Report of the Expiring Use Working Group

for the Joint Committee on Housing

Senator Susan Tucker, Chair
Representative Kevin Honan, Chair

June 6, 2007

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Acknowledgements:

Citizens' Housing and Planning Association (CHAPA) wishes to thank Senator Susan Tucker and Representative Kevin Honan, co-chairs of the Joint Committee on Housing, for inviting us to call together this working group and for giving the group time to meet in advance of scheduling a public hearing on the preservation bills before the committee.

We also want to acknowledge Rachel Heller and Thomas Plihcik, committee staff, who provided assistance to this effort. Additionally, this report would not have been possible without the time and effort expended by the working group members and the group's chairman, Vincent O'Donnell. We also want to thank Peter Munkenbeck who staffed the working group. Finally, we would be remiss if we failed to recognize the work of Representative Alice Peisch's subcommittee and the many owners, residents, and policy makers who are dedicated to preserving and increasing the Commonwealth's supply of housing that is affordable to low and moderate income households.

June 6, 2007

The Honorable Kevin Honan
The Honorable Susan Tucker
Co-Chairs, Joint Committee on Housing
State House
Boston, MA 02133

Dear Chairman Honan and Chairwoman Tucker:

In response to your invitation, CHAPA convened a working group whose members have an interest and expertise in the area of preservation of affordable housing to consider three bills that are before the Joint Committee on Housing (S. 782, H. 1276, and H. 1295) and to offer its suggestions and advice on the bills and how they might be altered to better accomplish their purpose.

The working group met four times (April 3, April 23, May 9, and May 23) over seven weeks and in subcommittees on other occasions. Its members and support staff also conducted interviews and research regarding current and past practice, laws and case precedents in Massachusetts and in other states. A list of working group members is in attachment 4 of this report.

Unfortunately, the working group did not reach complete consensus on the most policy-relevant issues related to the bills. The range of opinion as to the impact of these policies on owners and on existing and future low-income residents made it difficult to craft a result that would garner the voluntary endorsement of the various parties within the parameters and timeframe of the working group.

Nonetheless, some clear results of the group's work are worth reporting to you as they may clarify and narrow the issues and focus the debate. We also want to convey some practical and technical concerns and recommendations that were expressed by successful practitioners in various areas of affordable housing preservation.

We were impressed with the commitment and diligence of each Working Group member, and by the depth and frankness of the discussion. It was clear that each member had a deep commitment to the preservation of affordable housing, even when we could not fully agree on an effective solution. We are grateful for the time and effort that the members contributed.

Sincerely,

Vincent O'Donnell
Chair, Expiring Use Working Group

Aaron Gornstein
Executive Director, CHAPA

Introduction and Background

The committee had four plenary working sessions. This section provides some key highlights of each session.

Meeting I. After an initial charge to the committee by Senator Tucker and Representative Honan, the initial session focused on defining the scope of the problem to be addressed by the legislation, and singling out the central issues to be discussed and identifying topics for further investigation prior to the next meeting. There was consensus that the vast majority of the units that had reached the end of their term of restriction over the past 20 years had indeed continued as subsidized housing using a wide variety of sources of subsidy. Data obtained from CEDAC showed a net loss of 5,416 units of subsidized housing due to the expiration of use restrictions and/or federal contracts.

It was also noted that several important properties had become market housing and that several more were likely to do so in the near future. Because of factors such as the lack of suitable sites, land and construction costs, land use restrictions, and the loss of federal project-based subsidies upon conversion, the units lost may be very difficult to replace. While it is impossible to be precise (because the decision to convert to market is solely that of the private owner), the scale of the problem in the coming decade is in the range of several thousand units out of a pool of tens of thousands. Because of changes in the inventory of developments at-risk (developments reaching their 40-year mortgage maturity dates rather than prepayment dates and expiring federal tax credit units) and the lack of federal preservation programs, many believed that it is possible the rate of loss will increase going forward.

The key issue identified was whether an owner who wishes to leave the regulatory environment and convert the housing to market should be obliged to offer to sell to a preservation buyer willing to pay market price (as determined by an appraisal process) and preserve the housing as affordable. The issues identified for further study included recent laws in other state and/or local jurisdictions (Washington D.C., Maryland, New York, Rhode Island, and Illinois) and the circumstances surrounding housing in Massachusetts that recently went or soon may go to market (principally developments located in Boston, Cambridge, Lawrence, and Andover).

Meeting II. At the second meeting, it was reported that the units that had converted to market had mostly provided subsidy to tenants in place [in the form of Enhanced Vouchers] where both the properties and the tenants qualify for them, and that the population in the buildings had become progressively more market rate as the subsidized tenants moved out. Also, some owners clearly would not respond to any positive incentive to remain in the regulatory environment and would not be willing to sell at market value to an owner who would continue with subsidies.

The federal Government Accountability Office [GAO] also recently concluded that over 90% of all units nation-wide were renewing their HUD Section 8 contracts upon expiration, but that some aspects of Section 8 were an impediment to renewal for some

owners. It was also clear from the Andover case that an extremely complex challenge exists for any municipality that hopes to secure a property's continued compliance with regulatory restrictions when competing with market buyers and market timetables, even where an owner is open to preservation and the state is willing to commit substantial resources.

The prospect of relying upon or replicating eminent domain as a solution to expiring use, as proposed by some owner representatives, was examined in depth. The conclusions of the non-profit, tenant, and municipal representatives were that the urban renewal overtones of eminent domain would make it politically difficulty to use and that the municipality would bear a very large uncertainty as to price, potentially for several years pending the typical litigation as to fair market value. The issue of property valuation was discussed at length, and owner representatives stated that any bill should provide an owner with the opportunity for judicial review of the valuation. The owners also emphasized that determining fair market value is complicated, especially when it comes to the valuation of affordable housing properties.

Some believed that the likely available public resources would not permit preservation of all units and that the creation of a mandatory sale would unduly shift public resources to expensive preservation deals to the disadvantage of other affordable housing needs. Others stated that access to resources (especially 4% Tax Credits through private activity bonds issued by MassHousing and MassDevelopment) could be expanded to cover what they believed would be the relatively small additional demand that would be generated by the mandatory sales provision.

It was also noted that purchases involving the preservation of project-based Section 8 contracts could maximize the efficient use of state resources. That is, the income stream of a project-based Section 8 contract could help to reduce the need for state resources that would otherwise be required to achieve the same level of affordability.

Meeting III. At the third meeting, the impact of preservation laws in Montgomery County, Maryland and Washington D.C. were reviewed. Both require an opportunity for the government or the residents to buy, but only if an owner intends to sell (a right of first refusal). The general result of these laws was to create a good deal of negotiation early on between the sellers and the groups with the opportunity to purchase. The purchase and sales agreements also tend to postpone most careful due diligence until after the residents or government have decided if they plan to buy. Generally, it is described as a fairly orderly and productive process and the market has adjusted to such laws.

Turning to Massachusetts, the committee agreed that a bill that mimics eminent domain does not add much to the body of laws because both M.G.L. Chapter 79 (town takes first and learns price later) and Chapter 80A (town learns the price before finalizing the taking) are on the books. It was agreed that there should be a standard in any bill that defines an acceptable preservation outcome ('safe harbor') and that it should apply to owners that remain or new owners equally. Finally, it was agreed that the Internal Revenue Code (IRC) Section 1031 Like-Kind Exchange market had sufficiently

improved that an owner obliged to sell to a buyer willing to preserve use restrictions could find a way to avoid capital gains.

Meeting IV. At the final meeting, there was a report from a subcommittee that met with an owner who has converted projects to market regarding his perspective on the expiring use topic and how his properties have been affected. There was also discussion and general support for various incentives to further preservation (contained in Attachment II). There was a full discussion of the pros and cons of the basic question of whether to recommend to the legislature that it adopt a mandatory sale requirement in the cases that owners intend to allow the restriction to expire.

The working group attempted to narrow the differences among members to yield a compromise position, but no consensus was reached. Objections to the concept centered on the philosophical issue of an owner's right to his property and the practical problems related to setting a fair price and proceeding with an expeditious sale. Proponents focused on the loss of project-based federal subsidies; the impact on residents who could eventually be displaced; the gradual loss of community as low income residents moved away; the loss to market rate housing of valuable developments currently occupied by low income households who, in many cases, would end up in less favored locations and less well-maintained units; and the difficulty of accessing any housing at all even with mobile vouchers, especially during periods experiencing a tight rental market.

Opponents of the proposed legislation focused on the impact of continuing the concentration of governmentally assisted housing in certain distressed communities, the benefits of improving income diversity, the opportunity to utilize the voucher program to enhance racial desegregation, and, to the extent resources were inadequate to preserve every at-risk development, the implications of creating a public process for picking among the developments to be preserved.

Discussion of the Proposed Legislation

The balance of this report describes some alternative ways of addressing the central issues of the bills without representing that any of them are endorsed by the working group as a whole.

While there was no overall agreement on the central issue of obligatory sale, it is useful to lay out options which attempt to address owners' primary concerns.

The obligation to sell: Most working group members who are for-profit owners or represent for-profit owners of regulated properties would not support a provision that obliges such owners to sell their properties to a preservation purchaser in the event that they do not wish to continue to accept subsidy and restrict occupancy to lower income residents. (One for-profit owner of the working group was willing to accept the obligation to sell as long as it was done at fair market value). Tenant advocates and non-profit housing developers, on the other hand, felt that this obligation was a minimum condition of any meaningful legislation.

What we did learn from some owners was that the least objectionable version of an obligation to sell is one that has the following characteristics:

1. The price is full market value unencumbered by any restrictions except those that cannot be unilaterally terminated by the owner and are still in effect after the sale.
2. The price is determined by a process with the judicial safeguards that are in effect in the analogous situation of eminent domain. One alternative to this might be to allow owners to choose between an appraisal process and a right of first refusal (ROFR). An appraisal asks experts to set the price without going to the market to solicit competing offers. In ROFR, the seller first lines up a willing buyer and then is required to offer to sell to the municipality under the same terms and conditions.
3. A substantial non-refundable deposit is required.
4. The buyer is obliged, once it declares its intention, to complete the transaction regardless of the ultimate determination of price (specific performance).
5. The time frames are short from the initial signal to the outcome.
6. The prospective buyer has the proven capacity to complete the transaction.

Non-profit and tenant advocates, however, raised concerns about some of these criteria, (especially number 4, stating that it is a higher requirement than expected in a market sale) while pointing out that others (number 3 and number 5) are contained in the proposed legislation. The owner representatives stated that these conditions are what exist in the private marketplace and expressed concerns about a non-voluntary sale that would require only one side to be bound to proceed.

Right of First Refusal/Voluntary Sale: In the event that legislation did not require a non-preserving owner to sell a property that has expiring use restrictions and/or subsidy contracts, it would be important to learn whether there is a substantial constituency for a bill along the lines of the approach used in Washington, D.C. and Maryland.

The working group did learn some important provisions for a statute that requires the owner of a regulated property, who decides to sell or to change ownership structure, to provide a purchase opportunity for a preservation buyer interested in extending the project's affordability.

The owner should be able to elect one of two choices prior to the expiration of a restriction that triggers the statute:

1. The seller may seek market buyers by any means and select a bona fide third party buyer to purchase the property at a market-based price, subject only to any restrictions that would in any case survive the expiration of the trigger event, and subject to a Right of First Refusal (ROFR) that runs to the municipality or other designated responsible buyer. This ROFR should have a 60-day period during which it must be elected and a subsequent 180-day period to close. The nonrefundable deposit should be capped at 3% of the purchase price. Beyond

these minimum requirements, all terms (such as due diligence, environmental, title, etc.) and price would be those in the purchase agreement with the market buyer. Owner advocates believed that the ROFR should have the same terms as the market transaction with respect to timeframes and deposits and objected to an appraisal process for determining value.

OR:

2. The seller may proceed with the process outlined in all three bills obliging the owner to (i) make an offer of sale to the potential preservation purchaser identified in the statute, (ii) entertain the purchaser's counter-offer, and then (iii) either voluntarily agree on price and terms or go through the appraisal process to set the price and finally (iv) to sell the property.

   Modifications: Under this second option, the bills do not currently provide for a resolution of terms other than price, and do not have a mechanism for resolving which approach to reconciling appraisals would prevail in the event of a disagreement. We recommend that in any such approach the legislation should provide for a Department of Housing and Community Development (DHCD) hearing officer, specially trained, to resolve price and terms disputes within a 45 day time frame, and that this resolution be appealable to Superior Court using a standard equivalent to that which governs appeals of the Housing Appeals Committee of DHCD.

   (Note: this choice of price-setting mechanisms would work equally well to strengthen the seller's protection in the context of an obligation to sell)

The Affordability Outcome: There was substantial agreement that a "safe harbor" standard should be established for situations that will achieve a threshold preservation outcome. Under either a required sale or a ROFR process, when a willing seller wishes to negotiate an outcome satisfying the obligation without going through all the steps, this should be permitted provided that the affordability outcome is sufficient. Many working group members expressed the view that the preferred outcome, to the extent it is feasible, is a regime of affordability that is equivalent at least in depth, breadth and security to the one in place before the trigger event, and one that will last for as long as practicable or the maximum time permitted by the applicable subsidy program. The bills differ considerably in how they address the minimum acceptable outcome after the transaction, and some have a different standard for an owner who remains in control than for the replacement owner.

There was consensus in the working group that the same minimum acceptable standard be applied to both an owner who remains in control and to a replacement owner (purchaser). There was also agreement that the outcome should adjust to available resources so as to avoid complete affordability loss in cases when there are resources available for a significant level of preservation, but less than the pre-trigger event level or where other reasonable goals, as approved by DHCD, are being achieved.

The work of the subcommittees. There are two subcommittee work products that, while they do not have the endorsement of the full working group, are useful in addressing practical issues in the bills and related ideas.

1. Subcommittee on bill terms. A group of practitioners met to examine in detail the terms of each bill and offer comments on how the terms could be altered to improve efficacy and clarity. This subcommittee's premise was that there would be a statute adopted that requires a current owner to sell in the event the owner decides not to extend restrictions. Again, there was not consensus from the full working group, but we thought this work product should be shared with you (see Attachment I).

2. Subcommittee on incentives. There was broad consensus that the past 20 years had shown that well-crafted incentives to owners had indeed done a great deal to further the interest of preserving affordable housing (with most developments being preserved), and that the legislature should be encouraged to continue to focus attention on the opportunities to create and expand incentives to preservation that efficiently use state and federal resources. In that spirit, a brief description was prepared of possible preservation incentives, some of which may require legislative action, and this is in Attachment II. Proponents of the expiring use legislation believed that such incentives and a regulatory approach were complimentary solutions, not mutually exclusive.

Conclusion

While it is disappointing that the attempt at consensus among all major stakeholders on the main terms of a preservation statute did not succeed, the process did result in a detailed examination of all of the issues and a clarification and narrowing of differences. Also, some practical information has emerged on how to address the concerns of different parties, and on how a bill could be structured if the Joint Committee on Housing decides that circumstances warrant reporting one.

The threshold decision for the Joint Committee on Housing is whether to continue with the obligatory sale requirement. If so, the section on "obligation to sell" is worthy of your consideration. If legislators wish to scale back to a bill which creates a right to match an offer only where a sale is pending, then the "Right of First Refusal/Voluntary Sale" section above provides some input. In either event, the "Affordability Outcome" provides input on the terms of a 'safe harbor' provision, and Attachment I provides detailed input on the other terms a bill would address.

Attachment I

Report of the Subcommittee on Preservation Bill Terms

This subcommittee report is drafted to provide input in the event that the legislature proceeds with a bill that requires an option to purchase at market value when an owner would otherwise prefer to terminate affordability and retain ownership. Because this central premise is not endorsed by the working group as a whole, it follows that this report is also not endorsed. Also, the contents of this subcommittee report would require some adjustment if the legislature proceeds with a bill that provides an option to purchase only when an owner plans to sell.

1. Categories of housing to be covered: The three bills are consistent as to the categories of housing to be covered except as to three programs: projects with State low-income housing tax credit; projects with project-based MRVP assistance; and SHARP projects. Should these be included?

> **Recommendation:** Include all three programs in order to further establish that the bill is a law of general applicability that will not be preempted by federal law. In addition, projects that have complied with this statute will also be subject to the statute in the future when then-expiring restrictions mature.

2. Notification: All three bills require the owner to give notice one year prior to affordability termination. In addition, the Tucker bill requires DHCD to give 24 months' notice that affordability restrictions may terminate in order to give tenants ample time to participate in the process and localities to prepare. All three bills are consistent as to who should receive notice except that the Tucker bill adds three additional recipients: tenant organization, local elected legislative body (e.g., city council), and local housing authority. What should notice provisions be and who should receive/give notice(s)?

> **Recommendation:** Where a property is subject to affordability restrictions (e.g., subsidized mortgage, rental subsidy contract, 121A use restrictions) with a term longer than 24 months, require the owner (not DHCD) to give a purely informational "early warning" notice 24 months prior to the expiration of the term of the affordability restrictions. The early warning should state that the restrictions will expire, list options for the property, and state that the owner has 12 months to decide which option to pursue, and that the owner might act prior to that time. This informational notice requirement would be triggered only by the expiration of the term of affordability restrictions, would not be triggered by prepayments or other owner-initiated terminations, and would not prohibit any owner action (including prepayment) to terminate restrictions during the notice period-- subject to the one year notice in all three bills that applies to all terminations. DHCD would approve form of notice/develop form notice appropriate to circumstances, which would be sufficient to provide notice but not to alarm tenants. Recipients

of both notices should include the tenant organization as well as the others listed in all three bills.

3. Who gets to exercise right of first refusal/option to purchase? All three bills give the municipality the options to (i) exercise the right itself, (ii) designate another entity to exercise the right, or (iii) do nothing.

Where a municipality does nothing, or desists, there is no provision for anyone else to exercise the right. Should other entities be able to exercise the right to purchase if the municipality does not act (e.g., tenant association or designee, and/or non-profit or designee)?

> **Recommendation:** Add the Department of Housing and Community Development (DHCD) or its designee in the event the municipality declines. Give the municipality 30 days to elect or defer to DHCD, and then give 30 days to DHCD to elect or decline to organize a purchase.

4. What is the standard for preserving affordability for (i) a proposed purchaser and for (ii) an owner seeking to be exempt from sale provisions?

> **(a) Should the standard for preserving affordability be the same for the proposed purchaser and exempt owner?** Senate bill 782 has the same standard for both the proposed purchaser and an owner seeking to be exempt from the bill, while H. 1276 and H. 1295 have a high standard for proposed purchasers (purchaser must preserve the housing development's existing affordability restrictions for no less than 99 years) and a number of exemptions for owners with potentially very low standards (e.g., any mortgage financing from a number of public or quasi-public agencies without regard to affordability level; an allocation of low-income housing tax credits without regard to number of units; funding preserving 50% (H. 1276) or 80% (H. 1295) of current affordable units).
>
> Note: None of the bills is triggered unless there is a prepayment or other termination of affordability, so an owner renewing an existing subsidy contract for 100% of the units in a development would not be affected by the bills.
>
> > **Recommendation:** The standard should be the same for both the proposed purchaser and exempt owner.
>
> **(b) What should the standard be?** Considerations: difficulty of having one standard that will apply to the huge number of possible programs/use restrictions; changes in subsidy programs and availability over time; owner's and prospective purchaser's desire to have a clear "safe harbor".

Options:

(1) Flexible standard with a safe harbor: Senate bill 782 envisions that DHCD would review proposed transactions (proposed municipal/designee purchases as well as owner transactions involving a termination of some affordability restriction for which an owner seeks an exemption) to determine whether the transaction "preserves affordability." In the draft bill, a new purchaser or owner seeking an exemption must:

"take all reasonable, diligent, and good faith actions necessary

(i) to retain existing subsidies to the greatest extent possible, and to obtain additional subsidies, for the purpose of maintaining housing for the longest feasible period of time as housing affordable to low income households (those whose incomes do not exceed 80% of the area median income), especially very low (those whose incomes do not exceed 50% of the area median income) and extremely low-income households (those whose incomes do not exceed 30% of the area median income); and
(ii) to the greatest extent possible in light of available subsidies, to achieve tenant payments of no more than 30 percent of household income for rent and utilities." [It was suggested that the words "good faith" could be taken out, because people have tended to read this language as only requiring a "good faith" effort]

(2) Bright Line: In prior incarnations of this bill, some working group members proposed the following standard:

An owner remaining or a new buyer would be exempt from the process described in the statute if the purchase or renewal meets all of the following criteria:

(i) maintain the housing as affordable on terms at least as advantageous to current and future tenants as required by the existing affordability restrictions for the duration of their existing terms; and

(ii) provide the same number of project-based rental subsidy units as required by any existing project-based rental subsidy contract; and

(iii) for units with no current project-based rental subsidy that are vacant or occupied by households at or below 60% of the area median income at the time of termination, maintain the rents at a level no higher than Low Income Housing Tax Credit (LIHTC) rents (or payment standard rents for voucher holders) and limit occupancy in those units to households that qualify for LIHTC treatment; and

(iv) sign a maintenance of affordability agreement with DHCD that would require that the obligations in (i) through (iii) above be maintained for at least two years beyond the 24 month notice required.

Notes: (1) We do not recommend legislating the number of years the affordability is required because the property will be subject to the statute whenever the new restrictions are due to terminate. (2) We believe that the tenant protections described in (8) below do or should apply to residents displaced pursuant to (iii) above.

(3) Bright line with case by case exceptions: If an owner or buyer cannot meet all of the above criteria but is nevertheless providing the greatest level of affordability that can be accomplished with available subsidies, the owner should be able to apply for a certificate of compliance from DHCD with a showing that no higher level of affordability can reasonably be accomplished.

(4) Exemptions from any requirements of the bill without DHCD review: Two bills, H. 1276 and H. 1295, provide that the following are completely exempt from any requirements of the statute without providing for DHCD review or specifying levels of affordability: "any housing development with respect to which the owner has received, ["and continues to receive" H. 1276 only], a written commitment from the federal Department of Housing and Urban Development, the Massachusetts Department of Housing and Community Development, the Massachusetts Housing Partnership Fund, the Massachusetts Housing Finance Agency, the Massachusetts Development Finance Agency, or other similar government or quasi-public agency in connection with a proposed sale, transfer, other disposition or refinancing of such development for any one or more of the following:

(1) mortgage financing; (2) an allocation of low-income housing tax credits; (3) an extension or renewal of a government program contract providing affordability for the development; or (4) funding directed to preserving affordability, resulting in no less than 50% (H. 1276) or 80% (H. 1295) of the development's current affordable units; or any other disposition of publicly assisted housing in a manner pursuant to which the property after such disposition continues to be publicly assisted housing as defined in this section. Provided, if any development shall be subject to financing by any of the public agencies specifically named above, the provisions of subsection (b) of section 2 shall not take effect unless and until any public agency expressly named above shall fail to provide a commitment as set forth in this section, in (1) to (4) inclusive, within 180 days of the proposed prepayment or termination. "

Recommendation: We recommend (2) and (3) be adopted. We are concerned that (1) requires DHCD or another body to make fine grain judgments, considering alternatives to the proposed transaction, to

determine whether efforts were adequate to "preserve affordability". With regard to (4), this long list of exemptions would permit some projects to shed almost all subsidy- and use-restrictions.

(c) Role of administrative entity: Should DHCD or another administrative entity (e.g., Attorney General) have the role of deciding whether standard of affordability is met in a particular case?

Considerations: Some have questioned whether DHCD would have a conflict in this role because it controls funding, while others have said it is an advantage to have DHCD in this role because it controls funding. .

Attorney General as possible alternative/addition to DHCD:
The manufactured housing community statute, G.L. c. 140, section 32A-32S, gives shared regulatory oversight of mobile home parks to the Attorney General and DHCD. The AG also regulates public charities and generally has a legal oversight role.

Recommendation: Identify DHCD as the forum for resolving uncertainty about the bright line preservation test, and whether a waiver due to unavailability of subsidy is warranted, and providing regulatory oversight of the statute.

5. Retention of subsidy contracts: S. 782 requires the owner to "take all actions necessary to retain in place the current subsidy contracts on the affected public assisted housing" during the notice period, which the other bills do not.

Recommendation: Require the owner to take actions necessary to retain subsidy contract during the notice period, and during any re-start period.

6. Transactions categorically exempt from notice and purchase (i.e., not exempt because the owner is meeting an affordability standard or obtaining public financing): All three bills exempt a taking by eminent domain and a forced sale pursuant to a foreclosure. In addition, H. 1276 and H. 1295 also exempt some additional transactions: government taking by negotiated purchase; deed in lieu of foreclosure or agreed upon renegotiation; restructuring or repayment of past due debt between a lender and an owner; a transfer by gift, devise or operation of law; and, in H. 1276 only, the exercise of any remedies under any financing imposing affordability restrictions on the development.

Recommendation: Transactions will be categorically exempt from the statute only if they involve exercise of a right superior to affordability restrictions, e.g., eminent domain, property tax foreclosure or foreclosure of liens senior to the affordability restrictions.

7. Certificate of Compliance: Senate bill 782 includes an optional procedure where an owner can obtain a "certificate of compliance" from DHCD (or other administrative

entity) establishing that the owner complied with the various notice and purchase requirements of the bill. The certificate may be recorded in the appropriate registry. The rationale for this provision was to provide buyers and owners with a recordable instrument that confirms their compliance with the statute to satisfy investors, lenders and title insurers.

Recommendation: Include a certificate of compliance provision.

8. **Tenant Protections:** All the bills have similar provisions requiring owner to pay the cost of relocating tenants who are displaced by the termination of affordability restrictions/subsidy to a comparable affordable unit or pay the tenant the difference between the market rent the tenant must pay and an affordable rent for five years. This is similar to protections afforded tenants under Massachusetts state and local condominium conversion laws. Senate bill 782 limits application of this provision to low-income tenants and clarifies that the amount paid should be the difference between the actual rent the tenant is required to pay and the greater of (i) the amount of rent the tenant was required to pay at the time of termination or (ii) 30% of the tenant's household income

   Recommendation: Include tenant protections language from Senate bill 782 bill because it more clearly defines the formula for the rent differential.

Attachment II

Report of the Subcommittee on Preservation Incentives

These suggestions broaden the discussion of preservation to include recommendations to the General Court that focus on improving the incentive-based approach to preservation that has served the Commonwealth very well over the last twenty years. This approach has suffered in recent years, but with recent changes in the State House (and in Congress) we can move quickly to develop a set of 2007 preservation techniques that will help to preserve affordable housing.

Four ideas were submitted by members of the working group and are summarized below:

Preservation Bank: The marketplace for multifamily developments has become much more efficient in the last decade. It is not unusual for a sale of a major asset to be concluded within ninety days from the date the development is put on the market with significant binding deposits being made within thirty days of acceptance of an offer. One major obstacle for an owner who wishes to sell to working with a preservation oriented purchaser is the time, risk, and complexity of a full blown preservation transaction. As has been suggested during our meetings, one way to ameliorate this competitive disadvantage is to put in place a "Preservation Bank" (utilizing one or more of our existing quasi-public agencies) that would make acquisition bridge loans, which would be taken out post-acquisition by existing sources. There will be complications that need to be solved but the public sector has sufficient talent and experience to create and administer a bridge loan program. If underwritten properly, such a bank should represent no new state appropriations.

Reverse Equity Take Out Loans: This loan program would work exactly like a reverse equity take out loan does in the conventional single family housing market. Assume a MassHousing financed section 236 property with a prepayment lock-out expiring in 2015, an outstanding per-unit mortgage balance of $15,000, and a market value of $80,000 per unit. MassHousing could make an equity take-out loan at standard borrowing costs against the equity in the development. The loan would accrue interest and be repaid from the proceeds of a post-restriction transaction. Depending on underwriting and interest rate assumptions, this could allow an owner to take out substantial proceeds. In exchange for the loan, the owner would agree to a pre-emptive right to purchase. This would be similar to the Commonwealth's agricultural program that provides a tax incentive in exchange for the pre-emptive right to purchase. This type of program would be attractive to many owners. For technical reasons, this incentive may require a change in the MassHousing statute.

Front Running Use Restrictions: Rather than waiting until the year a use restriction expires, there could be an incentive for owners that permits an early preservation transaction. This would require the cooperation of MassHousing and HUD. The private sector is very sensitive to the time value of money. Being able to access significant

capital several years earlier than anticipated would be a meaningful incentive to engage in a preservation transaction. This is similar to what MassHousing has started to do with the section 8 developments that fully amortize beginning in 2010 and is what often occurs in the private marketplace when, for example, a retail or office building owner is interested in keeping a prime tenant. Since owners would be expected to accept a discount on price in exchange for the early release, this may also prove to be a cost-effective approach to advance preservation goals.

Donation Tax Credits: An interesting and effective tool used in Illinois and Missouri is the Donation Tax Credit. The credit provides a strippable one-time tax credit of 50% of the value of any property contributed to a non-profit. To claim the credit, the donor has to get an allocation from the state – and there is a set amount of donation-credit allocation authority for each year. This last element limits the total amount of state financial exposure in each year. The credits sell for approximately $.90, which means a $5,000,000 credit raises $4,500,000 of equity.

The credit implicitly induces a federal match, in terms of federal donation deductions. The states induce donations, and part of the economics is driven by a by-right federal tax benefit.

The economics of the federal donation deduction is that it is worth on its face about 30 – 35% (depending on the tax bracket of the taxpayer). It is actually worth a little more than that because of the asymmetrical nature of charitable donations: the donor deducts the full value of the donation, without having to recognize, from a tax perspective, the increase in value. Put differently, if the owner's basis in a debt free property is $1 million, and the value of the property is $5 million, if he donates it, he takes a $5 million charitable donation, without having to recognize the appreciation in value from $1 million to $5 million. On the other hand, if he sold it to a third party for $5 million, he would have to pay taxes on the $4 million appreciation in value. At the 20% bracket, this would cost the owner $800,000 in taxes.

In sum, a potential donor can get about 45% of the value of their property from donation credits, and approximately 45% from federal tax benefits. That means they are only getting 90%, but it also means that they are getting 90% of appraised value. They do not have to risk the actual market. Moreover, to the extent that there are other regulations (2 or 3 year notice requirements, right of first refusal requirements) that impede access to the market, a 90% return may look attractive.

This does not work for a lot of people, including many of the individuals who bought widely syndicated limited partnership interests in old Section 8 deals. The charitable donation is a tax preference item, and individuals are only allowed to offset up to 30% of their income in any year with charitable donations. On the other hand, donative deductions can be carried forward for up to 5 years.

There have been instances where the old limited partners have been bought out by high net-worth individuals. For many of those individuals, their income is sufficient that they

can use the benefits. It also often works for closely syndicated old deals where the investors are known, and the partnership can negotiate amongst themselves as to who gets cash and who gets charitable donation benefits. In addition, it works for most C corporations (i.e. – investors in tax credit deals), so it can be a tool for preserving those deals.

One important element is that notes and limited partnership interests qualify as donatable property. This means that many of the old 'basis booster' notes that were given in connection with early 1980's syndications can be bought out with donation, and tax credit investors can donate their partnership interests instead of selling the whole property.

Attachment III

Minutes of the Meetings

Expiring Use Working Group
Minutes
April 3, 2007

Members in attendance
David Abromowitz, Emily Achtenberg, Nancy Andersen, Amy Anthony, John Bennett, Laura Booth, Pat Canavan, Howard Cohen, Larry Curtis, Mark Curtiss, Mary-Louise Daly, Roger Herzog, Marty Jones, Joe Kriesberg, John Mahony, Vince O'Donnell, Jeanne Pinado, Kate Racer, Laura Schwarz, David Smith, and Margaret Turner

Support
Aaron Gornstein, Peter Munkenbeck and Chris Norris

Others in attendance
Deborah Goddard, Rachel Heller, Representative Kevin Honan, Judy Kelliher, Thomas Plihcik, Jeffrey Thomas, Senator Susan Tucker, and Carolyn Villers

Handouts
1) Agenda, 2) "A few thoughts to shape the discussion," and 3) Federally Assisted Units At Risk Through 2010

The meeting was called to order at 9:40 a.m. by Vince O'Donnell.

Attendees introduced themselves.

Senator Susan Tucker and Representative Kevin Honan, the Co-Chairs of the Joint Committee on Housing made brief welcoming remarks. They thanked CHAPA for convening the working group at the committee's request. They told the group that: it is their intention to move a bill this session, they do not expect the working group to reinvent the wheel, and they hope that the working group will come to common ground.

After Senator Tucker and Representative Honan left, *Vince* described the purpose and goals of the working group: to, within the next eight weeks, develop a compromise bill that can be presented to the Joint Committee on Housing. What needs fixing, and what would fix it?

Peter Munkenbeck has been hired by CHAPA to assist the working group by performing outside research and assisting with recommendations. Peter reviewed the "A few thoughts to shape the discussion" handout and estimated that starting with 27,000 total expiring use units in the next 3 years and making various assumptions, we are left with

approximately "6,804 units likely to be lost without a strong law" and then opened the floor for feedback.

Certain categories of housing are not on the CEDAC expiring use list (SHARP, project-based MRVP, certain tax credit deals, etc.). List is a work in progress. Corrections and suggestions should be brought to Roger's attention.

David A.: Have you talked to owners who opted out? *Peter M.*: No, but it's a good idea.

Jeanne P.: Address disincentives in current system that make it difficult for owners to remain in the programs or to renew.

Howard C.: What does it cost to preserve? What can we afford? Are we over or under compensating owners when we preserve?

David S.: How much money do we have? What type of money? Who's paying it? *Vince*: Who paid for what has varied over the years.

Joe: 500 to 2,000 units at risk per year over the next three years is a good range. If we can agree on that, then there's no need to clarify it further.

Mary-Louise: Think of mindset of developers who just want out of the program. *Peter M.*: HUD fatigue.

John M. and Kate R.: What impact has federal policy had? Don't rule out the link to federal policy. Vince: There is a separate group working on the federal side.

Margaret: Look at expiring use as a loss of federal dollars (such as project-based Section 8 contracts), not just loss of affordable housing.

Emily: Look at specifics of what's "broken" – for example, a seller who wants to sell for preservation, but can't be sure of the true market value.

Loss of Units, Meaning of

Peter M. reviewed the second page of the handout and discussed "what does 'loss of units' mean."

The following items were added during feedback after Peter's presentation: the existing scale and location of developments cannot be replicated (land use changes, less density, etc.), the loss of affordability makes it difficult to ensure economic, racial, and housing type diversity in a city/town, elders who may have moved into the development when they were young experience difficulty when accessing services if they move, potential reduction in a city or town's count for purposes of the subsidized housing inventory.

Preservation and Finances

Vince: What do we mean by preserved?

Ideally, no loss of any affordable unit in perpetuity (though some members suggested that it might make sense, in some cases, for a development to change its rent structure). However, any change in rent regime needs to be reviewed to determine the quality, length, and predictability of affordability.

What is our scope? *Vince*: The group has been asked to focus on 3 bills; however, we need a context. *Aaron*: we could come up with two documents, one bill and then a set of additional recommendations.

Members of the working group discussed the need to place any recommendations into a financial context, though questions were raised as to whether the group should discuss how and whether to increase resources as opposed to merely reallocating existing resources. Also, it was added that there should be a review of where we are using existing money and whether, for example, federal funds can be leveraged to preserve affordability with a minimal state investment. Vince said that the group would be honest about the financial implications of what is proposed.

Legislation

Some members suggested that the group, "come up with the best regulatory system we can" and find a balance between being practical and "solving all policy problems." *Joe K.:* reminded the group of the importance of producing a good bill that's adaptable for the future, with built in flexibility. Another member said that the Legislature needs to have a bill because it seems tired of reacting to the whim of a sitting governor regarding preservation.

General agreement that resources will be an important part of any solution and that though they may be insufficient to preserve every property, it will allow for triaging.

Howard and other members raised questions about the need for legislation. We've got to know what's broken before we try to fix it. Legislation may have unintended consequences. The suggestion was made that rather than a regulatory system, the group should work on a better incentive system.

Other Issues of Concern

- Any legislation which includes an option to purchase or right of first refusal needs to include a stated price and the ability to set terms.
- The group needs to prevent post preservation obsolescence (ie: "judicial" preservation, but not in improvements in terms of actual operating and capital needs) of developments.
- We want to avoid long litigation.
- There appears to be agreement that owners should receive fair market value, but the question is how to determine that value.

- How can we place a potential non-profit or municipal purchaser on the same level as a private-purchaser (new capital source with immediate availability of capital and predictable resources).
- What can/should be done if an owner wants to raise rents to market level and is unwilling to sell the property?
- Concern was expressed that some owners, after opting out, create an environment inhospitable to remaining enhanced voucher holders. Response indicated support for anti-abuse legislation, separately from the bills under consideration.
- Should this bill take into consideration resource limitations and the opportunity cost of moving scarce dollars away from other critical needs [such as public housing], or should it simply regard resources as a separate, fungible, political decision?
- If a bill induces more transactions and fully funds them, how can an inflationary effect be avoided?

Vince: Need to move toward what is achievable. Issues of disagreement such as determination of value.

Research for Next Meeting

- What has happened to "lost" units and residents? Who's living in "lost" units, and what are the rents in these units? – Roger and Peter
- Definition of market value, rapid response, capital – Howard, Emily, Larry, and Joe
- What resources are currently available? - Chris
- Exit tax implications for owners, and can this problem be remedied or reduced – Margaret and David A.
- What has been preserved, and what does "preserved" mean in different cases?

Meeting schedule, all meetings to be held at CHAPA from 9:30 a.m. until 11:30 a.m.
Monday, April 23
Wednesday, May 9
Wednesday, May 23

Draft legislation is due to the Joint Committee on Housing by the end of May.

The meeting adjourned at 11:30 a.m.

Expiring Use Working Group
Minutes
April 23, 2007 (Meeting 2)

Members in attendance
David Abromowitz, Emily Achtenberg, Nancy Andersen, John Bennett, Laura Booth, Howard Cohen, Mary-Louise Daly, Roger Herzog, Marty Jones, Joe Kriesberg, John Mahony, Vince O'Donnell, Jeanne Pinado, Lisa Schwarz, and Margaret Turner

Members absent
Amy Anthony, Pat Canavan, Larry Curtis, Mark Curtiss, Kate Racer, David Smith

Support
Aaron Gornstein, Peter Munkenbeck and Chris Norris

Others in attendance
Wendy Cohen for Mark Curtiss, Deborah Goddard & Patrick Hart from DHCD, Jeffrey Oakman for David Smith, and Carolyn Villers from Mass. Senior Action

Handouts
1) Agenda, 2) Current Financial Resources, 3) Andover Case Study, 4) State & Local Laws, and 5) Selected language from 26 U.S.C. Sec. 1033

The meeting was called to order at 9:35 a.m. by Vince O'Donnell.

Attendees introduced themselves.

Research since last meeting

"Lost" Units
Peter M reported on his conversation with owners of High Point and Huron Towers.

High Point (Boston) – Owner approached HUD and reached agreement to prepay the D3 mortgage early in order to secure enhanced vouchers for non-Section 8 tenants. Based on this agreement, all existing tenants had the opportunity for enhanced vouchers. Conscious decision. No history yet because less than one year. 319 units originally had Section 8 PBA. 394 currently have Section 8 enhanced vouchers. Unused enhanced vouchers were given to the Boston Housing Authority and become part of the overall regular voucher pool. Agreed with the city to maintain 50% of the units affordable for 10 years. 540 total units.

Huron Towers (Cambridge) – 248 units, 180 received enhanced vouchers, 70 remain at the development almost ten years later (28% of total units). Majority left for nursing homes or died.

Owners indicated that there was no incentive that would have kept them in the program. They wanted out. Their rationale, in part, was that federal and state agencies are difficult to deal with and mark up to market does not rise fast enough and is too rigid. In Peter's opinion, reasons for leaving are primarily related to a business strategy of ending regulatory constraints and becoming a free market player. There was also dissatisfaction with HUD's method for calculating the allowable distributions to owners under ELIHPA, based on actual dollar amount rather than a percentage.

Joe K asked Peter whether he asked the owners about their willingness to sell the properties. Peter said that he did not ask directly but it was clear from the context that the owner was very much engaged in actively managing these particular assets.

Peter told the group about a recent GAO study (April 2007) regarding Section 8 preservation. It found that approximately 92% of the contracts have been renewed and 95% of the units have been preserved. Many were mark up to market and mark to market. The main impediments to renewal were (1) the 'all or nothing' requirement that prevented Section 8 renewal for anything less than 100% of the units previously under contract, and (2) the inadequacy and slowness of OCAF adjustments. The full report is available at: http://www.gao.gov/new.items/d07290.pdf.

Vince summarized Pat Canavan's conversation with another owner. He wanted to take his business in a certain direction and was troubled by regulation and exposure in regulated environment. Opted out in August '06 in Lawrence.

Tax Implications
Margaret said that although she is not a tax attorney, she reviewed the relevant U.S. Code, IRS rulings, and other court cases. These were distributed to attendees.

The question is, "What constitutes sufficient government action to allow for a tax deferral?"

There was some discussion about requesting a letter ruling from the IRS, but it was thought that it would take too long to get an answer and that perhaps other states have already dealt with this issue.

David A – We've used this on individual deals, but, only when there has been federal, state, or local action. What have other states done? Has this been used, or have they requested rulings? Owner will need a level of certainty. The key question is whether the fact that the property owner makes an election to terminate HUD subsidy as a triggering event diminishes the validity of an "involuntary taking".

Margaret – The fact that an owner has options does not necessarily mean that the transfer is not involuntary.

Jeanne – If the property is already in an urban renewal district, perhaps that designation could somehow be used.

Howard – This is not a big issue. Timetable is issue. Marty agreed that this is not a go or no go issue.

*****Margaret and David will do further research regarding other states' actions and the impact of owners having a choice.

Available Financial Resources
Chris distributed a list of "Current Available Financial Resources" that was prepared by the Department of Housing and Community Development.

"Lost" Units cont. Discussion re: Andover Case Study
Emily Achtenberg distributed a memo regarding her work on a development in Andover. It is an expired tax credit, mixed-income development with an owner who is cooperative. The owner is cooperating with the town and wants/wanted to sell. If the affordable units are lost, the town will fall below 10% on its subsidized housing inventory. Had a purchase and sale agreement with a nonprofit, but it fell through. The market changed significantly in the middle of the bidding process, and it was difficult to determine value. Market sale competing against preservation within the same proposal.

Emily – We need a process to determine a fair price, some type of mechanism with rules. Also, need time for due diligence. Still do not know how much money (resources) state will provide for the project. Need that information. Plea for process and system with resource information up front.

Howard – The owner could have voluntarily agreed to an appraisal process and did not. Why? Difficulty setting price is fundamental difficulty. Also, it is a 40B development with old language regarding expiration after 15 years. Most high value suburban 40Bs are locked for longer terms.

<u>Valuation</u>

Peter M – If there is a legislatively sanctioned process of prioritizing land use with opposing views for future property, then generally they use appraisal to establish value.

Howard – We already have an established process…eminent domain. This provides owners with judicial review of the valuation process. Vince – Appraised value followed by litigation.

Joe K – There are thousands of laws that restrict what a private owner can do with their land. If appraisal is the issue, we can resolve it. Give the owner a choice of methodology and include time limits. If the property is put out to private bid and that bid is used to determine the value, require the owner to follow through with the sale to the private purchaser if the municipal purchaser or its designee declines to purchase at that price.

Vince – We need to continue pulling and tugging on this issue of valuation.

Howard – It's not just a question of resources if the value drops. What if the value increases? As originally drafted, the bills do not include a requirement to purchase, it is an option. There is no material compensation to the owner for taking the property off of the market.

Laura – We're flexible. Can owners come back with a proposal?

Howard – Passing this legislation would be a horrendous mistake in terms of housing policy. We need to balance resource allocation among production, preservation, etc. This legislation, instead, will preserve every high value deal and will take resources away from other deals. However, if we are going to implement bad housing policy, we can still do it fairly. *Proposal:* Create a preservation bank and then use eminent domain. We are already preserving 90%. Vince – We do not know the future. Howard – True, but we cannot ignore history.

Margaret – We should set up a process apart from eminent domain. Cities and towns do not have the money for eminent domain damages, but they can still guarantee the owner a fair return. The new owner should be able to assume the existing Section 8 contract and use it to help finance the deal. We do not want to lose value of existing resources.

Howard – Need independent venue to review the determined value. Court is one option.

Mary Louise – Eminent domain creates distrust and animosity. Using that process would give preservation a black eye.

Roger – Owner makes choice to get out. If the choice is between a right of first refusal or eminent domain, why would the owner choose right of first refusal? Howard – Certainty of price and no litigation. Roger – City, state, and HUD would all need to approve.

Marty – Exerciser of eminent domain need not be the entity with the cash. Also, it is likely that owners will opt out sooner rather than later if the supply of resources is limited.

Vince – We will have to think ahead to consequences.

Emily – Danger in using bid process would prefer an appraisal process.

Howard – Have other state preservation statutes helped or hindered the effort to preserve units? Roger – CEDAC is doing some research. Existence of statutes has led to negotiation. Do not have specific track record or tax implication information.

Joe – If we are already preserving 90%, then cost should not be a big issue. With some owners, no incentive will work. In that case, there needs to be some coercion.

David A – Everyone would like 100% preservation, but there are differing policy views on how to accomplish it. Look at policies that exist which are contrary to preservation [eg. Can't refinance with soft debt.]. We also need production. Will this type of statute chill private sector participation? How will capital markets react if we change the rules?

*****Vince – Come back with suggested policy changes at the next meeting. In addition, be responsive to what we have been asked to do. How do we move from policy to what the Joint Committee on Housing has asked us to do (create a compromise bill)?

Howard – Value and terms are key. Here is an idea, though it may not be acceptable to other owners: Right of first refusal if the owner chooses to sell (not a preemptive right to purchase) otherwise use eminent domain.

Emily – Keep at concept level for now. Right of first refusal is problematic because ends up trying to bust up other deal (ie. One the developer is seeking).

Howard – This entire process only kicks in when the owner cannot reach an agreement with the municipality. Talk to the municipality first. If deal falls through, so be it. May bid 10 times to get 1 deal.

Margaret – Mentioned sale of agricultural land statute. David A – Statute leads to lots of litigation. Margaret – Addresses sale and conversion. Perhaps add a judicial review piece. Howard – An owner puts land under agricultural use willingly. On expiring use it's a point of fairness for owners because the original contract (what was agreed to) is now being changed.

Wendy Cohen – There needs to be a deposit associated with the offer.

Emily – Ensure fair value but also build in protections to prevent overbidding.

Howard – Revive right of first refusal until deal is done.

Joe K – People have to make judgments based on something. Financing will require an appraisal. Need elements to determine bona fide offer (how it is comprised and how to safeguard against straw bidders, etc.).

David A – If you go down this route, the one Howard described, the market will adjust.

John Mahony – What is the triggering event? Margaret – Converting the affordable units. Roger – Would not apply if project being sold is locked.

Margaret – Would eminent domain process allow preservation of Section 8 contract? David – Title transfers with the Section 8 contract.

Joe – Can we mimic eminent domain and its protections without using the term?

Vince – What are material differences among options? Send to Chris one week before the next meeting. How would you put it together?

Meeting adjourned at 11:35 a.m.

Expiring Use Working Group
Minutes
May 9, 2007 (Meeting 3)

Members in attendance
Amy Anthony, Emily Achtenberg, Laura Booth, Pat Canavan, Larry Curtis, Mary-Louise Daly, Roger Herzog, Joe Kriesberg, John Mahony, Vince O'Donnell, Jeanne Pinado, Lisa Schwarz, and Margaret Turner

Members absent
David Abromowitz, Nancy Andersen, John Bennett, Howard Cohen, Mark Curtiss, Marty Jones, Kate Racer, David Smith

Support
Aaron Gornstein, Peter Munkenbeck and Chris Norris

Others in attendance
Bill Brauner from CEDAC, Wendy Cohen for Mark Curtiss, Deborah Goddard & Laurie Tickle from DHCD, Judy Kelliher from Governmental Strategies, Jeffrey Oakman for David Smith, and Carolyn Villers from Mass. Senior Action

Handouts
1) Agenda & 2) Discussion topics for the committee

The meeting was called to order at 9:40 a.m. by Vince O'Donnell.

Attendees introduced themselves.

Vince provided an overview of where the group is now and what needs to be accomplished to produce final recommendations. There may be some issues where the working group needs to acknowledge that it could not reach agreement. He also expressed a desire that the working group will be able to avoid having a majority report and a minority report.

Vince told the working group that Bill Kargman, an owner of several at-risk projects, would like an opportunity to address the working group. Discussion ensued.

Consensus was reached to allow Bill to submit something written to the group, and, if he would like to do so, to have a small subgroup of the committee meet with him outside of the regular meeting. Vince will coordinate this.

The meeting was opened for general comments.

John M – We have been charged with reconciling three bills, and we need to concentrate on that.

Mary Louise – There has been a lot of discussion about owners and their rights; however, so far there has not been any discussion about a role for residents. They're extremely vulnerable.

Research since last meeting

Other Jurisdictions – D.C.
Roger and Vince spoke to Aaron O'Toole from the Washington DC office of Klein Hornig, LLC regarding the D.C. ordinance. Roger reported that it applies to assisted and unassisted multifamily developments. The Right of First Refusal (ROFR) runs to the tenant association. Where there's no third-party offer, then there's a negotiation process. There is no requirement for tenants to maintain affordability. Could assign, flip, convert to condos, etc. Market has adapted and there are now sources of capital to assist tenants in acquiring properties. There has been no legal challenge on the constitutionality of the ordinance to date. Vince – Because private bidders can be outbid, not much due diligence. Deal is still subject to financing, and financing is based on appraisal. The ordinance only applies when there is a sale. It does not force a sale based upon expiration of affordability.

Jeff – Shared personal experience in D.C. Residents formed group to deal with buyer.

Peter M – Is there a reset if the private deal to be matched does not close, following the tenants' decision not to exercise right? Roger and Vince – Yes, back to the beginning. No sense as to how often residents get involved in multifamily sales.

Larry – The D.C. ordinance does impact (reduce) value for owners.

Amy – POAH purchased a D.C. property. It was a smooth process with a good outcome. The ordinance forced a negotiation. What has D.C. preservation impact been? Roger & Vince – Unsure but can find out.

Peter – In D.C. the owner can just let the restrictions lapse and not be subject to the ordinance. It only applies in the event of a sale.

Joe – What are the pros and cons of giving the right to purchase to a resident association versus the municipality?

New York City
Wendy – Do recent court decisions in New York impact what we are trying to do in Massachusetts? Peter said that the NYC situation differs from Massachusetts in that the NYC issues are primarily about lack of local authority whereas we are dealing here with a state statute. Vince: The legislature can work to make the bill "preemption proof," but that is not a policy issue. Margaret pointed out that the decisions were issued by New York's lowest court and said that decisions in MA would most likely be different.

Roger gave an update on the two NYC cases.

The first was *Mother Zion v. Shaun Donovan*. The second was *Real Estate Board v. City of New York*. The cases were regarding an NYC ordinance (not a state law) known as Local Law 79. Local Law 79 gives tenant associations the right of first refusal where an owner intends to sell or to take other action that could eliminate affordability.

In the first case the court granted a motion to dismiss after finding that the ordinance was preempted by federal law because it imposes too much of a burden on a property owner's decision to withdraw from project-based Section 8 and impermissibly interferes with what the federal statute intended to cover.

In the second case, the court found that the ordinance was preempted by state and federal law, and granted the motion for summary judgment and issued a permanent injunction prohibiting the enforcement of the ordinance.

Other Jurisidictions – Montgomery County, MD
Jeanne – Montgomery County, MD provides 60 days to match terms on subsidized developments. Majority of deals have not been project-based Section 8 developments. Sometimes exercise right and sometimes use to negotiate with buyer. Bob Goldman (nonprofit) was her contact. Bob's group does its own due diligence. County defines broadly what constitutes a sale.

Peter – Again, this ordinance does not force the owner to sell a property. It only applies if there is a sale. The affordability restrictions can expire on their own without triggering the ordinance. Jeanne agreed but emphasized that the county is very aggressive in defining what constitutes a sale.

Larry – Be careful. We do not want any unintended consequences.

Peter – If restructuring a partnership, is that a good point to at least review the deal?

Vince – Do we know how the price is set and what, specifically, constitutes a sale? No.

Tax Implications
At the last meeting, Howard and Marty agreed that this is not a big issue.

Margaret said that she is trying to locate a development that has done this, but has not been successful to date.

Roger – Federal exit tax legislation has been re-filed in the Senate.

David Abromowitz, through a note because he was not able to attend today, has agreed to do more research on this issue if it ends up being necessary as the working group proceeds.

Options Affecting All Proposed Bills

Distributed "Discussion topics for the committee."

Do we want to mimic eminent domain?

Discussed G.L. ch. 79 and G.L. ch. 80A, two eminent domain statutes and whether the group wanted to mimic one or the other.

Amy – The city looked at 79 for Meadowbrook Apts in Northampton but did not use it, because a negotiated sale was able to proceed.

Pat – Looked at eminent domain for High Point but cost was an issue due to the extremely large project size.

Lisa – Andover did not consider eminent domain.

Margaret – Why not municipal appraisal, owner appraisal, then decision by DHCD as expert agency with weight given to that decision during any later proceeding?

Joe – We already have eminent domain, why mimic it. It does not decrease the cost. That is still an issue.

Amy – We have eminent domain. It should only be used in extreme circumstances as an option of last resort. Need to create carrots and sticks to try and resolve issues before getting to eminent domain.

Emily – We are only talking about using this tool for a subset of properties. If the valuation process takes so long, how do we maintain affordability during the valuation process? Could we put in a "rent control" piece that protects tenants while waiting?

John – 79 and 80A are both problematic. We cannot afford to wait to know the value or leave properties in limbo.

Lisa – Neither 79 nor 80A are going to be feasible for smaller communities.

Margaret – Push for negotiation and facilitate resolution with an administrative mechanism.

Deborah – We are wasting our time to mimic or recreate 79 or 80A. It is on the books. Use it if you want it.

Margaret – We want to preserve the Section 8 income stream.

Larry – Capitalization of income stream left to appraisal process is problematic.

Joe – We cannot take away the right to sue over constitutional issue. There will always be judicial review and political considerations.

Margaret – Create a quick administrative process. Review appraisals. Value determination occurs before property is transferred.

Peter – How does DHCD develop and maintain that expertise when this issue only arises sporadically?

Consensus was reached that neither 79 nor 80A are good models for the expiring use legislation to emulate.

Should A Forced Sale be Required if Restrictions Terminate?
John – Yes, if the owner does not intend to sell the property, there should be a forced sale to preserve affordability when restrictions are going to expire or terminate.

Amy – A forced sale may be able to be avoided if there are adequate incentives available to the owner.

Margaret – An owner should be required to enter into a new contract, if available, to preserve Section 8.

Joe – Need to negotiate something. We are where we were when we started.

Larry – Owners want fair value and a timely process.

Pat – Perhaps exclude extreme high cost developments.

Roger – You, the municipality, chooses whether to exercise the right to purchase.

Jeanne – This type of requirement forces everyone to the table to hopefully negotiate a better deal than otherwise.

Joe – Described flowchart re: renewal versus forced sale. Peter will write this up and circulate it to the group.

Consensus reached on a process that provides owner choice between a right of first refusal process or a purchase option, provided definitions provide for fair value. Larry – This will result is complicated instructions to the appraisers.

Safe Harbor
Peter – Need to include a safe harbor, and that has not been discussed. Group agreed that there needs to be a safe harbor for proposals that meet defined long-term preservation criteria; however, that criteria still needs to be determined.

Amy – Where does the use of "other incentives" get put in? Vince – We'll gather those ideas, and submit to the Legislature as an addendum to the report.

Next Steps

Vince – Three subgroups of the working group will meet before the final meeting on May 23. The groups will be:

A group to meet with Bill Kargman and report back. – Vince will schedule this meeting and invite those who signed the list indicating they wish to attend.

A group to review the remaining items that need to be addressed, using as a starting point, the elements described in Susan Hegel's comparison chart of the three bills filed (handed out at the first working group meeting) to determine which of those issues are still relevant. – Peter will coordinate this process.

A group to sift through incentive ideas and other items that may be helpful to identify for possible legislative action. Items should be sent to Chris within the next week. – Chris will compile items submitted to him and, if necessary, schedule a meeting of those working group members who express interest.

Meeting adjourned at 11:30 a.m.

The working group's next (and final) meeting will take place on Wednesday, May 23rd at CHAPA. The meeting will begin at 9:30 a.m. and end at noon.

Expiring Use Working Group
Minutes
May 23, 2007 (Meeting 4)

Members in attendance
David Abromowitz, Emily Achtenberg, Nancy Andersen, John Bennett, Laura Booth, Pat Canavan, Howard Cohen, Larry Curtis, Mary-Louise Daly, Marty Jones, Joe Kriesberg, John Mahony, Vince O'Donnell, Jeanne Pinado, David Smith, and Margaret Turner

Members absent
Amy Anthony, Mark Curtiss, Roger Herzog, Kate Racer, and Lisa Schwarz

Support
Aaron Gornstein, Peter Munkenbeck and Chris Norris

Others in attendance
Bill Brauner from CEDAC, Wendy Cohen for Mark Curtiss, Deborah Goddard from DHCD, Susan Hegel from Cambridge & Somerville Legal Services, Judy Kelliher from Governmental Strategies, P.J. McCann from GBLS, Jeffrey Oakman from Recap Advisors, Susan Stott for Lisa Schwarz, and Carolyn Villers from Mass. Senior Action

Handouts
1) Agenda; 2) Draft language on obligation to sell, 3) Incentive Based Approaches to Preservation; & 4) Report from "content" subcommittee

The meeting was called to order at 9:40 a.m. by Vince O'Donnell.

Attendees introduced themselves.

Report Back on Meeting with Bill Kargman
Vince gave a report on the meeting that was held with Bill Kargman, an owner of several at-risk projects, attended by a small subgroup of the working group.

> Bill said that mixed-income housing with market discipline is healthy. He explained his frustration with U.S. HUD and his desire to be out from under its burdensome regulatory process. He wanted fundamental change, but also acknowledged that the use of enhanced vouchers means he is still working with the Boston Housing Authority.
>
> When asked whether he would support a "forced sale provision" or a "right of first refusal" in any preservation bill, he said no. His response was that there is already eminent domain.

Others who attended the meeting added their comments to Vince's report.
Emily – Bill feels he is providing the same number (or more) of subsidies. The issue is offsite versus onsite.

Vince – Bill's priority was to get vouchers into the system, and he indicated that new incremental vouchers could be project-based and used to help build new units.

John M – Bill feels personally vilified.

Vince – He would like to see "other" advocates draw a line on what is acceptable and what is not in terms of advocacy.

Mary Louise – He has a great housing services program.

Other comments.

John B – Heard from some tenants that they feel they were forced out and that Bill is not providing new services to elders who are continuing to live on site though new services are being provided to new residents.

Margaret – Will there be an opportunity to respond to the points in Bill's memo? Vince – Not through this body; however, we could ask him whether it is okay to circulate the memo, and if he says yes, groups could respond individually at that time.

Vince – We need to address overall policies re: opt out and prepayment.

Germane Topics Beyond the Three Bills

Only one memo was submitted. It came from Howard Cohen. Bart Lloyd from Amy's office may submit a memo re: using tax credits. Mary Louise submitted a memo, but it related to content and was referred to that subcommittee.

Howard reviewed his memo about possible incentives that he believes will also preserve the integrity of our existing programs. There was some discussion regarding incentives, and the group expressed general appreciation for the value of Howard's ideas. These ideas and others the group receives will be included as an appendix to the report.

Review of Obligation to Sell

General questions: If there are no new resources, does this just rearrange the deck chairs? Should there be a regulatory scheme in place of the current market scheme? Should or can we just request that the legislature provide more money for preservation?

Peter – One reason for a regulatory scheme is so that there is an option for policy makers to triage and choose the developments that should be preserved and to ensure that developments are not excluded outright. Also, we are not, now, using all resources. More resources are available.

Howard – The current system is working. If change is needed, it can be done without coercion and unintended consequences.

Joe – If we have already preserved 90%, then the cost to preserve the balance is not much.

Emily – We are preserving a fair number of units with bonds in markets that are not so high cost. The difficulty is where the owner is on the fence. We need a regulatory framework to prevent private deals from overtaking public deals. We are missing a process.

Larry – Is Bill Kargman's solution, the use of enhanced vouchers, acceptable?

Margaret – No. He exchanged valuable, affordable units for vouchers which will lose value, and residents will not be able to come back to Roslindale once project-based affordable units are gone.

Vince – Choice and value of choice for owners and residents.

David A – I am not sure I would build a policy around one poster child. Yes, Section 8 is a resource we want to capture, but the negatives are worse than the cure.

Vince – Owners, are there elements where you could acquiesce to a forced sale?

Larry – The elements would have to include, a short fuse; a purchaser/developer with a track record; the price would have to represent the value as unencumbered; the purchaser/developer would need to prove competency; nonrefundable deposit; specific performance on behalf of the purchaser/developer.

Howard – The nonrefundable deposit and specific performance are particularly important where you are going to step in and impact my original sale, if there is one, so it is important for the owner to be compensated for that risk.

Jeanne – An initial offer needs to be subject to financing. Larry – But this is a forced sale.

Marty – Still have issue with forced sale.

Howard – Concerned about politicalization of process. If data showed crisis (it does not) then I would support. For now, provide incentives and let the system work.

David S – Problem with forced sale on a philosophical level. It is different if an owner wants to sell and the government wants to choose a buyer. Not a good policy.

David A – one-third of the owners will say, okay I will work with it. Two-thirds of the owners will say, do not force me. As a policy matter, we chose to rely on the private sector. With these potential changes, we are hearing from the private sector that they are not happy. This could chill future participation.

Larry – We have been talking about HUD Expiring Use, but the bill is broader.
Nancy – Massachusetts has high barriers to entry and developers to do not want to come in. MassHousing is concerned about changing contractual relationship at this late date.

Margaret – These projects are irreplaceable. Public resources have been invested, and we no longer have available land of the size necessary to replace developments we lose.

Emily – Develop a specific set of criteria and find common ground around using a "forced sale" provision in "unique" situations that speak to irreplaceability or other compelling items such as significant Section 8 funds or where the municipality could fall below 10% on the subsidized housing inventory if the project-based affordability was lost?

Joe – Mechanics of eminent domain are clumsy for owners and sellers.

Vince – Can people support leaving this process and work on additional incentives for preservation? Consensus seemed to be yes, but Howard pointed out that if as this advances groups are fighting one another in the legislature, we will not be working together.

Vince – No consensus on required sale.

Review of Right of First Refusal

Pat – Unless we come out with something we all support, the legislature will not move anything.

Peter – Described owner who does not change ownership, structure remains. If change, then must offer to tenant group or municipality who can purchase within a reasonable time. Market proposal brought to table or an appraisal process.

Vince asked people to speak as to their willingness to support this type of a right of first refusal approach.

Mary Louise – The process would have to include residents, municipality, and local housing authority in ability to purchase/partner.

Howard, Marty, and Larry – Primary issue would be what is the triggering event that starts the right of first refusal process, and when would owners be protected and/or exempt.

Peter – Affordability would need to be as much as can reasonably be done with available resources.

Howard – I can develop a system to protect owners rights, but I am still not sure whether this is good policy. It tilts the playing field. I can defer on the housing policy.

Joe – Could conceptually live with giving elected officials the opportunity to make policy decision.

Bill – The question for advocates is, can we live with half-a-loaf rather than full (right of first refusal rather than option to purchase)? Concern because one goal of advocates is preserving project-based units. It is half-a-loaf, but it is a thin loaf.

John M – Overwhelming issue is protection of Section 8 contract.

Larry – If that is the overwhelming issue, why not use eminent domain now, then, before the Section 8 contract expires? Vince – Can still opt out of contract while pending. Peter – Can use ch. 79A and take it now. David S– Once know going to exercise, not going to drop restrictions (unless pure spite).

Larry – Am I reading the bill correctly that it could require the owner to renew the Section 8 contract while this process is pending?

Howard – Could support if carefully drafted, with incentives. Has some reservations.

Carolyn – If just ROFR when owner "sells," then falling far short of where we need to be.

Chris – Need definition of transfer/sale.

Vince – At broad level, as stated, would you support this ROFR with incentives?

Marty – Need details and timeline and it is worth putting time into.

Larry – Details will make it palatable or not. Need a safe harbor.

Joe – Do not think we can reach consensus. Right of purchase is important to Mass. Association of CDCs. Only scenario where would take up is if owners come forward and assure they will fight for ROFR. Do not see that happening.

Jeff – We ought to come out of here with a statement. Talk about cases, loss of Section 8, where makes more sense than others. Then, work toward ROFR.

Emily – Jaded by this annual experience. Consensus has broken down. Had appraisal process then backed off at owners' request but now owners are backing off.

David S– We should look at the New Hampshire mobile home park model where the owner of the land wants to sell it, then residents get a chance to purchase.

Margaret & Joe – Both sides need to go back and discuss.

Vince – We came to the same table and are informed by discussion that took place. Would still like to bridge gap.

David – Need an "it" for people to respond to.

Vince – We will draft a report, and it will be circulated to the committee for a response. Then, the full course of our discussion will have to be taken to the larger community.

Marty – Agreement reached on incentives.

Meeting adjourned at 12:05 p.m.

This was the working group's final meeting. A draft report will be prepared and circulated to the working group. The final report will be submitted to Senator Susan Tucker and Chairman Kevin Honan of the Joint Committee on Housing during the first week of June.

Attachment IV

Expiring Use Working Group

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