

DECLARATION OF AFFORDABILITY RESTRICTIONS

This Declaration of Affordability Restrictions (this “**Declaration**”) is made as of _____, 20___, by [Nonprofit Corporation] (the “**Community Organization**”).

The following is a recital of facts underlying this Declaration:

A. The Community Organization is organized for public welfare purposes,¹ including developing and preserving decent, affordable housing for low and moderate income people, combating community deterioration and promoting neighborhood stability, and creating home-ownership opportunities for low and moderate income people, who otherwise would be denied such opportunities because of limited financial resources.

B. The Community Organization owns certain residential property (the “**Property**”) commonly known as _____, and more particularly described in Exhibit A.

C. The conditions and restrictions set forth in this Declaration are essential to the fulfillment of the purposes of the Community Organization by (a) conserving the Community Organization subsidy; (b) limiting the inflationary effect of any appreciation in the value of the Property; and (c) restricting resale of the Property to other Income-Qualified Families, and shall be binding on all buyers and subsequent owners of the Property (individually and collectively, “**Buyer**”).

D. As shall be set forth in the Community Organization’s deed conveying the Property to the initial Buyer, **IF BUYER DOES NOT COMPLY WITH THE CONDITIONS AND RESTRICTIONS IN THIS DECLARATION, THEN THE COMMUNITY ORGANIZATION WILL HAVE A RIGHT TO REPURCHASE THE PROPERTY AT THE DESIGNATED PURCHASE PRICE, WHICH MAY BE SUBSTANTIALLY LESS THAN THE BUYER’S PURCHASE PRICE FOR THE PROPERTY.**

E. Each Buyer shall acquire the Property subject to the special nature of the terms and conditions of the sale of the Property, including without limitation such terms and conditions as might affect the marketability or resale price of the Property.

¹ Limits on the ability of a property owner to sell the property (referred to as “restraints on alienation”) may be unenforceable based on certain legal principles (for example, the “rule against perpetuities”). However, MCL 554.381 provides: “No statutory or common law rule of this state against perpetuities or restraint of alienation shall hereafter invalidate any gift, grant, devise or bequest, in trust or otherwise, for public welfare purposes,” with “public welfare purposes” defined in MCL 554.382 as “all lawful purposes beneficial to the public as a whole.” So, this recital is intended to reinforce the position that based on these provisions the restrictions in this Declaration should be valid and enforceable. It may be advisable to amend the Community Organization’s bylaws to explicitly state that it is organized for public welfare purposes. Also note that this provision must be coordinated with the Community Organization’s organizational documents, and should be tailored as necessary to protect the Community Organization’s 501(c)(3) status.

NOW, THEREFORE, in consideration of the foregoing recitals, of the mutual promises of the parties, and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **BINDING ON ALL OWNERS.** ANY PERSON WHO TAKES TITLE TO, OR POSSESSION OF, OR ANY INTEREST IN, ANY PORTION OF THE PROPERTY, SHALL BE DEEMED TO HAVE TAKEN SUCH INTERESTS SUBJECT TO THIS DECLARATION (SPECIFICALLY INCLUDING THE RESTRICTIONS ON RESALE) AND TO HAVE ACCEPTED AND AGREED TO BE BOUND BY THIS DECLARATION. THE COVENANTS AND RESTRICTIONS IN THIS DECLARATION SHALL BE DEEMED TO BE COVENANTS RUNNING WITH PROPERTY AND BINDING ON ALL SUCH PARTIES.

2. Residential Use.

2.1 Residential Use Only. Buyer shall use, and shall cause all occupants to use, the Property only for residential use² as permitted by applicable zoning law.

2.2 Occupancy. Buyer shall occupy the Property for at least [eight (8)] months of each calendar year unless otherwise agreed by the Community Organization. Occupancy by children or other immediate family members or dependents of Buyer shall be deemed occupancy by Buyer. Storage of personal property does not constitute occupancy.

3. Sale or Other Transfer of the Property.

3.1 Income-Qualified Family. An “***Income-Qualified Family***” means [a family whose income does not exceed eighty per cent (80%) of the area median gross income, adjusted for family size. Family income shall be determined in a manner consistent with determinations of lower income families and area median gross income under Section 8 of the U.S. Housing Act of 1937, as amended (the “***Section 8 Program***”). If the Section 8 Program is terminated, determinations under a comparable Federal or State of Michigan program identified by the Community Organization shall be used; and if the Community Organization does not designate a comparable program, then determinations shall continue to be made under the Section 8 Program regulations as in effect immediately before termination.]

3.2 Transfers to Income-Qualified Families. Buyer may sell, transfer, or otherwise dispose of its interest in the Property only to members of an Income-Qualified Family, as defined above that acknowledging that they are bound by this Declaration. Any purported sale, transfer or other disposition to any other person or entity done without following the procedures set forth below or in violation of such price limitations (1) shall be voidable at the option of the Community Organization, and (2) shall constitute a default that gives rise to the Community Organization’s option to repurchase the Property for the designated price (as set forth in the deed from the Community Organization to the initial Buyer).

² Note that the ICE model CLT ground lease requires use “only for residential purposes *and any incidental activities related to residential use* that are currently permitted by applicable zoning law.” This language would permit somewhat broader use (for example, a residence-based business use permitted under the zoning law).

3.3 Transfer to Buyer's Heirs. Upon receipt of notice from the executor of the decedent's estate given within ninety (90) days of the death of Buyer, the Community Organization shall, unless for good cause shown, consent to a transfer of the Property, subject to the terms of this Declaration, to one or more of the following possible heirs of Buyer:

- (a) the spouse of Buyer; or
- (b) the child or children of Buyer; or
- (c) member(s) of Buyer's [household] who have resided at the Property for at least one year prior to Buyer's death.

Any other person or persons who are heirs, legatees or devisees of Buyer must demonstrate to the Community Organization's reasonable satisfaction that they meet the definition of Income-Qualified Families above, and if any such person is unable to do so, then such person shall not be entitled to own the Property.

3.4 Notice to Community Organization.

(a) If Buyer contemplates a sale, transfer or disposition of the Property to a particular third party, then not less than sixty (60) days prior to the contemplated closing thereof, Buyer shall give the Community Organization notice (an "**Intent to Sell Notice**") of the proposed transfer substantially in the form of Exhibit 1.

(b) Such notice shall include evidence that the purchase price does not exceed the Maximum Purchase Price, together with the following or comparable items for the proposed buyer: (i) the tax return of the buyer for the immediately preceding year; (ii) a current verification of the buyer's employment; (iii) the pay stubs of the buyer for the three months immediately preceding the month in which notice is given to the Community Organization.

(c) A sale, transfer or other disposition is voidable at the option of the Community Organization unless and until the Community Organization confirms in writing that such assignee or buyer is an Income-Qualified Family and that the purchase price does not exceed the Maximum Purchase Price. If the Community Organization fails to respond in writing within forty-five (45) days of its receipt of such notice and accompanying documentation, such failure on the part of the Community Organization shall be deemed to constitute a denial of such status.³

(d) At the closing, the selling Buyer shall provide to the purchasing buyer a Buyer's Disclosure and Acknowledgment in the form of attached Exhibit 2.

³ The Community Organization may alternatively provide that the failure to timely respond is deemed its approval.

4. Maximum Purchase Price. The Maximum Purchase Price (the “**MPP**” or “**Maximum Purchase Price**”) shall be equal to⁴ the *lesser* of (1) the current appraisal value of the Property (as determined below) or (2) the sum of (i) the Buyer’s Purchase Price (as stipulated below or as established in a closing in compliance with a notice of sale as provided above), plus (ii) twenty-five percent (25%) of the increase in market value of the Property, if any, calculated in the manner described below.

4.1 The initial Buyer’s “**Purchase Price**” for the Property shall be the price paid to the Community Organization. Upon the closing of a permitted sale, transfer or disposition of the Property, the selling Buyer shall give the Community Organization notice of the purchase price paid for the Property, which shall be the purchasing Buyer’s Purchase Price for purposes of this Declaration.

4.2 For purposes of calculating the MPP, the “increase in market value of the Property” shall be determined by subtracting (i) the amount of the appraised value of the Property at the time of the selling Buyer’s purchase, as documented by the appraiser’s report delivered to the Community Organization in connection with the purchase, from (ii) the amount of the appraised value of the Property at the time of Buyer’s Intent to Sell Notice, to be determined as provided below. (The appraised value determined at the time of a selling Buyer’s Intent to Sell Notice under clause (ii) shall be the purchasing Buyer’s appraised value under clause (i).)

4.3 At the time of the giving of the Buyer’s Intent to Sell Notice, Buyer shall submit to the Community Organization, at Buyer’s expense, an appraisal (the “**Appraisal**”) of the Property by a qualified appraiser. Within ten (10) days of receipt of the Appraisal from Buyer, the Community Organization shall either (a) accept the Appraisal as accurately representing the market value of the Property for purposes of calculating the MPP, or (b) commission a second appraisal by a qualified appraiser, at the Community Organization’s expense, and submit a copy of this second appraiser’s report to Buyer within forty-five (45) days of the giving of Intent to Sell Notice. If a second appraisal is commissioned and results in an appraised value which is not less than 90% nor more than 110% of the amount of the first appraisal, the amount to be used in determining the “increase in market value of the Property” shall be the average of the two appraised values. If the amount of the second appraisal is more than 10% greater or less than the first, the two appraisers shall then select a third qualified appraiser, who shall choose the one of the two prior appraisal amounts that more closely represents the market value of the Property as of the date of the Notice of Intent to Sell. The cost of the third appraiser shall be shared equally by the Community Organization and Buyer.

5. General Provisions.

5.1 Notices. All notices and other communications which are required under this Declaration shall be in writing and will be deemed to have been duly given (a) upon receipt if delivered in person, or (b) within three business days if mailed, first class certified, registered or

⁴ This is just one example of a formula that can be used for determine the Maximum Purchase Price. The Community Organization should tailor this provision to best accomplish its goals, taking into consideration its own market conditions.

express mail, return receipt requested and postage prepaid, or (c) the following business day if sent by recognized overnight courier, with proof of delivery requested and charges prepaid, to:

Community Organization

[Nonprofit Corporation]

with a copy to:

or to such other address as the Community Organization may specify by written notice to a Buyer.

5.2 No Waiver. The Community Organization's failure to exercise any remedy available to it, or its failure to take action with respect to, any breach of the Declaration shall not be deemed to be a waiver of that or any subsequent breach of the same or of any other provision. The Community Organization may grant waivers in the terms of this Declaration, but any such waiver must be in writing and signed by the Community Organization before being effective.

5.3 Severability and Duration. If any provision of this Declaration, or any portion thereof, is invalid or unenforceable under any law, such provision, or portion thereof, shall be deemed reformed or deleted, but only to the extent necessary to comply with such law, and the remaining provisions of this Declaration shall remain in full force and effect and enforced to the fullest extent permitted by law. The Community Organization's intention is that its rights and options under this Declaration shall continue in full force and effect. In the event any such right or option shall be construed to be subject to any rule of law limiting its duration, the time period for the exercise of such right or option shall be construed to expire within ninety (90) years after its creation.⁵

5.4 Miscellaneous.

(a) This Declaration is binding upon all Buyers and inures to the benefit of the Community Organization and its successors and assigns in accordance with the provisions of this Declaration. This Declaration confers no benefits, rights, or remedies on, and may not be enforced by, any person other than the Community Organization (including its successors and assign), except a person that is designated in writing as a third party beneficiary by the Community Organization. The provisions of this Declaration and the rights of any designated third party beneficiary affected may be

⁵ As discussed in footnote 1, it is possible that certain rights might be invalidated by the rule against perpetuities, which provides that unvested property interests are invalid unless either of the following tests is met: "(a) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive. (b) The interest either vests or terminates within 90 years after its creation." So, this provision was included to provide additional assurance that this will not be a problem.

amended, waived, or terminated without the consent of or notice to any such third party beneficiary. Any third party that is specifically designated as a beneficiary is subject to all limitations and conditions set forth herein.

(b) This Declaration may be amended or modified only in writing executed by the Community Organization. Any such changes shall be binding on any Buyer that consents or that acquires an interest in the Property after such changes.⁶

(c) This Declaration shall be interpreted in accordance with and governed by the laws of the State of Michigan.

(d) Whenever a pronoun is used in this Declaration, it shall be construed to represent either the singular or the plural, masculine or feminine, as the case shall demand.

IN WITNESS WHEREOF, the undersigned has executed and delivered this Declaration as of the date first set forth above.

COMMUNITY ORGANIZATION:

[Nonprofit Corporation]

By: _____

Its: _____

Exhibits:

- A Legal Description
- 1 Form of Intent to Sell Notice
- 2 Form of Buyer’s Disclosure and Acknowledgment

Drafted by and when recorded return to:

⁶ In order to assure that an amendment is binding on subsequent homeowners, the amendment should be recorded (since recording provides “constructive” notice of the changes).

State of _____)
)ss.
County of _____)

The foregoing instrument was acknowledged before me on this _____ day of _____, 20____, by _____ (name of officer or agent), (title of officer or agent) of _____(name of corporation acknowledging), _____ (state of incorporation) corporation, on behalf of the corporation.

Notary Public
_____ County, _____ (State)
My Commission Expires: _____
Acting in the County of _____, Michigan

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www.clronline.org/app

This publication is intended to provide general information, and is not a substitute for legal advice. If you have additional questions about this issue, contact Community Legal Resources at 313/964-4130.

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