TOWN OF FALMOUTH

ZONING BOARD OF APPEALS

COMPREHENSIVE PERMIT PROCEDURAL RULES

1.00: Purpose and Context

1.01: These Rules establish procedures for applications to the Zoning Board of Appeals (the “Board”) for Comprehensive Permits granted pursuant to M.G.L. c. 40B, §§ 20-23 (the “Act”) and the regulations promulgated thereunder. They are required by M.G.L. c. 40B, § 21 and by 760 CMR 56.00, et seq. The purpose of the Act, the regulations and these Rules is to facilitate the development of affordable housing in Massachusetts.

1.02: These Rules alone are not sufficient to describe the Comprehensive Permit procedures before the Zoning Board of Appeals. They must be read in conjunction with and implemented in a manner consistent with M.G.L. c. 40B, §§20-23 and 760 CMR 56.00, et seq. In addition, the Board's Procedural Rules for conduct of hearings under M.G.L. c. 40A apply to Comprehensive Permit applications. In case of inconsistency or conflict between those general Rules for conduct and these Rules, these Rules shall govern.

1.03: These Rules take effect on passage and supersede any other c. 40B Rules that may have been adopted by the Board.

2.00: Definitions

(a) **Board** means the Zoning Board of Appeals established under M.G.L. c. 40A, § 12 and Chapter 240 of the Code of Falmouth.

(b) **Department** means the Massachusetts Department of Housing and Community Development and its successors, as established and currently existing pursuant to M.G.L. chs. 23B and c. 6A.

(c) **Limited Dividend Organization** means any entity which proposes to sponsor a Project under the M.G.L. c.40B, §§20 through 23; and is not a public agency or a nonprofit; and is eligible to receive a Subsidy from a Subsidizing Agency after a Comprehensive Permit has been issued and which, unless otherwise governed by a federal act or
regulation, agrees to comply with the requirements of the Subsidizing Agency relative to a reasonable return for building and operating the Project.

(d) **Local Board** means any local board or official, including, but not limited to the board of selectmen; board of health; planning board; conservation commission; historical commission; historical district commission, design review committee, traffic advisory committee, town engineer, town planner, utilities manager, wastewater superintendent, or other commission or; fire, police, traffic, or other department; building commissioner or similar official or board; fire prevention officer. All boards, regardless of their geographical jurisdiction or their source of authority (that is, including boards created by special acts of the legislature or by Town Meeting or the board of selectmen) shall be deemed local boards if they perform functions usually performed by locally created boards.

(e) **Local Concern** means the need to protect the health or safety of the occupants of a proposed Project or of the residents of the municipality, to protect the natural environment, to promote better site and building design in relation to the surroundings and municipal and regional planning, or to preserve Open Spaces. See 760 CMR 56.07(3)(c through g).

(f) **Uneconomic** means any condition imposed by a Board in its approval of a Comprehensive Permit, brought about by a single factor or a combination of factors, to the extent that it makes it:

(i) impossible for a public agency or a nonprofit organization to proceed in building or operating a Project without financial loss; or

(ii) impossible for a Limited Dividend Organization to proceed and still realize a reasonable return in building or operating such Project within the limitations set by the Subsidizing Agency on the size or character of the Project, 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 unit sizes proposed by the Applicant. See 760 CMR 56.05(8)(d).
(g) **Waiver** means an exception from a use, dimensional, or other restriction of Local Requirements and Regulations, granted to a Project through a Comprehensive Permit. See 760 CMR 56.05(7).

### 3.00: Filing, Time Limits and Notice

#### 3.01: The Application for a Comprehensive Permit shall consist of a completed Comprehensive Permit Application Form utilized by the Board which includes the following:

(a) preliminary site development plans showing the locations and outlines of proposed buildings; the proposed locations, general dimensions and materials for streets, drives, parking areas, walks and paved areas; and proposed landscaping improvements and open areas within the site. An Applicant proposing to construct or rehabilitate four or fewer units may submit a sketch of the matters in 760 CMR 56.05(2)(a) and (c) which need not have an architect's signature. All Projects of five or more units must have site development plans prepared by a registered architect or engineer;

(b) a report on existing site conditions and a summary of conditions in the surrounding areas, showing the location and nature of existing buildings, existing street elevations, traffic patterns and character of open areas, if any, in the neighborhood. This submission may be combined with that required in section 3.01(a) above;

(c) preliminary, scaled, architectural drawings. For each building the drawings shall be prepared by a registered architect, and shall include typical floor plans, typical elevations, and sections, and shall identify construction type and exterior finishes;

(d) a tabulation of proposed buildings by type, size (number of bedrooms, floor area) and ground coverage, and a summary showing the percentage of the tract to be occupied by buildings, by parking and other paved vehicular areas, and by open areas;

(e) where a subdivision of land is involved, a preliminary subdivision plan;

(f) a preliminary utilities plan showing the proposed location and types of sewage, drainage, and water facilities, including hydrants;
(g) the Project Eligibility letter, showing that the Applicant fulfills the requirements of 760 CMR 56.04(1); and

(h) a list of requested Waivers

3.02: The completed Application shall be accompanied by an application fee based upon the number of proposed housing units:

(a) For-_profit Application Fee: $200.00 + $125.00 per unit

(b) Non-profit, Public Agencies or Governmental Entities Application Fee: $100.00 + $25.00 per unit

(c) These fees are applicable for both original applications as well as for applications for permit modifications that are deemed to be substantial by the Board.

3.03: Within seven days of receiving a complete Application, the Board shall notify each applicable Local Board of the Application by sending such Local Board a notice of the Application and a copy of the list of Waivers required by 760 CMR 56.05(2)(h). Based upon that list, it shall also, within the same seven days, invite the participation of each applicable Local Board as is deemed necessary or helpful in making its decision upon such Application by providing such Local Board with a copy of the entire Application (such copies to be provided by the Applicant upon request).

3.04 Incomplete applications shall receive a procedural denial. Within seven days of filing an Application for a Comprehensive Permit, the Zoning Administrator shall review each Application for purpose of insuring completeness in accordance with Sections 3.01 and 3.02. The review shall not be substantive or evaluative in nature but only to determine if the required information has been included in the application. If the Zoning Administrator determines the Application is incomplete, the Zoning Administrator shall notify the Applicant in writing that the Application is incomplete and list any deficiency identified in the course of review. Such notice shall state that the Comprehensive Permit is denied. Any such procedural denial is without prejudice to the Applicant and the Applicant may reapply at any time. All such procedural denials will also be filed with the Town Clerk. Under no circumstances may the Zoning Administrator grant additional time for an Applicant to modify or update a pending Application.
3.05 Prior to the taking of any evidence at the first public hearing for any Comprehensive Permit, the Board shall make a finding that the Application is complete. If the Board is unable to make such a finding, the Board shall issue a procedural denial. The Board may grant additional time for an applicant to modify or update a pending Application.

3.06 A new filing fee shall be waived for any Applicant receiving a procedural denial if a new Application is filed within sixty days of the issuance of the procedural denial and there has been no more than one procedural denial issued against the property.

4.00: Review Fees

4.01: If, after receiving an Application, the Board determines that in order to review the Application it requires technical advice in such areas as civil engineering, transportation, environmental resources, design review of buildings and site, and (in accordance with 760 CMR 56.05(6) and section 4.03 below) review of financial statements that is unavailable from municipal employees, it may employ outside consultants. Whenever possible it shall work cooperatively with the Applicant to identify appropriate consultants and scopes of work and to negotiate payment of part or all of consultant fees by the Applicant. Alternatively, the Board may, by majority vote, require that the Applicant pay a reasonable review fee in accordance with 760 CMR 56.05(b) for the employment of outside consultants chosen by the Board alone. The Board should not impose unreasonable or unnecessary time or cost burdens on an Applicant. Legal fees for general representation of the Board or other Local Boards shall not be imposed on the Applicant. The Board may require that an Applicant deposit a lump sum in order to retain consultants. In the event that such sum is insufficient to fund the necessary consulting services, the Board may require additional deposits.

4.02: A review fee may be imposed only if:

(a) the work of the consultant consists of review of studies prepared on behalf of the Applicant, and not of independent studies on behalf of the Board;

(b) the work is in connection with the Applicant's specific Project, and
(c) all written results and reports are made part of the record before the Board. A review fee may only be imposed in compliance with applicable law and the Board's Rules. All fees assessed pursuant to 760 CMR 56.05(5)(b) shall be reasonable in light of:

(i) the complexity of the proposed Project as a whole;

(ii) the complexity of particular technical issues;

(iii) the number of housing units proposed;

(iv) the size and character of the site;

(v) the projected construction costs; and

(vi) fees charged for similar consultants and scopes of work in the area. As a general rule, the Board may not assess any fee greater than the amount which might be appropriated from town or city funds to review a project of similar type and scale in the town or city.

4.03: The Board may request an outside review the pro forma or other financial statements for a Project only after the following preconditions have been met:

(a) other consultant review has been completed;

(b) the Applicant has had an opportunity to modify its original proposal to address issues raised;

(c) the Board has had an opportunity to propose conditions to mitigate the Project's impacts and to consider requested Waivers; and

(d) the Applicant has indicated that it does not agree to the proposed condition(s) or Waiver denial(s) because they would render the Project uneconomic. A Board may not conduct review of a pro forma in order to see whether a Project would still be economic if the number of dwelling units were reduced, unless such reduction is justified by a valid health, safety, environmental, design, open space, planning, or other local concern that directly results from the
size of a Project on a particular site, consistent with 760 CMR 56.07(3).

4.04: The Board shall comply with any requirements of the Uniform Procurement Act, M.G.L. c. 30B by establishing a list of consultants if required. The list shall be available to the public for inspection during normal business hours of the Board. The list of consultants shall contain the particular consultant’s specialty (profession) and hourly billing rate.

4.05: Funds received by the Board pursuant to this section shall be deposited with the Treasurer of the Town of Falmouth who shall establish a special account for this purpose, consistent with the terms and provisions of M.G.L. c. 44, §53G. Expenditures from this special account may be made at the direction of the Board without further appropriation. Expenditures from this special account shall be made only for services rendered in connection with a specific Project or Projects for which a project review fee has been or will be collected from the Applicant. Accrued interest may also be spent for this purpose. Failure of an Applicant to pay a review fee within the stated time period shall be grounds for denial of the Comprehensive Permit Application.

4.06: At the completion of the Board’s review of a Project, any excess amount in the account, including interest, attributable to a specific Project shall be repaid to the applicant or the Applicant’s successor in interest. A final report of said account shall be made available to the Applicant or Applicant’s successor in interest. For the purpose of this rule, any person or entity claiming to be an Applicant’s successor in interest shall provide the Board with documentation establishing such succession in interest.

4.07: Any Applicant aggrieved by the imposition of, or the amount of, the consultant fee, or any act related thereto, may appeal according to the provisions of the Massachusetts General Laws.

5.00: Public Hearing and Decision

5.01: The Board shall open a hearing within 30 days of its receipt of a complete Application, and it shall thereafter pursue the hearing diligently. A hearing shall not extend beyond 180 days from the date of opening the hearing, presuming that the Applicant has made timely submissions of materials in response to reasonable requests of the Board that are consistent with its powers under 760 CMR 56.05, except with the written consent of the Applicant.
5.02: The Board shall render a decision, based on a majority vote of the Board, within forty days after termination of the public hearing, unless such time period is extended by written agreement of the Board and the Applicant. The hearing is deemed terminated when all public testimony has been received and all information requested by the Board that it is entitled to receive has been submitted. In making its decision, the Board shall take into consideration the recommendations of Local Boards, but shall not be required to adopt same. The Board shall file its decision within 14 days in the office of the Falmouth Town Clerk, and it shall forward a copy of any Comprehensive Permit to the Applicant or its designated representative and to the Department when it is filed.

5.03: The Board may dispose of the Application in the following manner:

(a) approve a Comprehensive Permit on the terms and conditions set forth in the Application;

(b) approve a Comprehensive Permit with conditions with respect to height, site plan, size, shape or building materials that address matters of Local Concern; or

(c) deny a Comprehensive Permit as not Consistent with Local Needs if the Board finds that there are no conditions that will adequately address Local Concern.

5.04: Conditions. The Board, in its decision, may make a Comprehensive Permit subject to any of the following conditions or requirements:

(a) the grant of the Subsidy by the Subsidizing Agency;

(b) issuance of final approval by the Subsidizing Agency pursuant to 760 CMR 56.04(7);

(c) the securing of the approval of any state or federal agency with respect to the Project which the Applicant must obtain before building, provided, however, that the Board shall not delay or deny an Application on the grounds that any state or federal approval has not been obtained;

(d) complete or partial waiver ordered by the Board of fees otherwise assessed or collected by Local Boards; or
(e) any other condition consistent with M.G.L. c.40B, §§ 20 through 23 and with 760 CMR 56.00.

5.05: Uneconomic Conditions. The Board shall not issue any order or impose any condition that would cause the building or operation of the Project to be Uneconomic, including a requirement imposed by the Board on the Applicant:

(a) to incur costs of public infrastructure or improvements off the Project site that:

(i) are not generally imposed by a Local Board on unsubsidized housing;

(ii) address a pre-existing condition affecting the municipality generally; or

(iii) are disproportionate to the impacts reasonably attributable to the Project; or

(b) to reduce the number of units for reasons other than evidence of Local Concerns within the purview of the Board (see 760 CMR 56.05(4)(e); see also 760 CMR 56.07(3)(c - h) regarding evidence that would be heard by the Committee on an appeal), such as design, engineering, or environmental deficiencies that directly result from the impact of a Project on a particular site.

If a proposed nonresidential element of a Project is not allowed by-right under applicable provisions of the Town of Falmouth Zoning By-law, a condition shall not be considered Uneconomic if it would modify or remove such nonresidential element.

5.04: It shall be the Applicant’s burden to demonstrate that the waiver of any particular local regulation, by-law or ordinance is necessary in order to maintain the Project’s economic viability. There shall be a presumption that the waiver of any local by-law, ordinance or regulation will adversely affect Local Concern.

5.05: If a subdivision of land is involved, the following shall apply:
(a) No construction is permitted until a Definitive Subdivision Plan has been submitted to and approved by the Board;

(b) The Definitive Subdivision Plan shall be prepared and submitted in accordance with The Town Of Falmouth’s regulations governing the Subdivision of Land. The Zoning Board and not the Planning Board is the permit granting agency.

5.06: No Comprehensive Permit shall take effect until a copy of the decision, bearing the certification of the Town Clerk, that twenty (20) days have elapsed after the filing of the decision and no appeals have been filed, is recorded in the Registry of Deeds and is indexed under the name of the owner of record of the land.

6.00: Changes in Application

6.01: In the event that, during the public hearing, the Applicant proposes any changes in its Application or project plans that, in the Board’s discretion, constitutes a material or substantial change to the Project, the Applicant shall provide a new site-eligibility letter from the designated subsidizing agency.

6.02: In the event of material or substantial changes, the Board may request, and the Applicant shall provide, any and all information specified in Section 3.00 hereof that is deemed by the Board to be necessary to evaluate such changes.

6.03: In the event of a material or substantial change, any and all plans and supporting information shall be provided to all of the applicable Local Boards.

6.04: If the Applicant submits a revised plan for the Board’s consideration and said plan is the plan that is the subject of the Board’s hearing and deliberation, then the Application shall be deemed to be revised, subject to the foregoing provisions.

7.00: Appeals

7.01: If the Board approves the Comprehensive Permit, any person aggrieved may appeal within the time period and to the court provided in M.G.L. c. 40A, § 17.
7.02: If the Board denies the Comprehensive Permit or approves the Permit with conditions or requirements considered by the Applicant to be unacceptable, the Applicant may appeal to the Housing Appeals Committee as provided in M.G.L. c. 40B § 22.

Board Vote:

At a duly posted meeting of the Board of Appeals on August 25, 2011 the Board voted as follows:

Member Favulli made a motion to rescind the previously approved Comprehensive Permit Rules and adopt the above Comprehensive Permit Rules. Member Johnson seconded the motion. Motion carried 6 – 0.

Matthew J. McNamara, Chairman
Patricia Favulli, Board Clerk

Date Filed with Town Clerk

Sdb – 8/26/2011
Comprehensive Permit Rules 08.23.11.doc