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February 18, 2005

Deputy Director of Policy Development
Department of Housing and Community Development
100 Cambridge Street, Suite 300
Boston, MA 02114

Reference: Chapter 40R Regulations

Dear Deputy Director:

On behalf of the Massachusetts Association of Consulting Planners (MACP), I am submitting the following comments on 760 CMR 59.00, the Department's proposed regulations for G.L. c.40R.

MACP is an organization of planners who work as consultants for a wide variety of public and private clients. Many of our members primarily or exclusively serve municipal clients: planning boards, zoning boards of appeal, boards of selectmen, master plan committees, town planners, and other officials involved with planning and zoning. We are particularly conscious of the strengths and weaknesses in local government capacity to plan, to build support for major and seemingly minor zoning changes, and to implement new zoning bylaws. In light of our experience, we have a perspective on implementation that may be helpful to the Department in considering the proposed regulations and opportunities to improve upon Chapter 40R itself. Most of our comments pertain to aspects of the regulations that may be difficult for local officials to interpret due to lack of clarity or the omission of criteria that DHCD will use to evaluate applications for approval of a Chapter 40R overlay district and annual reports filed by cities and towns.

1. Plan Review; 59.04(6). The proposed regulations provide that communities may adopt plan review procedures for projects developed in a Chapter 40R overlay district. The plan review component is very important because it helps to address some troubling omissions in the statute. We recommend that the regulations identify the criteria DHCD will use to determine whether a design standard, a performance standard or mitigation requirement is unduly restrictive.
2. Density; 59.04(4). The proposed regulations identify a series of minimum density requirements for residential uses. In particular, single-family residential use is subject to a minimum of eight units per acre. Under Definitions at 59.02, the regulations further provide that "attached townhouses on separate lots [may be

treated] as single-family residential use.” We recommend that the regulations clarify whether attached townhouses that are not on separate lots may be treated as single-family or multi-family residential use.

3. Affordability; 59.04(5). Under the proposed regulations, communities must identify the affordable housing requirements that will apply in a Chapter 40R overlay district, e.g., the mechanisms used to protect long-term affordability, affordability thresholds that may exceed 20% per project, or affordability targeted for very-low-income households. In its application for approval of a proposed Chapter 40R district, a community must “...prove to the Department...that its use of such mechanisms, or any decrease it proposes in the levels of income of households for which the Affordable units must be accessible, will not unduly restrict opportunities for development within the proposed District...” We recommend that you consider modifying the proposed regulations as follows:
 - Where long-term affordability mechanisms conform to the model regulatory agreement and deed rider of the Local Initiative Program (LIP), the mechanisms will be presumed to not unduly restrict development; and
 - In rental developments approved under the regulations of a Chapter 40R overlay district, i.e., with a minimum of 20% affordable units, all units shall be counted as Subsidized Housing Units and, where necessary, the Director of DHCD shall issue a waiver to authorize the same in accordance with 760 CMR 45.09. We are not aware of any language in regulations of the Housing Appeals Committee or the Local Initiative Program that would preclude DHCD from counting all units in a non-comprehensive permit rental development as Subsidized Housing Units, even if the percentage of units affordable to low- and moderate-income households is 20% instead of 25%. Such a provision might encourage communities to invite rental development in a Chapter 40R overlay district, achieve the objectives of Chapter 40R, and address the state’s rental housing shortage, which affects all market levels.

We also recommend that the regulations define what is meant by “prove to the Department,” and that the regulations identify the criteria DHCD will use to determine whether a community’s proposed affordability requirements would be unduly restrictive.

4. Historic District; 59.02, 59.04. Chapter 40R provides in part that a community, “with the approval of the department, may establish a historic district in an approved smart growth zoning district in accordance with chapter 40C, so long as the establishment of the historic district meets requirements for such a historic district and does not render the city or town noncompliant with this chapter, as determined by the department.” While this section grants DHCD authority to approve a local historic district that intersects a Chapter 40R overlay district, it does not prohibit DHCD from carrying out its obligations through an inter-agency agreement with MHC. Since MHC has existing authority to review and approve local historic districts under G.L.

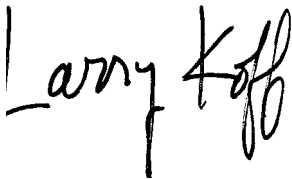
c.40C and it is staffed to make these determinations, we recommend that the proposed regulations establish a presumption of compliance unless DHCD's annual review reveals that a local historic district has adversely affected the implementation of the Chapter 40R overlay district.

Although the present comment period pertains solely to the proposed regulations, we would like to suggest some future changes to G.L. c.40R and related state policies:

- Consider providing a mechanism under Commonwealth Capital a "Junior 40R program", to reward communities for adopting as-of-right residential and mixed-use development incentives that do not meet the density thresholds of Chapter 40R. While these zoning bylaws would not qualify communities to receive any Chapter 40R payments, they should be recognized for Commonwealth Capital purposes if the density and dimensional regulations are reasonable in relation to a community's size and established development pattern.
- Consider limiting bonus unit payments to housing units without age restrictions, or reduce the amount of bonus unit payments for eligible units that are age-restricted. While Chapter 40R states that communities may not impose age restrictions on residential development, there is nothing to prevent communities from coaxing developers to limit projects to over-55 households or to limit dwellings units to a two-bedroom maximum. In fact, there is nothing to prevent an entire Chapter 40R overlay district from being developed as age-restricted housing. The state does not have unlimited financial resources. Wherever possible, its resources should be devoted to meeting the most significant needs. According to the HUD Consolidated Plan that is currently in effect, housing for families – especially rental housing – is a high priority need across the Commonwealth, and waiting lists for family housing are longer than waiting lists for elderly housing in virtually every region of the state.

We appreciate the opportunity to comment on the proposed Chapter 40R regulations and would be pleased to provide additional information upon request.

Sincerely,

A handwritten signature in black ink that reads "Larry Koff". The signature is written in a cursive, slightly slanted style.

Larry Koff AICP, President
Massachusetts Association of Consulting Planners

cc. Peter Lowitt AICP, President
Massachusetts Chapter, APA