

Real Estate Round Up

Q1 2025 Edition

Welcome to the Q1 2025 edition of Nutter's Real Estate Round Up, a periodic update of current trends in real estate law.

The Massachusetts Housing Finance Agency ("MassHousing") recently announced changes to its lending requirements for certain types of affordable housing projects. The changes will likely make it easier for traditional banks to extend construction loans for projects approved under the state's Comprehensive Permit Act, Massachusetts General Laws Chapter 40B, Sections 20-23 (the "Act").

The Act was enacted in 1969 to enable affordable housing developers to override certain local zoning and permitting requirements. MassHousing administers aspects of the Act, including the determination of whether projects are eligible for expedited permitting. MassHousing's role stems from regulations and guidelines promulgated by the Executive Office of Housing and Livable Communities (formerly known as the Department of Housing and Community Development ("DHCD")).

A key concept in the Act is the subsidy requirement. The Act defines affordable housing as "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing," and DHCD's regulations and guidelines, in turn, identify certain state and federal programs that qualify as a "subsidy" under the Act. One such program is the so-called New England Fund ("NEF"), which is made available through the Federal Home Loan Bank of Boston ("FHLBB"). This program is most commonly used when a developer needs construction financing from a bank. NEF proceeds can be advanced to FHLBB member banks, historically at below-market interest rates, and must meet certain parameters established by MassHousing.

On February 6, 2025, MassHousing published modifications to its NEF financing requirements. Under MassHousing's previous requirements (which stemmed from an iteration of the guidelines published by DHCD in 2005), any construction financing for a rental project needed to include a permanent loan term of at least 5 years, and at least 25% of the permanent loan needed to be obtained through the NEF program. Additionally, homeownership projects needed to pull 25% of the construction financing from the NEF program. These requirements created some unintended complications. With the 5-year permanent loan requirement for rental projects, many lenders were surprised to learn that their proposed short-term construction loan actually triggered a 7 or 8-year commitment. More unpleasant still was the occasional situation where a lender forgot to draw the NEF proceeds after the project achieved substantial completion – a hiccup that could delay the subsequent sale or refinancing of the project.

Furthermore, only banks that are members of the FHLBB can draw NEF funds – so many national lenders in the Boston market need to partner up with a local or regional bank familiar with the NEF program. While a few select Massachusetts banks have regularly assumed the NEF lender role, not all FHLBB member banks are familiar with the program or how to access it.

MassHousing's new, revised requirements provide for the following:

- For rental projects: a minimum of 10% of the construction financing or 10% of the permanent loan must be obtained through the NEF program. If the permanent financing option is selected, then the NEF funds only need to be utilized for 1 year.
- For homeownership projects: a minimum of 10% of the construction financing must be obtained through the NEF program.

In either scenario, if NEF funds are used for the construction financing, MassHousing requires that the funds be used for the entire duration of the construction loan (i.e., from the first loan advance, with the entirety of the 10% being disbursed up front).

Notably, MassHousing's announcement also states that the agency is willing to modify existing 40B project approvals to incorporate these revised requirements. Any such modification will be deal-specific and could require amending the regulatory agreements and covenants recorded against the title, as well as certifications and commitment letters executed by the lenders – so the process will likely require some level of legal review.

Given MassHousing's commitment to relax its financing requirements, a developer's efforts to secure site approval for a new housing project will likely be easier. More national lenders may be able to quickly issue term sheets for proposed 40B project loans, now that they can offer a more traditional construction and "mini-perm" loan term. Furthermore, more FHLBB member banks may be willing to assume the role of the NEF lender, given the greater flexibility for the NEF lender to refinance or transfer its interests after the minimum 1-year commitment.

Author



**Gregory
Bradford**

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This advisory was prepared by [Gregory Bradford](#) in Nutter's [Real Estate Department](#). For more information, please contact the author or your Nutter attorney at 617.439.2000.

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