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Chapter 40B Under Attack—Again

Initiative Petition Could Repeal the Law Responsible for Most New Housing in Massachusetts

On September 5th, the Massachusetts Attorney General certified a proposed ballot initiative petition to repeal the state's affordable housing statute, Massachusetts General Laws, Chapter 40B, Sections 20 to 23, commonly known as "Chapter 40B." Bills to repeal or significantly curtail Chapter 40B have been periodically introduced in the legislature over the last several years, but none ever gained serious traction. This initiative petition is an effort by Chapter 40B opponents to take the issue out of the hands of the legislature and place the decision directly before Massachusetts voters.

The petition, if passed, would repeal Chapter 40B effective as of January 1, 2009. The petition would potentially apply retroactively to projects that have received a Chapter 40B comprehensive permit, but have not received a building permit as of January 1, 2009. The petition states that "[n]o provisions of this act shall be interpreted as applying to, affecting, amending, or otherwise impairing the provisions of any project approved by a board of appeals or the Housing Appeals Committee pursuant to G.L. c. 40B, § 20–23 before the effective date of this Act, provided that said project has been issued a building permit pursuant to the State Building Code for at least one (1) dwelling unit."

The ballot initiative was filed by Arlington resident John V. Belskis with the support of the dubiously named "Municipal Coalition for Affordable Housing." Boards in a number of cities and towns have formally voted to support the petition. Now that the ballot initiative has been certified, the petition's supporters must collect 66,593 signatures by December 5th. Once the signatures are collected and certified by the Secretary of State, the proposal would go to the state legislature to enact before May 7, 2008. The legislature could enact the proposition either in its current form, or, in a rarely used procedure, after rejecting the proposed initiative, the legislature could formulate its own legislative proposal, to be grouped on the ballot with the petition as an alternate choice. If the legislature rejects

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the proposal outright, the petition's supporters must gather another 11,099 signatures by July 2008 to get the initiative placed on the November 2008 ballot.

A number of novel legal issues will arise if the petition is passed. Prior to certification, the Department of Housing and Community Development, Citizens Housing and Planning Association, the Real Estate Bar Association and others submitted letters to the Attorney General's office arguing that the retroactive revocation of comprehensive permits would amount to an unconstitutional taking of private property. Those arguments were rejected by the Attorney General, but they are likely to be raised again in court if the petition passes. In addition, the courts will undoubtedly be asked to interpret the somewhat ambiguous retroactivity provisions of the petition. As even its supporters have acknowledged, the petition says only that projects with building permits are grandfathered, without expressly saying that projects without building permits will no longer have the benefit of their comprehensive permits. That issue, too, might be litigated if the petition is adopted.

Developers who have comprehensive permit applications pending before local zoning boards of appeal should realize that these boards may be reluctant to issue new permits while this initiative petition winds its way through the political process. Developers with projects that have been permitted, or that are close to being permitted, would be well advised to manage the process so that a building permit can be pulled before January 1, 2009.

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If you would like to discuss this any related matters, please contact Paul Wilson, Jonathan Cosco, or any other member of Mintz Levin's Housing Practice Group listed below.

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