

## DECLARATION OF COVENANTS TO BE USED BY FOR-SALE AFFORDABLE DWELLING DEVELOPMENTS

### INTRODUCTION

This Declaration of Affordable Dwelling Units Covenants (the Declaration of Covenants) must be recorded on all for-sale ADUs in a development simultaneously with and immediately following the recordation of the final subdivision plat or, in the case of a condominium, recorded simultaneously with and immediately following the condominium declaration. The ADU Notice of Availability and Offering Agreement cannot be executed until this is done. Evidence that the Declaration of Covenants document has been recorded, in the form of a copy of the applicable recorded Declaration of Covenants document, must be submitted with the ADU Offering Agreement before ADUs in a development can be sold.

The Declaration of Covenants document requires two attachments to be prepared by the developer (Declarant). Exhibit A is a legal description of the property (development) which is subject to the requirements of the ADU Ordinance. Exhibit B is a legal description of the specific lots or units within the development on which the ADUs are being (or have been) constructed.

The Declaration of Covenants document must be signed by an authorized representative of the property owner/developer, notarized and recorded in the land records of Fairfax County, Virginia.

To be Used by For-Sale Affordable Dwelling Developments

To be recorded immediately following the Deed of Dedication and Subdivision /  
Condominium Declaration for all for-sale affordable dwellings

Revised as of July 2, 2002

And further revised as of February 28, 2006

And further revised as of March 5, 2009

**DECLARATION OF AFFORDABLE  
DWELLING UNITS COVENANTS**  
(For-Sale Developments)

**THIS DECLARATION OF AFFORDABLE DWELLING UNITS COVENANTS**

("Declaration" or "Covenants") is made as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by

\_\_\_\_\_

("Declarant") ("GRANTOR" for indexing purposes only), the owner of certain property ("Property") located in Fairfax County, Virginia as described on Exhibit A attached hereto and a part hereof. As provided for herein, among other things, the Declarant irrevocably transfers, conveys, and assigns to the Fairfax County Redevelopment and Housing Authority and its successors ("Authority") ("GRANTEE" for indexing purposes only) all right, title and interest to enforce and maintain in full force and effect, the terms, conditions, and requirements of these Covenants.

**RECITALS**

**R-1.** On December 11, 1989, the Board of Supervisors of Fairfax County, Virginia established an Affordable Dwelling Unit Program, as further amended and effective on March 31, 1998, July 2, 2002, January 31, 2004, September 14, 2004, February 28, 2006, and February 28, 2007 ("Program"), to assist in providing affordable housing for persons with low and moderate income.

**R-2.** The Program is intended to be administered in accordance with Part 8, Article 2 of the Fairfax County Zoning Ordinance and the regulations established with respect

thereto (that ordinance, together with those regulations, as the same may be amended from time to time, are collectively referred to hereinafter as the "Ordinance").

**R-3.** The Ordinance requires, in pertinent part, that owners of certain land zoned to certain zoning districts and to be developed into fifty or more residential dwelling units shall provide a number of affordable dwelling units (collectively, the "Affordable Dwellings", each individually referred to as an "Affordable Dwelling") for sale to qualified purchasers, all in accordance with and under the conditions set forth in the Ordinance.

**R-4.** Declarant has agreed that in consideration of benefits conferred upon Declarant under the Ordinance and in compliance with Declarant's obligations under the Program, the land described on Exhibit B attached hereto and made a part hereof, together with all improvements thereon (collectively, the "ADUs", each individually referred to as an "ADU"), shall be designated as the Affordable Dwellings on the Property in compliance with the Ordinance.

**R-5.** The Ordinance provides that no Affordable Dwellings shall be offered for sale to the general public until after the date on which all of the time periods referenced in Section 2-810 of the Ordinance have expired ("Availability Date") and the requirements therein have been fulfilled regarding the right to acquire Affordable Dwellings conferred by the Ordinance on (i) the Authority or its successor in interest, (ii) persons who met the income criteria established by the Authority and who had received a Certificate of Qualification from the Authority ("Certified Purchasers") in accordance with the Ordinance, (iii) any non-profit housing groups ("Non-Profit Groups") designated in writing by the County Executive of Fairfax County or the successor to such position ("County Executive"). (The period from the date hereof until the Availability Date is referred to herein as the "Initial Control Period").

**R-6.** The Ordinance establishes certain conditions, limitations and controls (the "Ordinance controls") on the Affordable Dwellings that are to remain in effect with regard to resale and occupancy of each of the Affordable Dwellings for a period beginning on the date the deed of conveyance from Declarant to the first purchaser of each of the Affordable Dwellings is recorded until 30 years thereafter. In addition, the Ordinance also provides, however, that (a) upon any resale and/or transfer to a new owner of each of the Affordable Dwellings within that first applicable 30 year period of Ordinance controls a new 30 year period of Ordinance controls shall commence on the date of the recordation of such resale or transfer of the applicable Affordable Dwelling and (b) and for each subsequent resale and/or transfer of each such Affordable Dwelling to a new owner within such renewed 30 year period of Ordinance controls a new 30 year period of Ordinance controls shall commence on the date of the recordation of such resale or transfer of the applicable Affordable Dwelling, (each such initial 30 year period of Ordinance controls beginning upon the initial sale of an applicable Affordable Dwelling and each such subsequent 30 year period of Ordinance controls beginning upon such transfer or resale of an applicable Affordable Dwelling shall be referred to individually as a "Renewable Resale Control Period," and collectively, as the "Renewable Resale Control Periods").

**R-7.** In addition, the Ordinance establishes certain requirements applicable to all the Affordable Dwellings during the period (the "Extended Control Period") which begins as to an applicable Affordable Dwelling upon expiration of the Renewable Resale Control Periods for such Affordable Dwelling and continues until the completion of the first resale of such applicable Affordable Dwelling thereafter. The Extended Control Period requirements establish procedures with regard to the right of the Authority to acquire each of the Affordable Dwellings and the payment of

contributions of a portion of the proceeds from the sale of each Affordable Dwelling to the Fairfax County Housing Trust Fund.

**R-8.** The expiration of the Renewable Resale Control Periods shall occur as to an applicable Affordable Dwelling only upon the completion by the same owners of an entire 30 year Renewable Resale Control Period, that is, there has been no sale or transfer to a new owner of the Affordable Dwelling during such period of 30 years. The Initial Control Period, the Renewable Resale Control Periods and the Extended Control Period shall be herein collectively referred to as the "Control Periods".

**R-9.** The Ordinance further provides that with regard to each of the Affordable Dwellings, covenants shall be recorded that will run with the land in favor of the Authority for the Control Periods and that shall specify certain terms and conditions of the Program applicable to each of the Affordable Dwellings.

**R-10.** In further compliance with the Ordinance under the terms of the Program, Declarant is making this Declaration and these Covenants as set forth below.

NOW, THEREFORE, Declarant hereby declares that the ADUs shall be subject to these Covenants which touch and concern the land and improvements constituting the ADUs as set forth in Exhibit B, that these Covenants shall run with the land, and that these Covenants shall be binding in accordance with the terms herein on Declarant and all Transferees, as such term is defined in the next sentence, of the ADUs until expiration of the applicable Control Periods. For purposes of these Covenants, Transferees shall be deemed all persons and entities that may hereafter acquire any interest whatsoever in any of the ADUs, or any part thereof, from Declarant, or any successor or assign of Declarant, or any other party, whether by sale, lease, assignment, hypothecation or any other means of transfer (any and all of the foregoing means of transfer being herein referred to as a "Transfer"), for the applicable Control Periods.

ARTICLE I  
PRE-GENERAL SALE CONTROLS

During the Initial Control Period, no Transfer of any of the ADUs, or any part thereof, shall be made unless the Authority, the Certified Purchasers and the Non-Profit Groups shall have received the notices required by, and shall have been afforded the opportunity to purchase the ADUs in accordance with, Section 2-810 of the Ordinance.

ARTICLE II  
ORDINANCE CONTROLS

A. During the Renewable Resale Control Periods, no Transfer of any of the ADUs, or any part thereof, shall be made for any amount, or as security for any amount, or for a sale price, that is in excess of the maximum sales price permitted pursuant to Section 2-812 of the Ordinance.

B. During the Renewable Resale Control Periods, no Transfer of any of the ADUs, or any part thereof, shall be made except in compliance with all other requirements of the Ordinance, including, without limitation, the obligation to offer each of the ADUs exclusively first to the Authority. The owner of each such ADU shall provide the Authority with written notification sent by certified mail that the ADU is being offered for sale. The Authority shall have the exclusive right to purchase such ADU at a purchase price that shall not exceed the control price of the unit at that time as established in accordance with the Ordinance. The Authority shall notify the owner in writing within 30 days after receipt of the written notification from the owner advising whether or not the Authority will enter into a contract to purchase the unit on the form approved by the Authority and subject to certain conditions, such as, but not limited to, acceptable condition of title and acceptable physical and environmental conditions. An all cash closing shall occur within 90 days after receipt by

the Authority of the written notification of the owner offering the ADU for sale, in the event that all such conditions of the contract are satisfied. The Authority may either take title to the ADU and amend and restate the covenants applicable to that unit to make the covenants consistent with the then current provisions of Ordinance or may assign the contract of purchase to a qualified homebuyer with a condition of the assignment being that such amended and restated covenants would be recorded and effective as express terms of the deed of resale. With respect to ADUs acquired by the Authority, the resale price shall include an increase in the amount of one and one-half percent (1½%) of the otherwise applicable control price as established in accordance with the Ordinance as an allowance for the Authority's marketing and transaction costs. With respect to ADUs contracted for purchase by the Authority and for which the contract has been assigned by the Authority, the resale price shall also include an increase in the amount of one and one-half percent (1½%) of the otherwise applicable control price as established in accordance with the Ordinance as an allowance for the Authority's marketing and transaction costs, which one and one-half percent (1½%) of the resale price shall be paid to the Authority at the time of the settlement of the resale of each such ADU as part of the disbursement of settlement proceeds. ADUs so acquired/contracted for purchase by the Authority shall be resold to qualified homebuyers in accordance with the Program.

C. For the first sale of each of the ADUs after expiration of the Renewable Resale Control Periods with respect thereto (the "First Applicable ADU Resale"), such ADU shall first be offered exclusively to the Authority for 60 days. The owner of each such unit shall provide the Authority with written notification sent by registered or certified mail that the unit is for sale. To the extent the net sales price paid by the purchaser of the First Applicable ADU Resale, whether such purchaser is the Authority or another party if the Authority does not exercise its right to purchase after the expiration of the Renewable Resale Control Periods as provided herein, exceeds the purchase price for that ADU paid by the immediate prior

purchaser thereof, as such net sales price and such purchase price shall have been adjusted in accordance with the Ordinance, one-half (1/2) of such excess shall be contributed at the time of closing on the First Applicable ADU Resale to the Fairfax County Housing Trust Fund with the balance of such excess made available to the ADU seller.

D. During the Control Periods, each of the ADUs shall be subject to all the provisions of the Ordinance.

E. During the Control Periods, this Declaration and these Covenants shall be senior to all instruments securing financing with respect to an ADU, and this Declaration and these Covenants shall be binding upon all assignees, mortgagees, purchasers and other successors in interest, except that this Declaration and these Covenants shall be released in the event of foreclosure by an Eligible Lender, as such term is defined in the next sentence, as and only to the extent provided for in Section 2-812(8)(B) of the Ordinance. An Eligible Lender is defined as an institutional lender holding a first priority purchase money deed of trust on an ADU or a refinancing of such institutionally financed purchase money deed of trust by an institutional lender, provided that such refinancing does not exceed the outstanding principal balance of the existing purchase money first trust indebtedness on the ADU at the time of refinancing.

F. During the Control Periods, every Eligible Lender and every other lender secured by an ADU or other parties who have or may seek to place a lien on any of the ADUs shall provide the County Executive and the Authority written notice of any delinquency or other event of default under the deed of trust or mortgage, or other instrument or agreement that may permit a lien to be filed against any of the ADUs, and shall offer the Authority the right to cure such delinquency or other event of default within a period of 90 days immediately after receipt by the Authority of such notice, and all financing documents with respect to each of the ADUs shall so provide.



G. During the Control Periods, no sale, transfer or foreclosure of an ADU shall affect the validity of this Declaration and these Covenants, except as expressly set forth in the provisions of the Program as set forth in the Ordinance.

H. During the Control Periods, each Eligible Lender and any other lender secured by an interest in the ADU, prior to foreclosure upon an ADU, shall provide the County Executive and the Authority at least 90 days prior written notice thereof.

I. During the Control Periods, the financing of each of the ADUs shall comply with all of the provisions of Section 2-812(8)(B) of the Ordinance as they may be amended from time to time. In addition to the provisions stated above in this Article II of the Declaration, during the control periods each ADU is subject to, and shall also comply with, the following in accordance with Section 2-812(8)(B) of the Ordinance:

1. The total aggregate amount of principal and accrued interest for all financing secured by an ADU shall not exceed the owner's purchase price (as adjusted in accordance with Section 2-812(2)(4) of the Ordinance). Any financing in excess of the owner's purchase price (as adjusted in accordance with Section 2-812(2)(4) of the Ordinance) shall not be secured by any interest in the applicable ADU.

2. An Eligible Lender shall have the right to foreclose on an ADU and these Covenants on the ADU shall terminate upon such foreclosure by the Eligible Lender in the event that the ADU is sold by a trustee on behalf of the Eligible Lender to a bonafide purchaser for value at a foreclosure sale and all the requirements of the Program as set forth in the Ordinance and these Covenants, and applicable regulations with respect to such foreclosure sale are satisfied. Such requirements include, but are not limited to, the Eligible Lender with respect to an ADU having provided the County Executive and the Authority written notice of the foreclosure sale proposed

and having provided the Right to Cure and the Right to Acquire, as such terms are defined below.

3. Each Eligible Lender with respect to an ADU shall also provide a right to cure any delinquency or default subject to the foreclosure notice given to the County Executive and the Authority as provided in Section F above (Right to Cure), and a right to acquire an ADU subject to the foreclosure notice given to the County Executive and the Authority as provided in Section H above (Right to Acquire). The Right to Cure and/or the Right to Acquire, as applicable, may be exercised by the Authority, or by a nonprofit agency designated by the County Executive in the event the Authority elects not to exercise its rights, at any time during such 90 day period after the Authority has received notice of the delinquency or default or of the proposed foreclosure up to and including at such foreclosure sale. An ADU so acquired shall be acquired for the purpose of resale of such ADU to persons qualified under the Program and not for conversion of the ADU to a rental unit. The Right to Acquire shall entitle the Authority or the nonprofit agency designated by the County Executive to acquire the ADU at or before any foreclosure sale for which such notice has been given upon payment in full of the outstanding indebtedness on the ADU owed to the Eligible Lender including principal, interest, and fees that together in the aggregate do not exceed the amount of the owner's purchase price (as adjusted in accordance with Section 2-812(2)(4) of the Ordinance), and other reasonable and customary costs and expenses (the Outstanding First Trust Debt), and no owner, prior owner or other party, whether secured or not, shall have any rights to compensation under such circumstances.

4. In the event that neither the Authority nor the nonprofit agency designated by the County Executive exercises the Right to Acquire and the ADU is sold for an amount greater than the Outstanding First Trust Debt, one-half (1/2) of the amount in excess of the Outstanding First Trust Debt shall be paid to the Fairfax County Housing Trust Fund to promote housing affordability in Fairfax County as part of the disbursement of settlement proceeds.

5. All financing documents for financing secured by an ADU shall state that the Eligible Lender's financing provides the Right to Cure and Right to Acquire which may be exercised by the Authority, or by a nonprofit agency designated by the County Executive in the event the Authority elects not to exercise its rights, at any time during such 90 day period after the Authority has received notice, as applicable, of the delinquency or default or of the proposed foreclosure up to and including at such foreclosure sale.

J. During any Renewable Resale Control Periods, upon any resale and/or Transfer of any of the ADUs to a new owner the prices for each subsequent resale and/or Transfer to a new owner shall be controlled for a new 30 year period commencing on the date of such resale or Transfer of the applicable ADU.

K. During the Extended Control Period, no Transfer of any of the ADUs, or any part thereof, shall be made unless the Authority shall have been given the exclusive right to acquire the ADU in accordance with Section 2-812(5) of the Ordinance.

### ARTICLE III

#### PRINCIPAL DOMICILE REQUIREMENTS

Any Transferee of an ADU, except for the Authority and any nonprofit housing development agencies or corporations approved expressly in writing by the County Executive, must occupy the ADU as such Transferee's principal domicile, and must not lease or rent or permit exclusive occupancy of the ADU to any other party or parties. Each year on or within 30 days prior to June 1, the owner of each ADU shall submit to the Authority, without notice or demand therefor, an affidavit executed by such owner, on form designated by the Authority, certifying such owner's continuing occupancy of the ADU.

### ARTICLE IV

#### DEED AND CONTRACT RESTRICTIONS

During the Control Periods, at the time of the sale of an ADU the owner/applicant shall provide in the sales contract for each ADU offered for sale a copy of the recorded Covenants running with the land in favor of the Authority. During the Control Periods, the owner/applicant shall include in the deed for each ADU sold an express statement that the ADU is subject to the terms and conditions of the Program and these Covenants recorded pursuant to the Ordinance with a specific reference to the deed book and page where such Covenants are recorded. During the Control Periods, at the time of any sale of an ADU, the owner shall also include in the deed for each ADU sold an express statement that the total aggregate amount of indebtedness that may be secured by the ADU is limited and that other terms and conditions apply, including, but not limited to, an exclusive right for the Authority to acquire and resell the ADU on certain terms in the event the ADU is offered for resale, a right for the Authority or a nonprofit agency designated by the County Executive to acquire the ADU on certain terms in the event of a pending foreclosure sale, all as set forth in these

Covenants and/or in the Program set forth in the Fairfax County Zoning Ordinance, as it may be amended.

#### ARTICLE V

#### ASSIGNMENT OF RIGHTS TO AUTHORITY

Declarant, and Declarant's heirs, successors and assigns, hereby irrevocably assigns, transfers and conveys to the Authority, and any successors thereto, all right, title and interest to enforce and maintain in full force and effect, the terms, conditions, and requirements of these Covenants.

#### ARTICLE VI

#### RIGHT TO ENFORCE

If the Authority shall determine that any default has occurred under these Covenants, the Authority, or its successors, may enforce these Covenants by proceeding at law, or in equity, against the persons or entities violating or attempting to violate any of the Covenants herein contained, either to restrain any violation hereof, seek specific performance of these Covenants, or to recover damages, including attorneys' fees and the costs of collection, including, without limitation, the value of legal services if provided by the Fairfax county Attorney's Office, or to proceed against the applicable ADU in the enforcement of any lien or obligation created by or resulting from these Covenants as allowed under Section 2-817 of the Ordinance. No remedy conferred upon or reserved to the Authority by these Covenants is intended to be exclusive of any other available remedy or remedies, but each and every such remedy is cumulative and in addition to every other remedy given under these Covenants and the Ordinance, existing at law or equity. No delay or omission to exercise any right or power conferred under the Ordinance or hereunder, will impair any such right or power or will be

construed to be a waiver thereof. Any liens filed pursuant to the Ordinance shall not relate back in time, but shall be effective as of the date recorded.

ARTICLE VII

BINDING ON ALL SUCCESSORS

These Covenants are binding upon the ADUs, upon the Declarant and the Declarant's heirs, successors and assigns, and upon all Transferees of title to each of the ADUs for the applicable Control Periods and shall run with the land.

ARTICLE VIII

NO AMENDMENTS

These Covenants cannot be amended, or released, unless by written instrument executed by the Authority until expiration of the Control Periods, except with respect to a foreclosure by an Eligible Lender conducted in accordance with these Covenants and the Ordinance.

ARTICLE IX

SEVERABILITY

If any provisions of these Covenants shall be held invalid or unenforceable, such holdings shall not invalidate or make unenforceable any other provision hereof.

ARTICLE X

HEADINGS

The headings herein are for reference purposes only and shall not affect the meaning or interpretation of the terms and conditions hereof.

[Signature on next page]

WITNESS THE FOLLOWING SIGNATURE AND SEAL;

WITNESS:

DECLARANT:

\_\_\_\_\_

\_\_\_\_\_  
[Name of Declarant]

By: \_\_\_\_\_ (Seal)

Name (Print) \_\_\_\_\_

Title: \_\_\_\_\_

STATE OF \_\_\_\_\_

CITY/COUNTY OF \_\_\_\_\_: to-wit:

The foregoing instrument was acknowledged before me, a notary public in and for the state and city/county aforesaid, this \_\_\_ day of \_\_\_\_\_ 20\_\_\_, by \_\_\_\_\_, as the duly authorized \_\_\_\_\_ of the Declarant of the foregoing instrument on behalf of such Declarant.

\_\_\_\_\_ (Seal)

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

Registration Number: \_\_\_\_\_

EXHIBIT A

[Legal description of the Property]



**EXHIBIT B**

[Legal description of the lots (or units) of the ADUs that are part of the Property]