



January 8, 2021

His Excellency Charles D. Baker Jr.  
Governor of the Commonwealth of Massachusetts  
State House, Room 360  
Boston, MA 02133

Re: **Veto Request of Section 83 (Right of First Refusal) of H. 5250, An Act Enabling Partnerships for Growth**

Dear Governor Baker:

On behalf of the Massachusetts Mortgage Bankers Association (MMBA) and our 239 member banks, credit unions and mortgage lenders who provide mortgage financing to consumers, we are proud of the work our Massachusetts legislators have done to support economic development and relief in the Commonwealth during the pandemic. We are especially pleased that the Housing Choice language was included in H.5250.

We have grave concerns regarding Section 83 (Right of First Refusal) that we would like to share with you. I am including a joint industry letter which was sent to legislators in July, 2020 on this topic. Associations the Greater Boston Real Estate Board, NAIOP Massachusetts, Massachusetts Association of Realtors, Home Builders and Remodelers Association, Massachusetts Bankers Association, Massachusetts Mortgage Bankers Association, Real Estate Bar Association and Massachusetts Land Title Association. Included in the concerns were:

- Delays the sale of real estate;
- Further harms homeowners and property owners;
- Complicates financing;
- Lack of structure and clarity for tenant association provisions
- Complicates loans and clouds title insurance;
- Similar Washington DC policy is mired in delays and corruption of the process;
- Reduces the quality and quantity of precious public funding;
- Reduces the production of multi-family housing;
- Harmful penalties;
- Implication for real estate taxes;

The concerns that were expressed six months ago are still concerns with Section 83.

This legislation requires owners to notify tenants about intent to sell, short-sales, deed in lieu or foreclosure procedures. Any municipality may adopt these provisions. The bill outlines a series of confusing back-and-forth communication requirements adding 9 months to the purchase, short-sale and foreclosure process which could create a hardship for consumers. The language in this bill provides tenant associations (not tenants) with the contractual opportunity to purchase rental properties.

The MMBA is particularly concerned with other states and districts where this has been imposed such as California and Washington, DC.; the results have been problematic. Tenants can assign their rights to developers; they can deliberately hold up a sale in order to get more money from sellers and homeowners will continue to incur debt until a home is sold. The MMBA believes that we can learn from the mistakes of other states. It shouldn't take 9 months for a bona fide sale to occur between owners and tenants. **Third party investors should not be allowed to cause havoc.**

The title of the bill suggests that the intent is to provide current tenants with the opportunity to purchase the subject property from the owner. However, the procedures contained within the language of the bill focuses more on tenant associations and not individuals.

**The MMBA opposes this process as we believe it will ultimately drive-up purchase prices, increase rent and create opportunities for developers and not former tenants to become property owners. The process is too convoluted and the additional 9 months would cause hardship for those wanting to sell their homes.**

The MMBA is an association that advocates for the welfare of our members and consumers. Our members are working with consumers to offer payment accommodations for all impacted with COVID-19 during this pandemic. Please contact me for questions or additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah J. Sousa".

Deborah J. Sousa, Executive Director



**STATEMENT OF THE GREATER BOSTON REAL ESTATE BOARD, NAIOP  
MASSACHUSETTS, MASSACHUSETTS ASSOCIATION OF REALTORS, HOME BUILDERS  
AND REMODELERS ASSOCIATION, MASSACHUSETTS BANKERS ASSOCIATION,  
MASSACHUSETTS MORTGAGE BANKERS ASSOCIATION, REAL ESTATE BAR  
ASSOCIATION, MASSACHUSETTS LAND TITLE ASSOCIATION  
IN OPPOSITION TO  
RIGHT OF FIRST REFUSAL LANGUAGE FOUND IN SECTION 82A OF H. 4887**

July 30, 2020

On behalf of the undersigned organizations we wish to express our united opposition to Section 82A in H. 4887, An act enabling partnerships for growth.

Section 82A would afford municipalities the option, by ordinance or by-law, to require owners to sell their rental properties to qualified tenant organizations. With some exceptions, the legislation would apply to all multi-unit housing, including market-rate, in a city or town that accepts its provisions. A tenant right of first refusal to purchase law (ROFR) would cause serious delays and impediments to the normal conveyancing process in the Commonwealth.

**DELAYS THE SALE OF REAL ESTATE**

Adopting a tenant right of first refusal to purchase law in Massachusetts would impose significant delays in the sale of real estate. Rather than allowing the owner to sell property on the open market on a schedule determined by the parties, the owner is required to provide written notice to both the municipality and all renters and wait for specified time periods to pass.

In Section 82A, the Tenant Association has thirty (30) days after receipt of Owner's intention to sell to submit an offer to purchase the property. In the event the Tenant Association fails to submit an offer within thirty (30) days, the Tenant Association waives its right to purchase the property, and the owner may proceed with efforts to sell the property to third parties. Upon execution of a purchase contract with a third party, the owner shall have seven (7) days to submit a copy of the contract and a proposed purchase contract for execution by Tenant Association or its Successor. The Tenant Association then has thirty (30) days to either execute the purchase contract or other agreement as acceptable to both parties or tender a counteroffer to the owner. The aforementioned seven (7) day period to send the contract to the Tenant Association and the thirty (30) day period to make a counteroffer may be extended by agreement. If the Tenant Association fails to timely execute the purchase contract or submit a counteroffer, the tenants' right to purchase is waived. In the event of a counteroffer, the owner then has thirty (30) days to either accept or reject the counteroffer. However, if the counteroffer is rejected, the owner may not sell the property to a third

party on terms which are the same or more favorable to the buyer than were contained in the rejected offer.

It should also be noted that the Tenant Association may agree to all of these terms and then fail to obtain financing or otherwise decide not to close, causing an even greater delay. Each requirement will only complicate and delay the sale and transfer of real estate.

Any right of first refusal creates a real chilling effect on an owner's ability to sell a property, and hence affects the value. Many potential buyers will not want to incur the expense of negotiating a purchase and sale agreement with a third party if they cannot be assured of getting the deal.

### **FURTHER HARMS HOMEOWNERS AND PROPERTY OWNERS**

These similar delays in short-sales and deed in lieu of foreclosure situations will have a devastating effect on these borrowers. Borrowers often attempt to effectuate such transactions in order to avoid further financial consequences when they cannot pay their mortgage. The longer these transactions are delayed the greater the economic loss to these homeowners. Section 82A mandates that homeowners wait months before their lender can even consider their offers. In many cases, this will result in additional amounts being owed to the bank or in the bank's decision to merely proceed with foreclosure.

### **COMPLICATES FINANCING**

Section 82A refers to the tenants executing a purchase and sale agreement. To be a true ROFR, the purchase and sale agreement would have to be identical to the one signed by the owner and proposed buyer, subject only to the special terms mandated in the bill or applicable municipal bylaw. However, in today's market for multi-family properties, there are often no financing contingencies. The absence of a financing contingency in a particular third-party offer may be what makes it more attractive to the seller than a competing offer. Alternatively, if the third-party purchase and sale agreement contains a 70% financing contingency, for example, is that percentage binding on the tenants?

### **LACK OF STRUCTURE AND CLARITY FOR TENANT ASSOCIATION PROVISIONS**

If 51% of the tenant households vote to create a "Tenant Association" the owner must offer the Tenant Association the opportunity to purchase the property prior to entering into an agreement to sell to a third party. While the bill is somewhat vague, it appears to confirm that the owner is not under any obligation to sell the property to individual tenants, but rather only to a duly formed Tenant Association. The Tenant Association may also designate a successor entity or designee to act on its behalf as purchaser upon notice to the owner and municipality. The bill does not provide how a Tenant Association is to be formed or the manner in which decisions are to be made. It also does not confirm whether the Tenant Association may operate the building for a profit, evict tenants, convert to condominiums, or take any other specific actions in relation to the building.

How would that work in a 25-unit building? What about a 100-unit building? What would prevent the new owners from adopting restrictions that would preclude rental to the very individuals whom the municipality seeks to benefit from the housing? What protections would there be for the tenants who do not choose to participate in a tenants' association? There is also no guarantee that a group of tenants exercising the ROFR would maintain the property as affordable.

## **COMPLICATES LOANS AND CLOUDS TITLE INSURANCE**

Loans and title insurance are critical components of real estate transfers. Title insurance is one of the basic steps home buyers take before closing. It protects the buyer and the lender from the possibility that the seller or previous sellers don't have free and clear ownership of the house and property and, therefore, can't rightfully transfer full ownership. Lenders and title companies would assume tremendous risk insuring or lending money on transactions that may or may not be compliant with the law.

## **SIMILAR WASHINGTON DC POLICY MIRED IN DELAYS AND CORRUPTION OF THE PROCESS**

Similar policies have faced reported abuses in other jurisdictions, namely Washington DC, where speculators have "organized" tenants to do their bidding, taking advantage of the law. Sales transactions are materially extended, which in turn makes for an unpredictable investment environment and subjects investors to great timing risk. Tenants are given time to form an association, and then receive additional time to secure financing if they exercise their ROFR rights without any cost to the tenant (tenants have a de jure financing contingency so no penalty if they exercise and fail to perform and close). As a result, sales of apartment buildings can easily take 10-12 months, almost four times the more typical 90-day process found here in Massachusetts. During that extended time, if economic conditions change, and the tenants fail to proceed to closing, the owner/seller has to start over completely. Due to this flawed policy, there are buildings in Washington DC that have been caught in this cycle for years without transacting.

In addition, the tenants almost never actually acquire the building. Rather, because the tenant rights are transferrable, typically they auction off their blocking rights to the highest bidder, frequently a competing buyer who did not get the initial award to purchase the building. There is no restriction on what consideration can be provided for this, which lends itself to corruption of the process. Who gets the benefit that might be negotiated in such circumstances? Who actually has authority to speak for the tenants?

Because buyers know this process exists, many do not even bid on the initial marketing for the asset, and wait to see what the selected buyer offered, knowing they can match that offer if they can buy off the tenants somehow through this process. All of this leads to a specialized market with a few players who understand how to work the system to their advantage.

Even in the rare cases where the actual tenants manage to acquire the building, there are frequently issues down the road when major capital expenses arise (plumbing, roofing, elevator replacement, façade repairs) and there is no source of funds for these costs.

## **REDUCES THE QUALITY AND QUANTITY OF PRECIOUS PUBLIC FUNDING**

As an unfunded mandate, this policy will have the practical effect of taking away the freedom of state and local agencies to make good choices when it comes to the investment of public resources. What deals to fund, what deals not to, and how much to fund requires expertise, public input and planning from both the public and private sectors. ROFR will undermine this process and make it more difficult to achieve long-term results. It will simply become the politically expedient thing to do and not stretch the public subsidy dollars in the best possible manner for the Commonwealth.

## **REDUCES THE PRODUCTION OF MULTIFAMILY HOUSING**

It is likely that the passage of Section 82 will result in fewer new housing rental units being built. As it currently stands, the development process in Massachusetts can take several years to bring a project through the design, permitting and construction process. An exit strategy from the asset allowing a developer to sell the building is a critical component of any prospective project. If adopted, Section 82A will strangle the transactional process, causing delay, uncertainty, and general chaos in the marketplace. Consequently, fewer developers will take on the risk of producing needed multi-family housing, thereby exacerbating the state's housing shortage.

## **HARMFUL PENALTIES**

According to the proposed language, an owner may not evict a tenant in order to avoid the application of this law in either the context of a third-party purchaser or a short sale/deed-in-lieu transfer. In the event of a violation, a tenant may also seek damages under 93A, seek a percentage of the sales price, seek injunctive relief and/or specific performance, and may file a complaint with the attorney general, in addition to any other rights tenants may have under applicable law. The attorney general is responsible for enforcing the provisions of the Bills and posting sample notices of intent to sell, notice to tenants, notice of offer, and any other documents required by the regulation.

## **IMPLICATIONS FOR REAL ESTATE TAXES**

Does the legislation amount to a taking of private property without fair compensation? Massachusetts law provides for a ROFR for cities and towns for property in an agricultural or horticultural tax classification. In those cases, the owner has received a financial benefit from the municipality, i.e. low real estate taxes, as somewhat of a quid pro quo for the ROFR. In the proposed bill there is no such quid pro quo

Tenant Right of First Refusal would have a profound effect on the transactional process of buying and selling real estate in the Commonwealth of Massachusetts, creating substantial barriers to the sale of housing and multi-family housing.

For the foregoing reasons we respectfully urge the Legislature to reject the tenant right of first refusal language found within section 82A.

Please do not hesitate to contact us if you have any questions.

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