

SENATE No. 741

The Commonwealth of Massachusetts

PRESENTED BY:

Patrick M. O'Connor

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:	
<i>Patrick M. O'Connor</i>	<i>Plymouth and Norfolk</i>	
<i>David F. DeCoste</i>	<i>5th Plymouth</i>	<i>1/25/2017</i>
<i>Donald F. Humason, Jr.</i>	<i>Second Hampden and Hampshire</i>	<i>1/30/2017</i>
<i>Ryan C. Fattman</i>	<i>Worcester and Norfolk</i>	<i>1/31/2017</i>

SENATE No. 741

By Mr. O'Connor, a petition (accompanied by bill, Senate, No. 741) of Patrick M. O'Connor, David F. DeCoste, Donald F. Humason, Jr. and Ryan C. Fattman for legislation to require 40B cost certification. Housing.

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

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 enforcement
102 of sections 20 through 23B of this chapter. Its powers and duties shall include, but not be limited
103 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 agents;

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

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

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

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

114 Section 21. Any public agency or nonprofit or limited dividend organization proposing to
115 build low or moderate income housing may submit to the board of appeals, established under
116 section 12 of chapter 40A, a single application to build such housing in lieu of separate
117 applications to the applicable local boards. All applications to any state or municipal body,
118 including any financial information, made under sections 20 through 23B shall be made under

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

289 (iii) keep a record of the proceedings.

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

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

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

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

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

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

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

322 The information reported under this paragraph shall include:

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

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

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

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