

A Primer on Chapter 40T

The Act regulates “Publically Assisted Housing”

A list of covered programs is included in the definitions and includes almost all HUD major programs (except McKinney); Rural Development (sec. 515 and 521); federal and state LIHTC; MassHousing 13A and SHARP; Mass. Rental Voucher Program (MRVP) project-based subsidy; and Chapter 121A. Chapter 40B and local zoning restrictions are not included (unless covered by another governmental funding program)

Notices:

There are three standard types of notices that must be sent to DHCD:

- 2 Year Notice “Notice of Termination” Sent 24-36 months prior to the termination [see below] of an affordability program.
- 1 Year Notice “Notice to Complete Termination” Sent 12-18 months prior to the termination of an affordability program
- Offer to Sell – sent prior to entering into a legal agreement (including P&S or contract with a listing broker)

Notices must be delivered to DHCD, CEDAC, municipality, all tenants, tenant organization (if any).

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.

Equivalent Affordability Restriction: means a replacement Affordability Restriction that meets the following tests: (i) 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); (ii) 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 the existing Affordability Restriction; (iii) any requirements to renew Affordability Restrictions that affect the Publicly-Assisted Housing are maintained; (iv) the Equivalent Affordability Restriction is a written agreement that is enforceable by the Department or another governmental entity, and by any non-governmental entity that has the power to enforce the existing Affordability Restriction.....

Offer To Sell: Prior to entering into any agreement, including but not limited to an offer, letter of intent, agreement with a listing broker or purchase contract.....

DHCD has 90 days to submit an offer to the seller. The seller, however, is not bound to accept the offer.

Selection of Designees.

DHCD has made it clear that it does not want to develop or own real estate. So to exercise a Right of Offer or Right of First Refusal, DHCD will select an experienced preservation developer as designee.

- (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, (i) grant preference in the selection process to potential Designees who have been prequalified, or (ii) limit submissions to such prequalified candidates, or (iii) make its selection directly from the existing pool of prequalified candidates. If an Affected Municipality requests designation under Section 3(b) of the Act, such Affected Municipality shall be required to demonstrate its compliance with the Department's selection standards.

Right of First Refusal:

Upon the expiration of the 90 day period for the DHCD offer, the owner may enter into a contract to sell the property. DHCD then has 30 days to step into the shoes of the buyer. The contract must have 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, 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...

Exemptions:

The Right of Offer and Right of First Refusal shall not apply to:

- (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 chapter, 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 in effect on the effective date of this chapter. (November 2009)

DHCD can issue a Certificate of Exemption for any of the 8 situations above.

Tenant Protections

After a termination, rents for non-Section 8 tenants may not be increased by more than CPI + 3% per year for 3 years. During this period a tenant by not be evicted except for cause.

Look Back Provision:

The Right of Offer and Right of First Refusal provisions remain in effect for 4 years after a termination.