

November 2020



CHAPTER 40T AT 10:

Massachusetts' Housing
Preservation Statute's Successful
First Decade

**Bill Brauner / Director of Housing
Preservation and Policy /
Community Economic Development
Assistance Corporation**



Introduction

Just over a decade ago, in November 2009, Governor Deval Patrick signed into law Chapter 40T, “An Act Preserving Publicly Assisted Affordable Housing.” The statute created a new legal framework that Massachusetts, led by the state’s Department of Housing and Community Development (DHCD), has implemented effectively over the past decade. In its first 10 years, Chapter 40T has been a significant factor in maintaining or extending affordability at 196 housing projects with 19,836 affordable units and, of those, has played a crucial role preserving 9,594 units in 97 properties.

The law has three main components:

- Public notices that the owner must send 24 months and again 12 months prior to a ‘termination,’ as well as required notices prior to a sale of the property.
- Protection for low-income tenants for three years after a termination, limiting annual rent increases to the Consumer Price Index plus 3% per year.
- A right of first offer and right of first refusal that are triggered if an owner proposes to sell a covered affordable housing project without ensuring continued affordability.

The passage of Chapter 40T was the culmination of a legislative advocacy process that lasted well over a decade. The statute itself represents a compromise between advocates who favored a stronger law which could force an owner to sell property in certain circumstances balanced against owner objections to any new restrictions on the operation of their properties.

Chapter 40T is a key regulatory tool which is actively managed by DHCD. Through 2019, over 600 40T notices in total have been sent by owners, with about one third of these relating to proposed property sales. Most importantly, DHCD has preserved 14 projects with 1,640 total units and 1,307 affordable units by exercising the right of first offer or right of first refusal provisions of the statute.

The statute is an important housing preservation law, but it would not be effective without an infrastructure of skilled preservation developers as well as affordable housing acquisition lenders such as the Community Economic Development Assistance Corporation (CEDAC). In particular, DHCD has been a consistent and reliable funder of high-risk preservation projects.

Although Chapter 40T has been a key component in the preservation of almost 20,000 affordable units, the law is far from a panacea. The future of 40T effectiveness relies on DHCD and partners allocating both staff and financial resources, including the availability of high loan-to-value acquisition financing and significant preservation resources such as housing tax credits.

Table of Contents

- Introduction
- Summary of the provisions of Chapter 40T
- Achievements and Limitations
- Conclusions

Appendices:

- A. Detailed review of Chapter 40T provisions
- B. Statute
- C. Regulations
- D. Guidelines on the Selection of Designees
- E. History of the Law
- F. Designations to Date
- G. Summary of State and Local Preservation Laws in Other Jurisdictions

Summary of Chapter 40T

Chapter 40T “An Act Preserving Publicly Assisted Housing” specifically covers existing affordable housing projects that were funded with any of 16 identified affordable housing funding programs. These include the major HUD production programs (Section 221(d)(3), Section 236, and Section 202), key state production programs (Section 13A, and SHARP), the state and federal Low Income Housing Tax Credit (LIHTC) programs, and USDA Rural Development Section 515. Most types of federal and state project-based rental assistance are covered, including all types of project-based Section 8 as well as the Massachusetts Rental Voucher Program (MRVP). Examples of programs not subject to Chapter 40T include federal programs such as HOME, CDBG, and Housing Trust Fund, the Massachusetts bond-financed subordinate debt programs, and municipal funding programs such as the Community Preservation Act (CPA).

The law itself has three principal components. The first is an owner’s requirement to send notices prior to taking certain actions, or allowing actions to happen. An important concept in Chapter 40T is a termination event that would reduce or end required affordability at a project. Examples of terminations include Section 8 contract expirations, the maturity of an affordable governmental mortgage program, and the end of a LIHTC use restriction. Termination notices must be sent at least 24 months and again at least 12 months prior to the date of the termination, with copies sent to tenants, any tenant organization, the municipality, DHCD, the local legal services agency, and CEDAC. While termination notices do not commit an owner to take any specific action relating to extending affordability, these notices provide a crucial warning regarding the potential future expiration of an affordable housing restriction. If a termination notice is not sent at the appropriate time, the owner must extend the affordability for the period that the notice was late. For example, a notice sent six months late would require that an owner extend a project’s affordability for six months beyond the normal termination date. In addition to termination notices, owners must send sale notices prior to a sale or transfer of affordable housing. The specific type of sales notice depends on whether or not the property will be sold to a preservation buyer or to any market buyer with the potential to convert to market rate use.

A second component of the law provides tenant protections for three years after a termination. Specifically, landlords are not allowed to increase annual rents by more than the annual change in the Consumer Price Index plus 3% for a period of three years for all low-income residents at the property on the date of termination. There is an exception to these rent increase limitations for tenants with Enhanced Vouchers or similar types of rental assistance.

Together these two components provide up to five years of advance notice to low-income tenants and public agencies about potential resident displacement, thus providing critical time for tenants to organize and public agencies to strategize a preservation outcome.

The heart of the statute, the third component, is the right of first offer (ROFO) and right of first refusal (ROFR). The ROFO and ROFR are triggered when an owner sends an Offer to Sell notice indicating an intent to sell a covered affordable housing project without ensuring extended affordability. Although the ROFO and ROFR technically create purchase opportunities for DHCD, the statute provides a process for DHCD to select a qualified designee (see Appendix D for much more detail on the process for designee selection). Designees, who are typically experienced non-profit or for-profit affordable housing developers, act on behalf of DHCD and remain in close contact with the agency on issues related to the purchase offer. DHCD must approve the terms of any purchase agreement entered into by the designee.

After receipt of an Offer to Sell notice and selection of a designee, the next step in the Chapter 40T purchase process is the ROFO. For a period of 90 days after DHCD's receipt of the Offer to Sell notice, an owner is prohibited from accepting an offer to purchase the property from anyone other than the Chapter 40T designee. During the 90-day period, Chapter 40T requires that the owner allow inspections, including inspections related to environmental, engineering, structural or zoning matters, and to make due diligence materials including rent rolls and financial statements available to DHCD and its designee. Toward the end of the 90 period the designee will typically make an offer to purchase the property. DHCD regulations indicate that the 90-day period may be extended if the owner fails to meet its statutory obligation to cooperate with due diligence investigations. The statutory right to due diligence is key to the designee's ability to craft a purchase offer that reflects the property's value, taking into account the need for capital improvements.

While the ROFO is not binding, 10 of the 14 successful designee transactions have occurred through a ROFO rather than a ROFR, so designees understand that a credible offer must propose a price and other acquisition terms that are acceptable to both the seller and the designee. Essentially, a designee attempts to demonstrate that its offer to purchase the property will provide better value overall to the seller than going through the ROFR process. It is not uncommon for sellers and designees to negotiate sales terms over the days and perhaps weeks after the designee's purchase offer is received.

If the owner and DHCD or its designee do not enter into an agreement for sale of the property within the statutory ROFO period, a seller may accept a market offer. Many sellers arrange to have the due date for offers from potential purchasers occur just a few days after the end of the ROFO period.

If the seller decides to accept an offer from another potential purchaser, the seller must so notify DHCD and send a copy of the proposed purchase and sale agreement (P&S) to DHCD with the notice. DHCD or its designee then can invoke the ROFR provision in Section 4 of the statute to 'step into the shoes' of the other purchaser. The seller is obligated to provide a P&S to DHCD with the same price and terms as the other potential purchaser with the following statutory limitations:

- The closing date cannot be less than 240 days from the signing of the P&S.
- The deposit cannot exceed the lesser of 2% of the sales price or \$250,000.
- The deposit must be refundable for at least 90 days.

So even if the P&S between the seller and the proposed purchaser has much stricter provisions, the P&S presented to DHCD must adjust those terms to conform to Chapter 40T requirements. For example, if the P&S with a market buyer were to require a \$500,000 deposit, a 60-day due diligence contingency and a closing in 180 days, all of these terms would have to be modified in the P&S that the seller sends to DHCD. The statute and regulations require the seller to provide the same due diligence documents and cooperation during the acquisition process as are required in connection with the ROFO.

Once the designee signs the P&S with the seller, it becomes bound by its terms. If a designee signs the P&S but the transaction does not close on the required schedule, the seller is then free to sell the property to the original proposed purchaser or to another buyer and has no further requirement to maintain affordability beyond the term of any remaining restrictions as long as the sale occurs within two years.

In lieu of signing the P&S provided by the seller, DHCD or its designee also has the option of sending a counteroffer, which would typically occur if DHCD/designee believes that the market purchaser has offered an unrealistically high price. For example, if DHCD and the designee believe that the P&S reflects a sales price that is 20% above market, they would send a counteroffer 20% below the price outlined in the P&S. In this situation, the seller is under no obligation to accept the lower counteroffer and is able to proceed to a closing on the transaction as proposed in its P&S. However, if there is a material reduction in the purchase price or change in other terms of the acquisition, DHCD or its designee may have another chance to match the revised P&S between the seller and the market buyer.

A number of types of transactions are not subject to the ROFO and ROFR. A few examples include:

- Transfer of the property to an affiliate of the owner through a transaction that does not trigger a termination of affordability.
- Sale of a property with more than 15 years of affordability remaining.
- Sale to a new owner preserving affordability (“Section 6(a)(4) sale”). To qualify under this provision, DHCD requires that the purchaser make ‘reasonable and diligent actions’ to extend affordability at the same income level(s) and number of units for at least 30 additional years.

In order to be exempt from the ROFO and ROFR, the buyer and seller jointly send an “exemption request” to DHCD using a standard template. The most common type of exemption request is a transfer of a property to an affiliate, which may have a nominal

purchase price or may have a higher stated sales price.¹ These affiliate transfer requests are routinely approved by DHCD, since the primary requirement is that the property transfer does not involve a termination. Affiliate transfers are quite common with LIHTC projects, both those going through a syndication as well as LIHTC projects reaching Year 15.

For Section 6(a)(4) sales to a new owner preserving affordability, typically two notices are sent. Prior to initiating a sales process, an owner first sends a “Notice of Sale to a Preservation Buyer” announcing that the property will be sold but without any loss of affordability. This notice does not indicate who the buyer will be but makes it clear that DHCD will not need to select a designee. Once terms have been negotiated with a specific purchaser, the buyer and seller jointly send an exemption request.

Section 6(a)(4) exemption requests receive significant scrutiny from DHCD since the project will be sold to a completely new owner, and in many cases will be refinanced with a different type of affordable housing funding along with affordability requirements that vary from what currently exist at the project. In some situations, DHCD will require that the owner sign and record a Chapter 40T affordability restriction as a condition for approval of a Section 6(a)(4) sale. In other cases, this is not necessary because existing affordability requirements continue to be in force for the period immediately after the transfer. However, unless long-term affordability requirements are put in place at the time of sale, DHCD initially provides only preliminary exemption approval, subject to a final exemption approval after long-term restrictions have been executed and recorded.

It is worth noting that once a designee has been selected, an owner cannot simply revoke its Offer to Sell so that it can then sell the property to a preservation buyer. DHCD, desiring to respect the time and money that a designee invests in its due diligence regarding a sale, generally requires that an owner wait at least six months after the last date on which an offer could have been made under the ROFO before revoking its Offer to Sell in order to sell the property to a preservation purchaser other than the designee.

Chapter 40T is a complex law and this summary provides only a very brief overview. Interested readers who want to learn more about the details of Chapter 40T should see Appendix A “Detailed Description of Chapter 40T” as well as the 40T statute in Appendix B, the regulations which can be found in Appendix C, and DHCD guidance on the selection of designees in Appendix D.

Chapter 40T Achievements

Chapter 40T has proven to be a significant success in its first decade of implementation. The high volume of public notices filed tell a portion of the story. In the ten years since passage of Chapter 40T, 326 projects located in 93 municipalities have filed 606 Chapter 40T notices, including one- and two-year notices, exemption requests, offers to sell, notice of sale to a preservation buyer, and curative notices. Most projects filed only one or two notices, but one project, Riverview Towers in Fall River, submitted 11 separate 40T notices. Several other projects filed more than a half dozen over the past ten years. These notices provided valuable information to tenants, municipalities and state agencies about upcoming terminations and sales.

Termination Notices

During the 10-year period ending December 2019, DHCD received some form of termination notice relating to 145 separate projects². In total there were 91 two-year notices, 100 one-year notices, and 47 'curative notices' that related to a missing or defective notice. As can be seen by the number of curative notices, a significant percentage of owners did not submit timely termination notices. This was particularly common during the first years after enactment, as word of the new law was fairly slow to reach property owners who were not active developers.

Exempt Sales

A number of types of property sales and transfers are exempt from the Chapter 40T ROFO and ROFR. These include sales to an affiliate of the owner with no loss of affordability, sales with more than 15 years before the first scheduled 'termination' of affordability, and 6(a)(4) sales where the buyer agrees to preserve the long-term affordability of the project. Of the 182 exemption requests, the majority of these transactions involved fairly routine transfers, such as the movement of ownership from one nonprofit affiliate to a different affiliate, or the sale from one of a sponsor's single purpose entities to another in order to syndicate the project using LIHTC. While understanding the ownership change is certainly useful information, most of these transfers would have taken place in the normal course of business, regardless of the presence of Chapter 40T. Nonetheless, these transfers represent continuing affordability for 10,242 housing units.

However, 83 of the exemption requests received through November 2009 were filed under Sec. 6(a)(4). These 83 properties contained 8,900 total units, of which 8,287 were affordable units³. An exemption request must be signed by both the seller of the project and the prospective buyer, so virtually all Sec. 6(a)(4) exemptions resulted in preservation sales, but there is not good data on whether some proposed transactions collapsed and did not result in a sale of the property⁴.

Sales proceeding under Sec. 6(a)(4) are the most critical type of exempt transaction since they reflect purchases of the property by a new owner who is agreeing to a substantial continuation of affordability.⁵ Absent Chapter 40T, many owners desiring to sell would probably have put their projects on the market without any requirement to maintain affordability. With the heated real estate market in greater Boston over much of the last ten years, this would likely have led to a substantial loss of affordable housing, as buyers with no interest in affordability purchased properties and ‘repositioned’ them with higher rents and significant displacement of the existing tenants.

Massachusetts boasts a number of experienced non-profit and for-profit preservation purchasers who have shown a willingness to bid in a competitive process to acquire preservation properties. Likewise, Massachusetts agencies such as CEDAC and the Massachusetts Housing Investment Corporation have developed experience making high loan-to-value acquisition loans to preservation buyers. Most owners of existing affordable housing appear confident that a Sec. 6(a)(4) exempt sale can secure full value for their property without going through the ROFO/ROFR process. This is indicated by the four to one ratio between 6(a)(4) sales and owners submitting Offers to Sell⁶. In other words, 80% of sales of affordable properties have been 6(a)(4) sales that avoided the ROFR process, an indication that this sales method is the preferential option for most owners to obtain a market sales price for their property.

In an interesting and troubling development, a few non-profit sponsors of LIHTC properties have been forced by their investor limited partners to submit an Offer To Sell prior to the limited partner exit at Year 15. In contrast, most limited partner exits under the LIHTC ROFR are processed as exempt transactions since they qualify as affiliate transfers. Using the Offer to Sell process for a Year 15 investor generates a host of complicated issues for both the sponsor non-profit and DHCD which are beyond the scope of this paper⁷.

ROFO and ROFR

Even more than exempt sales, the projects that were most directly impacted by Chapter 40T were those developments purchased by a 40T designee, either through a ROFO or a ROFR. In these situations, owners had submitted an Offer to Sell notice indicating a desire to complete a market sale. Excluding a few notices that were sent in error and quickly retracted, there were 21 Offers to Sell received by DHCD, representing 3,215 total units with 2,263 affordable units⁸. In virtually every case where an Offer to Sell notice was filed by an owner, the state has made a designation within the next 30 days⁹.

The pace of designations has been far from steady and breaks down as follows:

- | | |
|--------|------------|
| • 2011 | 3 Projects |
| • 2012 | 8 Projects |
| • 2013 | 0 Projects |
| • 2014 | 0 Projects |

| | |
|--------|-------------------|
| • 2015 | 1 Project |
| • 2016 | 4 Projects |
| • 2017 | 2 Projects |
| • 2018 | 3 Projects |
| • 2019 | <u>0 Projects</u> |
| Total | 21 projects |

There is no clear explanation why 2012, and to a lesser extent 2016 and 2018, had so much activity while there were very few Offers to Sell or designations during most other periods.

As of June 2020, 14 properties with 1,640 total units and 1,307 affordable units have been purchased by designees. Most of these have involved “2 step” transactions with the designee acquiring the property using short term financing followed by permanent financing four to 18 months later using LIHTC or other public funding. As of summer 2020, all projects that have been purchased by designees have subsequently closed on permanent financing.

The remaining seven designations have not led to preservation purchases by a designee. Four projects did not result in a sale of any kind, and the owners maintained the existing affordability at those properties for at least several additional years. In two of the remaining situations, the properties were eventually sold to market buyers with a loss of roughly 200 affordable units. A final project, 30-unit Fairfield Apartments, had a designation in 2018 but no definitive outcome as of September 2020. Although the designee was not able to match the ROFR price, the proposed purchase of Fairfield Apartments by the third-party purchaser does contemplate the retention of significant affordability. A summary of the Chapter 40T designations to date is found in Appendix F.

During the same time that Chapter 40T and other important preservation initiatives have been saving thousands of affordable units, 4,446 affordable units have been lost to market conversion either through mortgage maturity, Section 8 opt out, or the termination of some other use restriction¹⁰. Of these, only 204 affordable units have been lost through a sale of the property¹¹. The remaining 4,242 lost units remained under the control of the same owner and thus never triggered the 40T purchase opportunities that might have led to a preservation outcome. These 4,242 lost units are a clear indication of the limits of Chapter 40T; ***without a sale there is little the state can do to ensure an extension of long-term affordability.***

Three Year Tenant Protections

The tenant protection provisions in Section 7 of the statute limit rent increases for low-income residents for a period of three years after a termination. Coupled with the two years of required notices, this provides, for most tenants, up to five years of warning before they may be displaced due to a market conversion. It has also allowed for a few projects to be preserved even after a termination as new owners agreed to restore the affordability that had recently lapsed. For example, Sever Street Apartments in Worcester and Hillcrest Acres in Attleboro were both constructed in the 1970’s using funding from the Section 236 program. The two

projects were purchased by separate preservation purchasers after the termination of the Sec. 236 financing, but before the end of the three year tenant protection period. Although the affordability restrictions had officially ended at these two projects, the three years of tenant protections meant that the projects were still predominantly composed of low-income residents. In these cases, it was relatively easy for the preservation buyers to impose new affordability restrictions.

Obsolescence of covered funding programs

One of the potential concerns for Chapter 40T going forward is that the law only covers 16 specific affordable housing funding programs. Currently eight of these programs have not funded new production for 30 years or more, and each year fewer projects are covered by these legacy restrictions¹². At the same time, an increasing number of projects are funded with local allocations of HOME or CPA funding along with state resources such as Affordable Housing Trust that are not subject to Chapter 40T. Thankfully most new projects also include some combination of federal LIHTC, state LIHTC, project-based Section 8, or project-based MRVP, so for the time being almost all new affordable housing projects of any size continue to be covered by Chapter 40T. However, this could be a concern in the future as funding programs continue to evolve.

40T Compliance

In many ways Chapter 40T has become part of the legal landscape in Massachusetts. Most Massachusetts real estate attorneys involved with affordable housing know the process to ensure that any sale is 40T compliant, and roughly 70 40T notices of some type or other are processed on average each year. However, there is still concern over some real estate brokers who do not mention 40T requirements in real estate listings, and out of state buyers may not be aware of the statute. Preservation proponents including developers, tenant advocates and public agencies have been quick to alert DHCD when there is a suspected sale that is not following the Chapter 40T process. The agency has several times alerted owners of suspected noncompliance, and has occasionally filed formal notices of noncompliance.

Importance of DHCD

The state, through DHCD, has devoted significant human resources to the administration of Chapter 40T. While routine administration is provided primarily but not exclusively from legal staff, housing development staff become deeply engaged in the exercise of the ROFO or ROFR. DHCD estimates that the general administration of the program, including processing notices, updating regulations and guidance, and responding to noncompliance issues requires roughly 1,000 hours of staff time per year (.5 FTE)¹³. CEDAC also devotes another 150 hours per year in data management and 40T technical assistance. When there is an active designation, the state will typically devote hundreds of additional hours per project, often supported by CEDAC and/or MassHousing. Clearly, Chapter 40T could not function without significant public support, particularly from DHCD.

Conclusion

Chapter 40T was enacted in November 2009, which represented a pivotal year in the formation of a culture of housing preservation in Massachusetts. In February 2009, the MacArthur Foundation awarded a \$1 million grant to CEDAC as well as a \$3.5 million Program-Related Investment to CEDAC and MHIC for housing preservation lending. Two important and ongoing preservation committees began meeting in early 2009. The Preservation Interagency Working Group (IWG) is composed of representatives of roughly a dozen public sector housing agencies. The larger Preservation Advisory Committee (PAC) is composed of a broad cross section of public sector, for-profit and non-profit agencies involved in preservation work. In another preservation development, DHCD and CEDAC disseminated the first version of the Housing Preservation Matrix, a key ranking tool for preservation projects seeking state funding in June 2009. Finally, Chapter 40T was passed into law in November 2009.

Drivers of Success

In its ten-year history, Chapter 40T has piled up a significant number of successes. Unlike most similar preservation laws and ordinances that have seen little activity, Chapter 40T has served as a crucial component in the preservation of 9,594 units, including 1,307 affordable units preserved through the ROFO/ROFR process and 8,287 units through the Sec. 6(a)(4) sales process. During this period, only 204 affordable units have been lost through a sale where the state was not able to preserve affordability. This achievement has been due to the efforts of a great number of people on many levels. Advocates lobbied for over a decade for a preservation bill and have continued to support housing preservation in meetings of the PAC, in CHAPA meetings, and other public forums. Legislators, led by the Joint Committee on Housing, played a key role in drafting, supporting and passing the legislation as well as allocating funding for affordable housing preservation.

CEDAC has consistently supported Chapter 40T by providing data support, technical assistance, and trainings for developers. The agency has played a crucial financial role as well, funding the acquisition of seven properties by non-profit designees, as well as acquisition and predevelopment financing for a number of exempt sales. Most non-profits involved in complicated preservation transactions have relied on CEDAC technical assistance to navigate acquisition, capital assembly, rehabilitation, and other regulatory issues.

While by no means universal across the state, certain cities, led by Boston and Cambridge, have also been important actors in establishing and maintaining this culture of preservation. In fact, Boston, which for decades has convened interdepartmental housing preservation meetings, has served as a model for interagency communication. These two cities along with a few others, have committed significant amounts of preservation funding, particularly to locally based non-profit developers.

Overall, the public agency that has done the most to ensure the success of Chapter 40T is clearly DHCD, which has been a strong advocate for housing preservation in numerous ways. In public presentations and supporting documents, DHCD staff have repeatedly stressed the importance of not just producing affordable housing, but also preserving the existing stock. DHCD has consistently prioritized at-risk preservation projects in its competitive funding rounds and through approval of projects seeking 4% tax credits. This reliable and predictable funding has instilled confidence in preservation purchasers who must acquire projects using short-term acquisition financing before there is a commitment of state funding. In addition, DHCD has consistently allocated legal staff time to ensure that 40T notices are processed and approved under strict time limits imposed by the law, and the designations occur in a fair manner. As noted, general staff support typically requires 0.5 FTE, but this time investment increases significantly with an active designation. Chapter 40T's success would not be possible without this advocacy, agency staff support, and consistent state funding for preservation.

Changes and Opportunities

Looking forward, are there any amendments that should be made to the statute? The past few years have shown a widespread understanding in the affordable housing industry of how Chapter 40T works, and there is no evidence that the law is causing significant unintended consequences. While it is clear that half of the covered programs in 40T are now long dormant or discontinued, virtually all affordable rental production projects of any scale continue to be funded with one or more covered programs, so projects outside the scope of 40T are not yet a significant concern. Consequently there is currently no pressing need to amend the law, but at some point in the future the list of covered programs will need to be updated.

While not directly related to the preservation of use-restricted affordable housing, support is growing for a bill that would provide a ROFR for unassisted multifamily properties (so-called "naturally-occurring affordable housing", or NOAH) that are offered for sale¹⁴. A bill modeled on Washington, D.C.'s TOPA law, for example, could provide a new tool to prevent gentrification in unassisted housing with modest rents. Passage of such a bill would provide yet another tool for housing preservation in Massachusetts. TOPA, while not an affordable housing ROFR, is notable as one of the few other laws that, like 40T, has shown itself to be an effective tool in protecting tenants when their property is sold.

Chapter 40T has posted significant accomplishments after its first 10 years of operation. Beginning its second decade since enactment, the statute continues to be a useful and effective tool in preserving affordable housing.

¹ Often an affiliate transfer request can qualify for an exemption either under §6(a)(6) “sale to an affiliate” or under §6(a)(4) “sale preserving affordability. For technical reasons DHCD may decide to grant the exemption under the latter provision, even though the sale is essentially from one affiliate to another.

² To be technically accurate, the notices counted were received by CEDAC, which should have received identical copies of all 40T notices sent to DHCD. It is possible that one or more notices were sent to DHCD but not to CEDAC.

³ Totals omit duplicate or amended notices for the same project.

⁴ Although Chapter 40T has a process where an owner can apply for a Final Certificate of Exemption after the proposed transaction is complete, many preservation buyers have not followed through with this last step, so Final Certificates of Exemption are not a complete data source.

⁵ The statute and regulations refer to ‘reasonable and diligent’ actions to preserve essentially all of the affordable units at the same level of affordability for a period of 30 years or more. See 760 CMR 64.02 (2)(a) “Standards for Preserving Affordability”

<https://www.mass.gov/files/documents/2017/11/03/40te760064.pdf>

⁶ The ratio is over five to one if the four designations that did not result in sales of any kind are excluded.

⁷ See for example, Duong, Brandon, “Refusing the Right of First Refusal” Shelterforce, October 16, 2020. <https://shelterforce.org/2020/10/16/refusing-the-right-to-refuse>

⁸ This total does not include an Offer to Sell notice that was received on December 23, 2019 from Tenant’s Development Corp, the nonprofit sponsor of a 185 unit ‘Year 15’ tax credit project in Boston called SETH II. The sponsor’s limited partner insisted that, as a step in the LIHTC ROFR process, the sponsor market the property. As of this writing, it appears unlikely that a sale will result from this notice.

⁹ In one odd case in early 2019, the state found out that a nonprofit sold an obsolete Section 202 project serving disabled individuals after the transaction had occurred. Upon learning of its violation, the embarrassed nonprofit agency agreed to provide DHCD an ‘equivalent affordability restriction’ on another unrestricted property that it owned outright.

¹⁰ This total includes a few units in some preservation projects preserved with tax credits that cannot be included in the new affordability restrictions because the existing tenants have incomes over the maximum LIHTC incomes.

¹¹ This number does not include the likelihood that approximately 14 units will be lost to market conversion at Fairfield Apartments.

¹² The inactive programs are: Rent Supplement, 221(d)(3) BMIR, 221(d)(4) (with affordability. Restrictions), Sec 236, UDAG, HODAG, SHARP, and 13A.

¹³ DHCD calculated staff time devoted to Chapter 40T at the request of the author.

¹⁴ Tenant opportunity to purchase bills in the 191st session of the Massachusetts Legislature include S.801, S.786, H.1260 and H.1315.

Appendix A

Detailed Review of Chapter 40T Provisions

Information in this appendix is quoted from Emily Achtenberg's paper "Chapter 40T at 5: A Retrospective Assessment of Massachusetts' Expiring Use Preservation Law", May 2015, pages 7-12. This paper was commissioned by CEDAC and Masshousing to recognize the 5th anniversary of Chapter 40T. The paper is available online at:

<https://cedac.org/wp-content/uploads/2016/06/Chapter-40T-at-5-6.2.15-1.pdf>

1. Covered Projects (Chapter 40T, §1)¹

Chapter 40T applies to housing that is "publicly-assisted" under one or more federal or state programs covered by the statute, including project-based rental subsidies (Section 8, Rent Supplement/ RAP, and MRVP—the Massachusetts Rental Voucher Program), mortgage subsidies (Section 221(d)(3) BMIR, Section 236 and the state's Chapter 13A program), federal and state low income housing tax credits, rural development (Section 515/ 521), and Chapter 121A property tax incentives. Some examples of assistance that do not trigger 40T are tenant-based subsidies, tax-exempt bond financing, HOME, Chapter 40B zoning relief, and local affordable housing programs.

2. Required Notices (§2)

Owners of publicly-assisted housing are required to send three types of notices:

- *A Two-Year Notice* (Notice of Termination) must be sent at least two years prior to the termination of a covered housing affordability program.
- *A One-Year Notice* (Notice of Intent to Complete Termination) must be sent at least one year prior to termination.
- *Notice of Intent/ Offer to Sell*. Unless the transaction is otherwise exempt,² the owner cannot enter into a legal agreement to sell the housing (such as a purchase and sale contract or letter of intent) before first issuing a Notice of Intent to Sell and giving DHCD an opportunity to purchase.

All required notices must be delivered to DHCD, the Community Economic Development Assistance Corporation (CEDAC), the municipality, individual tenants, and the tenant organization (if any).

Under a special transition rule provision, owners of projects with restrictions having less than 1 or 2 years remaining as of the effective date of 40T were required to send the applicable notice(s) within 90 days (i.e. by February 22, 2010).

3. Right of First Offer/ Right of First Refusal ³

¹ Parenthetical citations denoted by (§) refer to provisions of MGL Chapter 40T.

² In accordance with Chapter 40T §6; see Section 4 below.

³ These provisions do not apply if the transaction is exempt under §6; see Section IC4 below.

Right of First Offer (§ 3)

During the 90-day window following the owner's Notice of Intent to Sell, DHCD has an exclusive Right of First Offer (ROFO) to purchase the housing. DHCD is not obligated to make an offer, nor is the owner required to accept it.

DHCD may select a designee to act on its behalf as the prospective purchaser, in consultation with the affected municipality. Upon request, the owner must promptly provide all required due diligence documents.

Right of First Refusal (§ 4)

Upon expiration of the 90-day ROFO period, the owner may enter into a contract to sell the property to a third-party purchaser. However, DHCD (or its designee) has a 30-day Right of First Refusal (ROFR) to match the terms of the third-party contract. DHCD's purchase contract must contain the same terms and conditions as the executed third-party contract, except that:

- the earnest money deposit may not exceed the lesser of 2% of the sales price or \$250,000 (or the amount required by the third-party contract);
- the deposit must be refundable for at least 90 days (or longer, if required by the third-party contract); and
- the closing timeframe must be at least 240 days (or longer, if required by the third-party contract).

If DHCD fails to exercise its ROFR, or matches the third-party contract but fails to consummate the sale, or makes a counter-offer which is rejected by the owner, the owner has 2 years to complete the third-party sale. However, if the third-party sale is on terms that are the same or materially more favorable to the purchaser than the terms reflected any counter-offer made by DHCD, the property must again be offered to DHCD, on those same terms.

4. Exempt Sales (§6)

The owner can apply to DHCD for an exemption from the ROFO/ ROFR provisions, on one of the following grounds:

- The transaction will "preserve affordability," as determined by DHCD (§6(a)(4)). In general, this means that the purchaser will take "reasonable and diligent actions" to "retain, renew, or secure" subsidies in order to maintain the existing occupancy mix of low, very low, and extremely low income households,⁴ and to keep vacant units affordable, to the extent of available subsidies and consistent with the provision of quality housing.
- The purchaser is an affiliate of the owner and the sale does not constitute a "termination," as determined by DHCD (§6(a)(6)). In general, this means that the property is being transferred within the domain of a given real estate entity and not on the open market,

⁴ Defined as households at or below 80%, 60%, and 30% of AMI, respectively.

and that no affordability restriction is ending unless it is being replaced by an equivalent restriction.

- The purchaser has entered into a legally binding agreement to renew a project-based Section 8 contract, which is the sole source of assistance that qualifies the property as “publicly-assisted” housing.
- There are more than 15 years remaining before the first scheduled termination of a covered affordability restriction at the property.
- The transaction is a forced sale, due to eminent domain, foreclosure, or a negotiated transfer to avoid either result.
- The sale is “grandfathered” pursuant to a bona fide sales contract in effect prior to 40T.

In the first three circumstances, written notice of the exemption request must be sent to DHCD, CEDAC, the local legal services organization, and the tenant organization, if any.

5. Tenant Protections (§7)

After a termination, rents for “protected low income tenants”⁵ who do not receive Enhanced Vouchers may not be increased by more than the CPI plus 3%, for 3 years. Also during this period, protected tenants may not be evicted or involuntarily displaced except for a good cause.

6. Look-Back Provision (§10)

For any housing subject to 40T whose government assistance subsequently terminates, the ROFO and ROFR provisions remain in effect for 4 years after the date of the last termination.

Regulatory & Policy Framework

DHCD’s implementing regulations and policies for 40T, as they have evolved over time, have also played an important role in shaping the program. Key provisions and changes are summarized below.

1. Preserving Affordability – CMR 64.02 (2)⁶

The regulations further define the factors that DHCD will take into account in determining whether a purchaser has taken “reasonable and diligent actions” to preserve affordability, e.g., when seeking an exemption from the ROFO/ROFR sales process. According to the regulations, DHCD will consider whether the purchaser has taken all necessary and timely actions to retain or renew existing subsidies and, if such subsidies are reduced or terminated, to identify and secure alternative subsidies by consulting with DHCD and the municipality, at a minimum. Additional

⁵ Tenants who reside in the housing on the termination date, are subject to rent restrictions, and have incomes at or below 80% of AMI.

⁶ Code of Massachusetts Regulations. The 40T regulations (760 CMR 64.00) can be found at: <http://www.mass.gov/hed/economic/eohed/dhcd/legal/regs/760-cmr-64.pdf>

factors relate to the provision of “quality housing” and “comparable replacement units,” if applicable.

2. Curative Notices and Equivalent Affordability Restrictions – CMR 64.03(5), 64.02

The regulations provide for corrective actions in the event that a 1-Year or 2-Year Notice is untimely or defective. The owner must send a Curative Notice, extending the termination date of the applicable restriction by the number of months that the notice was late. If the restriction cannot be extended, the owner must enter into a written Equivalent Affordability Restriction (EAR) that is enforceable by DHCD. The EAR must maintain the same number of low income, very low income, and extremely low income units, the same rent restrictions, and the same renewal requirements that were contained in the original restriction.

In cases where DHCD determines that the defect was *de minimus*, causing no substantial harm to the interests protected by 40T, no corrective action is required. These provisions have added important new dimensions to the statutory notice requirements which have significantly affected the operation of 40T, as described in Section IIA.

3. Certificates of Exemption – CMR 64.07

Where a property is being sold, the regulations provide a process for buyers and sellers to seek an exemption from DHCD’s ROFO/ ROFR process, as permitted by 40T. As a first step, before entering into a sales contract, the applicant(s) may apply for a preliminary exemption, demonstrating how the sale meets one or more of the statutory grounds for exemption. DHCD has 30 days to act upon the request.

Once the preliminary exemption is granted, the sales transaction can proceed. At the request of the buyer, DHCD will issue a final certificate of exemption at the closing, if the sale is completed as described in the original request and complies with all other terms of the preliminary exemption. This two-step process has also had important implications for the program (see Section IIC).

4. Facilitating Exempt Sales – CMR 64.03 (1)(d), (2)(f), & (4)

In August 2013, DHCD issued revised regulations to facilitate exempt sales transactions and limit the applicability of the ROFO/ ROFR process⁷. Under the original regulations, owners were required to provide a Notice of Intent to Sell to DHCD and other affected parties prior to listing and marketing a property through a broker (to preservation and/or non-preservation buyers). Since the Notice of Intent to Sell triggers DHCD’s exclusive 90-day offer period, this requirement was perceived as rendering meaningless owners’ efforts to establish a market value through competitive bidding, and to pursue a preservation sale with purchasers of their choice, under the statutory provisions authorizing exempt sales.

Under the revised regulation, owners can engage a broker and market their properties before issuing a Notice of Intent to Sell. The Notice of Intent to Sell is required to be issued only if the selected purchaser does not intend to seek an exemption for a preservation transaction. The regulation provides for an alternative Notice of Intent to Sell to a Preservation Purchaser, which the owner may file before entering into a sales contract with a buyer who seeks to preserve

⁷ NB: The regulations have since been further revised. See Appendix C.

affordability (with copies to DHCD, CEDAC, the municipality, tenants, and the tenant organization, if any).

Under this new regulatory approach, opportunities for DHCD (or its designee) to purchase a 40T property through the ROFO/ ROFR process are generally limited to situations where the seller and buyer are not pursuing a preservation sale. Since the revised regulation was adopted, no new Notices of Intent to Sell have been issued and no additional sales have been triggered under the ROFO/ROFR provisions (see Section IIB).

5. Designee Selection

Regulations (CMR 64.04)

When the Right of First Offer is triggered, the regulations require DHCD to consider a number of factors in selecting a designee to assume its rights and responsibilities as a prospective purchaser. These include the organization's resources and capabilities, its demonstrated commitment to, and experience in, successfully owning and operating affordable housing, and its ability to complete the transaction in a timely manner. To accommodate 40T's tight statutory timeframes, DHCD is authorized to select designees from a pre-qualified pool of candidates.

Massachusetts General Laws Annotated [Currentness](#)

Part I. Administration of the Government (Ch. 1-182)

▢ [Title VII](#). Cities, Towns and Districts (Ch. 39-49A)

→ [Chapter 40T](#). Publicly-Assisted Affordable Housing ([Refs & Annos](#))

→ **§ 1. Definitions**

As used in this chapter, the following words shall, unless the context clearly requires otherwise, have the following meanings:--

“Affected municipality”, a city or town in which publicly-assisted housing is located.

“Affiliate”, an entity owned or controlled by an owner or under common control with the owner.

“Affordability restriction”, a limit on rents that an owner may charge for occupancy of a rental unit in a public-ly-assisted housing development or a limit on tenant income for persons or families seeking to qualify for admission to such housing.

“CEDAC”, the Community Economic Development Assistance Corporation established in chapter 40H.

“Chief executive officer”, the mayor, city manager or city council in a city or the board of selectmen in a town unless otherwise designated by a municipal charter.

“Department”, the department of housing and community development or its designee as set forth in this chapter.

“Designee”, a municipality, local or regional housing authority, nonprofit or for-profit corporation or other entity qualified to do business in the commonwealth which is selected by the department to operate publicly-assisted housing that is decent, safe and sanitary affordable housing under [subsection \(b\) of section 3](#).

“Enhanced section 8 vouchers”, vouchers provided under [42 U.S.C. 1437f \(t\)](#) or other substantially equivalent assistance.

“Extremely low income”, a household income of not more than 30 per cent of the area median income, adjusted for household size, as periodically determined by the United States Department of Housing and Urban Development.

“Government program”, a program that provides government assistance under a program set forth in the definition of publicly-assisted housing.

“Low income”, a household income of not more than 80 per cent of the area median income, adjusted for household size, as periodically determined by the United States Department of Housing and Urban Development.

“Owner”, a person, firm, partnership, corporation, trust, organization, limited liability company or other entity, or its successors or assigns, that holds title to publicly-assisted housing.

“Prepayment”, (a) the payment in full or the refinancing of a governmental-insured or government-held mortgage loan indebtedness prior to its original maturity date; (b) the voluntary cancellation of mortgage insurance on a publicly assisted housing development; or (c) the payment in full of a government contract, any of which would have the effect of removing either: (i) the affordability restrictions applicable to publicly-assisted housing; or (ii) a requirement to renew any such affordability restrictions.

“Preserve affordability”, with respect to publicly-assisted housing, to undertake reasonable and diligent actions to retain, renew or secure subsidies affecting publicly-assisted housing in order to maintain at least the same number of units affordable to low, very low and extremely low-income households, respectively, as are currently occupied by such households, and to maintain as affordable to such households generally all units that are currently vacant, to the extent of available subsidies and taking into account the need to ensure that the publicly-assisted housing provides quality housing to its tenants. To the extent that the department determines that existing affordability does not provide quality housing to the tenants, the department shall consider affordability to a range of incomes for such units not to exceed 80 per cent of area median income as defined by United States Department of Housing and Urban Development; provided, however, that no tenant shall be displaced pursuant to the determination; and provided further, that units affordable to low, very low and extremely low-income households that are not retained, renewed or secured at the publicly-assisted housing shall be replaced with comparable deed-restricted publicly-assisted housing units at an alternative site to the extent of available subsidies and to the extent feasible.

“Protected low-income tenant”, a low-income tenant residing in publicly-assisted housing on the date of termination of the government program and whose rent was restricted by that government program.

“Publicly-assisted housing”, a housing unit or development that receives government assistance under any of the following programs: (i) section 8 of the United States Housing Act of 1937, [42 U.S.C. section 1437f](#), as it applies to new construction, substantial rehabilitation, moderate rehabilitation, property disposition and loan management set-aside programs or any other program providing project-based rental assistance; (ii) the federal Low-Income Housing Tax Credit Program, [26 U.S.C. section 42](#); (iii) section 101 of the Housing and Urban Development Act of 1965, [12 U.S.C. section 1701s](#), as it applies to programs for rent supplement assistance thereunder; (iv) section 202 of the Housing Act of 1959, [12 U.S.C. section 1701q](#); (v) the below market interest rate program codified at section 221(d)(3) of the National Housing Act, [12 U.S.C. section 1715 \(d\)\(3\) and \(5\)](#); (vi) section 221(d)(4) of the National Housing Act, [12 U.S.C. section 17151 \(d\)\(4\)](#), to the extent the project's rents are restricted pursuant to a government agreement; (vii) section 236 of the National Housing Act, [12 U.S.C. section 1715z-l](#); (viii) section 515 of the Housing Act of 1949, [42 U.S.C. section 1485](#); (ix) section 521 of the Housing Act of 1949, [42 U.S.C. section 1490a](#); (x) the Urban Development Action Grant, [42 U.S.C. section 5318](#), to the extent that the affordability of dwelling units subject to such program are restricted pursuant to a government agreement; (xi) the Housing Development Action Grant, [42 U.S.C. section 1437](#), to the extent the project's rents are restricted pursuant to a government

agreement; (xii) section 13A of chapter 708 of the acts of 1966; (xiii) the voucher program provided for annually in item 7004-9024 of section 2 of the general appropriation act as that program applies to project-based rental assistance; (xiv) the Massachusetts low income housing tax credit program established in [section 6I of chapter 62](#); (xv) the State Housing Assistance for Rental Production, established pursuant to chapter 574 of the acts of 1983; or (xvi) chapter 121A to the extent that the affordability of dwelling units are restricted pursuant to a written agreement with the affected municipality.

“Purchase contract”, a binding written agreement whereby an owner agrees to sell publicly-assisted housing including, without limitation, a purchase and sale agreement, contract of sale, purchase option or other similar instrument.

“Regulatory agreement”, an affordable housing restriction that establishes an owner's obligations created pursuant to the efforts of the department or its designee to preserve affordability and which is consistent with [section 31 of chapter 184](#); provided, however, that in any project that is eligible for participation in the United States Department of Housing and Urban Development's Mark Up to Market Program, the restriction, insofar as it relates to the limiting of the level of rents, shall not apply to units covered by a section 8 housing assistance payment contract so long as such contract is effective.

“Sale”, an act by which an owner conveys, transfers or disposes of property by deed or otherwise, whether through a single transaction or a series of transactions, within a 2 year period; provided, however, that a disposition of publicly-assisted housing by an owner to an affiliate of such owner shall not constitute a sale.

“Subsidy”, public financial assistance including, but not limited to, grants, loans, rental assistance, tax credits, tax abatements, mortgage financing, mortgage insurance, assistance pursuant to any government program or any other form of assistance intended to make housing affordable to low, very low and extremely low-income households.

“Tenant”, a person entitled to possession or occupancy of a rental unit within publicly-assisted housing, including a subtenant, lessee and sublessee.

“Tenant organization”, an organization established by the tenants of publicly-assisted housing for the purpose of addressing issues related to their living environment and which meets regularly, operates democratically, is representative of all residents in the development, is completely independent of owners, management and their representatives and which has filed a notice of its existence with CEDAC; provided, however, that no owner or other third party shall be required to ascertain the organization's compliance with this definition.

“Termination”, the cessation, discharge or removal of an affordability restriction affecting publicly-assisted housing in the absence of a simultaneous replacement of that restriction with an equivalent affordability restriction including, but not limited to: (i) nonrenewal or termination, in whole or in part, of a government program contract; (ii) expiration, in whole or in part, of an affordability restriction under a government program or the requirement to renew the restriction; (iii) payment in full of a government program mortgage loan; or (iv) prepayment of a government program mortgage loan.

“Time for performance”, the date for delivery of the deed or other document evidencing a sale pursuant to a purchase contract or any extension thereof.

“Very low income”, having a household income of not more than 60 per cent of the area median income, adjusted for household size, as periodically determined by the United States Department of Housing and Urban Development.

→ § 2. Notice requirements for termination of affordability restriction

(a) Except with respect to property subject to an affordability restriction which has less than 2 years remaining and, for which subsection (e) shall apply, the owner shall provide written notice to: (i) all tenants and the tenant organization, if any; (ii) the chief executive officer of the affected municipality; (iii) CEDAC; and (iv) the department, not less than 2 years before the termination of the affordability restriction affecting publicly-assisted housing. Nothing herein shall prohibit the owner from taking actions to terminate an affordability restriction during any notice period provided herein; provided, however, that the owner shall comply with all of the notice terms and restrictions pursuant to subsections (b) and (c).

The written notice shall provide: (1) the address of the publicly-assisted housing; (2) the name and address of the owner; (3) notification that an affordability restriction may terminate; (4) the date on which each affordability restriction may terminate; and (5) such other information as required by the department. Where more than 1 termination may occur, the owner may send 1 written notice so long as the terminations are scheduled to occur within 1 year of each other, the notice is given at least 2 years prior to the earliest termination and the notice otherwise complies with this subsection. Thereafter, the owner shall again be subject to the notice provision of subsection (c) of section 2.

(b) An owner shall not complete a termination or allow a termination to occur unless, not less than 1 year before the completion of the last termination event affecting the housing, the owner provides the entities identified in subsection (a) with written notice of intent to complete termination. The notice shall state: (1) the address of the publicly-assisted housing; (2) the name and address of the owner; (3) the date on which the owner intends to complete termination; (4) unless section 6 applies, a statement that the department has the right of offer pursuant to section 3 to the extent the owner wishes to pursue a potential sale of the property; and (5) such other information as required by the department.

(c) Except as provided in section 6, an owner shall not sell publicly-assisted housing before offering the department the opportunity to purchase the property pursuant to sections 3 and 4. The owner shall notify, in writing, the parties identified in subsection (a) of the owner's intention to sell the property.

(d) Any notice required by this chapter shall be deemed to have been provided when delivered in person or mailed by certified or registered mail, return receipt requested, to the party to whom notice is required; except that with respect to tenants, notice shall be deemed to have been provided when either: (1) the notice is delivered in hand to the tenant or an adult member of the tenant's household; or (2) the notice is sent by first class mail and a copy is left in or under the door of the tenant's dwelling unit. A notice to the affected municipality shall be sent to the chief

executive officer.

(e) Notwithstanding subsection (a) of section 2, an owner of publicly-assisted housing who, on the effective date of this chapter, has less than 2 years remaining prior to the date when the affordability restriction will cease to apply to such property, shall not be required to give the 2-year notice required by said subsection (a), but shall provide such notice within 90 days after the effective date of this chapter. Notwithstanding subsection (b), an owner who, on the effective date of this chapter has less than 1 year remaining prior to a termination shall not be required to give the 1-year notice required by subsection (b), but shall provide such notice within 90 days after the effective date of this chapter.

(f) The notice requirements of this section shall not be affected by the status of an offer, purchase contract or sale under section 3 or section 4.

→ § 3. Purchase option for publicly-assisted housing by department

(a) An owner shall offer the department an opportunity to purchase publicly-assisted housing prior to entering into an agreement to sell such property pursuant to the time periods contained in this section, but no owner shall be under any obligation to enter into an agreement to sell such property to the department.

(b) The department may select a designee to act on its behalf as purchaser of the publicly-assisted housing and shall give the owner and CEDAC written notice of its selection. The department shall promptly consult with the affected municipality before selecting a designee and shall immediately designate the affected municipality as its designee upon written request of the affected municipality, unless the department determines that such request is not feasible for reasons set forth in the department's regulations. The department shall enter into a written agreement with its selected designee providing that the designee, and any of its successors or assigns, agree to preserve the affordability of the publicly assisted housing. Once such an agreement is executed, the designee shall assume all rights and responsibilities attributable to the department as a prospective purchaser under this section and section 4. At any time prior to a sale under this section or section 4, the department may revoke its designation and assume the designee's rights and responsibilities, either in its own capacity or by selecting a new designee; provided, however, that no change in a designation shall operate to extend or alter any time periods for performance set forth in this chapter or in any purchase contract entered into pursuant to this chapter.

(c) The department may, within 90 days after it receives notice pursuant to subsection (c) of section 2 of the owner's intention to sell, submit an offer to the owner to purchase the publicly-assisted housing. Failure by the department to submit a timely offer shall constitute an irrevocable waiver of the department's rights under this section and the owner may sell the publicly-assisted housing subject to section 4. If the owner accepts the department's initial or any revised offer, the owner and the department shall enter into such other agreements as are necessary and appropriate to complete the sale. If the owner and the department have not entered into an agreement to sell the property to the department within 90 days after receipt of the notice pursuant to [subsection \(c\) of section 2](#), the owner may enter into an agreement to sell the property to a purchaser of the owner's choice, subject to section 4.

(d) At any time after the notice in section 2 has been provided and within 10 days of receiving a request, the owner

shall make documents available to the department for review and photocopying during normal business hours at the owner's principal place of business or at a commercial photocopying facility. Such documents shall include, but not be limited to: (1) any existing architectural plans and specifications of the development; (2) itemized lists of monthly operating expenses and capital expenditures in each of the 2 preceding calendar years; (3) any capital needs studies or market studies that have been submitted to a federal, state or local agency in the preceding 3 years; (4) utility consumption rates for the preceding year; (5) copies of the last 2 audited annual financial statements and physical inspection reports filed with federal, state or local agencies; (6) the most recent rent roll showing then current vacancies and rent arrearages; and (7) a statement of the approximate annualized vacancy rate at the development for each of the 2 preceding calendar years. Documents obtained pursuant to a request under subsections (c) and (d) shall not be considered public records, as defined in [clause 26 of section 7 of chapter 4](#), and the department shall not make such documents available to the public without the written consent of the owner or pursuant to a court order; provided, however, that disclosure may be made to potential funding sources, regulatory agencies or agents or consultants of the department in connection with the transaction, subject to appropriate confidentiality agreements. Upon request and with appropriate notice, the owner shall permit reasonable inspections of the dwelling units, building systems, common areas and common grounds by agents, consultants and representatives of the department or its designee including, but not limited to, inspections related to environmental, engineering, structural or zoning matters; provided, however, that the owner and agents, consultants or representatives of the department or its designee shall execute an access and confidentiality agreement, in a form approved by the department, with respect to such matters as insurance to be carried by the investigators, indemnities of the owner, restrictions on invasive testing, restoration requirements, the timing of such inspections and the requirement to keep all matters discovered confidential.

(e) Not later than 30 days after the department submits an offer to purchase the publicly-assisted housing pursuant to subsection (c), the department shall notify tenants in the housing development of its plans.

→ § 4. Sale of publicly assisted housing to third party by purchase contract; submission to department; contents; time for completion of sale

(a) Upon the expiration of the 90 day offer period in [subsection \(c\) of section 3](#), but not later than 2 years after the date notice was provided to the department in subsection (c) of said section 2, the owner may execute a purchase contract with a third party to sell the publicly-assisted housing pursuant to this section. Thereafter, the owner again shall be subject to the notice provision of said subsection (c) of said section 2.

(b) Upon execution of a third party purchase contract, the owner shall, within 7 days, submit a copy of the contract to the department and CEDAC, along with a proposed purchase contract for execution by the department. If the department elects to purchase the publicly-assisted housing, the department shall, within 30 days after receipt of the third party purchase contract and the proposed purchase contract, execute the proposed purchase contract or such other agreement as is acceptable to the owner and the department. The time periods set forth in this subsection may be extended by agreement between the owner and the department. The proposed purchase contract shall contain the same terms and conditions as the executed third party purchase contract, except that the proposed purchase contract shall provide at least the following terms: (i) the earnest money deposit shall not exceed the lesser of: (1) the deposit in the third party purchase contract; (2) 2 per cent of the sale price; or (3) \$250,000; provided, however, that the

owner and the department may agree to modify the terms of the earnest money deposit; and provided further, that the earnest money deposit shall be held under commercially-reasonable terms by an escrow agent selected jointly by the owner and the department; (ii) the earnest money deposit shall be refundable for not less than 90 days from the date of execution of the purchase contract or such greater period as provided for in the third party purchase contract; provided, however, that if the owner unreasonably delays the buyer's ability to conduct due diligence during the 90 day period, the earnest money deposit shall continue to be refundable for a period greater than 90 days; and (iii) the time for performance shall be not less than 240 days from the date of the execution of the purchase contract, or such greater period as provided for in the third party purchase contract.

(c) If the department fails to execute the proposed purchase contract within 30 days or such other period as provided in subsection (b), the owner shall have 2 years from the last day on which the department was entitled to execute the proposed purchase contract in which to complete a sale of the owner's publicly-assisted housing to a third party, except as provided in subsection (e). Upon the expiration of the 2-year period, the owner shall be subject again to [subsection \(c\) of section 2](#), section 3 and this section.

(d) If the department executes the proposed purchase contract as provided in subsection (b) but fails to perform as provided in the executed purchase contract, then the owner shall have 2 years from the date on which the executed purchase contract terminated in which to complete a sale of the owner's publicly-assisted housing to a third party. Upon the expiration of the 2-year period, the owner shall be subject again to all of [subsection \(c\) of section 2](#), section 3 and this section.

(e) After receipt of the third party purchase contract provided for in subsection (b), the department may, within the 30-day time period prescribed in said subsection (b), make a counteroffer by executing and submitting to the owner an amended proposed purchase contract. Failure by the department to execute the purchase contract or submit a counteroffer within the 30-day period referenced in subsection (b) shall constitute a waiver of the department's right to purchase under this section. If the department submits a counteroffer, the owner shall have 30 days from the date it receives the amended proposed purchase contract to execute the amended proposed purchase contract or reject, in writing, the counteroffer. If the owner rejects the counteroffer, the owner shall have 2 years from the date on which the owner rejects the department's counteroffer to complete a sale of the publicly-assisted housing to a third party; provided, however, that if such sale is upon economic terms and conditions that are the same as or materially more favorable to the proposed purchaser than the economic terms and conditions in the proposed purchase contract offered by the department in its counteroffer, the owner shall provide a copy of the new third party purchase contract, along with a proposed purchase contract for execution by the department which shall contain the same terms and conditions as the executed third party purchase contract; provided that the department shall have 30 days from the date it receives the third party purchase contract and the proposed purchase contract to execute the proposed purchase contract or such other agreement as is acceptable to the owner and the department.

(f) The owner shall, not later than 7 days after the execution of a purchase contract with a third party, provide the department with a copy of any new or amended purchase contract executed with respect to the property during the 2 year period set forth in subsections (c) to (e), inclusive, and shall not later than 7 days after the recording or filing of the deed or other document with the registry of deeds or the registry district of the land court of the county in which the affected real property is located, provide the department with a copy of any such deed or other document

transferring the owner's interest in the publicly-assisted housing.

(g) Any third party purchase contract, amended third party purchase contract, deed or any other document transferring the owner's interest in publicly-assisted housing shall include a certification by the owner that the document is accurate and complete and there are no other agreements between the owner and the third party buyer, or an affiliate of either, with respect to the sale of the publicly-assisted housing.

→ § 5. Applicability of Sec. 16 of chapter 30B

An affected municipality shall not be subject to [section 16 of chapter 30B](#).

→ § 6. Exemptions; requests

(a) Sections 3 and 4 shall not apply to the following: (i) a government taking by eminent domain or a negotiated purchase in lieu of eminent domain; (ii) a forced sale pursuant to a foreclosure; (iii) a deed-in-lieu-of foreclosure; (iv) a proposed sale to a purchaser pursuant to terms and conditions that preserve affordability, as determined by the department; (v) a proposed sale of publicly-assisted housing that the department has determined, as of the effective date of this act, was neither receiving government assistance nor was subject to regulation by any of the programs listed in the definition of publicly-assisted housing other than project-based section 8 and the buyer has agreed, in a regulatory agreement, to renew in whole, all project-based section 8 assistance contracts, or any successor program thereto; provided, however, that at the time of such renewal, such assistance is available to the owner on economic terms and conditions that are comparable to the existing project-based rental assistance contract; (vi) a proposed sale of publicly-assisted housing to an affiliate of the owner that is not a termination as determined by the department; (vii) a proposed sale of publicly-assisted housing which has more than 15 years from the date of the sale until the date of the publicly-assisted housing's first scheduled termination; or (viii) a bona fide proposed sale pursuant to a purchase contract on the effective date of this chapter.

(b) An owner seeking an exemption under clause (iv), (v) or (vi) of subsection (a) shall include the name and address of any tenant organization in the request and shall provide a copy of its request to the chief executive officer of the affected municipality, CEDAC, the local legal services organization as designated by the department and the tenant organization, if any, at the time it files its exemption request with the department. The department shall provide a copy of its written determination under said clause (iv), (v) or (vi) of said subsection (a) to the owner, CEDAC, the local legal services organization and the tenant organization.

→ § 7. Rent increases for protected low-income tenants after termination

For 3 years after termination, the rent for a protected low-income tenant who does not receive an enhanced section 8 voucher shall not be increased more than once annually by the increase in the consumer price index applicable to the area in which the publicly-assisted housing is located during the preceding year plus 3 per cent. The foregoing shall not apply to a low-income tenant: (i) who is income eligible for an enhanced section 8 voucher but does not obtain one solely due to some action or inaction of the tenant on or after the date he is eligible to apply for the enhanced

section 8 voucher; or (ii) who would be eligible for an enhanced section 8 voucher if this provision was not in effect. For a period of 3 years after termination, a protected low income tenant shall not be evicted or involuntarily displaced from his dwelling except for good cause related to tenant fault.

→ **§ 8. Regulatory agreements**

A purchase by the department or by its designee pursuant to this chapter shall be subject to a regulatory agreement. A regulatory agreement shall not contain any terms that would preclude an owner or buyer from participating in, or diminishing the benefits that an owner would otherwise receive by participating in the United States Department of Housing and Urban Development's Mark Up to Market Program.

→ **§ 9. Certificate of compliance; request; time for issuance; filing requirements**

An owner who has complied with sections 2 through 4, inclusive, which has not resulted in a purchase by the department or which has resulted in a sale pursuant to section 4, may apply to the department for a certificate of compliance by submitting a written request for the certificate in a form and with such documentation as required by the department to establish the owner's compliance to the satisfaction of the department. Upon submission of the written request, the owner shall provide a copy of the request to CEDAC and the chief executive officer of the affected municipality. Upon request by a tenant of the affected publicly-assisted housing, the owner shall provide a copy of the owner's request for a certificate of compliance. The department shall issue the certificate of compliance within 30 days after receipt of the application if it determines that the owner has complied with said sections 2 to 4, inclusive. The certificate of compliance shall be filed with the registry of deeds or the registry district of the land court of the county in which the real property is located within 1 year after the date of issuance.

→ **§ 10. Applicability**

For the purposes of sections 3 and 4, housing that qualified as publicly-assisted housing as of the effective date of this chapter shall be subject to this chapter for 4 years after the date of the last event or occurrence that constituted a termination; provided, however, that the termination occurred subsequent to the effective date of this chapter.

END OF DOCUMENT

Appendix C: Regulations

760 CMR: DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

760 CMR 64.00: PUBLICLY-ASSISTED AFFORDABLE HOUSING PRESERVATION

Section

64.01: Background and Purpose

64.02: Definitions

64.03: Notices

64.04: Department's Selection of Designee

64.05: Due Diligence Process

64.06: Sale by Owner to Designee or Third Party

64.07: Certificate of Exemption

64.08: Certificate of Compliance

64.09: Other Provisions

64.10: Amendments; Waivers

64.01: Background and Purpose

760 CMR 64.00 establish rules, standards, and procedures for the Publicly-assisted Affordable Housing Preservation Program created by M.G.L. c. 40T, added by St. 2009, c. 159. The Department of Housing and Community Development (the Department) is the regulatory agency for the program and is authorized to issue regulations to explain and to provide specifics of the program and its operation. It is the purpose of M.G.L. c. 40T and 760 CMR 64.00 to preserve the affordability of publicly-assisted housing in Massachusetts.

64.02: Definitions

(1) Capitalized terms used in this 760 CMR 64.00 and not specifically defined in 760 CMR 64.00 shall have the meaning set forth in M.G.L. c. 40T.

Certificate of Compliance - has the meaning set forth in 760 CMR 64.08.

Certificate of Exemption - has the meaning set forth in 760 CMR 64.07.

Curative Notice - has the meaning set forth in 760 CMR 64.03(5).

Defective Notice - has the meaning set forth in 760 CMR 64.03(5).

Disposition to an Affiliate – as used in M.G.L. c.40T, §1, *Sale*, means:

- a) the transfer of a limited partner interest in a limited partnership to an Affiliate of the general partner, provided that any accompanying transfer of the general partner interest is also to an Affiliate of the general partner;
- b) the transfer of a general partner interest in a limited partnership to an Affiliate of the General Partner;
- c) the transfer of a membership interest of an LLC member without management rights to an Affiliate of a managing member, provided that any accompanying transfer of the managing member's management interest or authority is also to an Affiliate of the managing member; or
- d) the transfer of a managing membership interest of an LLC member to an Affiliate of the managing member of the LLC.

Due Diligence Materials - has the meaning set forth in 760 CMR 64.05.

Equivalent Affordability Restriction - means a continuing or replacement Affordability Restriction that meets the following tests:

- (a) there is no reduction in the total number of Publicly-assisted Housing units or in the number of units made available to each of Low Income, Very Low Income, and Extremely Low Income households (to the extent units are required to be made available to such households under the existing Affordability Restriction);
- (b) there is no increase in the maximum rents currently charged to Tenants for occupancy of any Publicly-assisted Housing rental unit, as such maximum limit may change from time to time pursuant to the Government Program applicable to an existing Affordability Restriction;
- (c) any requirements to renew Affordability Restrictions that affect the Publicly-assisted Housing are maintained;

(d) the Equivalent Affordability Restriction is a written agreement recorded or suitable for recording in a registry of deeds or registry district of the land court, or other substantially equivalent written agreement acceptable to the Department, that is enforceable by the Department or another governmental entity, or by any non-governmental entity that has the power to enforce the existing Affordability Restriction; and

(e) if the existing Affordability Restriction was subject to the approval of the Department under M.G.L. c. 184, the Equivalent Affordability Restriction shall be subject to the Department's approval (but solely with respect to compliance with the requirements of said M.G.L. c. 184).

(f) A *Curative Equivalent Affordability Restriction* is imposed in conjunction with a Curative Notice in order to cure a Defective Notice, in accordance with 760 CMR 64.03(5), or to cure material noncompliance with the due diligence requirements, in accordance with 760 CMR 64.05(3). Its duration shall be determined by the Department in accordance with the applicable provision of 760 CMR 64.00.

(g) An existing Equivalent Affordability Restriction is an Affordability Restriction in place and continuing at the time of cessation, discharge, or removal of another Affordability Restriction that, as to the Affordability Restriction that is ending, meets the requirements of an Equivalent Affordability Restriction.

(h) 760 CMR 64.02 (1): Equivalent Affordability Restriction shall not be construed to impose a maximum limit on the number of Extremely Low Income, Very Low Income, or Low Income households.

Extended Time Period - has the meaning set forth in 760 CMR 64.03(5).

Inspection - means an examination of the condition of the premises generally, including dwelling units, building systems, common areas and common grounds, including but not limited to examinations related to environmental, engineering, structural and/or zoning matters; and, further, shall include minimally invasive actions and/or procedures such as sampling building surfaces and collecting soil samples with a narrow gauge auger to establish the condition and functionality of building components or systems that are not in plain view or to investigate the extent of potential issues such as water infiltration, mold and the presence of hazardous materials such as lead paint and asbestos.

LLC - means Limited Liability Company.

Notice - means a Notice of Intent to Complete Termination, a Notice of Intent to Sell to a Preservation Purchaser, a Notice of Future Termination, or an Offer to Sell.

Notice of Future Termination or Two-Year Termination Notice - means the notice required to be given by the Owner under M.G.L. c. 40T, § 2(a). *See* 760 CMR 64.03.

Notice of Intent to Complete Termination or One-Year Termination Notice – means the notice required to be given by the Owner under M.G.L. c. 40T, § 2(b). *See* 760 CMR 64.03.

Notice of Intent to Sell to Preservation Purchaser - means the notice that the Owner intends to pursue a potential Sale of Publicly-Assisted Housing to a Preservation Purchaser and to request an exemption from M.G.L. c. 40T, §§ 3 and 4, pursuant to M.G.L. c. 40T, § 6(a)(iv), (v), (vi), or (vii). *See* 760 CMR 64.03.

Offer to Sell - means the notice and offer required to be given by the Owner under M.G.L. c. 40T, § 2(c). *See* 760 CMR 64.03.

Preservation Purchaser - means a Purchaser who commits to Preserve Affordability of Publicly-Assisted Housing by (A) entering into a Purchase Contract that contemplates a transaction that would be exempt from the provisions of M.G.L. c. 40T, §§ 3 and 4, pursuant to M.G.L. c. 40T, § 6(a) (iv), (v), (vi), or (vii) and, (B) upon performance of the Purchase Contract, assumes any existing Affordability Restriction(s) and/or enters into one or more new Affordability Restrictions to the extent required by the requirements for exemption pursuant to M.G.L. c. 40T, § 6 (a) (iv), (v), (vi), or (vii).

Preserve Affordability - has the meaning set forth in M.G.L. c. 40T, § 1, as further affected by 760 CMR 64.02(2).

Purchase Contract – In addition to the types of agreements enumerated in M.G.L. c. 40T, § 1, the term “Purchase Contract” shall include, without limitation, a binding offer to purchase or letter of intent between an Owner and a Purchaser.

Purchaser - means a party who has entered into a Purchase Contract with an Owner and who will, upon performance of the Purchase Contract, become the new Owner of the Publicly-assisted Housing.

Sale - as set forth in M.G.L. c. 40T, § 1, shall include:

(a) a transfer, directly or indirectly, of

1. all or substantially all of the ownership interest in the Owner, or
2. of all or substantially all of the management or controlling interest of the Owner together with a transfer of some or all the ownership interest of such management or controlling interest,

whether by transfer of the partnership interests of a limited partnership, the member interest of a limited liability company (LLC), a class of stock or portfolio of shares of a corporation, the beneficial interest in a passive trust, or by other means, but not including:

- a. with respect to a limited partnership, the transfer of any other limited partner interest not in combination with the transfer of the general partner interest, which may include a transfer also qualified as a Disposition to an Affiliate under 760 CMR 64.02 (1) Disposition to an Affiliate (a); or
 - b. with respect to an LLC, the transfer of any other member interest not in combination with the transfer of the managing member interest or the interest held by the manager or its Affiliate, which may include a transfer also qualified as a Disposition to an Affiliate under 760 CMR 64.02 (1) Disposition to an Affiliate (c); or
 - c. any transfer similar in substance to the transfers described in 760 CMR 64.02: Sale a and b.; and
- (b) a transfer of any interest that causes dissolution of the Owner under applicable state law governing corporations, trusts, partnerships, or LLCs.

Simultaneous Replacement – As used in the definition of *Termination* in M.G.L. c. 40T, § 1, the term *Simultaneous Replacement* shall include the continuance, by assumption by a Purchaser or otherwise, of an *Existing Equivalent Affordability Restriction* that remains in place notwithstanding the cessation, discharge, or removal of an *Affordability Restriction* imposed by a different Government Program.

Successor Designee - has the meaning set forth in 760 CMR 64.04(4).

Termination - has the meaning set forth in M.G.L. c. 40T, § 1, as further affected by the definition of Equivalent Affordability Restriction in 760 CMR 64.02 (1).

Third-Party Purchaser - means a Purchaser who is not the Department, a Designee, or an Affiliate.

(2) Standards for "Preserve Affordability." In making a determination as to whether a Purchaser has taken the necessary actions to Preserve Affordability, the Department shall take the following factors into consideration. In each case the burden shall be on the party seeking the determination to provide sufficient evidence to support the Department's determination.

(a) Reasonable and Diligent Actions. In making a determination as to whether the Purchaser has undertaken reasonable and diligent actions to retain, renew or secure Subsidies affecting Publicly-assisted Housing, the Department will consider, in its reasonable discretion, the following factors and information.

1. If the opportunity exists to retain or renew Subsidies under an existing Government Program, the Purchaser must show either a. that it made all necessary filings and took all other necessary actions in a complete, timely, and diligent manner, and the Subsidies have been retained or renewed or b. new equivalent Subsidies have been secured.

2. If a request to retain or renew Subsidies is denied despite reasonable and diligent actions, or if the availability of Subsidies under an existing Government Program has been reduced or terminated, the Purchaser must show that it undertook diligent efforts to identify and secure an alternative source(s) of Subsidies. In identifying potential Subsidies, the Purchaser shall show, at a minimum, that it consulted with the Department to obtain information about the full range of alternative federal and state Subsidy programs, and that it consulted with the Affected Municipality to obtain information about the full range of alternative local Subsidy programs. A Purchaser who is suspended, debarred, or otherwise prohibited from participating in a Subsidy program that is otherwise available, shall not be considered to have complied with 760 CMR 64.02(2)(a).

(b) Quality Housing. In making a determination as to whether the Purchaser has taken into account the need to ensure that the Publicly-assisted Housing provides quality housing to its Tenants, the Department will consider, in its reasonable discretion, whether a reduction in the total number of affordable units or the number of bedrooms per unit is justified by the aggregate effect of some or all of the following factors:

1. substandard physical condition of the building that fails to meet the requirements of current building, fire, or energy codes;
2. substandard physical condition of the building that fails to meet the requirements of current accessibility codes;
3. the need to provide space within the building dedicated to programs and facilities directly serving the Low Income Tenant population;
4. the need to improve the quality of life of the Low Income Tenant population and/or the marketability of the Publicly-assisted Housing to the Low Income Tenant population; and
5. the need to meet regional Low-income housing needs, including the need for larger units to accommodate families; provided in each case that units should not materially exceed the Department's current minimum dimensional standards for affordable housing units found in the Department's *Construction/ Rehabilitation Guidelines* for developments that receive state assistance, published on the Department's website.

(c) Comparable Replacement Units. In making a determination as to whether the Purchaser has replaced lost units with comparable deed-restricted Publicly-assisted Housing units at an alternative site to the extent of available Subsidies and to the extent feasible, the Department will consider, in its reasonable discretion, the following factors and information. The Purchaser shall provide with respect to the proposed replacement the following information, to the extent applicable:

1. plans of the alternative site and the housing units to be provided and the number of units (to be further categorized by the number of bedrooms per unit) covered by each Affordability Restriction;

2. a copy of the Affordability Restriction(s) to be imposed on the replacement units;
3. a development and/or construction schedule;
4. a financial *pro forma* and preliminary financing commitment(s); and
5. satisfactory evidence that zoning and all other required approvals have been issued or may reasonably be expected to issue in due course. If the proposed development will not provide the full number of replacement units, the Purchaser must show that it complied with the standards of 760 CMR 64.02(2)(a) in trying to obtain available Subsidies. The Department shall make continuing compliance with this requirement a condition of a Certificate of Exemption, unless the Department or another governmental entity has imposed substantially equivalent requirements. Such conditions may include, at the Department's discretion, the power to impose a lien on the alternative site, not to be released except with the Department's consent upon full compliance.

(d) Minimum Expectations. The Department expects a request for a Certificate of Exemption on the basis of Preserving Affordability to include Affordability Restrictions meeting all of the following requirements to the extent applicable:

1. If an Affordability Restriction pursuant to project-based rental assistance under M.G.L. c. 40T, § 1, Publicly-assisted Housing (i) or (xiii) currently applies to the Publicly-assisted Housing, the Owner and Purchaser must commit to enter into a binding written agreement with the Department suitable for recording in a registry of deeds or registry district of the land court to renew, either at the time of the Sale or at such time as the existing Subsidy contract expires if it remains in effect after the Sale, the current Subsidies imposing such Affordability Restrictions on substantially equivalent terms and conditions for the longest term permissible by the agency administering the applicable Subsidies, and to continue to request such renewals on similar terms up to such time as is necessary to cover the date thirty years from the date of sale.

2. If an Affordability Restriction that does not qualify under 760 CMR 64.02 (2)

(d) 1. currently applies to the Publicly-Assisted Housing, the Owner and

Purchaser must assure through a combination of existing, renewable, and new Affordability Restrictions that such Affordability Restrictions on the affected property will be maintained for at least thirty years from the date of the applicable Sale for the same total number of Publicly-assisted Housing units and the same number of units restricted to each of Low Income, Very Low Income, and Extremely Low Income households as are covered by Affordability Restrictions at the time of the Sale.

If a request for a Certificate of Exemption on the basis of Preserving Affordability does not meet the requirements of 760 CMT 64.02 (2) (d) 1. and 2., to the extent applicable, the Owner and Purchaser must demonstrate that exceptional circumstances exist preventing them from meeting the requirements of 760 CMT 64.02 (2) (d) 1. or 2., including, but not limited to, demonstration of taking extraordinary diligent action to determine that Subsidies meeting the requirements of 760 CMT 64.02 (2) (d) 1. or 2., were not available or were available only on terms that are economically unfeasible, in accordance with such administrative guidance as may be issued by the Department.

64.03: Notices

760 CMR 64.03 contains procedures for the giving of Notices by the Owner.

(1) The following categories of notice (each a Notice) to be given by the Owner are governed by 760 CMR 64.03:

- (a) notice of the future Termination of an Affordability Restriction affecting Publicly-assisted Housing, as required by M.G.L. c. 40T, § 2(a) (a Notice of Future Termination). Where more than one Termination may occur, the Owner may send one written notice so long as the Terminations are scheduled to occur within one year of each other, the notice is given at least two years prior to the earliest termination, and the notice otherwise complies with 760 CMR 64.03.
- (b) notice of the Owner's intent to complete the Termination of an Affordability Restriction affecting Publicly-assisted Housing or that such Termination will occur without action by the Owner, as required by M.G.L. c. 40T, § 2(b) (a Notice of Intent to Complete Termination).
- (c) notice of the Owner's intent to pursue a potential Sale of Publicly-assisted Housing, and its offer to sell such Publicly-assisted Housing to the Department or its Designee, as required by M.G.L. c. 40T, § 2(c) (an Offer to Sell).
- (d) notice of the Owner's intent to pursue a potential sale to a Preservation Purchaser (a Notice of Intent to Sell to a Preservation Purchaser).

(2) Forms of Notices.

- (a) Each notice shall state:
 - 1. the address of the Publicly-assisted Housing;
 - 2. the name and address of the Owner and project sponsor, and the name, address, phone number, and email of the Owner's designated contact person;
 - 3. a. the Government Program that is the basis of each Affordability Restriction(s) that may Terminate in regard to 760 CMR 64.03(1) (a) and (b) and 760 CMR 64.03 (4) (e) and the number of units that would be affected by the Termination; or

b. the Government Program that is the basis of each Affordability Restriction(s) affecting the Publically-Assisted Housing in regard to 760 CMR 64.03 (1) (c) and (d).

4 . such other information requested by the Department in regard to all notices, as set forth in administrative guidance issued by the Department; and

5. information specific to the type of Notice, as set forth in administrative guidance issued by the Department.

(b) Use of a current form of Notice issued by the Department shall satisfy the requirements of 760 CMR 64.03(2) if accurate and complete.

(3) Delivery of Notices.

(a) The Owner shall provide any Notice to:

1. all Tenants and the Tenant Organization, if any;
2. the Chief Executive Officer of the Affected Municipality;
3. CEDAC;
4. the Department; and
5. the local legal services organization.

The envelope of any Notice provided to the Department, the Chief Executive Officer of the Affected Municipality, the local legal services organization, or CEDAC shall state, in 12-point all caps letters, "ATTENTION: CHAPTER 40T NOTICE."

(b) Notices shall be delivered as provided in M.G.L. c. 40T, § 2(d). The Owner shall maintain a record of all Notices delivered, including the date and manner of delivery.

The Owner shall make such record available to the Department upon request.

(4) Timing of Notices.

(a) A Notice of Future Termination shall be delivered not less than two years and not more than three years before the Termination of an Affordability Restriction affecting Publicly-assisted Housing.

(b) A Notice of Intent to Complete Termination shall be delivered not less than one year and not more than 18 months before Termination of an Affordability Restriction affecting Publicly-assisted Housing.

(c) A Notice of Intent to Sell to a Preservation Purchaser shall be delivered prior to the Owner entering into any Purchase Contract with a prospective Preservation Purchaser. A

Notice of Intent to Sell to a Preservation Purchaser shall remain in effect until the first of the following to occur:

1. rescission by the owner with notice to all parties entitled to receive the Notice of Intent to Sell to a Preservation Purchaser, which shall be required before an Owner who has issued a Notice of Intent to Sell to a Preservation Purchaser may issue an Offer to Sell in regard to the Publicly-assisted Housing,
2. a Final Certificate of Exemption certificate is issued for a Sale to A Preservation Purchaser in regard to the Publicly-assisted Housing, or
3. eighteen (18) months from the date of the receipt of the Notice of Intent to Sell to a Preservation Purchaser by the Department.

(d) An Offer to Sell shall be delivered prior to the Owner entering into any Purchase Contract with a prospective Purchaser, relating to a proposed Sale of Publicly-assisted Housing unless the Owner has delivered a Notice of Intent to Sell to a Preservation Purchaser. Once an Owner has delivered an Offer to Sell to the Department, the Owner may not rescind the Offer to Sell other than pursuant to a determination by the Department that:

1. the proposed transaction meets the requirements of a Sale to a Preservation Purchaser and that rescission will cause no substantial harm to the interests protected by M.G.L. c. 40T and 760 CMR 64.00; and
2. not less than six months have passed since the last date on which an offer, to purchase by a Designee pursuant to M.G.L. c. 40T, § 3, could have been made.

(e) If Publicly-assisted Housing is subject to a project-based contract under § 8 of the U.S. Housing Act of 1937 or another Affordability Restriction relating to rental assistance which by its terms is renewed upon intervals of less than two years and the owner can demonstrate reasonable and diligent action to renew the Affordability Restriction then , pursuant to administrative guidance, the Department may authorize an alternative form of notice to tenants in lieu of a Notice of Future Termination or a Notice of Intent to Complete Termination. In the event that the subsidizing agency denies or fails to renew a Subsidy, and such denial or failure is not due to the Owner's failure to comply with applicable program requirements, such alternative notice shall be

considered equivalent to timely service of a Notice of Future Termination and Notice of Intent to Complete Termination in accordance with 760 CMR 64.03

(f) If the Owner determines not to renew a subsidy subject to 760 CMR 64.03 (4) (e), or otherwise fails to comply with the requirements of 760 CMR 64.03 (4) (e), the Owner shall provide a timely Notice of Future Termination and Notice of Intent to Complete Termination.

(5) Defective Notice.

(a) If an Owner failed to give a Notice in a timely manner, or if the content or delivery of a Notice was defective (a Notice given in each of these circumstances constituting a “Defective Notice” for purposes of 760 CMR 64.03), then the Owner shall give proper curative Notice in accordance with the requirements set forth in 760 CMR 64.03 (5) (Curative Notice) and such guidance as the Department may issue. The Department shall not issue any Certificate of Exemption, 760 CMR 64.07, or Certificate of Compliance, 760 CMR 64.08, in regard to Publically-assisted Housing until any failure to provide a Notice or any Defective Notice in regard to such property has either been cured, or found by the Department to be a *de minimis* defect, or found by the Department not to be defective, in each case in accordance with 760 CMR 64.03(5).

(b) Curative Notice shall not be required in the event of a *de minimis* defect in a Notice that caused no substantial harm to the interests protected by M.G.L. c. 40T and 760 CMR 64.00 as determined by the Department. An owner may request in writing a determination by the Department that a Notice is sufficient, that defects in such Notice (if any) are *de minimus*, and that no curative notice is required.

(c) If a Curative Notice is delivered less than two years before a Termination in the case of a Notice of Future Termination or less than one year before a Termination in the case of a Notice of Intent to Complete Termination, such Curative Notice shall have the effect of extending any time period set forth in M.G.L. c. 40T or 760 CMR 64.00 as effective from the date of the Curative Notice (the Extended Time Period).

(d) Extended Time Period Required.

1. In giving Curative Notice when an Extended Time Period is required, the Owner shall be required to demonstrate reasonable and diligent action to extend the

Termination date of an Affordability Restriction pertaining to the Defective Notice for the Extended Time Period. Where such Affordability Restriction expires by its own terms and the Owner does not have the power to extend it or, after taking reasonable and diligent action, cannot extend it for the Extended Time Period, the Owner shall be bound to continue the effect of the Affordability Restriction for the Extended Time Period pursuant to a Curative Equivalent Affordability Restriction.

2. Before the Curative Notice is accepted as complete and compliant by the Department, the Owner shall enter into a Curative Equivalent Affordability Restriction for the Extended Time Period, notwithstanding the expiration of the Subsidy. The Department may provide in guidance standardized terms for Curative Equivalent Affordability Restrictions.

(e) The Department shall determine the effectiveness of any Curative Notice for an Offer to Sell or a Notice of Intent to Sell to a Preservation Purchaser based upon the facts and circumstances and the effectiveness of the curative undertakings agreed to by the Owner in such Notice to achieve the purposes of M.G.L. c. 40T and 760 CMR 64.00.

64.04: Department's Selection of Designee

760 CMR 64.04 contains standards and procedures for the open and competitive selection of a Designee by the Department, in accordance with M.G.L. c. 40T, § 3(b). 760 CMR 64.04 is intended to ensure that any Designee can demonstrate its ability to own and operate Publicly-assisted Housing. Because of the statutory timelines, time is of the essence relative to all deadlines set forth in 760 CMR 64.04.

(1) Process. The Department shall select Designees through an open and competitive process consistent with standards and procedures defined in written guidelines to be issued by the Department.

(2) Selection of Designees.

(a) Factors to be considered in the selection of a Designee shall include but not be limited to a party's resources and capabilities, its demonstrated commitment to affordable

housing, its prior experience in successfully owning or operating Publicly-assisted Housing, its record with respect to federal and state fair housing laws, and its ability to proceed with the proposed transaction in a timely manner.

(b) The Department may, if it chooses:

1. grant preference in the selection process to potential Designees who have been prequalified; or
2. limit submissions to such prequalified candidates; or
3. make its selection directly from the existing pool of prequalified candidates.

If an Affected Municipality requests designation under M.G.L. c. 40T, § 3(b), such Affected Municipality shall be required to demonstrate its compliance with the Department's selection standards.

(3) Agreements with Designees. Upon selection, the Department shall immediately notify the selected Designee in writing, and offer to enter into a written agreement with its selected Designee. The agreement shall provide that the Designee shall Preserve the Affordability of the Publicly-assisted Housing, in accordance with the standards set forth in 760 CMR 64.02(2). If the selected Designee fails to execute the agreement within three business days of its receipt, the Department may let the selection lapse, notify the next qualified potential Designee, and enter into an agreement with that party who shall thereupon be considered the Designee. It shall be a condition of designation that the proposed Designee disclose in writing to the Department all parties who currently hold ownership and/or control interests in the Designee as of the date of designation, and that it identify any reasonably anticipated future transfers of ownership or control.

(4) Successor Designees; Revocation of Designation.

(a) Assignments. A Designee may not assign or otherwise convey its designation to another party without the express written approval of the Department. The transfer of a greater than *de minimis* ownership or controlling interest in a Designee shall be deemed an assignment for the purposes of 760 CMR 64.04(4)(a). A transfer of the property to a special-purpose real estate entity that is wholly owned or controlled by the Designee shall not be considered an assignment for the purposes of 760 CMR 64.04(4)(a). For purposes of 760 CMR 64.04(4)(a), an assignment shall be deemed to occur if there is:

1. any change of identity or transfer of ownership in the managing body of the Designee (such as a general partner in a general or limited partnership, or a joint venturer in a joint venture, or a manager or managing member in an LLC, a trustee in a trust, or a controlling shareholder in a corporation); or

2. any transfer of ownership interest in the Designee (such as the limited partner interest of a limited partnership, or the membership interest of an LLC, or any class of voting stock of a corporation, or the beneficial interest in a passive trust) that would cause the initial owners of the Designee, as they were disclosed to the Department at the time of designation, to no longer own a greater than 50% share of the ownership interest. The Department may, at the time of designation acting in its sole discretion, identify certain reasonably anticipated future transfers of ownership or control that would not constitute an assignment (such as the anticipated admission of an investor limited partner).

(b) Revocation. The Department may revoke a designation:

1. if there is an assignment as defined under 760 CMR 64.04(4)(a); or

2. if the Designee has been unable to demonstrate reasonable progress toward completing the proposed purchase transaction; or

3. for any other action or inaction of the Designee that the Department deems in its reasonable judgment to be inconsistent with the goals of M.G.L. c. 40T. A revocation shall be made upon three business days' written notice and opportunity to cure. Following a revocation, the Department may select another party (a Successor Designee) in accordance with the applicable provisions of 760 CMR 64.04, including the standards for selection.

(c) Rights of Successor Designee. A Successor Designee shall have the same rights under M.G.L. c. 40T and 760 CMR 64.00 as the original Designee. In addition, if a designation has been revoked, the prior Designee shall within three business days make available to the Successor Designee and the Department all Due Diligence Materials that it has received from the Owner or generated by itself or through its consultants and other agents. The Successor Designee shall reimburse the prior Designee its out-of-pocket third party costs for any Due Diligence Materials that it chooses to receive, on or before the Time For Performance set forth in the Purchase Contract.

64.05: Due Diligence Process

750 CMR 64.05 contains standards and procedures for the Owner's cooperation with the due diligence activities to be undertaken by a Designee as a potential Purchaser of Publicly-assisted Housing.

(1) Due Diligence Materials. The Owner shall make available to the Department and/or its Designee the documents listed in M.G.L. c. 40T, § 3(d), in accordance with the time period set forth in M.G.L. c. 40T, § 3(d).

The Department may issue written guidelines that identify additional due diligence materials to be made available by the Owner. Collectively, the documents listed in M.G.L. c. 40T and any additional materials identified in the Department's guidelines are referred to as the "Due Diligence Materials." The Owner shall promptly notify the Department and its Designee of any Due Diligence Materials that are not in its possession, and it shall use reasonable and diligent efforts to locate and obtain such Materials.

(2) Property Inspections. The Owner shall, upon three business days' written notice, permit Inspection of the property by the Department and/or the Designee and their agents, consultants, and representatives, subject to the terms and conditions of an access and confidentiality agreement in a form approved by the Department.

(3) Breach of Due Diligence Requirements. If the Owner fails in a material way to comply with any provision of the due diligence requirements of M.G.L. c. 40T or the regulations, following three business days' written notice and opportunity to cure from the Department, such breach shall be considered grounds by the Department to extend the applicable time period(s) under M.G.L. c. 40T, to require the extension of the Termination date of an Affordability Restriction or the imposition of an Equivalent Affordability Restriction for an equivalent time period, to condition or deny issuance of a Certificate of Compliance, and/or issue a Notice of Noncompliance.

64.06: Sale by Owner to Designee or Third Party

760 CMR 64.06 contains standards and procedures for the Sale by the Owner of Publicly-assisted Housing to a Designee or Third Party, in accordance with M.G.L. c. 40T, § 4, so long as the Owner complies with all other requirements of M.G.L. c. 40T and 760 CMR 64.00.

(1) Sale to Third Party. If any of the following events occur, the Owner may complete a Sale of the Publicly-assisted Housing to a Third Party within two years from the applicable date specified in M.G.L. c.40T, so long as the Owner complies with all other requirements of M.G.L. c. 40T and 760 CMR 64.00:

(a) the Department and its Designee irrevocably waive their rights of offer, for the two-year period from the applicable date specified in M.G.L. c. 40T, by failing to submit a timely offer to the Owner, as set forth in M.G.L. c. 40T, § 3(c); or

(b) the Department and its designee waive their rights of offer as set forth in M.G.L. c. 40T, § 3, by prior written communication to the Owner; or

(c) the Department or its Designee fails to enter into a Purchase Contract with the Owner following the Owner's acceptance of an offer from the Department or its Designee, as set forth in M.G.L. c. 40T, § 3(c); or

(d) the Department or its Designee fails to execute a proposed Purchase Contract offered by the Owner, as set forth in M.G.L. c. 40T, § 4(b); or

(e) the Department or its Designee executes a Purchase Contract, but fails to perform in accordance with such Purchase Contract, as set forth in M.G.L. c. 40T, 4(d); or

(f) the Department or its Designee fails to make a timely counteroffer, or the Owner rejects such counteroffer, in either case as set forth in M.G.L. c. 40T, § 4(e).

(2) Failure of Performance by Department or Designee. For the purposes of M.G.L. c. 40T, § 4(d), failure of performance shall be deemed to occur on the Time For Performance set forth in the Purchase Contract, if the Department or its Designee fails to satisfy the terms and conditions of the Purchase Contract.

(3) Terms and Conditions of Third Party Purchase Contract. In making a determination under M.G.L. c. 40T, § 4(e), and the procedures set forth in 760 CMR 64.08 as to whether the economic terms and conditions of a Purchase Contract are the same as or materially more

favorable than the terms of the Third Party Contract, giving rise to the Department's rights pursuant to M.G.L. c. 40T, § 4(b), the Department will consider, in its reasonable discretion, such factors, as the Department may determine to be relevant in guidance, including, but not limited to, changes to the purchase price, property description, transaction structure, deposit amount, or Time for Performance.

(4) Submission of Documents to Department.

(a) Submission of Purchase Contract. The Owner shall, not later than seven days after the execution or amendment of a Purchase Contract with a Third Party, provide the Department with a copy of such document. The Owner shall accompany the submission with written confirmation demonstrating that the Purchase Contract was executed within the applicable two-year period set forth in M.G.L. c. 40T, § 4. The submission shall include a certification by the Owner that the document is accurate and complete and there are no other agreements between the Owner and the Third Party, or an affiliate of either, with respect to the Sale of the Publicly-assisted Housing. Together with this submission, the Owner and the Third Party may seek a Preliminary Certificate of Compliance from the Department, pursuant to 760 CMR 64.08.

(b) Submission of Transfer Document. A new Owner shall provide the Department with a copy of any deed or other document transferring the previous Owner's interest in Publicly-assisted Housing, not later than seven days after the recording or filing of the deed or other document with the registry of deeds or the registry district of the land court of the county in which the affected real property is located. Together with this submission, the new Owner may seek a Final Certificate of Compliance from the Department, pursuant to 760 CMR 64.08.

64.07: Certificate of Exemption

760 CMR 64.07 contains standards and procedures for the issuance by the Department of a Certificate of Exemption, in accordance with M.G.L. c. 40T, § 6.

(1) Parties Seeking Exemptions.

(a) In the event of a claimed exemption under M.G.L. c. 40T, §§ 6(a)(iv), (v), or (vii), the Owner and the Third Party Purchaser must jointly seek Preliminary and Final Certificates of Exemption from the Department, confirming that the Sale is not subject to the provisions of M.G.L. c. 40T, §§ 3 and 4, or to 760 CMR 64.05 and 64.06.

(b) In the event of a claimed exemption under M.G.L. c. 40T, § 6(a)(vi), the Owner and the Affiliate Purchaser must jointly seek Preliminary and Final Certificates of Exemption from the Department, confirming that the Sale is not subject to the provisions of M.G.L. c. 40T, §§ 3 and 4, or to 760 CMR 64.05 and 64.06.

(c) In the event of a claimed exemption, either because:

1. the Sale falls into one of the exemption categories expressly listed in M.G.L. c. 40T, §§ 6(a)(i), (ii), (iii), (vii), or (viii); or
2. four years have passed after the date of the last event or occurrence that constituted a Termination, as set forth in M.G.L. c. 40T, § 10,

then in either case the Owner and (in the case of a Preliminary Certificate of Exemption) the Third Party may individually or jointly, as the case may be, seek a Certificate or Certificates of Exemption from the Department, confirming that the Sale is not subject to the provisions of M.G.L. c. 40T, §§ 3 and 4, or to 760 CMR 64.05 and 64.06.

(2) Submission of Request to Department.

(a) The applicant(s) shall individually or jointly, as the case may be, submit a written request for a Certificate of Exemption in a form and with such documentation as required by the Department in guidance to establish the exemption to the satisfaction of the Department. Such guidance shall provide details as to the specific type of information required for the applicable category of exemption.

(b) The applicant(s) shall simultaneously provide a complete copy of the request to those parties specified in M.G.L. c. 40T, § 6(b), and such additional parties as the Department may provide for in guidance.

(3) Process for Department's Review.

(a) The Department shall review the request and notify the applicant(s) within 15 days if the request is incomplete. The Department shall within 30 days after receipt of a complete request:

1. issue a Preliminary or Final Certificate of Exemption, as applicable, if it determines that the applicant(s) has/have complied with all applicable provisions of M.G.L. c. 40T and 760 CMR 64.00; or
2. issue a Preliminary or Final Certificate of Exemption, as applicable, subject to certain conditions; or
3. issue a written statement of its reasons for denying the requested Preliminary or Final Certificate of Exemption, as applicable.

(b) In the event of an unusually complex review, the Department may extend the review period by not more than 30 days by issuing prior written notice to the applicant(s). The time to respond completely to any request by the Department for action or additional information shall toll any time periods in 760 CMR 64.07 (3)_(a) or (b).

(c) The process of review shall be deemed an informal non-adjudicatory process. The Department will review any written comments submitted and take these into consideration in making its determination on Preliminary and Final Certificates of Exemption. The Department shall provide a copy of its determination to the parties specified in M.G.L. c. 40T, § 6(b), to the Chief Executive Officer of the Affected Municipality, and to any person who submitted written comments on the request for exemption. The Department may rescind a Certificate of Exemption, if it subsequently discovers a willful misstatement or omission of material information in the request.

(d) Preliminary and Final Certificates of Exemption.

1. In the event that the Owner and a Third Party Purchaser or Affiliate have executed a Purchase Contract but have not yet completed the Sale, the Owner and the Third Party Purchaser or Affiliate may (or in the case of a submission under 760 CMR 64.07(1)(a) or (b), must) jointly submit a written request to the Department for a Preliminary Certificate of Exemption.

2. If the Department issues a Preliminary Certificate of Exemption, then it shall be presumed that a Final Certificate of Exemption will issue in due course under the standards and procedures of 760 CMR 64.07, so long as the new Owner can:

- a. demonstrate to the Department that the material terms and conditions of the Preliminary Exemption have been met; and
- b. provide such additional information as shall be required by the Department in guidance.

(e) Final Certificate of Exemption without Preliminary Certificate of Exemption

1. A new Owner may seek a Final Certificate of Exemption after the completion of a Sale, without having previously obtained a Preliminary Certificate of Exemption in case of an exemption pursuant to 760 CMR 64.07 (1) (c). In such case the information required by 760 CMR 64.07(2) and (3) shall be submitted in a single request for a Final Certificate of Exemption after the Sale.

2. If a sale has occurred without a Preliminary Certificate of Exemption contrary to 760 CMR 64.07 (1) (a) or (b), the Owner may request and receive a Final Certificate of Exemption upon providing the Department with all the information required for a Preliminary Certificate of Exemption and a Final Certificate of Exemption and meeting such standards as the Department may establish in guidance.

(f) A Preliminary Certificate of Exemption shall expire upon the first of the following to occur:

1. filing of a Final Certificate of Exemption by the Owner with the applicable registry of deeds or registry district of the land court;
2. the notification of the Department by the Owner and Third Party Purchaser (if applicable) that the Sale will not be completed; or
3. one year after the date of issuance of the Preliminary Certificate of Exemption (provided that the Department may extend such period upon demonstration of good cause and likelihood of completion of an exempt Sale within the extended period.

(g) The purchaser after an exempt Sale is required to make a request for a Final Certificate of Exemption not less than six months after the exempt Sale. A Final Certificate of Exemption may be filed by the Owner with the registry of deeds or the

registry district of the land court of the county in which the real property is located. Any rescission of a Final Certificate of Exemption by the Department shall be so filed by the Department.

64.08: Certificate of Compliance

760 CMR 64.08 contains standards and procedures for the issuance by the Department of a Certificate of Compliance, in accordance with M.G.L. c. 40T, § 9.

(1) An Owner and/or a Third Party Purchaser may individually or jointly seek a Certificate of Compliance from the Department, confirming compliance with M.G.L. c. 40T, §§ 2 through 4, and/or with 760 CMR 64.00, only with respect to one of the following events:

(a) the Department and its Designee have waived their rights of offer either by written communication or by failing to submit a timely offer to the Owner, as set forth in M.G.L. c. 40T, § 3(c);

(b) The original Owner proposes to complete or has completed a Sale to a Third Party Purchaser (who shall upon completion of the Sale be deemed the Owner for purposes of 760 CMR 64.08); or

(c) The original Owner proposed to complete or has completed a Sale to a Designee (who shall upon completion of the Sale be deemed the Owner for purposes of 760 CMR 64.08).

(2) Submission of Request to Department.

(a) The applicant(s) shall individually or jointly, as the case may be, submit a written request for a Certificate of Compliance in a form and with such documentation as required by the Department in guidance to establish the compliance to the satisfaction of the Department.

(3) Process for Department's Review.

(a) The provisions of 760 CMR 64.07 (3) (a), (b), (c), and (f) as to Certificates of Exemption shall apply to Certificates of Compliance.

(b) In the event that the Owner and a Third Party Purchaser have executed a Purchase Contract but have not yet completed the Sale, the Owner and the Third Party Purchaser may jointly submit a written request to the Department for a Preliminary Certificate of

Compliance in a form and with such documentation as required by the Department in guidance. The provisions of 760 CMR 64.07 (3) (d) 2. as to requesting a Final Certificate of Exemption after receipt of a Preliminary Certificate of Exemption shall apply to requesting a Final Certificate of Compliance after receipt of a Preliminary Certificate of Compliance. (c) A new Owner may seek a Final Certificate of Compliance after the completion of a Sale, without having previously obtained a preliminary Certificate of Compliance. In such case the procedures set forth as to Final Certificates of Exemption in 760 CMR 64.08(3)(e) 1. shall apply.

4. Standards for Department's Review. For the purposes of 760 CMR 64.08(1)(b), the Department shall, as applicable, take into consideration the factors set forth in 760 CMR 64.06(3) and any applicable guidance issued in regard thereto in making a determination as to whether a Sale to a Third Party complied with the provisions of M.G.L. c. 40T and 760 CMR 64.00.

(5) A final Certificate of Compliance shall be filed by the Owner with the registry of deeds or the registry district of the land court of the county in which the real property is located within one year after the date of the Certificate's issuance. Any rescission of a Certificate of Compliance by the Department shall be so filed by the Department.

64.09: Other Provisions

(1) Manner of Filings. Any filing or submission, other than a Notice, required to be made to the Department under M.G.L. c. 40T or 760 CMR 64.00, and not otherwise specifically provided for in M.G.L. c. 40T or 760 CMR 64.00, shall be made in the same manner as is set forth for Notices in M.G.L. c. 40T, § 2(d).

(2) Time Periods. All time periods set forth in M.G.L. c. 40T or 760 CMR 64.00 shall be calculated in calendar days, except as otherwise set forth 760 CMR 64.09(2). A time period shall not expire until the first day in which state offices are open. All time periods for action by the Department initiated by receipt of a document or request shall commence as of the date of receipt by the Department.

(3) Complaints and Advisory Opinions. Any allegation of a Defective Notice or other failure to comply with a provision of M.G.L. c. 40T or 760 CMR 64.00 or a request for an advisory opinion shall be made in writing to the Department. The Department may request such further information as it may find necessary or useful from any party, prior to making a determination relative to a complaint or issuing an advisory opinion.

(4) Information Provided to Tenants. Upon request by any Tenant of the affected Publicly-assisted Housing, the Department shall provide a copy of a Preliminary or Final Certificate of Exemption or a Preliminary or Final Certificate of Compliance. Upon request by any Tenant of the affected Publicly-assisted Housing, the Owner shall provide a copy of a request for a Preliminary or Final Certificate of Exemption or a request for a Preliminary or Final Certificate of Compliance, and any information accompanying such a request. Any such documentation, or other written communication to Tenant(s) by the Department, shall be delivered to Tenant(s) by the Owner and may be delivered to Tenant(s) by hand delivery by then Owner, by mail, or electronically, or, if the Owner demonstrates to the Department that delivery to Tenant(s) is not feasible and that posting will adequately inform such Tenant(s) of the information, by requiring the Owner to post a copy at the project site or allowing the Department to post such documentation.

(5) Guidance. The Department may issue from time to time such additional guidance as it deems appropriate and useful in implementing M.G.L. c40T and 760 CMR 64.00.

Guidance affecting Tenants, Owners, Purchasers, or potential Designees generally shall be posted electronically by the Department and made available in writing upon request.

As used in guidance issued by the Department, the following definitions shall apply:

Act or Affordable Housing Prevention Act – means M.G.L. c. 40T.

Regulation – means 760 CMR 64.00.

64.10: Amendments; Waivers; Compliance

(1) Amendments. 760 CMR 64.00 may be amended from time to time in accordance with the provisions of M.G.L. c. 30A.

(2) Waivers. The Undersecretary of the Department may waive, in writing, any provision of 760 CMR 64.00 not required by M.G.L. c. 40T on findings that such waiver is consistent with the purposes set out in M.G.L. c. 40T and 760 CMR 64.00 and that desirable relief in the public interest will be accomplished through such waiver. A request for waiver shall be in writing to the Undersecretary, Department of Housing and Community Development, 100 Cambridge Street, Suite 300, Boston, MA 02114 (or as that address may change from time to time), shall contain reliable evidenceshowing that the waiver meets all the requirements of this subsection, and shall provide notice to the parties listed in M.G.L. c.40T, § 6 (b). The Department may request such further information as it may find necessary or useful from any party, prior to making a determination relative to a requested waiver. In making its determination, the Department shall consider any written comments that it receives within ten days of receipt of the waiver request or before the determination is made, whichever is longer.

(3) Department Actions. The Department may take such equitable or other legal or administrative action as is necessary to implement a waiver or otherwise effectuate the purposes or requirements of M.G.L. c. 40T, or 760 CMR 64.00, upon a written finding by the Undersecretary of the Department that such action is consistent with the purposes set out in M.G.L. c. 40T and 760 CMR 64.00 and that desirable relief in the public interest will be accomplished through such action.

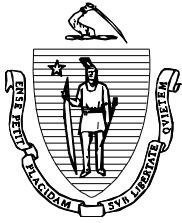
(4) Noncompliance Notices.

(a) The Department may issue a Notice of Noncompliance and may file it with the applicable registry of deeds or registry district of the land court in regard to any Publicly-assisted Housing when a current or prior Owner fails to comply with the requirements of M.G.L. c. 40T or 760 CMR 64.00. The Department shall serve copies of the Notice of Noncompliance on the parties listed in 760 CMR 64.03 (3) (a) 1.-3., and 5. The Notice of Noncompliance shall state the nature of the noncompliance and shall cite the relevant portion of M.G.L. c. 40T and/or 760 CMR 64.00.

(b) A Rescission of Noncompliance shall be provided to the Owner with notice to the parties listed in M.G.L. c.40T, § 6 (b), when the Owner of Publicly-assisted Housing has demonstrated to the satisfaction of the Department that the Owner has cured the noncompliance that is the basis of a Notice of Noncompliance.

REGULATORY AUTHORITY

760 CMR 64.00: M.G.L. c.23B; St. 2009, c. 159 and M.G.L. c.40T.



Commonwealth of Massachusetts
**DEPARTMENT OF HOUSING &
COMMUNITY DEVELOPMENT**

Deval L. Patrick, Governor ♦ Timothy P. Murray, Lt. Governor ♦ Tina Brooks, Undersecretary

GUIDELINES FOR SELECTION OF DESIGNEES

PURSUANT TO

M.G.L. CHAPTER 40T

"PUBLICLY-ASSISTED AFFORDABLE HOUSING"

1. BACKGROUND

On November 24, 2009, the Commonwealth enacted Senate Bill 2190, "An Act Preserving Publicly-Assisted Affordable Housing", creating a new Chapter 40T of the Massachusetts General Laws ("Ch.40T"). A key aspect of Ch.40T is the authority granted to DHCD to make an offer and/or respond to a right of first refusal when the owner of a covered property intends to sell such property. The statute permits DHCD to name a designee to assume the agency's rights and responsibilities in undertaking the purchase and ownership of covered properties pursuant to the processes established under the law ("Designee" or "Designees").

2. PURPOSE

The purpose of these Guidelines is to set out the standards and procedures by which DHCD will select a Designee pursuant to M.G.L. Ch.40T (the Act) and the related regulations found at 760 CMR 64 (the Regulations).

3. PROCUREMENT PROCESS

In order to have a ready pool of potential Designees, DHCD will typically procure a Designee in 2 stages.

A. Prequalification: The first stage, "Prequalification", will establish the general qualifications of interested parties. The prequalification process is conducted through a Request for Responses (RFR) process posted on Comm-PASS (www.comm-pass.com). Within 10 days of submission, DHCD will review any submitted qualifications and will approve, disqualify or request additional information. DHCD is solely responsible for evaluating the qualifications of interested organizations.

Ordering of Prequalified Designees: DHCD will create two ordered lists of prequalified Designees according to the date that DHCD receives a complete RFR response such that the entity that first

submits a complete response to the RFR shall be numbered "1" on the list of prequalified list; the second such response shall be numbered "2", etc. The first list will be for non-geographically constrained organizations ("open organizations"); the second list for geographically constrained organizations ("local organizations"). Potential designees must clearly indicate whether they desire to be considered a local or an open organization. Local organizations must have a service area (or "footprint") for purposes of 40T that is limited to a municipality, a portion of a municipality, or to a group of adjacent municipalities. DHCD will review the service area proposed by the local organization.

In the case where the organization wishes to be considered for designation outside the neighborhoods where it has previously developed or preserved housing, DHCD will review the following criteria: reasons stated by the organization for the proposed expansion, conformity of the expansion with the organization's workplan, representation by the organization's board of directors, and other relationships in the proposed neighborhoods. Following the review, DHCD will communicate with the organization the neighborhoods where the organization will be considered for designation.

B. PROCESS FOR DESIGNEE SELECTION

The second state of the process will occur upon DHCD receiving a Notice of Sale. As time is of the essence in this process, all potential designees except municipalities must be prequalified. To select a designee for a particular project, DHCD will take the following steps:

- 1) Determine if the project falls in the service area of any Local Organizations. Using the site specific selection criteria below DHCD will evaluate any Local Organization(s) to determine if any are qualified to serve as designee for the project.
- 2) Review the ordered list of Statewide Organizations and choose the next organization on the list that meets the site-specific criteria below.
- 3) Confirm that the Statewide Organization and any proposed Local Organization(s) satisfy the site selection Criteria in Section 5 below, and have an interest in serving as Designee.
- 4) Consult with the municipality regarding designee selection. DHCD will immediately designate the affected municipality upon written request, though this designation is not assignable. DHCD will discuss the qualifications of the Statewide Organization and any appropriate Local Organizations(s), and give particular consideration to the preference of a municipality proposing significant funding for the transaction or a municipality that has previously funded or placed a regulatory restriction on the project. Municipal officials must recommend a potential Designee within 5 days after being contacted by DHCD. DHCD is not required to designate the organization preferred by the municipality.
- 5) Taking into consideration feedback from the municipal consultation and an evaluation of the site-specific criteria of both Local and Statewide Organizations, select the designee.

C. Designation for Multiple Properties Simultaneously: Properties being offered for sale as a package by the owner will generally be treated as a single transaction and DHCD will select one Designee for the transaction. DHCD also may opt to treat the simultaneous offer for sale of

multiple properties by a single owner, regardless of whether the properties are offered as a package, as a single transaction. DHCD, with the consent of the owner, may decide to select Designees for individual properties in a portfolio sale if the size or separation of the properties would make a portfolio transaction more difficult to finance.

4. PREQUALIFICATION CRITERIA

In order to be prequalified, organizations must meet the following standards: These standards must be met by the developer, but in some cases the respondents can identify a consultant or contractor who may have specific experience not present in the developer's staff.

- A.** Direct experience within the past 5 years in negotiating for and acquiring existing "publicly assisted housing" as defined in Ch.40T.
- B.** Direct experience within the past 5 years in overseeing and managing the rehabilitation of occupied multi-family housing.
- C.** Demonstrated commitment to preserving affordable housing.
- D.** Expertise in state and federal assisted housing financing programs and successful experience in structuring complex real estate financing transactions.
- E.** Demonstrated capacity to productively engage with tenant organizations and low and moderate income tenants of multi-family housing regarding project development issues.
- F.** Sound financial position and demonstrated ability to attract necessary project debt and equity financing.

5. SITE-SPECIFIC SELECTION CRITERIA

In order to be selected to act as Designee for a particular purchase opportunity, Prequalified Designees must continue to meet all of the Prequalification Criteria above and also meet the following additional criteria at the time of selection:

- A.** Current organizational capacity to exercise the authority and undertake the obligations of Designees pursuant to the Act and the Regulations.
- B.** Ability to provide property management and asset management for the subject property through existing third party relationships or internal capacity.
- C.** That the individual identified with primary oversight of the Scope on behalf of the Designee has experience within the prior 5 years of successfully managing all due diligence aspects of acquiring existing "publicly assisted housing" as defined in Ch.40T, including but not limited to site control, deal structuring, assembling and/or obtaining requisite financing and permits/approvals, and assessing capital needs.
- D.** If deemed by DHCD to be relevant to the subject property, that the assigned individuals have direct experience within the prior 5 years in undertaking successful rehabilitation of occupied multi-family rental properties in Massachusetts.
- E.** In good standing with the U.S. Department of Housing & Urban Development (HUD), DHCD, MassDevelopment, MassHousing, Massachusetts Housing Investment Corporation and Massachusetts Housing Partnership, and CEDAC.

F. Satisfactory history of fair housing compliance. DHCD will consult with Massachusetts Commission against Discrimination, the Office of the Attorney General and its Fair Housing Counsel to determine satisfactory fair housing status.

G. DHCD may also exclude a prequalified organization for any of the following reasons:

- 1) The project is of a type or size that the organization has not previously undertaken;
- 2) The organization is already serving as a Designee for another project;
- 3) DHCD determines, in its sole discretion, based on staffing at the prequalified organization and projects under development, that the organization is not able to devote sufficient resources to proposed project acquisition.

If DHCD excludes an organization for one of the reasons listed above it will not affect the organization's position on the ordered list described in Section 3(A).

Appendix E. History of Chapter 40T

Preventing the loss of existing affordable housing units has been an issue in Massachusetts at least since the 1980's when advocates raised concerns regarding the potential for owners to prepay 40 year federal mortgages after 20 yearsⁱ. Massachusetts had considerable success extending affordability of 7,000 units to the full 40 year mortgage term with the federal ELIHPA program and ensuring long term affordability of 4,000 units with LIHPRHAⁱⁱ. Later in the 1990's the Mark Up To Market program provided another critical preservation tool.

2000 to 2009 – Lead up to Passage of 40T

In the early years of the 2000's, advocates and legislators attempted to pass a bill that could regulate owners' ability to prepay HUD mortgages, to opt out of Section 8 contracts or to sell affordable housing without ongoing affordability requirements. In 2002, an 'omnibus' housing bill, including preservation provisions, passed the legislature but was vetoed by governor Jane Swift. Over the next few years, several different preservation laws were proposed and 2006 saw three similar but differently drafted preservation bills introduced in the state legislatureⁱⁱⁱ. All three bills included not just a ROFR upon sale, but also a municipal purchase option (PO) that would take effect for any project where the owner was implementing a termination. The PO provisions, once triggered, would have forced owners to sell their projects in order to avoid a termination if the municipality desired to purchase the project to preserve affordability.

In early 2007, Rep. Kevin Honan, Chairman of the legislature's Joint Committee on Housing asked Citizen's Housing and Planning Alliance (CHAPA) to convene a task force to develop a consensus bill^{iv}. The task force met for roughly 18 months from early 2007 to late 2008. DHCD, led by its General Counsel Deborah Goddard, was an important participant in negotiating some of the final compromises between housing advocates and affordable housing owners. A key decision was to abandon the PO provisions that would have given a municipality or DHCD a preemptive option to buy an affordable housing project prior to a loss of affordability. The ROFO and ROFR remained to ensure affordability upon the sale of a property.

The following year, a bill quite similar to the eventual 40T law was sponsored by Sen. Tucker and Rep. Honan. Senate Bill 2799 passed the Massachusetts Senate unanimously in 2008 but did not receive a floor vote in the House of Representatives.

2009, in hindsight, represents a pivotal year in the formation of a culture of housing preservation in Massachusetts. Early in the year, Senate Bill 2190, "An Act Preserving Publicly Assisted Housing" was reintroduced and included additional compromise language relating to ROFO and ROFR provisions. In February, the MacArthur Foundation awarded a \$1 million grant to CEDAC as well as a \$3.5 million PRI to CEDAC and MHIC, thus providing crucial capital for the Preservation Acquisition Loan Fund. The Preservation Advisory Committee (PAC) and the Preservation Interagency Working Group were both formed in the early months of 2009. In June of that year, DHCD and CEDAC disseminated the first version of the Housing Preservation Matrix. Finally, Chapter 40T was passed into law on November 23, 2009.

2010 – Enactment and Regulations

Chapter 40T was enacted as ‘emergency’ legislation so the law became effective 90 days after passage, though the regulations were not drafted and finalized until the fall of 2010 when they were published as 760 CMR 64. In 2013, the regulations were amended to include an easier path to exempt sales for owners that wished to publicly market properties for sale. The regulations later had a fairly significant update in 2016 that included a revision of the standard that DHCD uses to determine if reasonable and diligent actions are being taken to preserve affordability when a project is sold. The 2016 regulations indicated for the first time that 30 years of continued affordability should be considered a minimum expectation. A current version of the regulations can be found in Appendix C.

DHCD has also promulgated guidance for the administration of the program. Current guidance includes:

- Advisory Opinions
- Certificates of Compliance
- Certificates of Exemption (including exemption request form and guidance)
- Definitions
- Notices
- Sale by Owner
- Model Curative Equivalent Affordability Agreement
- Designee Selection

Of these, the “Guidelines for Selection of Designees” (see Appendix D) is one of the most important. Updated most recently in 2017, the guidance outlines the specific process that DHCD follows when selecting a designee upon receipt of an Offer to Sell notice. The guidelines address how DHCD will evaluate ‘potentially qualified local organizations’, how it will rank the next appearing statewide organizations on the prequalified statewide organization list, and how DHCD will consult with the municipality regarding selecting the designee among the potential organizations.

ⁱ Historical information, unless specifically noted, comes from CEDAC archives as well as personal communication with Vince O'Donnell, Aaron Gornstein, Chris Norris and Deborah Goddard.

ⁱⁱ Achtenberg, Emily, “Chapter 40T at 5: A Retrospective Assessment of Massachusetts’ Expiring Use Preservation Law” May 2015, <https://cedac.org/wp-content/uploads/2016/06/Chapter-40T-at-5-6.2.15-1.pdf>

ⁱⁱⁱ Bill sponsors were Rep Alice Wolf, Rep. Alice Peisch and Sen. Susan Tucker

^{iv} Task force members included representatives from property owners, community development corporations, DHCD, CEDAC, legal services attorneys, affordable housing attorneys, and affordable housing advocates

Preservation Purchases Resulting from Offers to Sell and Designations

| Project Name | Total Units | Afford Units | Location | Date of Designation | Designee | ROFO or ROFR? | Acquisition Date | Permanent Financing (and Preservation) Date |
|---------------------|-------------|--------------|------------|---------------------|--------------------------------|---------------|------------------|---|
| Burbank Gardens | 52 | 52 | Boston | July-16 | Fenway CDC | ROFO | April-17 | February 2018 |
| Newcastle Saranac | 97 | 90 | Boston | January-18 | Fenway CDC | ROFO | January-19 | June 2020 |
| St. Botolph Terrace | 52 | 52 | Boston | May-12 | Madison Park Development Corp. | ROFO | May-13 | October 2014 |
| Chapman Arms | 50 | 25 | Cambridge | April-11 | Homeowners Rehab, Inc. | ROFO | December-11 | August 2013 |
| Putnam Square | 94 | 94 | Cambridge | October-12 | Homeowners Rehab, Inc. | ROFO | Sept 2013 | July 2014 |
| Edmands House | 143 | 143 | Framingham | February-12 | Beacon Communities | ROFO | May 2013 | August 2013 |
| Glen Meadow | 288 | 72 | Franklin | April-16 | Schochet Companies | ROFR | May 2017 | May 2017 |
| Tannery | 284 | 239 | Peabody | March-18 | Winn Companies | ROFR | June 2019 | June 2019 |
| Martensen Village | 12 | 12 | Quincy | July-17 | Asian CDC | ROFO | September 2018 | September 2018 |
| Mill Pond Apts. | 49 | 49 | Taunton | April-12 | John M. Corcoran and Co. | ROFO | Dec. 2012 | March 2013 |
| Taunton Green | 75 | 75 | Taunton | April-12 | John M. Corcoran and Co. | ROFO | Dec. 2012 | March 2013 |
| Fruit Sever | 132 | 120 | Worcester | August-15 | The Community Builders | ROFR | June 2016 | November 2017 |
| Stratton Hill | 156 | 128 | Worcester | April-16 | Beacon Communities | ROFR | July 2017 | July 2017 |
| Canterbury Tower | 156 | 156 | Worcester | April-12 | John M. Corcoran and Co. | ROFO | Dec. 2012 | March 2013 |

Total Sales **1640 1307**

Offer to Sell Notices that Did Not Result in Preservation Sales

| | | | | | | | |
|--------------------------------------|-----|-----|-------------|----------|------------------------------------|--|--|
| Fairfield Properties | 30 | 30 | Boston | May-18 | 1810 Realty | | As of Oct 2020, sale moving forward with third party buyer that will likely include preservation of 16 affordable units. |
| Riverview Towers | 200 | 200 | Fall River | May-17 | Weston Associates | | Owner rejected the ROFO and submitted a P&S under the ROFR. The designee was not able to assemble financing in the 90 day due diligence process. |
| Riverside Towers | 200 | 199 | Medford | July-11 | Preservation of Affordable Housing | | Owner did not sell. Property remains affordable. |
| Rolling Green Milford | 304 | 4 | Milford | April-16 | Schochet Associates | | There were only 4 remaining affordable units in this 304 unit property, so DHCD directed its designee not to submit under the ROFO and to decline the ROFR. The property was subsequently sold to a market buyer |
| Colonial Estates | 500 | 450 | Springfield | June-11 | John M. Corcoran and Co. | | No sale. Owner syndicated using LIHTC in Dec 2013. |
| Kimball Court I | 174 | 39 | Woburn | April-12 | Schochet Associates | | Owner did not sell. Property remains affordable. |
| Kimball Court II & Kimball Court III | 167 | 34 | Woburn | April-12 | Schochet Associates | | Owner did not sell. No short term loss of affordability. |

Totals **1575 956**

Appendix G. Summaries of State and Local Preservation Laws in Other Jurisdictions

Summaries in this appendix were produced by the National Housing Law Project (www.nhlp.org) and were retrieved from The Preservation Catalog or “PrezCat” located at www.prezcat.org on Dec 2, 2019 unless specifically noted.

State Affordable Housing Preservation Laws

California

AB 1521(enacted 2017) –Expansion of State Preservation Notice Law¹

* AB 1521 (revising Cal. Govt. Code §65863.10 and .11) applies to most California affordable rental housing of 5+ units with contractual use or affordability restrictions, including:

- Low-Income Housing Tax Credit
- HUD and RD federally subsidized housing programs (except housing choice vouchers),
- State subsidies, bond financing, and local subsidies or local land use concessions reflected in recorded rent and occupancy restrictions.

To protect tenants and advance preservation efforts, the revised law expands requirements to provide notice of expiring affordability and a right of offer to qualified entities.

NOTICE OF EXPIRING AFFORDABILITY to Tenants and Affected Public Entities

*Existing Cal. Govt. Code §65863.10(b) & (c) requires owners of affordable housing to provide notice of the expiration or termination of affordability restrictions or subsidies to current and prospective tenants, and to affected public entities (City, PHA and HCD):

- Notices must be given at least 12 months (any federally required 12 month notice will suffice) and another at least 6 months before expiration.
- Notices must contain specific content and be served by mail, and must be provided to applicants at eligibility review.

AB 1521 adds a requirement in § 65863.10(e) for a third notice, three years prior to any expiration of rent restrictions scheduled to occur after 1/1/21:

- Must be given to any prospective tenants when they are applying during the three-year period.
- Must be posted at the affected property at least three years prior expiration of affordability restrictions.

*The California Department of Housing and Community Development (HCD) shall develop approved forms for the 12 and 6-month notices, which owners must use. (§65863.10(k))

PRESERVATION PURCHASES

*The revised law requires owners to notify “qualified entities” of the right to make an offer to purchase an expiring property, via certified mail (§65863.11(g), (h) and (i)), and (k):

- This is a legal prerequisite to any expiration of restrictions or termination of subsidies.
- Qualified Entities: must now be certified by HCD with demonstrated affordable housing experience that commit to long-term affordability for at least 30 years.

¹ AB 1521 information provided by email from National Housing Law Project, November 26, 2019.

- HCD shall establish a certification process and maintain a list of Qualified Entities for affected property owners to notify.
- Qualified Entities can make an offer to purchase the property at market value determined by a new statutory appraisal process based on “highest and best use” under current zoning.
- If owner receives a “bona fide offer” from a Qualified Entity within six months but does not accept it, the owner must record a declaration that the property will not be sold for five years.
- Upon commencement of this process, the owner must take reasonable steps to preserve the assistance or restrictions.

MONITORING AND ENFORCEMENT

*The revised law clarifies and expands HCD’s monitoring role, requiring HCD to:

- provide summaries of rights and duties and form notices
- maintain the list of Qualified Entities
- monitor compliance (including owner certifications and referrals to the AG), and provide reports.

*The revised law also clarifies remedies for violations (§65863.10(j); .11(p)):

- Notice violations under .10 may be judicially enforced by affected tenants or any affected public entity; the notice and right of offer provisions under .11 may be enforced by qualified entities, tenant associations, or affected public entities.
- Makes injunctive relief available, which could include (for .10 notice violations) reinstating prior affordability restrictions and restitution of rent increases until the required notice has been provided and its time has run.
- Authorizes attorneys’ fees and costs to a prevailing plaintiff.
- To facilitate monitoring and enforcement, owners of affordable housing must certify annually under penalty of perjury that they have complied with the law’s requirements.

Connecticut

Connecticut state law (CONN. GEN. STAT. § 8-68c) requires owners of federally-assisted multifamily rental housing to provide a one-year notice to tenants, the state and the local government prior to the expiration or termination of any rental subsidy, a mortgage prepayment or the sale, transfer or lease of the property, where such action will result in a reduction or elimination of subsidies or regulatory agreements. The state agency must post the notice on its website within ten days and send an email notification to a list of persons who have registered to receive such notice.²

Illinois

The Illinois Federally Assisted Housing Preservation Act requires that owners provide at least 12-months’ notice to the tenants, local government, PHA and the state housing agency, prior to any sale or other proposed conversion.

In addition, the law gives tenant associations (representing at least a majority of the affected tenants) and their chosen non-profit or private partners the right to purchase any assisted housing development that is ending its participation (by sale, disposition or any other conversion) in a specified federal subsidy program. Covered programs include project-based rental assistance under Section 8; Sections 221(d)(3),

² “State & Local Preservation Initiatives”, National Housing Law Project website dated July 26, 2018, <https://www.nhlp.org/our-initiatives/state-local-preservation-initiatives/> retrieved January 14, 2020.

236 and 202 of the National Housing Act; rent supplement assistance under Section 101 of the HUD Act of 1965; Sections 514 and 515 of the Housing Act of 1949; and Section 42 of I.R.C. The tenants have 60 days from the date of the 12-month notice to notify the owner that they have formed a tenant association. The owner then has 60 days to submit in return a bona fide offer of sale to the association, containing the essential terms of the sale. The association must respond within 90 days with a written notice of intent to purchase. If the parties cannot agree on a price, each party is to hire an independent appraiser. If the appraisers do not agree, the parties can either take their average or jointly hire a third, binding appraiser. Note that the association must agree to close on the sale within 90 days of signing the purchase contract. Procedural protections provide that, upon request, the owner must provide the tenants access to the project's rent rolls, vacancy rates, operating expenses, capital improvements, project reserves and financial and physical inspection reports.

A separate provision of Illinois law governs the prepayment of mortgages for developments financed by the issuance of Illinois Housing Development Authority bonds and not covered by the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRA). In order to be permitted to prepay such a mortgage, the owner may enter into an agreement with the Authority to extend the affordability restrictions to the full term of the original mortgage or to create a comparable number of new low-income units. However, if the owner declines to enter into such an agreement, the law prohibits the Authority from accepting a prepayment prior to the owner giving the tenants a nine-month notice, as well as extending to the tenants a right to purchase the housing that is similar to that of the Illinois Federally Assisted Housing Preservation Act as described above. Tenants do not under this law have mandatory access to project information.

Maine

Maine law invests the Maine State Housing Authority with the "right of first refusal to purchase."

This right applies to certain properties that are both subject to federal or state income eligibility restrictions and where the rents within the projects are controlled, regulated or assisted by a federal or state agency pursuant to a regulatory or rental assistance agreement. This right appears to effectively operate as a preemptive option, not a right of first refusal. The statute defines the trigger for the right as "the sale, transfer, or other action that would result in termination of the financial assistance." Owners must give 90-days' notice to the tenants, the State Housing Authority and the local PHA. If the housing authority responds in writing within the 90-day period that it intends to exercise its right, it gains an additional 90 days to "buy or produce a buyer for the property." The statute also imposes a civil penalty of at least \$2,500 for any entity that fails to give the requisite notice before selling or converting a subsidized property.

Maryland

Maryland's Assisted Housing Preservation Act creates a "right of first purchase" (the functional equivalent to a right of first refusal) in local housing authorities, local jurisdictions, state-registered groups representing tenants, registered non-profit low-income developers and other registered persons with low-income housing experience that are unrelated to the owner.

The right of first purchase is triggered only by a proposed sale or transfer; however, notice rights and other procedural protections are more broadly triggered by a proposed prepayment or other

termination as well. In executing its right of first purchase, a qualifying entity must commit the property to specified extended use terms equal to the original use restrictions for at least the greater of 20 years or the remaining term of the mortgage or rental assistance agreement. The statute also provides that the property must be appraised at fair market value and contains dispute resolution steps. However, if another potential buyer makes a bona fide offer higher than fair market value, then the qualified entity must match the higher price in order to exercise its right of first purchase.

Oregon

Oregon's HB 2002 was first passed in 2017 and substantially amended in 2019.

The law does these four major things:

- *Tracks Oregon's Inventory of Affordable Housing*

Creates a statewide database at Oregon Housing and Community Services (OHCS) to monitor Oregon's inventory of affordable housing supported through federal, state, and local resources.

- *Requires Notice of Expiring Affordability*

Requires an affordable housing property owner to provide two-years' notice to OHCS and the local government agency where the property is located, of contract expiration or another action that would terminate affordability. The increased notice requirements enhance Oregon's ability to track units that are at risk of losing affordability so OHCS can facilitate their preservation and/or support residents who may be displaced from their homes.

- *Provides an Opportunity to Purchase for Existing Contracts*

Under HB 2002, for the first time, property owners subject to an existing affordability contract must provide OHCS, the local government agency, or a designee, an opportunity to purchase and preserve the property's affordability. With the passage of HB 2002 in 2017, Oregon becomes just the fourth state to adopt a first right of refusal on the sale of publicly supported housing. HB 2002 requires a property owner to provide first right of refusal to OHCS, the local government, or a designee. If the owner accepts an offer from a third party, the owner must provide OHCS, the local government, or a designee with an opportunity to match that purchase offer.

- *Provides Funding for Staffing*

The bill also provides OHCS with funding for two full-time positions for the oversight of a new preservation program which will involve creating and maintaining the state-wide affordable housing inventory, working with external stakeholders and local governments, overseeing contracts, and administering the rulemaking process.³

Rhode Island

Rhode Island's Affordable Housing Preservation Act creates purchase rights for tenant associations, the state housing agency, the local housing authority and the local municipality (in that order of priority) in

³ Rob Prasch blog post Aug 13, 2017, <https://www.oregonhousingalliance.org/hb-2002-new-tools-to-help-preserve-oregons-affordable-homes/> Retrieved December 2, 2019, updated with personal communication with Mr. Prasch regarding 2019 amendment on March 20, 2020.

any instance where an owner seeks to terminate assistance or restrictions on certain federally insured or assisted housing.

Owners must give a two-year notice of any intent to sell, lease, otherwise dispose of or prepay the mortgage on any covered subsidized property to the tenants association, state housing agency, local PHA and the municipality. For terminations of Section 8 assistance, owners must similarly provide a two-year notice, but only to the state agency, which must then promptly post it in the development and provide it to the tenants association. The offer of sale with detailed terms must be provided at least one year before termination of the Section 8 contract; for a prepayment or sale, the offer must be provided at an unspecified time prior to the conversion event. The price can be no higher than the fair market value, as determined by the average of two independent qualified appraisals, with one appraiser drawn from the state agency's list.

Texas

Texas state law (TEX. GOV'T CODE § 2306.185) provides that any owner of a housing project intending to sell, lease, prepay a loan financed with HUD subsidies, opt-out of the Section 8 program, or otherwise dispose of the property must give the state housing department notice one year in advance of any proposed sale or other action that would terminate the subsidy. The statute simply gives the state time to "attempt to locate a buyer who will conform to the development restrictions." Thus, while the law has a broad trigger for its notice requirement, it creates no direct purchase right.

A separate provision of state law (TEX. GOV'T CODE § 2306.805) establishes a housing preservation incentives program to provide loans, loan guarantees, and grants for the acquisition and rehabilitation of certain affordable multifamily housing developments⁴.

Municipal Affordable Housing Preservation Laws/Ordinances

Chicago

The city of Chicago passed the Affordable Housing Preservation Ordinance in 2007 to supplement the Illinois Federally Assisted Housing Preservation Act. The local ordinance requires owners of federally-assisted housing to notify the city department of housing in addition to the notifications that must be sent under the state law upon prepayment, termination or an intended disposition of the property.

Furthermore, where a tenant association has not exercised its purchase rights under the state law, owners must still give qualified entities the right of first refusal prior to sale of the property to a non-qualified entity, unless an affordability preservation agreement has been entered into extending for a period of at least ten years. The right of first refusal operates such that an owner may enter into a contingent sales agreement with a non-qualified entity that must then be submitted to the city housing commissioner. The commissioner is then required to make the agreement immediately available to all qualified entities, which then have 120 days to make a bona fide offer of purchase on terms that are "economically substantially identical" to the terms in the contingent sales agreement. If the qualified

⁴ "State & Local Preservation Initiatives", National Housing Law Project website dated July 26, 2018

entity agrees to close on the sale within 120 days then the owner must sell to the qualified entity and enter into an affordability preservation agreement. If no qualified entities make such a bona fide offer, or if one fails to close within 120 days, then the owner may sell to the non-qualified entity identified in the contingent sales agreement under terms that do not substantially deviate from the original agreement. Any aggrieved person, including tenants, may enforce these provisions.

Denver

Denver municipal code contains both notice and purchase offer rights for the city, which are triggered by an owner's decision to opt-out of a project-based Section 8 contract, as well as by owner actions to terminate other state and local affordability arrangements.

Owners must give, to both tenants and the city, one-year notice of pending Section 8 contract expirations, 210 days' notice of the intention to opt-out of long-term contracts and 150 days of the intention to opt-out of one-year contract extensions. For local preservation arrangements, a 90-day notice is required any time the owner "takes action which will make the affordable housing no longer affordable." The code prevents owners from taking any action during the required notice period that would "preclude the city or its designee from succeeding to the contract or negotiating with the owner for purchase." The code also provides for an unspecified civil penalty for failure to comply with its provisions, with all fines payable into a housing replacement fund established and run by the city.⁵

New York City

A New York City ordinance grants the rights of first purchase and first refusal to tenant associations and other "qualified entities" experienced in the management of affordable housing if designated by at least 60 percent of the residents.

The ordinance covers all situations where owners seek to terminate assistance or restrictions, and requires owners to provide a 12-month notice to tenants of any proposed action that would result in the conversion of the assisted rental housing. The notice must advise tenants of their purchase rights, as established by other sections of the law. Owners must also notify tenants of any proposed purchase offers to which the owner intends to respond, so that tenants can exercise their rights of first refusal to purchase. After the tenants or their designee have given notice of their intent to purchase, the city will convene a panel consisting of an appraiser selected by the owner, another by the tenants and a third by mutual agreement, or by the city if there is no mutual agreement, which then determines the property's appraised value.

A state court ruled the law unenforceable as preempted by federal law in the *Mother Zion* case.

Portland, OR

An owner's decision to opt-out of a project-based Section 8 contract, as well as any owner action to terminate other state and local affordability arrangements, triggers notice rights. The Portland ordinance (**PORTLAND, OR.**, CODE§ 30.01.010-110) requires owners to provide to the city and tenants a one-year notice of pending Section 8 contract expirations, 210-days' notice of an intention to opt-out of a long-term contract and 150-days' notice of an intention to opt out of one-year contract extensions. The ordinance applies to properties with project -based rental assistance, including properties with

⁵ This summary may not include amendments to the law that were passed in 2018.

assistance or insurance under a variety of HUD programs. It also prevents owners from taking any action during the required notice period that would 'preclude the city or its designee from succeeding to the contract or negotiating with the owner for purchase.

Sacramento

Owners of federally-assisted housing are required by law (SACRAMENTO, CAL., CODE §§ 5.148.010-100) to submit one-year and six-month notices to affected tenants and the Sacramento Housing and Redevelopment Agency (SHRA) in order to terminate, opt-out or prepay. In all such cases, owners may not evict tenants except for good cause for 180 days after the expiration of rental restrictions if the SHRA has arranged for payments of the monthly subsidy that the owner had been receiving. During the 180 days following the one-year notice, an owner may not sell to or solicit offers from non-qualified entities. During the second 180-day period, an owner may negotiate with any potential purchaser, but any sales agreement is made contingent upon qualified entities right of first refusal. Any such contingent agreement must be immediately provided to the SHRA which in turn must make it available to qualified entities. These entities then have 60 days to offer to purchase the property on terms that are economically substantially identical—if no such offer is made, the owner may sell the property pursuant to the terms of the original agreement. Any aggrieved person may enforce the provisions of this law.⁶

San Francisco

San Francisco's Assisted Housing Preservation Ordinance gives the city, tenant associations and affiliated nonprofit groups the equivalent of a right of first refusal when an owner proposes to sell or transfer any HUD-subsidized housing.

A proposed prepayment or Section 8 contract termination triggers other procedures and protections, whereas a Section 8 contract expiration or opt-out at its original expiration date triggers no purchase rights. The ordinance requires 18-months' notice of prepayments or mid-term Section 8 terminations, and 12-months' notice of Section 8 contract expirations at the end of their term. Information about tenants' rights must be made available to any interested parties at least 14 days prior to a required public hearing, which is held no later than 45 days after the owner gives notice of intent to prepay or terminate prematurely. The ordinance also uses a complex formula to reach a "fair return price" that may not exceed the appraised value based on the highest and best use, creates civil remedies for violations and provides that owners pay relocation fees of up to \$5,250 to very low-, low- or moderate-income tenants who are displaced by a conversion, according to a set formula.

The San Francisco Rent Ordinance also provides generally applicable rent increase limits and eviction protections. The Rent Ordinance generally does not apply to "dwelling units whose rents are controlled or regulated by any government unit, agency or authority, excepting those unsubsidized and/or unassisted units which are insured by the United States Department of Housing and Urban Development." However, upon the expiration or termination of Section 8 project-based HAP contracts, the units would come under the scope of the Rent Ordinance and the base rent is set at the contract rent immediately in effect prior to expiration or termination. Likewise, upon the prepayment or expiration of a HUD-insured mortgage, the units become subject to the ordinance and the base rent is set to equal the basic rental charge in effect immediately prior to prepayment or expiration. The Rent Ordinance only applies to buildings for which a certificate of occupancy was issued before June 13, 1979.

⁶ "State & Local Preservation Initiatives", National Housing Law Project website dated July 26, 2018

Santa Cruz, CA

Santa Cruz City law covers all multifamily rental buildings which receive “any public subsidy” including a mortgage loan, mortgage interest subsidy, mortgage insurance or rental subsidy from a federal, state or local governmental body and that has rent levels restricted to affordable levels.

Owners seeking to terminate affordable housing restrictions are required to give a 12-month notice to the city director of planning and development. Within 14 days of receiving this notice, the director may send a written “Request for Information and Access” which the owner has 21 days to respond to certifying that, among other things, the owner consents to a reasonable walk-through inspection of the property. Three months prior to offering to sell the property to anyone, the owner must give notice of such intent to the director. If an owner receives an offer from a qualified entity during this three month period, the owner must make a reasonable effort to negotiate and must allow the qualified entity a reasonable amount of time to obtain necessary financing and government approvals. Within 12 months following receipt of an offer by a qualified entity, an owner may not accept an offer that is equal to it or less so long as the qualified entity’s offer remains outstanding.

General Municipal ROFR Laws/Ordinances

Although the following two local laws are much broader in scope than the housing preservation laws such as Chapter 40T that only regulate existing affordable housing, Washington D.C.’s TOPA law has had unique success nationwide in protecting tenants and often preserving existing housing as affordable. San Francisco’s new COPA law, enacted in mid-2019, is fairly similar, but may lead to more housing preserved as affordable.

San Francisco

The San Francisco Community Opportunity to Purchase Act (COPA)⁷ applies to the sale of any non-condo residential building of 3 or more units. It would give qualified nonprofits a right of first offer at the front-end, and a right of first refusal at the back end—over multi-family residential buildings (and vacant lots), for the purpose of creating and preserving permanently affordable housing. Applicants are prequalified by the City as bona-fide nonprofits with a mission to create permanently affordable housing for low- and moderate-income residents, and a demonstrated capacity to effectively acquire and manage residential property at multiple locations in San Francisco.

COPA requires sellers to notify the qualified pool of nonprofit organizations of their intent to sell. Potential nonprofit buyers have a limited time (25 days) to work with tenants and exercise their first right of offer and, if accepted by the seller, enter into a Purchase-Sale Agreement. While a seller is not

⁷ Council of Community Housing Organizations, “COPA: What is it? Why is it important?” <https://www.sfccho.org/blog/2019/2/11/copa-community-opportunity-to-purchase-act-what-is-it-why-is-it-important>, retrieved December 3, 2019. The law was recently updated in June 2019.

required to accept the offer, the qualified nonprofit also has a right of first refusal to match a competing offer. Sales are defined to include partial transfers within LLCs.

At closing, deed restrictions will be placed on the building, restricting the building to affordable housing "for the life of the building," with a mean value of all rents paid in the building not to exceed 80% of Area Median Income. The building could also eventually be transferred to tenant ownership under a Limited Equity Cooperative or other model, as long as permanent affordability deed restrictions are maintained. The ordinance includes incentives, including a partial exemption from the City's transfer tax and the potential for qualified nonprofits to facilitate sellers' efforts to obtain federal tax benefits.

Washington, D.C.

Washington D.C.'s Tenant Opportunity to Purchase Act (TOPA) provides a general right of first purchase for tenants. Triggered by a proposed sale or transfer of interest by the owner, TOPA extends to both subsidized and unsubsidized properties, whether or not the property is considered affordable. Although the law extends to unsubsidized rental properties, it provides an opportunity for low-income tenants (or a party designated by them) to step in and purchase the property for preservation.⁸

⁸ More information about TOPA can be found at the website of the Washington D.C. Department of Housing and Community Development: <https://dhcd.dc.gov/service/tenant-opportunity-purchase-assistance> .