Rights of first refusal

Overview
Right of first refusal policies can be used in two contexts to preserve the stock of rental housing.

First, they can help preserve the ongoing affordability of dedicated affordable rental housing by giving priority consideration to mission-oriented buyers when the owner of a subsidized rental property decides to stop participating in a subsidy program. Second, they can be applied to unsubsidized rental properties, helping to preserve the availability of rental units and in some cases facilitate conversion to dedicated affordable rentals. Eligible buyers may include tenant associations, nonprofit and for-profit developers, and/or state or local government agencies—all of which ordinarily require a longer timeframe to assemble financing and can have difficulty competing with market-rate or luxury developers. Right of first refusal policies may give these buyers an exclusive period within which to make an offer on the property, or the option to match any offer made by a private buyer. Especially in strong and/or growing housing markets, right of first refusal policies help to preserve rental housing and prevent the conversion of subsidized rental properties to another use by enabling their sale to stakeholders who are committed to long-term affordability.

This section describes some of the considerations for cities, towns and counties interested in creating a right of first refusal program.

Approach
Communities that adopt a right of first refusal policy will need to establish the mechanism by which rental properties are made available to eligible purchasers. Approaches range in restrictiveness and include:

- Providing advance notification, during which the city has a non-exclusive right to identify a buyer (with no obligation on the part of the subsidized property owner to sell to that party)
- Offering a true “right of first refusal,” in which eligible purchasers are given the option to match an existing purchase offer
- Establishing a “right to make an offer” that gives eligible purchasers exclusive rights to make an offer for a designated period of time; if no offer is accepted, eligible purchasers are typically then given the right of first refusal to match any subsequent offer
purchase offer that the owner accepts

- Preempting private sales and requiring owners to sell the property at fair market value to a designated buyer; in this case the price is typically determined by independent appraisers

Notice provisions built into each of these approaches require owners to inform the community and current tenants of their intent to sell or convert the property and often the nature of their rights under the right of first refusal policy. Notification periods can range from several months to several years. Advance notice gives tenant associations a chance to organize and, along with other potential buyers, secure financing in preparation for making a bona fide offer.

Cities and counties should also establish requirements related to the process and timeline that owners must adhere to when notifying the community of their intention to sell or convert a property, and that potential buyers must follow when making an offer. This includes requirements for the timing of the advance notice given to building residents, which typically must be provided in writing anywhere from 3 months to several years before the planned sale or conversion, the period of time that potential buyers have to make an offer (typically 30 to 90 days), and the process used to determine the fair market value of a property (in cases where the city or county has an exclusive right to purchase).

**Coverage**

Communities will also need to specify the circumstances under which right of first refusal authority will be triggered: (a) to support preservation of dedicated affordable housing, (b) to preserve the availability of rental housing in general, or both.

1. **Preservation of dedicated affordable rental housing**

Some local jurisdictions limit the applicability of their right of first refusal policy to dedicated affordable rental housing properties. The right is triggered when property owners indicate their intention to opt out of a federal, state, or local rent subsidy program and convert the property to another use—whether residential (e.g., converting affordable rentals to market-rate units or condos) or nonresidential. This provision is in place for the federal Low Income Housing Tax Credit (LIHTC) program: program regulations give qualified nonprofit organizations a right of first refusal to purchase LIHTC projects and maintain rent restrictions if, at the end of the 15-year compliance period, the owners request permission to sell or convert the project to another use. Cities may also set the trigger point as the proposed sale or demolition of the property.
1. *Preservation of rental housing in general*

Some local jurisdictions establish broader rights of first refusal policies that cover unsubsidized rentals as well as dedicated affordable rental properties. This approach can help to prevent displacement and preserve the availability of rental units that might otherwise be converted to condominiums or non-residential use. Local jurisdictions need to establish clear guidance on which rental properties are subject to right of first refusal requirements. In some cases, coverage is determined by the year the property was built (e.g., all rental properties built before 1995 are covered by the policy). This focus on older rental properties is intended to avoid deterring new residential construction. Some policies also include size thresholds, limiting coverage to properties with a certain number of units (e.g., developments with 20 or more units).

**Eligibility**

A right of first refusal policy should specify the types of organizations that are eligible to purchase properties, as well as the criteria that will be considered by the city or county when determining whether to approve the offer. Many communities extend this right to nonprofit and for-profit mission-driven organizations, both local and national, as long as they agree to preserve affordability at the level specified by the community over a defined period of time. The building’s tenant association (or an organization acting on its behalf) is also commonly afforded a first opportunity to make an offer or match an existing offer. In some communities, the list of eligible purchasers also includes the housing and community development department and/or local housing agency.

Although the decision to submit and accept an offer is between the building owner and potential buyer, some cities and counties reserve the right to approve the sale and confirm the buyer’s qualifications. Criteria used to assess the strength of potential buyers often include demonstrated experience operating affordable housing developments and proof of readiness to purchase the property (i.e., access to financing through a commercial bank and/or subsidy program).

**Other considerations**

- *Support for tenant associations.* Tenant associations trying to exercise the right of first refusal will typically need substantial financial assistance and technical assistance to make a successful offer. Some communities have created complementary programs that help tenant associations manage the purchase and operation of a housing development. Cities may also want to identify non-profit organizations that have experience conducting preservation transactions and can act as partners to help tenant associations throughout the process.
• Using the right of first refusal to convert market-rate units to dedicated affordable units. In some cases, the right of first refusal creates an opportunity to create new dedicated affordable rental units. For example, Montgomery County, MD requires that tenant associations, the County, and the Housing Opportunities Commission (the County’s public housing agency) be given the right of first refusal to match a bona fide offer to purchase rental housing built before 1981. Where the County or Housing Opportunities Commission purchases the property, some or all of the units may be reserved for low- or moderate-income households. More details are available in the Montgomery County Code, section 53A.

Examples

• In Portland, OR, property owners who plan to opt out of a federal project-based rent assistance contract must give the City and affected tenants advance notice of at least 210 days for opt-outs from a long-term contract and 150 days from a one-year extension. During the notice period, owners must allow the City to conduct reasonable inspections of the property and owner reports on file with HUD and the state Housing and Community Services Department, and may not take any actions that would prevent the City from negotiating for purchase of the property. Rental properties with 10 or more units that participate in certain rent subsidy programs offered by the City or State are subject to additional requirements. If the change in use will result in the loss of housing affordable to households with incomes up to 80 percent of the median family income, the owner must provide 90 days’ notice, during which the City has the exclusive right to make an offer to purchase the property or to coordinate the purchase by an owner who will maintain affordability. Tenants of buildings that are being sold or converted receive special protections from no-cause evictions and rent increases, as well as relocation assistance from the owner. For more information on Portland’s federal project-based rent assistance contract, click here.

• Washington, DC’s Tenant Opportunity to Purchase Act (TOPA) gives DC tenants the right of first refusal should the owner decide to sell the property. The law formerly applied to all rentals, including multifamily buildings and single family homes. In March 2018, the DC City Council voted to exempt single-family homes from TOPA, noting that the law had been used to support the sale of only 19 properties to tenants in a 6 year period, but left home sellers vulnerable to delay tactics and other unscrupulous actions by renters with no real interest in buying the unit. Opponents of the amendment have expressed concerns about rolling back protections for lower-income tenants. TOPA is more commonly used by renters in multifamily buildings, and the District Department of Housing and Community Development
offers a loan program that can be used for seed money, earnest money deposits, and acquisition of apartment buildings by tenant associations. The Department also provides free development services and help with preparation of legal documents and loan applications.

Related resources

Program design

- A Brief Review of State and Local Preservation Purchase Laws, Housing Law Bulletin (November-December 2006) – This article provides a thorough review of the various components of a right of first refusal policy, as well as a summary chart describing provisions in five cities.
- Notification and Right of First Refusal Laws, Inclusive Communities Toolkit – This web resource describes the basics of a right of first refusal ordinance and provides case study examples of ordinances in three cities.
- Preserving Austin’s Multifamily Rental Housing: A Toolkit, University of Texas School of Law (April 2007) – This report includes discussion of a variety of tools, including notice and rights of first refusal requirements. The write-up includes brief examples of policies from several cities and states.

Local example

- Right of First Refusal Regulations, Prince George’s County, MD (November 2015) – Regulations established by the Prince George’s County Department of Housing and Community Development describe in detail the County’s approach to preserving multifamily rental buildings affordable to low- and moderate-income households.