



August 10, 2015

Roberta Rubin  
General Counsel  
Massachusetts Department of Housing and Community Development  
100 Cambridge Street, Suite 300  
Boston, MA 02114

Re: POAH Comments on DHCD Recommendations for 40T Regulatory Reforms

Dear Ms. Rubin:

Thank you for the opportunity to submit comments on DHCD's memo "40T Regulatory Reform – Working Document, Substantive Issues", circulated to the Preservation Advisory Committee on July 22, 2015.

As you know, Preservation of Affordable Housing, Inc. (POAH) is a Boston-based, national nonprofit devoted to the preservation and long-term stewardship of at-risk affordable housing. POAH's portfolio includes approximately 8,650 apartments nationwide, including more than 2,900 units in Massachusetts.

POAH's preservation mission is aligned with the preservation intent of the 40T statute, and we are strongly supportive of the Department's efforts to deploy the tools provided by 40T to promote the preservation of affordable properties which might otherwise not be preserved. However – we are concerned that applying these same 40T tools to owners who already intend to pursue preservation transfers will actually make the preservation option less attractive. We urge the Department to ensure that its 40T process builds upon and does not attempt to replace the state's existing, effective preservation efforts.

In that context, we have three serious concerns regarding the proposed "Preliminary Notice of Intent to Sell": that its statutory basis is unclear; that it will not be practical to implement or enforce; and most critically, that it is likely to have a real negative effect on the viability of preservation efforts in Massachusetts.

*The proposed "Preliminary Notice of Intent to Sell" has no clear basis in the 40T statute.*

As an over-arching consideration, we note that the underlying goal of the 40T statute is to promote exempt transactions (because they result in preservation); and both the regulations and all ambiguities in the statute should be construed to achieve that purpose.

Section 6(a)(iv) provides that "a proposed sale to a purchaser pursuant to terms and conditions that preserve affordability" is not subject to the procedures for the Department's purchase option and

right of refusal, described in Sections 3 and 4. The first sentence of Section 2(c) prohibits the owner of assisted housing from selling the property without providing the state the rights of first offer and refusal, but explicitly excludes exempt preservation transactions from providing these rights. The second sentence of Section 2(c) does not explicitly exclude exempt transactions from providing the notices required in Section 2(a), but we feel it is reasonable and consistent with the intent of the statute to interpret that exemption as extending to this second sentence of Section 2(c).

This statutory interpretation is supported by the required contents of the Offer to Sell (the owner's notice to the Department of its intent to sell) stipulated in the implementing regulations at 760 CMR 64 e contents), which state that the owner must "identify the Government Program that is the basis of the Affordability Restriction(s) that may Terminate". The implication that any owner submitting an Offer to Sell is contemplating a Termination (that is, a transaction which will not maintain or replace existing affordability restrictions) suggests that non-Termination (preservation) transactions are intended to be exempt from the notice requirements of 40T.

*The proposed notice timing will be challenging to define and impossible to enforce.*

The statutory issues aside - we are concerned that a new requirement for notices at "initiation of negotiations" will be impractical to implement because the triggering event is hard to define, harder still to identify in practice, and compliance impossible to enforce.

Defining when a seller has "initiated negotiations" will be challenging – does any discussion of sale, however idle, qualify? Is a written offer required? What if the offer is unsolicited? As noted above – the statute indicates no basis for this new notice, and so it offers no guide to defining its timing. Neither is the URA precedent much help, since the definition of the ION date varies by program.<sup>1</sup> Moreover, there is no evidence that its inclusion in the URA has in any manner improved the effectiveness of the program. In fact, the evidence seems to be to the contrary; that it has chilled interest in accessing certain programs.

The various URA ION definitions do universally rely on the execution of legal contracts as unambiguous triggers – HAP contracts, purchase contracts, grant/loan agreements, and so on – none relies on any of the preliminary activity leading up to the execution of such contracts. In that context, the existing notice trigger – "agreement of sale", broadly defined – appears consistent with the level of event used by the various URA ION definitions.

Moreover - if DHCD does define an earlier event requiring notices, enforcement will be impossible because (1) DHCD is unlikely to be aware of private negotiations which might have triggered notice requirements, and (2) DHCD has no mechanism to enforce compliance if it does become aware of violations.

*The proposed notice would undermine preservation transactions.*

The lack of statutory basis for early notices, and the impracticality of enforcing them, are real issues – but our most pressing concern is that the proposed early notice requirement will cause real harm to preservation efforts – because it will have a chilling effect on preservation transfers (particularly

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<sup>1</sup> <http://portal.hud.gov/hudportal/documents/huddoc?id=1378ExhibitACPDH.pdf>).

portfolio transfers – as to which the requirement could be confounding), and is also likely to drive up pricing for sellers who do proceed.

As background - the majority of POAH's preservation activity grows out of unsolicited outreach to existing owners (who are often not actively marketing their properties). POAH works with existing owners for months – in many cases years – to develop transactional approaches that ensure preservation of affordability while addressing the owner's priorities and concerns. In some cases these negotiations result in a successful preservation solution, but in many cases they do not.

In the context of these kinds of exploratory negotiations, public notices at the initiation of negotiations would be disruptive and burdensome for both owners and potential preservation purchasers, because they would trigger the involvement of a broad range of stakeholders – concerned residents and their advocates; other shareholders in the property; existing lenders; public agencies; prospective buyers; and prospective seller's brokers – before it is remotely clear whether a transfer, preservation or otherwise, is desirable or viable.

In that context – our long experience indicates that imposing a notice requirement at initiation of negotiations will discourage owners from engaging in exploratory negotiations with preservation buyers like POAH. Many owners will weigh the certainty of disruption caused by the notices against the mere possibility of a successful transfer, and will elect to wait out their restrictions (in which case the opportunity for “pre-emptive preservation” will be lost) or will simply engage a broker (in which case the property's acquisition price, and the subsidy cost to preserve, will be driven up).

We note that portfolio purchases have been one of the most successful preservation vehicles for preservation in Mass. In one transaction in 2012 we preserved properties in Boston, Hudson, Brewster and Orleans. We sincerely doubt that seller (or most portfolio sellers) would have any interest in selling into a preservation transaction if it had meant giving notice to all four communities.

In view of these issues – the lack of clear statutory authority, the impracticality of enforcement, and especially the real likelihood of impeding preservation efforts – we urge DHCD to abandon the proposed early notice requirement.

We believe that the rule as currently applied is working well. On a theoretical level - for-profit owners wake up every day wanting to sell. So every discussion with third parties about their property is, to some extent, a negotiation. The bright line - that intending to sell triggers the notice requirements – will encourage owners (such as the seller on Briston Arms) to explore the advantages inherent in a transaction that is exempt from 40T. Drawing a very murky line much closer and putting those decisions into the glare (and sometimes frenzy) of public scrutiny - will discourage those very successful (from a policy perspective) explorations.

Thanks once again for the chance to share POAH's perspective on DHCD's Recommendations for 40T Regulatory Reforms. We appreciate the Department's openness to incorporating feedback from housing practitioners as it continually refines its policies and procedures for implementing 40T. Please don't hesitate to contact me at (617) 449-0866, or Andrew Spofford at (617) 449-1016, with any questions or comments you may have.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bart Lloyd", written over the word "Sincerely,".

Bart Lloyd  
General Counsel and Managing Director, Acquisitions  
Preservation of Affordable Housing, Inc.

Cc: Chrystal Kornegay, DHCD  
Kate Racer, DHCD  
Roger Herzog, CEDAC

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