

**Department of Housing & Community Development
Chapter 40T Guidance on Notices, 760 CMR 64.03:**

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Introduction

This Guidance is intended to provide assistance to property owners and managers about the information that the Department expects to receive in notices pursuant to M.G.L. c. 40T, § 2. The level of detail provided in the Guidance is too specific to warrant inclusion in the text of 760 CMR 64.00, the regulation governing M.G.L. c. 40T.

I. Notices, General Content

A. As provided in 760 CMR 64.03, there are four standard forms of notice applicable under M.G.L. c. 40T: the notice of the future Termination of an Affordability Restriction (2-year notice); the notice of the Owner's intent to complete the Termination (1-year notice); the Offer to Sell; and the Notice of Intent to Sell to a Preservation Purchaser. Under M.G.L. c. 40T and 760 CMR 64.03, the basic information regarding ownership and contact information that is required in each of these notices is the same and must be sent to both tenants and Institutional Recipients.

B. Supplemental Information to Institutional Recipients. In addition to the information required to be provided to Tenants by 760 CMR 64.03, Owners required to serve a notice pursuant to M.G.L. c. 40T, § 2, and/or 760 CMR 64.03, shall provide the following supplemental information to Institutional Recipients:

1. Unit and Occupancy Information. Each supplemental information packet shall contain information required for Institutional Recipients to understand the current occupancy of the property, to facilitate analysis of the aggregate impact of the proposed action or occurrence on the affordability of the property as a whole, including: the total number of units in the development, including a break-down by the number of bedrooms per unit; the total number of Publicly-assisted Housing units under each existing Affordability Restriction, including a break-down by the number of bedrooms per unit; and the number of Publicly-assisted Housing units restricted to occupancy by and the number occupied, as of the date of the notice, by each of Low, Very Low, or Extremely Low Income households under each existing Affordability Restriction, including a break-down by the number of bedrooms per

unit. The Owner shall indicate if occupancy is restricted by income only as of the time of initial occupancy or throughout tenancy. In place of a separate calculation of the number of units occupied by each of Low, Very Low, or Extremely Low Income households under each the existing Affordability Restriction(s), the Owner may attach to the supplemental information included above, a rent roll with unit numbers and tenant names omitted showing the most recently certified income and tenant's portion of rent for each Publicly-assisted Housing unit, along with the unit's bedroom size, and the applicable Subsidy(ies).

2. Supplemental Information to Institutional Recipients, Summary of Affected Affordability Restrictions.

a. With each supplemental information packet, the Owner shall also provide a summary of the affected Affordability Restriction, as determined in 760 CMR 64.03 (2) a. 3., or a copy of the document establishing the affected Affordability Restriction (except that, if such summary or document was submitted to the Department with a previous Notice, the Owner may instead identify the previous submission by date). If an Owner chooses to identify a previous Notice by date, the Owner shall provide a copy of such previous Notice with summary or Affordability restriction upon request to any of the parties entitled to receive the supplemental information packet.

b. A summary of an Affordability Restriction shall include, or the copy of the Affordability Restriction provided in lieu of a summary must disclose, the following:

- i. the method by which the tenant's portion of rent and total rent are calculated, and the method by which rents can be increased, or a reference to any relevant statute(s), regulation(s), and/or administrative guidance providing such information,
- ii. the date that the Affordability Restriction will expire if no further action is taken by the Owner,
- iii. the terms applicable to early termination and grounds on which the Affordability Restriction may be terminated early,
- iv. whether income restrictions apply only upon entering the program or throughout tenancy,
- v. whether the restrictions are applicable to specific units within the building or are allowed to float among units depending on occupancy, and
- vi. whether there is any obligation or right to renew the Affordability Restriction; if so, the applicable date and time period of the renewal; and an indication of the intention of the Owner to exercise any right to renew, if applicable.

C. Additional Information to Tenant on Request. Upon request by an individual Tenant or any person who submits comments in regard to any possible Department action in regard to the Notice, the Owner shall provide to such party copies of all information required to be provided to Institutional Recipients pursuant to this *Guidance*. The Owner may provide such information to Tenant(s) in the manner provided in 760 CMR 64.09 (4).

II. Contents of Specific Notices

A. Notice of Future Termination. A Notice of Future Termination shall also:

1. state that an Affordability Restriction may Terminate; and
2. state the date on which each Affordability Restriction may Terminate.

A form Notice of Future Termination, combined with a form Notice of Intent to Complete Termination, 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>.

B. Notice of Intent to Complete Termination. A Notice of Intent to Complete Termination shall also:

1. state the date upon which the Owner intends to complete Termination of an Affordability Restriction or the date upon which such Termination will occur without action by the Owner; and
2. acknowledge that, if the Owner pursues a potential Sale of the property, the Department or its Designee shall have a right of offer pursuant to M.G.L. c. 40T, § 3, unless the proposed Sale is exempted under M.G.L. c. 40T, § 6.
3. identify any previous Notice of Future Termination in regard to the relevant Affordability Restrictions by date and provide a copy of such Notice, together with any accompanying documents, to the Department and/or CEDAC upon request.

A form Notice of Future Termination, together with a form Notice of Intent to Complete Termination, 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>.

C. Notice of Intent to Sell to a Preservation Purchaser. A Notice of Intent to Sell to a Preservation Purchaser shall also:

1. state that the Owner intends to pursue a sale of the Publicly-assisted Housing to a Preservation Purchaser;
2. state that upon identifying a specific Preservation Purchaser with whom the Owner is willing to enter a Purchase Contract, the Owner intends to request an exemption to the Department's right of first offer and right of first refusal pursuant to the requirements of M.G.L. c. 40T, § 6 (a) (iv), (v), (vi), or (vii), and 760 CMR 64.07; and
3. specifically identify any Affordability Restriction(s) that may be subject to Termination or Cessation in connection with the Sale, and the number of units that would be affected by the Termination or Cessation.

D. Offer to Sell. An Offer to Sell given pursuant to M.G.L. c. 40T, § 3 shall also:

1. state that the Department or its Designee has a right of offer pursuant to M.G.L. c. 40T, § 3;
2. state that the Department or its Designee must exercise its offer within 90 days of the Department's receipt of the Offer to Sell (or such longer time as the Owner may agree to); and
3. specifically identify any Affordability Restriction(s) that may be subject to Termination or Cessation in connection with the Sale, and the number of units that would be affected by the Termination or Cessation.

III. Notices Relating to Renewable Affordability Restrictions.

Where Publicly-assisted housing is subject to a project-based Section 8 contract or other Affordability Restriction which by its terms is renewed upon intervals of less than two years, as described in 760 CMR 64.03(4)(e), and an Owner intends to renew the

Affordability Restriction prior to its expiration, in lieu of delivering recurrent Notices of Termination the Owner may provide notice pursuant to 760 CMR 64.03 (4) (e) by providing each affected Tenant with a Notice, to be countersigned by the Tenant, at initial lease execution and at the time of such Tenant's annual lease renewal.

A. Notice to Tenants. Notices to Tenants pursuant to 760 CMR 64.03 (4) (e) shall contain:

1. the information required in 760 CMR 64.03 (2) (a) 2.,
2. the renewal term of the applicable Affordability Restriction and associated Subsidy, if any (including the date on which the program will be terminated if not renewed), and
3. a statement by the owner committing to take reasonable and diligent actions to seek all possible renewals of the Affordability Restriction and associated Subsidy during the following two years.

B. Notice to Institutional Recipients. In addition to the information required under IV. (A), the Owner shall provide to each Institutional Recipient within thirty days following renewal of any such Affordability Restriction and associated Subsidy, evidence of such renewal together with a certified statement of

1. the information required in 760 CMR 64.03 (2) (a) and 760 CMR 64.03(2)(d),
- 2., and
3. the next date upon which such Termination will occur without action by the Owner by the applicable subsidizing agency's denial of or failure to renew a Subsidy.

IV. Curative Notices

A. Notice of Future Termination and Notice of Intent to Complete Termination.

1. The Department may determine upon request by the Owner that a defect in a Notice, including either a Defective Notice or an incomplete Curative Notice, was a *de minimis* defect that caused no substantial harm to the interests protected by M.G.L. c. 40T, in which case the Department may determine (in the case of a Defective Notice) that no Curative Notice is required and therefore that no Extended Time Period is required, or (in the case of an incomplete Curative Notice) that the Extended Time Period shall commence as of the date of the incomplete Curative Notice, and that other undertakings by the Owner, which may include provision of additional information in a subsequent Curative Notice, are sufficient to cure any remaining defects in the Defective or incomplete Curative Notice.

2. If, in circumstances requiring a curative notice, an Affordability Restriction imposed by a Government Program is being terminated and replaced by an otherwise materially identical affordability requirement imposed by an affordable housing program not listed in the definition of *publicly-assisted housing* in G.L. c. 40T, § 1, in the context of providing such curative notice, the Owner shall agree in an Equivalent Affordability Restriction:

(a) to provide the Tenants with a Notice equivalent to a Notice of Future Termination at least two years and not more than three years before the effective end date of the affordability requirement imposed by such affordable housing program (whether the affordability requirement ends pursuant to its own terms without further action by the Owner, or earlier due to action by the Owner such as pre-payment of a loan imposing the affordability requirement) and, if such notice is not timely provided, to extend the effective end date of the

affordability requirement so as to ensure a 2-year notice period to Tenants of the information required by such notice.

(b) to provide the Tenants with a Notice equivalent to a Notice of Intent to Complete Termination at least 1 year and not more than 18 months before the effective end date of such replacement affordability requirement (whether the affordability requirement ends pursuant to its own terms without further action by the Owner, or earlier due to action by the Owner) and, if such notice is not timely provided, to extend the effective end date of the affordability requirement so as to ensure a 1-year notice period to Tenants of the information required by such notice.

(c) to provide the Tenants with a rent protections equivalent to those provided for by G.L. c. 40T, § 7, if such G.L. c. 40T, § 7, were otherwise applicable, for three years from the effective end date of such affordability requirement as the same may be extended if notices are not timely pursuant to Sections V (A) (2) (a) and (b).

3. As a part of any Curative Equivalent Affordability Restriction, except a Curative Equivalent Affordability Restriction covered by Section V (A) (2) above replacing Affordability Restrictions covered by M.G.L. c. 40T with comparable restrictions under an affordable housing program not qualified as Publicly-Assisted Housing pursuant to M.G.L. c. 40T, § 1, the Owner shall agree:

(a) to provide to the parties listed in 760 CMR 64.03 (3) (a) 2.-5. and the Tenant Organization a copy of the Curative Equivalent Affordability Restriction, with

recording information from the applicable registry of deeds or registry district of the land court if applicable.

(b) to provide each Tenant who would be adversely affected by the Termination if the Curative Equivalent Affordability Restriction were not required with a Plain English notice of the Tenant's rights under the Curative Equivalent Affordability Restriction, including the end date of the Extended Time Period, the method of calculation of the Tenant's portion of the rent during the Extended Time Period, and the fact that the Tenant might have further rent protections after the end of the Extended Time Period pursuant to M.G.L. c. 40T, § 7.

(c) to provide the Tenants with a Notice equivalent to a Notice of Intent to Complete Termination at least one year and not more than 18 months before the end of the Extended Time Period, unless the Extended Time Period is less than 18 months in duration; and

(d) that when a unit is or becomes vacant more than 12 months remaining in the Extended Time Period, the Owner will take reasonable and diligent actions to rent the unit to a tenant qualified for the terminating Affordability Restriction for the remainder of the Extended Time Period with the tenant's portion of rent set pursuant to the terminating Affordability Restriction, and, if the Owner is unable to fill such unit with a qualified tenant after taking reasonable and diligent actions, the Owner may only fill such a unit with a non-qualifying tenant after notifying the Department and providing the Department with 14 days to identify a qualifying tenant.

No tenant selected to fill a vacancy pursuant to this provision shall qualify as a Protected Low-Income Tenant by virtue of filling such a vacancy.

4. A model Curative Equivalent Affordability Restriction is available on the Department's website pursuant to 760 CMR 64.09 (5)..

B. Notice of Intent to Sell to a Preservation Purchaser. An Owner seeking a Certificate of Exemption who has entered into a Purchase Contract without first serving a timely Notice of Intent to Sell to a Preservation Purchaser may request the Department's permission to cure such failure in the context of the Department's review of the exemption request by treating the exemption request as including a late-filed Curative Notice of Intent to Sell to a Preservation Purchaser. . Any such Owner proceeds at its own risk. After review of the materials submitted with the exemption request under the standards applicable under 760 CMR 64.03(5), 760 CMR 64.07, and this *Guidance*, the Department may request additional information to complete its analysis, or 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 Purchase Contract.

C. Effect of Notices

1. An Owner may request in writing a determination by the Department that a Curative Notice is sufficient to cure any defects in the Defective Notice, and that no further Curative Notice is required. If the Department determines that a further Curative Notice is required, the Department shall notify the Owner of such additional undertakings and information as must be provided in order to cure any remaining defects.

2. The issuance by the Department of a Certificate of Compliance shall be deemed a determination by the Department that any Notice that the Owner failed to serve or is actually or allegedly a Defective Notice and of which the Department has been made aware has been either 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).

3. The issuance by the Department of a Final Exemption Certificate shall be deemed a determination by the Department that

a. any Notice of Intent to Sell to a Preservation Purchaser that the Owner failed to serve or is actually or allegedly a Defective Notice in regard to the Sale of the Publicly-assisted Housing that is the subject of the Final Certificate of Exemption,

b. any Notice of Future Termination or Notice of Intent to Complete Termination that is actually or allegedly a Defective Notice in regard to a Termination which the Owner was required to cure pursuant to *Guidance on Certificates of*

Exemption § I.F,

has been either 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), provided that the Department has been made aware of such Termination or failure to serve or defect in such Notice of Intent to Sell to a Preservation Purchaser as part of the request for a Final Exemption Certificate.