



The Commonwealth of Massachusetts
Office of the Inspector General

GREGORY W. SULLIVAN
INSPECTOR GENERAL

December 1, 2008

JOHN W. MCCORMACK
STATE OFFICE BUILDING
ONE ASHBURTON PLACE
ROOM 1301
BOSTON, MA 02108
TEL: (617) 727-8140
FAX: (617) 723-2334

Senator Marc R. Pacheco, Chair
Senate Committee on Post Audit and Oversight
State House, Room 312B
Boston, MA 02133

Dear Chairman Pacheco,

I thank you for allowing me the opportunity to testify before your committee in regards to Chapter 40B. As you requested, I am submitting to the committee my concerns with the Chapter 40B regulations and guidelines. Members of my staff are available to discuss these issues with your staff on a more in-depth level.

The recently published Chapter 40B Regulations (760 CMR 56) and the associated guidelines fail to provide adequate safeguards to prevent abuse of the program's limited dividend requirement. In many ways these changes make the situation worse for municipalities. They minimize the role of the municipalities in the financial process and strip away basic protections that are essential for a municipality in meeting its fiduciary responsibilities, as a party of interest in a development's excess profits. Though there are numerous changes to the guidelines that we have suggested (a redline copy of which is enclosed), the three biggest issues in my estimation are:

1. Increasing the profit limit from a minimum of 15% to a minimum of 20%, Guidelines I.A. definition of "Reasonable Return";
2. Increasing the density bonus from the standard of four times the density of the underlying zoning, or up to eight units per acre, whichever is greater, to up to 40 units per buildable acre for low rise/townhouses to up to 160 units per buildable acre for midrise developments, Guidelines IV.A.3 "Density";
3. Placing a rebuttable presumption on the municipality that it has made a development uneconomic if it reduces the scope of a project by more than five percent, Guidelines I.A. definition of "Reasonable Return".

These recent "reforms" implemented by DHCD to Chapter 40B have effectively

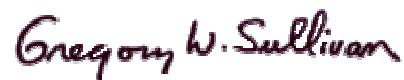
“supersized” both the scope/density of future proposed developments and the associated profits that can be realized by developers at the expense of the municipalities.

Under DHCD's current regulations, municipalities are excluded – in my opinion illegitimately excluded – from acting as parties of interest in the Chapter 40B process (760 CMR 56.04(e), 56.04(6), 56.04(8)(a), 56.05(6)(a) and (c)). The new regulations/guidelines impair the ability of municipalities to gain access to project financial information. A municipality's right to request, review and challenge the pro forma or other financial statements for a project is significantly limited (760 CMR 56.05.(6)). The regulations empower the Subsidizing Agencies to be “*solely responsible for the monitoring and enforcement*” of profit limitations (760 CMR 56.04(8)(a)). Since Subsidizing Agencies like MassHousing are not subject to administrative law, municipalities are placed in a compromised position due to their lack of standing in an appeals process. The business relationship between Subsidizing Agencies and developers further exacerbates the risks and problems faced by municipalities.

The land value determination should be in the regulations, not in the guidelines, and should reference the as-is value of the land under current zoning (Guidelines IV.B.1). Also, the submission of documents throughout the process should be made under the pains and penalties of perjury. In practice, municipalities have traditionally been the beneficiaries of any excess development profits. The new regulations undermine municipal rights by providing that “*Any funds in excess of applicable limitations on profits and distributions shall be paid over to the Subsidizing Agency or the municipality, as determined solely by the Subsidizing Agency's program requirements and the terms of a regulatory agreement, or similar agreement, to be entered into between the Subsidizing Agency and the Developer.*”(760 CMR 56.04(8)(e)) These are some of the issues with the regulations, but again, the bulk of the detail has been left to the guidelines.

I look forward to continuing to work with you on this very important matter. Please do not hesitate to contact my Office for additional input and information.

Sincerely,

A handwritten signature in black ink that reads "Gregory W. Sullivan". The signature is written in a cursive, slightly slanted style.

Gregory W. Sullivan
Inspector General