40 B PLAN

ACTION PLAN FOR THE COMMUNITY TO DEAL WITH 40B COMPREHENSIVE PERMIT APPLICATIONS

- **Object promptly and loudly.** The first line of defense is for the town, all boards, and the affected citizens to respond promptly when a letter of intent is first presented to the Board of Selectmen. While this is not the formal presentation, it is an opportunity for the town to discover irregularities in the project, which may be sufficient for the applicable housing funding agency (e.g., MassHousing) to deny the developer project eligibility and approval for a Comprehensive Permit application.

- **Review 40B projects thoroughly for adverse environmental impact.** When the 40B Comprehensive permit application is formally submitted to the Zoning Board of Appeals (ZBA), the town must carefully review any sites of proposed 40B applications to ensure that the project does not violate state wetlands regulations or otherwise endanger wetland areas, aquifers, watersheds, flood plains and other conservation areas, or is otherwise seriously deficient. This is especially important for Norwell, because there is so little good buildable land left, so that all the 40B proposals to date have been on land which would normally be considered unbuildable. This is especially important also, because cutbacks in state funding has meant that Norwell dare not rely on DEP to safeguard Norwell's environmental issues.

  This may require hiring a specialized engineering firm to review all applications and the sites thoroughly from the onset; this may also require special counsel for such applications, because history tells us that the developers will sue the town if they cannot get what they want. Although the town land use boards escrow developers' funds for peer review technical review, the town may have to pay for some of this expense; however, it is money well spent. The cost is minuscule compared to the cost of a destroyed essential part of our infrastructure, e.g., a failed town well. The one Comprehensive Permit application currently before the ZBA and the three project eligibility applications pending now have serious environmental issues which may mandate that they be denied.

  If the town ZBA denies a Comprehensive Permit application, or grants it with conditions which the developer does not like (for example, requiring that the project be genuinely 100% affordable), then the developer will likely appeal the denial to the Housing Appeals Court (HAC), which is an administrative board within the Department of Housing and Community Development (DHCD). Generally these people are likely predisposed by statute, by case law, by their own regulations, and by their own political preference to overrule town ZBA denials and grant the comprehensive permit.

The test before HAC is whether the regional need for affordable housing outweighs town regulations. Generally it is a difficult burden for the town to sustain a burden of proof that it has justly denied a comprehensive permit. If the municipality has met one of the statutory minima of M.G.L. Chapter 40B secs. 20-23 (e.g., approved affordable housing stock equal to 10% of the overall housing stock, or has built 2% affordable housing per year, or now has qualified or built 0.75% per year in recent progress with an approved plan) creates an irrebuttable presumption that the municipality's decision is consistent with regional housing needs. However, proof that a municipality has failed to satisfy creates a rebuttable presumption that the regional housing need outweighs local health, safety, design, or planning concerns. On that basis HAC will virtually always overrule the ZBA's denial or approval with conditions and grant the comprehensive permit.

However, G.L. 40B does not override state laws, and HAC is not empowered to override them. The applicant must comply with such state regulations as Title V septic system regulations (310 CMR 15.00, *et seq.*) and the Wetlands Act and DEP regulations (M.G.L. c. 131 § 40 and 310 CMR 10.00 *et seq.*).

In a HAC appeal, the standard for the municipality to rebut the presumption that there is a substantial regional need for low and moderate income housing sufficient for the comprehensive permit to be granted is contained in 760 CMR 31.07(2)(b), which is that either: the natural environment is endangered, design of the site must be seriously deficient, or open spaces must be critically needed. Of these, endangerment of the environment is the only basis upon which the municipality has any realistic chance of prevailing.

In other words, wetlands violations are the viable regulations which HAC cannot overrule and environmental impacts, including but not limited to wetlands violations, are essentially the only concerns which have a reasonable chance of rebutting the presumption of consistency with local needs in favor of the town. This is the only way to stop these projects at this stage, and the primary reason which Norwell ***must*** stop them, because of its poorly draining soil, shallow aquifer and scarcity of buildable land. However, such grounds for denial must be properly documented in advance of a denial in order to be upheld by HAC, and that requires that the ZBA have an expert consulting engineering firm on board.

♦ **Verify site plan surveying and engineering.** The town must scrutinize all Comprehensive Permit Applications for accuracy of surveying and engineering. The town needs to retain its own (again, through the ZBA) specialty attorneys, title examiners, and engineers to ensure that all that is represented to the town is accurate. A mistake, once allowed, cannot easily be undone. Identification of boundaries, location of wetlands, aquifers, watersheds, and conservation areas is an inexact science. We cannot be sure that any judgment calls made by the developers' experts will be made with the best interests of the town in mind.

Once the environmental issues have been addressed, then the focus is on the parameters of the project itself. If the environmental issues have been addressed, and it has been concluded that the site can support development, then the ZBA needs to influence the development for the maximum benefit to the town. If the project is another condominium development, and it appears that the development is going to be approved, and the number of units which the site can support have been approximately determined, then the issue becomes how to maximize the benefit to the town. As I have noted elsewhere, if the town allows its 40B quota of affordable housing units to be met by means of sales developments which are only 25% affordable, then it will take approximately 1500 new units, or a 50% increase in the size of the town, to meet the 10% requirement. The effect of this would be a devastating impact on the town's infrastructure and tax burden.

- **Verify project specifications.** The town should scrutinize all Comprehensive Permit Applications for accuracy of project specifications. It is difficult to take away extra bedrooms once built and impossible to control what future owners may do with extra space. This is a critical element: If environmental review has determined the maximum allowable impact on the site based on these plans, extra units, footprint, or waste water discharge will violate all of these determinations. Norwell's fragile aquifer cannot afford a miscalculation of this sort. If a plan is approved, the town through the ZBA must hire its own project supervisor to ensure that what is built complies with approved plans. If this can be done by the Building Inspectors office, then permit fees must be sufficient to cover the increased monitoring cost. This process should tie in with ongoing monitoring of developer's costs, to ensure that the profit margin is held to 20%.

- **Verify project costs and profit margins.** The town should scrutinize all Comprehensive Application permits for honesty and accuracy of project profit and loss projections. DHCD regulations mandate that the developer's profit is limited to 20%; but once the project is completed and the money spent, it will be impossible to regain excess profits from a developer, whose profit will be spent as soon as the checks are cleared. The town through the ZBA must hire its own forensic accountants to examine the claimed profits. With experience as a former builder and real estate developer myself, I can assure you that when a developer acquires land for less than $10,000 per unit, it will be very difficult to hold the profit down to 20%, even if the project is 100% affordable. In most cases the developer has bounced the property through several entities and had his construction entity overbill the development entity and hidden the excess profits. The uncovering of misrepresentation by a developer might be enough to stop the project altogether. More realistically, the town can force 100% affordable and/or lower density in advance of and during the project. Assuming that the issue of how many units the site can support has already been decided, then the town can and should use the profit ceiling to ensure maximum affordable housing qualification. The critical point of negotiation with the developer, unless the proposed site is one upon which there should be no building, will be the economic feasibility. In a HAC appeal, if the project is denied, the burden of proof is

on the town to demonstrate that its decision is consistent with regional needs. If the town grants the Comprehensive Permit with conditions, e.g., specifying the number of affordable units, then the burden of proof is on the developer to demonstrate economic unfeasibility.

- ♦ **Identify conservation areas ASAP.** The town needs to identify as soon as all possible land areas which the town may in the future need or wish to acquire for protection of the wetland areas, aquifers, watersheds, flood plains, and other legitimate conservation goals, especially where the areas themselves may not be wetlands, but their proximity to aquifers, watersheds, etc. mandate that we seek to prevent development of the land. The Master Plan Steering Committee (MPSC) and the Community Preservation Committee (CPC) need to confer on this one immediately. If necessary, we may need to hire a consulting engineering firm with GIS capabilities to make some immediate recommendations. This list can always be added to later or reduced, but we cannot afford to wait to create the perfect final list at this time. If a Comprehensive Permit project comes before the town in an area which endangers our wells our aquifers but which project otherwise satisfies the wetlands regulations, it would be safer to take the land for conservation rather than trust HAC to make the right decision to protect Norwell's environment.

- ♦ **Taking by eminent domain.** Then, if there is no other way to protect an identified conservation area from destructive development, the town can take such parcels by eminent domain. If a proposal comes forward for a site which Norwell considers to be part of its historical legacy or land which we really want for critical open space, we cannot protect such a site through environmental laws. We will have no recourse but a taking, and such a taking will need to be defensible.

  At least two towns have tried to stop 40B applications by taking the land by eminent domain. Chelmsford succeeded: the Supreme Judicial Court (SJC) upheld the taking after HAC had granted the Comprehensive Permit to the developer, because the town had been seeking to acquire the piece of land for conservation for years. Where Burlington acquired a site by taking but showed no interest in the site until after the Comprehensive Permit proposal, and admitted its purpose was to stop the project, the taking was voided by the SJC.

- ♦ **Genuine 100% affordable projects.** Require that any Comprehensive Permit which is granted is for genuine 100% affordable housing to ensure maximum compliance with the requirements of the law and to provide genuine help for affordable housing. If a project is going to be built, because we cannot otherwise stop it, then we at least need to ensure that we get maximum credit toward the HUD approved affordable housing inventory.

  The most current available Department of Housing and Community Development list of Chapter 40B Subsidized Housing Inventory revised as of April 24, 2002 indicates that

Norwell has 97 approved units against a housing inventory of 3299 units. To reach a 10% goal, therefore, would require 230 additional units of qualified "affordable" housing. To achieve this goal through 40B Comprehensive permits which are only 25% affordable would require construction of four times that number of units, or nearly 1000 additional housing units. This would in turn require another 100 "affordable" units (10% of the additional 1000 units), which will require another 400 units. This will in turn require another 40 "affordable" units, which will require another 160 units, etc. The end result is that, if Norwell were to attempt to achieve its mandated goal of 10% affordable housing by means of 40B Comprehensive Permit projects, the housing stock would need to increase by 1600 to 1700 units, an increase of 50%.

The net result of such staggering growth would be a crushing load on the town's infrastructure (schools, roads, fire department, police department, etc.), which costs money, which will result in more taxes. Typically, a residence does not generate enough taxes to cover its costs in services (which is why Norwell developed the industrial park off route 3). It is likely that low cost housing (which applies to substandard "market rate" housing in these projects as well as to the affordable units) will generate a lesser percentage of revenue to costs of services. Even if the state were not in a fiscal crisis and reneging on its promises of aid to towns, 40B is an unfunded mandate: the state will pay for none of under the best of circumstances, and the case law clearly indicates that increased infrastructure costs are not grounds for denial of a comprehensive permit. Thus, **your taxes will go up a lot**. If he cost of these infrastructure loads is high; the cost of the future environmental damage is priceless.

Norwell cannot survive such intensive development. The inescapable conclusion is that the town cannot allow its affordable housing quota to be met through these 25% "affordable" housing permits.

- **Permanent affordability deed restrictions.** At the least, the town must require that any Comprehensive Permit which is granted provide for permanent qualifying affordable housing deed restrictions. The Supreme Judicial Court has held that for so long as the developer reaps the benefit of a zoning exception, the town can mandate that the deed restrictions remain, even if the particular housing funding program which the developer is using does not so require. It will do the town no good to suffer a 40B project and lose the housing credit in 15 years. Before 1700 units as noted above could be completed, the first of them would be coming off their 15 year life time, and the building cycle would be never ending.

- **Develop needed affordable senior housing.** Despite the furor over 40B, there seems to be a consensus that we need some more elder/handicapped access rental housing. Considering the scarcity (and prohibitive cost if suitable land were privately available) town owned land for a project such as Norwell Gardens is likely the only feasibility.

Rental tenants at the existing Norwell Gardens elderly housing pay no more than 30% of

their income: for a single retire person of SSI of $531 per month, the rent is approximately $160 per month, and no private entity can rent housing of any sort for that amount. Thus, subsidized rental housing can only be run by a true non-profit/governmental entity, because of these severe rental rate restrictions and the unpredictability of future rental costs and income. Thus, we need to identify town owned or to be acquired parcel(s) for construction of an additional senior housing development.

The irony, as I have noted elsewhere, is that Norwell does not actually lack for affordable housing, it merely lacks for bureaucratically approved affordable housing. Norwell appears to have a genuine need for some affordable senior housing. The further irony is that the correlation between 40B and the legitimate affordable housing needs is essentially zero.

- **Build the requisite number of housing units.** Although it almost seems too simple to mention, the alternative that the town build 230 qualified affordable housing units on top of a base of 3300 units is certainly far preferable than that the town allow developers to destroy the town with 1700 new units 25% of which are qualified and 75% of which are sub-standard, non-conforming units. Alternatively, if the town provided some assistance to a developer, a "friendly 40B", then the town would not have to go into the building business. If there were a suitable town owned parcel, then the town could send out requests for proposals to private developers to build units for resale and/or to build units for the town to hold as rental property.

- **Local Initiative Program.** DHCD has a Local Initiative Units (LIU) program (710 CMR 45.03) by which it shall approve units for the affordable housing inventory if these units are new construction (e.g., Habitat), building conversion, adaptive re-use, or rehabilitation. The town should provide opportunities for conversion of some of the existing stock of low income housing to be converted to qualified affordable housing through the DHCD Local Initiative Program: The potential for the LIU program is largely overlooked and enormous. As noted above, conversion of existing housing stock which may have cost less to build than new construction makes sense when the cost of new construction is high. There are several ways the town can go about this:

- **Tax incentives/rehabilitation program.** We can create a program through the LIU to enable residents who believe they are being forced out of Norwell because of the increasing taxes to be granted rehabilitation funds and/or tax abatements in exchange for allowing qualifying deed restrictions to be placed on their homes. It may be possible to create a program with permanent restrictions which could be undone in the future on payment of a penalty. Alternatively, the town can contract to provide tax relief for 15 years in exchange for the minimal 15 year deed restrictions. This could be a small program with only a few participants, or this could be a very large program filling much of Norwell's requisite quota for affordable housing under 40B.

- **Housing funds for conversion.** Establish funds through the Community Preservation Committee or other agency to purchase qualifying homes as they come on the market, place the deed restrictions on the homes, and then resell them. The reselling price of these homes may not be significantly or any less, if the homes purchased are in a price range where they have always s sold and will likely always continue to be sold in the range of affordable home prices.

- **DHCD Affordable Housing Plan.** Submit the Affordable Housing Plan to DHCD for approval. The new regulations at 710 CMR 31.07 specify that the plan must contain certain statistical data, must address certain issues, and then DHCD "**shall**" approve the plan. Once approved, the town need only put 3/4% of he existing housing stock per year into inventory in order to be permitted to deny any further 40B Comprehensive Permit applications that year. It is important to note that the regulations do not specify what the Town's plan is, only that we have one, that it meet DHCD guidelines, and that the town meet the 3/4% goal, which in Norwell is about 25 units on line per year. It is important to submit the plan as soon as possible; it can be modified at a later time; however the plan itself is of no effect unless and until the necessary units are created. Note also that this Affordable Housing Plan is only a part of the overall plan to control and plan for Norwell's future. A simple matter of converting 25 homes per year under the LIU program would protect Norwell from unwanted 40B proposals in swampland.

- **Legislative relief.** Work legislatively to repeal or amend M.G.L. Ch. 40B, sections 20-23, the Affordable Housing Law. As attractive as this alternative sounds, realistically, it is not a likely alternative.

- **DO NOT** create districts or geographic areas for re-zoning to permit low and moderate income housing developments. This is a trap: if we create a new high density district and 40B is repealed or Norwell meets its requirements under the current or subsequently modified 40B, we will be stuck with a high density district which will be used to destroy the character of the town but with no redeeming social merit.

- **Abutter litigation.** The last line of defense is abutters' lawsuits. All of the 40B rules pertaining to overriding local rules and regulations do not necessarily pertain to civil action by abutters, who may be able to sustain a claim for nuisance or actual damage to their property, which claim might be sufficient (and costly enough) to dissuade a developer from going forward.