



Henry Investment Partners

December 5, 2023

County Council for Montgomery County  
Council Office Building  
100 Maryland Avenue, 6<sup>th</sup> Floor  
Rockville, MD 20850  
Attn: Stephen Mathany, Legislative Svc. Coordinator

RE: Expedited Bill No. 38-23  
Tenant Displacement – Right of First Refusal to Buy Rental Housing  
Proposed Amendment to Montgomery County Code  
Chapter 53A, Tenant Displacement, Sections 53A-2 and 53A-4

Dear Council Members:

We wanted to thank you for the opportunity to testify concerning the proposed right of first refusal bill, which we spoke in favor of. We need affordable housing – which is why we were the first developer to offer it in the City of Gaithersburg in 2005.

Having had that opportunity, we wanted to follow up with a few points that have proven important in Prince Georges County and other jurisdictions to not have the proposed ROFR discourage new multifamily development in the County by making tranches of capital significantly more difficult to raise.

For ease in review of the proposed language we see as necessary to assure its smooth and fair application in practice, we have attached (a) the current Code Section 53A with the current proposed language of Bill No. 38-23 in **blue text**, and (b) the proposed tweaks below interlined in **red text**.

Reflecting on other Jurisdictions ordinances, these are the changes which we believe to be necessary to have the proposed legislation work to increase affordable rental housing stock:

**53A-5(b) – An owner should be able to convey the property to a family member, into a trust, or an LLC.**

**Trusts:** Many families have spent years – even decades – sacrificing to purchase and hold the real estate for their spouses, children and future generations. These are usually transferred into and held in Trusts or limited liability corporations under Maryland Law. They are often gifted for a zero dollar or conveyed at a nominal amount. To require them to sell the property at the gifted amount does not work.

Transfers should be permitted without a ROFR in cases of:

- (a) to a family member(s);
- (b) to a trust or LLC for their benefit;
- (c) a transfer into a partnership, limited liability company, or corporation the majority of which is owned by the person or persons so contributing;

**53A-2(g) – The ROFR should not apply to new construction.**

Most developers of new projects have a capital partner (or several), which often includes the ability for the capital partner to sell their interest. This is often accomplished by the developer buying out the existing capital partners interest (often 50% or more) utilizing a replacement capital source to allow it to continue in its investment. For a ROFR to kick in before the project has had a change to stabilize and generate its initial sets of returns allowing the initial investor to recover its capital and anticipated return (typically in the first 7 years) will act to discourage both the developer and investor from taking on new projects and act to discourage *new* multifamily construction in Montgomery County.

**53A-4(d)(2) – Deposit be refundable in case of Default.**

Proper incentives are important Deposits which move from refundable to non-refundable as feasibility requirements are met force the buyer to be “real” – and the Seller to gain assurance that the transaction will close. Allowing the Deposit to be fully refundable – and immunity granted to the assigned buyer – encourages bad acts -- it should not be unexpected to see some less scrupulous buyers ‘taking a shot’ at squeezing the seller’s price as the 6<sup>th</sup> month winds down.

**53A-4(d)(3) – “...or any qualified entity...” should not be omitted from this section.**

. This section required the ROFR buyer to complete the sale within 180 days. The language “...or any qualified entity...” should be included, lest it be interpreted that qualified entities have an unlimited period to complete the sale. We assume this was an oversight, and that it was not the intent of the drafters to give ‘..qualified entities...’ unlimited time to close.

**53A-4(e) – After the owner/seller has gone through the ROFR process and the buyer designated by the County fails to perform, there should there be a window where the owner/seller can sell to another third party on substantially the same terms rather than being subjected to yet another 180 day process.**

This situation will arise when, after 180 days the County assigned purchaser drops the contract – leaving the owner/seller hanging. At this point there has been a lot of effort and waiting on the sellers part – and if the original contract buyer does not wait around, the seller is back to ground zero.

It would be equitable to let the Seller sell the property upon the same terms and conditions as the original contract to a buyer for a window of time – 12 months – without having to go through the failed process again.

**53A-4(f) – County assigned purchaser should be responsible for their actions.**

The proposed language seeks to grant fully immunity to the County and other assigned buyers. This is not found in other jurisdictions' ROFR languages we have reviewed. Common practice is that if a prospective buyer fails to close, it is responsible for the (a) loss of the deposit, (b) repairs of any physical damage to the property and similar bad acts, but not (c) consequential damages.

**53A-4(g) – The County designated Buyer should have tangible net worth.**

The ability for the County to assign the Contract to a qualified entity currently does not have a net worth requirement – at all. We are used to seeing a tangible net worth requirement of two times the purchase price or more (often with some liquidity requirements as well) to accommodate the typical financial requirements need to complete a transaction.

Having developed more than \$1.2 billion in real estate, we believe these changes will keep the County from creating another barrier to the development of new housing – while protecting the interest of maintaining existing affordable units.

Respectfully submitted,

Sincerely,



Peter J. Henry, JD, CPA



Leigh H Henry, JD

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**Sec. 53A-1. Legislative findings.**

The County Council finds that:

- (a) there is a continuing severe shortage of low and moderate-income rental housing in the County;
- (b) tenants often experience significant hardship when they are displaced by conversion of rental housing; and
- (c) it is in the best interests of public health, safety, and welfare to regulate the conversion of rental housing in the County.

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**Sec. 53A-2. Definitions.**

(a) *Convert* and *conversion* mean:

- (1) (A) changing the use of rental housing to nonresidential use;
- (B) demolishing at least one-third of the units in rental housing in a 12- month period;
- (C) displacing tenants from at least one-third of the occupied units in rental housing in a 12-month period by:
  - (i) raising rents; or
  - (ii) preparing to rehabilitate the rental housing; or
- (D) any other act that ends the use of the property as rental housing.

(2) *Conversion* does not include establishing a **condominium** or cooperative.

- (b) *Department* means the Department of Housing and Community Affairs.
- (c) *HOC* means the Montgomery County Housing Opportunities Commission.
- (d) *Owner* means a person holding title to rental housing.
- (e) *Qualified entity* means a legal entity that is:

- (1) designated under 53A-4(g); and

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(2) assigned a right of first refusal by the County Executive.

The following are designated *qualified entities*: Rockville Housing Enterprises of the City of Rockville, the Division of Housing and Community Development of the City of Gaithersburg, and the Department of Housing and Community Development of the City of Takoma Park.

~~(e)~~ **(f)** *Rental housing* means a multiple-family dwelling, or a group of multiple-family dwellings operated as one entity, with a total of at least 4 rental units. *Rental housing* does not include a dwelling operated for a religious or charitable purpose.

~~(f)~~ **(g)** (1) *Sale, sell, or selling* means **for Rental Housing which has been constructed within the prior seven (7) year period:**

- (A) transfer of title to rental housing;
- (B) transfer in a 12-month period of a majority interest in owner; or
- (C) lease of rental housing for more than 7 years.

(2) These terms do not include entering into a contract for the sale of rental housing that gives the County, HOC, or a tenant organization or a qualified entity a right of first refusal under this Chapter.

~~(g)~~ **(h)** *Tenant* means an individual who lives in a rental housing unit with the owner's consent and is responsible for paying rent to the owner.

~~(h)~~ **(i)** *Tenant organization* means an association of tenants of rental housing that:

- (1) represents tenants of at least 30 percent ~~[(30%)]~~ of the occupied units in the rental housing; and
- (2) is certified by the Department according to Executive regulations.

~~(i)~~ **(j)** *Title* means:

- (1) a legal or equitable ownership interest in rental housing; or
- (2) a legal, equitable, or beneficial interest in a partnership, limited partnership, corporation, trust or other person who is not an individual, that has a legal or equitable ownership interest in rental housing.

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**Sec. 53A-3. Notice of sale.**(a) *Notice required.*

(1) Within 5 days after an owner enters into a bona fide contract of sale to sell rental housing, the owner must provide written notice of the sale:

- (A) to each tenant in the rental housing by first class mail;
- (B) posted in the public areas of the rental housing; and
- (C) to the Department with a list identifying each tenant and the tenant's address.

(2) The notice of sale must offer to sell the rental housing to any tenant organization under Section 53A-4, and include any other information required by Executive regulations.

(b) *Tenant organization.* If there is no certified tenant organization for the rental housing when the notice of sale is due under subsection (a), then a tenant organization may be formed to exercise the right of first refusal if the Department certifies the organization within 45 days after the owner provides notice to the tenants under subsection (a).

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**Sec. 53A-4. Right of first refusal to buy rental housing.**

- (a) *Right of first refusal.* An owner must offer the County, HOC, and any tenant organization the right to buy rental housing before selling the rental housing to another party, except as provided under Section 53A-5.
- (b) *Requirements for offer.* An offer required by subsection (a) must:
  - (1) be in writing;
  - (2) be sent by certified mail, return receipt requested, within 5 business days after:
    - (A) the execution of a bona fide contract of sale, for the County, HOC, and any existing tenant organization; or
    - (B) the Department certifies a tenant organization, for a new tenant organization formed under Section 53A-3(b);

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(3) include substantially the same terms and conditions as a pending bona fide contract of sale from a third party to buy the rental housing; ~~and~~

(4) remain open for

(A) 60 days after it is received, for the County ~~and~~ HOC, and any qualified entity that receives an assignment under 53A-4(g), and

(B) 90 days after it is received by any tenant organization, including a new tenant organization formed under Section 53A-3(b), and

(5) an owner must send a copy of the offer to all qualified entities contemporaneously with providing the offer to the County, HOC, and any tenant organization.

(c) *Information and inspection.* The owner must give the County, HOC, ~~and~~ any tenant organization, and any qualified entity:

(1) any information about the rental housing relevant to exercising the right of first refusal, such as architectural and engineering plans and specifications, and operating data; and

(2) access to the rental housing to inspect the property and conduct reasonable tests at reasonable times after reasonable notice.

The County, HOC, ~~and~~ any tenant organization, and any qualified entity must pay the owner a reasonable deposit for any architectural and engineering plans that the owner provides. The owner must refund the deposit when the plans are returned to the owner. The County Executive must issue regulations to implement this subsection.

(d) *Exercise of right of first refusal.*

(1) The County, HOC, ~~and~~ any tenant organization, or any qualified entity that receives an assignment under 53A-4(g) may exercise the right of first refusal by accepting the offer within the applicable period under subsection (b)(4). The County and HOC may accept an offer to buy rental housing in a municipality only if the municipality approves.

(2) The owner must sell the rental housing under the right of first refusal if the acceptance includes substantially the same terms and conditions contained in the owner's bona fide contract of sale with the third party, including any

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contract term that provides for a bona fide real estate commission payable to an independent broker. Notwithstanding this general requirement or any term of the contract, the County, HOC, ~~or~~ a tenant organization or any qualified entity may condition its acceptance on obtaining financing at any time before the deadline in paragraph (3) for completing the sale. The County, HOC, any tenant organization, or any qualified entity must not be required to pay [to] the owner a deposit of more than five percent [(5%)] of the contract price to accept the offer and exercise its right of first refusal. **The deposit shall be refundable under the same terms and conditions as the original contract.** ~~The deposit is refundable in the event of a good faith failure of the County, HOC, any tenant organization, or any qualified entity to perform under the contract.~~

- (3) The owner and the County, HOC, ~~or~~ tenant organization or any qualified entity that receives an assignment under 53A-4(g) must complete a sale under this subsection within 180 days after the County, HOC, or tenant organization **or any qualified entity** receives the owner's offer unless the owner agrees to extend the 180-day period.
- (4) Before a tenant organization completes a sale under paragraph (3), a majority of all of the tenants must ratify the purchase.
- (5) The right of first refusal applies in the following order of priority:
- (A) the County;
  - (B) any qualified entity that receives an assignment under 53A-4(g);
  - ~~(B)~~ (C) HOC; and
  - ~~(C)~~ (D) any tenant organization.
- (6) The Executive must issue regulations that establish procedures and guidelines for exercising the County's right of first refusal.
- (e) *Expiration of right of first refusal.* If the County, HOC, ~~and~~ any tenant organization or any qualified entity that receives an assignment under 53A-4(g), do not exercise their rights of first refusal within the applicable period under subsection (b)(4), the owner may sell the rental housing to **the a** third-party buyer under substantially the same terms and conditions offered to the County, HOC, and any tenant organization,

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**however if the property is not sold within twelve months following the expiration of the right of first refusal without, the Owner shall be subject to repeating the right of first refusal process.**

- (f) *Immunity.* The County, HOC, ~~and~~ any tenant organization or any qualified entity are not liable for any **consequential** damages incurred by the owner, a third-party buyer, a tenant, or any other person in connection with a **good faith** decision to exercise or not exercise a right of first refusal under this Section.

*(g) Assignment.*

(1) The County Executive may assign the right of first refusal, or a contract to purchase rental housing, to an entity qualified by the Department to receive such assignment that:

(A) has demonstrated expertise in acquiring, maintaining, and managing rental and affordable housing;

(B) is a bona fide nonprofit or a for-profit entity in good standing under the laws of the State of Maryland at the time of assignment;

(C) is registered and licensed to do business in Maryland; and

(D) commits in writing to maintain the affordability of housing acquired under this subsection.

**(E) Has a tangible net worth equal to two (2) times the purchase price.**

(2) The County Executive must adopt regulations under Method (3) to establish a process for qualifying and selecting entities to receive an assignment under this subsection. The regulations must establish:

(A) a process that provides entities a fair opportunity to demonstrate to the County Executive or the County Executive's designee its qualifications to receive an assignment;

(B) factors that an entity must demonstrate to be deemed eligible to receive an assignment;

(C) affordable housing restrictions that an entity must commit in writing to maintain, if selected as an assignee; and

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(D) criteria the County Executive or the County Executive’s designee must use for selecting assignees from among qualified entities.

(3) An assignment by the County Executive of the County’s right of first refusal must be accomplished by a written agreement with the assignee that includes an assignment of the County’s rights and obligations under this Chapter as to its right of first refusal.

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**Sec. 53A-5. Sales not requiring right of first refusal.**

(a) *Agreement not to convert.*

(1) An owner may sell rental housing without providing any right of first refusal under Section 53A-4 if the Department approves a written agreement that:

(A) prohibits the buyer from converting the rental housing for at least 5 years after the sale;

(B) the Department received from the prospective buyer at least 30 days before the sale; and

(C) except as provided in paragraph (2)(B), requires the buyer to follow the voluntary rent increase guidelines published annually under Section 29-53 during:

(i) the first 3 years of the agreement, for all tenants who resided in the rental housing when the Department approved the agreement; and

(ii) the last 2 years, for each of these tenants who qualifies as a low- or moderate-income tenant under Department regulations.

(2) The Department may:

(A) approve or reject an agreement with the buyer under this subsection only after considering the:

(i) physical condition of the rental housing, including any rehabilitation necessary to correct dangerous defects;

(ii) tenants' ability to afford rent increases; and

(iii) need to preserve low- and moderate-income rental housing in the County;

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(B) allow the buyer to increase rents above the limits in paragraph (1)(C) only when the Department decides that a greater increase is justified by:

- (i) unforeseen circumstances beyond the buyer's control; or
- (ii) rehabilitation or renovation to the rental housing.

(3) The Department annually must verify the buyer's compliance with the rent increase limits required by this subsection.

(b) *Other exceptions.* An owner also does not have to provide a right of first refusal for a sale:

- (1) under the terms of a bona fide mortgage or deed of trust;
- (2) to a mortgagee in lieu of foreclosure;
- (3) under a court order;
- (4) from one co-tenant to another co-tenant by operation of law;
- (5) under a will or intestate distribution;
- (6) to the State or a local government; or
- (7) of a minority title interest;

**(8) to a spouse, son, daughter, grandchildren, or to a trust for their benefit, or to a qualified 501(c)(3) organization.**

**(9) made pursuant to the liquidation of a partnership, limited liability company, or corporation, or consolidation or merger between two publicly traded entities (e.g., REIT); or**

**(10) into a partnership, limited liability company, trust or corporation the majority of which is owned by the person(s) so contributing.**

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**Sec. 53A-6. Conversion of rental housing.**

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Existing Code Language in Black Text

Expedited Bill No-28-23 Language in Blue Bold Text

**Proposed modifications in red text**

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(a) *Notice of conversion.* An owner must not convert rental housing unless the owner notified each tenant in the rental housing at least 120 days before converting the building. Before renting to a prospective tenant during this 120-day period, the owner must notify the prospective tenant about the conversion.

(b) *Termination of lease.* A tenant who receives a notice of conversion may terminate a lease without penalty at least 30 days after notifying the owner in writing.

(c) *Tenant relocation assistance.* The owner must pay a tenant relocation assistance equal to 2 months' rent if the tenant moves out of the rental housing within 180 days after the tenant received the notice of conversion required by subsection (a). The owner must pay the relocation assistance not more than 10 days after the owner received the tenants' notice of termination under subsection (b).