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March 15, 2016

Arlington Board of Selectmen

Arlington Town Hall

730 Massachusetts Avenue

Arlington, MA 02476

Dear Select Board Members,

The attached material provides additional detail and information related to testimony I intend to provide in seeking your support of 2016 Warrant Article 30.

I will touch on some of the information contained here but it will not be the core of my testimony. It will take you about 15 minutes to read all of this and it may serve as a basis for questions you may ask in the course of my testimony.

I have already appeared before the Finance Committee and the Conservation Commission and responded to their questions on this Article.

The testimony I offer will focus on the importance of this request, its impact on our Town and to a great degree it's relationship to the pending East Arlington Mugar 40B project.

I look forward to my appearance before the Board and the opportunity to seek your support in moving this Article forward.

Respectfully submitted,



John Belskis TMM Pct. 18

**REFERENCE MATERIAL
PROVIDED TO ARLINGTON
BOARD OF SELECTMEN FOR
MARCH 21, 2016 HEARING ON
WARRANT ARTICLE 30 OF 2016
TOWN WARRANT**

**SUPPORTING TESTIMONY OF PRECINCT 18
TOWN MEETING MEMBER JOHN BELSKIS**

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Arlington's Impressive Performance	Our Town vs. other cities and towns
The Magic Numbers of MGL c40B	Two pages detailing skewed 40B accounting
Meeting with Conservation Committee	Two pages of material presented to the Con. Comm.
Protected Open Spaces	Two pages detailing utilization of Chapter 97
DMH / DMR Housing Units	A two page job aid to obtain land area of such units.
Outstanding Issues and Concerns	1.5% items that have not been addressed or responded to.

Arlington and MGL c40B

- 1986 Town supported establishment of Arlington Housing Corporation and began a series of CDBG funding for utilization in providing affordable housing units.
- 2000 First 40B proposal withdrawn after abutters revealed hazardous conditions were incorrectly cited as a number of conditions were above State mandated levels for habitation dwellings.
- 2002 John Belskis appeared before BOS with an initial study citing attainment of 1.5% safe harbor status. Planning Department went through a number of conflicting assessments of the figures. Town Meeting passed Article 18 a Resolution to the Massachusetts Legislature seeking changes to MGL c40B
- 2005 Second 40B proposal Minuteman Village Brattle Street. 20 units w/ 4 provided as affordable. A subsequent State Inspector General audit found excess profits not returned to town. Despite the finding the Town never recovered the cited excess. Planning cited 1.17% as current 40B safe harbor level.
- 2006 A Warrant Article seeking to validate the 1.5% calculations passed Town Meeting and established a Geographic Information System (GIS) Committee to validate 1.5% calculation. Three citizen members appointed, town administrations never appointed their members! Planning cited 1.28% as the current affordable units land area.
- 2007 Local citizen files an Initiative Petition to repeal MGL c40B. Fails to acquire the required 70,000 signatures to create the repeal Bill.
- 2008 Local citizen again files a MGL c40B repeal Initiative Petition and 100,000 signatures are collected and the repeal Bill goes before the Legislature. They sit on the Bill until May and with an additional 15,000 collected the Petition is forced to placement on the 2010 Ballot. The Petition fails with the opposition spending over a dollar for each opposing vote while the proponents got over 900,000 votes at a cost of less than five cents per vote.
- 2010 Third Arlington 40B submitted for 17 Winter Street. Project was so outrageous and problematic that the developer eventually withdrew the application.
- 2012 Warrant Article 11 passed by Town Meeting that all special permit hearings before the ZBA must have testimony taken under oath and recorded.
- 2015 A Fourth Arlington 40B proposed for the Mugar property in E. Arlington. BOS send opposing letter to MassHousing the approving agency after hundreds of citizens attend a presentation in Arlington Town Hall.
- 2016 With support of an outside consultant informational meetings held with ZBA and they vote acceptance of the latest 1.5% safe harbor calculations.
- 2016 A Warrant Article is submitted seeking transfer of a property at 1 Gilboa from Town Ownership to Arlington Housing Authority ownership as an insurance that the 1.5% calculation is well above reproach. Hearings have been held with the Finance Committee and the Conservation Committee.

Arlington's impressive performance

	Hsg Auth	Sec 8 *	Avg # of Hsg Auth units / # Of residents	SHI #	% Chg Since 06
Boston	2860	9657	An average of 1 per 206 residents (pop. 589,141) Sec 8 = 1 / 67	18.3%	-1.0%
Cambridge	2716	1763	An average of 1 per 37 residents (pop. 101,355) Sec 8 = 1 / 57	12.3%	=
Quincy	941	998	An average of 1 per 94 residents (pop. 88,205) Sec 8 = 1 / 88	9.6%	-0.4%
New Bedford	941	1603	An average of 1 per 100 residents (pop. 93,768) Sec 8 = 1 / 59	12.0%	-0.1%
Worcester	926	1587	An average of 1 per 186 residents (pop. 172,648) Sec 8 = 1 / 11	13.4%	-0.1%
Fall River	922	2080	An average of 1 per 100 residents (pop. 91,938) Sec 8 = 1 / 44	11.3%	=
Springfield	1069	2120	An average of 1 per 120 residents (pop. 152,082) Sec 8 = 1 / 72	16.2%	-1.1%
Chicopee	816	397	An average of 1 per 67 residents (pop. 54,653) Sec 8 = 1 / 14	10.2%	-0.2%
Somerville	1009	880	An average of 1 per 76 residents (pop. 76,210) Sec 8 = 1 / 87	9.7%	-0.1%
Framingham	834	678	An average of 1 per 90 residents (pop. 66,910) Sec 8 = 1 / 99	10.5%	+ 0.3
Brockton	781	804	An average of 1 per 120 residents (pop. 94,304) Sec 8 = 1 / 117	12.6%	- 0.3
Arlington	710	422	An average of 1 per 58 residents ** (pop. 42,389) Sec 8 = 1 / 100	5.6%	+0.4% ***

Notes

* Section 8 Housing not counted as SHI

** Only Cambridge has a better average / residents

*** Highest increase in SHI

THE MAGIC NUMBERS OF MGL c40B

In October of 2015, through the intervention of the Secretary of State, to a request for a listing of the number of affordable units created with comprehensive permits, the Department of Housing and Community Development (DHCD) provided an Excel spreadsheet titled DHCD SUBSIDIZED HOUSING INVENTORY (SHI) dated 10-7-2015.

For some fifteen plus years, agencies and supporters of MGL c40B have been publishing and quoting numbers that many have assumed were factual and accurate. Unless there is some record at DHCD other than the information they provided with this recent document, there appears to be a vast disconnect between what is being quoted and the actuality of the SHI record of subsidized affordable housing provided through MGL c40B.

An analysis of this record provides an entirely different view of what agencies such as Citizens Housing And Planning Association (CHAPA) MassHousing, and a plethora of housing agencies across the State have provided as the viability of MGL c40B.

What the analysis indicates follows below:

It has been broadly quoted, "40B has provided upwards of 59,000 units of affordable housing". Total number of units per this record is 59,204 but a large number of records are duplicates for the same site and these totaled 15,706 units thereby indicating that the real number is more like 43,435 affordable units.

There is an even more questionable issue and that has to do with the accepted practice of counting 100% of a rental unit project as affordable when only 20% are required to be affordable. There are approximately 12,000 rental units in the SHI listing, thus if only 20% are actually affordable the SHI affordable unit count would be reduced about another 7,091 units. So if this accounting and logic is true, did MGL c40B in its 47 years of existence only provide 36,344 affordable units? That is an annualized production of about 773 units which if applied across our 351 cities and towns, says 40B provided an average of two units of affordable housing per each city and town. This is a success story???

In addition to the questionable SHI numbers, we must also consider the impact of expiring use. This is the situation whereby the affordable units subsidized funding debt has reached its payment maturity and may be reverted to market rate status. A Harvard University study from over 15 years ago and supported by DHCD records projected a loss of between 22,000 and 18,000 affordable units. To negate this tremendous loss of affordable units, the Legislature has been filing budget Bills to "preserve" the affordable units. These funds have involved hundreds of millions of dollars in the State Budget.

In each of the past three Legislative sessions literally hundreds of Bills have been filed seeking to improve MGL c40B by requiring things like deed recorded perpetuity of affordable units created with a comprehensive permit, an increased percentage of affordable units in order to qualify for a comprehensive permit, regionalized SHI planning and programs, etc. etc.. None of these Bills have ever emerged from the heavily lobbied Housing Committee.

There also remains the question of how status and progress is measured per a city or town as well as what is the true measure of affordable unit provisioning. The safe haven number

indicating that a city or town has accomplished a desired level of housing affordability is by MGL c40B definition 10% of its housing is deemed affordable or 1.5% of its build qualified land area is already occupied by affordable housing. These criteria are quite often contentions between developers and local government and resolution is sought through the Housing Appeals Committee (HAC) or the judicial system. A vast number of the HAC decisions are made on the basis of a "regional need for affordable housing" outweighing a city or town's denial or conditioning of a comprehensive permit.

Once again through an appeal with the Secretary of State's office a request for what was the HAC's defined region for the regional need criteria, The DHCD Council's office responded that the HAC's regions were the same as defined by Government's Department of Housing and Urban Development (HUD). A recent study appears to indicate that a number of our communities have lost at HAC when the HAC region in which they reside is above the 10% criteria. So what is the true objective? A region's 10% or a municipalities 10%? It has the appearance that the HAC uses whatever will favor the development industry's position.

Another area of "funny" numbers is the developer profit margins. The law allows a developer's MGL c40B project to earn a maximum of 20% over project costs. This is a form of incentive to developers to attract willingness to build affordable units. This is in addition to allowing them to ignore or circumvent what local bylaws exceed state standards. Where the national average for housing development runs around 12 % our incentive is generous.

But wait, the State Inspector General (IG) in a series of audits of 40B profits found serious instances of un-reported excess profits some of which were approaching 50% profit, yet none of these excesses were returned, as the law stipulates, to the involved town for their affordable housing programs. In testimony before the Joint Committee on Housing and before the Senate Post Audit and Oversight Committee the IG projected that as much as \$110 million dollars of excess profits have been denied to municipalities. We no doubt could have provided significant numbers of affordable units leveraging that amount of dollars.

Once again despite filed Bills, the Joint Committee on Housing has failed to release Bills calling for audits on MGL c40B project profits. This in the face of the fact that a number of towns have sued and recovered the millions of dollars of excess profits due them.

Isn't it time Massachusetts moves to emulate the other 46 States that create more affordable housing than what our dependence on the abusive MGL c40B has ?

My background - 16 yrs chair 40B Coalition - members in over 200 cities & towns - testified before Legislature - filed Bills - lobbied for reforms- panelist on many public and commercial TV - participant in conferences at Harvard Kennedy School of Government - MIT Real Estate Institute - had many published articles and op eds in many local, regional and national publications, I guess I may be considered an affordable housing expert and SME on MGL c40B especially paragraphs 20 -23.

40B as a law - 47 years old - original for rental housing - early 90's lobbied by development industry to include ownership units - very contentious passed by a single vote - it's a failure - 47 of 50 better that MA - current record statistically annualized 2 units / each city and town - closely controlled and heavily lobbied by development industry - unlike Arlington its regulations (760 CMR 50.00) do not include perpetuity of developed units or inclusionary zoning - not all 40B affordable units are affordable in rental projects. Section 8 affordable units not counted - manufactured homes not counted.

Arlington and 40B - at 5.6% SHI - (State at 9.3% SHI) - to attain 10% we need at least 4,000 more units - already 3rd densest town in State - done an admirable job w/ affordable provisioning - at 1.5% land area but number is yet to be certified by DHCD - 760 CMR 30.00 vs, 760 CMR 56.00) they don't want towns to get that relief! - that is why I sought solidifying the number with 1 Gilboa Road - 1.76 acres nothing to do with the other Chapter 97 land.

Understand the measurement process - Town, County and State record searches - excluded and non included properties - expiring use and conditions - GIS measurement - town's participation and efforts - apportionment of multi unit properties - exceptions yet to be adjudicated - easements - cemeteries -unregistered wetlands &

conservation land - DMH/DMR units- application of town bylaw regarding project bonding for Mugar -

AG Healy recently appointed **Christophe Courchesne** to serve as **Chief of the Environmental Protection Division**. Courchesne will join the Attorney General's Office following his role as a senior attorney at the Conservation Law Foundation's New Hampshire office. Prior to his work at the Conservation Law Foundation, Courchesne practiced environmental, energy, and land use law for more than five years as an associate at Goodwin Procter LLP in Boston. Courchesne previously served as a law clerk at the Massachusetts Supreme Judicial Court for Justice Robert J. Cordy. He is an alum of the BBA's Public Interest Leadership Program, has served as the chair of the Grafton Planning Board A graduate of Harvard Law School and the University of Massachusetts at Amherst, Courchesne resides in East Kingston, New Hampshire. Attorney Courchesne's paper *What Regional Agenda? Reconciling Massachusetts Affordable Housing Law and Environmental Protection*, written in May 2003 provides a great insight into 40B vs environmental concerns. Well worth your reading if you are dealing with a 40B project. I'll be happy to supply a copy for the Commission to copy but I can't afford to provide copies for all as it's 44 pages and Staples charges a lot per page. Or even easier you may access it on line at http://www.law.harvard.edu/students/orgs/elr/vol28_1/courchesne.pdf

PROTECTED OPEN SPACE - LEAVING LEGAL FOOTPRINTS

The Problem

Town-owned conservation land and parkland may not be legally protected open space.

Open Spaces across the Commonwealth may not be as protected from development as we thought. A recent ruling by the Massachusetts Supreme Judicial Court (June 2005 *Town of Hanson v. Lindsay*) found that land acquired for conservation purposes as stipulated in the Town Meeting Vote, but *not* subsequently reflected in the deed, can be “disposed”, (in this case it was sold), without going through a stringent public review process. In this particular case, the town meeting vote required that the deed reflect the conservation designation and when the deed did not have the conservation language, the court found that it was not conservation land, and not subject to Article 97.

Legally Protected Open Spaces

Some Background

Citizens of Massachusetts have a state constitutional *right to a clean environment* as first established under an amendment adopted in 1918. Subsequently, Article 97 of the Articles of Amendment to the Massachusetts Constitution provides that “the people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment.” “Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.” These public lands include both state-owned lands and municipal lands acquired for conservation or recreation purposes.

Article 97

Philosophy of Article 97 – 1973 Opinion of Attorney General Quinn:

- Public has the right to clean air, water, freedom from excessive noise, natural, scenic, historic, esthetic qualities of their environment. (“The fulfillment of these rights is uniquely carried out by parkland acquisition.”)
- Land Protection: “the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources... in harmony with their conservation.”

The Quinn opinion broadly defines lands acquired for Article 97 purposes, asserts a wide definition of “natural resources” protected, gives examples of both conservation and recreation lands that are protected, and applies this protection to lands acquired both before and after the effective date of Article 97. “[W]hile small greens remaining as the result of constructing public highways may be excluded, it is suggested that parks, monuments, reservations, athletic fields, concert areas and playgrounds clearly qualify.”

Removing Land from Legal Protection under Article 97

EOEA Article 97 Disposition Policy - No Net Loss

The policy of EOEA and its agencies is to protect, preserve and enhance all open space areas covered by Article 97 of the Articles of Amendment to the Constitution of the Commonwealth of Massachusetts. The goal of this policy is to ensure no net loss of Article 97 lands under the ownership and control of the Commonwealth and its political subdivisions (*i.e.*, municipalities and counties.) Exceptional circumstances must exist for EOEA and its agencies to support an Article 97 disposition. Determination of “exceptional circumstances” includes a finding that all options to avoid the Article 97 disposition have been explored and no feasible and substantially equivalent alternatives exist, including the evaluation of other sites for the proposed activity.

EOEA's Disposition Process – Purposefully Onerous

- 1) Municipal conservation commission must vote that the land is surplus to its needs
- 2) Municipal park commission must vote the same if it is parkland in question
- 3) Town Meeting or City Council must also vote to remove the land from protected status
- 4) Municipality must file an Environmental Notification Form with EOEAs MEPA Unit
- 5) The disposition request must pass by a two-thirds vote of the Massachusetts Legislature and be signed by the Governor.

Finally, if the property was either acquired or developed with grant assistance from EOEAs Division of Conservation Services (DCS) (*i.e.*, Self-Help, Urban Self-Help or Land and Water Conservation Fund), the converted land must be replaced with land of equal monetary value and recreational or conservation utility. While conversions do occur, the process is purposefully onerous in an attempt to protect these conservation and recreation lands in perpetuity.

A Solution – Research and Re-record

Research Acquisition History and Deed

Research the acquisition history and deeds for all municipal conservation and parkland and identify those parcels that have affirmative Town Meeting Votes or City Council Orders stipulating that the land is for either conservation or recreation use, and deeds echoing that particular purpose for acquisition. You may discover some surprises as the research uncovers which lands have the most protection as “open space.” The deed may stipulate that the land is to be managed by the conservation commission or park commission, or that it was donated to the town with deed restrictions, or for park or conservation purposes. If the property was acquired or developed with DCS grant assistance, the grant agreement should have been recorded as an adjunct to the deed. The authorizing Town Meeting Vote or City Council Order may also be recorded as an adjunct to the deed (*i.e.*, request that the Register of Deeds or Land Court clerk make a marginal reference on the deed or title).

Consider the following:

- Some publicly owned lands can be sold or developed easily (with local legislative approval) either to private parties or for other public purposes. For example, school playgrounds and ballfields are often not protected parklands.
- Some deed restrictions may only last for a period of years (typically, 30 years) and not in perpetuity.

The Fix - Record a Confirmatory Deed

If you discover that the Town Meeting Vote or City Council Order authorizing the acquisition of a conservation property or park property stated that the land to be acquired was for either conservation or recreation use, but the accompanying deed does not reflect that intent, fix it by recording a corrective deed. Again, it may also be prudent to record the authorizing Town Meeting Vote or City Council Order as an adjunct to the deed.

Sample for Conservation Land

“...hereby grants to the TOWN OF _____, a Massachusetts municipal corporation, through its Conservation Commission for administration, control, and maintenance under the provisions of M.G.L., Chapter 40, §8C, as amended, with _____ covenants the land as bounded and described as follows:...”

Sample for Parkland

“...hereby grants to the TOWN OF _____, a Massachusetts municipal corporation, through its Park Commission (department) for administration, control, and maintenance under the provisions of M.G.L., Chapter 45, §3, as amended, with _____ covenants the land as bounded and described as follows:”

JOB AID FOR PROVIDING LAND AREA INFORMATION OF DMH /DMR HOUSING UNITS LOCATED IN ARLINGTON

While the precise location of DMH /DMR units are for just cause protected from public identification, towns involved in detailing the land area of related units may only have the total count of such units resident in their municipality. This privileged information may be provide and remain anonymous if a DMH / DMR employee uses this process to identify property area, without exposing exact locations.

The Town's assessor's records are on line and may be accessed for a property search at <http://arlington.patriotproperties.com/default.asp>. Type in the street name in the street name block and a list of properties on that street will be displayed. scroll to the address containing a DMH /DMR unit and click on the Parcel ID number that appears in that first column. The next screen will display all of the property details and just above the Narrative Description and under Current Property Assessment and to the left will be displayed the land area in Acres. (Example below)

Current Property Assessment

<u>Card 1 Value</u>	
Year 2015	Building Value 184,400
	Xtra Features Value 0
Land Area 0.142 acres	Land Value 242,400
	Total Value 426,800

In the attached form, record that figure. (Just that figure and no other information!) and repeat the above steps until all DMH / DMR units have had their location's land area figures recorded.

By simply recording each entity as "Property A, B, C,etc." with their land area figure and no specific address, it will satisfy the documentation required by the Department of Housing and Community Development, (DHCD) and the Housing Appeal Committee, (HAC) without exposing the exact location, keeping that information private.

Land Area of DMH / DMR properties residing in Arlington

	Land Area Acres	Notes
Property A		
Property B		
Property C		
Property D		
Property E		
Property F		
Property G		
Property H		
Property I		
Property J		
Property K		
Property L		
Property M		
Property N		
Property O		
Property P		
Property Q		
Property R		
Property S		
Property T		
Property U		
Property V		
Property W		
Property X		
Property Y		
Property Z		

OUTSTANDING ISSUES AND CONCERNS

Data base and records related to MGL c40B

How are the vital statistics recorded and maintained? Conflict resolutions?

Planning's role in ensuring MGL c40B safe harbor calculations are protected

Process needs definition and commitment.

What is the Town's position regarding protecting safe harbor status?

Is the target the 10% SHI level or is it the 1.5% land area?

Will the Town seek a DMH / DMR land area record?

A simple job aid for collecting this record has been provided. Where has it gone?

Will the Conservation Commission impose the bonding requirement for comprehensive permit projects (like Mugar) when wetlands are involved?

Town Meeting passed the bylaw but the Commission must impose.

Will the ZBA require sworn testimony for 40B hearings?

Town Meeting passed the requirement but the ZBA must impose.