finance Agency, whichever agency is financially assisting such housing. Decisions or conditions
203 and requirements imposed by a board of appeals that are consistent with local needs shall not be
204 vacated, modified or removed by the committee notwithstanding that such decisions or
205 conditions and requirements have the effect of making the applicant's proposal uneconomic.

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

211 Section 23A. (a) Within 180 days of substantial completion of a development, or within
212 120 days of the sale of the last housing unit in the development, whichever occurs first, the
213 developer shall prepare and sign, under the pains and penalties of perjury, a certified cost and
214 income statement, and submit the statement to the department. Such statement shall be audited
215 by a qualified, independent certified public accounting firm chosen by the city or town where the
216 development is located from a list maintained by the department. If at the time of the certified
217 cost and income statement less than 100 percent of the total number of housing units in the
218 development have been sold, the certified cost and income statement shall include the
219 development's costs and income as of the date of the statement, and supplement said statement
220 quarterly until the development has been fully sold.

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

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

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

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

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

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

246 (d) The developer, the chief elected official or board of a municipality may request the
247 department in writing to perform an audit of a certified cost and income statement of a
248 development. The department shall within 30 days of its receipt of the request notify the
249 developer, the chief elected official or board of its decision whether to perform the audit. The
250 developer, the chief elected official or board aggrieved by a decision not to perform an audit may
251 request an adjudicatory hearing before the department. If no such request is timely made, the
252 determination whether to perform an audit shall be deemed assented to. If a timely request is
253 received, the department shall, within a reasonable time, act upon such request. All adjudicatory

254 proceedings before the department shall be conducted in accordance with all provisions of
255 chapter 30A governing the conduct of adjudicatory hearings.

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

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

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

274 (b) A penalty shall be assessed against a developer who does not submit a timely certified
275 cost and income statement. Such penalty shall be one percent of the total projected development

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

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

286 (i) bring specific charges with respect to the developer;

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

290 (iii) keep a record of the proceedings.

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

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

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

296 (e) If the department finds, based on all of the facts and circumstances, that a developer
297 has violated a provision of this chapter or the regulations of the department, the department may
298 assess a civil penalty in an amount not to exceed five percent of the total development costs of
299 the development as determined by the department following an audit, and in any case of
300 intentional or knowing conduct, including reckless conduct, not to exceed eight percent of said
301 total development costs. The department's decision may be appealed pursuant to chapter 30A.
302 The provisions of this paragraph may be enforced by suit in the superior court. In the event that a
303 developer does not appeal the department's decision to assess a civil penalty, and the department
304 brings an action in superior court to enforce a penalty imposed under this chapter, and the
305 department prevails in such action, the superior court shall award the department its reasonable
306 costs and attorneys fees.

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

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

- 318 (i) any appropriate state regulatory authority;
- 319 (ii) any appropriate prosecutorial authority;
- 320 (iii) the chief elected official or board of any municipality affected by the violation
- 321 committed by the developer; and
- 322 (iv) the public

323 The information reported under this paragraph shall include:

- 324 (i) the name of the sanctioned person;
- 325 (ii) a description of the sanction and the basis for its imposition; and
- 326 (iii) such other information as the department deems appropriate.

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

330 (i) Any person who knowingly makes any materially false or inaccurate statement in any
331 application, certified cost and income statement, or statement which said person submits to the
332 department or board of appeals, or in testimony in any adjudicatory proceeding before the
333 department, or who knowingly tampers with, alters, destroys, or disturbs any financial records of
334 a development so as to avoid liability for excess profits or penalties under this chapter shall be
335 punished by imprisonment in the state prison for not more than five years, or imprisonment in
336 the house of correction for not more than two and one-half years, or by a fine of not more than
337 \$10,000, or by both such fine and imprisonment.

338 (j) The superior court department of the trial court shall have jurisdiction to enjoin
339 violations of, or to grant such additional relief as it deems necessary or appropriate to secure
340 compliance with, the provisions of sections one through eleven, inclusive, or of any regulation,
341 license, or order issued or adopted thereunder, upon the petition of the department or the attorney
342 general.