

Department of Housing & Community Development
Chapter 40T Guidance on Certificates of Exemption, 760 CMR 64.07

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Introduction

This Guidance is intended to provide information and clarification to property owners and managers about the documentation that the Department requires Owners and/or Purchasers to submit in requests for exemption pursuant to M.G.L. c. 40T (“c. 40T”), § 6 (a) and the standards that the Department uses in evaluating such requests. The Guidance complements 760 CMR 64.07, the regulation governing c. 40T (the “Regulation”). Capitalized terms used in this Guidance and not defined in the Guidance shall have the meaning assigned to them in c. 40T, § 1; 760 CMR 64.02 (1); and the Department’s Chapter 40T Guidance on Definitions.

It should be noted that Sales exempt pursuant to M.G.L. c. 40T, § 6 (a) (iv)–(vii) (preservation of affordability, Section 8, affiliate sale, 15 remaining years of affordability) are required to obtain a preliminary exemption before Sale because these Sales are Preservation Sales under which the affordability of the property will be preserved in accordance with the statutory requirements for the applicable exemption. Analysis of affordability before and after Sale is required to determine whether the Sale qualifies under the relevant exemption. In accordance with 760 CMR 64.07 (1) (a) and (b), the Department expects that an Owner and/or Purchaser will request a Preliminary Certificate of Exemption in the case of any Preservation Sale.

Sales exempt pursuant to M.G.L. c. 40T, § 6 (a) (i)–(iii) or (viii) (taking by eminent domain, foreclosure sale, deed in lieu of foreclosure, or sale under a contract in effect before November 23, 2009), on the other hand, are not required to obtain a preliminary exemption before Sale because the Owner is under a legal compulsion to sell and therefore

is not in control of the timing of the Sale. The exemptions in these cases are also non-preservation sales, in that preservation of affordability is not required due to the legal compulsion, so no review of affordability before and after Sale is required. Owners often choose to obtain Preliminary Certificates of Exemption voluntarily in these circumstances in order to facilitate the Sale.

I. Preliminary Certificate of Exemption, Contents:

Each request for a Preliminary Certificate of Exemption under c. 40T, § 6 (a), seeking confirmation of exemption from the otherwise applicable Right of First Offer and Right of First Refusal provisions of M.G.L. c. 40T, §§ 3 and 4, in connection with a proposed Sale of Publicly-Assisted Housing of interests in Publicly-Assisted Housing, shall include the following information:

A. Information Required for Notices. The request must include all of the information required by *Guidance on Notices* II.A.–B.;

B. Contact Information. The request must state the name and address of the Owner, the Third Party Purchaser (if a co-applicant) or Affiliate, any Tenant Organization, the project sponsor of the Owner and Third Party Purchaser or Affiliate, and the name, address, phone number, and email of the designated contact person for the Owner and the Third Party Purchaser (if a co-applicant) or Affiliate;

C. Applicable Affordability Restrictions. The request must identify all the Affordability Restriction(s) to which the Publicly-assisted Housing is or has been (within the past three years) subject, including

1. all requirements to renew such Affordability Restrictions, including any Affordability Restrictions that will Terminate as a result of the proposed Sale and

any Affordability Restrictions to which the Publicly-assisted Housing will become subject in conjunction with or as a consequence of the Sale, and

2. the Government Program that is the basis of each Affordability Restriction;

D. Affordability Restriction Terminations. The request must identify any Affordability Restriction that will terminate in conjunction with or as a consequence of the Sale and inform the Department of the dates and types of any Notices served in regard to or in conjunction with the proposed Sale.

E. Terminations within Past 3 Years. If any Affordability Restriction to which the Publicly-assisted Housing is or has been subject has terminated within the three years prior to the date of the request for Preliminary Certificate of Exemption or Final Certificate of Exemption, or will terminate in conjunction with or as a consequence of the proposed Sale, the party(ies) requesting the exemption must demonstrate to the reasonable satisfaction of the Department that Notices of Future Termination and, if applicable, Notices of Intent to Complete Termination (i) have been served in regard to any such Termination, and (ii) either all such Notices were not defective, any defect in any such Notice has been cured, or any defect in any such Notice has been found by the Department to be a *de minimis* defect, in each case in accordance with 760 CMR 64.03(5);

F. Grounds for Certificate. The request must identify and describe the statutory grounds under which the requesting party(ies) is(are) claiming an exemption—M.G.L. c. 40T, § 6 (a) (i), (ii), (iii), (iv), (v), (vi), (vii), or (viii); and

G. Information Required by Form. Each request must state such additional information and provide such additional documentation as may be required by the Department in any exemption request form issued by the Department.

H. Information Applicable to Certain Specific Exemptions Categories:

1. Preservation of Affordability M.G.L. c. 40T, § 6 (a) (iv). The Owner shall provide a certification of counsel or an affidavit signed by an authorized representative of the Owner providing a detailed response as to the actions taken by the Owner to Preserve Affordability and demonstrating to the Department that the Owner took reasonable and diligent actions to Preserve Affordability of the Publicly-assisted Housing, if the exemption request is based on M.G.L. c. 40T, § 6 (a) (iv) (preservation of affordability), and any of the following apply:

a. a Termination will occur in conjunction with or as a consequence of the proposed Sale,

b. some other Loss of Affordability will occur in conjunction with or as a consequence of the proposed Sale, or

c. the standards to Preserve Affordability in 760 CMR 64.02 (2) are not met.

2. Section 8 as Sole Covered Subsidy, M.G.L. c. 40T, § 6 (a) (v).

a. Section 6 (a) (v) applies to “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” of the United States Housing Act of 1937 (42 U.S.C. § 1437f) (“Section 8”). When Section 6 (a) (v) applies because the only Affordability

Restriction expected to be applicable to the Publicly-Assisted Housing at the time of the Sale is a project-based Subsidy under Section 8, the Purchaser must agree, in a regulatory agreement binding on the successors and assigns of the Purchaser, to renew all project-based Section 8 assistance contracts, or equivalent contracts under any successor project-based rental assistance program, for all renewals that become available for at least 30 years after the date of the Sale, if, 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. If the United States Department of Housing and Urban Development and the state or local agency administering the Section 8 Subsidy have not entered into such a regulatory agreement with the Purchaser as of the time of the exemption request, the Purchaser may satisfy this requirement by entering into a binding agreement with DHCD in recordable form to the same effect.

b. This exemption category does not apply when the Publicly-Assisted Housing is subject to other Affordability Restrictions at the time of Sale. The imposition of additional, new Affordability Restrictions on the Publicly-Assisted Housing under Government Programs other than Section 8 after the Sale neither creates nor prevents eligibility for this exemption category, although such an additional Affordability Restriction may contribute to eligibility under a different exemption category.

c. The phrase “as of the effective date of this act” as used in “[P]ublicly-[A]ssisted [H]ousing that the [D]epartment 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 [P]ublicly-[A]ssisted [H]ousing other than project-based section 8,” M.G.L. c. 40T, § 6 (a) (v), shall mean “on or after the effective date of M.G.L. c. 40T, November 23, 2009.” The relevant exemption was intended to apply to properties where the only applicable Government Program after November 23, 2009, was project-based Section 8. The intent of the phrase “as of the effective date of this act” was intended to clarify that some properties, which had previously been subject to Affordability Restrictions under several Government Programs, could still utilize the exemption under M.G.L. c. 40T, § 6 (a) (v) if the Affordability Restrictions under the other Government Programs had already been terminated before November 23, 2009, leaving project-based Section 8 as the only remaining Affordability Restriction applicable to the Publicly-Assisted Housing.

3. Sale to an Affiliate, M.G.L. c. 40T, § 6 (a) (vi).

a. Information Regarding Parties, Ownership, and Control. If the exemption request is based on a sale to an affiliate pursuant to Section 6 (a) (vi), the request shall disclose the entity type (*e.g.*, corporation, limited partnership, limited liability company, trust, etc.) and jurisdiction of formation of the Owner, the Seller, the Purchaser (“primary level entity”), any controlling entity (*e.g.*, general partner, managing member, controlling shareholder, etc.), and any entity owning a majority equitable interest of each Owner, Seller, and Purchaser (“second level entity”), and any controlling entity and any entity owning a majority equitable interest in a second level entity (“tertiary level entity”). If there is no common

ownership or controlling entity at the tertiary level, then the application shall disclose additional levels of control and equitable interest to the point that common ownership or control is ascertainable. A qualifying relationship between an Owner and an Affiliate Purchaser based on common control means that the same person, group of people, or entity has ultimate control over decisionmaking by both the Owner and the Affiliate Purchaser. A qualifying relationship between an Owner and an Affiliate Purchaser based on common ownership shall be based on common ownership by the same person, group of people, or entity of at least the percentage of ownership needed to ensure ultimate decisionmaking authority in all of the relevant entities in the chain of entity relationship between the common owner, the Owner, the Seller, and the Affiliate Purchaser. If ultimate ownership or control rests with the same group of people, the decisionmaking control among the group must be materially equivalent for both the Owner and the Affiliate Purchaser.

b. Sale that is Not a Termination. Section 6 (a) (vi) allows an exemption from the requirements of M.G.L. c. 40T, §§ 3-4 for “a proposed sale of publicly-assisted housing to an affiliate of the owner *that is not a termination* as determined by the department.” (emphasis added). A Sale “that is not a Termination,” as used in Section 6 (a) (vi), means a Sale that occurs without any Termination occurring in conjunction with or as a consequence of the Sale.

4. Fifteen Remaining Years of Affordability under Existing Affordability Restrictions, M.G.L. c. 40T, § 6 (a) (vii).

a. An exemption requested under M.G.L. c. 40T, § 6 (a) (vii), for a sale subject to existing Affordability restrictions providing for fifteen remaining years of affordability, must meet statutory safeharbor requirements different from those applicable to M.G.L. c. 40T, § 6 (a) (iv), a sale that “preserves affordability.” The exemption under M.G.L. c. 40T, § 6 (a) (vii) only applies when *all* existing, non-duplicative Affordability Restrictions in regard to the Publicly-Assisted Housing will last at least fifteen years from the date of Sale. The fifteen-year period includes renewals of existing Subsidies if the relevant Government Program provides for renewals, the Purchaser enters into a formal assumption agreement with the Seller, and the Purchaser commits in such agreement, or in an Equivalent Affordability Restriction with the Department, to seek renewals on economic terms and conditions that are comparable to existing subsidies. If some, but not all, of the Affordability Restrictions applicable to the property will cease less than fifteen years from the date of the Sale, but the remaining Affordability Restrictions constitute Equivalent Affordability Restrictions as to the Affordability Restrictions that will cease, in that they provide for the same affordability for all affected units such that the Cessation will have no adverse impact on tenants, then the Cessation of those duplicative Affordability Restrictions will be disregarded in determining the fifteen-year period.

b. An Owner may also request that the Cessation of an existing Affordability Restriction be treated as a Cessation that is not a Termination due to Simultaneous Replacement by an Equivalent Affordability Restriction by entering into an Equivalent Affordability Restriction with the Department,

provided that the Equivalent Affordability Restriction will not cease for 15 years after the Sale.

c. The ability of the property owner or the administering agency of any Government Program to terminate the Subsidy less than 15 years from the date of the Sale shall not be considered in determining the 15-year period provided that the Purchaser agrees, in a recorded agreement binding on the successors and assigns of the Purchaser, to take no voluntary action that would result in Termination less than 15 years from the Sale.

e. Any request for a Preliminary Certificate of Exemption under this category must include the estimated date of Sale. No Preliminary Certificate of Exemption will be approved under this category if any Termination would occur less than 15 years from the estimated date of Sale.

f. In addition to any other requirements applicable to a Final Certificate of Exemption, any request for a Final Certificate of Exemption under this category shall clearly identify the actual date of the Sale. If the date of the Sale is later than the estimated date of Sale in the request for the Preliminary Exemption Certificate, the time periods should be re-calculated based on the actual date of Sale. If the re-calculation indicates that a Termination will occur less than 15 years from the actual date of Sale, the Purchaser shall enter into an Equivalent Affordability Restriction continuing the applicable Affordability Restrictions through the date 15 years from actual date of Sale.

I. Interim Transaction. A Preliminary Certificate of Exemption may be granted with respect to 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. In such cases, the Department will not grant a Final Certificate of Exemption until all Affordability Restrictions contemplated in the original Preliminary Certificate of Exemption, or alternative Affordability Restrictions considered by the Department to be equivalent, are in effect. The Department may, in these circumstances, grant a second or subsequent Preliminary Certificate of Exemption without issuance of a Final Certificate of Exemption with respect to a later transaction that involves a Sale. The Department shall condition any initial Preliminary Certificate of Exemption granted as part of an interim or bridge Sale on the Purchaser's grant to the Department of an option in writing to purchase the Publicly-assisted Housing on terms substantially equivalent to those of the original Sale, as determined pursuant to M.G.L. c. 40T, § 4 (b) and 760 CMR 64.06 (3), exercisable within 90 days following the first of the following to occur:

1. the notification of the Department by the Owner, Third Party Purchaser, or Affiliate Purchaser, that the contemplated Affordability Restrictions, or their substantial equivalent, will not be executed; or
2. one year after the date of issuance of the initial 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).

II. Final Certificate of Exemption, Additional Contents

A Third-Party Purchaser or Affiliate Purchaser requesting a Final Certificate of Exemption shall provide to the Department, the following information:

A. Documentation of Sale. The request must include documentation that the Sale was completed upon materially the same terms and conditions as was described in the original request, including a copy of the deed with evidence of filing with the applicable registry of deeds or registry district of the land court of the county, or equivalent evidence of consummation of a Sale other than transfer of a fee interest in property, and an executed copy of all Affordability Restrictions entered into in conjunction with or as a consequence of the Sale;

B. Documentation of Completion of Conditions. The request must also include documentation that all other conditions of the Preliminary Certificate of Exemption have been met, including by provision of a certification of counsel or an affidavit signed by an authorized representative of the Purchaser or purchasing Affiliate attesting to the completion of all conditions of the Preliminary Certificate of Exemption and to the fact that there have been no material changes in any of the terms of the Sale in regard to the affordability or ownership of the Property, as detailed in the documentation supporting the request for the Preliminary Certificate of Exemption, or, if there have been such changes, the additional information requested in § II.C; and,

C. Documentation of Changes. If applicable, the Owner and/or Purchaser shall provide to the Department a narrative description of any changes to the factual statements made in the request for a Preliminary Certificate of Exemption or the accompanying or subsequent documentation provided to the Department that have an impact of the Affordability Restrictions, Subsidies, or Government Programs applicable to the Publicly-assisted Housing or on the ownership identity or structure of the Owner,

Seller, or Purchaser. The Owner and/or Purchaser shall further provide such supporting documentation of any such changes as may be requested by the Department

III. Standards for Review of Request for Final Certificate of Exemption without a Preliminary Certificate of Exemption.

A. General Requirements. The Owner and/or Purchaser requesting a Final Certificate of Exemption without having first received a Preliminary Certificate of Exemption shall provide the Department with all the information and documentation necessary for a request for the applicable Preliminary Certificate of Exemption pursuant to § II together with any additional documentation required for a Final Certificate of Exemption pursuant to § III.

B. Preliminary Exemption Not Required. As a condition of the issuance of a Final Certificate of Exemption pursuant to Section 6 (a) (i)–(iii) or (viii) or 760 CMR 64.07 (1) (c) 2., when the Owner and Third-Party Purchaser have not previously requested a Preliminary Certificate of Exemption, the Owner and/or Purchaser shall demonstrate to the satisfaction of the Department that the Sale met the statutory requirements for the relevant exemption category.

C. Preliminary Exemption Required. If a Sale exempt from the M.G.L. c. 40T, §§ 3–4, Right of First Offer and Right of First Refusal process pursuant to Section 6 (a) (iv)–(vii) occurs without the Owner and Third-Party Purchaser or Affiliate Purchaser requesting a Preliminary Certificate of Exemption, contrary to 760 CMR 64.07 (1) (a) or (b), as a condition of the issuance of a Final Certificate of Exemption, the Owner and/or Purchaser shall demonstrate to the satisfaction of the Department that the failure to request a Preliminary Certificate of Exemption was a *de minimis* defect that caused no substantial

harm to the interests protected by M.G.L. c. 40T and 760 CMR 64.00 and that, if a request for a Preliminary Certificate of Exemption had been timely made, the request would have met the requirements for issuance of a Preliminary Certificate Exemption. If the Owner is not able to demonstrate to the satisfaction of the Department that a Final Certificate of Exemption is warranted, the Department may issue a Notice of Noncompliance under 760 CMR 64.10 and take such other action as may be appropriate in the circumstances, including, but not limited to, seeking invalidation, voiding, or rescission of the Sale.

IV. Exemption Request Form. An exemption request form, with instructions, covering both requests for Preliminary Certificates of Exemption and Final Certificates of Exemption, is available on the Department's website on the Chapter 40T webpage, <http://www.mass.gov/hed/economic/eohed/dhcd/legal/mgl-chapter-40t.html>. All requests for exemption shall be submitted on the posted exemption request form, which may include additional informational requests beyond those specified in this Guidance. The exemption request form shall be certified by the applicant(s) to be accurate and complete.

V. Service of Certificates of Exemption and Requests for Certificates of Exemption

A. Notice to Tenant on Request. In addition to the parties listed in M.G.L. c. 40T, § 6 (b), the Owner shall provide a copy of the request for a Certificate of Exemption to any affected Tenant upon request.

B. Recipients of Copies of Certificates. In addition to the parties listed in M.G.L. c. 40T, § 6 (b), the Department shall provide copies of any Preliminary Certificate of Exemption and Final Certificate of Exemption to the chief executive officer of the affected municipality, any person who submits comments in regard to any possible Department action in regard to the request for Certificate of Exemption, and, upon request, any affected Tenant. The

Department may require the Owner to provide such information to Tenant(s) in the manner provided in 760 CMR 64.09 (4).

VI. *Bona Fide Sale.*

For the purposes of making a determination under M.G.L. c. 40T, § 6(a)(viii) as to whether a proposed Sale to a Third Party was “*bona fide*,” the Department shall consider, in its reasonable discretion, whether the purchase price, when taken together with other elements of the transaction, was consistent with the fair market price for comparable transactions during the same time period.