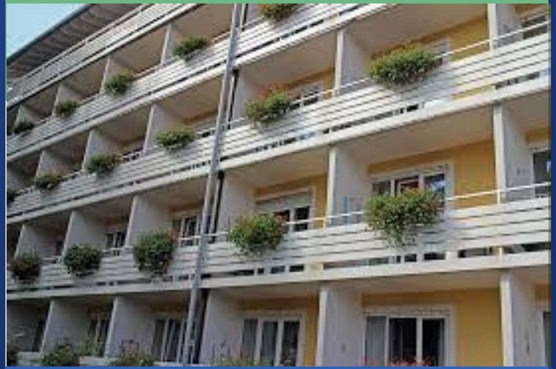

Policy Brief: Using the Right of First Refusal (ROFR) to Create and Preserve Affordable Housing

Full paper will be available on the VHC website: vhc.virginia.gov

Virginia Housing Commission

Basics of Right of First Refusal

In housing policy, a right of first refusal (ROFR) is a contractual right that allows an interested party the first right to purchase housing units under the same terms and conditions an owner would offer to a third-party. Additionally, there are other purchase opportunity policies that are slightly different in process and still often referred to as right of first refusal policies

Types of purchase opportunities created by state or local law vary but typically take one of several different forms:

Right of First Refusal (ROFR) - permitting a designated purchaser to acquire a property prior to it being sold to a third-party by matching the existing offer. In this type of purchase option, the owner has already marketed the property or received a third-party offer

Right to Purchase - requiring the owner to sell to a designated purchaser at market value in lieu of converting the property to market-rate or another triggering event.

Right to Make an Offer or **Right of First Offer (ROFO)** - with no obligation on the owner's part to sell. Owners still must provide notice and first opportunity to purchase the property to the eligible buyers

Basics of Right of First Refusal Policies

The details in right of first refusal policies vary greatly but generally contain the same basic structure.

Triggering Event – The right is triggered when the property owner decides to sell, transfer, or convert the property into market rate housing.

Notification – The owner must notify the ROFR holder of the potential sale, transfer, or conversion. This typically includes the terms and conditions of the offer.

Timeframe for Exercise – The ROFR holder has a specified period to decide whether to exercise their right and purchase the property

Right to Match or Exceed – The ROFR holder has the right to purchase the asset at the same price and terms as the offer received from a third party, or to offer better terms.

Declination – If the ROFR holder declines to exercise their right, the owner is free to sell to a third party

Affordable Housing

Preserve Existing Housing:

- Dedicated affordable housing properties.
- Unsubsidized rentals ("naturally occurring affordable housing").

Create New Affordable Housing:

- Can enable development of new dedicated affordable rental units.

Combat Displacement:

- Can help tenants and homeowners remain in their communities.
- Can prevent eviction or foreclosure in some cases.

Entities with Right of First Refusal

- Local/State Government Agencies
- Community Development Organizations
- Tenant Associations
- Approved Non-Profit Developers
- Approved For-Profit Developers (focused on affordable housing)

Common Concerns in ROFR Policy Discussion

Economic theory and assertions made by parties who have participated in ROFR processes have suggested that ROFR policies can drive up costs for owners and deter potential buyers from bidding on the land in certain circumstances.

- A right of first refusal may deter potential buyers from placing bids on properties that may be purchased when a right of first refusal is exercised.
- To comply with the right of first refusal, owners must spend time and potentially money navigating legal processes and waiting for governments to either wave or exercise the right to buy the property.

Exploring Other State Laws

<u>11 States Studied:</u>

California - ROFR
Colorado – ROFO, ROFR
Maryland - ROFR
Massachusetts – ROFO, ROFR
New Jersey - ROFR
Oregon - ROFR
Rhode Island - ROFR
Washington – ROFR
Maine - ROFR
Michigan - ROFR
Texas – ROFR

- Most state laws are designed for the purchase of multi-family rental properties that have income restrictions and are federally subsidized and publicly supported.
  - California, Colorado, Maryland, Massachusetts, Oregon, Rhode Island, Maine, Texas
- A few states have passed purchase opportunity policies.
  - Colorado, Massachusetts
- Some states have statutes that are triggered not only when an owner is selling affordable housing, but also when the affordable housing is being converted into market-rate housing, affordability provisions are expiring, or any actions occur that would terminate affordability.
  - California, Maine, Maryland, Massachusetts, Oregon, and Rhode Island

Exploring Other State Laws

11 States Studied:

California - ROFR
Colorado – ROFO, ROFR
Maryland - ROFR
Massachusetts – ROFO, ROFR
New Jersey - ROFR
Oregon - ROFR
Rhode Island - ROFR
Washington – ROFR
Maine - ROFR
Michigan - ROFR
Texas – ROFR

- Most states studied that provide a right of first refusal to local governments to purchase multifamily rental properties also allow local governments assign their right to a qualified developer, non-profit, or local or regional housing authority.

- In these policies, the qualified purchaser generally must ensure affordability after purchasing a property through exercising an ROFR or other opportunity to purchase.

- Statutes that apply to publicly supported housing typically contain a notice provision that requires a property owner to notify the state and local government prior to any action that would terminate affordability of publicly supported housing.
    - Oregon requires a property owner provide two-years notice to the Oregon Housing and Community Services Department (OHCS) and to each local government where the property is located. According to OHCS, the advanced notice allows them to track units that are at risk of losing affordability and potentially facilitate preservation.

Exploring Other State Laws: Highlights from Statutes

Maryland requires owners of assisted living projects to offer a right of first refusal to approved purchasers. While this law only applies to buildings that are considered assisted living projects, localities in Maryland have adopted their own programs that apply to buildings that are not income restricted to ensure affordability with the goal of preserving naturally occurring affordable housing.

Prince George's County, Maryland

- In 2013, Prince George's County enacted a ROFR Program to expand the availability of affordable rental housing.
- The Prince George's County Code allows the Prince George's County Department of Housing and Community Development to hold the ROFR to purchase properties that consist of 20 or more dwelling units or assign its ROFR to a third party.
- The County maintains a list of developers who may serve as potential assignees to exercise the County's ROFR, and this list is reopened every few years to consider other developers.
- In 2023, the County received 10 offers of ROFR and exercised its right twice.

Montgomery County, Maryland

- Montgomery County enacted a right of first refusal lawin 1980 to preserve affordable housing and prevent displacement.
- Under that law, the County, the Housing Opportunities Commission, or any certified tenant organization (in that order) must be offered the opportunity to buy any multifamily rental housing development of 4 or more units before the owner sells to another party.
- The County received 369 ROFR notices from 2015-2023 but only exercised their ROFR 12 times

Exploring Other State Laws: Highlights from Statutes

Massachusetts

- Owners of publicly assisted housing must offer the Massachusetts Department of Housing and Community Development (DHCD) a right of first offer (ROFO) prior to a third-party sale.
- If no agreement with DHCD is reached after 90 days, the owner can sell to their chosen purchaser.
- Accepting another purchaser's offer triggers the ROFR provision.
- From 2009-2019, Massachusetts DHCD preserved 1,640 total units in 14 transactions using ROFO/ROFR provisions.

Colorado

- In 2024, Colorado passed the Local Governments Right to Property and Affordable Housing Act, aiming to preserve 4,400 units facing expiring affordability protections within six years.
- The Act creates a ROFR and ROFO for local governments to acquire affordable multifamily properties and ensure continued affordability.
- The ROFO, unlike the ROFR, applies to properties without existing restricted use covenants (not designated affordable housing).
    - It covers multifamily residential or mixed-use rental properties with 15-100 units.
    - Owners must notify the local government of intent to sell before listing.
    - The local government has 14 days to make an offer, which the seller can accept or reject.

Exploring Other State Laws: Highlights from Statutes

Texas

Texas grants the ROFR to community housing organizations in limited cases and encourages developers applying for housing subsidies to offer a ROFR.

- State law grants qualified organizations ROFR to purchase deed-restricted affordable properties from municipal land banks to build affordable housing.
  - The land bank must first offer a property to qualified organizations.
  - The municipality specifies a time period for qualifying organizations to exercise the ROFR.
  - If no offers are made in that period or all qualified entities decline their ROFR, the land bank may sell to another qualified participating developer at the same price offered to qualified organizations.
- An additional Texas law encourages developers to offer ROFR to qualified entities by allocating affordable housing subsidies based in part on whether the developer provides an ROFR.

Exploring Other State Laws: Highlights from Statutes

Michigan

- In Michigan, cities, towns, and land banks can exercise the right of first refusal to buy tax-foreclosed properties prior to conveyance.
- Cities, townships, and land banks must pay fair market value for tax-foreclosed property they purchased under their right of first refusal.

Washington

- Washington has ROFR for cities to purchase tax-foreclosed properties from the county for the purpose of developing affordable housing.
- When a county legislative authority purchases the tax foreclosed property for non-public purposes, the county must give the city notice before acquiring the property.
- The notice must offer the city the opportunity to purchase the property for the original minimum bid plus any direct costs incurred by the county in the sale

THANK YOU

A PAPER IS AVAILABLE ON THE VHC WEBSITE

JESSECA HOFF
JHOFF@VHC.VIRGINIA.GOV
(804) 967-3993

Virginia Housing Commission