Chapter 40T at 5:

A Retrospective Assessment of Massachusetts' Expiring Use Preservation Law

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EXECUTIVE SUMMARY

Five years ago, Massachusetts faced a substantial risk that a significant portion of its affordable housing stock could be lost due to mortgage maturity or prepayment, subsidy contract opt-outs, and expiring affordability restrictions in federally- and state-assisted properties. In an effort to preserve these units and protect tenants from displacement, Chapter 40T of the Massachusetts General Laws—the Commonwealth's expiring use preservation law—was enacted in November 2009.

Chapter 40T reflects a compromise consensus reached by diverse preservation stakeholders—including private and non-profit owners, tenant advocates, and public sector representatives—after a multi-year process. It covers housing that is assisted under specific federal and state programs, and includes 3 key components:

- a required notice to affected parties when affordability restrictions terminate;
- measures to protect existing tenants from displacement; and
- an exclusive opportunity for the state's Department of Housing and Community Development (DHCD) to make and/or match a purchase offer when a subsidized property is offered is sale.

Importantly, 40T does not give DHCD a right to purchase when affordability is terminating and the property is not being sold.

Over the past 5 years, the 40T program has evolved and grown along with parallel state preservation initiatives. DHCD, the Massachusetts Housing Finance Agency (MassHousing) and the Community Economic Development Assistance Corporation (CEDAC) have committed substantial resources to preservation transactions, while CEDAC has also coordinated interagency preservation activities and continuing stakeholder input into the 40T process. These efforts have positioned Massachusetts to make creative use of federal resources such as HUD's Rental Assistance Demonstration (RAD) and Moving to Work (MTW) programs, to preserve a significant number of at-risk developments.

Within this context, 40T has achieved significant benefits in preserving units and protecting tenants in properties that are subject to its jurisdiction.

- It has allowed tenants and other affected parties to have advance notice of most impending terminations of affordability restrictions, providing a potential opportunity for intervention to facilitate preservation outcomes.

- It has temporarily extended affordability and tenant protections through Equivalent Affordability Restrictions (EARs) imposed by DHCD, when notices have been filed late.

- It has provided a framework for resolving conflicts between affordability, tenant protection, and timely notice objectives in the case of RAD/ MTW conversions, and for structuring negotiated approaches to preservation in challenging situations, such as the sale of properties assisted under the state's Chapter 13A program where no replacement federal subsidies are available.

- Eight properties offered for sale that have triggered of DHCD's Right of First Offer (ROFO) under 40T have been sold to qualified non-profit and for-profit purchasers, resulting in the long-term preservation of more than 1,000 affordable units in some of the Commonwealth's strongest housing markets. This approach has offered a high degree of transparency and opportunities for collaborative participation by tenants, municipalities, advocates, and community-based non-profit purchasers in preservation-oriented localities.

- Another 10,000 units in more than 100 properties have been or are slated to be preserved by owners and purchasers who have pledged to keep them affordable in exchange for receiving a preliminary exemption from the 40T ROFO process. In the vast majority of these cases, owners and purchasers have promised to retain at least the same number of affordable units that existed prior to 40T. Most purchasers have also pledged to extend and deepen the level of affordability, although in a significant minority of cases (30%) the term of restrictions and/or subsidies will remain the same. Recent regulatory changes have buttressed the exemption process as the primary vehicle for 40T preservation sales, while generally limiting the ROFO process to situations where the seller and buyer are not pursuing a preservation transaction.

- Based on owner promises, not a single property with remaining restrictions that has been offered for sale under 40T has been lost as affordable housing (i.e. sold without existing restrictions and subsidies retained, extended, or replaced). Overall, fewer than 100 net affordable units (less than 1% of all units sold subject to 40T) have been or are slated to be lost through the 40T preservation sales process.

- Since the inception of 40T, an estimated 2,400 net affordable units in subsidized mortgage properties (financed under Section 221(d)(3) BMIR, Section 236, and Chapter 13A) have been lost through prepayment, mortgage maturity, and related subsidy contract opt-outs without replacement restrictions, creating the potential for market-rate conversion. The vast majority of these losses have occurred in

properties not being sold, that are outside the reach of 40T's preservation provisions.

- While 40T may not have affected the behavior of owners who are not inclined to sell and are not interested in preservation, it has provided a significant incentive for sellers of high-value properties in strong markets to sell to preservation buyers. It has also made it easier for preservation-oriented principals to justify a preservation sale to their investors.

- 40T has helped to elevate the importance of preservation in Massachusetts, by providing a consistent framework for state preservation policies and priorities, and helping to create a regulatory and financing system in which preservation transactions can proceed with predictability and reliability.

Significant changes in the preservation environment are presenting new challenges for 40T. These including the difficulty of preserving maturing Chapter 13A properties and protecting tenants without the benefit of federal resources that have been available to past 40T transactions, and the growing number of subsidized properties that will pass beyond the reach of 40T sales restrictions as their affordability obligations expire. To address these challenges, program modifications may be needed to:

- facilitate owner compliance with 40T termination notice requirements;

- ensure more timely notice to stakeholders, improve transparency in purchaser selection, and maximize opportunities for long-term preservation in 40T exempt sales outside the ROFO process;

- incentivize the filing of final certificates of exemption, or otherwise ensure compliance with owner affordability promises in exempt sales;

- track and enforce owner compliance with 40T tenant protection requirements;

- facilitate systematic program monitoring through agency record-keeping; and

- develop a more policy-oriented and less owner-driven approach to 40T, consistent with the Commonwealth's overall preservation agenda.

I. INTRODUCTION & CONTEXT

A. Introduction

On November 23, 2009, the Commonwealth of Massachusetts enacted Senate Bill 2190, "An Act Preserving Publicly-Assisted Affordable Housing," more commonly known as Chapter 40T, the state's expiring use preservation law. [1] The statute was designed to help preserve the stock of affordable housing in Massachusetts that is at risk of loss due to expiring affordability restrictions and subsidy contracts, and to protect tenants in these developments from displacement.

Five years later, this report is an effort to take stock of what has occurred under 40T: what the program has (and has not) accomplished, what lessons have been learned, and what challenges can be anticipated in the future. This assessment is based on a detailed review of available program records, interviews with program participants and preservation stakeholders, and the author's direct participation in 40T's legislative development and policy debates and experience with 40T transactions.

B. Origins of 40T

Massachusetts has long relied on its stock of privately-owned, government-assisted housing to meet the needs of the Commonwealth's low and moderate income families. During the first decade of the new century, preservation advocates became increasingly concerned that a significant portion of this inventory, developed close to 40 years ago under federal and state mortgage subsidy programs (Section 221(d)(3) BMIR, Section 236, and the state's Chapter 13A program), was at risk of loss as affordable housing as the mortgages associated with the properties reached maturity.[2]

Many of these "maturing mortgage" properties were also partially assisted with Section 8 project-based subsidies, whose contracts were scheduled to expire around the same time that the mortgages ended. Still other properties developed in the early years of the Low Income Housing Tax Credit (LIHTC) program were reaching the end of their 15-year affordability terms.

Historically, Massachusetts has had a strong track record in preserving at-risk subsidized housing. Between 1987 and 1995, approximately 4,000 subsidized mortgage units were permanently preserved under the federal Title VI program (LIHPRHA), and another 7,000 units had their affordability extended under Title II (ELIHPA) for the remaining terms of their subsidized mortgages.[3] After the federal preservation programs were defunded, a significant number of properties were preserved by owners and purchasers using new federal tools (e.g., Section 8 Mark Up to Market and Section 236

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[1] Chapter 40T of the Massachusetts General Laws.
https://malegislature.gov/Laws/GeneralLaws/PartI/TitleVII/Chapter40T

[2] According to one report, up to 17,000 affordable units were at risk of loss due to mortgage maturity by 2020. See "Maturing Subsidized Mortgages: The Next Frontier of the Expiring Use Crisis" by Emily Achtenberg, prepared for the Center for Social Policy, UMass/Boston, April 28, 2009.
http://www.umb.edu/editor_uploads/images/centers_institutes/center_social_policy/MATURING_SUBSIDIZED_MORTGAGES-_THE_NEXT_FRONTIER_OF_THE_EXPIRING_USE_CRISIS.pdf

[3] Ibid.

"decoupling"[4]) in combination with state resources such as Low Income Housing Tax Credits, tax-exempt bond financing, and gap financing loans. At the same time, between 1996 and April 2009, an estimated 6,700 net affordable units were permanently lost from the Commonwealth's affordable housing inventory.[5]

The accelerating mortgage maturity crisis clearly posed new challenges, as evidenced by a series of high-profile conversions that took place in strong market areas between roughly 2007 through 2009. More than 800 affordable units were lost at three Boston developments under common ownership (High Point Village, Camelot Court, and Brandywine Village), when the owner prepaid their subsidized mortgages just prior to maturity and opted out of 2 of 3 associated Section 8 contracts. Another 83 units were lost in Brookline when a subsidized cooperative converted to condominiums at the end of its mortgage term. Despite a protracted effort, the Town of Andover was unable to save 55 expiring tax credit units in a high-value, mixed income development (Riverview Commons).

In response, preservation advocates initially sought legislation that would give state and local government entities the right to purchase and preserve any at-risk housing, but were unable to obtain the necessary votes for passage. In early 2007, Citizens Housing and Planning Association (CHAPA) convened a broad-based committee of preservation stakeholders, including private and non-profit owners, tenant advocates, and public sector representatives, in an effort to achieve consensus on a statewide preservation agenda including an expiring use bill.

Working for over two and a half years, the CHAPA committee forged a legislative proposal that was ultimately enacted as Chapter 40T. The final bill, reflecting a true compromise among the various stakeholder interests, featured 3 key components: a notice requirement for terminations of affordability, tenant protections, and an exclusive opportunity for the state's Department of Housing and Community Development (DHCD) to make and/or match a purchase offer when a subsidized property was offered for sale.

Importantly, 40T does not give DHCD a right to purchase when affordability is terminating and a property is *not* being sold, nor does it obligate a seller to accept DHCD's offer to purchase. These limitations are critical to understanding what 40T has (and has not) been able to accomplish.

C. Statutory Framework

The basic statutory provisions of Chapter 40T are summarized below.

1. Covered Projects (Chapter 40T, §1)[6]

[4] A HUD initiative which allows the remaining interest-subsidy stream in a Section 236 development to be recaptured and redirected to support new debt financing for acquisition and rehabilitation.
[5] "Maturing Subsidized Mortgages," op. cit.

[6] Parenthetical citations denoted by (§) refer to provisions of MGL Chapter 40T.

Chapter 40T applies to housing that is "publicly-assisted" under one or more federal or state programs covered by the statute, including project-based rental subsidies (Section 8, Rent Supplement/ RAP, and MRVP—the Massachusetts Rental Voucher Program), mortgage subsidies (Section 221(d)(3) BMIR, Section 236 and the state's Chapter 13A program), federal and state low income housing tax credits, rural development (Section 515/ 521), and Chapter 121A property tax incentives. Some examples of assistance that do not trigger 40T are tenant-based subsidies, tax-exempt bond financing, HOME, Chapter 40B zoning relief, and local affordable housing programs.

2. Required Notices (§2)
Owners of publicly-assisted housing are required to send three types of notices:

- A *Two-Year Notice* (Notice of Termination) must be sent at least two years prior to the termination of a covered housing affordability program.

- A *One-Year Notice* (Notice of Intent to Complete Termination) must be sent at least one year prior to termination.

- *Notice of Intent/ Offer to Sell*. Unless the transaction is otherwise exempt,[7] the owner cannot enter into a legal agreement to sell the housing (such as a purchase and sale contract or letter of intent) before first issuing a Notice of Intent to Sell and giving DHCD an opportunity to purchase.

All required notices must be delivered to DHCD, the Community Economic Development Assistance Corporation (CEDAC), the municipality, individual tenants, and the tenant organization (if any).

Under a special transition rule provision, owners of projects with restrictions having less than 1 or 2 years remaining as of the effective date of 40T were required to send the applicable notice(s) within 90 days (i.e. by February 22, 2010).

3. Right of First Offer/ Right of First Refusal [8]
Right of First Offer (§ 3)
During the 90-day window following the owner's Notice of Intent to Sell, DHCD has an exclusive Right of First Offer (ROFO) to purchase the housing. DHCD is not obligated to make an offer, nor is the owner required to accept it.

DHCD may select a designee to act on its behalf as the prospective purchaser, in consultation with the affected municipality. Upon request, the owner must promptly provide all required due diligence documents.

Right of First Refusal (§ 4)
Upon expiration of the 90-day ROFO period, the owner may enter into a contract to sell the property to a third-party purchaser. However, DHCD (or its designee) has a 30-day

[7] In accordance with Chapter 40T §6; see Section IC4 below.
[8] These provisions do not apply if the transaction is exempt under §6; see Section IC4 below.

Right of First Refusal (ROFR) to match the terms of the third-party contract. DHCD's purchase contract must contain the same terms and conditions as the executed third-party contract, except that:

- the earnest money deposit may not exceed the lesser of 2% of the sales price or $250,000 (or the amount required by the third-party contract);

- the deposit must be refundable for at least 90 days (or longer, if required by the third-party contract); and

- the closing timeframe must be at least 240 days (or longer, if required by the third-party contract).

If DHCD fails to exercise its ROFR, or matches the third-party contract but fails to consummate the sale, or makes a counter-offer which is rejected by the owner, the owner has 2 years to complete the third-party sale. However, if the third-party sale is on terms that are the same or materially more favorable to the purchaser than the terms reflected any counter-offer made by DHCD, the property must again be offered to DHCD, on those same terms.

4. Exempt Sales (§6)

The owner can apply to DHCD for an exemption from the ROFO/ ROFR provisions, on one of the following grounds:

- The transaction will "preserve affordability," as determined by DHCD (§6(a)(4)). In general, this means that the purchaser will take "reasonable and diligent actions" to "retain, renew, or secure" subsidies in order to maintain the existing occupancy mix of low, very low, and extremely low income households,[9] and to keep vacant units affordable, to the extent of available subsidies and consistent with the provision of quality housing.

- The purchaser is an affiliate of the owner and the sale does not constitute a "termination," as determined by DHCD (§6(a)(6)). In general, this means that the property is being transferred within the domain of a given real estate entity and not on the open market, and that no affordability restriction is ending unless it is being replaced by an equivalent restriction.

- The purchaser has entered into a legally binding agreement to renew a project-based Section 8 contract, which is the sole source of assistance that qualifies the property as "publicly-assisted" housing.

- There are more than 15 years remaining before the first scheduled termination of a covered affordability restriction at the property.

[9] Defined as households at or below 80%, 60%, and 30% of AMI, respectively.

- The transaction is a forced sale, due to eminent domain, foreclosure, or a negotiated transfer to avoid either result.

- The sale is "grandfathered" pursuant to a bona fide sales contract in effect prior to 40T.

In the first three circumstances, written notice of the exemption request must be sent to DHCD, CEDAC, the local legal services organization, and the tenant organization, if any.

5. Tenant Protections (§7)
After a termination, rents for "protected low income tenants"[10] who do not receive Enhanced Vouchers may not be increased by more than the CPI plus 3%, for 3 years. Also during this period, protected tenants may not be evicted or involuntarily displaced except for a good cause.

6. Look-Back Provision (§10)
For any housing subject to 40T whose government assistance subsequently terminates, the ROFO and ROFR provisions remain in effect for 4 years after the date of the last termination.

D. Regulatory & Policy Framework

DHCD's implementing regulations and policies for 40T, as they have evolved over time, have also played an important role in shaping the program. Key provisions and changes are summarized below.

1. Preserving Affordability – CMR 64.02 (2)[11]
The regulations further define the factors that DHCD will take into account in determining whether a purchaser has taken "reasonable and diligent actions" to preserve affordability, e.g., when seeking an exemption from the ROFO/ROFR sales process. According to the regulations, DHCD will consider whether the purchaser has taken all necessary and timely actions to retain or renew existing subsidies and, if such subsidies are reduced or terminated, to identify and secure alternative subsidies by consulting with DHCD and the municipality, at a minimum. Additional factors relate to the provision of "quality housing" and "comparable replacement units," if applicable.

2. Curative Notices and Equivalent Affordability Restrictions – CMR 64.03(5), 64.02
The regulations provide for corrective actions in the event that a 1-Year or 2-Year Notice is untimely or defective. The owner must send a Curative Notice, extending the termination date of the applicable restriction by the number of months that the notice was late. If the restriction cannot be extended, the owner must enter into a written Equivalent Affordability Restriction (EAR) that is enforceable by DHCD. The EAR must maintain

[10] Tenants who reside in the housing on the termination date, are subject to rent restrictions, and have incomes at or below 80% of AMI.
[11] Code of Massachusetts Regulations. The 40T regulations (760 CMR 64.00) can be found at: http://www.mass.gov/hed/economic/eohed/dhcd/legal/regs/760-cmr-64.pdf

the same number of low income, very low income, and extremely low income units, the same rent restrictions, and the same renewal requirements that were contained in the original restriction.

In cases where DHCD determines that the defect was *de minimus*, causing no substantial harm to the interests protected by 40T, no corrective action is required. These provisions have added important new dimensions to the statutory notice requirements which have significantly affected the operation of 40T, as described in Section IIA.

3. Certificates of Exemption – CMR 64.07

Where a property is being sold, the regulations provide a process for buyers and sellers to seek an exemption from DHCD's ROFO/ ROFR process, as permitted by 40T. As a first step, before entering into a sales contract, the applicant(s) may apply for a preliminary exemption, demonstrating how the sale meets one or more of the statutory grounds for exemption. DHCD has 30 days to act upon the request.

Once the preliminary exemption is granted, the sales transaction can proceed. At the request of the buyer, DHCD will issue a final certificate of exemption at the closing, if the sale is completed as described in the original request and complies with all other terms of the preliminary exemption. This two-step process has also had important implications for the program (see Section IIC).

4. Facilitating Exempt Sales – CMR 64.03 (1)(d), (2)(f), & (4)

In August 2013, DHCD issued revised regulations to facilitate exempt sales transactions and limit the applicability of the ROFO/ ROFR process. Under the original regulations, owners were required to provide a Notice of Intent to Sell to DHCD and other affected parties prior to listing and marketing a property through a broker (to preservation and/or non-preservation buyers). Since the Notice of Intent to Sell triggers DHCD's exclusive 90-day offer period, this requirement was perceived as rendering meaningless owners' efforts to establish a market value through competitive bidding, and to pursue a preservation sale with purchasers of their choice, under the statutory provisions authorizing exempt sales.

Under the revised regulation, owners can engage a broker and market their properties before issuing a Notice of Intent to Sell. The Notice of Intent to Sell is required to be issued only if the selected purchaser does not intend to seek an exemption for a preservation transaction. The regulation provides for an alternative Notice of Intent to Sell to a Preservation Purchaser, which the owner may file before entering into a sales contract with a buyer who seeks to preserve affordability (with copies to DHCD, CEDAC, the municipality, tenants, and the tenant organization, if any).

Under this new regulatory approach, opportunities for DHCD (or its designee) to purchase a 40T property through the ROFO/ ROFR process are generally limited to situations where the seller and buyer are not pursuing a preservation sale. Since the revised regulation was adopted, no new Notices of Intent to Sell have been issued and no additional sales have been triggered under the ROFO/ROFR provisions (see Section IIB).

5. Designee Selection

Regulations (CMR 64.04)

When the Right of First Offer is triggered, the regulations require DHCD to consider a number of factors in selecting a designee to assume its rights and responsibilities as a prospective purchaser. These include the organization's resources and capabilities, its demonstrated commitment to, and experience in, successfully owning and operating affordable housing, and its ability to complete the transaction in a timely manner. To accommodate 40T's tight statutory timeframes, DHCD is authorized to select designees from a pre-qualified pool of candidates.

Guidelines

In conjunction with the revised regulations for exempt sales, DHCD also issued detailed guidelines outlining the standards and procedures for designee selection.[12] Under these provisions, potential designees (both for-profit and non-profit) are solicited and pre-qualified through a rolling RFQ process and placed on a chronologically-ordered "local" or "statewide" list, depending on their geographic service area.

Upon receipt of a Notice of Intent to Sell, DHCD will identify any qualified local organizations, as well as the next organization on the ordered statewide list, that meet the site-specific selection criteria for the project and have an interest in serving as designee. In selecting the designee, DHCD is required to give particular consideration to municipal preference in cases where the locality will provide, or has provided, significant funding or has imposed a regulatory restriction on the property. DHCD will generally select a single designee for multiple properties being offered in a portfolio sale.

As of March 2014, DHCD maintained a list of 20 pre-qualified designees, including 12 local-regional non-profits, 2 national non-profits, and 6 for-profit developers. Of this total, 10 had geographically-restricted service areas, 4 had minimum property size restrictions, and 6 had no restrictions.

E. Related Preservation Initiatives

Chapter 40T has not evolved in a vacuum. A number of parallel efforts and initiatives in support of preservation have been carried out in Massachusetts over the past 5 years which have been critical to the outcomes achieved under 40T.

1. State Preservation Commitment & Resources

The Commonwealth, through DHCD, has committed substantial resources to preservation transactions, through the allocation of Low Income Housing Tax Credits and state tax credits, tax-exempt bond volume cap, and gap financing resources. In particular, the Capital Improvement and Preservation Fund (CIPF) is targeted exclusively for the preservation of at-risk subsidized developments. DHCD's Qualified Allocation Plan

[12] "Guidelines for Selection of Designees Pursuant to MGL Chapter 40T," July 10, 2012. http://www.mass.gov/hed/docs/dhcd/legal/guidelinesforselectionofdesignees.pdf

(QAP), which governs the allocation of 9% tax credits, includes a set-aside for preservation, currently 30%.

The Commonwealth's quasi-public lending agencies have also played a critical role in preservation. The Massachusetts Housing Finance Agency (MassHousing) has aggressively promoted the preservation of its state-financed Section 236 and Chapter 13A developments, which constitute a substantial portion of the state's maturing mortgage inventory. In addition, MassHousing and MassDevelopment have provided new tax-exempt bond financing for most of the preservation transactions carried out under 40T, while the Massachusetts Housing Partnership (MHP) has participated in the refinancing and recapitalization of numerous projects.

CEDAC has served as the focal point for the state's preservation efforts, providing additional staff support to DHCD for the implementation of 40T and helping to coordinate interagency preservation efforts as well as federal, state, and local preservation activities. CEDAC maintains a database of at-risk and other subsidized projects, and provides technical assistance and predevelopment funding to non-profit purchasers who have been critical players in many preservation transactions.

In February 2009, CEDAC received a $1 million grant and a $3 million program-related investment from the MacArthur Foundation to support and expand these activities, and to establish a Preservation Loan Fund to provide timely predevelopment and acquisition financing on favorable terms to preservation purchasers. CEDAC has partnered with the Massachusetts Housing Investment Corporation (MHIC) to develop and implement the fund, which has leveraged more than $150 million in loan fund capital, primarily from private investment sources. The fund has provided critical support for many 40T purchasers.

2. Preservation Advisory Committee & Interagency Working Group

In March 2009, in conjunction with the MacArthur initiative, a Preservation Advisory Committee (PAC) was appointed by Governor Deval Patrick representing diverse interests from the public, private, and non-profit sectors, to facilitate continuing stakeholder input into the state's preservation activities.[13] A parallel Interagency Working Group (IWG) was also established to coordinate the work of HUD, DHCD, CEDAC, MassHousing, the City of Boston, and the other public and quasi-public agencies involved in preservation.

These groups have played a critical role in the ongoing implementation of Chapter 40T. Early in the process, they developed a set of preservation project appraisal guidelines to promote consistency in agency reviews, and a Priority Funding Matrix to provide a common framework for allocating scarce public resources to projects based on their relative risk and preservation opportunity.[14] Subsequently, the IWG and PAC worked

[13] Subsequently, the PAC was formally authorized under Chapter 159 of the Acts of 2009, which also authorized Chapter 40T.

[14] http://www.mass.gov/hed/docs/dhcd/hd/lihtc/2015-qap.pdf

closely with DHCD to develop the new designee selection guidelines and the important mid-course regulatory changes to the ROFO/ROFR and exempt sales process. Most recently, they have focused on developing strategies and initiatives to preserve the Chapter 13A maturing mortgage inventory.

3. MTW and RAD Preservation Initiatives

Two recent initiatives which have allowed Massachusetts developments to project-base the Enhanced Vouchers (EVs) that tenants receive from HUD when a subsidized mortgage is prepaid have also had significant implications for 40T. The Cambridge Housing Authority pioneered this strategy in 2011 at Inman Square, an expiring use development, by using its Moving-to-Work (MTW) authority to convert the EVs to Project-Based Vouchers (PBVs) and leveraging substantial funds for a preservation sale.[15]

Subsequently, DHCD, another MTW PHA, secured HUD approval to replicate this program through its regional housing authorities on a statewide basis. As of August 2014, the CHA and DHCD MTW Expiring Use Initiatives have preserved affordability at 13 expiring use properties, awarding PBVs to more than 1,000 units.[16]

Under HUD's Rental Assistance Demonstration (RAD) program, projects receiving Rent Supplement, RAP, or Mod Rehab assistance for some or all of the units can also convert 50% to 100% of the EVs received upon mortgage prepayment to PBVs. MassHousing, which has a substantial inventory of RAD-eligible Section 236 projects in its portfolio, has significantly facilitated this program by providing bridge loans to participating owners, enabling the RAD/PBV resources to be captured in a timely manner without needing to assemble all the elements of a permanent preservation transaction.

As of mid-December 2014, the RAD program had preserved affordability at 17 Section 236 developments in Massachusetts, with PBVs committed to more than 1,500 units.[17] Another 7 properties were scheduled to close by the end of 2014.

The MTW and RAD initiatives have impacted 40T properties in two ways. First, several RAD and MTW conversions have occurred in conjunction with, or ahead of, sales transactions that are subject to 40T, enabling the developments to preserve significant affordability. Additionally, conflicts between RAD/ MTW preservation opportunities and the 40T notice requirements have posed significant challenges for 40T, as described in the next Section.

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[15] See "Cambridge Housing Authority Converts Enhanced Vouchers to Project-Based Vouchers to Preserve Inman Square Apartments," Bill Brauner, CEDAC, April 12, 2011. http://cwc.cedac.org/Uploads/Files/CHAConvertsEnhancedVouchersToProjectBased.pdf

[16] "MTW Agencies' Expiring Use Preservation Programs: An Innovative Effort to Preserve Affordable Housing in Massachusetts," prepared by Laurie Gould/ VIVA Consulting, for CEDAC, August 12, 2014. http://cwc.cedac.org/Uploads/Files/MTW%20Expiring%20Use%20Exec%20Summ%20%20Report%20August%2012%20-%20Final.pdf

[17] Data provided by Charles Francis/ Boston HUD, and David Keene/ MassHousing, December 2014.

II. 40T EXPERIENCE

In order to assess what has occurred under 40T, this section looks at the four major areas of program activity: Terminations, Sales under the Right of First Offer/ Right of First Refusal Process; Exempt Sales; and Tenant Protections. It also examines the losses in affordable units that have occurred since 40T was enacted.

A. Terminations

1. Notices Filed

As of May 31, 2014, a total of 145 termination notices were filed under 40T, from 98 different properties (see Exhibit 1). This includes 71 Two-Year Notices and 74 One-Year Notices. Forty properties filed both notices, 30 filed only One-Year Notices, and 28 filed only Two-Year Notices.[18]

Almost half of the 145 notices (44%) concerned expiring rental subsidy contracts (Section 8 or Rent Supplement), while 17% dealt with expiring subsidized mortgage restrictions (236, BMIR, or 13A). Thirty-five percent covered both types of terminations, and the remaining 4% addressed other types of expiring restrictions (e.g. 121A).

Depending on the nature of the subsidy or restriction that is ending, the filing of a 40T termination notice may have different implications, While mortgage maturity, which is beyond the owner's control, does not necessarily indicate an intent to terminate affordability, it does signal the end of the owner's legal affordability obligation, absent other restrictions associated with the property. Conversely, expiring rental subsidy contracts are typically renewable—either directly, in the case of Section 8, or through the conversion of Rent Supplement/ RAD to Project-Based Vouchers (PBVs) under HUD's RAD program (see above). Unless the owner affirmatively "opts out" of a rental subsidy contract, a 40T notice filed for subsidy termination does not typically signal the end of affordability.

2. Timeliness

Close to 60% of the notices were filed on time, while 13% were filed up to 6 months late. The remaining 28% were filed more than 6 months late. Notices for maturing mortgages, or for both maturing mortgages and expiring subsidies, were generally filed in a less timely manner than were notices for expiring rental subsidy contracts only. In a number of cases, maturing mortgage notices were filed *after* the mortgage actually terminated (due to owner ignorance or oversight, or an unplanned opportunity to access subsidies through early prepayment).

A closer look at the 31 late notices filed for maturing mortgage properties (with or without expiring rental subsidy contracts) indicates that in at least 21 of these cases (two-thirds), affordability was extended for a period equal to the number of months by which

[18] Some properties were required to file only one of the two required notices within the timeframe of this study, while others filed one but not the other. Some properties covered by the transition rule may have been required to file only one notice. For different reasons, some properties have also filed multiple notices of the same type.

the notice was late, through a curative notice and/or an Equivalent Affordability Restriction (EAR; see Section IIA4 below). In 3 cases, the units remained affordable after mortgage prepayment due to a PBV contract or a HUD Use Restriction, resulting in a finding of *de minimus* harm by DHCD.

In the remaining 7 cases (involving 5 properties, all with mortgages that have now matured), the results were inconclusive or could not be determined from available data. These include 2 tenant cooperatives, where unclear termination notices were sent, 2 properties with very late (or after-the-fact) notices but no evidence of corrective action or mitigating circumstances, and one case where DHCD's repeated efforts to secure an EAR had not yet produced a satisfactory result within the timeframe of this study. In some of these cases, owner filings indicated a general intent to keep the property affordable, but no enforceable obligation was imposed requiring them to do so for a specified period, as required by the 40T regulations.

In the 26 cases of late notices filed for expiring rental subsidy contacts only, 15 were resolved through curative notices and/or *de minimus* findings by DHCD (primarily where Rent Supplement contracts were terminated for the purpose of a RAD/ PBV conversion, or owners provided evidence that their subsidy contracts had been renewed). In the remaining 11 cases, the results could not be determined from available data.

Based on a review of HUD and CEDAC databases, it appears that in the vast majority of cases (80%) where termination notices were filed for expiring rental subsidy contracts, the subsidies have been renewed or replaced. In 10% of the notices (7 properties), owners indicated an intent to opt-out of the subsidy (typically in conjunction with mortgage maturity/ prepayment), and the contracts have been terminated. In the remaining 10%, the owner intent or subsidy outcome could not be determined. It is worth noting that in all the intentional opt-out cases, 40T termination notices were filed on time.

3. Owner Compliance

Apart from timeliness, to what extent are owners complying with the 40T termination notice requirements in the first place? Are there owners who should be filing termination notices who have not filed them?

To partially address this question, the termination notices filed for maturing mortgage properties were compared with the known inventory of BMIR, 236, and Chapter 13A properties whose subsidized mortgages have matured, or have been prepaid, since the enactment of 40T (see Exhibit 2).[19] Subsidized mortgages that will mature by May 31, 2016 (two years after the cut-off date for notices reviewed in this study) were also included in the analysis.

The results are inconclusive. Of the 123 projects with subsidized mortgages that have matured, have been prepaid, or that will mature within the applicable timeframe, only 55

[19] Due to the limitations of available data, a similar comparison could not be made for properties with expiring Section 8 contracts.

(45%) have filed any type of termination notice under 40T. However, of the 68 properties that have not filed termination notices, 11 (16%) have applied for and received preliminary exemptions from DHCD for a sale outside the ROFO/ROFR process, which may obviate the need for a separate termination notice filing. Fifty-three (78%) appear to have other existing or proposed restrictions that may, in some cases, rise to the level of an Equivalent Affordability Restriction, effectively mooting the "termination."[20] In such cases, owners may have a legitimate argument as to why a termination notice has not been filed.

4. Equivalent Affordability Restrictions (EARs)

Where termination notices have not been filed on a timely basis, EARs have proved to be a useful mechanism to temporarily preserve affordability and protect tenants. A total of 7 EARs, executed or in progress, were identified by DHCD and CEDAC during the course of this study.[21]

A case in point is Harbor Lofts, a 358-unit development with 148 units subsidized under Chapter 13A. The owner prepaid the mortgage in anticipation of securing Enhanced Vouchers (EVs) from HUD which could then be project-based (see Section IE). Subsequently, HUD determined that EVs would no longer be provided to Chapter 13A properties, leaving the project without a preservation strategy and the tenants with no affordability protections. The EAR (which has since lapsed) extended the Chapter 13A income and rent restrictions for 19 months beyond the original mortgage maturity date, to compensate for the late notice. The 40T tenant protection benefits were required to commence after the extended affordability period expired, giving protected tenants an additional 3 years of rent restriction.

5. RAD Conversions

As noted in Section IE, RAD conversions have posed new challenges for 40T, in terms of balancing the goals of timely notice, tenant protection, and preserving affordability. Owners who seek to take advantage of this opportunity to project-base the EVs they will receive upon mortgage prepayment must prepay within mandated regulatory timeframes,[22] and cannot meet the 40T notice requirements triggered by their mortgage and subsidy terminations. Additionally, they typically cannot specify the number of PBVs to be received when the notice is filed, which depends on income eligibility and other factors to be determined later. The impact on affordability and tenant protection is

[20] For example, restrictions associated with a continuing HUD Use Agreement, IRP decoupling, Title VI preservation, or Section 8 subsidy contract covering all of the affected units may be considered an equivalent replacement for the lapsing mortgage subsidy restrictions.

[21] Because DHCD does not maintain a centralized file of EARs, it was not possible to obtain a complete list or to determine how many EARs had been requested but not obtained. Some owners have negotiated agreements with MassHousing that provide equivalent affordability for the remaining original mortgage term in exchange for early prepayment, which DHCD recognizes as an EAR for 40T purposes.

[22] Each of the two RAD program rounds has required mortgage prepayment by a specified date (currently 12/31/14). Related opportunities for project-basing EVs through the MTW program do not share these externally-imposed deadlines, but are similarly driven by transaction-related timelines.

further complicated to the extent that there are moderate income tenants at the property who are ineligible for PBVs, or who currently pay less than 30% of income for rent, and may face substantial rent increases during the conversion.

In the interest of encouraging RAD PBV conversions, DHCD has generally found the harm caused by late termination notices in these cases to be *de minimus*, provided that any resulting rent increases are implemented in a reasonable manner consistent with the overall goal of preserving affordability. However, the consistent application of this policy to differing project circumstances poses a continuing challenge.

In those RAD conversions where the owner is not seeking to maximize affordability, DHCD has worked with MassHousing to develop an approach consistent with 40T notice and EAR requirements. For example, at Brookline Village, a 307 unit Section 236 development with 77 RAP units, the owner is seeking to prepay the mortgage currently (and without the required statutory notice) in order to implement a partial RAD conversion, with the ultimate goal of maintaining approximately 100 affordable PBV units (33%) for 30 years. The remaining 207 units will be eligible for EVs and will be permitted to transition to market with turnover over time, with two important caveats.

First, the 236 affordability restrictions will continue until the original mortgage maturity date (2018), through an agreement with MassHousing that satisfies the requirements for an EAR under 40T. Second, the existing tax credit restrictions covering 166 units will continue through their natural termination date (2027). This preserves existing affordability, protects existing tenants for the duration of the existing restrictions (plus an additional 3 years of tenant protection under 40T), and avoids any violation of the 40T notice requirements.

At the same time, under the terms of this preservation transaction, 45% of the units could be lost as affordable housing in 4 years, increasing to 67% in 13 years. With respect to 40T specifically, since the property is not being sold, there is no leverage under the statute to require more extensive or extended affordability.

6. Stakeholder Perspectives

Conversations with preservation stakeholders (see Exhibit 6) reveal a diversity of views on the utility of the 40T notice requirements. Some owners perceive the notices as a "waste of time and resources," whose costs do not justify the limited benefits (of temporarily extended affordability and tenant protections) that result only from non-compliance. They cite the difficulties of enforcement and the dubious value, in particular, of the Section 8 notice requirement, in the vast majority of cases where owners are seeking to renew their contracts. Rather than provide useful information to tenants, these owners argue that the notices are "mostly ignored or misunderstood" by tenants, and often "sow confusion and unwarranted aggravation."

For other owners and industry representatives, the termination notices are accepted as a necessary cost of doing business which is justified by 40T's overall preservation and tenant protection goals. Recent adaptations such as the EAR tool and evolving policies

for RAD prepayments in coordination with MassHousing are generally recognized as adding both predictability and flexibility to the system.

Tenant advocates point to a number of additional benefits, especially with respect to termination notices for expiring mortgage restrictions. They cite instances where such notices have enabled tenants and advocates to alert owners to the option of early prepayment in order to access EVs and PBVs, opportunities that are not available if the owner waits until mortgage maturity. In at least one instance, tenant intervention triggered by an owner's violation of the notice requirement resulted in an EAR and, subsequently, in an agreement by the owner to a (still pending) preservation sale.

Advocates believe that a more proactive approach is needed to facilitate owner compliance. For a period of time, DHCD initiated outreach by sending non-compliance letters to delinquent owners, but this practice has not become routine.

Currently, there is no mechanism in place to systematically coordinate expiring subsidy and mortgage maturity dates with 40T notice filings, as a basis for triggering early intervention. This strategy may be especially useful for "low-capacity" owners who have not managed to routinize a notice filing system. Advocates also cite the need for more aggressive and visible enforcement, including the initiation of legal claims against owners who repeatedly flout the notice requirements but refuse to enter into EARs, as authorized by the 40T regulations.[23]

B. ROFO/ROFR Sales

1. Projects

Since the inception of 40T, 10 properties have triggered DHCD's exclusive Right of First Offer after filing a Notice of Intent to Sell (see Exhibit 3). In each instance, DHCD selected a designee from its list of pre-qualified purchasers to pursue a preservation sale.

Each of these cases was initiated before the 40T regulations were revised in August 2013 to facilitate exempt sales and limit the applicability of the ROFO/ROFR provisions (see Section ID). Accordingly, the trajectories of these sales may have limited future relevance for 40T, despite the high-profile nature of several of the properties and transactions. At the same time, these properties have contributed significant transaction experience as well as models for municipal, community, and non-profit participation which offer important lessons for the preservation process.

The properties include:

- 2 high-risk, high-profile Cambridge developments located in or near Harvard Square: Chapman Arms, a mixed- income, mixed-use property with 25 affordable units, and Putnam Square, a 94-unit elderly project, both with expiring PBV contracts. Harvard University was involved in the ownership of both properties.

[23] DHCD may initiate legal claims upon a written finding by the Undersecretary that such action it is necessary and desirable to effectuate the purposes of 40T (760 CMR 64.10 (3)).

- 2 Section 236 developments with partial Section 8 assistance, maturing mortgages, and expiring restrictions associated with the federal Title II preservation program: Colonial Estates in Springfield (500 units) and Edmands House in Framingham (143 affordable units).

- 3 Section 8 properties containing 280 units in Framingham and Taunton (Canterbury Towers, Mill Pond, and Taunton Green), offered in a portfolio sale by AIMCO.

- a 52-unit property acquired in 2007 by Northeastern University in the high-value South End district of Boston, subject to a long-term Section 8 contract and Chapter 121A affordability restrictions (St. Botolph Terrace).

- a 200-unit Section 8 property in Medford (Riverside Towers), subject to a medium-term Section 8 contract; and

- a mixed-income SHARP/ expired tax credit project in Woburn, containing 88 affordable units (Kimball Court I & III).

2. Sales Process

Designees

In 3 cases (Chapman, Putnam, and St. Botolph) DHCD appointed a community-based non-profit developer as the designee, in consultation with the municipalities of Cambridge and Boston. At St. Botolph, where two CDCs with overlapping jurisdictions competed for the designation, the selected designee was supported by the local tenant organization.

At Riverside, DHCD appointed a Boston-based national non-profit developer. At each of the other properties, a for-profit affordable housing developer was designated.

Offers

Most of the properties were initially offered for sale by a regional or national broker, often in violation of regulations then in effect that required a Notice of Intent to Sell to be filed before the property could be listed (see Section I). Some sellers had identified preferred purchasers and negotiated sales terms (and in at least one case, had entered into a purchase and sale agreement), before the process was halted due to intervention by the municipality and/or DHCD.

Subsequently, sellers and brokers developed alternative strategies to accommodate the 40T requirements. For example, at Chapman, the broker withdrew and then reissued the solicitation after the Notice of Intent had been filed. Prospective purchasers were prohibited from submitting offers until after DHCD's 90-day window had expired, but were encouraged to act immediately thereafter, to permit a timely comparison with the designee's bid.

In 7 of the 10 cases, the designee made a viable offer within the initial 90-day window which was accepted by the seller—in some cases without soliciting other bids, and in others, after reviewing competitive offers (received on Day 91 or later). In both Cambridge projects, the community-based non profit designees received critical support from the City, including technical assistance, predevelopment funding, and substantial acquisition financing commitments. The City also intervened directly to renegotiate the terms of Harvard's ground lease at Chapman, and to resolve local zoning and tax issues that affected preservation feasibility at Putnam. These contributions were key in enabling the designee to make a successful offer.

At 2 properties (Riverside and Kimball Court), the designee elected to waive DHCD's Right of First Offer, based on its due diligence indicating that the price desired by the seller was infeasible. In both cases, the property was subsequently taken off the market and no sales transaction occurred.

At Colonial Estates, the designee waived DHCD's Right of First Offer and subsequently submitted a lower counter-offer to the third-party offer received from the seller's preferred buyer. The counter-offer was rejected; however, the third party failed to perform and its purchase contract was terminated. Subsequently, the seller requested and received a preliminary exemption from DHCD for a preservation sale to an affiliate. The preservation transaction was ultimately consummated as an exempt sale.

3. Preservation Transactions

Of the 8 preservation sales transactions resulting—directly or indirectly—from the ROFO/ROFR process, all but one (Colonial Estates, sold to an affiliate as described above) required a 2-stage transaction, with acquisition followed by permanent financing. For the non-profit purchasers, critical acquisition financing was provided by CEDAC, in conjunction with the City of Cambridge (for the Cambridge properties). The for-profit buyers secured acquisition financing from MHIC (for Edmands) and MassHousing (for the AIMCO properties).

For permanent financing, 5 of the sales transactions (Chapman, Putnam, Edmands, Colonial Estates, and St. Botolph) utilized tax-exempt bonds and equity from the sale of 4% low income housing tax credits. Four of these also involved state and local gap financing, with the 2 Cambridge properties receiving very substantial amounts of City funds. St. Botolph, which—due to its long-term Section 8 contract—was not categorized as a high-risk development under the "Priority Matrix" for preservation funding,[24] received no state or city contributions.

The 3 AIMCO properties utilized an unusual financing structure, combining MassHousing taxable bond-financed debt with substantial private equity contributed directly by the purchaser.

[24] See Section IE.

Reported acquisition prices for the properties vary widely, ranging from $63,500 per unit for Mill Pond in Taunton to $362,500 per unit for St. Botolph in the South End. These variations largely reflect the diversity of markets in which the properties are located.

Five of the 8 transactions have projected rehab costs in excess of $50,000 per unit. The AIMCO transactions generated no funds for upfront rehab, but capitalized reserves in the amount of $7,000 - $17,000 per unit to support ongoing improvements.

4. Preservation Outcomes

Overall, in the 8 properties sold, a total of 1,074 affordable units have been preserved, representing a net loss of just 2 affordable units.[25] No rental subsidy units have been lost, and 59 new rental subsidy units (PBVs) were added.

At each of the properties, new restrictions have extended affordability for 20-50 years, with the longer terms applying to the tax credit and city/state-funded projects. Existing rental subsidy contracts were also extended and/or obligated to be renewed.

The 5 tax credit projects have generally deeper affordability with the inclusion of an extremely low income tier, the addition of MTW PBVs (at Edmands), and the replacement of Title II profile requirements by tax credit income limits (at Edmands and Colonial Estates). At the 3 AIMCO projects, the depth of affordability remains the same before and after the 40T transaction.

While all of the properties have multiple restrictions, the specific type of affordability obligations imposed by 40T varies with each case. Three properties (Chapman, Putnam, and St. Botolph) have an independent 40T affordable housing restriction, that generally extends the level of affordability imposed by previously existing restrictions for 20- 30 years. At the other 5 properties, affordability is enforced through other restrictions. At the 3 AIMCO properties, which do not have tax credits, only 20% percent of the units are restricted (by MassHousing) for a minimum of 20 years, and the obligation to renew rental subsidies is limited to the MassHousing financing term.

5. Impact of Recent Regulatory Changes

While the 8 transactions described above are widely regarded as successful, especially by preservation stakeholders in the communities where the properties are located, they also illustrate some of the challenges posed by the ROFO/ROFR process. In particular, despite the creative tactics developed by brokers, it has been difficult to accommodate seller desires for competitive pricing and purchaser selection within the constraints of the ROFO/ROFR framework, leading to what some have described as a "chilling effect" on preservation sales.

[25] Additionally, no affordability has been lost at the 2 properties offered to DHCD that did not result in sales transactions, which are subject to other long-term restrictions (a multi-year Section 8 contract, in one case, and a 99-year municipal restriction, in the other).

For DHCD, reconciling the statutory requirement for filing a Notice of Intent to Sell (which triggers the Right of First Offer) with the exemption process that is available for preservation sales has been especially problematic. Additionally, there is a sense that some sellers have used the ROFO process as a proxy to test pricing, wasting the designee's time and resources.

These concerns have led to regulatory changes which significantly limit the opportunity for DHCD to exercise its Right of First Offer under 40T (see Section ID above). As previously noted, since these revisions were adopted in 2013, no Notices of Intent to Sell have been filed and no designees have been appointed. The exemption process has become the exclusive vehicle for 40T preservation sales (see Section IIC).

During the debate over the proposed changes, some preservation advocates and practitioners raised concerns about their potential unintended consequences.
The new regulatory approach, they commented to DHCD, could "undermine the statutory role of the designee in preserving affordability," by effectively limiting its involvement to matching a third-party offer in a non-preservation sale (after the seller has already identified a buyer, price, and sales terms). Further, advocates noted, the proposed change could "preclude meaningful participation by tenants and municipalities in the 40T process" by deferring notice to affected parties until all actions short of executing the purchase and sale contract have been completed. In contrast, the ROFO/ ROFR process requires a 90-day notice period before an offer can even be made.

The City of Cambridge expressed concern that the proposed changes could jeopardize the success of its proactive, collaborative approach to 40T preservation sales, noting that "our ability to influence the purchaser selection process and to ensure that properties will be preserved cost-effectively, for the longest term, by locally-accountable developers, will be greatly diminished." In particular, the City commented that "opportunities for community-based purchasers to participate in 40T sales will be significantly more limited," since these groups are typically excluded from national broker solicitations and find it difficult to compete without the "level playing field" created by 40T (e.g. with respect to the limitation on earnest money deposits).

The recently proposed sale of Briston Arms, another high-value, high profile property, and the first to be offered competitively in Cambridge outside the ROFO/ROFR process, has refocused attention on these issues. The property was listed with a national broker for some time before the City, tenants, and local advocates learned about the sale. Neither of the City's community-based non-profit developers (both pre-qualified designees, who have successfully purchased 40T properties in the past) was invited to participate, although one did submit an unsuccessful offer with a substantial City financing commitment.[26]

Despite its anticipated role as a preservation funder, the City advised DHCD during the solicitation that "we have no direct information about the offering," and that bidders had

[26] In 2 recent competitive solicitations for exempt 40T sales in Roxbury, a considerably weaker housing market, community-based non-profits were included and were the successful bidders.

been instructed not to contact the City during the extremely short (6-week) period allowed for the development of offers. In accordance with the new regulations, the tenants and the City were officially notified of the seller's Intent to Sell to an (unidentified) Preservation Purchaser only after the buyer had been selected and the sales price and terms established, setting critical parameters for the transaction.

While the selected purchaser intends to pursue a preservation sale, the process represents a significant departure from the collaborative approach that has characterized previous 40T sales in Cambridge. Local stakeholders remain concerned about the degradation of transparency in the purchaser selection process relative to previous ROFO/ROFR transactions, and the risks posed by competitive bidding to the goal of cost-effective preservation. Still, no property with ongoing restrictions that has been offered for sale through the ROFO/ ROFR or the exempt sales process has yet been lost as affordable housing, as further described in the next section.

C. Exempt Sales

1. Introduction

Through May 21, 2014, DHCD has granted 117 preliminary exemptions under Section 6 of Chapter 40T, which allows properties to be transferred outside the ROFO/ ROFR process due to the preservation nature of the sale and pursuant to the terms of the statute (see Exhibit 4). This is more than ten times the number of properties that have triggered DHCD's Right of First Refusal (see Section IIB). [27] Since the inception of 40T, the exemption process has been the primary vehicle for 40T preservation sales, and the recent regulatory changes described above have served to buttress this outcome.

2. Grounds for Exemption

Sixty-two preliminary exemptions (53%) were granted for transactions that DHCD has determined will preserve affordability, in accordance with the statutory and regulatory definition. Another 34 (29%) represent sales to affiliates where DHCD found that affordability will not be terminated. Combined, these two categories account for more than 80% of all preliminary exemptions granted.[28]

Another 13 preliminary exemptions (11%) involve sales that were "grandfathered" under 40T, with purchase and sale contracts entered into prior to the effective date of the statute. The remaining exemptions were approved for other reasons (e.g. renewals of Section 8 contracts which are the sole source of affordability, restrictions expiring more than 15 years from the date of sale, and foreclosure or foreclosure avoidance).

3. Preserving Affordability

[27] The number of properties represented is slightly less than the number of exemptions, since some properties have received multiple exemptions covering different phases of the transaction (e.g. acquisition and permanent financing). The grounds for exemption may be different for each phase.

[28] The line between the two categories is somewhat blurred, since many proposed sales to affiliates also promise to preserve affordability and quite a few preservation sales are also sales to affiliates. A number of exemptions have been granted on both grounds.

To what extent are exempt sales under 40T preserving affordability? In an effort to address this question within the limitations of available data, the affordability promises made by purchasers and the conditions for approval contained in 103 preliminary exemptions granted by DHCD were analyzed in detail.[29]

Term of Restriction
In close to two-thirds of the exemption cases, owners pledged to extend the term of affordability. Typically, this involves an expiring mortgage subsidy restriction being replaced with a new tax credit restriction, with a minimum term of 30 years.

In another 30%, the preservation sale did not extend the term of affordability. These properties were simply proposed to be transferred subject to the existing restrictions for their remaining natural terms (ranging anywhere from a few years to several decades).

Term of Rental Subsidy
In close to half of the exemption cases, owners committed to extend the rental subsidy term, primarily by renewing an existing Section 8 subsidy contract or replacing an expiring Rent Supp/ RAP subsidy with a 15-year PBV contract. In 31% of the cases, the contract term remained the same, reflecting the same bifurcated pattern described above for the term of affordability restrictions.[30] In 2 instances, existing MRVP rental subsidies were not renewed, but affordability was deepened and extended in other respects.

Depth of Affordability
In more than half of the exemptions, owners promised to deepen affordability through greater income targeting, e.g. by replacing a Section 236 affordability restriction targeted to households with incomes at or below 80% AMI with a tax credit restriction targeted to households with incomes at or below 60% AMI. Most tax credit transactions also include at least 10% of the units targeted to households with incomes at or below 30% AMI, as required by the QAP.

In more than 40% of the cases, the level of affordability was proposed to remain the same. At the same time, the shift from budget-based Section 236 rents to tax credit rents, which is proposed to occur in at least 17 properties, may involve a loss of affordability to the extent that rents are increased.

Affordable Units
In 80% of the exempt sales transactions, owners pledged to retain the same number of affordable units that existed at the property prior to 40T. In another 10%, the number of affordable units was proposed to increase, e.g. through the creation of additional tax credit units in a formerly mixed-income property.

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[29] This analysis excludes the 13 exemptions granted for "grandfathered" sales transactions and one deed-in-lieu of foreclosure transaction, for which affordability data was not available.

[30] This is partially a function of the timing of the subsidy contract expiration, relative to the exemption request and the proposed sales transaction.

In the remaining 10% of transactions, some affordable units that no longer housed low, very low, or extremely low income households were not promised to be maintained as affordable. This typically occurs when a 100% affordable Section 236 or BMIR project is converted to a tax credit project with some unrestricted units, to avoid displacement of households who have become over-income during their tenancies. It reflects a conscious decision made in the drafting of 40T to define preservation as maintaining affordability based on the current occupancy mix of low, very low, and extremely low income households. In most cases, the proposed reduction in affordable units has been accompanied by a promise of deeper and more extended affordability. In at least one case (Georgetowne Apartments), the purchaser agreed to extend income and rent restrictions on the non-tax credit units upon turnover.

In total, 229 new affordable units were proposed to be added and 316 were proposed to be lost, resulting in an aggregate potential net loss of 87 affordable units through the exempt sales process. Based on owners' affordability promises as approved by DHCD, exempt sales transactions should result in the preservation or retention of up to 10,238 of the 10,325 affordable units that existed in these properties prior to 40T, with less than 1% of the units being lost on a net basis.

In only one case has an entire property subject to 40T been lost as affordable housing through the exempt sales process. At Wentworth Manor, a 102-unit property in Stoughton, the sole (BMIR) affordability restriction expired after enactment of 40T, but within the 4-year "look-back " period of extended coverage required by Section 10 of the statute. After giving proper notice of the termination, the owner received a preliminary exemption for a sale to an affiliate, based on DHCD's determination that no termination had occurred (since there were no restrictions remaining). While this transaction appears to be an anomaly today, it suggests the need for greater clarity regarding how the "preservation sales" exemption will apply to "look-back" properties, as they constitute a growing proportion of future preservation sales.

4. Chapter 13A Properties

Preserving affordability when a Chapter 13A property is being sold is another growing challenge for 40T, given HUD's decision to deny EVs to these properties when their mortgages are prepaid (or mature).

Since the enactment of 40T, ten 13A sales transactions have received preliminary exemptions: 8 on the grounds of preserving affordability, 1 as a sale to an affiliate with no termination of affordability, and 1 on both grounds. These include 3 early transactions (Conway Court, Wilkins Glen, and Summer Hill Glen) that did receive EVs and preserved affordability through tax credits, extending restrictions for 30 years on virtually all of the units. At 2 of these properties, a substantial number of EVs were converted to PBVs through the MTW program, deepening existing affordability.

Since then, owners and purchasers have negotiated different types of affordability commitments with MassHousing and DHCD, in exchange for prepayment or transfer approvals and receipt of a 40T preliminary exemption.

- In four 40T sales projects (Central Grammar, Franklin Park, Mashpee Village, and River Place Towers), the 13A mortgages have been prepaid early without the benefit of EVs or PBVs. However, because the purchasers utilized tax credits, affordability has been extended for 30 years on virtually all the units, and deepened through the required addition of an extremely low income tier.

- At River Place Towers, the largest 13A development containing 448 units, 40 non- tax credit units were also preserved at the 13A affordability level (80% of median) through an agreement with MassHousing. Projected annual rent increases for the balance of the original mortgage term, according to the owner and DHCD, will be less than the budget-based rent increases that would have been justified under 13A (driven by a substantial increase in the ground lease rent).

- At Mashpee Village, where 15 of 145 former 13A units are not subject to a new tax credit restriction, the purchaser established an internal subsidy fund to finance a rent increase phase-in for existing tenants. Since notice of the 13A prepayment was not timely under 40T, an EAR is in place, maintaining 13A rent and affordability restrictions on the non-tax credit units for 2 years, followed by 3 years of CPI-based tenant protections.

- At 3 other properties (Christian Hill, Lincoln Woods, and Upton Inn), preliminary exemptions were granted for transactions where the 13A mortgages were proposed to be assumed, rather than prepaid, by the new owner. The average term remaining on the 13A mortgage restrictions was 5-7 years. At Christian Hill, the purchaser committed to 30 additional years of affordability on all the units, in exchange for receipt of DHCD gap financing. In contrast, at Upton Inn, the purchaser extended affordability only on 20% of the units for 15 years (11 years after the date of original mortgage maturity).

The recent case of Skyline Drive I provides an interesting alternative model for preserving affordability in 13A properties with scarce resources, in the context of the 40T exemption process. The proposed sale involves a mixed-income property with partial (50%) 13A assistance, an imminently maturing mortgage, and no new public financing or subsidies.

As a condition of receiving the 40T preliminary exemption, the purchaser has agreed to restrict occupancy of the former 13A units to households with incomes at or below 80% AMI for 30 years, and limit rent increases for current tenants to 2.5% annually (increasing to tax credit rents upon turnover). The existing MRVP rental subsidy contract for 21 units will be renewed, provided that rents can be increased to at least 90% of tax credit levels. The transaction will finance modest property rehab. In two related sales transactions, the same owner and purchaser have agreed to extend affordability and cap rent increases at 3% for existing tenants for 15 years, in exchange for MassHousing's prepayment approval and the 40T exemption.

While these preservation outcomes are not solely attributable to 40T, they illustrate how the 40T exemption process can provide a framework and catalyst for structuring a variety of approaches to extend affordability, where owners and purchasers are willing to do so.

5. Owner-Driven Process

While 40T owners and purchasers, in the aggregate, have committed to preserve a substantial amount of affordability in exchange for receiving a preliminary exemption, an important feature of the exempt sales process is that it is largely owner-driven. On a project-specific basis, the preservation promises made by owners and purchasers of projects in similar circumstances, and accepted as grounds justifying an exemption, have varied considerably from case to case.

For example, while many preservation-oriented purchasers of projects with subsidized mortgages that have a few more years remaining have readily agreed to extend affordability through new tax credits, other buyers are simply willing to assume and retain the existing restrictions. In both circumstances, transactions have been found to meet the statutory and regulatory test of "preserving affordability," or in some cases have qualified as affiliated sales without a termination. In some projects where the subsidized mortgage has recently matured, even during the course of the exemption process, the purchaser's assumption of a partial Section 8 contract has been considered sufficient grounds for "preserving affordability." In general, unless the purchaser is willing to go beyond the retention of existing subsidies or restrictions to extend affordability, DHCD has not required it.

While existing regulatory standards for "preserving affordability" allow a substantial degree of administrative discretion, some advocates believe that a more policy-driven approach to exempt sales is needed to avoid missed opportunities for longer-term preservation. In this view, discretionary approval of a sale outside the 40T ROFO/ROFR process should require more than the retention of an existing short-term affordability restriction, that the owner would be obligated to maintain even without a sale. Especially with the increasing challenges posed by 13A transactions, an owner-driven process may result in considerably less affordability in future sales transactions.

6. Final Certificates of Exemption

A related problem, especially given the owner-driven nature of 40T sales exemptions, is the apparent failure of most owners to request final certificates of exemption.

According to records made available by DHCD, final certificates have been issued for only 39 (33%) of the 117 transactions that have received preliminary exemptions. Preservation practitioners cite a variety of factors that may help to explain this anomalous result, including the extended timeframe required to assemble resources for complex transactions. On an anecdotal basis, some transactions that have received preliminary exemptions are reported to have failed for a variety of reasons, or are still pending.

Still, many transactions that do not appear to have final certificates are known to have closed. The most likely explanation is that since lenders and investors are not routinely requiring final certificates to close transactions, owners are not requesting them.

While this problem requires further investigation, it poses an important caveat for this analysis and raises questions about compliance with the 40T exemption process. Without evidence of a final certificate, there is a question as to whether owner and purchaser affordability promises can be reliably counted as units actually preserved. Moreover, there is no method for determining whether DHCD's terms and conditions for the sale, which incorporate these promises, have been met.

D. Tenant Protections

1. EARs & Other Restrictions

EARs have proved to be a useful remedy when 40T termination notices are not timely filed, that protects tenants as well as extending affordability (see Section IIA). In some other cases, such as the Skyline Drive properties, tenants have achieved substantial rent increase protections in conjunction with 40T sales exemptions, that go well beyond the 3-year CPI-based protections afforded generally by 40T (see Section IIC).

2. RAD/ MTW Conversions

The issue of tenant protections has also arisen in the case of RAD and MTW conversions, where 40T's notice and tenant protection requirements may appear to conflict with its preservation goals—especially if some tenants face substantial rent increases (see Section IIA). As noted above, DHCD has sought to balance these goals by ensuring that rent increases for affected tenants are consistent with those that would have been permitted under the applicable 236 or 13A restriction, prior to mortgage prepayment.

3. Rent and Eviction Protections

To date, the 3-year CPI-based rent and eviction safeguards provided by 40T for protected tenants have not been a major program focus. In the past, most terminations have involved federally-subsidized mortgage prepayments, that have triggered EVs for tenant protection.

At one 236 property where EVs were not provided (Taunton Gardens), tenants with regular mobile vouchers are now becoming rent burdened as rising rents exceed the PHA payment standard. DHCD and the owner have agreed that the CPI-based protections apply to the tenant's rent share, which has required rent reductions in some cases.

Overall, there is little information about properties that are currently subject to 40T's tenant protection regime, or how these requirements are being enforced. No mechanisms are currently in place to track the projects or monitor owner compliance. This will be a growing concern for the future, as more and more 13A properties reach mortgage maturity without the benefit of EV protection, and post-prepayment/ maturity rents in many markets become increasingly unaffordable to regular voucher-holders.

E. Affordable Units Lost Since 40T

Since the enactment of 40T in late 2009, an estimated 2,400 mortgage subsidy units have been permanently lost as affordable housing on a net basis (see Exhibit 5). These units are located in projects that were formerly-subsidized under Section 221(d)(3)BMIR, Section 236, and Chapter 13A, whose affordability restrictions have terminated due to mortgage prepayment or maturity and have not been replaced. They likely account for the vast majority of affordable units lost during this period, since projects with 15-year tax credit restrictions reached the end of their affordability terms prior to 40T,[31] and there have been few (if any) Section 8 opt-outs outside the subsidized mortgage inventory.

These lost units fall into several categories. The vast majority (1,802 units, or close to 75%) are located in projects where no sales have occurred and existing owners appear not to be preservation-oriented (e.g. Burbank Apartments in the Fenway, Battles Farm in Brockton, and Queen Anne's Gate I in Weymouth). Some of the same owners were responsible for the high-profile prepayments and mortgage maturities that occurred just prior to 40T (see Section IB).

In some of these properties, the Section 8 contracts have been renewed, at least for the short term, limiting the affordable units lost to the non-assisted mortgage subsidy units. In others, owners elected to opt out of their Section 8 contracts when the mortgages matured, or were prepaid. In most cases, other than the more recent 13A properties, tenants have received Enhanced Vouchers which have slowed the rate, and mitigated the impact, of market conversion.

[31] Since 1990, all Low Income Housing Tax Credit awards in Massachusetts have required at least 30 years of affordability.

III. CONCLUSIONS

A. Program Accomplishments and Benefits

Over the past 5 years, the 40T program has achieved significant benefits in terms of housing preservation and tenant protection. It has allowed tenants and other stakeholders to have advance notice of most impending terminations of affordability restrictions, providing a potential opportunity for intervention to facilitate preservation outcomes. It has temporarily extended affordability and tenant protections through EARs when notices have been filed late. It has also provided a framework for resolving conflicts between affordability, tenant protection, and timely notice objectives, e.g. in the context of RAD/ MTW conversions, and for structuring negotiated approaches to preservation in challenging situations, such as 13A property sales.

More than 1,000 units in 8 properties sold through the exercise or trigger of DHCD's Right of First Offer under 40T have been preserved on a long-term basis. This approach has offered a high degree of transparency and opportunities for collaborative participation by tenants, municipalities, advocates, and community-based non-profit purchasers in preservation-oriented localities.

Another 10,000 units in more than 100 properties have been or are slated to be preserved, by owners and purchasers who have pledged to keep them affordable in exchange for receiving a preliminary exemption from the 40T ROFO process. In the vast majority of these cases, owners and purchasers have promised to retain at least the same number of affordable units that existed prior to 40T. Most purchasers have also pledged to extend and deepen the level of affordability, although in a significant minority of cases (30%) the term of restrictions and/or subsidies will remain the same.

Significantly, based on owner promises, not a single affordable property with remaining restrictions that has been offered for sale under 40T has been lost. Overall, fewer than 100 net affordable units have been or are slated to be lost through the 40T preservation sales process (both ROFO and exempt sales). Since the inception of 40T, an estimated 2,400 net affordable units in subsidized mortgage properties have been lost through prepayment, mortgage maturity, and related subsidy contract opt-outs, creating the potential for market-rate conversion. The vast majority of these losses have occurred in properties not being sold, that are outside the reach of 40T's preservation provisions.

To what extent are these probable preservation outcomes attributable to 40T, or would they have occurred anyway in the absence of 40T? How much has 40T changed owner behavior? While these questions are impossible to answer with certainty, owners interviewed for this study generally agree that 40T has made a significant difference for sellers of high-value properties in strong markets, by encouraging then to sell to preservation buyers. Such properties include high-profile ROFO transactions like St. Botolph Terrace in Boston, as well as exempt sales such as Norstin Apartments in Cambridge. Under both processes, DHCD's right to intervene and unravel a proposed sale has apparently acted as a significant deterrent to market-rate conversion.

Some owners note that 40T has indirectly helped preservation-oriented sellers as well, by making it easier for them to justify a preservation sale to investors. It has also affected the behavior of owners who are undecided about deferring a potential sale until after the 40T "look-back" period expires, by presenting the viable alternative of selling sooner to a preservation buyer. There is general agreement that the behavior of the owner subgroup that is not inclined to sell currently, and not interested in preservation, has not been affected by 40T.

Finally, many stakeholders point to the significant symbolic and practical value of 40T in elevating the importance of preservation in Massachusetts, in providing a consistent framework for state preservation policies and priorities, and in helping to create a regulatory and financing system in which preservation transactions can proceed with predictability and reliability.

B. Meeting Future Challenges

A number of significant changes in the preservation environment are presenting new challenges for 40T. These include the difficulty of preserving maturing Chapter 13A properties and protecting tenants without the benefit of federal assistance (Enhanced Vouchers and Project-Based Vouchers) which has been available to 40T properties in the past, in an environment of uncertain state resources. Additionally, a growing number of subsidized properties will be entering the 40T "look-back" period, after which they can be sold without restriction.

To meet these new challenges, experience to date suggests the need for further analysis and potential policy or regulatory changes to strengthen the 40T program in the following areas.

- **Termination Notices**. A more proactive approach may be needed to improve owner compliance, including mechanisms to coordinate expiring use dates with 40T notice filings on a systematic basis, regular outreach to non-complying owners, notification to legal services organizations (who currently do not receive copies of termination notices), and the initiation of legal claims against repeat offenders, to the extent permissible under 40T.

- **Exempt Sales Process**. The exempt sales process could be strengthened by requiring more timely notice to stakeholders and improving the overall transparency of the purchaser selection process. In addition, the standards for "preserving affordability" may require clarification to maximize opportunities for long-term preservation in 40T sales outside the ROFO/ROFR process, where there is less direct public control. This could include requiring more than the retention of an existing short-term affordability restriction that the owner is obligated to maintain even without a sale.

- **Certificates of Exemption**. Further analysis is needed to determine how to incentivize the filing of final certificates of exemption, or otherwise ensure

compliance with owner affordability promises and the grounds for preliminary exemption approvals.

- **Tenant Protections**. The statutory tenant protections could be strengthened by mechanisms to track and enforce owner compliance, as a growing number of projects become subject to these requirements.

- **Record-Keeping**. More systematic, comprehensive, and consistent maintenance of program records by DHCD and CEDAC, that enables data to be accessed both categorically and on a project-specific basis, would greatly facilitate future program monitoring.

- **Preservation Orientation**. In general, an approach to 40T that is less owner-driven and more policy-oriented, consistent with the state's overall preservation agenda, could fortify 40T to better address its future challenges. This could include more direct involvement of DHCD's Housing Development Division, which is responsible for implementing the Commonwealth's affordable housing preservation programs, in shaping 40T policies, procedures, and overall program strategies.

EXHIBIT 1
40T TERMINATION NOTICES

40T TERMINATION NOTICES	Total		Timeliness:			Late/ Defective Notices - Outcomes:			Rent Subsidy Notices - Owner Intent:		
through May 31, 2014		On Time	Late 1-6 Mos	Late >6 Mos	Curative Extension/ EARs (Note 3)	De Minimus Finding (Note 4)	Not Resolved/ Unclear	Optout	Renewal (Note 5)	Unclear
Notice Type (Note 1)										
1-Year	74									
2 Year	71									
Total	145									
Projects (Note 2)	98									
Termination Type										
Mortgage Restriction Only	24	13	2	9	8		3			
Mortgage Restriction & Rent Subsidy	50	30	6	14	13	3	4	8	33	9
Rent Subsidy Only	65	39	10	16	8	7	13	3	59	3
Other	6	3	1	2	1					
Total	145	85	19	41	30	10	20	11	92	12
Total in Category				145			60			115
Projects	98				19			7		
Mortgage Restrictions - All	74	43	8	23	21	3	7			
Rent Subsidy - All	115	69	16	30	21	10	17	11	92	12
Termination Type - %										
Mortgage Restriction Only	16.6%	54.2%	8.3%	37.5%						
Mortgage Restriction & Rent Subsidy	34.5%	60.0%	12.0%	28.0%						
Rent Subsidy Only	44.8%	60.0%	15.4%	24.6%						
Other	4.1%	50.0%	16.7%	33.3%						
Total	100.0%	58.6%	13.1%	28.3%	50.0%	16.7%	33.3%	9.6%	80.0%	10.4%
Total in Category				100.0%			100.0%			100.0%

Source: Compiled from termination notices filed with CEDAC within the applicable timeframe.

Note 1: As characterized by CEDAC. Notices filed under the 90-day Transition Rule may be counted in either category, or in both.

Note 2: Includes 40 properties filing both notices, 30 filing 1-Year Notices only, 28 filing 2-Year Notices only, and several with multiple filings of the same notice. The discrepancy between notices and properties reflects the study timeframe, the 90-day transition rule, and missed or multiple filings by some properties.

Note 3: Of the 30 notices (19 properties) resulting in Curative Extensions of affordabiliy, 13 (7 properties) have been addressed by Equivalent Affordability Restrictions (EARs) executed or in progress.

Note 4: "De Minimus" letters issued by DHCD indicating no material harm from the defective notice and no Curative Extension of affordability required.

Note 5: As indicated by owner filing or as subsequently verified from CEDAC/ HUD databases.

EXHIBIT 2:
MATURING SUBSIDIZED MORTGAGE PROJECTS SUBJECT TO 40T TERMINATION REQUIREMENTS

MATURING SUBSIDIZED MORTGAGE PROJECTS SUBJECT TO 40T TERMINATION REQUIREMENTS through 5/31/14		**Projects**	**40T Term Notice(s) Filed** (Note 3)	**No 40T Term Notice(s) Filed**	**No 40T Term Notices: 40T Exempt Sales** (Note 4)	**Other Restric-tions** (Note 5)
Maturity Date - Past	(Note 1)					
2010		12	8	4	0	1
2011		11	5	6	1	4
2012		16	9	7	1	6
2013		21	13	8	0	8
2014 - thru 5/31		23	9	14	2	11
2015 - prepaid		1	1	0	0	0
2016 - prepaid		6	3	3	0	3
2017 - prepaid		10	6	4	3	4
2018 - prepaid		4	0	4	3	4
2019 - prepaid		1	0	1	0	1
		========	========	========	========	========
Subtotal		105	54	51	10	42
Maturity Date - Future	(Note 2)					
2014 - 6/1 on		1	0	1	0	0
2015		9	0	9	1	6
2016		8	1	7	0	5
		========	========	========	========	========
Subtotal		18	1	17	1	11
Total		123	55	68	11	53
% Total			44.7%	55.3%		
% in Category					16.2%	77.9%

Note 1 Includes projects subsidized under 221d)(3) BMIR/ 236/ 13A whose mortgages matured, or were prepaid, between 11/23/09 and 5/31/14. Compiled from CEDAC, HUD, and MassHousing databases and prior studies by the author. Due to data discrepancies, some projects with mortgages prepaid before 40T may be inadvertantly included, while others with mortgages maturing or prepaid since 40T may be omitted. Properties that have prepaid but "decoupled" and retained their IRP contracts are included with their original mortgage maturity dates, but may not be consistently reported in the databases.

Note 2 Includes subsidized mortgage projects with mortgages maturing between 6/1/14 and 5/31/16 (two years after the cut-off date for notices reviewed in this study). See Note 1 for sources, discrepancies, and inconsistencies.

Note 3 Compiled from 40T termination notices filed with CEDAC.

Note 4 Compiled from DHCD 40T preliminary exemption approvals.

Note 5 E.g., restrictions associated with a continuing HUD Preservation Agreement, IRP contract, LIHTC Regulatory Agreement, or Section 8 contract covering all or a substantial portion of the units (existing or proposed) that may constitute an Equivalent Affordability Restriction (EAR) under 40T. Compiled from 40T preliminary exemption requests and approvals, CEDAC databases, and prior studies by the author.

	1		2		3		4	
Name	**Chapman Arms**		**Colonial Estates**		**Edmands House**		**Canterbury Tower**	
Location	**Cambridge**		**Springfield**		**Framingham**		**Worcester**	
	(note 1)		(note 2)				(note 3)	
Seller	Craigie Arms (Kuehn estate)		Beacon Communities		McCarthy family		AIMCO/NHP	
Designee	Homeowner's Rehab, Inc.		John M. Corcoran & Co.		Beacon Communities		John M. Corcoran & Co.	
Purchaser	Homeowner's Rehab, Inc.		Beacon Communities (affiliate)		Beacon Communities		John M. Corcoran & Co.	
At risk date	6/2016		3/2012		2/2012		3/2018	
Timeline								
Designee appointed	4/2011		6/2011		2/2012		4/2012	
Acquisition	12/2011		10/2013		5/2013		12/2012	
Permanent financing	8/2013		12/2013		8/2013		3/2013	
	Pre-40T	Post 40T	Pre-40T	Post 40T	Pre-40T	Post 40T	Pre-40T	Post 40T
Affordability								
Total units	50	50	500	500	190	190	156	156
Affordable units	25	25	483	450	140	171	156	156
Rent subsidy units	25	25	349	349	112	171	156	156
Term		15 + 15 yrs.		23 yrs.		20/15 yrs.	<4 yrs.	20 yr mand. renew
LIHTC units		25		450		132		n/a
Term		50 yrs.		45 yrs.		45 yrs.		n/a
DHCD affd units		25		450		171		n/a
Term		50 yrs.		41 yrs.		41 yrs.		n/a
City affd units		25						
Term		50 yrs.						
40T restricted units		25		n/a		see LIHTC, DHCD		31
Term		30 yrs		n/a		see LIHTC, DHCD		min. 20 yrs.
Source		40T AHR		n/a		see LIHTC, DHCD		MH Dispo. Ag.
Unit mix (targeted to):								
ELI <30%		5		51		98		
VLI < 50%/60%		20	349	399	112	34	156	156
Low <80%	25		134		28	39		
Moderate <95%			17		3			
Unrestricted	25	25	0	50	47	19		
Total	50	50	500	500	190	190	156	156
Financing/ Subsidies								
Acquisition Financing		CEDAC/ City		n/a		MHIC		MassHousing
Perm. Financing	MassHousing	T-E Bonds	HUD236/ Title II	T-E Bonds	MassHsg236/ Title II	T-E Bonds	MassHousing	TX Bonds
Equity		LIHTC		LIHTC, state credits		LIHTC, state credits		Private
Gap financing		CIPF, AHT, City		AHTF, City HOME		CIPF, HOME, Town		n/a
Rental Subsidy	PBVs	PBVs	S8	S8	S8	S8, PBVs	S8	S8
Sources & Uses								
Permanent Debt	10,400,000	208,000	42,941,000	85,882	22,500,000	118,421	13,000,000	83,333
Equity	2,378,811	47,576	30,406,064	60,812	15,818,370	83,255	3,182,025	20,398
Gap Financing - State	1,975,000	39,500	2,000,000	4,000	2,000,000	10,526		
Gap Financing - Local	4,078,181	81,564	100,000	200	70,000	368		
Soft Debt - Other	4,506,473	90,129	260,971	522	0	0	0	0
Deferred fee	138,683	2,774	4,149,429	8,299	174,909	921	0	0
Other	75,611	1,512		0		0	49,917	320
Total	23,552,759	471,055	79,857,464	159,715	40,563,279	213,491	16,231,942	104,051
Acquisition	13,900,000	278,000	36,000,000	72,000	22,073,371	116,176	12,536,295	80,361
Rehab	3,911,787	78,236	28,747,587	57,495	10,240,848	53,899	0	0
Soft Costs	3,025,282	60,506	7,545,906	15,092	4,110,368	21,634	2,545,647	16,318
Reserves	1,298,214	25,964	2,050,971	4,102	1,451,248	7,638	1,150,000	7,372
Developer fee	1,417,475	28,350	5,513,000	11,026	2,687,444	14,144	0	0
Total	23,552,758	471,055	79,857,464	159,715	40,563,279	213,491	16,231,942	104,051

Source: Compiled from public records and project documents provided by 40T purchasers.

Note 1 Includes commercial units.
Acquisition price includes substantial sponsor note.

Note 2 After initially triggering DHCD's Right of First Refusal, the presservation transaction was completed as an exempt sale.

Note 3 Soft costs include debt service reserve for repayment of existing mortgage.
No up front rehab costs; replacement reserve only.
Section 8 renewal obligation tied to MassHousing financing only.

Note 4 Acquisition price includes substantial sponsor note.

	5		6		7		8	
Name	**Mill Pond Apts.**		**Taunton Green**		**St. Botolph Terrace**		**Putnam Square**	
Location	**Taunton**		**Taunton Green**		**Boston**		**Cambridge**	
	(note 3)		(note 3)				(note 4)	
Seller	AIMCO/NHP		AIMCO/NHP		Northeastern Univ.		Harvard University	
Designee	John M. Corcoran & Co.		John M. Corcoran & Co.		Madison Park Devel Corp.		Homeowner's Rehab, Inc.	
Purchaser	John M. Corcoran & Co.		John M. Corcoran & Co.		Madison Park Devel Corp.		Homeowner's Rehab, Inc.	
At risk date	10/2013		3/2014		8/2023		9/2013	
Timeline								
Designee appointed	4/2012		4/2012		5/2012		10/2012	
Acquisition	12/2012		12/2012		4/2013		8/2013	
Permanent financing	3/2013		3/2013		10/2014		7/2014	
	Pre-40T	Post 40T	Pre-40T	Post 40T	Pre-40T	Post 40T	Pre-40T	Post 40T
Affordability								
Total units	49	49	75	75	52	52	94	94
Affordable units	49	49	75	75	52	52	94	94
Rent subsidy units	49	49	75	75	52	52	94	94
Term	<1 yr.	20 yrs.	<4 yrs.	20 yr mand. renew	9 yrs.	29 yrs.		15 + 15 yrs.
LIHTC units		n/a		n/a		49		94
Term		n/a		n/a		40 yrs.		50 yrs.
DHCD affd units		n/a		n/a		n/a		94
Term		n/a		n/a		n/a		41 yrs.
City affd units								94
Term								50 yrs.
40T restricted units		9		15	52	52		94
Term		min. 20 yrs.		min. 20 yrs.		min. 29 yrs		30 yrs
Source		MH Dispo. Ag.		MH Dispo. Ag.		40T AHR		40T AHR
Unit mix (targeted to):								
ELI <30%								19
VLI < 50%/60%	49	49	75	75	52	52		75
Low <80%							94	
Moderate <95%								
Unrestricted								
	==========	==========	==========	==========	==========	==========	==========	==========
Total	49	49	75	75	52	52	94	94
Financing/ Subsidies								
Acquisition Financing		MassHousing		MassHousing		CEDAC		CEDAC/City
Perm. Financing	MassHousing	TX Bonds	MassHousing	TX Bonds	HUD 221(d)(4)	T-E Bonds	MassHousing	T-E Bonds
Equity		Private		Private		LIHTC		LIHTC
Gap financing		n/a		n/a		n/a		CIPF, AHT, City
Rental Subsidy	S8	S8	S8	S8	S8	S8	PBVs	PBVs
Sources & Uses								
Permanent Debt	3,500,000	71,429	6,200,000	82,667	14,500,000	278,846	6,190,000	65,851
Equity	837,704	17,096	1,543,757	20,583	6,588,000	126,692	7,567,196	80,502
Gap Financing - State							2,500,000	26,596
Gap Financing - Local							3,652,000	38,851
Soft Debt - Other	0	0	0	0	5,030,000	96,731	5,435,035	57,820
Deferred fee	0	0	0	0		0		0
Other	20,667	422	28,517	380	75,000	1,442		0
	==========	==========	==========	==========	==========	==========	==========	==========
Total	4,358,371	88,946	7,772,274	103,630	26,193,000	503,712	25,344,231	269,619
Acquisition	3,110,000	63,469	6,075,000	81,000	18,850,000	362,500	14,200,000	151,064
Rehab	0	0	0	0	3,360,000	64,615	5,313,001	56,521
Soft Costs	408,371	8,334	342,274	4,564	1,448,000	27,846	2,968,269	31,577
Reserves	840,000	17,143	1,355,000	18,067	915,000	17,596	1,213,962	12,914
Developer fee	0	0	0	0	1,620,000	31,154	1,649,000	17,543
	==========	==========	==========	==========	==========	==========	==========	==========
Total	4,358,371	88,946	7,772,274	103,630	26,193,000	503,712	25,344,232	269,619

Source:

Note 1

Note 2

Note 3

Note 4

EXHIBIT 4
40T PRELIMINARY EXEMPTIONS APPROVED

40T PRELIMINARY EXEMPTIONS APPROVED through May 31, 2014	SOA	DHCD Prelim Exempt	% Total			Units Pre-40T	Units Post-40T	Net Change			DHCD Final Certs							
Grounds for Exemption:																		
Preserving affordability	6a(4)	62	53.0%			5,012	5,034	22			18							
Transfer to affiliate; no termination	6a(6)	34	29.1%			4,014	3,905	-109	(note 2)		7							
S8 only - renewing	6a(5)	5	4.3%			1,239	1,239	0			2							
>15 yrs affordability remaining	6a(7)	2	1.7%			60	60	0			0							
Foreclosure/ deed-in-lieu	6a(3)	1	0.9%			0	n/a		(note 3)		1							
Grandfathered: existing P&S	6a(8)	13	11.1%			1,265	n/a				11							
		======	======			======	======	======			======							
Total		117	100.0%			11,590					39							
Total adjusted (note 1)		103				10,325	10,238	-87			27							

	Term of Affordability Restriction					Term of Rental Subsidy					Depth of Affordability					Number of Affordable Units		
	Less	**Same**	**More**	**n/a**		**Less**	**Same**	**More**	**n/a**		**Less**	**Same**	**More**	**BB-->TC Rents** (note 4)		**Less**	**Same**	**More**
Grounds for Exemption:																		
Preserving affordability	0	21	39	2		2	17	28	15		1	28	33	11		5	52	5
Transfer to affiliate; no termination	1	7	26	0		0	15	16	3		1	12	21	4		4	24	6
S8 only - renewing	0	0	3	2		0	0	5	0		0	3	2	2		0	5	0
>15 yrs affordability remaining	0	2	0	0		0	0	0	2		0	2	0	0		0	2	0
	======	======	======	======		======	======	======	======		======	======	======	======		======	======	======
Total adjusted (note 1)	1	30	68	4		2	32	49	20		2	45	56	17		9	83	11
				103					103				103					103
Percent	1.0%	29.1%	66.0%	3.9%		1.9%	31.1%	47.6%	19.4%		1.9%	43.7%	54.4%	16.5%		8.7%	80.6%	10.7%
Total				100.0%					100.0%				100.0%					100.0%

Source: Compiled from DHCD preliminary exemption letters, owner requests, and final certificates issued.

Note 1 Excluding exemptions for foreclosure/ deed-in-lieu or grandfathered sales; no affordability data available.

Note 2 Lost units due to mortgage subsidy restrictions expiring post-40T but prior to exemption request filing. These are not viewed as terminations under 40T. Includes 1 property (102 units) subject to 40T "look-back" provisions whose restrictions had fully expired.

Note 3 Property with multiple exemptions filed at different stages; units counted in a previous category.

Note 4 Budget- based rents shifting to tax credit rents upon subsidized mortgage maturity or prepayment; may be less affordable.

EXHIBIT 5
AFFORDABLE UNITS LOST SINCE 40T

AFFORDABLE UNITS LOST SINCE 40T through 5/31/14 (Subsidized Mortgage Projects)	Projects (note 1)	Orig Units Total	Orig Affd Units	Orig S8 Units	Orig RAP/SUPP Units	New PBV Units	New Affd Units	Lost Affd Units (net)	Lost Affordable Units (Net): Non-Pres Existing Owners	40T Sales (note 2)	Other Pres. Existing Owners (note 3)	Other/ UNK
Maturity Date												
2010	12	2,841	2,841	1,568	0	0	1,946	895	793	102	0	0
2011	11	1,758	1,664	1,106	7	0	1,283	381	261	-11	0	131
2012	16	2,710	2,708	1,745	0	83	2,388	320	217	103	0	0
2013	21	3,224	2,621	1,107	151	519	2,335	286	190	0	54	42
2014 - thru 5/31	23	3,308	3,186	1,306	262	591	2,667	519	341	37	0	141
2015 - prepaid	1	118	118	118	0	0	118	0	0	0	0	0
2016 - prepaid	6	682	682	455	31	63	665	17	0	0	17	0
2017 - prepaid	10	1,500	1,444	0	93	617	1,443	1	0	4	-3	0
2018 - prepaid	4	384	372	0	81	242	362	10	0	0	10	0
2019 - prepaid	1	71	71	0	37	0	71	0	0	0	0	0
Subtotal	105	16,596	15,707	7,405	662	2,115	13,278	2,429	1,802	235	78	314
Percent								100.0%	74.2%	9.7%	3.2%	12.9%

Sources: Compiled from: CEDAC, HUD, and MassHousing databases; prior studies by the author; 40T termination notices and exemption requests, approvals, and certificates filed with DHCD and/or CEDAC; and project-specific information for completed transactions.

Note 1 Includes all projects subsidized under 221d)(3) BMIR/ 236/ 13A whose mortgages matured, or were prepaid, between 11/23/09 and 5/31/14.

Note 2 Includes projects sold pursuant to 40T Right of First Refusal or exempt sales provisions (completed sales transactions). This total exceeds the number of net affordable units proposed to be lost through 40T exempt sales (see Exhibit 4) because it is limited to subsidized mortgage units. Most new affordable units proposed to be added under 40T are located in other types of affordable projects.

Note 3 Includes RAD, MTW, and other preservation conversions carried out by existing owners (not sales).

Exhibit 6
Acknowledgements

The following preservation stakeholders were consulted, interviewed, and/or provided documents or information during the course of this study:

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