

CITY AND COUNTY OF DENVER

Office of Economic Development

**PRESERVATION OF AFFORDABLE HOUSING ORDINANCE  
ADMINISTRATIVE RULES AND REGULATIONS**

APPROVED FOR LEGALITY:



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**PRESERVATION OF AFFORDABLE HOUSING ORDINANCE**  
**ADMINISTRATIVE RULES AND REGULATIONS**

*Adopted February 1, 2019*

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Adopted pursuant to Article III, Chapter 27 (Housing) of the Denver Revised Municipal Code (D.R.M.C)

**TABLE OF CONTENTS**

**SECTION 1: PURPOSE, AUTHORITY AND DEFINITIONS**

- A. Purpose
- B. Applicability
- C. Authority
  - 1. Administration, Implementation, and Monitoring for Compliance
  - 2. Standard Notice Forms
  - 3. Recordation of Notice
- D. Definitions

**SECTION 2: NOTICE AND NOTICE PERIOD REQUIREMENTS**

- A. Timing of Required Notice
  - 1. Federal Preservation Projects
    - a. Affordability Expiration Notice Period
    - b. Notice Period Prior to Planned Sale
    - c. Sale Prior to Expiration
  - 2. Local Preservation Projects
    - a. Affordability Expiration Notice Period
    - b. Notice Period Prior to Planned Sale
    - c. Sale Prior to Expiration
- B. Content Requirements for Required Notice
  - 1. Required Form of Notice
  - 2. Notice to City
  - 3. Access to Public Offering Materials
  - 4. Confidentiality of Documentation Provided through Notice
  - 5. Notice to Tenants

- C. Rights and Restrictions During Affordability Expiration Notice Period
  - 1. Separate Notice of Planned Sale
  - 2. Negotiation for Extension of Affordability
- D. Rights and Restrictions During Notice Period Prior to Planned Sale
  - 1. Marketing
  - 2. Site Visits
  - 3. Negotiation for Purchase

### **SECTION 3: RIGHT OF FIRST REFUSAL**

- A. Provision of Contingent Purchase and Sale Agreement to City
- B. Evaluation of Contingent Sales Agreement
  - 1. Generally
  - 2. Waiver for Perpetual Affordability
  - 3. Transactions for Which an Expedited Waiver May Be Requested
  - 4. Standard Waiver; Default Waiver
  - 5. Waiver Only Applicable to Single Transaction
  - 6. Selection and Appointment of the City's Designee
- C. City's Exercise of Right of First Refusal
  - 1. Election to Exercise Right of First Refusal
  - 2. Replacement Sales Agreement
  - 3. Termination of the Replacement Sales Agreement
  - 4. Closing Period

### **SECTION 4: CITY SUBSIDY PROJECTS – LONG-TERM AFFORDABILITY REQUIREMENTS**

- A. Rental and Occupancy Covenant
  - 1. Affordability Period
  - 2. Covenant Contents
  - 3. Subordination of Covenant
- B. Amendments/Modification to the Rental and Occupancy Covenant
  - 1. In Conjunction with an Application for New City Subsidy
  - 2. Without an Application for New City Subsidy
  - 3. Redevelopment
  - 4. Tenant Relocation
  - 5. Assumption of Good Faith

C. Additional City Subsidy

1. Provision of Additional City Subsidy
2. City Subsidy Applications for a Specific Capital Need or Health and Safety Repair
3. Underwriting Criteria

**SECTION 5: ENFORCEMENT**

A. Penalties for Violation of Ordinance Requirements

1. Penalties

- a. Civil Fines
- b. Notice of Violation
- c. Affordability Extension
- d. Imposition of Penalties Included in Existing City Documentation

2. Violations

B. Contingency for City's Right of First Refusal

C. Appeals Process

D. Finding of a De Minimis Effect

**EXHIBITS AND ADDENDA**

A. Addendum to Purchase and Sale Agreement

**SECTION 1: PURPOSE, AUTHORITY AND DEFINITIONS**

**A. Purpose**

The purpose of these rules and regulations is to set forth responsibilities and procedures for administration and implementation of the Preservation of Affordable Housing Ordinance ("Preservation Ordinance") codified at Article III, Chapter 27 (Housing) of the Denver Revised Municipal Code ("D.R.M.C."). Per D.R.M.C. Sec. 27-45, the intent of the Preservation Ordinance is to protect the availability of publicly-assisted affordable housing for low- and moderate-income households by providing notice to the City and tenants when current project-based rental assistance programs and/or affordable housing uses are ending; providing purchase opportunities for the City to attempt to preserve the affordable housing while respecting ownership interests of building owners; and ensuring long-term affordability in future projects that the City assists with public financing designed to create or preserve affordable housing. Section 2 and Section 3 of these rules and regulations address the process by which the City will implement D.R.M.C. Sec. 27-47 through Sec. 27-49. Additionally, the Preservation Ordinance details the minimum length of time that a

property receiving subsidy from the City and County of Denver must be income-restricted as affordable housing. Per Sec. 27-50, any City Subsidy Project must be income-restricted for a minimum of sixty (60) years, the implementation of which is described in Section 4 of these rules. Recognizing that no set of regulations can anticipate every conceivable situation in which an ordinance may apply, it is anticipated that these rules may be amended or supplemented as needed. Further, these regulations are not intended to limit the administrative discretion of those persons implementing the Preservation Ordinance on subjects not covered herein. In some instances, these rules and regulations attempt to summarize portions of the Preservation Ordinance. In the event of a conflict or discrepancy between these rules and regulations and the Preservation Ordinance, the Preservation Ordinance shall control.

**B. Applicability**

These rules and regulations shall apply to all multi-family residential projects with a total of five (5) or more units located in the City and County of Denver that fall under the definition of “Federal Preservation Project,” or “Local Preservation Project,” or “City Subsidy Project” contained in the Preservation Ordinance and in these rules. A project shall NOT be subject to the Preservation Ordinance solely due to the owner’s or operator’s acceptance of tenant-based rental assistance (for example, Housing Choice Vouchers, formally known as Section 8 vouchers) for units in the project. Additionally, the Preservation Ordinance does NOT apply to individually-owned units that are subject to resale restrictions.

**C. Authority**

1. *Administration, Implementation, and Monitoring for Compliance.* Per the Preservation Ordinance, the Office of Economic Development (“OED”) bears responsibility for the administration, implementation, and monitoring for compliance with the Preservation Ordinance.
2. *Standard Notice Forms.* Forms or other supporting documents related to these rules and regulations may be updated from time to time as needed by the Executive Director of OED. OED will make the most current version of each such form or supporting document available on OED’s website.
3. *Recordation of Notice.* The City may record notice of the applicability of the Preservation Ordinance in the land title records of any property affected by the provisions of the Preservation Ordinance.

## **D. Definitions**

*Affiliate*, with regard to any Owner, shall mean an entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the Owner, in each case where the term “control” means possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether through ownership of voting securities, by contract interest or otherwise.

*Affordability Expiration Notice Period* shall have the meaning set forth below in subsections 2.B.1.a. and 2.B.2.a. for Federal Preservation Projects and Local Preservation Projects, respectively.

*Affordability Restrictions* shall mean and include any restriction placed upon a property that (i) limit the use and/or occupancy of all or part of the units on the property to households with incomes below a certain level or (ii) limit the rent that can be charged for such units to below-market rates. Affordability restrictions may be imposed by deed restriction, covenant, contract, or other manner.

*City* shall mean the City and County of Denver.

*City Notification* shall have the meaning set forth below in subsection 2.B.2.

*City Subsidy* shall mean locally controlled public funds administered by OED or another city agency allocated for the purpose of creating or preserving affordable rental housing. City subsidies may be provided to developers through direct financial assistance such as low interest or deferred loans, grants, equity gap investments, credit enhancements or loan guarantees, or other mechanisms.

*City Subsidy Projects* shall mean privately owned properties that include five (5) or more units receiving funding from or through a city subsidy.

*Contingent Sale Agreement* shall have the meaning ascribed thereto in subsection 3.A. below. Contingent Sale Agreements shall be contingent on the City’s right of first refusal, whether or not such agreement contains language setting forth such contingency.

*Days* shall, within the context of the Preservation Ordinance and these Rules and Regulations, mean calendar days, unless otherwise specified.

*Economically Substantially Identical*, with regard to the provisions of a contract, shall mean terms that, when compared to another contract, are so similar as to have no more than a de minimus effect on the

economic value of the contract in the market.

*Expedited Waiver* shall mean the notice of the City's decision to waive its right of first refusal that is given by the City within a shortened timeframe in accordance with Section 3.A.2 hereof.

*Federal Preservation Projects* shall mean a rental housing project with five (5) or more units with federally-funded loans, contracts, or insurance, which is subject to affordability restrictions because of receiving federal financial assistance. An updated list of all known federal preservation projects will be maintained by OED and will be made available to the public upon request. Omission from such list shall not affect the applicability of this ordinance to a federal preservation project.

*Instrument of Affordability* shall be an executed and recorded agreement to limit the use of the property to affordable housing with income qualifications and rent restrictions through the sixty (60) year period of affordability.

*Local Preservation Projects* shall mean rental housing projects that have affordability restrictions in place on five (5) or more rental units because of receiving financial assistance from the City of Denver. An updated list of all known local preservation projects will be maintained by OED and will be made available upon request. Omission from such list shall not affect the applicability of this ordinance to a local preservation project.

*Notice Period Prior to Planned Sale* shall have the meaning set forth in subsection 2.B.1.b. and 2.B.2.b. below for Federal Preservation Projects and Local Preservation Projects, respectively.

*Opt-Out* shall mean an owner's (i) non-renewal of an available option to extend any project-based rental assistance contract under which a federal preservation project is subject. Owners may consider "opting out" when they contemplate conversion to open market rental housing, other housing financial assistance was provided for the project or (ii) prepayment of a federally-subsidized loan or commercial uses, or a sale of the property mortgage if such prepayment results in termination of federal affordability restrictions.

*Owner* means any entity holding title to, or a direct ownership (including a long term recorded leasehold interest) in, a Preservation Project.

*Preservation Project* means any property that is either a Local Preservation Project or a Federal Preservation Project, or both.

*Qualified Preservation Partner* means an organization that has been selected by the City for inclusion on the list of entities from which the City may choose a designee when exercising its right of first refusal.

*Rental and Occupancy Covenant* means an instrument of affordability that describes the affordability restrictions and required term of the restrictions that is recorded on the deed of the property. The Covenant runs with the land and is binding on all current and future owners of the site.

*Replacement Purchase and Sale Agreement* means a copy of the Contingent Purchase and Sales Agreement that has been revised to name the City or its designee as buyer of the subject property and otherwise as set forth in subsection 3.C of these rules and regulations.

*Restricting Agency* means any agency capable of placing Affordability Restrictions on a housing property in the City and County of Denver. Restricting agencies include, but are not limited to, the City and County of Denver, the State of Colorado, the Colorado Housing and Finance Authority (CHFA), and the Department of Housing and Urban Development (HUD).

*Right of First Refusal or ROFR* means the right to purchase a property before it is sold to another party. As used herein, the term refers to the City's right of first refusal to purchase a Preservation Project as described further in the Preservation Ordinance and in these rules and regulations.

*ROFR Due Diligence Period* means the period after the City's receipt of a Contingent Purchase and Sale Agreement from the Owner of a Preservation Project during which the City may evaluate the project and must decide whether to exercise or waive its right of first refusal, as described further in subsection 3.C.4. herein.

*Sale* means an act by which an owner conveys, transfers or disposes of property by deed or otherwise, whether through a single transaction or a series of transactions; provided, however, that a disposition of publicly-assisted housing by an owner to an affiliate of such owner shall not constitute a sale.

*Tenants* refers to any and all tenants of a Preservation Project.

*Tenant Notification* shall have the meaning set forth in subsection 2.C.5. below.

## SECTION 2: NOTICE AND NOTICE PERIOD REQUIREMENTS

### A. Timing of Required Notice

#### 1. Federal Preservation Projects

- a. Affordability Expiration Notice Period. At least one year but no more than fifteen (15) months prior to the anticipated expiration of any Affordability Restrictions on a Federal Preservation Project or the Owner's intent to Opt-Out of such existing contract, the Owner of such project shall provide notice to the City and the project's Tenants. Such notice shall include the information set forth in subsection B below.
- b. Notice Period Prior to Planned Sale. In the event of a planned sale of a Federal Preservation Project, the Owners of the project shall provide notice to the City and Tenants at least ninety (90) days prior to the anticipated date of sale. Such notice shall include the information set forth in subsection B below.
- c. Sale Prior to Expiration. In the event that an Owner of a Federal Preservation Project plans to sell the Federal Preservation Project during the one-year notice period described in subsection A.1.a. above, the notice requirements of subsection A.1.b above shall apply.

#### 2. Local Preservation Projects

- a. Affordability Expiration Notice Period. In the event of an anticipated expiration of an existing affordability restriction on a Local Preservation Project, the Owner(s) of such project shall provide notice to the City and Tenants at least one year but no more than fifteen (15) months in advance of the anticipated expiration date. Such notices shall include the information set forth in subsection B below.
- b. Notice Period prior to Planned Sale. In the event of a planned sale of a Local Preservation Project, the Owner(s) of such project shall provide notice to the City and Tenants at least ninety (90) days prior to the anticipated date of such sale. Such notice shall include the information set forth in subsection B.5 below.
- c. Sale Prior to Expiration. In the event that an Owner of a Local Preservation Project plans to sell the Local Preservation Project during the one-year notice period described in subsection A.1. above, the notice requirements of subsection A.2.b above shall apply.

### B. Content Requirements for Required Notice

#### 1. Required Form of Notice

OED shall endeavor to develop and publish on its website templates for notices required to be

given to the City pursuant to the Preservation Ordinance. Only completed notification forms that are signed by the Owner of a Preservation Project shall be considered formal notice when received by OED. No other written or verbal communication with a City staff member nor any notification form signed by a person other than an authorized signatory of record of the Owner will be considered formal notice. Notice in the format described above must be provided both at the commencement of the Affordability Expiration Notice Period and the Notice Period Prior to Planned Sale.

2. *Notice to City*

In providing notice to the City under the Preservation Ordinance at the commencement of both the Affordability Expiration Notice Period and Notice Period prior to Planned Sale, Owners of a Preservation Project shall use any notification form provided for such purpose on OED's website. In addition to the completed form, notice to the City of an expiring affordability restriction or a planned sale ("City Notification") shall include at a minimum:

- a. A description of the development, including the property name, property address, number of units contained in the development, number of bedrooms within each unit, mix of income-restricted and market rate units contained in the development;
- b. A list of existing Affordability Restrictions on the property, including all contracts, covenants or other affordability restrictions and the units subject to the restrictions;
- c. Expiration date(s) of each existing Affordability Restriction;
- d. Current contact information for existing owner and property manager, as appropriate;
- e. A description of the ownership structure of the Preservation Project (including any long-term leasehold interests), the length of the existing owner's ownership of the property, and identification of the manager(s) of the Preservation Project;
- f. Identification of the specific action that will make the property no longer affordable;
- g. Current financial and/or physical condition statements regarding the Preservation Project, including but not limited to:
  - i. The Preservation project's current rent rolls, including each unit number and the monthly rent charged for each unit;
  - ii. The number of vacant units in the development;
  - iii. Statement of the development's vacancy rate during the preceding 12 months;
  - iv. Statement of the development's current income and operating expenses;
  - v. Itemized lists of the development's capital expenditures in each of the two preceding calendar years;

- vi. Itemized lists of the development's anticipated capital needs and expenditures;
- vii. Amount of the project reserves;
- viii. Copies of two most recent financial and physical inspection reports on the development, if any, filed with federal, state or local agencies;
- ix. Most recent Environmental Assessment for the Preservation Project.
- x. Any other information as reasonably requested by the Executive Director of OED.

h. In addition to the information noted above, Owners of Federal Preservation Projects must provide the following:

- i. Whether the Owner intends to Opt-Out or withdraw the property from an existing project-based rental assistance or project-based voucher contract;
- ii. Whether the Owner is involved in negotiations with HUD regarding an extension of an expiring project-based rental assistance or project-based voucher contract;

i. In addition to the information noted above, Owners of Federal and Local Preservation Projects must provide the following:

- i. Whether the Owner intends to extend the existing Affordability Restriction or permit such restriction to expire;
- ii. Whether the Owner is involved in negotiations with any restricting agency regarding an extension of the existing covenant or other Affordability Restriction.

3. *Access to Public Offering Materials*

Should an Owner of the Preservation Project or its representative commence marketing of such Preservation Property for public sale, the City and its designees shall be afforded access to due diligence documents identical to that of any other prospective buyer.

4. *Confidentiality of Documentation Provided through Notice*

Documentation provided to the City pursuant to these rules and regulations shall not be shared with external partners unless approval from the Owner is received, except that the City may disclose such documentation to potential funding partners, regulatory agencies, agents, consultants or prospective designees of the City in connection with the evaluation of the City's right of first refusal, and as may be required by law. Should disclosure be made to funding partners, regulatory agencies, agents, consultants, or prospective designees, the City shall require such third parties to enter into an agreement ensuring confidentiality.

5. *Notice to Tenants*

In providing notice to Tenants under the Preservation Ordinance, the Owner of a Preservation Project shall use the notification form provided for such purpose on OED's website. Notice to Tenants of an expiring Affordability Restriction or a planned sale ("Tenant Notification") shall include at a minimum:

- a. List of existing Affordability Restrictions on property, including all contracts and covenants, and other affordability restrictions;
- b. Expiration date(s) of each existing affordability restriction;
- c. Current contact information for persons most able to provide information to tenants regarding implications of sale (owner and/or property manager as appropriate);
- d. Identification of the specific action that will make the property no longer affordable;
- e. For Federal Preservation Projects:
  - i. Whether the Owner intends to Opt-Out or withdraw the property an existing project-based rental assistance or project-based voucher contract;
  - ii. Whether the Owner is involved in negotiations with HUD regarding an extension of an expiring project-based rental assistance or project-based voucher contract;
- f. For Local Preservation Projects:
  - i. Whether the Owner intends to extend the existing Affordability Restrictions or permit such covenant or Affordability Restrictions to expire;
  - ii. Whether the Owner is involved in negotiations with any restricting agency regarding an extension of the existing covenant or other Affordability Restriction.

g. **Additional Information**

An Owner may attach additional information to the Tenant Notification as may be appropriate for tenants of a specific building. Within fifteen (15) days of its distribution, Owner shall provide OED with a copy of the final version of the Tenant Notification distributed to the affected Tenants.

h. **Confidentiality**

If confidentiality of the transaction is critical to the preservation of an income-restricted property or protection of the property's residents, the Executive Director of the Office of Economic Development reserves the right to waive the requirement to provide tenant notice.

**C. Rights and Restrictions During Affordability Expiration Notice Period**

*1. Separate Notice of Planned Sale*

During the Affordability Expiration Notice Period, Owners of a Preservation Project shall not sell or contract to sell the property unless separate notice is provided to the City and tenants of a planned sale of the property pursuant to subsections B.1 and B.2. above. Should a marketing period commence during the Affordability Expiration Notice Period, the City and/or its designee shall be afforded access to the subject property in a manner commensurate with access provided to any other prospective buyer during the marketing period.

*2. Negotiation for Extension of Affordability*

During any Affordability Expiration Notice Period, the City may negotiate with the Owner for an extension of affordability restrictions on all or some of the units in the Preservation Project.

**D. Rights and Restrictions During Notice Period Prior to Planned Sale**

*1. Marketing*

Following the provision of a Notice of Planned Sale to the City, the Owner of a Preservation Project may commence a public marketing period, and/or negotiate the sale of the property to any buyer, including but not limited to the City or its designee.

*2. Site Visits*

During a Notice Period Prior to Planned Sale, Owners of Federal Preservation Projects who have decided to Opt-Out or sell the Federal Preservation Project shall offer the City or its designee or their agent or consultant the opportunity to conduct a site visit of the property and review the owner reports on file with HUD, the State of Colorado, the Colorado Housing Finance Authority, or the City. These reviews are designed to facilitate the City's ability to assess the fair market value of the property and evaluate status of the Tenants, viability of transfer, and/or continuation of a project-based rental assistance or project-based voucher contract with HUD and other pertinent information.

The access provided to the City, its designee or their agents or consultants must be commensurate with the access provided to any other prospective buyer during the marketing period.

3. *Negotiation for Purchase*

During any Notice Period Prior to Planned Sale, the City or a designee may negotiate with the Owner for purchase of the property or with any prospective buyer regarding extension of the affordability period.

**SECTION 3: RIGHT OF FIRST REFUSAL**

**A. Provision of Contingent Purchase and Sale Agreement to City**

The Owner of a Preservation Project shall provide to the City a copy of any agreement between the Owner and one or more third parties (other than the City or its designee) for the sale of all or any portion of the Preservation Project (the "Contingent Sale Agreement") upon (and in all cases, within two business days after) full execution of such agreement. To expedite the potential exercise of the City's right of first refusal, the Owner of a Preservation Project shall also provide to the City a form of such Contingent Sale Agreement (with all dates and Buyer-specific information left blank) for completion by the City or its designee, should it elect to assume the agreement through its ROFR. If the City or its designee elects to exercise its ROFR and enters into such agreement for purchase of the Preservation Property, it shall have the right to attach an addendum thereto, which shall be in the form attached to these rules and regulations as **Attachment 1**.

Upon confirmation to Seller of receipt of the Contingent Sales Agreement, the City's Right of First Refusal Due Diligence Period ("ROFR Due Diligence Period") shall commence, and the City shall have one hundred twenty (120) days to waive its ROFR or to notify the Owner of the Preservation Project of its or its designee's intent to exercise its ROFR.

Should the City elect to notify the Owner of its intent to exercise its ROFR, it shall provide a letter to the Owner within the ROFR Due Diligence Period. The letter indicating the City's interest in exercising its right of first refusal shall contain at a minimum:

- a. The name, address and form of organization of the party with intent to purchase the property;
- b. If the party exercising its right to purchase the property is a designee acting on behalf of the City, the letter shall include the names and titles of the officers, directors, and similar persons in control of and principal investors in the organization;

## **B. Evaluation of Contingent Sales Agreement**

### *1. Generally*

The City shall exercise its right of first refusal only in furtherance of its purpose, as stated in the Preservation Ordinance, which is to preserve affordable housing in the long-term. The City's exercise of its ROFR, in its own right or through a designated preservation partner, shall be reserved for projects where the City has determined that there exists a threat to the continued long-term affordability of units in the Preservation Project. The City shall also consider the value that the preservation of individual Preservation Projects will offer to the City and its residents. In evaluating whether to exercise or waive its right of first refusal during the ROFR Due Diligence Period, the City or its designee may use the following:

- a. Due diligence information provided by the Owner of a Preservation Project during the Affordability Expiration Notice Period and/or Notice Period prior to Planned Sale;
- b. Findings of site visits;
- c. Length of time remaining on the affordability restriction(s);
- d. The City and OED's policy priorities, as outlined in the City's Five-Year Housing Plan and updated annually in the City's Annual Action Plan. OED will endeavor to publish its updated policy priorities regularly on its website.
- e. Other criteria as needed to determine whether the planned sale may impact a Property's affordability

### *2. Waiver for Perpetual Affordability*

If the affordability restrictions on a subject property are imposed by a permanent covenant or deed restriction in favor of or for the benefit of a government entity or mission-driven non-profit organization, and that covenant or deed restriction is in a form satisfactory to the City, the sale of such project shall receive an expedited waiver of the City's Right of First Refusal. Sales of such properties remain subject to the notification requirements outlined in the Preservation Ordinance.

### *3. Transactions for which an Expedited Waiver may be Requested*

Concurrently with the submittal to the City of a Contingent Sales Agreement pursuant to the Ordinance and these Rules, the Property Owner may also submit a request to the City for an expedited waiver of its ROFR. The City may endeavor to provide an expedited waiver within thirty (30) days where any of the following circumstances exist:

- a. The City is able to verify, to its satisfaction, that all then-existing affordability restrictions on the property will continue to encumber the Preservation Project for a

minimum of fifteen (15) years after the date scheduled for closing of the sale of the property.

- b. The Buyer under the Contingent Sales Agreement has obligated itself, in a manner fully satisfactory to the City (which may include, in part, execution of an agreement with the City providing for a temporary encumbrance on the property), to retain affordability of all of the currently-restricted units in the Preservation Project for a minimum period of sixty (60) years following the expiration of the last to expire of then-existing affordability restrictions. (Buyer shall be permitted the opportunity to negotiate the use of OED housing finance products in advance of the sale.)
- c. The Preservation Project is being transferred to an Affiliate of the Owner, including but not limited to a special purpose entity in which the current owner or an affiliate retains a management interest.

4. *Standard Waiver; Default Waiver.*

If the City otherwise determines that it does not desire to exercise its ROFR, it shall so notify the Owner of its decision within one hundred twenty (120) days after receipt of the Contingent Sale Agreement. If the City does not provide notice to the Owner of its decision during the ROFR Due Diligence Period, it shall be deemed to have waived its right to purchase.

5. *Waiver Applicable Only to Single Transaction*

In all cases, the City's decision to exercise or waive its right of first refusal shall be applicable only to the individual Contingent Sales Agreement addressed at hand. Should additional Contingent Sales Agreements be entered into with respect to an individual property, the City's right of first refusal shall be applicable to each Contingent Sales Agreement entered into by the Owner.

6. *Selection and Appointment of the City's Designee*

After receiving a Contingent Sales Agreement, the City may select a designee with which it will partner the Right of First Refusal Period.

**C. City's Exercise of Right of First Refusal**

1. *Election to Exercise Right of First Refusal*

Prior to expiration of the ROFR Due Diligence Period, the City shall notify the Owner in writing of its intent to waive or exercise its ROFR for purchase of the Preservation Property. Such notice of intent shall be non-binding on the City. The Owner shall have five (5) days after the delivery of such notice to execute a Replacement Sales Agreement (as defined

below). The City shall have ten (10) days from the date the Seller returns a Contingent Sales Agreement to also execute and deliver a final Replacement Purchase and Sale Agreement.

2. *Replacement Sales Agreement*

In the event that the City or its designee chooses to exercise its ROFR to purchase a Preservation Project, it shall execute (on the form provided to it by Owner under paragraph 3.A.1 of these Rules if such form is found to be satisfactory) a purchase and sale agreement containing terms that are economically substantially identical to the Contingent Sales Agreement (the "Replacement Sale Agreement"). The Replacement Sale Agreement may contain changes to any Buyer-specific, non-economic terms and to any specified dates or deadlines in order to conform them to the provisions of the Preservation Ordinance. If the City is the buyer, the Replacement Sale Agreement may also be modified to include Addendum A in the form attached hereto.

3. *Termination of the Replacement Sales Agreement*

All rights (including without limitation the right to conduct due diligence and any rights of extension or termination) and contingencies available to the buyer under the Contingent Sale Agreement shall also be available to the City or its designee under the Replacement Sale Agreement. In the event that a Replacement Sale Agreement is terminated by the City or its designee, the Owner of the Preservation Project may proceed with the sale of the Preservation Project to another purchaser. Any termination of a Replacement Sale Agreement shall be specifically limited to the transaction described therein and shall not be deemed a waiver of the City's right of first refusal on any future sale of the Preservation Project.

4. *Closing Period*

The Replacement Sale Agreement shall specify that the City will have one hundred and twenty (120) days from the date of the execution thereof to close on the transaction.

## **SECTION 4: CITY SUBSIDY PROJECTS – LONG-TERM AFFORDABILITY REQUIREMENTS**

### **A. Rental and Occupancy Covenant**

1. *Affordability Period*

An affordability period of 60 years will be imposed by the execution and recording of a Rental and Occupancy Covenant or a similar recorded instrument at the time of financial closing and prior to funding being transferred to the owner.

2. *Covenant Contents*

The Covenant sets forth, as a covenant running with the Property for a minimum of 60 years, the low-income unit set-asides, the percentages of median income to be served, the special housing needs units committed to (if any), and other requirements set forth by the City and County of Denver. The Rental and Occupancy covenant will be accompanied by a Deed of Trust and Promissory Note securing the City Subsidy associated with the City Subsidy Project that shall be coterminous with the duration of the Rental and Occupancy Covenant.

3. *Subordination of Covenant*

The Covenant will subordinate to the Colorado Housing and Finance Authority's Land Use Restriction Agreement in Low Income Housing Tax Credit (LIHTC) projects and/or a project's senior debt. The Covenant may be subordinate to land use restrictions or debt imposed by other project funding sources.

**B. Amendments/Modifications to the Rental and Occupancy Covenant**

A recorded Covenant may require an adjustment to ensure that City Subsidy Projects remain sources of stable and high-quality affordable housing in the long-term. During the 60-year affordability period, a Covenant may be amended, modified, or a new Covenant may be recorded, provided that adjustments are in compliance with Section 42 of the Internal Revenue Code, when applicable. Any adjustment to the recorded Covenant shall not be made without the consent and approval of all ownership entities or organizations with a recorded lien on the Property. The following section sets forth criteria that permit an adjustment in the terms of the recorded Covenant.

1. *In Conjunction with an Application for New City Subsidy*

- a. Changes to the rent and occupancy requirements set forth in the recorded Covenant may occur in the course of an application to OED for new City Subsidy. This may occur in conjunction with, but not limited to, a resyndication of LIHTCs or refinancing of senior debt.
- b. If new City Subsidy is awarded, the existing covenant may be amended or modified, or a new covenant may be recorded based on requirements of the other funding sources and/or the expected useful life of the property.

2. *Without an application for New City Subsidy*

- a. An Owner of a City Subsidy Project may request a restructure of the existing City Subsidy during the Covenant term. The affordability limitations in the existing

Covenant may be amended or modified based on the Property's cash flow requirements, the Property's ability to service amortizing debt, changes in demand for special needs housing or other targeted populations, loss of rental subsidies or services funding, or notice of noncompliance or default at the time of restructure.

- i. A request to restructure a City Subsidy or the City Subsidy Project's affiliated Covenant does not guarantee that the associated Covenant will be amended or modified.
  - ii. Any request for an amendment or modification of the Rental and Occupancy Covenant Subsidy will be received and reviewed in accordance with OED's standard application and review process using underwriting criteria in place at the time of the request.
- b. The City's Covenant may be administratively amended or modified for reasons including, but not limited to, a change in the property's ownership structure, or a regulatory change in Section 42 of the Internal Revenue Code or other federal programs. In these circumstances, the rental and occupancy limitations may not change and an extension in the term of affordability is not required.

### 3. *Redevelopment*

- a. If the Owner of a property with an existing Covenant is the subject of a redevelopment plan or pursuing redevelopment of the property, the Owner may request an amendment, modification, or recordation of a new Covenant.
  - i. A request for amendment or modification of the Covenant does not guarantee that the Covenant will be amended or modified.
  - ii. Any request for an amendment or modification of the Covenant will be received and reviewed in accordance with OED's standard application and review process using underwriting criteria in place at the time of the request.
  - iii. If a Covenant is amended, modified, or replaced, the new Covenant will be subject to a minimum affordability period of sixty years.
- b. If redevelopment is pursued on a property with an existing Covenant, and an amendment, modification, or replacement of the Covenant is not requested, new development must include the unit mix, occupancy limitations, and affordability period described in the existing recorded Covenant.

### 4. *Tenant Relocation*

If an adjustment or modification of a Covenant will increase a unit's rent to more than 30% of the household income of an existing Tenant, the Project Owner must provide a

relocation plan and associated funding source for that household. Any change in a unit's income limitation may only occur at lease renewal. If the source of the City Subsidy was federal funds, Uniform Relocation Act requirements will apply.

*5. Assumption of Good Faith*

The City agrees that it will work in good faith with the Owner of a City Subsidy Project to address the need for amendment or modification of the Covenant, provided that the need to amend or modify is not the result of a curable default by the Owner or other material failure to comply with agreements, laws, or regulations applicable to the Project.

**C. Additional City Subsidy**

*1. Provision of additional City Subsidy*

The City may provide additional City Subsidy during the Covenant period to support the rehabilitation or recapitalization of existing City Subsidy Projects to ensure that those properties remain sources of stable and high-quality affordable housing. The provision of additional City Subsidy may be offered in conjunction with, but not limited to, a resyndication of Low Income Housing Tax Credits (LIHTCs), refinance of project debt, or at other points in time as required to rehabilitate and/or recapitalize properties to improve living environments for residents, reduce building operating costs, achieve energy savings, and extend the life of the building.

*2. City Subsidy Applications for a Specific Capital Need or Health and Safety Repairs*

OED will consider applications for additional City Subsidy for a specific capital need or health and safety repairs and are not part of a resyndication, refinance of senior debt, or recapitalization of the property.

- a. A request must demonstrate that the capital need or repair request cannot be met through the property's cash flow, reserves, or that private financing is either not available or not feasible to meet the property's need.

*3. Underwriting Criteria*

In all cases, the provision of additional City Subsidy will be received and reviewed in accordance with OED's standard application and review process using underwriting criteria in place at the time of application.

## SECTION 5: ENFORCEMENT OF THE PRESERVATION ORDINANCE

### A. Penalties for Violation of Ordinance Requirements

#### 1. Penalties

In the event that the Owner of a Preservation Project fails (be it unknowingly or intentionally) to comply with the requirements stipulated by the Preservation Ordinance, OED reserves the right to apply any one or more of the below penalties.

- a. Civil Fines. Noncompliant Owners may be held liable for a civil fine not to exceed \$15,000 for each separate violation. Each day of noncompliance shall constitute a separate violation.
- b. Notice of Violation. The City and County of Denver reserves the right to record a Certificate of Non-Compliance with the Preservation Ordinance against the property, specifying any assessed fines, which shall thereafter constitute a lien against such property. Said lien shall be removed when noncompliance with the Preservation Ordinance is resolved to the satisfaction of OED.
- c. Affordability Extension. In the event that an Owner fails to give a required notice in a timely manner, or if the content of the notice given is insufficient or defective, the City may require the Owner to provide a proper curative notice meeting the content requirements of the original notice and being delivered as soon as possible after the missed deadline ("Curative Notice"). If the date of termination or expiration of affordability restrictions will occur less than one year from the date the Curative Notice is given, then the Owner shall extend such date of termination of affordability restrictions, either by the Owner's action or, where such affordability restrictions are unable to be extended by the Owner, by execution of an Equivalent Affordability Restriction Agreement in a form to be provided by the City. A Curative Notice shall not be required if it is determined by OED that the defect in the original notice caused no substantial harm to the interests protected by the Preservation Ordinance.
- d. Imposition of Penalties Included in Existing City Documentation. If the Property has received subsidy from OED, penalties for non-compliance may be included in the affiliated Loan Agreement, Deed of Trust, or Rental and Occupancy Covenant. The City reserves the right to apply the penalties detailed within those documents in an instance of non-compliance with the Preservation Ordinance.

## 2. *Violations*

Violations that may incur application of the above penalties include, but are not limited to, the following:

- a. Failure to provide 1-year notice to the City and Tenants of the expiration of project-based rental assistance or project-based voucher contract.
- b. Failure to provide 90-day notice to the City and Tenants of the Owner's intent to withdraw from an existing project-based rental assistance or project-based voucher contract, or the Owner's intent to undertake action that will make the property no longer affordable.
- c. Entrance into contract to sell the Preservation Project during the 90-day period following the provision of notice to the City and tenants.
- d. Failure to provide the property information required as part of the City Expiration Notice Form, as outlined within Section 2.1.C.1 of these rules and regulations.
- e. Failure to provide the property information required as part of the Notice to the City Notification of Sale Form, as outlined within Section 2.1.D.1 of these rules and regulations.
- f. Failure to provide a contingent sales agreement to the City in a timely manner.
- g. Refusal to consent to the City's right to reasonable inspection of the property and inspection of owner reports on file with HUD, the State of Colorado, the Colorado Housing Finance Authority, or the City.
- h. Failure to comply with the restrictions provided in a Property's Rental and Occupancy Covenant.

### **B. Contingency for City's Right of First Refusal**

In the event that the Owner of a Preservation Project does not provide contingency for a right of first refusal to the City or its designee or does not make any purchase and sale agreement entered into by the Owner expressly contingent on the right of first refusal of the City or its designee, the Owner may also be levied a monetary penalty up to the replacement cost of the unit(s) restricted as affordable within the Preservation Project. The replacement cost of the unit(s) will be calculated using guidance provided by OED's financing criteria.

### **C. Appeals Process**

Any person who disputes an action taken by the City hereunder or the imposition of a fine or penalty by the City hereunder may request from OED a reversal or modification of such action or fine. Such request shall be made in writing not later than six (6) months after notification of the

action or fine was sent. Compliance with the provision of this subsection shall be a jurisdictional prerequisite to any action brought under the provisions of this section, and a failure of compliance shall forever bar any such action. Following a full consideration of the matter, OED shall issue a written determination granting or denying the reversal or modification of such action or fine, in whole or in part, which determination may be appealed pursuant to Section 56-106(b) through (f) of the Denver Revised Municipal Code, substituting the Executive Director of OED for the manager of public works.

**D. Finding of a De Minimis Effect**

Should the Executive Director of OED find via the Appeals Process that the Owner's violations have had a de minimis effect on the City, Tenants, or other engaged parties, the Executive Director of OED has the capacity to render the penalties detailed above null and void.

## **ADDENDUM TO PURCHASE AND SALE AGREEMENT**

The following provisions are hereby included and incorporated into the Purchase and Sale Agreement ("PSA") dated \_\_\_\_\_, to which this Addendum is attached. In the event of any conflict between this Addendum and the PSA, the provisions of this Addendum shall prevail.

1. **NO DISCRIMINATION IN EMPLOYMENT.** In connection with the performance duties under the Agreement, the Seller agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color religion, national origin, gender, age, military status, sexual orientation, gender variance, marital status, or physical or mental disability; and further agrees to insert the foregoing provision in all subcontracts relating to the Agreement.

2. **WHEN RIGHTS AND REMEDIES NOT WAIVED.** In no event shall any performance under this Agreement constitute or be construed to be a waiver by either Party of any breach of covenant or condition or of any default that may then exist. The rendering of any such performance when any breach of default exists in no way impairs or prejudices any right of remedy available with respect to the breach of default. Further, no assent, expressed or implied, to any breach of any one or more covenants, provisions, or conditions of this Agreement may be deemed or taken to be a waiver or any other default or breach.

3. **SUBJECT TO LOCAL LAWS; VENUE.** This Agreement is subject to and is to be construed in accordance with the laws of the City and County of Denver and the State of Colorado, without regard to the principles of conflicts of law, including, but not limited to, all matters of formation, interpretation, construction, validity, performance, and enforcement. Venue for any action arising out of this Agreement will be exclusively in the District Court of the City and County of Denver, Colorado.

4. **RIGHT TO ALTER TIME FOR PERFORMANCE.** The Parties may alter any time for performance set forth in this Agreement by a letter signed by the Director of the Division of Real Estate and an authorized representative of Seller.

5. **NO DEFAULT SATISFACTION OF CONTINGENCIES.** All contingencies contained in the PSA that required satisfaction by Seller shall be deemed reinstated and shall be considered in full force and effect unless and until actual evidence of satisfaction thereof by Seller is provided to the City.

6. **APPROPRIATION BY CITY COUNCIL.** All obligations of the City under and pursuant to this Agreement are subject to prior appropriations of monies expressly made by the City Council for the purposes of this Agreement and paid into the Treasury of the City.

7. **REASONABLENESS OF CONSENT OR APPROVAL.** Whenever under this Agreement “reasonableness” is the standard for the granting or denial of the consent or approval of either Party, such Party shall be entitled to consider public and governmental policy, moral and ethical standards, as well as business and economic considerations.

8. **NO PERSONAL LIABILITY.** No elected official, director, officer, agent or employee of the City nor any director, officer, employee or personal representative of Seller shall be charged personally or held contractually liable by or to the other Party under any term or provision of this Agreement or because of any breach thereof or because of its or their execution, approval or attempted execution of this Agreement.

9. **NO INDEMNIFICATION.** Notwithstanding anything in the PSA or in any other agreement to the contrary, the City shall have obligation to indemnify any other party to the PSA in connection with any matter related to or arising out of the subject matter of the PSA.

10. **CONFLICT OF INTEREST BY CITY OFFICER.** Seller represents that, to the best of Seller’s information and belief, no officer or employee of the City is either directly or indirectly a party to or in any manner interested in this Agreement except as such interest may arise as a result of the lawful discharge of the responsibilities of such elected official or employee.

11. **CITY EXECUTION OF AGREEMENT.** This Agreement is subject to and will not become effective or binding on the City until, full execution by all signatories of the City.