



Town of Wayland Massachusetts

To: Wayland Board of Selectmen

From: Daniel C. Hill, Chair
Wayland Planning Board

Re: Chapter 40B Monitoring

Date: March 27, 2018

As you may recall, I wrote to you on May 4, 2016 to bring to your attention a lapse in post-permit monitoring at four residential developments in Wayland permitted under Chapter 40B - Wayland Gardens (Cochituate Road), Wayland Commons (Town Center), Post Road Village (Route 20), and the Nike Site housing development off of Oxbow Road. As I explained in my previous memorandum, each of these projects is governed by a “regulatory agreement” that caps the project’s profit at 20% of development costs. Any profit made by the developer in excess of this profit cap must be given to the Town of Wayland for reinvestment in affordable housing.

The regulatory agreements each provide that upon “substantial completion” of the project, the developer must commission a “cost certification,” prepared by an independent certified public accountant, attesting to the costs and income from the project, which certification must then be filed with the respective project’s “monitoring agent” for review. The purpose of the cost certification is to determine whether there are any excess profits from the project. Of the four projects identified above, only two have filed cost certifications (Wayland Gardens and Nike Site), and as far as I know, neither of those cost certifications has been reviewed for completeness or veracity by the designated monitoring agent or subsidizing agency.

On September 8, 2016, the Board of Selectmen wrote to the designed agencies requesting information on whether cost certifications have been requested and/or reviewed. MassHousing, which is responsible for enforcing the profit cap requirements for the Wayland Commons and Post Road Village projects, responded on September 22, 2016, acknowledging that the developers’ cost certifications were overdue, but not promising to take any action to enforce that filing requirement. We received the cost certifications from DHCD and CHAPA for the Nike Site and Wayland Gardens projects, respectively, but it is unclear whether those agencies have actually reviewed the cost certifications and made the findings it is required to make under the regulatory agreements.

My immediate concern is the continued resistance from MassHousing to fulfill its legal

obligations to enforce the regulatory agreements – we have no evidence that the developers of Wayland Commons and Post Road Village have filed cost certifications, much less that MassHousing has reviewed them and given the Town an opportunity to review them, as required under MassHousing’s rules and procedures. We know as matter of public record that the condo units in those projects sold at prices that exceeded expectations, and it is not uncommon in Chapter 40B development for profits to exceed 20% of development costs – my firm has prosecuted several claims against Chapter 40B developers to recover such “excess profits.”

If there are in fact excess profits from these projects, they should be paid to the Town so that the Town can use them to increase the Town’s affordable housing inventory, which is one of the purposes of Chapter 40B – to encourage municipalities to develop their own affordable housing in order to avoid “unfriendly” comprehensive permit projects that require waivers from town bylaws and regulations.¹

I respectfully request that the Board of Selectmen present MassHousing with a demand, insisting that it fulfill its obligations to enforce the profit cap requirements in the regulatory agreements. If MassHousing persists in obstructing the Town’s efforts to ensure compliance with the regulatory agreements, the Board should be prepared to legal action. Thank you for your attention to this matter.

^{1/} There is a tract of land on Oxbow Road that the federal government is preparing to sell – former Army housing associated with the former Nike missile site. This land would be an excellent site for a small-scale affordable housing development, but the Town lacks the financial resources to make a competitive bid.