OHIO HOUSING FINANCE AGENCY

Restrictive Covenant Modification Policy

BACKGROUND

Ohio Housing Finance Agency (OHFA) as the Housing Tax Credit (HTC) allocating agency is responsible for monitoring the low income housing tax credit properties in Ohio throughout the compliance and extended use periods. OHFA recognizes that some HTC properties that have completed or are near the end of the 15-year HTC Compliance Period may experience issues that impact the financial viability and long-term affordability of the property. Such properties may be experiencing marketing and vacancy issues, a reduction or depletion of replacement reserve accounts, a need to refinance the project or other issues that make it difficult to maintain the project under the current structure. Owners may seek relief from the Ohio Housing Finance Agency (OHFA) using the measures outlined in this policy. The available options (as applicable) should be considered in the order set forth below:

1. **Operational Savings**: Owners should consider or pursue operational savings methods, such as weatherization, energy conservation measures, OHFA approved utility allowances or others. Depending on the funding a project receives, a project may be granted a utility allowance which may provide relief to projects experiencing increases with public housing authority allowances. For more information, review the **OHFA Utility Allowance Policy ECP-13**. These options, when applicable, should be considered well in advance of requesting changes to covenants.
2. **Restrictive Covenant Modifications**: If a multifamily project cannot find financial relief from the options above, an owner may request a modification of restrictive covenant. A **modification for restrictive covenant** would provide financial relief for a project if it would benefit from changes in rent and income restrictions, increases to the extended use period length and/or other changes.
3. **Qualified Contract**: If a project is near the end of its 15- year Compliance Period, was allocated tax credits before 1996 and retained the right to request a Qualified Contract in its Restrictive Covenant, owners may request OHFA to provide a Qualified Contract. For more information on this option, please review the **OHFA Qualified Contract Policy ECP-25**.

The following applies for those projects that are part of the HTC Lease Purchase program:

1. **Lease Purchase Partial Releases**: Owners of **lease purchase** properties may pursue partial releases of Restrictive Covenants to units that are sold to qualified existing tenants after year 15 of the Compliance Period.

OHFA's decision whether to approve an owner's request will be based upon a number of factors including, but not limited to, vacancy rates, market conditions, financial stability, property condition and age, recent and planned capital improvements and current or past compliance issues including if the project is on the OHFA Project Watch List or has Uncorrected 8823 Forms. If a modification or partial release is approved, the project may still have requirements that must be fulfilled and therefore, owners should review the **Post Release Compliance Requirements** section of this policy.

Requests for Restrictive Covenant Modifications, Qualified Contracts or Lease Purchase Partial Releases must be sent to **ohfaprojectchanges@ohiohome.org**. Initial review of Restrictive Covenant Modifications or Qualified Contracts may take up to 30 days while Lease Purchase Partial Releases generally will take up to three days.

MULTIFAMILY RESTRICTIVE COVENANT MODIFICATIONS

If an owner determines that a modification to the Restrictive Covenant is absolutely necessary for the project to continue, a modification should be requested as set forth in this section. Restrictive covenant modifications may be granted so long as the applicable fraction will not be less than that specified in the project's first taxable year as noted in 24 U.S.C. § 42(h)(6)(B) and (c)(1), income and rent restrictions are not increases above the minimum set-aside 42(g)(1)(A)or(B).

For example: a 50-unit property has applicable fraction of 80 percent listed in the Restrictive Covenant and a minimum set-aside of 40 to 60. The property could request to increase limits up to 60 percent AMGI on 40 of the units, and no more than 10 units may be maintained as market rate.

Submission of a request for a Restrictive Covenant Modification:

All of the following must be submitted to **ohfaprojectchanges@ohiohome.org**:

1. OHFA's **Restrictive Covenant Questionnaire** (form PC-E41). The questionnaire includes questions on vacancy rates, current condition of the property, attempts to refinance, marketing efforts and other information related to the property's stability and sustainability.
2. Four years audited financial statements and current year-to-date financial statement. OHFA may require additional financial statements as warranted.
3. A copy of the project's current year rent roll
4. The **Restrictive Covenant Amendment** that may be filed with the county recorder where the property is located. A sample template can be found on OHFA's website.

Review Process for Restrictive Covenant Modification

OHFA reserves the right to require the owner to submit additional documentation at OHFA's request and may alter the modifications suggested by the owner. Modification requests generally do not require Board approval; however, OHFA reserves the right to bring any modification request to the Board for final approval. This process can take at least 90 days. OHFA recommends that tenants are notified of changes. If the project also received gap financing from OHFA or other state agencies (such as HOME, Ohio Housing Trust Funds or other Housing Development Assistance Programs (HDAP)), the funding source may have restrictions related to the project that will remain in place through the affordability period in the funding agreement and will not be altered by any modification granted by OHFA with respect to the Restrictive Covenant. The owner should review the requirements associated in any funding agreement and related regulations if the project received other sources of assistance.

If a Restrictive Covenant Modification is approved, it shall be executed, returned to the owner and recorded within 10 business days of approval. A final stamped copy shall be sent to OHFA at **ohfaprojectchanges@ohiohome.org** no later than 10 business days after it is recorded.

Reporting Requirements after Restrictive Covenant Modification

The owner must follow all requirements and restrictions of the Restrictive Covenant as modified and any other requirements or restrictions associated with all other OHFA funding sources. Additionally, OHFA may require documentation to monitor the progress and effectiveness of the modification(s). Once a Restrictive Covenant Modification is approved, the project owner shall receive a cover letter setting forth all required annual documentation that OHFA will use to verify the effectiveness of the modification. Annual documentation must be submitted for a period of two years after the modification is filed or longer if determined necessary by OHFA. The documents should be submitted to **ohfaprojectchanges@ohiohome.org** and may include, but are not limited to, the following:

- Narrative explaining whether and how the modification has improved the project's financial viability;
- Copy of any updated capital needs assessments completed or scheduled;
- Copy of the rent roll that shows the average monthly vacancy rate, average number of residents with an outstanding account balance, including the low and high outstanding amount, and the number of move-ins;
- Status of outstanding bank debt;
- The current year's property reserve account balances (operating and replacement);
- The past year's audited financial statement; and/or
- Other documentation as deemed necessary by OHFA.

LEASE PURCHASE RESTRICTIVE COVENANT PARTIAL RELEASE

At the end of the 15-year Compliance Period, the owner of a HTC Lease Purchase project may sell homes to qualified existing tenants. To do this, the owner must submit a request for a Partial Release of Restrictive Covenant with respect to the specific building(s) to be sold. If the qualified existing tenant declines to purchase the unit the owner should document the first right of refusal.

A "qualified existing tenant" is defined as the current tenant who was properly qualified under the requirements of Section 42 of the Internal Revenue Code of 1986 as amended. This expressly includes an existing tenant whose income would not currently qualify under Section 42, but who was qualified at the time of original occupancy of that unit.

For any units not sold to qualified existing tenants, the owner may consider the following options:

- All units not sold must be maintained under the existing Restrictive Covenant for the property and continue to follow the IRC requirements as well as **OHFA's Extended Use Policy ECP-26**. They may be sold at a later date to a subsequent qualified resident.
- The owner can offer vacant units for sale to a potential homeowner whose household income does not exceed 80 percent of the area median income. A potential homeowner who qualifies under this income restriction is not required to lease the unit before they purchase it, and upon this sale the unit is released.
- The remaining units may be sold to another entity that will continue to maintain the property under the Restrictive Covenant, as long as the new entity is approved by OHFA in accordance with the **Owner Management Company Change Policy ECP-23**.

If the project also received gap financing from OHFA or other state agencies (such as HOME, Ohio Housing Trust Funds or HDAP), the funding source may have restrictions related to the project that will remain in place throughout the affordability period in the funding agreement and will not be altered by any partial release granted by OHFA to the Restrictive Covenant. The owner should review the requirements associated in any funding agreement(s) and related regulations if the project received other sources of assistance. Qualified existing tenants may have to meet the income restrictions of the funding agreement at the time of sale, and a portion of the gap financing amount must be secured by a subordinated mortgage on the property in order to enforce these restrictions. This amount must be repaid to OHFA if the qualified existing tenant sells the home to a non- qualifying household during the affordability period.

Submission of a Lease Purchase Release

The owner will send written notification to OHFA no earlier than 90 days before the start of year 16 for any buildings requesting to be released after the end of year 15. An owner's request for a Partial Release of a Lease Purchase Restrictive Covenant should be submitted to **ohfaprojectchanges@ohiohome.org**, and must include the following.

1. A cover letter listing the buildings to be released and a copy of the contract being entered into by the buyer
2. A receipt of the completed online **Lease Purchase Sales Form**
3. A copy of the project's current year rent roll
4. If the building(s) are being sold to anyone other than the Qualified Existing Tenant, the following must be included in the cover letter:
    a. Proof that the building was offered to the Qualified Existing Tenant, but the tenant declined to purchase the building
5. The Partial Release of Restrictive Covenant including each building being sold shall be drafted and included with the request. Use the **sample template** found on OHFA's website.
6. Other documentation as necessary.

Approval Process for Lease Purchase Releases

Requests for Partial Releases of Lease Purchase Restrictive Covenants shall be reviewed by OHFA staff and generally take three business days to review. These requests generally do not require Board approval; however, they can if deemed necessary.

Once approved, OHFA will execute the Partial Release of Lease Purchase Restrictive Covenant, and return to the owner for recording at the time of the sale. A file stamped copy filed with the county recorder shall be sent to OHFA at ohfaprojectchanges@ohiohome.org no later than 10 business days after it is recorded.

POST RELEASE COMPLIANCE REQUIREMENTS

According to the Internal Revenue Code Section 42 (h)(6)(E)(ii), for a three-year period following the termination of extended use (i.e., foreclosure, deed in lieu or sale through qualified contract), low- income residents may not be evicted for reasons other than for just cause, nor may the rent for low- income units be raised above the applicable HTC rent. HTC owners may not refuse to rent to Housing Choice Voucher holders because of their status, presumably at least so long as the rents are determined "reasonable" by the public housing authority (26 U.S.C. § 42(h)(6)(B)(iv) and 26 C.F.R. § 1.42-5(c)(1)(xi)). These protections apply only to low income residents with a lease in effect as of the date that the building is released from the Restrictive Covenant.

If at any time during the three-year restriction period the owner fails to adhere to the requirements according to Internal Revenue Code Section 42(h)(6)(E)(ii), the owner shall be deemed in violation and either the existing tenant and/or the Ohio Housing Finance Agency shall/may be entitled to injunctive relief against the owner in order to specifically enforce the three-year restrictions. The restrictions shall run with the land and be binding upon any successors in the interest of the property. The restrictions shall expire with respect to each unit on the earlier date of

1. The end of the three-year restriction period; or
2. The date the existing tenant vacates the unit voluntarily or due to just cause the tenant is forced to leave.

Any unit vacant at the time of the release is exempt from the above restrictions in this section.

ADDITIONAL INFORMATION AND DISCLAIMER

During the review process for modifications or releases, certain development financial and tenant income information may be needed. Ohio Revised Code Section 175.12(B) states that financial information and data submitted to OHFA by any person in connection with financial assistance is not a public record and shall be treated accordingly.

Ohio Housing Finance Agency does not discriminate on the basis of race, color, creed, national origin, sex, religion, marital status, status with regard to public assistance, disability familial status or sexual or affectional orientation in the provision of services.

Ohio Housing Finance Agency may waive any provision of this policy if it deems it necessary and in the best interests of the parties involved after considering all factors of the situation including the interests of the tenants occupying the project. In extreme cases, a modification request submitted that is not outlined in this policy will require additional scrutiny and will require Board approval.

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