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**STATEMENT OF THE GREATER BOSTON REAL ESTATE BOARD, NAIOP  
MASSACHUSETTS, MASSACHUSETTS ASSOCIATION OF REALTORS AND HOME  
BUILDERS AND REMODLERS ASSOCIATION IN OPPOSITION TO HD.5166, & SD.2992  
AN ACT TO GUARANTEE HOUSING STABILITY DURING THE COVID-19 EMERGENCY  
AND RECOVERY**

**JOINT COMMITTEE ON HOUSING**

July 13, 2020

On behalf of the undersigned organizations we wish to express our adamant opposition to HD.5166 and SD.2992, *An Act to guarantee housing stability during the COVID-19 emergency and recovery*. This bill would paralyze the real estate industry, a vital part of the Massachusetts economy, and further exacerbate the state's longstanding housing crisis. It will have a lasting negative impact that will extend far beyond the timeline outlined in the legislation.

Our members in the real estate industry provide homes for thousands of Massachusetts residents. They are committed to ensuring the safety of their residents and communities. Apartment owners and operators play an important role in slowing the spread of COVID-19, and as an industry we take this responsibility seriously. Many industry members have been proactive in assisting residents during this unprecedented time by offering rent deferment, payment plans and waiving rent fees. Providing safe and secure homes remains the primary goal for this industry.

**EXECUTIVE SUMMARY**

**HD.5166 AND SD.2992 WILL HAVE DEVASTATING CONSEQUENCES FOR REAL ESTATE IN MASSACHUSETTS**

This bill would implement an eviction moratorium lasting twelve-months from the end of the March 10 state of emergency. Such an action would cripple real estate, creating extensive short- and long-term impacts on the housing market. Not only is a twelve-month extension an arbitrary and onerous length of time, but, seeing as we are still under a state of emergency, it could be extended far longer than intended. For example, if the state of emergency remains in place until January 2021, the moratorium would not expire until January 2022.

Additionally, this bill would impose rent cancellation and rent control, unfairly expose good faith property owners to 93A damages, and seal records of all renters, not just those impacted by COVID-19. These provisions, and others detailed below, will damage every property owner in Massachusetts, further exacerbate the state's housing crisis, and significantly disincentivize development, the state's best hope to spur economic recovery.

**HD.5166 AND SD.2992 ARE UNNECESSARY**

The Legislature created the strongest emergency housing protection law in the country. It is in effect until at least August 18. Beyond that date, the Legislature had the foresight to permit the

Governor to extend the law's protections indefinitely under the state of emergency, and up to forty-five (45)-days after the state of emergency has ended, in increments of up to ninety (90)-days at a time.

The Legislature passed this law, including its effective period and method of extension, on April 17, 2020, after twenty-nine (29)-days of discussion and debate.<sup>1</sup> We are confident that this careful and deliberate process will continue. Weekly meetings between the Governor and Legislative leaders ensure a coordinated, thoughtful, and effective approach by Massachusetts state government to best manage any potential extension of this law.

HD.5166 was filed a mere seventy-one (71)-days after enactment of this emergency housing law. During that time, the daily rate of new positive COVID-19 tests dropped drastically, and the state has progressed to Phase 3 of the reopening plan, which allows limited and regulated reopening of most industries. We do not believe that additional legislative action is required to address housing concerns caused by the COVID-19 pandemic. If it is necessary to extend the protections of the emergency housing law, Chapter 65 of the Acts of 2020 already contains a mechanism to do so, rendering HD.5166 and SD.2992 unnecessary.

### **HD.5166 AND SD.2992 WOULD DISTRESS A KEY DRIVER OF THE MASSACHUSETTS ECONOMY**

Massachusetts apartments and their residents contribute \$61.4 billion to the state economy annually, supporting 268-thousand jobs. The operation of Massachusetts' apartment homes contributes \$4.5 billion to the local economy each year (including \$1.3 billion in property taxes), creating 7-thousand jobs. Spending from Massachusetts' apartment residents contributes \$53.9 billion to the local economy each year (including \$7.6 billion in taxes), creating 250-thousand jobs<sup>2</sup>.

The real estate industry accounted for \$107.1 billion, or eighteen percent of the state's gross state product in 2019 and rental housing plays a major role.<sup>3</sup> Real estate is the top contributor to the state's gross domestic product, ten percent greater than the next highest producing industry sector, professional and technical services<sup>4</sup> and fifty-seven percent (15%) greater than health care, the state's more publicized "leading" industry.

No economic engine can withstand this type of government-mandated shutdown without significant long-term repercussions. At a time of unprecedented distress throughout the local, state and national economies, we cannot afford to take actions that would further harm the livelihoods of Massachusetts' residents. The Commonwealth's economic recovery depends on the survival of the real estate industry, and this legislation would devastate the sector, creating

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<sup>1</sup> March 22, 2020, Statehouse News Service, *House, Senate Working on Housing "Safety Net" Bill*.

April 17, 2020, H.4647 passed by the House and Senate

April 20, 2020, signed into law by the Governor

<sup>2</sup> Hoyt Advisory Services; NMHC/NAA; U.S. Census Bureau

<sup>3</sup> State Economic Impact Reports, <https://www.nar.realtor/sites/default/files/documents/2019-state-economic-impact-of-real-estate-activity-ma-04-14-2020.pdf>

<sup>4</sup>[http://www.donahue.umassp.edu/documents/Massachusetts\\_Economic\\_Due\\_Diligence\\_Report\\_Q4\\_FY\\_2019.pdf](http://www.donahue.umassp.edu/documents/Massachusetts_Economic_Due_Diligence_Report_Q4_FY_2019.pdf)

significant impacts that will affect every person who lives or works in Massachusetts.

### **ISSUE DETAILS**

#### **HD.5166 AND SD.2992 WOULD WORSEN THE STATE'S HOUSING SHORTAGE**

The enactment of this legislation would serve to discourage investment in multi-family development, thereby drastically worsening the state's existing housing shortage. Building permit data published by the U.S. Census Bureau reveals that through the month of May, permits for both single-family homes and rental units were down substantially compared to the same period last year. This data is not surprising given the advent of the COVID-19 pandemic in February and the Governor's declaration of a state of emergency on March 10.

What is particularly troublesome is that over the course of the past three years – years of strong economic growth and historically low mortgage interest rates – housing production actually fell in Massachusetts from a total of 17,778 units in 2017 to 17,365 in 2019. As has been well documented, developing rental housing in the Commonwealth is exceedingly difficult, risky and time-consuming. Many suburban and rural communities do not even allow multi-family housing under their local zoning bylaws. And those that do typically require a developer to obtain a special permit that requires a supermajority vote for approval.

Because of the virulent local opposition to new housing, particularly rental housing, nearly all multi-family housing is produced utilizing Chapter 40B, the Comprehensive Permit Law. That law requires that up to twenty-five percent (25%) of the units in a development be set aside for persons of low and moderate income—persons who are disproportionately from minority communities.

Multifamily developers already face great risk when looking at new projects. Lead times for entitlements can easily stretch into years, with daunting payments upfront, such as land acquisition, legal fees, and architectural and engineering costs, among others. It has been estimated that over thirty-two percent (32%) of multifamily development costs are associated with regulations at all levels, all of which are incurred before construction even begins. Further, land prices have risen, and construction material and labor costs have also gone up substantially. Financing mechanisms for the industry dictate that developers can only raise money to build their projects if there is a reasonable rate of return for the given level of risk. If we add to that mix political uncertainty regarding an eviction moratorium and rent control, new multifamily construction will cease, especially for middle-income and low-income developments.

#### **RENT CANCELLATION**

Under the proposed legislation, an owner would be prohibited from taking any legal action to collect rent unless they could prove that the cause of the non-payment was not, in any way, related to COVID-19. This issue is made even more difficult due to the exceptionally broad language used in this legislation as to the “effect” COVID-19 must have had on the resident. The property owner does not merely need to prove that the resident’s income did not change. Rather, the property owner has to prove that the loss of income “or change in economic circumstance” was not caused “in any way, directly or indirectly” by any COVID-19 related issues. Thus, it is not only a change in income which would have to be established. The property

owner would also have to prove that the current pandemic had no effect in any way on this resident's "economic circumstances." Even beyond this shifted burden and broad definition, this legislation also requires the property owner to prove this fact by "clear and convincing" evidence, a standard of proof which is so high as to effectively render the burden insurmountable. Of course, only the resident would have this information. A property owner would never know whether there was some COVID-19 related reason for the non-payment of rent. Thus, because the burden of proof cannot be met, there is no means to differentiate between renters impacted by COVID-19 and those who are otherwise unable or unwilling to pay their rent. This will result in rent cancellations that are incurred at property owners' expense without cause, drastically impacting property management and maintenance.

### **UNREALISTIC BURDEN TO VERIFY LOSS IS COVID RELATED FOR MORTGAGE FORBEARANCE**

The proposed legislation would permit owners with up to fifteen (15) residential units to obtain mortgage forbearance for an initial period of one-hundred and eighty (180) days, with an optional extension of an additional one-hundred and eighty (180) days, if they have experienced a financial impact from COVID-19. However, during the period of the forbearance, all rents in the building must be forever waived unless the owner can demonstrate by clear and convincing evidence that a resident's failure to pay rent did not result from any loss of income or change in economic circumstance caused, directly or indirectly, by COVID-19. Again, as the owner would not have such information, it would be virtually impossible to produce such "clear and convincing" evidence and, as a result, all rents would be waived during any such forbearance.

### **OWNERS WOULD BE PROHIBITED FROM RECOVERING POSSESSION INCLUDING FOR PERSONAL USE**

The bill would prohibit owners from recovering an apartment at the end of a fixed-term lease or after terminating a tenancy at will. Residents under a lease which has expired could remain during this additional twelve (12) month period regardless of whether the inability to relocate was the result of any COVID-19 issue. Owners are also prohibited from recovering property for their own personal use, to sell the property, to perform required repairs, or for any other reason other than lease violations, criminal conduct, damage, and interference with quiet enjoyment. At the same time, a person who agreed to a month to month tenancy may not be required to relocate during this extended period.

### **UNPRECEDENTED USE OF G.L. C. 93A TO IMPOSE LIABILITY ON AN INDIVIDUAL THAT SEEKS, IN GOOD FAITH, TO EXERCISE THEIR CONSTITUTIONAL RIGHT TO PETITION THE COURTS**

A fundamental principle of our constitutional democracy is that people have the right to seek redress from a court without having to proffer evidence which is not within their possession. There does not appear to be any other Massachusetts statute, which not only prevents a party from accessing the courts, but imposes liability if they seek such redress and are unable to thereafter prove a fact with evidence which was outside of their possession. This legislation in practice, imposes treble damage and attorneys' fees for the simple fact of seeking, in good faith, redress from a court.

### **SEALED RECORDS/CREDIT REPORTING**

This legislation would permanently seal all records of any non-payment of rent cases from March 10, 2020 through twelve (12) months after the expiration of the Emergency Declaration. Thus, access to these public records would be prohibited even in those cases filed based on clear and convincing evidence that the non-payment had no connection to any COVID-19 condition or event. Likewise, an owner can neither initiate nor file any negative credit report for rent during this extended period regardless of the reason for the non-payment.

### **“JUST CAUSE” RESTRICTION**

This legislation would create a “just cause” restriction on summary process actions. By eliminating so called “no-fault terminations,” an owner whose resident remains after the expiration of their lease term will be permitted to remain for at least an additional year. This is true even if the owner desires to move into their own home, has rented the apartment to another resident, or needs to sell the property. This restriction applies regardless of the contract the parties signed with a set term and is not conditioned on the income of the resident or any effect of COVID-19. Furthermore, at the end of this period, the owner would still need to comply with current state law which not only requires the owner to proceed with the legal process, which can often take 7 – 10 months, but also provides for a discretionary stay of an additional 6 – 12 months.

This legislation would effectively allow a resident whose lease has expired to stay in a person’s home for an additional 2 years regardless of whether the owner had a good faith need to recover their property. In addition, this legislation would prevent the owner from increasing the rent during this entire period even if the market rent increased. This would also apply to a month to month resident. While that resident could leave at any time, the owner could not recover their own property for this extensive period.

### **ADDITIONAL REQUIREMENTS FOR MATERIAL LEASE VIOLATIONS**

Under this legislation the property owner would be required to afford residents a thirty (30) day period to cure a material lease violation. Assuming the violation remains after the thirty (30) day period, the resident would then receive a notice to quit and the rights afforded in summary process procedure. As a result, a resident could be smoking in the apartment and could then continue smoking for thirty (30) days if, at the end of that thirty (30)-day period, they then agreed to cease. They could then commence this behavior again and be entitled to another thirty (30)-day cure period for this new lease violation. This would also apply to residents housing unauthorized occupants with criminal records, using their apartments for short-term rentals, creating loud disturbances, and otherwise violating their lease. Again, under current law, the resident would receive a notice to quit and, upon the expiration of same, the property owner could proceed in court and seek an agreement for the resident to cease this conduct. Under this proposed law, owners would be unable to effectively enforce their leases, which would have a serious impact on the other residents who are forced to live with these issues.

### **RENT CONTROL**

This legislation would re-impose a form of rent control by prohibiting owners from raising rents above those in effect on March 10, 2020 for a period of twelve (12) months after the expiration of the Emergency Declaration. This is regardless of the resident’s income, whether or not they had actually suffered any loss of income, or whether the lease permitted such an increase. The

sole exception would be subsidized housing in which the rent is permitted to be recalculated based on the resident's household income. Otherwise, even if the lease permits a rent increase, or the lease has ended and the resident remains, no rent increase may be imposed.

The voters across Massachusetts have rejected rent control practices, and so we must consider other solutions. Time and again, economists have shown that rent control measures do not work, and often harm the local economies where implemented. Rent control has been shown to lead to the decay of rental housing stock, mismatched resident demand, and the slowdown of new housing production.

## **MULTIFAMILY HOUSING PROVIDERS SUPPORT JOBS AND LOCAL COMMUNITIES**

There exists a misconception that rental housing owners enjoy large margins and can continue operating in the absence of rent payments. Only 9 cents of every \$1 in rent payments are returned to owners, including the many apartment owners who are themselves small businesses who rely on this revenue<sup>5</sup>.

- 10 cents of every \$1 is spent on capital expenditures, including roof and HVAC replacement and other important repairs
- 14 cents of every \$1 goes to property taxes, which in turn supports the community through financing for schools, teachers, emergency services and other important local needs.
- 27 cents of every \$1 covers payroll expenses, including paying employees who operate and maintain the property, ongoing maintenance, utilities, insurance and the like.
- Approximately 39 cents of every \$1 pays for the mortgage on the property. Roughly two-thirds of the apartment industry has private lenders and are ineligible for federal mortgage forbearance via the CARES Act. This is a critical expense, as mortgage foreclosures put all residents at risk of losing their housing.

If rent is not collected, it could affect owners' ability to provide essential services, impact repair and maintenance capabilities, and result in a loss of employment for staff. Rental income shortfalls would impact the ability to pay community-wide water, sewer, gas and electricity bills, and trash, recycling collection charges, and taxes.

## **REQUIRES REAL ESTATE TO BEAR A PUBLIC BURDEN UNLIKE ANY OTHER INDUSTRY**

There is no question that renters need assistance. However, forcing private property owners also facing hardships to provide that assistance as proposed in this legislation is not a viable solution. It is also out of line with the state's handling of any other challenge created by this pandemic. For example, with fourteen percent (14%) of residents projected to face food insecurity<sup>6</sup>, the state committed \$56 million on May 18 to support funding food assistance and distribution programs. The state needs to follow this model and ensure there is appropriate funding and

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<sup>5</sup> National Apartment Association 2019 Survey of Operating Income & Expenses in Rental Apartment Communities; U.S. Census Bureau 2015 Rental Housing Finance Survey; Real Capital Analytics; Redstone Residential

<sup>6</sup> <https://www.wgbh.org/news/local-news/2020/05/28/greater-boston-food-bank-sees-increased-demand-for-assistance-braces-for-more>

programming to protect those families facing housing instability. We cannot continue to require and rely on private property owners to subsidize nonpayment of rent.

We applaud the Governor for taking proactive measures to provide desperately needed support for the rental housing industry through the Emergency Rental and Mortgage Assistance program, thereby protecting housing stability and kickstarting the economy. We urge the Legislature to do the same.

We are pleased to see the progress being made on H.4808S/S.2799, *An Act making appropriations for the fiscal year 2020 to authorize certain COVID-19 spending in anticipation of federal reimbursement*, which includes an additional \$20-million for the COVID-19 RAFT program and increases grant amounts to \$10-thousand per household. H.4808S/S.2799 is an important step in recovery. For the foregoing reasons we strongly urge the Committee to give HD.5166 and SD.2992 an unfavorable report. Please do not hesitate to contact Justin Davidson, General Counsel, MAR, [jdavidson@marealtor.com](mailto:jdavidson@marealtor.com), Patricia Baumer, Director of Government Affairs, GBREB, [pbauamer@gbreb.com](mailto:pbauamer@gbreb.com), Tamara Small, CEO NAIOP at [small@naiopma.org](mailto:small@naiopma.org) or Ben Fierro, [bfierro@lynchfierro.com](mailto:bfierro@lynchfierro.com) of the HBRAM if you have any questions.