

Chapter 159 of the Acts of 2009

AN ACT PRESERVING PUBLICLY-ASSISTED AFFORDABLE HOUSING.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to preserve forthwith the affordability of publicly-assisted housing, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The General Laws are hereby amended by inserting after chapter 40S the following chapter:-

CHAPTER 40T PUBLICLY-ASSISTED AFFORDABLE HOUSING

Section 1. 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 publicly-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-1; (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.

Section 2. (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.

Section 3. (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.

Section 4. (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.

Section 5. An affected municipality shall not be subject to section 16 of chapter 30B.

Section 6. (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.

Section 7. 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.

Section 8. 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.

Section 9. 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.

Section 10. 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.

SECTION 2. Section 6I of chapter 62 of the General Laws, as appearing in the 2008 Official Edition, is hereby amended by striking out, in line 173, the word “taxpayer” and inserting in place thereof the following words:- qualified Massachusetts project.

SECTION 3. Section 31H of chapter 63 of the General Laws, as so appearing, is hereby amended by striking out, in line 177, the word “taxpayer” and inserting in place thereof the following words:- qualified Massachusetts project.

SECTION 4. Within 45 days after the effective date of this act, the department of housing and community development shall establish a 13-member advisory committee to provide advice and recommendations to the department regarding regulations to implement this act. The advisory committee shall consist of the following members: the undersecretary of the department of housing and community development or his designee; the executive director of the Community Economic Development Assistance Corporation; 1 member selected by the Massachusetts Mayors Association; 1 member selected by the Massachusetts Municipal Association; 1 member selected by Citizens Housing and Planning Association; 1 member selected by the Greater Boston Real Estate Board; 1 member selected by the Real Estate Bar Association for Massachusetts; 1 member selected by the Massachusetts Association of Community Development Corporations; 1 member selected by the Massachusetts Legal Assistance Corporation; 1 member affiliated with the Affordable Housing Preservation Initiative of the Local Initiatives Support Corporation; 1 member selected by the Massachusetts Chapter of the National Association of Housing and Redevelopment Officials; and 2 members chosen by the department of housing and community development.

SECTION 5. The department of housing and community development shall promulgate regulations to effectuate the purposes and implement chapter 40T of the General Laws not later than 150 days after the effective date of this act.

Approved November 23, 2009.