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: Waivers; Compliance

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. 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 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. M.G.L. c. 40T, § 1, excludes certain dispositions to an affiliate of the Owner from the definition of Sale that would otherwise initiate the obligation to provide notice and seek exemption pursuant to M.G.L. c. 40T, § 6(a)(vi). As excluded from the definition of Sale in M.G.L. c. 40T, § 1, Disposition 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);

64.02: continued

(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.

Institutional Recipient - means the Department, the Community Economic Development Assistance Corporation (CEDAC), the tenant organization (if any) for the affected Publicly-assisted Housing, the chief executive officer of the municipality in which affected Publicly-assisted Housing is located, and the legal services organization recognized by the Department as covering the geographic area of the affected Publicly-Assisted Housing.

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.

64.02: continued

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, 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.

64.02: continued

(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

64.02: continued

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.

1. 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:

a. 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 30 years from the date of sale.

b. If an Affordability Restriction that does not qualify under 760 CMR 64.02(2)(d)1.a. 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.

c. If a request for a Certificate of Exemption on the basis of Preserving Affordability concerns Publicly-Assisted Housing subject to Affordability Restrictions covered by both 760 CMR 64.02(2)(d)1.a. and b., the Minimum Expectations applicable to both such provisions shall apply.

2. If a request for a Certificate of Exemption on the basis of Preserving Affordability does not meet the requirements of 760 CMR 64.02(2)(d)1.a. and b., to the extent applicable, the Owner and Purchaser must:

a. demonstrate that exceptional circumstances exist preventing them from meeting the requirements of 760 CMR 64.02(2)(d)1.a. or b., as applicable, including, but not limited to, demonstration of taking extraordinary diligent action to determine that Subsidies meeting the requirements of 760 CMR 64.02(2)(d)1.a. or b.,were not available or were available only on terms that are economically unfeasible; or

b. in the case of an interim or bridge Sale based on the Purchaser's representation that a subsequent Sale or financing transaction will provide for extending existing Affordability Restrictions or additional Affordability Restrictions, submit a plan acceptable to the Department indicating how they will meet the requirements of 760 CMR 64.02 (2)(d)1.a. or b., as applicable, prior to securing a Final Certificate of Exemption.

3. a. For property subject to the provisions of M.G.L. c. 40T, § 6, during the four-year period covered by M.G.L. c. 40T, § 10, the Department shall determine appropriate Minimum Expectations on a case-by-case basis, in its sole discretion, depending on the circumstances.

b. The Department may issue administrative guidance in regard to the application of Minimum Expectations pursuant to 760 CMR 64.02(2)(d).

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 Departmentin 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
2. all Institutional Recipients.

The envelope of any Notice provided to Institutional Recipients 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:

64.03: continued

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. 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,

64.04: continued

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:

64.04: continued

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.

(a) 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).

(b) The Owner and any agent or broker employed by or on behalf of the Owner shall cooperate in good faith with the Designee in promptly providing or facilitating the provision of full due diligence materials and inspections.

(c) 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.

64.05: continued

(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 760 CMR 64.00 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);

(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;

(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);

(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);

(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);

(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); or

(g) the Department and its Designee waive their rights of first refusal and counteroffer as set forth in M.G.L. c. 40T, § 4, by prior written communication to the Owner.

(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.

64.06: continued

(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), 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 all Institutional Recipients 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).

64.07: continued

(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 all Institutional Recipients 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 all applicable standards for receipt of a Preliminary Certificate of Exemption for the relevant category of exemption and such additional requirements 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. two years 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 later than three months after the exempt Sale, unless the Department determines that the Purchaser is diligently pursuing a plan pursuant to 760 CMR 64.02(2)(d)2.b. which will enable it to meet the requirements of 760 CMR 64.02(2)(d)1.a. or b., as applicable, in which case Purchaser is required to make a request for a Final Certificate of Exemption no later than the first to occur of:

1. the expiration of the Preliminary Certificate of Exemption pursuant to 760 CMR 64.07(3)(f)3.; or

2. three months after the execution and, if applicable, filing with the applicable registry of deeds or registry district of the land court of the final Affordability Restriction(s) approved by the Department pursuant to 760 CMR 64.02(2)(d)2.b.

(h) 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. 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.

64.09: continued

(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 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 additional guidance as it deems appropriate and useful in implementing M.G.L. c. 40T 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 definition shall apply: Affordable Housing Prevention Act - means M.G.L. c. 40T.

64.10: Waivers; Compliance

(1) 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 shall contain reliable evidence showing that the waiver meets all the requirements of 760 CMR 64.10(2), and shall provide notice to all Institutional Receipients. 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.

(2) 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.

(3) 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. through 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 all Institutional Recipients 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.