

The misplaced attack on 40B

Yet another study has shown that the cost of housing is the most important issue facing the commonwealth. In a recent poll, about two-thirds of Massachusetts residents rated housing costs as a significant concern and 36 percent of those surveyed said they have seriously considered moving out of Massachusetts because of housing costs.

We can continue to stick our heads in the sand and continue to lose population and jobs — and face economic stagnation. Or we can take baby steps to address the problem, such as extremely complicated laws like Chapter 40R, which encourages new housing by making grants to communities that designate “smart growth” districts. Since 40R’s passage nearly three years ago, not a single dollar has been distributed by the commonwealth to any municipality that has adopted 40R districts.

With looming budget deficits, it is questionable how much, if any, 40R money will ever be disbursed. It remains to be seen whether 40R will make an appreciable difference.

The only thing that has worked in any meaningful way is Chapter 40B. This law permits housing developers to override zoning and other local law requirements if a certain percentage of units is set aside as affordable. Former Gov. Mitt Romney’s 40B Task Force reported that, as of March 2005, close to 42,000 units had been developed under Chapter 40B and more than another 30,000 units were in the pipeline in more than 200 cities and towns. As of 2003, 40B accounted for 83 percent of all housing units constructed in the prior five years in towns in which less than 10 percent of housing was classified as affordable.

Unfortunately, Massachusetts Inspector General Gregory Sullivan has his guns pointed in 40B’s direction. Sullivan, having described 40B as a “pig fest” for unscrupulous developers, has focused his attention on developers who may have violated Chapter 40B rules on “limited profits.”

Sullivan’s campaign against 40B plays right into the hands of those who want 40B to disappear. Moreover, his attack is based on one of the main misconceptions about 40B. The law does not mandate limited profit

for developers. Rather, it specifies that for-profit developers under 40B must be “limited dividend” entities. This means only that a developer must limit its profit in accordance with the rules of a subsidizing agency — usually MassHousing, MassDevelopment or the Department of Housing and Community Development. The current rules limit the developer’s profit on for-sale developments to 20 percent, and, in a rental development, limit the owner’s annual distributions to no more than 10 percent of the owner’s equity.

The “limited dividend” rules are complicated and obtuse. A common example: Suppose a parcel is appraised at \$1 million. A developer may agree to pay an unrelated landowner \$3 million dollars for this parcel once a 40B permit is obtained. The difference in value is because the density of housing that can be created under 40B is considerably higher than what can be built without the permit. The \$3 million cost is a real cost to the developer. But state agencies limit what the developer can attribute to land value to only \$1 million.

Why should a developer who is creating affordable housing be subjected to limited profit rules that do not apply to any developer who is proposing 100 percent market rate housing? In fact, in most states with affordable housing laws, developers’ profits are not restricted.

The vast majority of 40B developers play by the rules. Many have no need for any “subsidy.” In a state that must create housing fast, the goal should be to make sure new housing remains affordable, not to restrict the developer’s profit.

Ideally, 40B would be amended to eliminate the anachronistic “subsidy” requirement so that developers using only private money would be free of all profit restrictions. But, in the meantime, state agencies can redefine what it means to be a “limited dividend” entity. The rules should be simplified and the profit limitations relaxed. This proposal would not cost the commonwealth’s taxpayers a dime, and would remove one of the red herrings used by 40B opponents to attack the law.



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