MassLandlords.net
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Eviction Moratorium 2.0 Filed, Would Undo Rent Escrow (192 H.1434 HD3030)

Legislature Asked To Follow Eviction Diversion Initiative Money Through MLAC

The Complete Landlords' Guide to Lodging and Rooming Houses in Massachusetts

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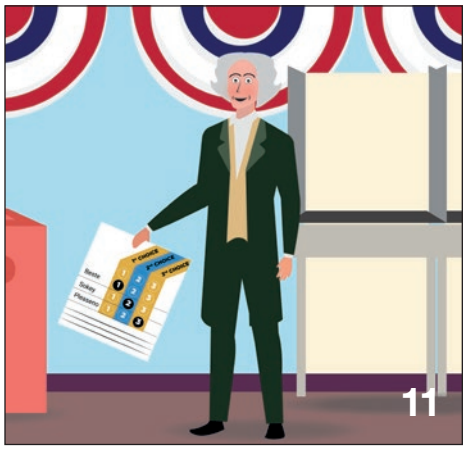

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Cover Photo by Mark Olsen (unsplash.com).

LETTER FROM THE EXECUTIVE DIRECTOR

Emergency over? Covid not

IN MAY 2021 WE CONTINUED MOVING FORWARD ON CERTIFICATION AND POST-PANDEMIC RECOVERY.

Over the last month we have continued to develop certification test questions and various other policy responses. Although Massachusetts may congratulate itself on a nation-leading Covid vaccine roll-out, we are part of a larger country and world where it now seems likely SARS-CoV-2 may circulate permanently.

Globally less than 10% of us are vaccinated. We are on track to vaccinate everyone in 30 months (anti-vax aside). Overall, this may be too slow to avoid new variants and vaccine escape. We should therefore expect, absent newfound political will for coordinated international action, that this virus will continue to circulate around and into Massachusetts in the medium term. The SARS-CoV-2 variants are roughly more transmissible than the cold and three times as transmissible as the flu.

Meanwhile, international travel to Massachusetts for tourism, scholarship, and business may continue to be less than what it was pre-pandemic. And working from home, which started before the pandemic, continues apace. Whether domestic activity will backfill shortfalls remains to be seen. Many of us in short-term, college, or tech housing markets will want to affirm or reevaluate which market we're in.

During the pandemic, we communicated the value of small business housing providers in all markets. Especially last month, when the CDC moratorium was briefly overturned in court, we were responsive to media requests and told people not to worry. Now through certification we must make sure this good will endures. The most important thing we can do at MassLandlords is launch our certification program.

A Certified Massachusetts Landlord™ will demonstrate three levels of attainment, the second of which is a test. We got snared on some production server configuration issues in May, but otherwise this test is running internally. I am confident by the next letter it will be live, if not by the time you read this.

Just as the certification will build on the good will we have established, so too will good faith participation in the safety net. The RAFT/ERAP safety net requires landlords to participate (MGL Chapter 151b Section 4, with associated case law *DiLiddo v. Oxford Street Realty, Inc.* 2007). At a webinar on May 13, the Attorney General indicated that enforcement was likely to come soon.

Compare a five figure discrimination penalty to an equally large RAFT/ERAP award for rental assistance, and you'll see participation is a no-brainer. Why should I even have to write about it? Well, many of us remain stung by our treatment over the last year and a bit. Don't be. The better we are as landlords, the harder it will be for those policy mistakes to be made again.

Forward this newsletter to a friend. Encourage them to read and help our global neighbors still struggling with Covid. Thank you for supporting our mission to create better rental housing.

Stay safe,
Douglas Quattrochi
Executive Director,
MassLandlords, Inc.

Eviction Moratorium 2.0 Filed, Would Undo Rent Escrow (192 H.1434 HD3030)

By Peter Vickery, Esq. Legislative Affairs Counsel

A bill before the legislature would enact state eviction moratorium 2.0 and undo Davis v. Comerford rent escrow (192 H.1434 HD3030).

INTRODUCTION

Is the Massachusetts legislature planning another partial eviction moratorium? Bill 192 H.1434 HD3030, titled "An Act to prevent COVID-19 evictions and foreclosures and promote an equitable housing recovery," would come close.

The bill would make it all but impossible for judges to award possession to landlords during the State of Emergency. It would also reverse the small rent escrow victory for landlords that the state's highest court announced in *Davis v. Comerford*.

And it even manages to create a perverse incentive in favor of smoking. In the State House, support for 192 H.1434 HD3030 now amounts to 31% of the legislature (62 cosponsors at time of writing).

PRE-FILING REQUIREMENTS OF H.1434

In order to even file summary process cases that include claims for rent/use and occupancy, 192 H.1434 HD3030 would require landlords to meet an impossible test, but which sounds reasonable. First, landlords must establish that they have made a good faith effort to obtain rental subsidies for the tenants (e.g. RAFT). Second, they must prove that there are no outstanding sanitary code violations. Third, they must prove that they have given the tenants notice of the complete affirmative defense described below.

With 192 H.1434 HD3030, the Legislature once again threatens to close the courts and further reduce the number of housing providers in Massachusetts.

The first two points are not our primary concern, but consider for the time being the following. First, many renters refuse to participate in RAFT out of fear, misunderstanding, or anti-landlord animosity. What constitutes a good faith effort to apply in those circumstances is not defined in 192 H.1434 HD3030.

Second, what renter at risk of COVID-19 will allow an inspector into a unit? How else can a landlord prove there are no outstanding code violations?

But never mind these first two, which are in some measure irrelevant compared to the third affirmative defense.

COMPLETE AFFIRMATIVE DEFENSE OF H.1434

In summary process cases where the landlord seeks payment of rent/use and occupancy, 192 H.1434 HD3030 would create an affirmative defense against the landlord's claim for possession. It is worth noting that the defense comes into play not only in nonpayment cases but also in any other case that includes a claim for rent or for use and occupancy, e.g. a no-cause case where the landlord seeks payment.

This affirmative defense would be a complete defense, meaning that once the tenants establish it the landlord cannot get possession. This is true no matter how high the arrears. There are exceptions for what the bill calls "just cause," such as where landlords can prove tenants are damaging the property or using the premises for illegal purposes. Another "just cause" would be where the landlord can show a bona fide intent use to use the property as the primary residence for

themselves or a family member within 180 days. To establish "just cause," the landlord bears the burden of proof.

What exactly constitutes this complete affirmative defense? The bill would prohibit judges from awarding possession to the landlord unless no "portion of the non-payment of rent or use and occupancy... was due to a financial hardship related to or exacerbated by the COVID-19 emergency" and the household does not include a minor (i.e. a person under the age of 18), or "a handicapped person," or "an individual with any medical condition the Centers for Disease Control has deemed to cause increased risk of experiencing severe illness from a COVID-19 infection."

Breaking it down, this means that to regain possession the landlord would have to prove all of the following:

- No portion of the arrears was due to a financial hardship related to or exacerbated by the COVID-19 emergency;
- No person in the household is under the age of 18;
- No person in the household is over the age of 60;
- No person in the household is a current or former cigarette smoker;
- No person in the household has a substance-use disorder, including alcohol-use disorder;
- No person in the household is pregnant; and
- No person in the household has a physical or mental impairment which substantially limits such person's ability to
  - care for themselves
  - perform manual tasks
  - walk
  - see
  - hear
  - speak
  - breathe
  - learn, or
  - work

This list may strike readers as an exaggeration. It is not. Below we explain how 192 H.1434 HD3030 would make it effectively impossible for judges to award landlords possession.

FINANCIAL HARDSHIP

Under 192 H.1434 HD3030, the threshold question for the judge is whether "any portion of the non-payment of rent or use and occupancy was due to a financial hardship related to or exacerbated by the COVID-19 emergency." The question is not whether all, most, or even much of the nonpayment was due to financial hardship: the words are "any portion." And the question is not whether the COVID-19 emergency was the predominant or a significant cause of the financial hardship. Rather, the question is whether the hardship is "related to" or "exacerbated by" the emergency.

Of those among us suffering a financial hardship of some kind, who could honestly say that it is not "related to or exacerbated by the COVID-19 emergency"? Proving the absence of any causal connection between a person's financial hardship and the COVID-19 emergency is impossible. We are all impacted. As a practical matter, therefore, in any summary process

case in which the landlord is seeking payment the judge's analysis could well end at this stage.

Even if the landlord carries the burden of proving that there is no causal connection between any portion of the nonpayment and the COVID-19 emergency, the other burdens are equally heavy.

DEFINITION OF "HANDICAPPED PERSON"

The judge must determine that the household does not include a "handicapped person," i.e. a person with a disability. The drafters of 192 H.1434 HD3030 do not attempt to create a new definition of "handicapped." Instead, they adopt the definition used in M.G.L. c. 239, s. 9, which defines "handicapped person" as a person who:

> "(a) has a physical or mental impairment which substantially limits such person's ability to care for himself, perform manual tasks, walk, see, hear, speak, breathe, learn or work; or
>
> (b) has a physical or mental impairment which significantly limits the housing appropriate for such person or which significantly limits such person's ability to seek new housing; or
>
> (c) would be eligible for housing for handicapped persons under the provisions of chapter one hundred and twenty-one B."

This three-part definition in chapter 239 has some narrow criteria and some that are quite broad. Starting at the narrow end, sub-paragraph (c) incorporates the definition in M.G.L. c. 121B, which covers "handicapped persons of low income," i.e.

> "persons whose annual net income is less than the amount necessary to enable them to maintain decent, safe and sanitary housing and who have been determined, pursuant to regulations issued by the director of housing and community development to have an impairment which is expected to be of long continued and indefinite duration, which substantially impedes the ability to live independently in conventional housing and which is of such a nature that such ability could be improved by more suitable housing conditions."

To come within (c), the person must have an impairment that is expected to be of long continued and indefinite duration *and* the impairment must substantially impede the ability to live independently in conventional housing. Similarly, to come within (b) a person must have an impairment that significantly limits the housing appropriate for such person or which significantly limits such person's ability to seek new housing.

But the scope of (a) is considerably broader. This definition of "handicap" includes a person with a mental impairment that substantially limits the person's ability to learn. This covers a considerable proportion of Massachusetts residents. According to the CDC's disability statistics, people with "serious difficulty concentrating, remembering or making decisions" constitute 10.3% of the state's population.

Many of us have, or know people with, learning disabilities. The fact that a member of a tenant's household has a learning disability is not a legitimate reason to deny legal redress to the landlords. What if the landlords have a family member with a learning disability? Should that weigh in favor of awarding them possession? Of course not. So why then does a renter household with a learning disability get insulated from their obligations, when the Tenancy Preservation Program and other systems exist to help renters with such disabilities? Because at issue is not the disability at all, but the fact that these bill sponsors are only looking for an excuse to hurt housing providers.

I draw attention to this provision simply to point out that H.1434 would prevent judges from awarding possession to the landlord, no matter how high the arrears, so long as (1) any portion of the nonpayment was due to a financial hardship related to or exacerbated by the COVID-19 emergency and (2) one member of the household has a learning disability.

WHAT MEDICAL CONDITIONS CAUSE INCREASED RISK OF EXPERIENCING SEVERE ILLNESS FROM A COVID-19 INFECTION?

192 H.1434 HD3030 would prevent the judge from awarding possession to the landlord if the tenants' household includes someone "with any medical condition the Centers for Disease Control has deemed to cause increased risk of experiencing severe illness from a COVID-19 infection." Who, exactly, is at "increased risk of experiencing severe illness from a COVID-19 infection" according to the CDC? In addition to cancer, heart disease, diabetes, dementia, and obesity, the CDC website states that:

> "Adults of any age with the following conditions can be more likely to get severely ill from COVID-19... Smoking: Current or Former. Being a current or former cigarette smoker can make you more likely to get severely ill from COVID-19... Substance use disorders: Having a substance use disorder (such as alcohol, opioid, or cocaine use disorder) can make you more likely to get severely ill from COVID-19."

In addition, in the same list of conditions the CDC includes pregnancy: "Pregnant people are more likely to get severely ill from COVID-19 compared with non-pregnant people."

To win possession, therefore, the landlord would need to prove that no person in the household is pregnant, currently has alcohol-use or opioid-use disorder, or was ever a cigarette smoker.

Many of us struggle with (or have friends or family who struggle with) substance-use disorders, or who smoke, or who are pregnant. As with the disability discussion above, the fact that a member of a tenant's household may be somewhat immunologically impaired, without weighing that against the equally likely possibility that the landlord may be likewise impaired, is not a legitimate reason to deny access to the courts. Especially when one considers that denial of justice may in fact drive one to engage in self-destructive behaviors with respect to smoking or substances, the unfairness becomes manifest.

Consider also the perverse incentives that may be created for renters. For example, what do the drafters think will happen if you can fend off a claim for possession by being pregnant or by smoking? We humans are quite predictable.

The courts exist to decide matters of fairness, but 192 H.1434 HD3030 would in many common instances deny access to the courts.

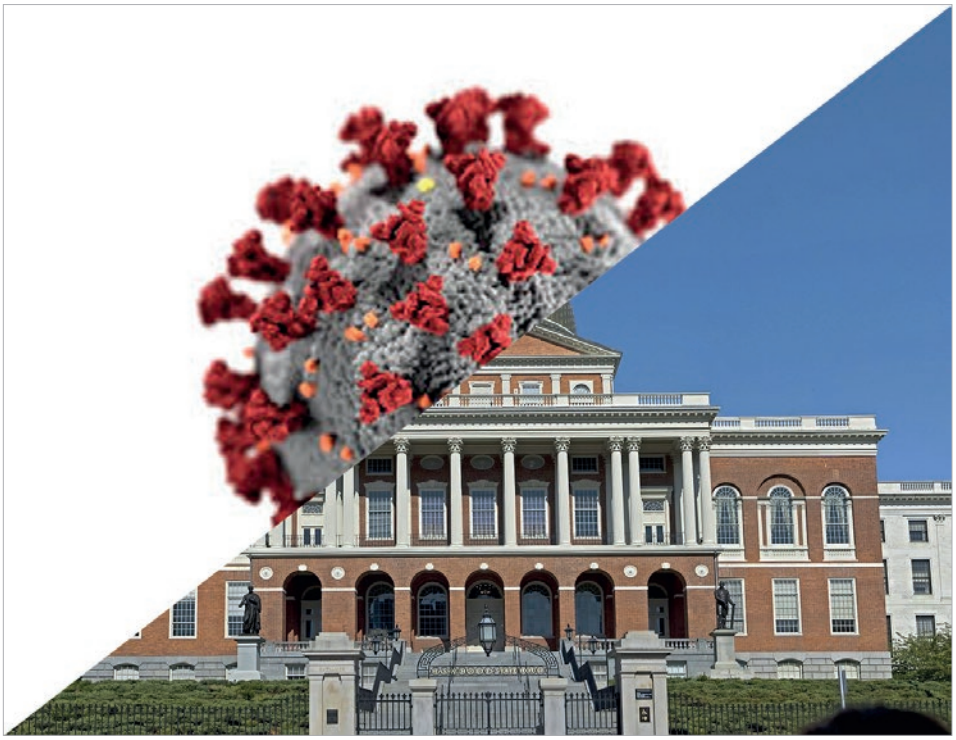
NO RENT ESCROW USE AND OCCUPANCY ORDERS

In the 2019 decision Davis v. Comerford, the Supreme Judicial Court authorized judges to order tenants to make use and occupancy payments before trial. 192 H.1434 HD3030 would effectively ban such orders, making *Davis v. Comerford* a dead letter.

Section 2(e) of the bill would prevent the judge from ordering use-and-occupancy payments unless the landlord shows that the tenants are "not reasonably likely" to have the complete affirmative defense described above. So in order to win a motion for use and occupancy, the landlord would need to prove several negatives. The landlord would bear the burden of proving all of the following:

- No portion of the arrears was due to a financial hardship related to or exacerbated by the COVID-19 emergency;
- No person in the household is under the age of 18;
- No person in the household is over the age of 60;
- No person in the household has any medical condition the Centers for Disease Control has deemed to cause increased risk of experiencing severe illness from a COVID-19 infection, e.g. is pregnant, has a substance-use disorder, or has ever smoked cigarettes; and
- No person in the household has a physical or mental impairment which substantially limits such person's ability to
  - care for themselves
  - perform manual tasks
  - walk
  - see
  - hear
  - speak
  - breathe
  - learn or
  - work

It is not realistic to expect that any landlord could carry that burden.



With 192 H.1434 HD3030, the Legislature once again threatens to close the courts and further reduce the number of housing providers in Massachusetts.

STAY OF PROCEEDINGS ON TRIAL DAY

192 H.1434 HD3030 creates an incentive for tenants to wait until the day of trial to apply for subsidies. Under Section 3(b), if a landlord manages to get that far, the judge will have to continue the case (postpone it) if the tenants show, on the day of trial, that they have applied for a rental subsidy. No reasonable policymaker should want this outcome. We should be encouraging qualified applicants to seek public assistance promptly, not encouraging them to fall further behind with payments and deeper into debt.

192 H.1434 HD3030 CONCLUSION

192 H.1434 HD3030 represents a major step backward. The bill would prevent judges from awarding possession – and even from ordering tenants to make use and occupancy payments – unless the landlord can prove that all occupants are between the ages of 19 and 59, not one of them has a disability of any kind, not one of them is pregnant, not one of them has ever been a smoker, not one of them has a substance use disorder, and no portion of the arrears was due in any way to a financial hardship in any way related to or exacerbated by the COVID-19 emergency. Contrary to its title (an act to "promote an equitable housing recovery"), this is a partial eviction moratorium by another name and ought not pass.

Point your camera app here to read more online.

Legislature Asked To Follow Eviction Diversion Initiative Money Through MLAC

Peter Vickery, Esq., Legislative Affairs Counsel

MassLandlords has been blocked in our attempt to trace Eviction Diversion Initiative funding through to renters and landlords. We have written a letter to the Legislature's Joint Committee on the Judiciary encouraging them to take up the investigation.

When you give lawyers a retainer, they deposit the money into something called an IOLTA account (IOLTA stands for "Interest on Lawyers' Trust Accounts").

The state takes the interest and gives it to an entity called the Massachusetts Legal Assistance Corporation (MLAC) that channels the funds to variety of nonprofit organizations.

Some of those organizations (Massachusetts Law Reform Institute, for example) lobby for measures that are diametrically opposed to the interests of MassLandlords members. Challenging that unfair system is a fight for another day. In the meantime, we face the more immediate question of how MLAC is distributing another pot of money - separate from IOLTA - under the Eviction Diversion Initiative, including a component of the initiative called COVID Eviction Legal Help (CELHP).

As discussed in a previous article, one notable feature of CELHP is that it helps fund the Volunteer Lawyers Project (VLP), which is supposed to help low-income landlords. But VLP itself does not represent landlords, nor does it even pay other lawyers to represent them. Rather, it tries to find lawyers who will represent landlords for free. (And VLP attorneys, although passionate, are not necessarily landlord–tenant experts. We have welcomed three to our educational events over the last several months.)

In addition, some CELHP funds are dedicated to about a dozen mediation organizations across Massachusetts, including the Martha's Vineyard Mediation Program, Inc., and Cape Mediation (a.k.a. Cape Cod Dispute Resolution Center, Inc.). Perhaps there are a lot of residential landlord–tenant disputes in need of mediation on the Cape and Martha's Vineyard. If so, public funding of those corporations could be money well spent, and we ought to be able to see the need clearly in public records. Or if not, perhaps some of it could go toward legal representation for low-income landlords, or elsewhere in the state.

To find out exactly how MLAC is spending the CELHP money that the Legislature appropriated, and how well the recipients are helping to resolve landlord–tenant disputes, on March 16, 2021, we submitted a public records request. In the request we asked for records detailing the distribution of funds, and about number of cases actually handled by the MLAC-funded mediation organizations. This was to be the beginning of a broader inquiry as to whether and how mediation works and how it might be improved.

MLAC NOT SUBJECT TO THE PUBLIC RECORDS STATUTE?

On March 22, 2021, we received a letter from an attorney at Weil, Gotshal & Manges, LLP, a private law firm that represents MLAC, stating that MLAC "is not subject to the Public Records Statute and the materials you have requested are not public records subject to the statute." The rationale? MLAC is part of the judicial branch, and the judicial branch is exempt from the Public Records Statute.

Is that true? Certainly, the statute that established MLAC (MGL Chapter 221A, Section 2) states that the corporation is "under the Supreme Judicial Court." For administrative and budgetary purposes a public agency has to go somewhere, after all. But although it is "under" the high court, MLAC is not an adjudicatory body; its only job is to distribute money. And there is no doubt that it is a public agency with a public function. There is no ambiguity in the plain language of Chapter 221A:

> The corporation is hereby constituted a public instrumentality of the commonwealth and the exercise by the corporation of the powers conferred in this chapter shall be deemed and held to be the performance of an essential public function.

Yes, MLAC's lawyer is correct that the Supreme Judicial Court (SJC) has held that the Public Records Statute does not expressly include the judicial branch. But, as we pointed out in our reply to his letter, Chapter 221A provides that "[t]he corporation is hereby placed under the supreme judicial court **but shall not be subject to the supervision or control of said court** or of any other board, bureau, department, or agency of the commonwealth except as specifically provided in this chapter."

So while MLAC is "under" the SJC, the SJC has no say in how MLAC does its job. Whatever the reasons for exempting the courts from the Public Records Law, it is hard to see how those reasons could

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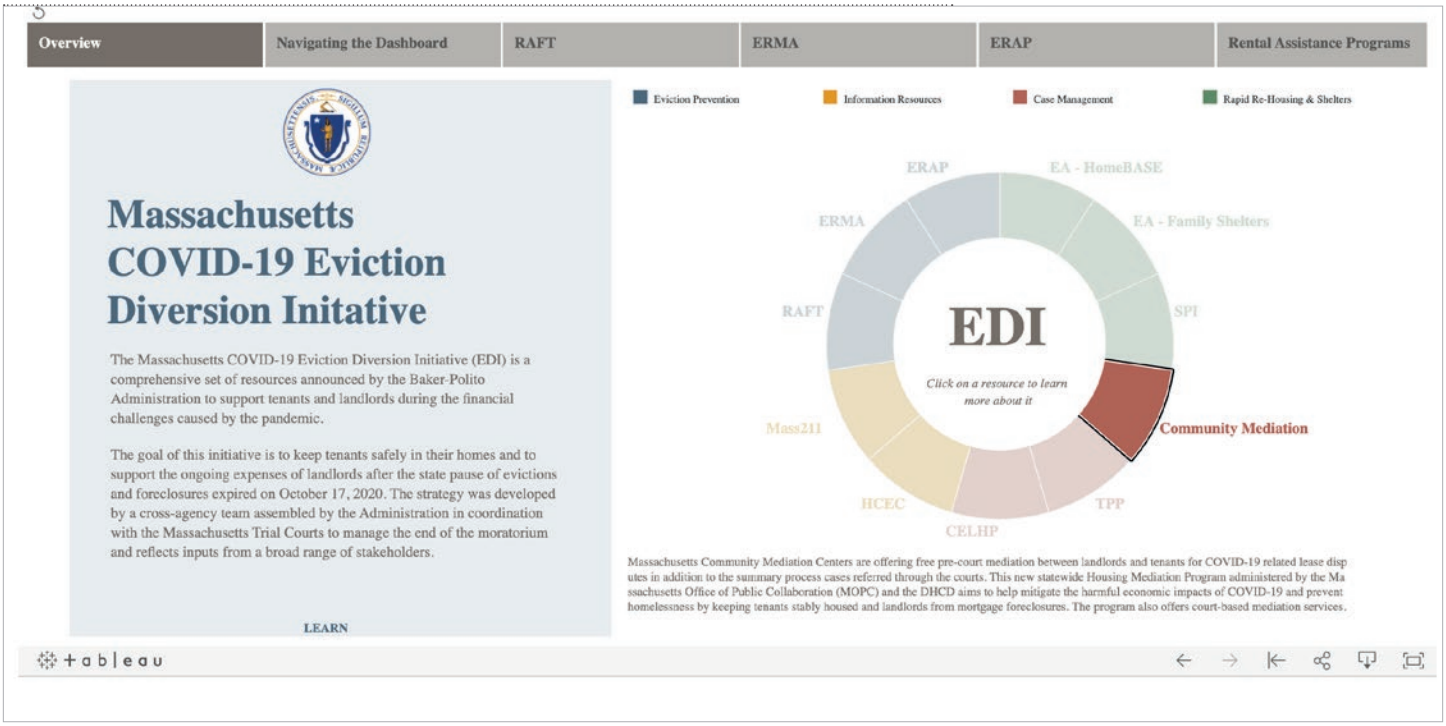


This is the Eviction Diversion Initiative dashboard. Clicking the "Community Mediation" tab gives a brief overview of mediation options, but no resources to click, and it's not apparent whether you can find more information from the tabs above, either. Image: mass.gov, public domain

apply to a body that: (1) is not a court, (2) is outside the control of the courts and (3) exists for the sole purpose of distributing funds.

MLAC is a corporation that the Legislature uses to channel public money to nonprofits of its choosing. But its lawyer argues that because the corporation is "under" the SJC it is not subject to the Public Records Law. In other words, MLAC does not have to share with the public the documents that show how it spends public money and how effectively (or not) the recipients of that money perform their publicly funded tasks.

Trying not to paint anyone into a corner, we asked MLAC's lawyer - twice - if MLAC would agree to produce the records without conceding that the corporation is subject to the Public Records Law. We received no response. So we are trying something else, namely asking the Legislature to exercise its oversight function.

JOINT COMMITTEE ON THE JUDICIARY

On April 12, 2021, we wrote to the Legislature's Joint Committee on the Judiciary asking it to "review and study the manner in which the Massachusetts Legal Assistance Corporation (MLAC) is disbursing public funds pursuant to the COVID Eviction Legal Help Project (CELHP) and the efficacy of that project." Even if MLAC will not disclose its records to the public, it should have to disclose them to the Legislature.

As our letter says, "members of MassLandlords wish to know how MLAC is administering the funds that the Legislature appropriated for CELHP, (approximately $12 million) and whether those funds are successfully furthering the Commonwealth's policy objectives." We will keep you posted on how the committee responds.

MLAC CONCLUSION

The Legislature appropriated $12 million for a program designed to help resolve landlord–tenant disputes short of eviction. But MLAC will not tell us exactly where it is going. We suspect that none of it went toward helping those low-income landlords who have been hit hard by the politicians' response to Covid-19, e.g., the unfunded eviction moratorium, the shifting criteria for subsidies and the delays arising from the unusually high rejection rate for RAFT applications. We suspect also, based on uneven county eviction rates, that the spending may not be allocated where it is needed most. This had spurred previous public records requests from DHCD.

In Chapter 257 of the Acts of 2020, the Legislature called for an Eviction Diversion Initiative Task Force to oversee this and other matters. To the best of our knowledge, no such task force has been convened. The Legislature entrusted a large amount of public funds to a public corporation that considers itself beyond the reach of the Public Records Law. It is time for the Legislature to tell us how - and how effectively - that money is being spent.

Point your camera app here to read more online.

Ranked Choice Voting, Defeated Statewide, Not Going Away

By Eric Weld, MassLandlords, Inc.

The defeat of Ranked Choice Voting by Mass. voters was a setback for landlords, but the issue is still alive and being adopted locally across the state.

When Ranked Choice Voting (RCV) was rejected by Massachusetts voters on November 3, 2020, it was a setback for housing providers and businesses in the state. The continuation of our state's Plurality Voting System means that legislative candidates will carry on with campaigns appealing to small constituencies that they wager will win them just enough votes to top their competitors.

As a voting bloc, landlords lose in this structure because we are vastly outnumbered by renters. And though there are common interests among renters and landlords, politicians seem to treat these as disparate constituencies. So in our current system it makes perfect sense for a legislative candidate to appeal to renters and renter advocates – without regard for landlords' interests – in order to win their votes and carry them to a plurality. Once in office, they are duty-bound to make policies that favor the constituencies that elected them.

That's exactly what Rep. Mike Connolly, a Democrat representing Cambridge, did. Then he went on to propose a rent cancellation bill that gained strong traction and would have driven many landlords out of the industry. Obviously, that's not a good long-term solution for the state's housing crisis.

PLURALITY VOTING'S IMPACT ON LANDLORDS AND HOUSING

The MassLandlords Board of Directors endorsed the Ranked Choice Voting initiative on the state ballot in November partly because of the voting system's potential to elect legislators that appeal to a broader constituency, including landlords.

The current plurality voting system in place in Massachusetts – and most other states – requires the winning candidate only to receive the most votes, regardless of whether those votes constitute a majority. As a result, candidates frequently appeal to a narrow constituency, such as renters, knowing that the backing of that constituency can win the election, sometimes with as little as 20% to 30% of the total vote. That means, in many cases, 70% to 80% of voters voted against the legislator who represents them.

We saw the result of this system in 2020 when legislators loyal to a constituency of renters and renter advocates succeeded in enacting one of the nation's most inequitable eviction moratoriums in reaction to the coronavirus pandemic. The moratorium provided little recourse for small landlords, rendering unnecessary financial strife and putting many out of business, while doing nothing to address the long term.

Ranked choice voting allows voters to list their ballot choices in order of preference. CC BY-SA MassLandlords

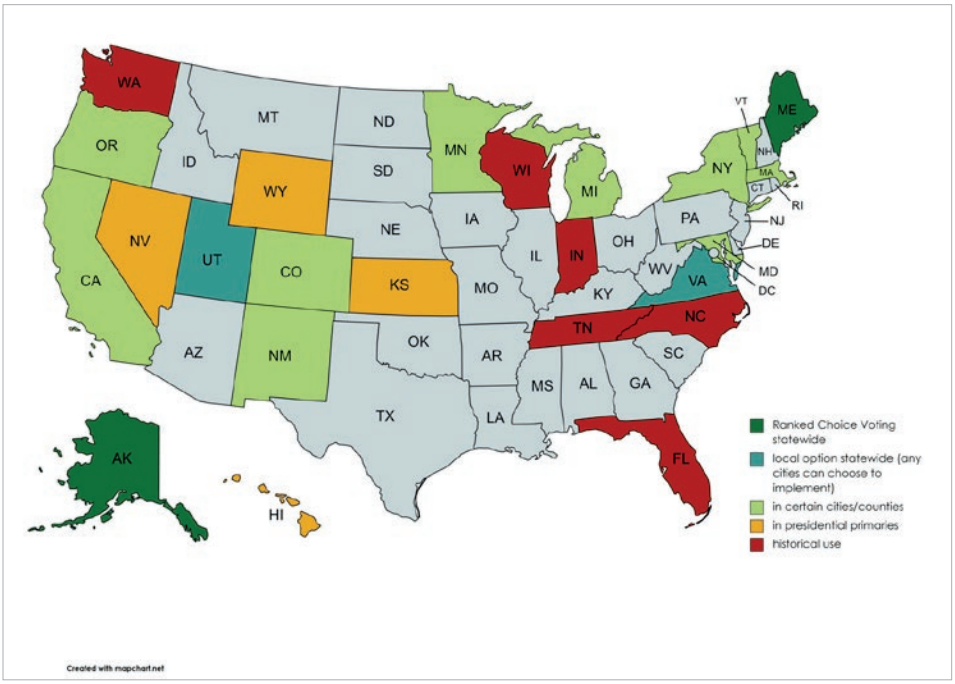
A CASE IN POINT

This scenario was repeated recently with a special election, on March 30, 2021, in the 19th Suffolk District, representing Winthrop and part of Revere, to fill the vacated seat of former House Speaker Robert DeLeo. Trump supporter and self-described moderate Jeff Turco won the four-way Democratic primary with 36% of the vote. Turco has publicly espoused some views that run counter to the majority of his district. Nearly two-thirds of the electorate voted against him in favor of another candidate. Yet Turco went on to win the general election, soundly defeating an

unenrolled candidate, Richard Fucillo, and Republican challenger Paul Caruccio.

In the four-way primary, labor organizer Juan Jaramillo garnered 30% of votes, boosted by the progressive electorate in the district, which had supported DeLeo. But, having carved up the vote with the other two candidates, who totaled 34% between them, it wasn't enough to overcome Turco's plurality.

This is how a district ends up being represented by a legislator with whom they don't align on some major stances. It's impossible to say that the outcome would have been different had ranked choice voting been in place. But given the progressive lean of the district, it's at least plausible that Jaramillo would have taken a strong share of the other candidates' votes and gained the 6%-plus necessary to have won the primary with ranked choice voting.



As this graphic illustrates, ranked choice voting is used in some fashion in nearly half the states in the nation. Image: CC SA-BY Wikimedia Commons

WINNING ELECTIONS WITH LESS THAN MAJORITY VOTE

The March 30 election wasn't the only contest this year with an outcome not representative of the majority of voters. The 4th District, primarily including Newton and Brookline, held a similar primary to fill the congressional seat of Representative Joseph Kennedy III. This resulted in the election of Jake Auchincloss, a one-time Republican who helped elect Gov. Charlie Baker. Auchincloss won a crowded Democratic primary contest with only 22.41% of the vote before besting Republican candidate Julie Hall in the general election.

The primary was stacked with eight progressive candidates who split the remainder of the vote. Jesse Mermell topped that list with 21.11% of the primary vote, losing by 2,000 votes following the discovery of a cache of some 3,000 votes after election night.

Looking further back, Rep. William Driscoll, Jr., a Democrat representing the 7th Norfolk District, won his 2016 primary contest with 21.37% of the vote, splitting with six other candidates. He ran unopposed in the general election. Joseph Boncore, a Democratic representative of the 1st Suffolk and Middlesex District, won a 2016 primary among seven candidates with 25.7% of the vote before running unopposed in a special election.

The Massachusetts legislature has more than a dozen legislators who won their primaries with less than a majority of votes before capturing general elections, in lopsided or unopposed races.

RANKED CHOICE VOTING REDUX

To revisit briefly, ranked choice voting is an election system in which voters are given the option to rank candidates in order of their preference. RCV requires a candidate to have a majority of votes in order to declare a winner. If no one gets at least 50% of the votes cast, the candidate with the fewest top votes is eliminated and that candidate's votes are awarded to the front-runner, until someone has gained a majority and is declared the winner.

RCV would allow multiple candidates, such as those in Winthrop and Revere, to compete without canceling out each other's votes and ending up with a default winner who doesn't represent the majority of the district. It might also encourage candidates to run campaigns that appeal to a wider swath of voters rather than negative campaigns that seek chiefly to impugn their competitors.

Plurality voting, the most prevalent system across the nation, potentially waters down democracy by incentivizing practices like the gerrymandering of districts in order to concentrate an incongruous share of voters favorable to one party. A less fair election is the result.

Plurality voting also frequently has a dampening effect on voter turnout because parties, in an attempt to reduce the effect of multiple candidates canceling each other's votes, may minimize the number of candidates, presenting voters with fewer choices.

WHY RANKED CHOICE VOTING LOST

Massachusetts voters rejected ranked choice voting in November 2020, by a 55% to 45% margin. Much of the opposition to the voting system concluded that RCV was too complicated, and that because of its complicated structure it would reduce voter participation. Other critics have decried a projected increase in the cost of elections with RCV. And some opposition claimed that RCV would increase likelihood of tallying mistakes or election fraud – an unsubstantiated claim.

The argument that RCV is too complicated is refuted by recent facts. Maine, which adopted RCV in 2016, saw 87% of voters there opt to rank their ballots instead of choosing just one candidate

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in the first RCV election. And in Minneapolis, where municipal elections use RCV, 95% of respondents said ranked choice voting was easy and intuitive.

But in a pandemic year, it's difficult to educate voters and build local consensus for a referendum without the use of community forums, which were mostly not allowed during the 2020 campaign season.

"It was challenging to run a campaign during a pandemic," Evan Falchuk, chair of the 2020 Ranked Choice Voting Committee and a former independent candidate for governor, recently told MassLandlords. "If you can't organize, and sit with people, it's hard to educate people. Because of the pandemic, we couldn't organize."

WILL RANKED CHOICE VOTING COME AROUND AGAIN?

Legislative rules disallow ranked choice voting from appearing on the ballot for statewide vote again until 2026. But Falchuk points out that the issue is not going away.

"There are a lot of people out there who want to see this continue," he said. The 2020 RCV campaign raised the profile of the issue and gained the interest of many voters who weren't aware of it. "It really put RCV on the map for people in the commonwealth."

Meanwhile, Falchuk noted, several Massachusetts municipalities continue the trend of adopting RCV systems for local elections.

Arlington is one. The town, whose voters opted for RCV by 63% in November, has begun the legislative process of adopting the system for its local elections with a town meeting vote. Other Massachusetts municipalities with RCV in place include Amherst, Cambridge and Easthampton.

The Arlington RCV campaign is spearheaded by the town's Election Modernization Committee, chaired by Greg Dennis, who assumed leadership of the Ranked Choice Voting Committee from Falchuk.

"A key thing about RCV is that oftentimes in a town like Arlington, people are told not to run for public office because they are concerned about splitting the vote with another candidate," Dennis told WickedLocal.com in March. "With ranked choice, you don't have to be worried about that and the result is that more candidates can run for local positions."

RANKED CHOICE VOTING CONTINUES HISTORIC TREND

Massachusetts would hardly have been the first state or entity to employ RCV. Maine voters approved RCV in a referendum in 2016 and the system was in place for the state's 2018 gubernatorial election, national primaries and congressional races. A lawsuit was filed by Maine Republicans claiming that the RCV system was not constitutional. The lawsuit was rebuffed twice by the state Supreme Court, and again by the U.S. Supreme Court in October 2020. Maine is now in the process of amending its state constitution to allow it to expand RCV to state congressional elections.

Further afield, Alaska narrowly approved RCV for general elections in November 2020. Municipalities in 13 states use RCV for some elections. Abroad, ranked choice voting is employed in Australia, Ireland, New Zealand, Scotland, India and a few other countries. And many corporations use RCV to elect their boards.

Historically, the United States has seen a gradual, if uneven, trend toward greater voter inclusion and representation. Since the republic began with highly restrictive voting, exclusive to white male landowners, laws over our 244-year history have broadened voter representation and the right to vote, even considering the recent spate of suppressive voter identification legislation in some states.

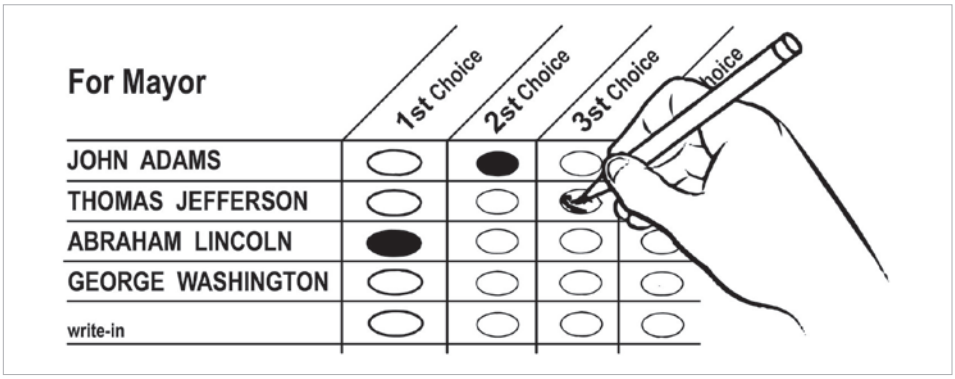
This voting system evolution makes sense. As the population of the United States has expanded demographically, its voting laws and inclusion have had to grow with it in order to respond to the societal needs of an ever-changing populace. When the country cast its first votes, its lawful electorate and needs were much more homogenous, and policies were proposed to meet those simpler, more unified demands (primarily those of white male landowners).

Today's United States is a welcome potpourri of cultures, backgrounds, outlooks, beliefs, socioeconomic diversity and needs. Our voting methods must change to amalgamate wildly different perspectives into consensus solutions, lest we end up permanently whipsawing back and forth depending on who ekes out a plurality to wield power over the rest.

We see the results of the more restrictive system we have in place. Housing crises and homelessness on the rise nationally, with no visionary solutions able to gain traction. Governmental gridlock and rampant negative political culture. It's not a sustainable model for a highly functioning democracy. Our voting structure needs to evolve in order to allow and enable the most inclusive participation possible.

Ranked choice voting is a move toward that objective.

Point your camera app here to read more online.



As this illustration demonstrates, ranked choice voting is a simple process of listing your choices for each candidate on the ballot in order of preference. Image: CC SA-BY Wikimedia Commons

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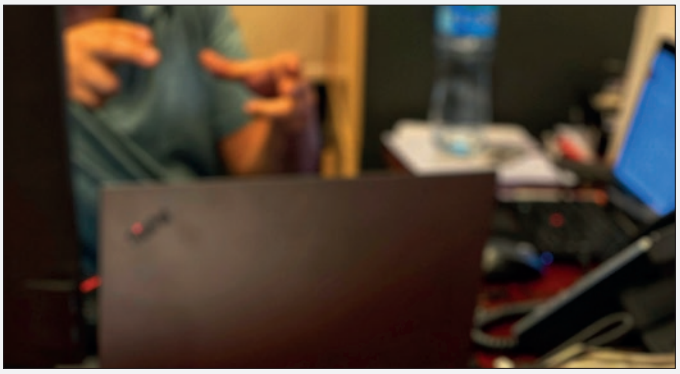

ARTICLE YOU MAY HAVE MISSED

How to Screen Tenants with Temporary Sources of Income

When you are considering potential tenants for your rental unit, income is an important consideration. After all, you want to make sure your renters can afford the rent. Massachusetts law is clear that you cannot deny a tenant because they receive Section 8 housing assistance. You should also be considering SNAP benefits (formerly known as food stamps) as income when calculating if someone can afford the rent. We are very careful to tell you that you should request proof of income, not wages, when vetting tenants.

The full article can be found at: MassLandlords.net/blog

Summer Notice for 2021 Annual Business Meeting and Elections

Our 2021 Annual Business Meeting and Annual Election will be held electronically in December 2021. Now is the time to volunteer.

MassLandlords' mission is to create better rental housing by helping prospective, new, and current owners run profitable, compliant, quality businesses. We are a 501(c)6 trade association. We have two democratic mechanisms for governance by and for members. First, our ongoing Policy Priorities Survey helps us take positions on complex issues of public policy. Second, each year in December at our Annual Business Meeting and Annual Election, we elect a new Director to the statewide Board of Directors.

Individual volunteers are welcome to look at volunteer opportunities online. We are currently looking for message board gardeners. You may also see calls for signatures and phone banks related to rent control opposition.

Regional Boards of Advisors help us to keep connected with local members, and can help with planning events.

Our statewide Board of Directors discusses operations, certification, and political strategy. To run for election at the statewide level, nominate yourself, or nominate a friend. Some name recognition and history of contributions will be required to succeed.

We send this notice six months early so there is plenty of time before decisions are required. Let us know if you want to contribute or learn more! 774-314-1896 or hello@masslandlords.net.

Point your camera app here to read more online.

The Complete Landlords' Guide to Lodging and Rooming Houses in Massachusetts

By Kimberly Rau, MassLandlords writer
with Peter Shapiro, contributing

Rooming houses come in all shapes and sizes, but what's the difference between a lodging house and a standard rental? Image license: CC_by_SA_4 MassLandlords

Embracing a non-traditional form of rental will have drawbacks and advantages for any landlord.

Rooming houses – that is, rental units where individuals rent access to a single room versus renting use of an entire property – have a long history in America, but not always the best reputation. Many people may imagine rooming houses as run down, or an opportunistic zone for illegal or immoral activity. It's why Massachusetts requires anyone running a rooming house to be properly licensed.

But what, exactly, is a rooming house? How do you know if you need a special license for your rental unit? What can you do if it turns out you've been accidentally running a rooming house, or boarding facility, all this time? And if you haven't had experience with rooming houses, why would you ever consider operating one?

TRADITIONAL RENTALS VS. ROOMING HOUSES

A traditional rental is easily explained: a family, or group of individuals, rents an apartment, house or some other domicile (trailer, condominium, etc.) from a landlord or property management company, signing a lease for a determined amount of time and paying rent for the duration of the lease. Typically, in this arrangement, the entire unit of people is collectively responsible for the rent (in other words, if three friends rent an apartment, and one friend moves out, the remaining two are still responsible for the entire rent payment each month).

In contrast, a rooming house, also sometimes called a boarding house, lodging house or single-room occupancy (SRO), operates differently. In that scenario, four or more people, unrelated to the person who operates the rooming house, rent a single room from the operator (which may or may not have amenities such as en suite bathrooms or kitchenettes). Some tenants may stay in the rooming house for a few days, others may rent a room for years or more. Sometimes, tenants in rooming houses pay rent by the day or the week, and may share bathroom facilities with the people renting the other rooms. The kitchen, if there is one, may be shared among the boarders.

The person who operates the boarding house may be a landlord or manager who may or may not live in the domicile. In any case, rooming houses fall under special licensure guidelines from the state, as well as any ordinances that exist in the relevant municipality.

One key difference between traditional rentals and rooming house tenancies is whether essential facilities, such as bathrooms and kitchens in some cases, are under the exclusive use of the tenant, or whether they must share these areas with separate signatories.

LEGAL DEFINITION OF A ROOMING HOUSE OR LODGING HOUSE

When we speak informally, we don't distinguish between rooming or lodging houses. But Massachusetts law defines two separate things based on the renters who occupy it. For instance, MGL Ch. 140 Section 22 defines a ***lodging house*** as "a house where lodgings are let to four or more persons not within second degree of kindred to the person conducting it and shall include fraternity houses and dormitories of educational institutions, but shall not include dormitories of charitable or philanthropic institutions or convalescent or nursing homes licensed under section seventy-one of chapter one hundred and eleven or rest homes so licensed, or group residences licensed or regulated by agencies of the commonwealth."

Separately, MGL Ch. 111, Section 199b defines a ***rooming house*** as "every dwelling or part thereof which contains one or more rooming units in which space is let or sublet for compensation by the owner or operator to four or more persons not within the second degree of kindred to the person compensated." This definition is only used as a deleading exemption, provided no one under the age of six resides in the rooming house. Since the deleading laws only apply to

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this age anyway, this definition is of no interest to landlords. Landlords must still delead rooming houses where children live. For the purpose of this article, we are referring to lodging houses or rooming houses interchangeably, and we mean to invoke the Chapter 140 definition only.

Per Chapter 140, lodging houses with four or more renters living in the building at the same time must be licensed. But that's not as cut-and-dried as it may seem.

First, rooms do not necessarily have to be rented to individuals. You might have two or more individuals in a room jointly and severally liable for their room rental. However many people you rent to, all rooms must meet the square footage requirements under the state sanitary code. According to 105 CMR 410.400, that's 80 square feet for an individual renter, or 60 square feet per person if the room is shared with someone else. If you have a family of four that wants to rent a room, and that room is 240 square feet, you're in compliance with the law. Note that this square footage requirement is not the same as when the entire dwelling unit (rather than rooming unit) is rented out.

Second, note the exceptions. For instance, sober housing is not considered a lodging house, and therefore does not fall under the licensing requirements of Chapter 140. Convalescent or nursing homes, hospitals, infirmaries, or "boarding homes for the aged" are also not subject to Chapter 140. These are separately regulated.

Third, it matters whether you are renting a complete dwelling or a room. Chapter 140 talks only about whether renters are related. But case law from Worcester vs. College Hill Properties builds on the Chapter 140 definition to separate lodgers with rooms from tenants with possession of a complete dwelling. Because this distinction is not written into the law, we need to explain the case and its gray-area limitations.

In the early 2000s, the city of Worcester tried to limit the number of students who live together in an apartment by deeming such rentals "lodging houses." The court of appeals upheld this decision in 2002, but in 2013 the Supreme Judicial Court issued a decision that raises questions regarding the earlier ruling. Suffice it to say the court forbade application of the lodging house law to renters with possession of a complete dwelling. (If you'd like to read the entire 2013 ruling, it's City of Worcester v. College Hill Properties, LLC.)

Unfortunately for us, the court left open the possibility that the city might make and enforce its own ordinance, which is what Worcester has done. Therefore, in Worcester, four or more is still too many even on a joint and several lease for a complete dwelling.

MassLandlords maintains that any such ordinance is vulnerable to a lawsuit under the Fair Housing Act. Checking whether people are related to one another, even after they have signed a joint and several obligation for a full dwelling, is a thinly justified policy with a discriminatory disparate impact on the basis of at least one major protected category: international students routinely come here without income and team up to form large, stable households, but Worcester does not allow this.

So to summarize: think of yourself as a lodging house in need of licensure if you rent by the room and a needed facility (e.g., kitchen, bath) is not under the exclusive use of your renter. Don't think of yourself as a lodging house if you sign a joint and several agreement for a complete dwelling.

You may be cited by your town or city depending on what ordinances they have and how many people are on the joint and several agreement. If you are cited for having too many unrelated people in your unit and you have rented an entire premises jointly and severally, then contact us.

WHAT ARE THE REQUIREMENTS FOR OPERATING A ROOMING HOUSE?

If you have a boarding house setup that requires a license, there are a few things you'll need to do to ensure you're in compliance with the state sanitary code.

Per 105 CMR 410 and MGL Ch. 140, landlords operating a rooming house must:

- Provide one bathroom with a toilet, sink and shower or bathtub for every eight rooming house renters.
- Clean the bathroom every 24 hours if the bathroom is shared (so if you're lucky enough to have an en suite bathroom for every room, you may be able to skip this one).

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- Provide automatic smoke or heat detectors.
- Provide sprinklers if there are six renters or more. (Your local ordinances may allow you to wait on this one until you are pulling permits for another job that would make this upgrade feasible, but check with your municipality to make sure.)
- Provide a room that is at least 80 square feet for a single occupant, or 60 square feet per person if the room is shared with another person.

You do not need to provide a kitchen to your renters, but if you do, the kitchen must have a sink, stove, oven, storage space and "space and proper facilities for the installation of a refrigerator." If you have a larger rooming house, between six and 19 renters inclusive, you may provide a kitchenette in the room, but only if the room exceeds 150 square feet of space. If you opt for this, the kitchenette must have a hot plate, refrigerator, and a sink that has hot and cold running water.

Besides that, many other standard landlord-tenant rules apply. You need permission to enter a tenant's room, unless it's an emergency. You must keep on top of pest control and repairs. And you must still follow proper eviction procedures, though in most cases you will not need to issue a 30-day notice to quit. Tenants in residence for three months or more require different notice lengths, depending on why you are evicting them (seven days for damaging property or causing a nuisance, 14 days for rent owed, 30 days for other reasons). In no circumstances can you lock a tenant out without a court order.

Finally, your city or town may have additional licensure requirements.

WHAT ARE THE BENEFITS AND DRAWBACKS TO ROOMING HOUSE RENTALS?

Renters find boarding houses attractive for many reasons. Many potential tenants will be drawn to rates that are typically lower than an Airbnb rental. That, combined with not being locked into a long-term lease, will make rooming houses ideal for per diem workers who may only be in the area for a short, or undetermined, amount of time. Students who are not interested in a traditional dorm situation may also be drawn to the independence a rooming house offers, without getting bogged down by a lease or needing to find roommates. Then there are those who may have sold their house but are still looking for their next property (or are waiting to be able to close on their mortgage).

Your rooming house will likely be most attractive to people looking for shorter-term commitments and more budget-friendly options. This will mean more single individuals and couples, and probably fewer families. You may also see young professionals who are not ready to commit to living in a certain city yet.

Of course, there's the other side of the coin: dealing with multiple rental agreements means dealing with a lot of different people, some of whom may pay their rent right on time, others who may require you to do a lot of door-knocking to collect. You're also going to have to figure out how to meet requirements for things such as daily bathroom cleaning.

It's also worth considering that rooming house tenants who have lived in the unit for less than 30 days do not require the same lengthy eviction notice as a tenant with a traditional lease. In theory, that means you can turn over your units faster than if you had a longer notice period. But no eviction is fast or desirable. If you manage your lodging house poorly, you could easily end up with more losses than income.

I WANT TO START A ROOMING HOUSE. WHAT DO I NEED TO DO?

First things first: check with your city or town to find out what the licensing procedure for your municipality is. Some areas may follow the state requirements and nothing more; others may have more boxes for you to check.

At minimum, you will need to comply with state and local building codes. Your local building department will need to approve your setup, and you'll need to follow the requirements outlined in the prior sections. Additionally, you'll need to have the proper fire extinguishers, exit signs, automatic fire systems, sprinklers and smoke and carbon monoxide detectors. This could mean an extensive renovation, depending on what is already in place.

Annual inspections are required, and your egress inspection certificate must be kept current. It's important to realize that although your local inspection department's mission is to protect the health and safety of the residents, the department also wants you to provide housing. Talk with them and see what solutions you can come to that keep everyone safe but also protect your wallet. Although health and safety are paramount, your local officials do want to find workable solutions. Communication is key.

The highest hurdle to clear will probably be zoning. If you're lucky, your rental unit is already properly zoned for a rooming house, but this is not a given. If you are not already zoned for a rooming house, you'll need a variance from your zoning department. Depending on the neighborhood, your abutters may make this an arduous task. Here also, communication is important. Talk with your neighbors. Have a clear plan for your rooming house and be prepared to show how it will be an asset to the area.

For the ZBA hearing, it's a very good idea to get testimony from renters who would want to live in the rooms, non-profits who will refer renters to you, neighbors who support affordable housing, and city councilors.

HELP! I'VE BEEN RUNNING A ROOMING HOUSE AND DIDN'T KNOW IT!

It would be hard to operate a boarding house and not be aware of that fact. The multiple separate rental agreements would be a big clue. A more likely scenario is that you weren't aware you needed to be licensed. Maybe you started out with just one or two rooms, and didn't realize expanding to four or more was a game changer. Maybe you've just gotten lucky and no one's reported you (so far).

Whatever the case, you know now, and you need to be proactive. Don't wait for a tenant to make a complaint or request an

inspection to get licensed. That can open the door to fines and penalties, including jail time. It's in your best interest to get licensed as soon as possible.

If you don't think you can get your residence into compliance, then you can also downsize or dissolve the arrangement (following all state and local guidelines) until you are ready to get licensed.

CONCLUSION

In summary, running a rooming house isn't right for every landlord, or every location. You may find your four-bedroom colonial an hour from the nearest big city doesn't attract the kind of student or worker population that would make it worthwhile (but the family of five who wants to live the suburban life will be thrilled to sign for the whole place). Conversely, you may have a wonderful location that is attractive to prospective rooming house tenants, but neighbors who will fight you tooth and nail for a zoning variance.

However, if you are willing and able to get the necessary variances (or are lucky enough to already live in a place zoned for rooming houses), can do the work to get properly licensed and you are in the right place to make it worth your while, a rooming house could be a great way for you to maximize your rental's overall profitability, along with providing affordable housing to those who need it. As always, check with an attorney if you have any concerns about drafting your rental agreements, and consult your local laws before opening your rooming house.

Do you have a rooming house success story you'd like to share? Email us at hello@masslandlords.net

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		1	2	3	4	5
6	7 SWCLA Virtual Meeting 7:00pm - 8:00pm	8	9	10 NWCLA Virtual Meeting 7:00pm - 8:00pm	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

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SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

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You will still be able to screen your renter as normal. You will have to waive screening criteria that would adversely affect an applicant with non-violent criminal history, bad credit, and/or an eviction record. All other screens can be conducted as normal (ability to pay rent, move-in monies, smoking, pets, etc.).

You will get unlimited helpline access if you participate. We can issue these guarantees because we know in over 80% of cases, you won't lose a dime, and we won't have to pay the guarantee.

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SWCLA Virtual Meeting: The Housing Mediation Program

MON 06/07

Part of Governor Baker's comprehensive Eviction Diversion Initiative is The Housing Mediation Program that uses mediation as a homelessness prevention and housing stability vehicle to help mitigate the human and economic costs of eviction.

Family Services of Central Mass is one of the MA Community Mediation Centers offering FREE mediation services to parties before, during, or after eviction notices have been filed in court. Their aim is to reach cases before they enter the legal system. By using mediation, parties may be able to avoid the costs and concerns of court involvement altogether. Their confidential mediation process is a way for the parties to have a conversation facilitated by two highly trained, neutral co-mediators, most often leading to a mutually acceptable agreement, which keeps the tenants stably housed and the landlords from mortgage foreclosure. When needed, interpreters can be arranged.

This presentation will be given by:

- Robin Bahr Casey, Housing Mediation Program Coordinator
- Norka Michelen N., Esq., Project Manager, Mediation Dept.

PLEASE NOTE: Given the current COVID-19 precautions, we have decided to continue holding our meetings via ZOOM until further notice.

All members whose dues are up to date will be sent a link to the meeting via email. From that email, all you have to do is click on the link and it will bring you to the meeting.

MONDAY, JUNE 7TH

SWCLA MEETING AGENDA
7:00pm Meeting Start
7:00pm Meeting wrap-up

LOCATION
Zoom meeting information will be emailed to SWCLA members on the day of the event and viewable online.

PRICING
Open to SWCLA Members only. Pay annual dues then free. All SWCLA members whose dues are up to date will be sent a link to the meeting via email.

This event is operated by volunteers.

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