Chapter 40B Safe from Yet Another Attack, For Now
Attorney General Refuses to Certify Petition That Would Drastically Curtail the State’s Affordable Housing Law

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In November 2010 the voters of Massachusetts soundly rejected a statewide ballot question ("Ballot Question 2") that, if adopted, would have repealed the Commonwealth’s affordable housing law, commonly known as “Chapter 40B.” Opponents of Chapter 40B were apparently eager to try again, this summer proposing another initiative petition that would, if put on the ballot and approved by the voters, amend Chapter 40B in ways that would virtually eliminate the construction of new affordable housing.

Yesterday, advocates of affordable housing cheered the Attorney General’s decision to refuse to certify the new initiative petition, No. 11-24 (the “2011 Petition”), on the grounds that the 2011 Petition is “substantially the same” as the repeal petition that was rejected during the 2010 statewide elections. The Attorney General’s non-certification means that the proposed amendments to Chapter 40B will not appear on the statewide ballot in November 2012, except in the unlikely event that a court reverses the Attorney General’s decision. Mintz Levin successfully advocated for this result in arguments presented to the Attorney General on behalf of the Citizens Housing and Planning Association (CHAPA) and other non-profits concerned about affordable housing.

The 2011 Petition proposed changes to Chapter 40B that would drastically curtail its effectiveness in most of the Commonwealth, including:

1. An amendment that would change the affordable housing safe harbor of each municipality from 10 percent of its housing stock to only 3 percent of its housing stock, dramatically increasing the number of cities and towns which can say “no” to affordable housing without review in an administrative or judicial appeal.

2. An amendment that would prohibit private for-profit entities from utilizing Chapter 40B, a change that would effectively gut Chapter 40B since these entities are responsible for most of the affordable housing produced under Chapter 40B.

3. An amendment that would allow local conservation commissions to stop affordable housing projects by enforcing local wetland regulations that are more stringent than state regulations — making the “comprehensive permit” no longer comprehensive.

However, the 2011 Petition had a constitutional problem: Article 48 of the Amendments to the Massachusetts Constitution (“Amendment Article 48”) prohibits any initiative petition that is
“substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial state elections.” Amendment Article 48 also requires the Attorney General to review every proposed initiative petition to ensure it meets the requirements of Amendment Article 48. The Attorney General is required to certify an initiative measure if the requirements enumerated in Article 48 are met; but must refuse to certify the measure if those requirements are not met.

Mintz Levin argued on behalf of its non-profit clients that the proposed amendments would so drastically curtail the construction of new affordable housing in Massachusetts that they should be considered to be “substantially the same” as the recently defeated repeal of Chapter 40B. In a legal memorandum to the Attorney General, Mintz Levin marshaled officially noticeable facts showing, for example, that the proposed amendment lowering the law’s safe harbor threshold from 10 percent to 3 percent would cause about 93% of the state’s residents to live in a city or town that is effectively exempt from Chapter 40B — leaving just a small minority living in towns where Chapter 40B could be used for its intended purpose of overcoming local barriers that prevent the construction of new affordable housing.

Mintz Levin also demonstrated that the portion of the 2011 Petition that would make private, for-profit entities ineligible for comprehensive permits under Chapter 40B likewise would be akin, if adopted, to a repeal of the statute, because most affordable housing in Massachusetts is developed by these “limited dividend organizations.” In the last decade, approximately 88% of all comprehensive permit units on the Commonwealth’s subsidized housing inventory came from comprehensive permits issued to these private entities.

Finally, Mintz Levin argued that the defining characteristics of Chapter 40B’s permitting scheme would be undone by the part of the 2011 Petition that would give local conservation commissions the ability to enforce wetlands bylaws that are more stringent than state standards, regardless of how great the town’s need for affordable housing, or the measures taken by the developer to protect the wetlands. Chapter 40B allows affordable housing to be constructed with one “comprehensive permit” in lieu of separate permits from a variety of local boards — this one-stop shopping is what makes the Chapter 40B permit a “comprehensive permit.” A comprehensive permit also can override local requirements that are inconsistent with the need for affordable housing and not essential to the protection of public health and safety. The power to override unnecessary local obstacles to affordable housing is at the heart of Chapter 40B, and is essential to the continued construction of new affordable housing.

The Attorney General agreed with Mintz Levin’s analysis in concluding that the amendments proposed in the 2011 Petition are substantially the same as a repeal of Chapter 40B. Her thoughtful and well-reasoned decision should be given substantial deference by a court if the petitioners decide to appeal the non-certification. In that event, the Supreme Judicial Court would have the last word on whether the 2011 Petition is substantially the same as the proposed repeal that was presented by Question 2, and soundly defeated at the polls.