CPA AND AFFORDABLE HOUSING RESTRICTIONS- September 19, 2006

A. Deed Rider or Affordable Housing Restriction?: A deed rider is attached to the deed, while the affordable housing restriction is recorded as a separate instrument from the deed. There is no difference in content; however, an affordable housing restriction- although costing the buyer an additional recording fee- should show up readily in a title exam and is therefore less likely to fall through the cracks upon refinancing or sale. Another option is to record a notice of restriction in addition to the deed rider.

B. Length of Affordability Period?: Mass General Law Chapter 184- Sections 31 & 32- allows affordable housing restrictions in perpetuity, and language referencing this MGL should be included. Unless there are some other compelling policy reasons, affordability should be in perpetuity.

C. Ownership Restrictions- The following are the major elements that are included in any ownership affordable housing restriction:

1) Eligible household: The maximum household income is described (typically 80% of area median family income, adjusted for household size) and the data source for the income is referenced- usually HUD. There is usually an asset limit also referenced ($50,000 is the current state maximum allowed). In addition, if the housing is to be restricted to first time homebuyers, that needs to be stated. The standard definition of a first time homebuyer is a household in which no member has had an ownership interest in a principal residence in the three prior years, a single parent, or a displaced homemaker.

2) Owner occupancy required: There is a separate section that simply states that the owner(s) are obligated to occupy the home as their principal residence.

3) No leasing or refinancing without permission: Renting of the home is prohibited, and any proceeds from such leasing is eligible to be captured by the Town and/or the other public funding sources. Any refinancing of the property requires the permission of the Town/other funders. The purpose is to ensure that the property will not be refinanced for a price higher than the resale price. Again, proceeds from any refinancing that is done without permission are eligible to be recaptured by the Town/other funders.

4) Calculation of resale price upon transfer: The methodology for calculating the maximum sales price upon resale needs to be clearly and explicitly stated. The current standard practice is to calculate property appreciation based upon the percentage increase in HUD area median family income from time of purchase to time of sale. A resale price multiplier is stated in the restriction (initial sales price divided by current HUD area median family income). Thus, if the initial sales price is $150,000 and the current HUD median income is $66,800, the multiplier is 2.2455. We recommend showing the calculation in the restriction so that the buyer and subsequent enforcers of the restriction are clear about how the multiplier was derived. When the owner wants to sell, the maximum sales price will be the multiplier times the current HUD median income.

In addition, language is also inserted that in case the resale price results in a price that is unaffordable to a household at 80% of median (this could happen with a significant rise in interest rates), then the resale price is calculated at what a household at 80% of median (70% for MassHousing) could afford.

Finally, some public agencies allow capital improvements to be added to the resale price. This is a difficult policy issue for a number of reasons. If you choose to incorporate capital improvements into your resale formula, there should be as clear a definition as possible of what constitutes a capital improvement (e.g. does roof replacement count?). In addition, permission from the Town is required if an owner wants to do an improvement that will impact the resale price. Lastly, MassHousing's deed rider discounts the value of the improvement over time. Capital improvements are a difficult area to monitor, and Towns should have the capacity to do so should they incorporate this component into the resale formula.

5) Process for sale: This is usually the longest section in the restriction as it enumerates the various scenarios that could occur after the original sale. Initially, the owner is required to notify the Town of their intention to sell. The Town has the first option to purchase or to find an eligible purchaser. The Town has 30 days from the date of the owner's notice to respond whether it will exercise its option and what the maximum resale price will be. If the Town exercises its option, it typically has 90- 120 days to find an eligible buyer and to execute the sale. If the Town does not exercise its option, then the seller needs to find a buyer and there should be specific steps the seller needs to take to make a diligent effort to find a buyer. If an income eligible household cannot be found, then the house can be sold to an over income buyer. We recommend that the resale price be maintained and the restriction kept in place in this case so that the subsequent sale should still be to an income eligible buyer at the restricted price.

6) What happens in a foreclosure: Historically, lenders have been reluctant to lend to affordable housing developments unless they had the ability to eliminate the restriction in a foreclosure situation. Most restrictions provided for a 60 day notice by the lender to the Town of an intent to file for foreclosure to provide the Town with some time to attempt to forestall it. These restrictions also provided that any windfall amount beyond the outstanding mortgage and associated costs or the resale price (whichever is greater) is provided to the Town for future affordable housing purposes. Recently, Fannie Mae has agreed to a form restriction that it will buy from lenders in which affordability survives foreclosure. Fannie has stated that the restriction must be in its exact format for it to qualify; therefore, it is unclear what will happen if there are slight deviations made to the restriction (the Consortium's restriction is different in a couple of policy areas from Fannie's).

D. Rental Restrictions- The following are the major elements that are included in any rental affordable housing restriction:

1) Permitted use: This section basically describes the project- the number of units, the number that are affordable to various income levels. In addition, if there is a bedroom unit mix and there are requirements that a certain number of one, two, or three bedroom units need to be affordable, that needs to be described as well.

2) Eligible household: The maximum household income is described (typically 80% of area median family income, adjusted for household size) and the data source for the income is referenced- usually HUD. The restriction will describe if there are differing layers of affordability, e.g. units targeted to households at or below 30%, 50%, 80% units or 100% of area median income. The restriction also contains provision for regular (usually annual) certification of household income and what happens if households become over income (have to move or pay more rent).

3) Maximum rents: The restriction will describe how the maximum rent for the various income categories is to be calculated. It is most often described in reference to some program standard- Section 8, HOME program, Mass Housing Partnership, etc. or by 30% of a household's income at a certain % of area median income. Rents include utilities, and the reference for the utility allowance that is deducted from the rent should the tenants' pay for their own utilities should be included. If over income tenants are allowed to remain, the methodology for calculating their rent is included here as well.

4) Tenant selection process: This section has non-discrimination provisions, generally how the initial households will be selected (usually either by lottery or by order of receipt of applications). If there is any local preference allowed (the state allows up to 70% local preference for units that can be counted on the subsidized housing inventory), then that will be included in this section as well.

5) Lease terms: The restriction should provide certain basic parameters for the appropriate lease terms: term of at least one year; conditions under which a landlord can terminate the lease; at least 30 days notice to tenants of any action to evict or non-renew the lease; certain legal rights that tenants should not waive in the lease.

6) No transfers or refinancings without permission: Any refinancing or transfer of the property requires the permission of the Town/other funders. As with the ownership restriction, proceeds from any refinancing or transfer that is done without permission are eligible to be recaptured by the Town/other funders.

7) What happens in foreclosure: Most restrictions provide for a 60 day notice by the lender to the Town of an intent to file for foreclosure to provide the Town with some time to attempt to forestall it. These restrictions also provided that any windfall amount beyond the outstanding mortgage and associated costs is provided to the Town for future affordable housing purposes.

If the project was permitted via the Chapter 40B process, then affordability might survive foreclosure based upon the legal arguments in the Supreme Judicial Court Ardemore decision that ruled that financing arrangements cannot override the affordability requirements that were part of the permitting in the zoning board of appeals process.

Web version of these standard restrictions are available at the following:

HOME Consortium restrictions- rental and ownership- www.capecodcommission.org-
Commission programs/affordable housing/HOME Consortium

Fannie Mae universal deed rider – ownership -www.masshousing.com