

# Questions and Answers About Chapter 40T

Prepared by the Massachusetts Coalition for Healthy Communities, [www.masschc.org](http://www.masschc.org)  
Revised 6/18/07

Below are some questions and answers about the proposed Chapter 40T law. The answers provided here are based upon a careful reading of the current text of House 159 as filed in the 2007 legislative session. (Senate 146 is a similar bill in the Senate.) Footnotes can be found at the end of the document.

## CONTENTS

1. SUMMARY
2. KEY CONCERNS
3. WHAT ARE THE CLAIMED BENEFITS OF 40T?
4. HOW WOULD CHAPTER 40T WORK?
  - 4A. CREATION OF THE LOCAL IMPROVEMENT DISTRICT (LID)
  - 4B. POWERS OF THE LOCAL IMPROVEMENT DISTRICT (LID)
  - 4C. THE GOVERNING “PRUDENTIAL COMMITTEE”
  - 4D. OPERATION OF THE LOCAL IMPROVEMENT DISTRICT

### 1. SUMMARY

Chapter 40T allows the creation of a new “**political subdivision of the commonwealth**” that would function within existing towns or cities. Certain governmental powers would be placed in the hands of an **unelected panel** that would initially be selected by major landowners. While proponents describe certain benign uses of these powers, it is clear that very **disturbing abuses** could result. The developer-selected panel would be allowed to bypasses fundamental democratic rights and to ignore normal public interest safeguards. Chapter 40T disempowers voters, homeowners and tenants, and allows worrisome financial risks to be imposed on residents, municipalities and investors alike. The assessments it imposes would add to an already onerous **property tax burden**, and would tend to skew **property tax priorities** towards private, profit-making ventures, and away from more urgent municipal needs such as schools, public safety etc.

### 2. KEY CONCERNS

- Chapter 40T allows landowners to petition for creation a of *local Improvement Districts (LID)*, which then becomes a new “**body politic**” and “political subdivision of the Commonwealth”<sup>i</sup>. Within the LID, key functions of local government are assumed by a governing committee (the “Prudential Committee”) initially appointed by the major landowners. Chapter 40T would tend to produce a committee composed of persons with personal financial interests in the infrastructure projects.
- 
- 40T allows the new District to **issue tax-exempt bonds to fund infrastructure projects and to impose property taxes (“assessments”)** to repay those bonds. This takes place **without voter approval** of the tax increases, the proposed development, and without observing the limits imposed by **Prop 2** <sup>ii</sup>. Homeowners and tenants may find themselves forced to subsidize private, for-profit ventures they oppose, and that adversely impact quality of life and the environment. If

some property holders – such as a developer with cash flow problems– default, the remaining homeowners would be required to pay spiraling assessments to pay off the bonds. Chapter 40T allows a developer’s risks and cash flow problems to be handed off to the unlucky homeowners in the development district.

- **The LID can pass its own bylaws, fine violators and enjoy liability protection.** The **bill exempts the LIDs from oversight** by the Department of Revenue<sup>iii</sup>, public records law<sup>iv</sup>, prevailing wage standards<sup>v</sup> for service contractors, laws governing public construction<sup>vi</sup>, civil service<sup>vii</sup>, conflict of interest<sup>viii</sup> and more. This creates an **open invitation to insider-deals and the misuse of power governmental powers to advance private profit.**
- **The bill tramples on tenant rights** by denying residents who don’t own property any voice in the establishment or function of the LID. Despite this, tenants are asked to bear the costs as increased property assessments are passed along as **rent increases.**
- 
- A majority vote of the municipal governing body is required to approve the developer petition and create a LID. While this is a possible point at which the premise of the LID could be questioned, it is far from an adequate protection of the public interest, especially given the history of developer influence on elected officials in the Commonwealth. Nowhere else in Massachusetts law is a municipal board empowered to create an entirely new “body politic” without further review or voter consent. This single vote **would in effect override a whole spectrum of existing rights and statutes.** This single vote would confer, among other things, **virtually unlimited authority to tax and unprecedented exemptions from democratic, public interest, consumer, homeowner, worker and investor safeguards.** Once the vote is taken, the LID is guaranteed to exist for 40 years without any provision for repeal.
- Chapter 40T is **fundamentally different from bills in other states, such as California, that have been successfully** used to fund needed infrastructure such as schools, libraries and water systems. Other states do not create political sovereignty for unelected developer-selected panels. In other states, these infrastructure bills create funding tools that are under democratic government control. In striking contrast to 40T, **the California law (referred to as “Mello-Roos”), requires approval by 2/3rds of the voters** before a LID type district can be established. And **voters are allowed to establish the maximum tax rate** at the time the district is approved.
- 

### 3. WHAT ARE THE CLAIMED BENEFITS OF 40T?

#### **Q: What is the stated purpose of the bill?**

A: The stated purpose is to provide a new way of **funding “public” infrastructure and facilities associated with land development.** This would be done by creating “Local Improvement Districts” (LIDs) that could issue bonds to obtain funding. The district - under direction of an appointed “Prudential Committee” - would then **levy assessments** on all properties in the district in order to pay for the bonds.

#### **Q: What is the appeal of the bill to developers ?**

A: 40T benefits politically influential developers because it would give them **huge financial advantages** in the real estate market - such as the ability to issue tax-exempt bonds to fund part of their development costs. It would also free them from many **regulatory constraints** and allow them to fashion bylaws and assessments to benefit their project and, in some cases, put competitors at a disadvantage. It should be noted that Chapter 40T was largely written and promoted by bond lawyers, who would stand to pocket large commissions for overseeing the bond issues under the law.

**Q: What is the potential appeal of the bill to a municipal governing board?**

A: There are two categories of appeal: Personal and municipal. On the personal side, some members of governing boards have real estate interests of their own and may have political or business relationships with the petitioners, many of whom are major donors to political campaigns. On the municipal side, Chapter 40T projects could result in an increase in taxable property, could bring economic development, and might provide infrastructure that provides a public benefit beyond just supporting the development itself. Each community would have to assess whether the benefits of development were worthwhile given the costs of development in terms of increased cost of municipal services, traffic congestion, pollution, sewer loading, etc. Some municipal boards may see Chapter 40T as a **way around Proposition 2 1/2** limits on the revenues that can be raised through property taxes. And 40T would allow municipalities to **evade their own bond caps**, expanding bonding in the city without hurting their bond ratings.

**Q: Are there alternatives to Chapter 40T?**

A: Yes. Massachusetts already has laws such as Chapter 80, betterment districts, Chapter 40Q (District Improvement Financing), and Infrastructure Improvement Investment (I-Cubed) to allow municipalities to issue bonds for genuine public-interest but project-specific uses. State grants and self-help funding can be tapped for certain projects. Unlike Chapter 40T, none of these alternatives requires **creating new political entities with broad, unregulated powers**.

**4. HOW WOULD CHAPTER 40T WORK?**

**4A. CREATION OF THE LOCAL IMPROVEMENT DISTRICT (LID)**

**Q: How is a Local Improvement District formed?**

A: Land-owner(s) who own 80% of the acreage and taxable parcels in the district<sup>ix</sup> petition for approval of the District, and its proposed “improvement plan,” by the municipal governing body<sup>x</sup>. The petitioners do not have to live in the District. **Non-land owners, such as residential and business tenants, do not count in the petition process**. Although there is a public hearing, there is **no popular vote** on the District’s formation on behalf of the people living in the district.

**Q: Are the existing homeowners who would be included in a Special Improvement District allowed to vote on whether the district should be created?**

A: No. A vote of approval by 2/3 of the affected residents is required in Mello-Roos law in California. But no such vote is required under Chapter 40T. The petition must be approved by a majority of the City Council, or Board of Selectmen. (If the proposed District encompasses land of an owner who opposes the development, approval by a majority of Town Meeting would be required in addition to the Board of Selectmen.)<sup>xi</sup>

**Q: Does the single vote of approval required of the Board of Selectmen or City Council provide adequate protection against creation of a district that will be harmful to the public interest?**

A: Some bad petitions will undoubtedly be rejected. But there is a very real problem in Massachusetts with real estate industry influence upon elected boards. In some cases, developers run for office because they seek to influence local decision-making. If 3 of 5 selectmen come under the influence of a particular local developer, a district can be approved. Chapter 40T will provide a very attractive payoff for any developer who can engineer a takeover, even if temporary, of a local Board of Selectmen or City Council. This will further motivate real estate interest intrusion into local government. Furthermore, as municipalities fall deeper into fiscal crisis, land development decisions are “fiscalized” and Chapter 40T development schemes may be viewed as the only way to stave off

fiscal collapse. Chapter 40T does not promote the type of decision-making that focuses upon the long-term good of the community.

**Q: If a Board of Selectmen or City Council improperly approves a special improvement district, and are defeated in a subsequent election, can the new Board of Selectmen repeal the district?**

A: No. According to Chapter 40T, the district stays in place for at least 40 years even if every person in the host community wants to see it eliminated. The district can keep itself in existence after 40 years by merely issuing some new bonds.<sup>xii</sup>

#### **4B POWERS OF THE LOCAL IMPROVEMENT DISTRICT**

**Q: What powers does the new developer-controlled “body politic” have?**

A: Among their rights are the following:

- 1) The explicit right to *bypass Proposition 2 1/2*, and impose property taxes (“assessments”) beyond the 2 1/2% cap without voter approval.
- 2) The right to issue *tax-exempt bonds* without being subject to normal anti-fraud or consumer protection laws,
- 3) The right to adopt *bylaws* regarding the operation of their projects and to fine persons violating those bylaws,
- 4) The right to sue and be sued,
- 5) The right to acquire property both inside and outside of the LID,
- 6) The right to operate profitable *“infrastructure” facilities*, such as parking garages and sports/entertainment venues, *without paying any state or local taxes*,
- 7) The right to decide by the developer-controlled governing panel (the “Prudential Committee”) certain issues that Massachusetts laws currently requires be put to popular vote.

**Q: What types of projects could be funded?**

A: In addition to standard infrastructure, 40T imposes taxes (“assessments”) to pay for performing arts and recreational venues, parking garages, and other potentially profitable, and potentially privatized, facilities. The residents of a LID could find themselves paying off bonds for facilities they can’t afford to use, and that substantially diminish the quality of community life.

According to House 159, projects could include “storm drainage systems, dams, sewage treatment plants, sewers, water and well systems, roads, bridges, culverts, tunnels, streets, sidewalks, lighting, traffic lights, signage and traffic control systems, parking, including garages, public safety and public works buildings, parks, landscaping of public facilities, *cultural and performing arts facilities, recreational facilities, marine facilities* such as piers, wharfs, bulkheads and sea walls, transportation stations and related facilities, *shuttle transportation equipment*, fiber and telecommunication systems, facilities to produce and distribute electricity, including alternate energy sources such as co-generation and solar installations” and funds for cleaning up environmental contamination on the site.<sup>xiii</sup>

**Q: Do the projects undertaken by the “Prudential Committee” have to be consistent with existing local master plans and state land use and transportation planning?**

A: When formed, the municipal governing body must find that the development plan is “**not inconsistent**” with the municipal master plan. There is no further requirement for coordination with the municipality as the district plan unfolds. There is **no provision at all for review for consistency with state or regional plans.**

**Q: Are the additional taxes (“assessments”) imposed by the “Prudential Committee” constrained by Proposition 2 1/2?**

A: No. They are imposed in addition to any taxes the host municipality might impose under Proposition 2 1/2.

**Q: What are the other voting rights that are taken away from residents in the District by Chapter 40T?**

A: Several current laws pertaining to water supplies and water rates require a vote of the municipal officials or of the registered voters of a municipality. These rights would be negated by Chapter 40T. After listing the specific laws, House 159 states that “any requirement in said chapters for a vote by the governing body of a district, town or city or for a vote by the voters of a town, city or district shall be satisfied by a vote or resolution duly adopted by an annual or special meeting of the prudential committee.”<sup>xiv</sup> [Section 3(b)12

**Q: What competitive advantage does the district have in issuing bonds? What’s wrong with giving them these advantages?**

A: The district can issue tax-exempt bonds, just as if it were a municipal government. The right to issue tax-exempt bonds has traditionally been reserved for true governmental bodies that are serving the public interest. Under Chapter 40T, a bond issuance solely to benefit a real estate developer would be competing in the bond market with bonds for hospitals, schools, and other public interest projects. Municipalities would probably have to increase their interest payments in order to compete with Chapter 40T bonds. *Businesses that were not politically favored* with the creation of a LID would have to raise money in less advantageous ways, and would be at a *serious competitive disadvantage*. Under Chapter 40T, *real estate development in Massachusetts will become even more intimately entwined with insider politics than it is now*.

#### 4C. THE GOVERNING “PRUDENTIAL COMMITTEE”

**Q: Why is a prudential committee any different from other governmental bodies?**

A: W governments are assumed to operate in the public interest and to adhere to democratic principles, this new body politic *can operate solely to enrich private parties* and its officials are appointed by those very private parties. Chapter 40T *exempts the developer-government from essential safeguards for protecting democracy and the public interest*: elections (and accountability to the voters), oversight by the Department of Revenue<sup>xv</sup>, conflict of interest protections, Public Records Law obligations<sup>xvi</sup>, laws governing public construction<sup>xvii</sup>, prevailing wage provisions<sup>xviii</sup>, civil service<sup>xix</sup>, Prop 2 1/2<sup>xx</sup> and more.

**Q: Who chooses the ”Prudential Committee” that is granted critical governmental powers?**

A: For the first five years, the members of the “Prudential Committee” are those persons selected by the developer(s) who petitioned for the creation of the district.<sup>xxi</sup> In the first five years, most of the key decisions regarding the projects undertaken and the assessments to be imposed will have been made. Thereafter, members are appointed by the mayor with City Council approval or the Board of Selectmen. The owners or occupants of the whole District never get to vote for the Prudential Committee. There are no term limits.

**Q: Are the members of the “Prudential Committee” subject to conflict of interest safeguards?**

A: They must disclose their financial interests. After doing this, they are allowed to freely act on matters in which they have personal financial interests.<sup>xxii</sup> Since the purpose of the district is often to promote a developer’s financial interests, it’s no surprise that **40T has been effectively exempted from conflict-of-interest protections.**

#### **4D. OPERATION OF THE LOCAL IMPROVEMENT DISTRICT**

**Q: Does the district pay property taxes on its holdings to compensate the host community for municipal services provided to it?**

A: **No.** According to Chapter 40T: “the local improvement district shall not be required to pay any tax, excise or assessment to or from the commonwealth or any of its political subdivisions.”<sup>xxiii</sup> Thus, a golf course owned by the district would not even pay state excise taxes, much less local property taxes. Other privately owned property within the district, including that of homeowners unwillingly incorporated into the district, or businesses competing with the district-owned facilities, would still be subject to the normal state and municipal taxes.

**Q: What percentage of housing built in a local improvement district must be affordable?**

A: **None.** It is unlikely that a developer seeking to maximize profits would build any affordable housing in a local improvement district. This creates difficulties for local housing initiatives. Construction of unaffordable housing would consume buildable land that might otherwise be used for affordable units. Adding unaffordable units would also make it more difficult for the host community to meet state guidelines for the percentage of affordable units in the municipality.

**Q: Are there any provisions for disclosure of Chapter 40T assessments to potential homebuyers within the district?**

A: **No.** This was a problem in California where homebuyers have been unaware that they would be paying stiff district assessments in addition to the municipal property taxes. For this reason, California added disclosure requirements.

**Q: What happens if a project fails and the developer goes bankrupt before the “improvements” are finished? Does the host municipality have to clean up the mess? Will government funds invested in the bonds be lost?**

A: A failing project could generate substantial costs that would probably be borne by the municipality and by existing homeowners within the district. The level of risk to which the developer chooses to expose himself in his search for higher profits is likely to be much greater than the risk that the municipality or existing homeowners would accept if given a choice.

---

<sup>i</sup> Sec. 1a, 2a

<sup>ii</sup> Sec. 5a: “The infrastructure assessments established by the assessing party shall not be subject to supervision or regulation by any department, division, commission, board, bureau, or agency of the commonwealth or any of its political subdivisions, including without limitation, the municipality, if it is not the assessing party, **nor shall the assessing party be subject to the provisions of sections 20A and 21C of chapter 59.**” [Sections 20A and 21C of chapter 59 are Prop 2 \_ provision.]

---

<sup>iii</sup> Sec. 5a: “The infrastructure assessments established by the assessing party shall not be subject to supervision or regulation by any department, division, commission, board, bureau, or agency of the commonwealth or any of its political subdivisions, including without limitation, the municipality...”

<sup>iv</sup> Sec. 9: “...the local improvement district’s receipts, expenditures, disbursements, assets and liabilities, which shall be open to inspection by any record owner of land within the development zone, or duly appointed officer or duly appointed agent of the commonwealth or the municipality.

<sup>v</sup> Sec. 3d(6)

<sup>vi</sup> Sec.3 (d)(6).

<sup>vii</sup> Sec. 3d(6)

<sup>viii</sup> Sec. 10

<sup>ix</sup> Sec. 2b

<sup>x</sup> Sec. 3a,b,c,d.

<sup>xi</sup> Sec. 3(c)

<sup>xii</sup> Sec.15

<sup>xiii</sup> Sec. 1, (“Improvements”)

<sup>xiv</sup> Sec 3(b)12.

<sup>xv</sup> Sec. 5a: “The infrastructure assessments established by the assessing party shall not be subject to supervision or regulation by any department, division, commission, board, bureau, or agency of the commonwealth or any of its political subdivisions, including without limitation, the municipality...”

<sup>xvi</sup> Sec. 9: “...the local improvement district’s receipts, expenditures, disbursements, assets and liabilities, which shall be open to inspection by any record owner of land within the development zone, or duly appointed officer or duly appointed agent of the commonwealth or the municipality.

<sup>xvii</sup> The prevailing wage law would not apply to service workers. Sec.3 (d)(6).

<sup>xviii</sup> Sec. 3d(6)

<sup>xix</sup> Sec. 3d(6)

<sup>xx</sup> Sec. 5a: “nor shall the assessing party be subject to the provisions of sections 20A and 21C of chapter 59.”

<sup>xxi</sup> Sec. 2(b)3: “if a local improvement district is to be established, the designation by the petitioners of 5 persons that are either record owners of real estate within said development zone or designees of said owner or owners to be the initial members of the prudential committee; provided further, that initial members of the committee shall serve for a term not to exceed 5 years”

<sup>xxii</sup> Sec. 10: “For the purposes of chapter 268A, the local improvement district shall be considered a municipal agency. The members of the prudential committee and the officers and employees of the local improvement district, together with any person who performs professional services for the local improvement district on a part-time, intermittent or consultant basis...shall be special municipal employees; provided, however, that the provisions of said chapter 268A, or any similar provision of any general or special law, shall not apply to any member of the prudential committee having a direct or indirect financial interest ... if said improvement plan contains a statement making disclosure of said member’s interest and the interests of his immediate family in said contract or transaction.”

<sup>xxiii</sup> Sec.7