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Affordable Housing Study Reports

11. Preserving Affordability

Preservation of Affordable Ownership Housing Affordable units created under Chapter 40B must be subject to a deed restriction in order to remain on the Subsidized Housing Inventory (SHI) – the list maintained by the Department of Housing and Community Development of a community's progress toward meeting the goal of 10% of its housing stock being affordable. This deed restriction is recorded at the Registry of Deeds with the deed and other deed documents.

As more affordable homes are built in Massachusetts, especially under Chapter 40B, local officials have increasingly insisted that the units remain affordable to future low- and moderate-income buyers "in perpetuity" or for the longest term allowed by law. Much of the affordable housing built in the 1980s was built with the period of affordability running 20 to 30 years, at which point these primarily rental units could and did move to market rate – and are continuing to do so. See below for more information on preserving affordable rental units.

A deed rider is the method used to specify many requirements and restrictions intended to protect the affordability of an ownership unit. Some examples are:

- Eligibility requirements of purchaser.
- The property must be occupied and used by the purchaser as his/her principal residence.
- The property cannot be leased, refinanced or mortgaged without the permission of the Monitoring Agent; if this does occur, any rents or profits received by the owner will be recovered by the Monitoring Agent or the municipality, including any associated costs with recovering the money. The proceeds can be deposited in its Affordable Housing Fund, if the city or town has established one.
- If the owner decides to sell the property, the Monitoring Agent and municipality must be notified in writing. The Monitoring Agent will calculate the resale value of the property – maintaining its affordability; the owner will hire a broker and cooperate in every way in finding an eligible buyer. The Monitoring Agent also has marketing responsibility, and listings are available on line.

Deed riders require that the units be sold to qualified low or moderate income buyers.

The property must be sold generally within 90 days after the Monitoring Agent is informed of the desire to sell, with some exceptions. The city or town also has the right to purchase the property.

If more than one eligible purchaser qualifies, the Monitoring Agent may conduct a lottery or similar procedure as provided in the Regulatory Agreement.

At closing, any amount of profit to the seller, which exceeds the maximum resale price, will be paid to the municipality for deposit in its Affordable Housing Fund.

Under some of the existing deed riders, if the property goes into foreclosure, the affordability component is lost. However, any amount in excess of the balance of the mortgage, and some expenses, are returned to the municipality to be deposited into its Affordable Housing Fund.

However, there is good news on protecting the affordability of units, even in the event of foreclosure. Fannie Mae used to require that all deed restrictions be extinguished in the event of foreclosure. Now Fannie Mae will purchase mortgages on single-family properties that have deed restrictions that survive foreclosure. A new Affordable Housing Deed Rider boilerplate, designed by Fannie Mae and MassHousing, has been created for projects in which affordability restrictions do not terminate upon foreclosure. The new legal document is designed to be 'universal' and can be used in conjunction with any government subsidy program that creates low-cost, for-sale housing in Massachusetts, including Chapter 40B.

DHCD has stated that affordable units subject to the new deed rider will continuously be counted on the SHI, if used in conjunction with an approved state or federal housing subsidy program. The new universal deed rider will also eliminate the costly and time-consuming process whereby individual deed riders were reviewed by local officials, developers, government agencies, lenders and secondary market investors.

For rental properties, deed riders include requirements like:

- Eligibility of renters, including local preference, if it applies.
- Maximum rents.
- Basic parameters for appropriate lease terms, like a term of at least a year, conditions under which a landlord can terminate the lease and notice terms, including eviction, non-renewal of lease, etc.

Preservation of Affordable Rental Housing The "expiring use" problem in affordable rental housing arises from a federal government decision in the early 1960s to partner with private developers to produce affordable housing. In return for subsidized mortgages and tax benefits, developers agreed to rent to low-and-moderate-income tenants and to charge affordable rents. These public-private partnerships were cheaper for the government and more politically acceptable than public housing. Developments built under Section 221d3 of the National Housing Act effectively had 3% mortgages, and later Section 236 developments effectively had 1% mortgages.

Starting in 1974, the federal government began using project-based Section 8 tenant rent subsidies instead of mortgage subsidies to stimulate affordable development. The rent subsidies pay owners the difference between a federally-determined "fair market rent" and the tenant rent payment, set at 30 % of income.

Subsidized mortgages were typically written for 40 years, but in most cases pre-payment was allowed after 20 years. By pre-paying, owners could terminate low-and-moderate-income use restrictions, raise rents to market levels, convert to condominiums, or sell the properties. As housing markets heated up, owners began to utilize the pre-payment option and to decline renewal of Section 8 rent contracts. Over the past 15 years, thousands of federally-subsidized private housing units have been lost, and thousands more are at risk of being lost.

The Massachusetts Chapter 13A program, like the federal Section 236 program, provides interest subsidies to reduce rents to the level they would be if mortgages had been financed at 1% interest. Chapter 13A developments were built primarily in the 1970s with 30-40 year mortgages and 20-year pre-payment options.

At-risk private subsidized housing in Massachusetts. About 85,000 affordable housing units were built or substantially rehabilitated in Massachusetts using federal or state mortgage subsidies and/or project-based rental subsidies. Between 1995 and July 2006, more than 4,500 subsidized private units had been permanently lost through mortgage pre-payment and/or expiration of Section 8 subsidy contracts. Another 28,000 private affordable units are at risk of loss by the end of 2010. These 28,000 units represent 14% of the state's total affordable housing inventory, both public and private.

Mechanisms for preserving private subsidized housing. Federal statutes passed in 1987 and 1990 in effect barred mortgage prepayment and offered various financial incentives to maintain affordability. But in 1996, Congress restored prepayment rights, ended funding for preserving affordable units, and shifted focus to protecting residents from displacement.

Massachusetts traditionally provided supplementary resources for preserving at-risk affordable housing. But policy and procedural changes introduced in 2005 constrained use of these resources. The Department of Housing and Community Development (DHCD) eliminated a preservation set-aside for allocation of federal low-income housing tax credits. Similarly, housing production was given priority over preservation for other funding programs.

The nonprofit Citizens Housing and Planning Association in 2006 made the following recommendations for addressing preservation needs in Massachusetts:

- Restart the Capital Improvement and Preservation Fund (CIPF) and allow use of the Housing Stabilization Fund (HSF) for preservation.
- Remove barriers to the use of low-income tax credits and bond financing for preservation.
- Launch a technical assistance program to inform tenants, nonprofits and municipalities about local expiring-use properties and help them negotiate long-term preservation agreements, and access purchase and rehabilitation funding.

Proposed bills to enable municipalities to preserve expiring use properties. As of June 2007, the Joint Committee on Housing had before it three bills (S. 782, H. 1276, and H. 1295) on creation of a regulatory framework for municipalities to preserve expiring use properties. At request of the Committee, Citizens Housing and Planning Association convened a working group with expertise in this area to offer suggestions and advice. Opinions varied on the primary issue of whether owners who intend to convert to market should be required to sell to entities which would maintain affordability.

Sources

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