

OFFICE OF BOARD OF SELECTMEN
TOWN OF NORWELL

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June 11, 2008

His Excellency Deval Patrick
Governor of the Commonwealth
State House, Room 360
Boston, Massachusetts 02210

Dear Governor Patrick:

On a cold night in December of 1773, a group of Massachusetts's citizens loosely disguised as Indians, fed up with what they considered to be onerous burdens placed upon them by a government that did not listen, dumped chests of tea into Boston Harbor. They had reached the end of their collective patience and, through this act of civil disobedience; they lit the spark on an explosion that changed the world in which they lived. We, the Board of Selectmen and residents of the Town of Norwell are fast reaching that point of civil disobedience and the spark for our explosion are the provisions of Massachusetts General Laws Chapter 40B, their interpretive regulations by the Department of Housing and Community Development, and the decisional law by the Housing Appeals Committee

There is little doubt that Mass. Gen. L. Chapter 40B was passed into law in 1969 with the laudable goal of providing affordable housing for the people of the Commonwealth. In the intervening 39 years it has been twisted from its stated purpose to provide for affordable housing to a pro-developer, anti-community character, anti-home rule weapon used to punish communities that have the audacity to insist that basic quality of life issues must and should remain under the control of local officials and individual communities. We in Norwell are under siege by ravenous, unscrupulous developers who are not interested in building affordable housing projects but rather are looking to cash in on the quiet reputation of a community and who propose projects that are so oversized or completely inimical to the neighborhoods in which they have been proposed that they would destroy the very community character that attracted them in the first place.

The Commonwealth has not legislated significant or meaningful change to Chapter 40B since its passage. Instead, they have, quite literally, placed the interpretation of this vitally important statute in the hands of unelected bureaucrats that pursue their own agenda to the complete detriment of the communities and residents that they are sworn to serve. The Housing Appeals Committee (the "HAC") is an agency run amok, drunk with their own power and authority, acting without thought to established law, precedent or common sense. They continually rule against municipalities in decisions that defy logic, leading to needless, time consuming and costly appeals through the judicial system. The Supreme Judicial Court in Massachusetts (the "SJC") is currently considering more than several cases directly relating to Chapter 40B. These are cases that, for the most part, are caused by HAC decisions that seek to place new interpretations of Chapter 40B.

We will attempt to point out the most egregious of the cases recently decided by HAC that are now either before the Courts or have been recently decided. These cases represent the proverbial tip of the iceberg as communities are fast realizing that there is no fairness to the community or justice dealt to the communities at HAC, just a wave of the hand, a decision favoring the developer and a ruling often without basis in either fact nor law.

In the Groton case, the local ZBA denied a comprehensive permit, in part, for safety reasons, as there was insufficient site distance at the entrance/exit of the proposed development for vehicles to enter and leave safely. Clearly, it was not in the best interest of the community to permit a development that they believed to be unsafe. Enter HAC. In its decision, HAC not only ordered the issuance of a comprehensive permit, but also granted the developer a site easement over property owned by the Groton Electric Light Department notwithstanding the fact that a Town Meeting vote is required to grant such an easement. This decision essentially constituted a taking of municipal property without the required approval of Town Meeting. In one stroke, HAC gave itself the authority to seize land from a municipality and grant it to a developer. This gross abuse of power was thankfully overturned by the SJC.

In our community in the matter of *Tiffany Hill, LLC v. Town of Norwell Board of Appeals* the developer appealed the decision of the local ZBA granting him permission to construct 24 units of housing which was the maximum number of units which the Board determined that the property could support and comply with the minimum state stormwater and Title V standards on a small piece of property on a duly designated "scenic road" in Norwell. During the HAC proceedings the Town pointed out that even the reduced 24 unit project would require the construction of retaining wall some 200+ feet long, 14-18 feet high beginning just 5 feet from the edge of Tiffany Road to hold back a mounded septic system required to purportedly comply with Title V. The hydro-geologist consultant the developer admitted on cross-examination that there would be breakout of septic effluent at the base of the property along the street and on abutting

properties on the same side and opposite sides of the street and was unable to refute the Town's expert's conclusion that this breakout contained pathogens, viruses and the like which are characteristic of septic effluent and cause a major public health issue. Despite this testimony, HAC approved 36 units of housing on the site, knowing that the septic design could not support 24 units. Their rationale was that the issue of septic systems was not properly that of the ZBA but must be decided by the Board of Health.

The most egregious actions of both the Department of Housing and Community Development (the "DHCD") and HAC center around the recent *Canton* and *Taylor* decisions of the SJC and the promulgation of new regulations by DHCD and HAC. Both the *Canton* and *Taylor* revolved around the issue of when does a community get to the 10% threshold of affordable housing to be able to get itself out from the obligations of 40B. The question for the Court was did a community achieve their 10% affordable level as of the date that the local ZBA made a decision (as HAC argued) or was the date of decision inconsequential as a community reached 10% whenever it reached 10%? Both of the cases relied on interpretation of statute and the applicable regulations promulgated by DHCD. In both cases, the court ruled that the 10% level was achieved as of date of decision. Yet, as these cases progressed through the system and HAC argued in favor of the date of decision as the demarcation point, they were promulgating new regulations that would change the date of computing the 10% level to the date that the *application is filed*, regulations that were repealed by DHCD in 1991. This is a monumental change that favors and benefits only one group – developers. It will cause a flood of applications to a ZBA should a community near 10% or entertain a project that will get them to the 10% level forcing them to ultimately approve more affordable housing units than the statute obligates communities to have.

In addition, it removed the leverage that a community would have in negotiating with a developer to design and permit a project that is in the best interest of the Town. The looming 10% threshold would force developers to be more amenable to requests a community would have for changes to a project. Now, with the 10% leverage removed, developers will have no incentive to sit down and negotiate a project that is in the process. Once begun, there is no going back for a community. This is an outrageous change in regulations, particularly in light HAC's own comments in the *Casaleto* decision (May 19, 2003) "which stated that local zoning requirements are consistent with needs 'when imposed by a board of zoning appeals after a comprehensive hearing,'" that is, after a decision has been made. The continues by referencing HAC comments on the change in regulations in 1991 that the change

"may well have reflected a desire to change the controlling date so that when a municipality faces several applications that are filed nearly simultaneously, it does not have to bear the burden of having all of the applications appealable even though granting only one or two would be sufficient to take it to the ten per cent

threshold. That is, in promulgating the regulations, DHCD may have intended to shift the advantage to municipalities, even though a developer would prefer to see the application date remain as the benchmark lest it run the risk . . . of other proposals being permitted before the decision on its application is rendered."

HAC knew that the change back to the 1991 regulations would severely tip the scale in favor of developers at the expense of local communities and their residents and the did it anyway. Where is the consideration for a community? Where is the right to home rule? With this change in the regulations, all of the leverage under 40B continues to go to developers.

In addition, the new regulations also change the way in which a community calculates the total land area set aside for affordable housing and, in reality, contradicts itself in the goals that it is supposed to be pursuing. Under 40B, a community may get itself out from under the 40B hammer by achieving 10% affordable units or having 1.5% of the Town's land area set aside for affordable housing. Under the old regulations, rental developments were allowed to count the entire land area of the project towards the 1.5% land area. Under the new regulations, only that portion of the property that is disturbed and used for the development shall count towards the 1.5% calculation. Yet, at the same time, the Commonwealth is pushing communities to use smart growth initiatives and to preserve as much open space as they can in developing properties. How are we supposed to do both? The new regulations will lead a community to develop every square inch of a project site so as to count the maximum land area towards the 1.5% minimum.

Finally, and most recently, the Town of Needham has been forced to sue HAC over a decision to allow a developer to put 10 units of housing on a one-acre parcel in that community. The Town had permitted 8 units as per DHCD guidelines that hold that 8 units should be the maximum. The developers, some how, countered that building 8 units on a one-acre piece of property that formally held one home would not be economical and that they needed all 10 units to make a profit. HAC agreed with the developer. It is inconceivable that a developer could not make a profit by forcing 8 units onto a piece of property that formally held one home. This example illustrates how HAC deeply defers to developers in determining what is appropriate level of development. No project is too big, no harm is too great and no law, regulation, by-law or other controlling document shall ever get in the way of achieving the true goal of HAC – the maximization of profits for developers, not the providing of affordable housing.

We need you to hear our plea and our voices. 40B, in the hands of an un-elected, uncaring, pro-developer bureaucratic agency is destroying the fabric of our communities. The uniqueness of each community in the Commonwealth that makes our state such an attractive and varied place to live is being replaced with a mad rush to remake every community in the same image, local control and zoning be damned. You are forcing us to

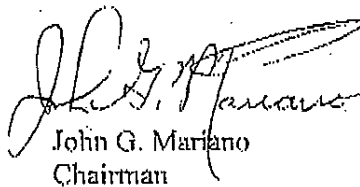
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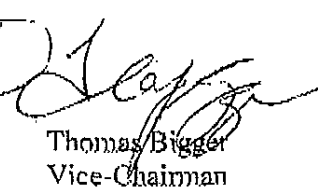
spend scarce resources to sue you to defend ourselves from you. Money that could be going to schools, police, fire, DPW and other budgets is instead going to lawyers who are defending a community's right to determine its' own destiny, a right that is guaranteed us in the state Constitution. We are tired of having to defend ourselves. If you would meet with us and hear our concerns, together we can work towards a solution. If you continue to ignore us and ram this mandate down the throats of the cities, towns and residents that you are supposed to represent then we will be forced to use all the means at our disposal to fight this madness. Do not be confused any longer. The veil of 40B providing affordable housing has been shredded by HAC revealing it for what it really is, a means for a developer to force a municipality to accept a project on property that cannot otherwise be developed. It is a developer profit maximization law, plain and simple.

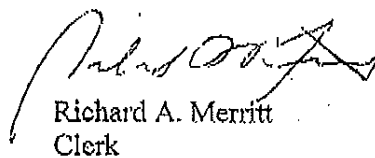
We look forward to hearing from you and, hopefully, meeting with you face to face to show you the devastation being caused. Resident against resident, Town against resident, developer and state against town and residents with the character of a community at stake. It is tearing us apart. Those who ignore the lessons of history are doomed to repeat it. Please hear us. We are not far away from another cataclysmic event that will once again cause the citizens of the Commonwealth to rise up and dump the proverbial tea into the sea.

Thank you for your attention. We look forward to hearing from you.

Very truly yours,


John G. Mariano
Chairman


Thomas Bigger
Vice-Chairman


Richard A. Merritt
Clerk