

## Appendix C:

# Qualified Non-Profit Purchasers

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- I. **Introduction.** MAHRA Section 517(a)(5) provides that: “The Secretary may modify the terms of the second mortgage, assign the second mortgage to the acquiring organization or agency, or forgive all or part of the second mortgage ... if the project is acquired ... by a tenant-endorsed community based non-profit ....” This Appendix discusses how non-profit purchasers can qualify for and receive 2<sup>nd</sup> and 3<sup>rd</sup> mortgage relief. The term 2<sup>nd</sup> mortgage refers specifically to the Mortgage Restructuring Note and the phrase “3<sup>rd</sup> mortgage” refers to the Contingent Payment Note.
- A. **Forms of Relief.** Qualified non-profit purchasers may request cancellation, modification, or assignment of the Mortgage Restructuring Note, which is normally secured by a second mortgage. If OMHAR approves a request for cancellation, modification or assignment of the second mortgage, any additional debt that would normally be evidenced by a Contingent Repayment Note and a third mortgage will be cancelled simultaneously with the cancellation, modification, or assignment of the second mortgage.
- B. **Requirement For Second Mortgage Relief.** The only entities that may request modification, cancellation or assignment of the M2M second mortgage are independent, tenant-endorsed, community-based non-profit purchasers who meet the requirements herein. Purchasers will submit their request to the PAE and the OMHAR Production Office. The OMHAR Portfolio Director will determine if the non-profit purchaser qualifies for consideration of debt forgiveness, modification, or assignment based on the requirements herein.
- II. **Definitions.** The following definitions apply to this Appendix. The definitions for “independent”, “tenant endorsed”, “community based” and “non-profit” referenced in Section I.B. above are contained in Section III – Eligibility Criteria.
- A. **Acquiring organization or entity.** For the purpose of second mortgage debt assignment, the term acquiring organization or entity means the legal entity that will have ownership of the project.
- B. **Affiliates.** The terms “Affiliate of the Owner” and “Affiliate of the Purchaser” mean any person or entity (including, but not limited to, a general partner or managing member, or an officer of either) that controls an Owner or Purchaser, is controlled by an Owner or Purchaser, or is under common control with the Owner or Purchaser.
- C. **Control.** The term “Control” means the direct or indirect power (under contract, equity ownership, the right to vote or determine a vote, or otherwise) to direct the financial, legal, beneficial or other interests of a company (or other entity) and includes the definition of “control” at 24 CFR 401.310(a)(2): “Control means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company; the ability to direct in any manner the election of a majority of a company (or other entity's) directors or trustees; or the ability to

exercise a controlling influence over the company or entity's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership.”

- D. **Control in Multi-Layered Organizations.** For Purchasers and/or Sellers that have multi-layered organizational structures, Control refers to the level at which Control is actually held and/or exercised, without regard to structure (i.e., the determination of Control is not limited to a specific number of layers above the Purchaser entity itself).
- E. **Financial Interest.** With respect to a Seller, the term “Financial Interest” includes the ownership of:
  - 1. Any equity interest in the Purchaser or an Affiliate of the Purchaser.
  - 2. Any debt that is secured by the Property.
  - 3. Any debt that is otherwise associated with the Property, for example:
    - a) Debt that is secured by a pledge of ownership interests in the Property.
    - b) Debt whose repayment is materially dependent on the cash flow and/or future value of the Property.
- F. **Owner.** The term “Owner” has the same meaning as in §516(a) of MAHRA that reads in part: “The term “owner” as used in this subsection, in addition to it having the same meaning as in section 8(f) of the United States Housing Act of 1937, also means an affiliate of the owner...”
- G. **Property.** The term “Property” means the property proposed to be purchased.
- H. **Purchaser.** The term “Purchaser” means the legal entity that is proposed to own the Property.
- I. **Seller.** The term “Seller” means the Owner of the Property and any Affiliates of the Owner.

III. **Eligibility Criteria.** In order to request and receive 2<sup>nd</sup> mortgage relief, a Purchaser must demonstrate to the PAE and OMHAR that it is an independent, tenant-endorsed, community-based, non-profit.

A. **Primary Criterion for “Tenant-Endorsed.”** A Purchaser may demonstrate that it is tenant-endorsed by submitting documentation to the PAE that either of the following two events occurred:

- 1. A majority of the tenant heads of household gave their endorsement in writing.
- 2. At the Second Tenant Meeting, a majority of the tenant heads of household who were present and who voted, voted in favor of endorsement.

**NOTE:** No more than one person from each household may vote. Disputes will be resolved by the PAE, whose decision will be final. Because Purchasers will be making binding commitments, tenant endorsement, once given, cannot be retracted.

B. **Alternate Criterion for “Tenant-Endorsed.”** If the primary criterion is not satisfied, the Purchaser may file a written request to the OMHAR Portfolio Director, setting forth why the

Purchaser believes it should be considered “tenant-endorsed.”

C. **Criteria for “Non-Profit.”** A Purchaser may demonstrate that it is a “non-profit” by showing that, under the laws of its state of incorporation, one of the following parties has qualified as a non-profit

1. The Purchaser itself.
2. If the Purchaser is a limited partnership, the sole general partner. Co-generals will be allowed as long as each meets the definition of “qualified non-profit purchaser”.
3. If the Purchaser is a limited liability company (LLC), the sole managing member.

Other types of entities (e.g., general partnerships and joint ventures) will not be considered “non-profit” for purposes of 2<sup>nd</sup> mortgage relief, regardless of the entity’s status under the laws of its state of incorporation, unless each member of the partnership, joint venture or limited liability company meets the definition of “qualified non-profit”. Note: The Purchaser need not qualify as a Section 501(c) under the Internal Revenue Code.

D. **Criteria for “Community-Based.”** A Purchaser may demonstrate that it is “community-based” by demonstrating, and certifying, that at least one of the following conditions is satisfied:

1. **Corporate Purchasers/Board Composition.** The Purchaser is a corporation, and one-third of its Board of Directors are project tenants or low-income members of the community in which the Property is located.
2. **Community Advisory Board.** The Purchaser has established a Community Advisory Board whose structure has been approved by the PAE. The PAE will approve any Community Advisory Board that in the PAE’s reasonable judgment meets these requirements:
  - a) The membership of the CAB is selected in a manner that assures that there is (and will be, for the term of the M2M Use Agreement) significant representation of the views of the community in which the Property is located.
  - b) The Purchaser’s governing documents (e.g., Limited Partnership Agreement, LLC Operating Agreement, ...) provide that the Community Advisory Board has a genuine substantive voice in project operations.
  - c) The Community Advisory Board is required to hold regular meetings with written minutes.
3. **Tenant Organization.** The Purchaser is a Tenant Organization as defined in the M2M program regulations at 24 CFR 401.2: “Tenant organization means an organization that meets regularly, whose officers are elected by a majority of heads of households of occupied units, and whose membership is open to all tenants of a project.”
4. **CBDO, CHDO, or CDFI.** OMHAR considers Community Based Development Organizations (CBDOs), Community Housing Development Organizations (CHDOs), and Community Development Financial Institutions (CDFIs) to be “community-based”. A Purchaser that is a CBDO, CHDO, or CDFI is “community-based.” A Purchaser that is an affiliate of a CBDO, CHDO or CDFI may demonstrate that it is “community based” by showing that any of the following:

- a) The Purchaser is a limited partnership, whose sole general partner is a CBDO, CHDO or CDFI.
  - b) The Purchaser is a limited liability company (LLC), whose sole managing member is a CBDO, CHDO or CDFI
  - c) The purchaser is 100% owned or 100% controlled by a CBDO, CHDO or a CDFI (as defined below).
  - d) Other Affiliates. CBDOs, CHDOs, and CDFIs may seek and obtain written determination that specific Purchaser entities they created and funded, but that are not themselves CBDOs, CHDOs or CDFIs, are “community-based” for purposes of 2<sup>nd</sup> mortgage relief. OMHAR will consider applications on behalf of entities with additional sponsors other than the CBDO, CHDO, or CDFI. OMHAR’s determination will be based on the existence of substantial investment by the sponsoring CBDO, CHDO, or CDFI and on confirmation that the Purchaser’s mission is consistent with CHDO / CBDO / CDFI status. The investment must be significant in relation to the sponsoring organization’s resources, and may not be less than \$100,000.
- E. **Criteria for “Independent.”** Neither the Purchaser, nor any parent entities, nor any affiliates, may be dependent (as defined below) upon any for-profit entity (including, but not limited to, the seller of the property and/or any affiliates of the seller).
1. **Safe Harbored Purchasers.** Some Purchasers can demonstrate that they are “independent” without the need for any transaction-specific review by the PAE or OMHAR. To qualify under the safe harbor standard, a Purchaser must certify to the PAE and OMHAR, in a form acceptable to OMHAR, that all of the following are true:
    - a) No for-profit entity has Control of the Purchaser.
    - b) The Seller (encompassing the owner of the Property and all Affiliates of the Owner) does not have Control of the Purchaser.
    - c) Within the three year period prior to the date of the certification, the Seller has not provided any financial support including in-kind support; or any goods and services to the Purchaser or any affiliate of the Purchaser.
    - d) The Purchaser has provided the complete purchase and sale agreement to the PAE. The purchase and sale agreement describes all compensation of any sort to be paid to the Seller. There are no additional agreements of any sort between the Purchaser and Seller.
    - e) After the proposed purchase, the Seller will not retain any Financial Interest in the property being purchased; or provide any goods or services to the Property.
- NOTE:** This certification will be given to the PAE, in writing, and signed by an authorized representative of the Purchaser, at the time the purchase and sale agreement is first delivered to the PAE, and again at the M2M closing. Transactions involving more than one Property (under one or more purchase and sale agreements) may be addressed in a single certification.
2. **Purchasers Not Safe-Harbored** - A Purchaser that cannot meet the safe harbor standard may request that OMHAR determine it to be “independent” by submitting:

- a) A safe harbor certification as described in subparagraph 1. above, but amended to indicate the specific failures to meet the standard.
- b) The Purchaser's proposal for addressing each specific failure to meet the standard.
- c) The reasons that OMHAR should determine that the Purchaser is "independent." The Purchaser's submission should address each of the factors discussed below.

3. **OMHAR's Determination For Purchasers Not Safe-Harbored.** The PAE will recommend and the OMHAR Portfolio Director will issue a transaction-specific determination that the Purchaser is "independent". A Purchaser may also request a non-transaction-specific determination of "independence" to support the acquisition of multiple properties from a single Seller. Factors that OMHAR will consider include:

- a) The mission and history of the Purchaser relative to the long term preservation of affordable housing.
- b) Whether the Purchaser has financial ties to the Seller.
- c) Whether the Purchaser shares staff, or office space, with for-profit organizations that have financial ties to the Seller.
- d) Whether there are other inappropriate ties between the Seller and the Purchaser that would suggest undue influence or control of the Purchaser by the Seller.
- e) Transactions in which the Seller or affiliate will act as property management agent after the purchase (or will provide other goods or services to the Property after the purchase) will generally be acceptable if the Purchaser demonstrates to the reasonable satisfaction of OMHAR that the terms of the property management contract (or other agreement) are arms-length, and the contract is for a period not longer than three years and can be terminated for cause. This is in addition to other normal HUD requirements for service contracts. However, OMHAR generally will not consider the Purchaser to be "independent" if the post-M2M first mortgage lender is an affiliate of the Seller.
- f) Transactions in which the Seller (or affiliate) retains any other ongoing Financial Interest in the Property generally will not be acceptable, unless the Purchaser can demonstrate that the Financial Interest is structured so as to preclude the Seller (or affiliate) from exercising Control of the Purchaser at any point during the term of the M2M Use Agreement.
- g) Whether there is any financial relationship between the Purchaser and Seller, other than the Purchase and Sale Agreement and other than as described above.

IV. **Necessary to Recapitalize.** The program regulations at 24 CFR 401.461(a)(5) require that any 2<sup>nd</sup> mortgage relief granted be "necessary to recapitalize the project in order to preserve it as affordable housing." The Purchaser must demonstrate that this standard has been met, to OMHAR's reasonable satisfaction. The OMHAR Portfolio Director will determine the amount and nature of the debt forgiveness.

V. **Additional Affordability Commitments.** In order to receive cancellation, modification or

assignment of the 2<sup>nd</sup> Mortgage, a Qualified Non-Profit Purchaser must:

A. **Accept a 50-year Use Agreement.** The Restructuring Commitment will provide for a 50-year term. The standard form Use Agreement will be otherwise applicable.

B. **Accept a 10 year Sale Restriction.** The Restructuring Commitment will provide for a 10 year restriction on sale, to be documented in the M2M Rider to the Regulatory Agreement.

1. The Rider will contain the following language: “Ten Year Sale Prohibition”. For the ten year period beginning with the date hereof, Owner agrees not to, without the prior written consent of the Secretary, (a) convey or transfer any portion of the Property, or permit the conveyance or transfer of such; or (b) convey, assign, or transfer any beneficial interest in any trust holding title to the Property, or the interest of any general partner in a partnership owning the Property, or any interest of twenty-five percent (25%) or more in a partnership owning the Property, or any right to manage or receive the rents and profits from the Property.”
2. In general, HUD will require that any sale within the ten-year period be to an entity meeting the Qualified Non-Profit Purchaser standards.
3. In general, HUD will not allow compensation to the seller, in any sale within the ten-year period.

VI. **Distribution Limitations.** The existence of the 2<sup>nd</sup> mortgage created in the M2M debt restructuring process establishes eligibility for the Capital Recovery Payment (CRP), the Incentive Performance Fee (IPF) and the 75%/25% cash flow split (collectively the “Owner Incentives” – See Chapter 3 of the OPG). The M2M subordinate debt also overrides the otherwise applicable distribution limitations contained in the underlying mortgage being refinanced or in the Section 8 HAP contract. In the absence of a M2M 2<sup>nd</sup> mortgage, the Owner Incentives are not available, and the following, pre-existing distribution limitations may apply:

- A. The Regulatory Agreement might provide that no distributions may be made to non-profit mortgagors.
- B. The Regulatory Agreement might provide that distributions are limited to a percentage of equity.
- C. The HAP Contract might include a limitation on distributions.
- D. New first mortgage financing might impose a limitation on distributions

**NOTE:** A Qualified Non-Profit Purchaser will need to choose debt forgiveness with otherwise applicable distribution limitations or some level of M2M subordinate debt with eligibility for Owner Incentives.

VII. **Delayed Sale To A Qualified Non-Profit Purchaser (3 Year Window).** Paragraph 8 of the standard form Restructuring Commitment provides for the potential cancellation, modification or assignment of the M2M 2<sup>nd</sup> mortgage if the Property is transferred to a Qualified Non-Profit Purchaser within three years of the date of the Restructuring Commitment.

- A. **Eligibility.** To take advantage of this provision, the Purchaser must:
1. Demonstrate its eligibility for 2<sup>nd</sup> mortgage relief in the same manner as Purchasers seeking 2<sup>nd</sup> mortgage relief at the time of the M2M closing, as described above.
  2. Accept the additional affordability and sale restriction requirements described above.
  3. Request the form of 2<sup>nd</sup> mortgage relief desired.
- B. **Other Purchaser Incentives Are Generally Not Available.** If the delayed sale involves the assumption of the existing debt, the M2M program cannot fund any costs associated with the purchase. Purchase related costs must be covered by Purchaser funds or the proceeds of a new financing. New financing may be hindered or prevented by the presence of pre-payment penalties or prepayment lockout provisions in the M2M 1<sup>st</sup> mortgage.
- C. **TPA Processing.** Delayed sale TPAs will be processed and approved by the Multifamily Hub or Program Center. The TPA must modify the M2M Use Agreement to extend the term to 50 years, and the Rider to the Regulatory Agreement to include the ten year sale restriction. The Multifamily Hub or Program Center will obtain the purchaser's request for debt relief and the supporting organizational documentation referenced in VII.A. above and then forward the request and supporting documentation to OMHAR Headquarters. OMHAR will establish the Purchaser's eligibility for M2M debt relief. The OMHAR Portfolio Director will determine the amount and nature of debt relief.

## VIII. Additional Information

- A. **ITAG Pre-Development Grants.** An entity that meets the criteria for a Qualified Non-Profit Purchaser also meets the eligibility criteria for the Pre-Development Grants available under the Intermediary Technical Assistance Grant (ITAG) program.
- B. **Transfers Between Non-Profit Affiliates.** Nothing in this policy prohibits otherwise acceptable purchase and sale transactions between non-profit parent entities and their subsidiaries. Such transfers are not, however, eligible for 2<sup>nd</sup> mortgage relief.
- C. **First Mortgage Financing By An Affiliate of the Purchaser.** OMHAR does not prohibit mortgage lending institutions affiliated with Purchasers from providing financing on M2M transactions. Such financing must be on commercially reasonable and competitive terms and acceptable to the PAE and OMHAR. However, as provided above, in general Purchasers who are affiliated with the first mortgage lender will fail to meet the definition of "independent".
- D. **Closing Considerations.** The statute allows the assignment of debt to the acquiring organization or entity. The closing of the M2M debt restructuring will need to be accomplished in a manner that avoids local legal impediments that might threaten the validity of the debt. The following is an example of a potentially acceptable closing procedure (depending on state and local law):
- The debt is created by the seller executing the mortgage restructuring note

- The note is assigned to the acquiring entity
- The acquiring entity immediately reassigns the debt to the general partner or other entity approved by OMHAR
- The acquiring entity takes title and assumes the debt.

The acquiring entity's attorney may suggest a closing process that meets local legal concerns. The suggested process will need prior approval by OMHAR.