

AFFORDABLE HOUSING

New legislation introduces complexity, uncertainty

The Colorado Legislature passed House Bill 24-1175 in the 2024 legislative session, which, effective on Aug. 7, 2024, provides local governments with (i) a quasi-right of first refusal on the sale of qualifying affordable multifamily rental properties, and (ii) a right of first offer on qualifying market-rate multifamily rental properties. Under the act, governments have a time period to decide whether to purchase a property subject to the ROFR or ROFO, along with an additional period to finalize the transaction. The act introduces new layers of complexity and uncertainty for private owners and investors.

The basics

The ROFR applies to multifamily or mixed-use rental properties with five or more units subject to a restricted use covenant (i) recorded against the property to ensure affordability and consistent with affordable housing financial assistance requirements and (ii) in effect on or after June 1, 2024. It's noteworthy that the affordable restriction establishes an extended-term ROFR, since the affordable restriction remains applicable even if it expired prior to a sale. Alternatively, the ROFO applies to market-rate multifamily or mixed-use rental properties that (a) lack an affordable restriction, (b) have between 15 and 100 units, and (c) have a certificate of occupancy at least 30 years old when the property is listed for sale.

The process

Step 1: Applicability. Sellers must determine whether their property



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qualifies under the act's criteria and identify any applicable transaction exemptions (e.g., corporate restructuring, familial sales, foreclosures, etc.) to their transaction.

Step 2: Government identification. Sellers must identify the applicable government based on the property's location and determine if the government has either waived its ROFR or ROFO or assigned the same to a housing authority in its jurisdiction, a regional housing authority, or the Colorado Housing and Finance Authority.

Step 3: Notification. For properties subject to the ROFR, notices must be given to the government both at two years and six months before the expiration of the property's affordable restriction. Additionally, under the ROFR and ROFO, sellers must also provide notice when they take any material step to sell the property (e.g., a listing agreement).

Step 4: Response. After notification, governments have a specified time to respond, which varies based on whether the ROFR or ROFO is applicable.

Step 5: Timelines. If the government submits a matching offer under the ROFR, sellers have a specified time to accept or reject the same. If accepted, closings typically occur within 60 days unless specified otherwise. For the ROFO, sellers have 14 days to accept or reject the government's offer, which, if accepted,



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the parties have 30 days to negotiate and to execute a contract, followed by 60 days to close unless agreed otherwise. It's important to note that the exact timelines may increase based on specific considerations of each sale. However, in general, if a seller rejects the government's offer, the ROFR rejection process will typically take a minimum of 60 to 90 days, while the ROFO rejection process will typically take a minimum of 30 days. The act also requires sellers to notify governments of any material changes to sale terms – such as a price reduction of 5% or more – allowing governments another opportunity to exercise its ROFR. Sellers must be aware that subjective criteria for identifying material changes to sales terms will present challenges in determining when re-notifications to governments are necessary under the act.

Significant considerations

Title insurance. Compliance with the act raises important title insurance considerations. Title insurance is critical in all real estate transactions, and the act presents unique challenges for sellers, buyers, lenders and title companies. In order to obtain title insurance, sellers must obtain a certificate of compliance from the government verifying satisfaction of all applicable requirements. The certificate will be required as a condition for provid-

ing title insurance, loans, or completing transactions. Complexities and uncertainty will arise when: (i) governments fail to timely respond to a sale notice under the act; (ii) delays occur in obtaining the certificate; and (iii) the government is reluctant to provide the certificate because it doesn't believe it possesses all information required by the act. In these situations, it's crucial for sellers to foster positive relationships with governments to obtain the certificate as the government's cooperation will be essential for the transaction to move forward.

Other considerations. The act presents additional significant concerns, including the following: (i) If a property applicable to the ROFR is being sold subject to existing financing, the act permits the government to reject the loan assumption with no obligation for the government to pay prepayment penalties, which unfairly penalizes sellers of financed properties; and (ii) exemptions applicable to the ROFO do not apply equally to the ROFR (e.g., exemptions for portfolio sales with properties in multiple jurisdictions, tenancy-in-common transactions or transfers involving small portions of a property).

Wrapping it up

The act creates a complex regulatory framework for sellers to navigate, presenting procedural hurdles that will make transactions involving properties subject to the ROFR and ROFO more costly, time-consuming and cumbersome for all parties involved. ▲

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Preservation: Losing affordable units is not OK

Colorado faces an extraordinary challenge to meet the 100,000-unit demand for affordable housing across the state.

With 80,000 homes financed with low-income housing tax credits with expiration dates on their affordability protections, there is also a need to grant critical status to the preservation of the existing affordable housing stock. In many Colorado communities, it is impossible to replace these homes due to high land and building costs. When rents increase 200%-300%, the result forces residents into paying more rent, moving into substandard housing or moving out of their communities. And if these units are lost from the affordable housing inventory, the gap almost doubles!

From 1994-1996, 120 homes were built in two phases at Eagle Villas, using the LIHTC program. The affordability protection through LIHTC was set to expire at Eagle Villas in 2024 and 2026, which would allow the homes to convert to market-rate rents. Market prices around Eagle Villas increased by 25% annually since 2019, forcing one-third of the town of Eagle to be cost burdened in paying for their housing.

Perched on the banks of the Eagle River, the project comprises more than 50% of the LIHTC affordable homes in the town of Eagle. Essential members of Eagle's community, including restaurant workers, gas station attendees, grocery



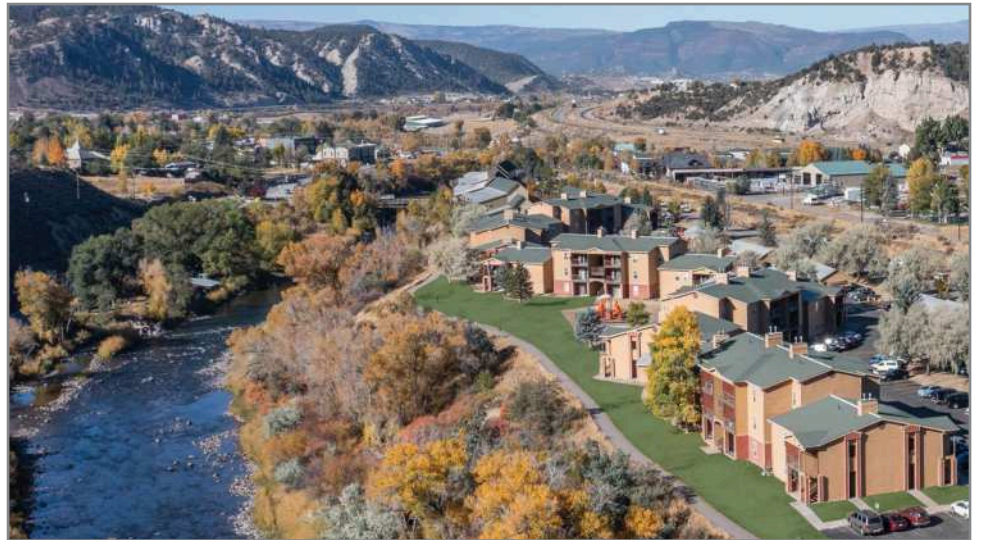
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store clerks, and state and county employees live in these homes. Two-thirds of the homes at Eagle Villas include children under the age of 18, making it even more essential they remain affordable.

Preservation is just like creating new homes – it takes a strong team of partners. In this case, the partners that preserved Eagle Villas included local and state leaders, community members, willing investors and a housing developer with a high-risk tolerance.

Ulysses Development Group is a Denver-based, mission-driven affordable housing developer with a history of preserving affordable communities across the country. When presented the offering statement in 2023, UDG recognized the need to give its preservation high priority because of the negative impact its loss would have on the community. This recognition led us to create a plan that would protect this valuable resource from being converted to market-rate rents, improve the quality of the homes through a major renovation, and ensure long-term affordability for future generations.

To accomplish this vision, UDG



Eagle Villas project

partnered with the Eagle County Housing and Development Authority and the state of Colorado (Department of Local Affairs/Division of Housing) to acquire and renovate the property.

The challenge the partners faced was developing a financial plan to fund the \$325,000 per unit for acquisition and \$80,000 per unit for renovation – a \$60 million budget – and filling a \$13 million gap between that cost and the supportable loan.

ECHDA's partnership provided real estate tax abatement and put in place an extended regulatory agreement in exchange for providing \$6.5 millions of bridge financing, and a \$3 million long-term subordinate

loan, with the balance to come from the Division of Housing.

The permanent loan will come from the sale of \$30 million in private activity bonds that were necessary to leverage LIHTC investment. Eagle County has allocated its full PAB award of \$3.5 million, with the balance coming from the Colorado Housing and Finance Authority and Division of Housing.

To overcome a LIHTC regulatory issue that restricts use of tax credits to properties that haven't changed hands in the past 10 years, UDG came up with a "step-in-the-shoes" structure whereby ECHDA passed an inducement resolution to \$30

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