

When Recorded Return to:
City Attorney
City of Whitefish
PO Box 158
Whitefish, MT 59937-0158

**AFFORDABLE RENTAL HOUSING
RESTRICTIVE COVENANT AND AGREEMENT**

This Affordable Rental Housing Restrictive Covenant and Agreement ("Covenant") is entered into this _____ day of _____, 20____, between _____ ("the Owner"), the City of Whitefish ("the City"), and its duly authorized agent, the Whitefish Housing Authority ("the WHA"), their successors and assigns.

This Covenant applies to the real property ("the Property") commonly known as _____ the legal description of which follows:

RECITALS

WHEREAS, pursuant to its Whitefish Legacy Homes Program, the City has provided development incentives to develop the Property; and

WHEREAS, the Owner has benefitted from such development incentives; and

WHEREAS, as a condition of the City's approval of development of the Property, the City has required a certain number of units be maintained as permanently affordable rental units; and

WHEREAS, subsequent residents will benefit from the rent limitations required by this Covenant; and

WHEREAS, the intent of the City and the Owner is to permanently preserve affordable rental housing and to assign to the City the right to enforce compliance with the Covenant; and

WHEREAS, the Owner hereby acknowledges and agrees this Covenant is a deed restriction that limits the rent on certain units on the Property.

NOW THEREFORE, in consideration of the benefits received by the parties, the sufficiency which is hereby acknowledged, the parties agree as follows:

DEFINITIONS

The following terms shall have the meanings defined herein:

A. "Area Median Income" (AMI) means the Area Median Income reported annually for single persons and households of various size by the United States Department of Housing and Urban Development, or by any successor United States Government department, agency, or instrumentality, for the Primary Metropolitan Statistical Area which includes the City of Whitefish, Montana.

B. "HUD" means the United States Department of Housing and Urban Development, or any successor governmental agency.

C. "Administrative Procedures" means the Whitefish Legacy Homes Program Administrative Procedures, as adopted by the Whitefish City Council and as amended from time to time.

D. "Transfer" means any sale, assignment or transfer, voluntary or by operation of law (whether by deed, contract of sale, gift, devise, bequest, trustee's sale, deed in lieu of foreclosure, or otherwise) of an interest in the Property, including but not limited to a fee simple interest, a joint tenancy interest, a tenancy in common, a life estate, a leasehold interest or any interest evidenced by a land contract by which possession of the Property is transferred and the Owner retains title.

E. "Qualified tenant" means an individual or household who the WHA determines is eligible to occupy a Whitefish Legacy Homes Affordable Rental Unit pursuant to the WHA's procedures and guidelines.

COVENANTS

1. Satisfaction of Conditions. The City agrees that execution, recordation, performance of, and compliance with this Covenant shall constitute performance of Condition No. _____ of [Discretionary Approval No.] approved by the City Council on _____, and shall be sufficient in that respect to permit the issuance of building permits for the Property subject to satisfaction of all other applicable conditions and compliance with all provisions of the law.

2. Number of Affordable Units. The Owner agrees it will provide and manage _____ (___) permanently affordable rental housing units as hereinafter defined ("Affordable Rental Units") on the Property.

3. Location, Configuration and Size of the Affordable Rental Units. The type, size and maximum income level of the Affordable Rental Units on the Property shall be as follows:

<u>Unit Type</u>	<u>No. of (sq ft)</u>	<u>No. of Bedrooms</u>	<u>No. of Bathrooms</u>	<u>Max. Income Level % AMI</u>

The Affordable Rental Units must have substantially the same equipment and amenities as the market rate units on the Property. The Affordable Rental Units must have equal access to enjoyment of all common facilities of the Property as the market rate units. The location of the Affordable Rental Units may change in accordance with Paragraph 6.

4. Certification and Marketing. In accordance with its internal policies and procedures, and applicable state and federal requirements, the WHA will screen potential qualified tenants. The Owner is responsible for all other marketing for the Affordable Rental Units and for screening and selecting tenants based upon desirability, background and creditworthiness. If, at any time, the Owner is unable to lease or rent an Affordable Rental Unit, the WHA, at its discretion, may relax the maximum income level for the unit. Nothing herein shall be construed to constitute a representation or guarantee that a qualified tenant will be located or that the Owner will be able to rent or lease any Affordable Rental Unit and neither the WHA nor the City shall be liable if a qualified tenant is not located and/or the Owner is unable to rent or lease an Affordable Rental Unit.

5. Administrative Fee. In order to compensate the WHA for its services performed under this Covenant, the Owner or its property manager shall pay the WHA 3% of the total rents collected from the Affordable Rental Units. The Owner or its property manager shall remit the administrative fee to the WHA semi-annually by January 15th of each year for the periods of July through December and by July 15th of each year for the periods of January through June.

6. Annual Income Recertification. The WHA will perform income recertification on each tenant's "anniversary date" (one year from the date of initial certification). If a tenant's income increases above the maximum income level for his/her Affordable Rental Unit after he/she becomes an occupant of one of the Affordable Rental Units, the Owner must follow the "next available unit rule." This means that if a tenant who occupies an Affordable Rental Unit has an increase in income to more than 140% of the AMI, the next available market rate unit must be rented to a qualified tenant as an Affordable Rental Unit. The tenant with the increased income is still eligible to remain in his/her unit but must pay market price for the unit.

7. Maximum Rents. The maximum rents charged for each Affordable Rental Unit are those set forth in the Whitefish Legacy Homes Program Administrative Procedures, as may be amended from time to time. Nothing herein shall be construed as a requirement that the Owner charge the maximum rent for any Affordable Rental Unit. Maximum rents are inclusive of utilities.

8. Rent Increases. Rent may be increased no more than once a year up to the amounts set forth in the Whitefish Legacy Homes Program Administrative Procedures.

9. Transfer. Except as set forth in Section 10, the Owner shall inform the City, in writing or via e-mail, thirty days prior to any anticipated transfer of interest in the Property. The Owner shall not transfer its interest in the Property without the express written agreement of the City that the City's affordable housing interest in the Property will not be jeopardized by such transfer. The new Owner must execute and record a Covenant substantially similar to this Covenant.

10. Foreclosure. The Owner agrees that he/she/it will give immediate notice to the City of a foreclosure notice or any similar documents he/she/they receive from a mortgagee within five (5) days of receipt.

11. Enforcement. The Owner shall exercise reasonable diligence to comply with the requirements of this Covenant and shall correct any noncompliance within sixty (60) days after such noncompliance is first discovered by the Owner or within sixty (60) days after the City gives the Owner written notice of noncompliance. If such noncompliance remains uncured after such period, the Owner is in default and the City may take any one or more of the following steps:

- a. By any suit, action or proceeding at law or in equity, require the Owner to perform its obligations under this Covenant, or enjoin any acts or things which may be unlawful or in violation of this Covenant, it being recognized that the City cannot be adequately compensated by monetary damages in the event of the Owner's default.
- b. Have immediate access to and inspect, examine and make copies of all books and records of the Owner pertaining to the Property.
- c. Take other such action at law or in equity as may appear necessary or desirable to enforce this Covenant.
- d. In the event the City files a suit, action or proceeding to enforce the terms of this Covenant, the prevailing party shall be entitled to its attorney fees and costs.

12. Indemnification. The Owner shall defend, indemnify and save harmless the City from and against all losses, claims, suits, judgments or liabilities which may be asserted against the City arising from or caused by the Owner, the Owner's employees or agents in the negligent performance of this Covenant or any sole negligent or intentional act or omission by the Owner, the Owner's employees or agents. As part of such indemnification obligation the Owner shall pay all costs and attorney's fees incurred by the City as a result of such claims or suits. The time of attorneys and legal assistants in the Whitefish City Attorney's Office spent on any such claims or suits shall be paid for in accordance with the prevailing attorney's fees charged in Flathead County for similar services.

13. Maintenance. The Owner shall maintain the Affordable Rental Units in good, safe and habitable condition, except for normal wear and tear, and in full compliance with all applicable laws, ordinances, rules and regulations of any governmental authority with jurisdiction over matters concerning the Property. The Owner shall maintain and upgrade the Affordable Rental

Units to the same standard and with the same processes and procedures as market rate units. The City shall have the right, but not the obligation, to inspect the Affordable Housing Units prior to initial occupancy and periodically thereafter, upon three business days' notice to the Owner and without unreasonable disruption to the Owner's operations.

14. Reporting. The Owner shall comply with any and all annual reporting requirements of the City, or any of its assigns or successors.

15. Records. The Owner shall maintain:

- a. Any documentation reasonably required to demonstrate its performance under the Covenant.
- b. Complete records on applicants and tenants sufficient to comply with federal and state fair housing requirements and laws.
- c. The Owner must allow access to its records at any time during normal business hours by the City.

16. Lease Provisions. Leases between the Owner and tenants of the Affordable Rental Units must be for not less than one year. The Owner is responsible for: (1) screening and selecting tenants for desirability, background and creditworthiness; and (2) ensuring that lease/rental agreements do not contain any provision prohibited by federal, state or local law. Lease agreements for Affordable Rental Units must contain substantially the same terms, except for monthly rent charges, as the lease agreements for the market rate units. The City has no obligation or duty to enforce the terms of any lease/rental agreement, other than the maximum rent limits, nor does it have any liability for the Owner's or any third-party property manager's enforcement of such terms or failure to enforce such terms.

17. Owner's Obligations. All property management functions and obligations pertaining to the Affordable Rental Units are the responsibility of the Owner. The Owner may enter into a property management agreement with a third-party in its discretion at its own expense. Such agreement shall contain standard provisions pertaining to the collection of past due rent, default and termination for uncured default, the eviction of tenants, and setting forth the obligations of tenants to comply with applicable laws and regulations. All property management agreements covering the Property shall include a provision stating that they are subject to the terms of this Covenant and that, in the event of a conflict, the terms of this Covenant control with respect to the Affordable Rental Units.

18. Termination of Leases. The Owner or its designee shall have the right to terminate the tenancy or refuse to renew the lease of a tenant of the Affordable Rental Units pursuant to the provisions of the lease/rental agreement. The Owner and its designee shall comply in all aspects with the Montana Residential Landlord and Tenant Act, §§ 70-24-101, *et seq.*, MCA. Neither the City nor the WHA shall be liable in the event the Owner terminates the tenancy or refuses to renew the lease of a tenant of the Affordable Rental Unit or in the event the Owner fails to comply with the Montana Residential Landlord and Tenant Act or other applicable laws or regulations.

19. Conversion to Non-Rental Use. In the event the Property is proposed for conversion to condominium, owner-occupied, or non-rental residential use, the Owner must submit to the City for its approval an amendment to the housing mitigation plan for preserving the Affordable Rental Units.

20. No Discrimination. The Owner shall not discriminate on the basis of race, creed, religion, color, sex, sexual orientation, age, national origin, marital status, or presence of any mental or physical disability as set forth by applicable federal, state and local laws in the lease, use or occupancy of the Property or in connection with the employment or application for employment of persons for the operation and management of the Property.

21. Compliance with Law. The Owner shall apply with all applicable laws and regulations of the City, State and Federal governments.

22. Perpetual Covenant. This Covenant shall be perpetual, shall run with the land and in favor of the City, and shall be recorded in the real property records of the Clerk and Recorder of Flathead County.

23. Partial Invalidity. If any provision of this Covenant shall be held by a court of proper jurisdiction to be invalid, illegal or unenforceable, the remaining provisions shall survive and their validity, legality or unenforceability shall not in any way be affected or impaired thereby.

24. No Agency. Nothing in the Covenant shall be deemed to create an agency, partnership, joint venture or employment relationship between the City and the Owner.

25. Waiver. The waiver by any party of any breach or violation of any term or condition of this Covenant or of any provisions, ordinance or law shall not be deemed to be a waiver of such term, condition, ordinance or law.

26. Merger. This Covenant constitutes the entire agreement of the parties relating to the subject matter addressed in this Covenant. This Covenant supersedes all prior communications, contracts, or agreements between the parties with respect to the subject matter addressed in this Covenant, whether oral or written.

27. Modification. This Covenant may be supplemented, amended, or modified only by the mutual written agreement of the parties. No supplement, amendment, or modification of this Covenant shall be binding unless it is in writing and signed by all parties.

28. Choice of Law and Venue. This Covenant shall be governed by the laws of Montana and venue shall be in Flathead County, Montana.

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