March 7, 2019

Peter Forcellese, Chair
Legislative Matters Committee of the Whole
Somerville City Council, City Hall
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VIA EMAIL
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RE: Agenda Item Agenda Item 205420, Somerville Condo Conversion

Dear Chair Forcellese and Members of the Legislative Committee of the Whole:

On behalf of the members of the Greater Boston Real Estate Board who live and work in Somerville we offer the following comments regarding agenda item 205420, the proposed Draft Conversion Ordinance.

If adopted, the Draft Conversion Ordinance would significantly alter the rules regarding condominium conversions in Somerville, including notification requirements, tenant and City rights to purchase a converted unit, and tenant relocation benefits.

GBREB is concerned that the Draft Conversion Ordinance is unreasonably tilted in favor of tenants and would have a negative impact on the property rights of affected owners.

BACKGROUND
Overview of the Massachusetts Condominium Conversion Act

In 1983 the General Court enacted "An Act Enabling Cities and Towns to Regulate the Conversion of Residential Property to the Condominium Forms of Ownership"[1] (the "Conversion Act" or "MCCA") in response to the Commonwealth's shortage of rental housing.[2] The stated purpose of the Conversion Act is "to protect low-to-moderate income, elderly, and handicapped tenants from the loss of rental housing due to condominium conversions."[3]

Grant of Local Authority to Regulate Condominium Conversions

[1] *See* Act of November 30, 1983, ch. 527, 1983 Mass. Acts 926, as amended by Act of January 12, 1990, ch. 709, 1989 Mass. Acts 1181. The Conversion Act is not codified in the General Laws. A PDF copy of the Conversion Act is available online at http://archives.lib.state.ma.us/actsResolves/1983/1983acts0527.pdf.
[2] *See* Douglas E. Chabot, *Casting New Light on a Continuing Problem: Re-Considering the Scope and Protections Offered by Massachusetts's Condominium Conversion Regulations*, 42 SUFFOLK U. L. REV. 101, 107 (2008) (hereinafter "*Casting New Light*").
[3] *Id*.

In addition to creating several specific tenant protections (key aspects of which are summarized in the table below) the Conversion Act expressly authorizes cities and towns to adopt an ordinance or bylaw to protect tenants in a condominium conversion. This grant of authority is located in Section 2 of the Conversion Act, which states, in relevant part:

Any city or town may, by ordinance or by-law, impose provisions or requirements to regulate for the protection of tenants with respect to the conversion of *housing accommodations* to the condominium or cooperative forms of ownership and evictions related thereto which differ from those set forth in this act, upon a two-thirds vote of the city council with the approval of the mayor, in the case of a city, or a two-thirds vote of a town meeting, or town council, in the case of a town; provided, however, that *no such ordinance or by-law which imposes additional provisions or requirements than those set forth in this act shall be applicable to any of the following housing accommodations*:

(i) *housing accommodations constructed or converted from a non-housing to a housing use after the effective date of this act*;
(ii) housing accommodations which were constructed or substantially rehabilitated pursuant to any federal mortgage insurance program, without any interest subsidy or tenant subsidy attached thereto; and
(iii) housing accommodations financed through the Massachusetts Housing Finance Agency, with an interest subsidy attached thereto.[4]

Section 2 also contains the following exemption for cities and towns that have adopted a condominium conversion ordinance or bylaw under the authority of a special act:

Any city or town, which has adopted an ordinance or by-law for the regulation of the conversion of housing accommodations to the condominium or cooperative forms of ownership and evictions related thereto *pursuant to the authority conferred upon such city or town by special act*, shall be exempt from the provisions of this act, and this act shall not be construed to restrict the authority of any such city or town to amend or repeal any ordinance or by-law in accordance with the provisions of such special act.[5]

Under Section 3 of the Conversion Act, "*housing accommodation*" is defined to mean:

any building, structure, or part thereof or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, together with all services connected with the use or occupancy of such property, but not including the following:

(i) housing accommodations which the United States or the commonwealth or any authority created under the laws thereof either owns or operates;
(ii) housing accommodations in any hospital, convent, monastery, asylum, public

[4] MCCA § 2 (emphasis added). The effective date of the MCCA is November 30, 1983.
[5] MCCA § 5 (emphasis added).

institution or college or school dormitory operated exclusively for charitable or educational purposes, or in any nursing or rest home for the aged;
(iii) *buildings containing fewer than four housing accommodations*; [or]
(iv) housing accommodations in hotels, motels, inns, tourist homes, and rooming and boarding houses which are occupied by transient guests staying for a period of fewer than fourteen consecutive calendar days.[6]

Limitations on Local Authority to Regulate Condominium Conversions. The Conversion Act contains several important limitations on the scope of municipal authority to regulate condominium conversions. As will be discussed below, the limitations, in the form of exemptions, that are of particular relevance to the Existing CCO and the Draft Conversion Ordinance are:

- **Exemption for Units Constructed After November 30, 1983**: Under Section 2, housing accommodations constructed or converted to housing use after the effective date of the Conversion Act (November 30, 1983) are exempt from any local ordinance or bylaw regulating condominium conversions.

- **Exemption for Buildings Containing Fewer than Four Units**: Because the definition of "housing accommodation" expressly *excludes* "buildings containing fewer than four housing accommodations," such buildings are exempt from any local ordinance or bylaw regulating condominium conversions.

Somerville's Existing Condo Conversion Ordinance – Adopted by Special Act

Somerville adopted the Existing CCO in 1985 by special act pursuant to "the authority vested in the city by law, including without limitation, Chapter 37 of the Acts of 1976, as amended by Chapter 218 of the Acts of 1985"[7] (the "1985 Special Act"). The 1985 Special Act states, in relevant part:

Notwithstanding ... the provisions of [the Conversion Act] or any other general or special law to the contrary the city of Somerville may establish a condominium review board, and may by ordinance regulate the conversion of housing accommodations in said city to the condominium or cooperative form of ownership and the eviction of tenants incident to the conversion or sale of condominiums. Such ordinance may include, but is not limited to, provisions for investigations into and hearings on condominium conversions or proposed conversions, a permit process, tenant notification requirements and other measures to protect tenants, control of evictions, and penalties for violation of the ordinance....[8]

Under **Section 7-66(a)** of the Existing CCO, the owner of any building that contains one or more rental units must obtain a "removal permit" from the Somerville Condominium

[6] MCCA § 3 (emphasis added).
[7] Existing CCO § 7-61.
[8] Chapter 218 of the Acts of 1985, Section 1 (approved July 31, 1985).

Review Board (the "Board") in order to convert any rental unit(s) into condominiums.[9] In addition, **Sections 7-66(b)** and **(c)** provide that an owner intending to convert rental units into condominiums must give written notice to the tenant at least one year prior to seeking to recover possession, with the exception that an elderly, handicapped, or low- or moderate-income tenant must be given at least two years' notice of the owner's intent to convert.[10] Under **Section 7-69**, a tenant has a 30-day right to purchase their unit following the granting of the removal permit or the filing of the master deed, whichever occurs first. If the tenant and the owner do not execute a purchase agreement during the 30-day period, then the unit cannot be sold at a price or on terms that are more favorable to the prospective buyer than the price or terms offered to the tenant for the next 180 days. Under **Section 7-70** of the Existing CCO, tenants have a right to reimbursement for the costs relocation, up to $300 or one month's rent, whichever is greater.

Key Differences Between the Existing CCO and the Draft Conversion Ordinance

The following table provides a summary comparison of the key differences between the Existing CCO and the Draft Conversion Ordinance. As a further point of reference, the table also contains a third column showing the comparable requirement under the Conversion Act.

COMPARISON: EXISTING CCO, DRAFT CONVERSION ORDINANCE, AND CONVERSION ACT			
	Existing CCO	**Draft Ordinance**	**Conversion Act**
Properties Subject to Ordinance	Properties with one or more rental units (Section 7-64□)	Properties with one or more rental units, but excluding single family dwellings (Section 7-63□)	Properties with four or more rental units (MCCA § 3)
Event Triggering Notification Requirement	Notice required at least one year before filing of master deed[11] (Section 7-67)	Notice required when owner has "intent to convert"[12] (Section 7-64(a)□)	Notice required when owner has "intent to convert" (MCCA § 4(a))

[9] *See* Existing CCO § 7-66(a).
[10] *See* Existing CCO § 7-67(b), (c).

[11] If a master deed was already filed, landlord must give required notice one before initiating an eviction action (or two years in the case of disabled, elderly or low/moderate income tenants). *See* Existing Condo Conversion Ordinance § 7-67.
[12] "Intent to Convert" is defined at Section 7-63 of the Draft Ordinance.

COMPARISON: EXISTING CCO, DRAFT CONVERSION ORDINANCE, AND CONVERSION ACT			
	Existing CCO	**Draft Ordinance**	**Conversion Act**
Notification Requirements	1-year notice of intent; 2-year notice of intent for disabled, elderly or low/moderate income tenants (Section 7-67(a)-(c))	1-year notice of intent; 5-year notice of intent for disabled, elderly or low/moderate income tenants (Section 7-64(a)(ii))	1-year notice of intent; 2-year notice of intent for physically disabled, elderly or low/moderate income tenants (MCCA § 4(a))[13]
Tenant Right to Purchase	30-day right to purchase; unit cannot be sold on more favorable terms for 180 days (Section 7-69(b)-(c))	120-day right to purchase; elderly, disabled and low/moderate income tenants have 180-day right to purchase (Section 7-64(c))	90-day right to purchase (MCCA § 4(b))
City Right to Purchase	None	City has a concurrent 120-day right to purchase, with tenant having priority; for unoccupied units, City has a 120-day right to purchase (Section 7-64(c))	None
Reimbursement for Tenant Relocation Costs	Owner must reimburse relocation costs up to $300 or one month's rent, whichever is greater, for tenant whose income level meets Section 8 qualifications (Section 7-70)	Flat fee reimbursement of $10,000 for elderly, disabled or low/ moderate income tenants; $6,000 for all other tenants (Section 7-64(d))	Reimbursement of documented expenses of up to $1,000 for elderly, disabled or low/ moderate income tenants; up to $750 for all other tenants (MCCA § 4(c))

[13] The notification period for elderly, disabled and low/moderate income tenants is extended by two years if no comparable housing is located. *See* MCCA § 4(d).

COMPARISON: EXISTING CCO, DRAFT CONVERSION ORDINANCE, AND CONVERSION ACT			
	Existing CCO	**Draft Ordinance**	**Conversion Act**
Obligation to Assist Tenant in Finding Comparable Housing	None	Landlord must assist elderly, disabled or low/ moderate income tenants to locate comparable housing; failure to do so extends the occupancy for 2 years (Section 7-64(e))	Landlord must assist elderly, disabled or low/ moderate income tenants to locate comparable housing; failure to do so extends the occupancy for 2 years (MCCA § 4(d))
Penalty for Violation	Violation or false statement punishable by fine of not more than $200 (Section 7-76)	Violations punishable by fine of not less than $1,000 or per Code Section 1-11 (Section 7-65□)	Violations punishable by fine of not less than $1000 or imprisonment for not less than 60 days; each unit converted in violation is a separate offense (MCCA § 5)

GBREB believes that however well intended the Draft Conversion Ordinance would make it unreasonably difficult, if not infeasible, for owners to convert rental properties into condominiums. These provisions are:

▪ **Section 7-64(a)(iii)**, which would require that disabled, elderly, or low/moderate income tenants be given at least five years' notice of the owner intent to convert. Moreover, as discussed below, under Section 7-64(e), if the landlord is not able to find comparable rental housing with a rental fee equal to or less than the tenant's then-current rent, the notice period would be extended an additional two years. Under those circumstances, an owner would have to wait at least seven years to convert the affected rental units into condominium units.

▪ **Section 7-64(d)**, which would require owners to pay a flat fee reimbursement of $10,000 for elderly, disabled or low/moderate income tenants and $6,000 for all other tenants. The owner of a three-unit building, for example, would have to pay between $18,000 and $30,000 in relocation fees alone, depending on whether any of the units are occupied by elderly, disabled or low/moderate income tenants. Simply put, for many rental property owners, particularly individual owners with limited financial resources, the proposed "relocation benefit" fees could be prohibitive.

▪ **Section 7-68(d)**, which would allow the Review Board to deny a Conversion Permit if it finds that "the hardships imposed on tenants justify a denial." This provision is especially problematic because it lacks standards to be applied by the Review Board in determining what constitutes a hardship that justifies the denial of a Conversion Permit. For example, if the owner has fully complied with the requirements of the Draft Conversion Ordinance, could the Review Board find a hardship justifying a denial in a case where a tenant has not yet found new housing—despite having received the required notice (either one or five years), and declined the right to purchase the unit and the promise of a $10,000 or $6,000 relocation benefit? The lack of clarity as to what constitutes a hardship justifying the denial of a Conversion Permit could, by itself, be sufficient to discourage some rental property owners from investing the time and resources necessary to convert their property.

GBREB maintains that the proposed Section 7-68(d) is vague with regard to the Review Board's authority to deny or impose conditions on a Conversion Permit. These key standards of the Draft Conversion Ordinance are vague and therefore vulnerable to challenge under the "void for vagueness" doctrine.

In general, a law can be held invalid under the "void for vagueness" doctrine if its language lacks sufficient clarity or certainty and therefore is subject to arbitrary and discretionary interpretation, application, and enforcement. The "void for vagueness" doctrine is a constitutional doctrine rooted in the procedural due process clause of the Fourteenth Amendment to the U.S. Constitution.[14] In Massachusetts, the "principles governing a vagueness challenge ... are well established."[15] In a 1995 decision applying the void for vagueness test, the Supreme Judicial Court explained that:

A law is void for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." A statute must define an offense only with sufficient definiteness so that ordinary people can understand what conduct is prohibited and so that it does not encourage arbitrary and discriminatory enforcement.[16]

In Proposed Section 7-68(d) of the Draft Conversion Ordinance, several standards that apply to the Review Board's determination whether to issue a Conversion Permit are sufficiently imprecise that they may be vulnerable to challenge on void for vagueness grounds. Section 7-68(d) states that the Review Board can deny a conversion permit application if it finds that "the hardships imposed on tenants justify a denial." It also authorizes the Review Board to "impose reasonable conditions on the granting of a permit." Lastly, Section 7-68(d) would authorize the Review Board to deny a Conversion Permit "in its discretion," if the Review Board finds that the owner has "taken any action to circumvent the state or local condominium law, including but not limited to, unreasonable rent increases, reduction or

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[14] *See* BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 1:19 (Thomson-Reuters: 2018) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 868 (1973)).
[15] *See Commonwealth v. McGhee*, 472 Mass. 405, 413-14 (2015).
[16] *Doe v. Superintendent of Sch*., 421 Mass. 117, 143 (1995) (citing *Caswell v. Licensing Comm'n for Brockton*, 387 Mass. 864, 873, 444 N.E.2d 922 (1983), *Commonwealth v. Taylor*, 413 Mass. 243, 248, 596 N.E.2d 333 (1992)).

elimination of services, termination of tenancy without cause, or the imposition of new conditions of the tenancy."

Proposed Section 7-68(d) is vague in the following respects. First, it fails to define or provide standards for the Review Board to apply in determining whether the "hardships imposed on the tenants justify a denial" of a Conversion Permit. Given the lack of precision and clarity as to what constitutes such a hardship, Section 7-68(d) is vague and susceptible to arbitrary and discriminatory interpretation and application. Because Section 7-68(d) would authorize the Review Board to deny a Conversion Permit on hardship grounds without any guidance in the form of standards to be applied in determining whether such a hardship exists, a strong case can be made that "persons of common intelligence" would necessarily have to guess at the meaning of "hardships imposed on the tenants [that] justify a denial" and would differ as to its application.

Second, Section 7-68(d) likewise fails to define or provide any guidance in the form of standards to be applied by the Review Board in determining the types of conditions that can reasonably be imposed on a Conversion Permit. For example, could the Review Board impose a condition requiring that an owner pay a relocation fee that exceeds the $10,000 or $6,000 amounts called for under Section 7-64(d)? Would a condition that requires an owner to find comparable housing at a rental fee at or below the tenant's current rent before the Conversion Permit can be issued be considered a "reasonable condition"?

Lastly, other than the examples given (e.g., unreasonable rent increases or the reduction or elimination of services) it is not clear how or on what basis the Review Board could make a finding that an owner has taken any action to "circumvent" the Conversion Act or the Draft Conversion Ordinance. Even the examples given are vague and susceptible to interpretation. For example, what constitutes an "unreasonable rent increase"? Would a 10% increase be unreasonable?

GBREB believes that proposed Section 7-64(e) is likely to convert the five-year notice period for elderly, disabled, and low or moderate income tenants into a de facto seven-year notice period.

Under proposed **Section 7-64(a)(iii)**, a rental property owner generally would have to give tenants written notice of their intent to convert at least one year prior to the date that the tenant is required to vacate the premises. However, in the case of any "elderly, disabled, or low/moderate income tenant," the notice requirement is extended to five years— more than double the two-year notice requirement under the Existing CCO and the Conversion Act. Moreover, under **Section 7-64(e)**, the five-year notice requirement for elderly, disabled, or low/moderate income tenants can be extended an additional two years, for a total notice period of seven years.

Proposed **Section 7-64(e)** would require rental property owners to "assist elderly, disabled, and low or moderate income tenants ... by locating, within the five-year period of the notice to such tenants, comparable rental housing within the City of Somerville which rents, for at least the remainder of the notice period, for a sum which is equal to or less than the sum which any such tenant had been paying for the tenant's unit." If the owner is unable to find such comparable housing, then the five-year notice period would be extended "until the owner locates such comparable rental housing, or for two additional years, whichever occurs first."

While it may good public policy for the City to require owners to assist elderly, disabled, or low/moderate income tenants in locating new housing, the requirement that the five-year notice is extended for an additional two years in cases where the owner is unable to find such comparable housing arguably is not reasonable. By its own terms, the Draft Conversion Ordinance declares the rental housing market to be in a state of emergency. Section 7-61, titled "Declaration of Emergency," states that Somerville has a "substantial and increasing shortage of rental housing, especially for the elderly, the disabled, and persons and families of low and moderate income." In light of this rental housing emergency, it arguably is not realistic to expect an owner to find comparable rental housing that rents at or below a tenant's current rental fee. Simply put, to the extent that it is highly unlikely, or possibly infeasible, that owners will be able to find comparable rental housing that rents at or below an elderly, disabled, and low or moderate income tenant's then current rental fee, proposed Section 7-64(e) arguably converts the five-year notice period for elderly, disabled, and low or moderate income tenants into a de facto seven-year notice period.

<u>GBREB would point out that the Draft Conversion Ordinance could have the unintended consequence of further exacerbating the shortage of rental housing in Somerville by discouraging the production of new rental housing units.</u>

According to the "Declaration of Emergency" in Section 7-61, Somerville has a "substantial and increasing shortage of rental housing, especially for the elderly, the disabled, and persons and families of low and moderate income." Section 7-61 attributes its rental housing emergency to a combination of factors, including the lack of rental housing production in and around Somerville, and the conversion of rental housing into condominiums or cooperatives.

While the Draft Conversion Ordinance presumably is intended to address the conversion issue, it will do nothing to increase the <u>production</u> of rental housing in the City. In fact, it can be argued that by making it significantly more costly and more difficult to convert rental housing into a condominium or cooperative, the Draft Conversion Ordinance could have the unintended consequence of discouraging the production of rental housing in Somerville. In other words, unless market conditions strongly favor the production of rental housing over for sale units, residential developers who otherwise might choose to build multifamily apartment housing may choose instead to build residential condominium rather than risk the high cost, lengthy process, and uncertainties involved in converting rental housing down the road.

<u>Lastly, the proposed flat-fee "relocation benefit" amounts are unreasonable because they bear no relation to a tenant's rental fee or actual relocation costs.</u>

GBREB questions the fairness of the requirement that the landlord make a flat fee "relocation benefit" payment of $10,000 or $6,000 to a tenant whose lease is expiring. GBREB also questions the basis for the proposed flat fee relocation benefit approach and urges the City to consider replacing it with a requirement that tenants be reimbursed for their actual, documented relocation expenses, up to a maximum amount. GBREB points to Section 4(c) of the Conversion Act as one example of this approach.

Proposed **Section 7-64(d)** of the Draft Conversion Ordinance would require rental property owners to pay flat fee "relocation benefit" of $10,000 per unit for elderly, disabled, and low or moderate income tenants and $6,000 per unit for all other tenants. These relocation payments presumably are intended to provide financial assistance for affected tenants faced with relocation costs such as moving expenses, rent deposits, and the general disruption of life that accompanies any move. However this requirement raises a number of concerns from the standpoint of a property owner.

First, it is not clear why the owner of a building that is being converted to condominiums should pay to relocate tenants after their lease has expired. If the building were not slated for conversion to condominiums, the tenant would be expected to move after the expiration of a lease, and presumably would have to assume the costs of that effort. Why should the fact that the owner is in the process of changing the form of ownership of the building at the time the lease expires mean that the landlord has to bear the burden of a substantial relocation payment?

Second, it is not clear on what basis the proposed relocation payment amounts were established. Moreover, even if one assumes that it is appropriate to require landlords to make a relocation payment, the proposed flat-fee amounts are unreasonable because they bear no relation to a tenant's rental fee or actual relocation costs. The unreasonableness of the flat-fee approach is evident when one considers that under proposed Section 7-64(d) an individual tenant of a 500 square foot studio apartment would receive the same relocation benefit ($6,000) as a family of four renting a 1,500 square foot two-bedroom apartment. In addition to being disproportionate to the amount of rent paid by these hypothetical tenants, the flat fee relocation benefit likely would have no relation to the actual relocation costs of each party.

If a relocation benefit cannot be avoided altogether, then a better and more fair approach would be to require that tenants affected by a condominium conversion be reimbursed for their <u>actual</u> relocation costs, up to a maximum amount. The Conversion Act takes this approach, requiring landlords to reimburse tenants for documented relocation expenses up to a maximum of $1,000 for elderly, disabled, and low or moderate income tenants and up to

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$750 for all other tenants.[17]

In addition, the relocation benefit may be vulnerable to challenge as an *unconstitutional exaction* under the United States and Massachusetts Constitutions. The relocation benefit requirement arguably implicates the *Koontz*[18] requirement that a governmental approval may not be tied to a condition that cannot satisfy the *Nollan/Dolan* "dual rational nexus" test.[19] It is questionable whether a flat fee relocation benefit requirement could satisfy the *Nollan/Dolan* requirement that the amount or extent of the exaction must be "roughly proportional" to the project's impact.

Thank you for the opportunity to submit this letter. Should you have any questions regarding the materials referenced herein, please do not hesitate to contact me.

Very truly yours,

Patricia Baumer

Patricia Baumer
Director of Government Affairs
Greater Boston Real Estate Board

[17] *See* Conversion Act § 4(c).
[18] *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013).
[19] *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 687 (1994).