

M E M O R A N D U M

November 29, 2023

TO: Planning, Housing, and Parks (PHP) Committee

FROM: Ludeen McCartney-Green, Legislative Attorney

SUBJECT: Expedited Bill 38-23; Tenant Displacement – Right of First Refusal to Buy Rental Housing – Amendments

PURPOSE: **Worksession** – to receive a Committee recommendation

Expedited Bill 38-23; Tenant Displacement – Right of First Refusal to Buy Rental Housing – Amendments, sponsored by Council President Glass on behalf of the County Executive, was introduced on September 26, 2023. A public hearing was held on October 10, 2023, where 4 speakers testified. The bill will be considered by the Planning, Housing, and Parks (PHP) Committee on December 4, 2023.

Expedited Bill 38-23 would amend Sections 53A-2 and 53A-4 of the Montgomery County Code to authorize the County Executive to designate a qualified entity that may exercise the right of first refusal.

A resolution to approve companion regulations, Executive Regulation 16-23, Tenant Displacement, is forthcoming. The public comment period on the regulation under the County Register closed on September 30, 2023, [Montgomery County Register \(montgomerycountymd.gov\)](http://montgomerycountymd.gov).

PURPOSE

The Executive has explained the purposes and mechanics of the bill in the enclosed memorandum and legislative request report. (©11).

BACKGROUND

In 1990, the Montgomery County Council enacted legislation that established the County's Right of First Refusal to Buy Rental Housing Program (ROFR), which expanded the availability of affordable housing in the County.

The ROFR process¹ requires that within 5 days after an owner accepts a bona fide contract with a third party to sell a rental housing, a notice must be sent to the County, HOC, and then posted in the public area of the rental housing for each tenant to review.

The County, HOC, or any certified tenant organization (in that order) must be offered the opportunity to buy the rental housing before the owner sells to another party. The ROFR offer

¹ County Code §53A

must remain open for up to 60 days for the County and HOC, and up to 90 days for a tenant organization. The County and HOC may only accept an offer in a municipality if the municipality approves.

If the County decides to exercise ROFR to purchase the property, the sale must consummate the sale within 180 days after the offer has been accepted, unless an extension is granted by the seller. In the event, the County, HOC, or tenant organization does not exercise its ROFR, the owner may sell the rental housing to the third party buyer under substantially the same terms and conditions.

Annually, DHCA is required to report to the Council on all ROFR offers that were received the prior year and include whether there were any conversions or agreements not to convert.² The 2023 ROFR report issued by DHCA is at ©26.

Prince George's County has a similar ROFR program that identifies qualified developers who may be assigned a right to purchase.³

BILL SPECIFICS

Bill 38-23 would require an owner to send a *copy* of a third-party offer to a qualified entity at the same time the County, HOC, and tenant organization receives the offer. (See lines 61-63 of the Bill).

Followed by the County may choose to accept the offer or assign its purchase right to a qualified entity. A qualified entity would have been previously identified and approved by the County as a buyer in good standing that has demonstrated, among other things, commitment to preserving affordable housing. By regulations, the executive may delineate further requirements for a qualified entity to meet certain criteria. (See lines, 125-155).

Finally, the Bill requires that any earnest money deposit, paid by the buyer as a condition of accepting the offer, must not exceed 5% of the contract price. The deposit is fully refundable in the event of a good faith failure by a ROFR buyer under the contract. (Lines 92-98).

A municipality may be granted a right by the County as a designated qualified entity, with the option to accept the assignment. The assignment of rights under an agreement with the County would not override or conflict with municipal laws; however, the ROFR assignment remains subject to the approval of the municipality.

SUMMARY OF IMPACT STATEMENTS

The **fiscal impact statement** provides the Bill 38-23 would not increase the County's revenues or expenditures. (©10).

² The agreement provides for the retention/preservation of rent restricted housing as an alternative to the ROFR process.

³ Prince George's County DHCD Apartment & Multifamily Rental Properties (ROFR), <https://www.princegeorgescountymd.gov/984/Apartment-Multifamily-Rental-Owners-ROFR>

The Office of Legislative Oversight’s (OLO) **economic impact statement** anticipates that the Bill would have an insignificant direct impact on economic conditions in the County in terms of the Council’s priority economic indicators. (©16).

OLO’s **climate assessment** indicates that Bill 38-23 will have an indeterminate impact on the County’s contribution to addressing climate change, including the reduction and/or sequestration of greenhouse gas emissions, community resilience, and adaptative capacity. (©13).

The **racial equity and social impact statement** anticipates the legislation could have a positive impact on racial equity and social justice (RESJ) in the County as it codifies a recognized promising practice for preserving and creating affordable housing into County law. (©20).

SUMMARY OF PUBLIC HEARING

Three speakers testified in support of Bill 38-23, and one speaker opposed the bill with amendments. Scott Burton, Director of Department of Housing and Community Development (DHCD), representing the Executive branch, testified that, “[c]urrent law creates significant impediments for the County to exercise ROFR to preserve affordable housing...Under this bill, a County Executive, after exercising the right of first refusal, would be permitted to assign the contract to purchase a property to an affordable housing developer. The ability to assign the contract allow the County to expeditiously use the funds annually appropriated to preserve or create long-term affordability...” See, (© 31).

Organizations that testified, include Mary Kolar of Montgomery Housing Alliance (MHA) (© 37), “...[T]he technical amendments offered in Bill 38-23 will enable the county to exercise the right in a more meaningful way, preventing harmful tenant displacement.” Further, MHA testified that, “Affordable housing is one of the county’s most pervasive and persistent challenges. According to a 2020 study done by the Montgomery County Planning Department, we are at risk of losing 7,000 to 11,000 units of naturally occurring affordable housing (NOAH) by 2030. Melissa Bondi, Policy Director of Enterprise Community Partners Mid-Atlantic, provided written testimony, “support the 5% cap on deposit to help make fair-market transactions easier to assemble and pay within the short turnaround time required by ROFR execution. (© 39).

Brian Anleu on behalf of Apartment of Building Association (AOBA), testified that, “AOBA supports the County's objective of preserving affordable housing. However, our members are concerned with such a broad expansion of the ROFR law and the impact that it will have on property sales in Montgomery County. Attached to this testimony is a letter from Transwestern outlining the negative impact that Prince George’s County’s law has had on sales;” in addition, AOB proposed several amendments for consideration, See (© 32).

Peter Henry, an individual, testified on issues related to the amount of the deposit mattered and the time to close a sale (180 days) was too long and should be reviewed by the Council. (no written testimony was provided).

ISSUES FOR THE COMMITTEE'S DISCUSSION

1. Should the County have a certain timeframe to evaluate the initial ROFR offer?

The law requires that an offer of sale must remain open for at least 60 days before an offer may be rescinded or considered by a third-party buyer. However, there is ambiguity regarding the duration allowed within the 60-day period of how long the County can decide to evaluate whether to exercise its ROFR rights - choosing either to accept a purchase opportunity or to assign its right to a qualified designated entity. For example, if the County decided after 10 days to assign its purchase right to a qualified entity, the assignee would have 50 days remaining to do its due diligence, negotiate, and accept the offer. In another scenario, an assignee may have less than the 50 days because the County made an evaluation at a later date and the window to accept the offer by the assignee is condensed.

To avoid this scenario or any ambiguity in the law, the Committee may wish to contemplate an amendment related to the initial evaluation or interest period. This amendment could stipulate that County must express interest within the first 7 days of the 60-day offer period. In addition, the amendment would require notification in writing to the owner.

Amend line 52, as follows:

- (4) within seven (7) business days after the receipt of an offer by an owner, under subsection (b)(2), the County must:
 - (A) make an initial evaluation whether it is interested in exercising its right of first refusal or assign its right to a qualified designated entity; and
 - (B) notify the owner of its decision in writing;

Decision Point: Whether to adopt the amendment to clarify the time allowed by the County to evaluate an initial ROFR offer?

2. Should an owner send a copy of the offer of sale electronically?

Bill 38-23 requires that an owner send a copy of the offer of sale to all qualified entities contemporaneously with the offer sent to the County, HOC, or a tenant organization (see lines 59-61). The offer must be sent by certified mail, return receipt requested. The Committee may wish to consider whether the owner should also have the option to send the copy electronically, if the qualified entities' email address is available. There are other jurisdictions that have implemented both mail and electronic requirement (i.e., San Francisco, Philadelphia, Chicago), while other local jurisdictions (Prince George's, Howard County, the City of Takoma Park) do not have this requirement.

As for a tenant organization, DHCA suggested language that a copy of the offer would be sent to a tenant organization, if known at the time.

Amend line 59, as follows:

- (5) an owner must send a copy of the offer, whether by U.S. certified mail or electronic mail, to the extent email is available to all qualified entities contemporaneously with providing the offer to the County and HOC; and to any tenant organization, if known.

Decision Point: Whether to adopt the amendment as described above?

3. Removal of the religious/charitable purposes exemption for rental housing.
(proposed by Councilmember Stewart).

Section 53A-2(e) defines rental housing as “a multiple-family dwelling, or a group of multiple-family dwellings operated as one entity, with a total of at least 4 rental units. *Rental housing does not* include a dwelling operated for a religious or charitable purpose.”

Councilmember Stewart may propose an amendment to remove the exemption for rental housing where the primary purpose is religious or charitable. See the Councilmember’s Memo (©49) and amendment (©40). Council staff notes that while Prince George’s County does continue to provide this exemption, Howard County ROFR law (Section §13.1400 of the Howard County Code) does not have an exemption for rental housing operated for religious/charitable purposes.

Amend line 13, as follows:

Rental housing means a multiple-family dwelling, or a group of multiple-family dwellings operated as one entity, with a total of at least 4 rental units. *Rental housing* [does not] may include a dwelling operated for a religious or charitable purpose.

Decision Point: Whether to remove the exemption for rental housing operated for religious/charitable purposes?

4. Whether executive regulations should be transmitted under Method (3) or Method (2)?

The Bill provides for the County Executive to adopt regulations related to establishing a process for qualifying and selecting entities to become a “qualified entity.” Simply put, the regulations will indicate the eligibility criteria for an affordable housing developer to receive an assignment to purchase. The goal is for the Executive to have a rolling application that would include a pool of approved entities that met the eligibility criteria. Under Method (3) regulations, Section 2A-18 of the Code, that specific criteria are not subject to Council’s approval or disapproval.

The Committee may wish to consider whether it prefers the Council to have a more active role with the regulations and instead require a Method (2) approval. Method (2) would allow the

Council to, by resolution approve or disapprove the proposed regulation within 60 days after the Council receives it.

Note: The CE transmitted regulations that accompanied Bill 38-23 for the Council's review back on August 30; however, the statutory 30-day comment period did not expire until September 30. Therefore, the regulations would need to be retransmitted to the Council now that the public comment period has ended.

Decision Point: Whether to require a Method (2) regulations or as introduced keep Method (3)?

5. Several technical and clarifying amendments proposed by DHCA.

(Amendments are reflected in bill draft #2 for illustrated purposes only, see © 41.

- a. DHCA testified and recommended amending the Bill to **include the “Rockville Department of Housing and Community Development” as an automatic prequalified developer.** Rockville’s DHCD omission from the qualified entity definition in the Bill, as introduced, was an inadvertent oversight. (See, lines 7 to 12 (©42)).
- b. **Define a “County assignee.”** County assignee means a qualified entity that has accepted in writing an assignment of a right of first refusal by the County Executive or County Executive’s designee. (See, lines 3-5, © 42).
- c. **Replace “qualified entity” with “County assignee” where applicable.** (See, lines 27, 69, 70, 76, 77, 84, 86, 99, 105, 130, and 136.)
- d. **Clarify the good faith failure provision.** As introduced, a deposit (5% of the contract price) is refundable in the event of a good faith failure to perform under the contract. DHCA has proposed an amendment to modify and narrow the reason for good faith failure based on the assignee’s inability to secure financing. (See, lines 98-105, © 45).

Further, the required 5% deposit is considered within industry standards. Council staff notes that the City of Takoma Park ordinance requires 1% deposit for single-family and rental housing with up to six units.

- e. **Clarify the process after a failure to consummate the sale.** This amendment would specify that if the sale does not close within 180 days after the offer was accepted, the owner has the option to transfer the rental housing to any purchaser within 365 days following the date of the initial offer, provided that the purchase price is not less than 90% of the purchase. (See, lines 110-117, © 46).
- f. **Confidentiality provision.** The qualified entity must adhere to confidentiality with regards to any documentation received by the owner. (See, lines 153-155, © 47).

- g. **Establish a specific deadline for the written agreement between the County and the assignee.** The County must provide the assignee a copy of the written agreement within 3 business days after it selects a qualified entity to assume its purchase right. (See, lines 175-180, © 48).
- h. **Transition language.** A clarifying amendment that specifies the provisions within this Bill would not apply to any transactions prior to the effective date of this legislation. The transition language would preserve pending transactions that may be mid-stream in the ROFR process. (See, lines 184-185, © 48).

Decision Point: Whether to adopt or reject any of the described amendments proposed by DHCA?

6. Technical Amendment by Council Staff

The assignment provision should incorporate nonprofits, for profits, but also governmental housing agency. Below is the amendment to include governmental housing agency:

Amend line 129, as follows:

- (1) The County Executive may assign the right of first refusal, or a contract to purchase rental housing, to an entity qualified by the Department to receive such assignment that:
 - (A) has demonstrated expertise in acquiring, maintaining, and managing rental and affordable housing;
 - (B) is a bona fide nonprofit, a governmental housing agency, or a for-profit entity in good standing under the laws of the State of Maryland at the time of assignment;

Decision Point: Whether to adopt the technical amendment as describe above?

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Expedited Bill No. 38-23
Concerning: Tenant Displacement –
Right of First Refusal to Buy Rental
Housing - Amendments
Revised: 9/21/23 Draft No. 1
Introduced: September 21, 2026
Expires: December 7, 2026
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: _____
Ch. [#], Laws of Mont. Co. [year]

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the Request of the County Executive

AN EXPEDITED ACT to:

- (1) allow the County Executive to designate a qualified entity that may exercise the right of first refusal; and
- (2) generally amend the law regarding the right of first refusal.

By amending

Montgomery County Code
Chapter 53A, Tenant Displacement
Sections 53A-2 and 53A-4

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 53A-2 and 53A-4 are amended as follows:**

2 **53A-2. Definitions.**

3 * * *

4 (e) Qualified entity means a legal entity that is:

5 (1) designated under 53A-4(g); and

6 (2) assigned a right of first refusal by the County Executive.

7 The following are designated *qualified entities*: Rockville Housing

8 Enterprises of the City of Rockville, the Division of Housing and

9 Community Development of the City of Gaithersburg, and the

10 Department of Housing and Community Development of the City of

11 Takoma Park.

12 [(e)] (f) *Rental housing* means a multiple-family dwelling, or a group of multiple-

13 family dwellings operated as one entity, with a total of at least 4 rental

14 units. *Rental housing* does not include a dwelling operated for a religious

15 or charitable purpose.

16 [(f)] (g) (1) *Sale, sell, or selling* mean:

17 (A) transfer of title to rental housing;

18 (B) transfer in a 12-month period of a majority interest in owner;

19 or

20 (C) lease of rental housing for more than 7 years.

21 (2) These terms do not include entering into a contract for the sale of

22 rental housing that gives the County, HOC, [or] a tenant

23 organization, or a qualified entity a right of first refusal under this

24 Chapter.

25 [(g)] (h) *Tenant* means an individual who lives in a rental housing unit with the

26 owner’s consent and is responsible for paying rent to the owner.

27 [(h)] (i) *Tenant organization* means an association of tenants of rental housing

28 that:

29 (1) represents tenants of at least 30 percent [(30%)] of the occupied
30 units in the rental housing; and

31 (2) is certified by the Department according to Executive regulations.

32 [(i)] (j) *Title* means:

33 (1) a legal or equitable ownership interest in rental housing; or

34 (2) a legal, equitable, or beneficial interest in a partnership, limited
35 partnership, corporation, trust or other person who is not an
36 individual, that has a legal or equitable ownership interest in rental
37 housing.

38 * * *

39 **53A-4. Right of first refusal to buy rental housing.**

40 (a) *Right of first refusal.* An owner must offer the County, HOC, and any
41 tenant organization the right to buy rental housing before selling the rental
42 housing to another party, except as provided under Section 53A-5.

43 (b) *Requirements for offer.* An offer required by subsection (a) must:

44 (1) be in writing;

45 (2) be sent by certified mail, return receipt requested, within 5 business
46 days after:

47 (A) the execution of a bona fide contract of sale, for the County,
48 HOC, and any existing tenant organization; or

49 (B) the Department certifies a tenant organization, for a new
50 tenant organization formed under Section 53A-3(b);

51 (3) include substantially the same terms and conditions as a pending
52 bona fide contract of sale from a third party to buy the rental
53 housing; [and]

- 54 (4) remain open for:
- 55 (A) 60 days after it is received, for the County, [and] HOC, and
- 56 any qualified entity that receives an assignment under 53A-
- 57 4(g); and
- 58 (B) 90 days after it is received by any tenant organization,
- 59 including a new tenant organization formed under Section
- 60 53A-3(b)[.]; and
- 61 (5) an owner must send a copy of the offer to all qualified entities
- 62 contemporaneously with providing the offer to the County, HOC,
- 63 and any tenant organization.
- 64 (c) *Information and inspection.* The owner must give the County, HOC,
- 65 [and] any tenant organization, and any qualified entity:
- 66 (1) any information about the rental housing relevant to exercising the
- 67 right of first refusal, such as architectural and engineering plans
- 68 and specifications, and operating data; and
- 69 (2) access to the rental housing to inspect the property and conduct
- 70 reasonable tests at reasonable times after reasonable notice.
- 71 The County, HOC, [and] any tenant organization, and any qualified entity
- 72 must pay the owner a reasonable deposit for any architectural and
- 73 engineering plans that the owner provides. The owner must refund the
- 74 deposit when the plans are returned to the owner. The County Executive
- 75 must issue regulations to implement this subsection.
- 76 (d) *Exercise of right of first refusal.*
- 77 (1) The County, HOC, [or a] any tenant organization, or any qualified
- 78 entity that receives an assignment under 53A-4(g) may exercise
- 79 the right of first refusal by accepting the offer within the applicable
- 80 period under subsection (b)(4). The County and HOC may accept

81 an offer to buy rental housing in a municipality only if the
82 municipality approves.

83 (2) The owner must sell the rental housing under the right of first
84 refusal if the acceptance includes substantially the same terms and
85 conditions contained in the owner's bona fide contract of sale with
86 the third party, including any contract term that provides for a bona
87 fide real estate commission payable to an independent broker.
88 Notwithstanding this general requirement or any term of the
89 contract, the County, HOC, [or] a tenant organization, or any
90 qualified entity may condition its acceptance on obtaining
91 financing at any time before the deadline in paragraph (3) for
92 completing the sale. The County, HOC, any tenant organization,
93 or any qualified entity must not be required to pay [to] the owner
94 a deposit of more than five percent [(5%)] of the contract price to
95 accept the offer and exercise its right of first refusal. The deposit
96 is refundable in the event of a good faith failure of the County,
97 HOC, any tenant organization, or any qualified entity to perform
98 under the contract.

99 (3) The owner and the County, HOC, [or] tenant organization, or any
100 qualified entity that receives an assignment under 53A-4(g) must
101 complete a sale under this subsection within 180 days after the
102 County, HOC, or tenant organization receives the owner's offer
103 unless the owner agrees to extend the 180-day period.

104 (4) Before a tenant organization completes a sale under paragraph (3),
105 a majority of all [of the] tenants must ratify the purchase.

106 (5) The right of first refusal applies in the following order of priority:
107 (A) the County;

- 108 (B) any qualified entity that receives an assignment under 53A-
 109 4(g);
 110 ~~[(B)] (C)~~ HOC; and
 111 ~~[(C)] (D)~~ any tenant organization.
- 112 (6) The Executive must issue regulations that establish procedures and
 113 guidelines for exercising the County's right of first refusal.
- 114 (e) *Expiration of right of first refusal.* If the County, HOC, [and] any tenant
 115 organization, or any qualified entity that receives an assignment under
 116 53A-4(g) do not exercise their rights of first refusal within the applicable
 117 period under subsection (b)(4), the owner may sell the rental housing to
 118 the third-party buyer under substantially the same terms and conditions
 119 offered to the County, HOC, and any tenant organization.
- 120 (f) *Immunity.* The County, HOC, [and] any tenant organization, or any
 121 qualified entity are not liable for any damages incurred by the owner, a
 122 third-party buyer, a tenant, or any other person in connection with a
 123 decision to exercise or not exercise a right of first refusal under this
 124 Section.
- 125 (g) *Assignment.*
- 126 (1) The County Executive may assign the right of first refusal, or a
 127 contract to purchase rental housing, to an entity qualified by the
 128 Department to receive such assignment that:
- 129 (A) has demonstrated expertise in acquiring, maintaining, and
 130 managing rental and affordable housing;
- 131 (B) is a bona fide nonprofit or a for-profit entity in good
 132 standing under the laws of the State of Maryland at the time
 133 of assignment;
- 134 (C) is registered and licensed to do business in Maryland; and

135 (D) commits in writing to maintain the affordability of housing
 136 acquired under this subsection.

137 (2) The County Executive must adopt regulations under Method (3) to
 138 establish a process for qualifying and selecting entities to receive
 139 an assignment under this subsection. The regulations must
 140 establish:

141 (A) a process that provides entities a fair opportunity to
 142 demonstrate to the County Executive or the County
 143 Executive's designee its qualifications to receive an
 144 assignment;

145 (B) factors that an entity must demonstrate to be deemed
 146 eligible to receive an assignment;

147 (C) affordable housing restrictions that an entity must commit
 148 in writing to maintain, if selected as an assignee; and

149 (D) criteria the County Executive or the County Executive's
 150 designee must use for selecting assignees from among
 151 qualified entities.

152 (3) An assignment by the County Executive of the County's right of
 153 first refusal must be accomplished by a written agreement with the
 154 assignee that includes an assignment of the County's rights and
 155 obligations under this Chapter as to its right of first refusal.

156 **Sec. 2. Expedited Effective Date.**

157 The Council declares that this legislation is necessary for the immediate
 158 protection of the public interest. This Act takes effect on the date on which it becomes
 159 law.




OFFICE OF THE COUNTY EXECUTIVE

Marc Elrich
County Executive

MEMORANDUM

August 31, 2023

TO: Evan Glass, Council President
Montgomery County Council

FROM: Marc Elrich, County Executive 

SUBJECT: Bill XX-23, Tenant Displacement – Right of First Refusal to Buy Rental Housing
– Amendments

I am transmitting Bill XX-23, Tenant Displacement – Right of First Refusal to Buy Rental Housing – Amendments. This bill seeks to address the growing need for affordable housing in Montgomery County by amending sections of the County Code (53A-2 & 53A-4) regarding the right of first refusal.

Under this bill, a County Executive, after exercising the right of first refusal, would be permitted to assign the right to purchase a property to a qualified entity. The purpose of permitting a County Executive to make such an assignment is to relieve the County of the necessity of purchasing a property and then having to sell it to a developer within less than twenty-four hours, which requires the County to have tens of millions of dollars available in accounts for the purpose of taking ownership of a property only to transfer it immediately. The ability to assign the right to purchase to a qualified entity will allow the County to use its funds to preserve or create long-term affordability without the need to reserve tens of millions of dollars solely to purchase and then transfer properties to affordable housing developers. To become a qualified entity, a housing developer must demonstrate experience and commitment to owning and operating affordable housing through an application process.

This proposed legislation also places a 5% cap on the deposit that an owner can charge if the right of first refusal is exercised. The purpose of limiting a required deposit to 5% is to prevent property owners from requiring deposits far in excess of industry norms for the purpose of thwarting the County's ability to exercise the right of first refusal. The draft Executive Regulation #16-23 (enclosed) will be advertised in the September 2023 Register.

Bill XX-23, Tenant Displacement – Right of First Refusal to Buy Rental Housing –
Amendments
August 31, 2023
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If you have any questions, please contact Scott Bruton, Director, Department of Housing and
Community Affairs at scott.bruton@montgomerycountymd.gov.

ME:sb

Enclosure

Fiscal Impact Statement

Office of Management and Budget

Executive Regulation XX-23

Tenant Displacement - Right of First Refusal to Buy Rental Housing - Amendments

Regulation Summary

This bill seeks to address the growing need for affordable housing in Montgomery County by amending sections of the county code (53A-2 & 53A-4) regarding the right of first refusal. Under this bill, the County Executive, after exercising the right of first refusal, would be permitted to assign the right to purchase a property to a qualified entity. To become a qualified entity, a housing developer must demonstrate experience and commitment to owning and operating affordable housing through an application process. Additionally, the bill specifies what is to be included in the executive regulations regarding it, and generally amends the procedure surrounding the right of first refusal. In particular, it places a 5% cap on the deposit that an owner can charge if the right of first refusal is exercised.

Fiscal Impact Summary

This bill will not increase County revenues or expenditures. The Department of Housing and Community Affairs (DHCA) already evaluates properties that issue a right of first refusal (ROFR) notice, makes decisions about when to exercise ROFR, and evaluates which development partners to choose in partnering to purchase a property. This bill will simplify that process by allowing the County, after exercising ROFR, to assign the right to purchase to a development partner without the complexity and significant labor and financial cost of having to purchase the property itself and then sell it within less than twenty-four hours to its partner.

Fiscal Impact Analysis

DHCA does not expect any changes on County revenues or expenditures over the next six years.

Staff Impact

The regulation is not expected to impact staff time or duties.

Actuarial Analysis

The regulation is not expected to impact retiree pension or group insurance costs.

Information Technology Impact

The regulation is not expected to impact the County Information Technology (IT) or Enterprise Resource Planning (ERP) systems.

Other Information

Later actions that may impact revenue or expenditures if future spending is projected

The regulation does not authorize future spending.

Contributors

Scott Bruton, Pofen Salem, Department of Housing and Community Affairs
Anita Aryeetey, Office of Management and Budget



LEGISLATIVE REQUEST REPORT

BILL: XX-XX

Tenant Displacement – Right of First Refusal to Buy Rental Housing - Amendments

DESCRIPTION: The Bill would amend Sections 53A-2 and 53A-4 of the Montgomery County Code to allow the County Executive to designate a qualified entity that may exercise the right of first refusal in purchasing rental housing.

PROBLEM: Increasing access to affordable housing has become an increasingly important need for the County. Additionally, without the ability to delegate the right of first refusal, the County must keep large sums of money available to purchase and turn over this housing as it becomes available.

GOALS AND OBJECTIVES: Enable the County to more effectively evaluate and exercise the right of first refusal on the purchase of rental housing by delegating the ability to qualified entities.

COORDINATION: The Office of the County Executive, Department of Housing and Community Affairs

FISCAL IMPACT: Office of Management and Budget

ECONOMIC IMPACT: Office of Legislative Oversight

EVALUATION: Subject to general oversight of the County Executive and County Council. The Office of the County Attorney will evaluate for form and legality.

EXPERIENCE ELSEWHERE: The Montgomery County code already includes provisions for the right of first refusal to be exercised by the County, the HOC, and tenant organizations. Most of the amendments in this Bill serve to extend existing procedures to Executive-designated entities, adding them into an established framework.

SOURCE OF: Scott Bruton, Director, DHCA; Neal Anker, Assistant County Attorney, Division of Land Use, Zoning & Economic Development, Office of the County Attorney; Jake Weissman, Assistant Chief Administrative Officer, Office of the County Executive.

INFORMATION

APPLICATION WITHIN MUNICIPALITIES: Rockville, Gaithersburg, Takoma Park

PENALTIES: N/A

Climate Assessment

Office of Legislative Oversight

Expedited Tenant Displacement – Right of First Refusal to Buy Rental Housing – Amendments

SUMMARY

The Office of Legislative Oversight (OLO) anticipates Expedited Bill 38-23 will likely have an indeterminate impact on the County's contribution to addressing climate change as access to affordable housing increases community resilience and the proposed change is intended to simplify the process of buying rental housing for the purpose of creating affordable housing. However, it cannot be predicted how much affordable housing will be created by this change.

BACKGROUND AND PURPOSE OF EXPEDITED BILL 38-23

Right of first refusal is defined as a contractual right that allows an interested party, like a local government agency, the first right to purchase a property. Government agencies can use the right of first refusal to acquire private property for sale as long as it matches the price of any third-party offer.¹ Governments often use this power to preserve affordable housing and prevent the conversion of subsidized rental properties for another use, if it is sold to another buyer.²

As established in the County Code, a rental housing owner must offer the County, Housing Opportunity Commission (HOC), and any tenant organization the right to buy the property before selling the rental housing to another party, barring certain exceptions as defined in the County Code.³ Expedited Bill 38-23 would amend the County Code to allow the County Executive to designate a qualified entity that may exercise the right of first refusal.⁴ Housing developers are considered a qualified entity if they “demonstrate experience and commitment to owning and operating affordable housing through an application process.”⁵

The proposed bill is intended to simplify the process by allowing the County, after exercising its right of first refusal, to then assign the right to purchase to a qualified entity. In a memorandum from the County Executive included in the bill's introduction packet, it is stated that the amendment would relieve the County of the necessity of purchasing a property and then having to sell it to a development partner, which requires the County to quickly have funds available for the purchase of property.⁶ Further, Bill 38-23 would place a 5% cap on the deposit an owner can charge if the right of first refusal is exercised, consistent with industry norms.⁷

Expedited Bill 38-23, Tenant Displacement – Right of First Refusal to Buy Rental Housing – Amendments, was introduced by the Council on behalf of the County Executive on September 26, 2023.⁸

ANTICIPATED IMPACTS

The affordability of a community's housing stock has a direct correlation to the overall resilience of a community, and on its ability to prepare for current and future risks.⁹ Affordable housing can improve community resilience through two ways: increasing housing stability and alleviating cost-burdened households. Housing stability can increase community resilience, through enhancing social cohesion by building community ties and enabling residents to stay better connected during emergencies. Cost-burdened households, which are households that spend over 30% of income on housing, generally have less cash on hand to weather shocks, such as extreme weather events, compared to households that are not cost-burdened.¹⁰

The bill proposes changes that are intended to simplify the process of acquiring rental housing for the purpose of creating affordable housing. Increased access to affordable housing increases community resilience; however it cannot be predicted how much affordable housing will be created by this change. OLO anticipates Expedited Bill 38-23 will have an indeterminate impact on the County's contribution to addressing climate change, including the reduction and/or sequestration of greenhouse gas emissions, community resilience, and adaptative capacity.

RECOMMENDED AMENDMENTS

The Climate Assessment Act requires OLO to offer recommendations, such as amendments or other measures to mitigate any anticipated negative climate impacts.¹¹ OLO does not offer recommendations or amendments as Expedited Bill 38-23 is likely to have an indeterminate impact on the County's contribution to addressing climate change, including the reduction and/or sequestration of greenhouse gas emissions, community resilience, and adaptative capacity.

CAVEATS

OLO notes two caveats to this climate assessment. First, predicting the impacts of legislation upon climate change is a challenging analytical endeavor due to data limitations, uncertainty, and the broad, global nature of climate change. Second, the analysis performed here is intended to inform the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

PURPOSE OF CLIMATE ASSESSMENTS

The purpose of the Climate Assessments is to evaluate the anticipated impact of legislation on the County's contribution to addressing climate change. These climate assessments will provide the Council with a more thorough understanding of the potential climate impacts and implications of proposed legislation, at the County level. The scope of the Climate Assessments is limited to the County's contribution to addressing climate change, specifically upon the County's contribution to greenhouse gas emissions and how actions suggested by legislation could help improve the County's adaptive capacity to climate change, and therefore, increase community resilience.

While co-benefits such as health and cost savings may be discussed, the focus is on how proposed County bills may impact GHG emissions and community resilience.

CONTRIBUTIONS

OLO staffer Kaitlyn Simmons drafted this assessment.

¹ ["Public Rights of First Refusal", The Yale Law Journal, 2020.](#)

² ["Rights of First Refusal", Local Housing Solutions, Accessed 9/27/2023.](#)

³ [Montgomery County Code § 53A-4, Accessed 9/27/2023.](#)

⁴ [Introduction Staff Report for Bill 38-23, Introduced September 26, 2023.](#)

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ ["The Community Resilience Benchmarks", Alliance for National and Community Resilience, 2019.](#)

¹⁰ ["Equitable Adaptation Legal and Policy Toolkit: Resilient Affordable Housing, Anti-Displacement, and Gentrification", Georgetown Climate Center, Accessed 10/2/23 ; "Community Resilience: A Social Justice Perspective", Community and Regional Resilience Initiative, 2008.](#)

¹¹ Bill 3-22, Legislative Branch – Climate Assessments – Required, Montgomery County Council, Effective date October 24, 2022

Economic Impact Statement

Montgomery County, Maryland

Expedited Bill 38-23

Tenant Displacement – Right of First Refusal to Buy Rental Housing – Amendments

SUMMARY

The Office of Legislative Oversight (OLO) anticipates that enacting Expedited Bill 38-23 would have an insignificant direct impact on economic conditions in the County in terms of the Council’s priority economic indicators.

BACKGROUND AND PURPOSE OF EXPEDITED BILL 38-23

Right of first refusal (ROFR) is defined as a contractual right that allows an interested party, like a local government agency, the first right to purchase a property. Government agencies may use ROFR to acquire private property for sale as long as it matches the price of any third-party offer.¹ Governments often use this power to preserve affordable housing and prevent the conversion of subsidized rental properties for another use, if it is sold to another buyer.²

As established in the County Code, a rental housing owner must offer the County, Housing Opportunity Commission (HOC), and any tenant organization the right to buy the property before selling the rental housing to another party, barring certain exceptions as defined in the County Code.³ Expedited Bill 38-23 would amend the County Code to allow the County Executive to designate a qualified entity that may exercise ROFR.⁴ Housing developers are considered a qualified entity if they “demonstrate experience and commitment to owning and operating affordable housing through an application process.”⁵

The proposed bill is intended to simplify the process by allowing the County, after exercising ROFR, to then assign the right to purchase to a qualified entity. According to the memorandum from the County Executive included in the Bill’s introduction packet, the amendment would relieve the County of the necessity of purchasing a property and then having to sell it to a development partner, which requires the County to quickly have funds available for the purchase of the property.⁶ Further, Bill 38-23 would place a 5% cap on the deposit an owner can charge if ROFR.⁷

The Council introduced Expedited Bill 38-23, Tenant Displacement – Right of First Refusal to Buy Rental Housing – Amendments, on behalf of the County Executive on September 26, 2023.⁸

¹ Damrosch, “Public Rights of First Refusal.”

² “Rights of First Refusal.”

³ Montgomery County Code § 53A-4, Accessed 9/27/2023.

⁴ Introduction Staff Report on Expedited Bill 38-23.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

INFORMATION SOURCES, METHODOLOGIES, AND ASSUMPTIONS

Per Section 2-81B of the Montgomery County Code, the purpose of this Economic Impact Statement is to assess, both, the impacts of Expedited Bill 38-23 on residents and private organizations in terms of the Council’s priority economic indicators and whether the Bill would have a net positive or negative impact on overall economic conditions in the County.⁹

By allowing the County to assign ROFR to a qualified entity, the Bill could *indirectly* impact economic conditions. This will occur if the reform leads to ROFR being used more than it otherwise would under existing law. Given that the County has rarely acquired properties through ROFR in the past¹⁰ and the challenges with financing affordable housing projects, OLO is doubtful that the Bill would significantly increase the demand for acquiring properties among potential qualified entities.

However, if the Bill significantly increases the use of ROFR, the net indirect economic impact would be uncertain. For one, there is a small literature in theoretical economics on the effects of ROFR on sellers, rights-holders, and third-parties, with conflicting theoretical results.¹¹ Second, estimating the net impact would require weighing the Bill’s uncertain effects on these market actors against the economic impacts of preserving more affordable rental units in the County than otherwise would occur in the absence of the Bill, which would include lowering the risk of foreclosure to certain resident households and increasing household spending.¹²

Thus, OLO concludes that the Bill would have an insignificant *direct* impact on the Council’s priority economic indicators.

VARIABLES

Not applicable

IMPACTS

WORKFORCE ▪ **TAXATION POLICY** ▪ **PROPERTY VALUES** ▪ **INCOMES** ▪ **OPERATING COSTS** ▪ **PRIVATE SECTOR CAPITAL INVESTMENT** ▪ **ECONOMIC DEVELOPMENT** ▪ **COMPETITIVENESS**

Businesses, Non-Profits, Other Private Organizations

Not applicable

Residents

Not applicable

⁹ Montgomery County Code, Sec. 2-81B.

¹⁰ It is worth noting that the County has rarely acquired properties through ROFR. See “Annual Report on the Montgomery County Right of First Refusal Program”; “Memorandum: Right of First Refusal,” December 6, 2021; “Memorandum: Right of First Refusal,” February 13, 2020.

¹¹ See, for example, Kahan, Leshem, and Sundaram, “First-Purchase Rights”; Brisset, Cochard, and Maréchal, “The Effect of a Right-of-First-Refusal Clause in a First-Price Auction with Heterogeneous Risk-Averse Bidders.”

¹² Boyle et al., “The Regional Macroeconomic Impact of Projected Affordable Housing Developments.”

Net Impact

Not applicable

DISCUSSION ITEMS

Given the information constraints in this analysis, Councilmembers may want to consider a more thorough assessment of the demand for acquiring properties through ROFR among potential qualified entities, the Bill's potential impacts on market transactions among sellers, rights-holders and third-parties, as well as the economic impacts to residents and businesses of preserving affordable housing.

WORKS CITED

- "Annual Report on the Montgomery County Right of First Refusal Program." Department of Housing and Community Affairs, Montgomery County Government, February 17, 2023.
- Boyle, Stephen, Kevin Connolly, Peter G McGregor, and Mairi Spowage. "The Regional Macroeconomic Impact of Projected Affordable Housing Developments: Facilitating the 'Levelling up' Agenda?" *Local Economy* 37, no. 5 (August 1, 2022): 384–402. <https://doi.org/10.1177/02690942221130022>.
- Brisset, Karine, François Cochard, and François Maréchal. "The Effect of a Right-of-First-Refusal Clause in a First-Price Auction with Heterogeneous Risk-Averse Bidders." *Journal of Institutional and Theoretical Economics: JITE* 176, no. 3 (September 2020): 526–48. <https://doi.org/10.1628/jite-2020-0034>.
- Damrosch, Peter. "Public Rights of First Refusal." *The Yale Law Journal* 129, no. 3 (January 2020): 812–64. <https://www.yalelawjournal.org/note/public-rights-of-first-refusal>
- "Introduction Staff Report on Expedited Bill 38-23, Tenant Displacement – Right of First Refusal to Buy Rental Housing – Amendments." Montgomery County Council, September 26, 2023. <https://apps.montgomerycountymd.gov/ccllims/BillDetailsPage?RecordId=2816&fullTextSearch=38-23>.
- Kahan, Marcel, Shmuel Leshem, and Rangarajan K. Sundaram. "First-Purchase Rights: Rights of First Refusal and Rights of First Offer." *American Law and Economics Review* 14, no. 2 (December 1, 2012): 331–71. <https://doi.org/10.1093/aler/ahs014>.
- "Memorandum: Right of First Refusal." Planning, Housing, and Economic Development Committee, Montgomery County Council, February 13, 2020. https://www.montgomerycountymd.gov/council/Resources/Files/agenda/cm/2020/20200213/20200213_PHED4.pdf.
- "Memorandum: Right of First Refusal." Planning, Housing, and Economic Development Committee, Montgomery County Council, December 6, 2021. https://www.montgomerycountymd.gov/council/Resources/Files/agenda/cm/2021/20211206/20211206_PHED3.pdf.
- "Rights of First Refusal." Local Housing Solutions. Accessed October 9, 2023. <https://localhousingsolutions.org/housing-policy-library/rights-of-first-refusal/>.

CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. Second, the analysis performed here is intended to *inform* the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the Bill under consideration.

AUTHOR

Stephen Roblin (OLO) prepared this report.

Racial Equity and Social Justice (RESJ) Impact Statement

Office of Legislative Oversight

EXPEDITED TENANT DISPLACEMENT – RIGHT OF FIRST REFUSAL TO BUY BILL 38-23: RENTAL HOUSING – AMENDMENTS

SUMMARY

The Office of Legislative Oversight (OLO) anticipates Expedited Bill 38-23 could have a positive impact on racial equity and social justice (RESJ) in the County as it codifies a recognized promising practice for preserving and creating affordable housing into County law.

PURPOSE OF RESJ IMPACT STATEMENTS

The purpose of RESJ impact statements (RESJIS) is to evaluate the anticipated impact of legislation on racial equity and social justice in the County. Racial equity and social justice refer to a **process** that focuses on centering the needs, leadership, and power of communities of color and low-income communities with a **goal** of eliminating racial and social inequities.¹ Achieving racial equity and social justice usually requires seeing, thinking, and working differently to address the racial and social harms that have caused racial and social inequities.²

PURPOSE OF EXPEDITED BILL 38-23

The right of first refusal is defined as a contractual right that allows an interested party, like a local government agency, the first right to purchase a property when it is put up for sale. Government agencies can use the right of first refusal to acquire private property for sale as long as it matches the price of any third-party offer.³ Governments often use this power to preserve affordable housing and prevent the conversion of subsidized rental properties for another use if it is sold to another buyer.⁴

According to County law, a rental housing owner must offer the County, the Housing Opportunities Commission (HOC), and any tenant organization the right to buy the property before selling it to another party, barring certain exceptions.⁵ If enacted, Bill 38-23 would:⁶

- Allow the County Executive to designate a qualified entity that may exercise the right of first refusal.
- Establish basic criteria for the Department of Housing and Community Affairs (DHCA) to qualify entities for a right of first refusal assignment, as well as a requirement for the County Executive to adopt regulations under Method (3) establishing a process for qualifying and selecting entities to receive a right of first refusal assignment.
- Place a 5 percent cap on the deposit an owner can charge if the right of first refusal is exercised, which according to the County Executive, is consistent with industry norms.⁷

The County Executive states that assigning the right to purchase a property to a qualified entity after exercising the right of first refusal would “allow the County to use its funds to preserve or create long-term affordability without the need to reserve tens of millions of dollars solely to purchase and then transfer properties to affordable housing developers.”⁸

Expedited Bill 38-23, Tenant Displacement – Right of First Refusal to Buy Rental Housing – Amendments, was introduced by the Council on behalf of the County Executive on September 26, 2023.

RESJ Impact Statement

Expedited Bill 38-23

In September 2021, OLO published a RESJIS for Expedited Bill 30-21, Landlord-Tenant Relations – Restrictions During Emergencies – Extended Limitations Against Rent Increases and Late Fees.⁹ Please refer to this RESJIS for detailed background on racial segregation in housing and the racial wealth divide.

HOUSING INSECURITY, AFFORDABLE HOUSING, AND RACIAL EQUITY

Housing Insecurity. Local data demonstrates that Black and Latinx households in the County are especially housing insecure. For instance:

- In 2022, 59 percent of Black renters and 56 percent of Latinx renters were cost-burdened (expending 30 percent or more of income on rent), compared to 47 percent of White renters and 42 percent of Asian renters.¹⁰
- Among COVID-19 Rent Relief Program recipients, 45 percent were Black and 23 percent were Latinx, while 8 percent were White and 2 percent were Asian or Pacific Islander.¹¹
- Among single adults experiencing homelessness in 2022, 60 percent were Black, 27 percent were White, 8 percent were Native American, and 5 percent were Asian or Pacific Islander.¹²
- Among families experiencing homelessness in 2022, 73 percent were Black, 22 percent were White, 3 percent were Native American and 3 percent were Asian or Pacific Islander.¹³

Racial disparities in housing security are reflective of the legacies of housing segregation and the racial wealth divide, established over centuries by government policies and practices such as:^{14,15}

- A failure to fully implement Reconstruction and provide land to Black people who had been held in bondage;
- Enacting exclusionary zoning policies, such as single-family zoning, designed to segregate communities;
- Creating large federal programs that supported homeownership for working- and middle-class White families while explicitly excluding Black families of similar means;
- Using racial restrictive covenants to prevent Black people from buying homes owned by White people.
- Tolerating violence and hostility from White residents towards Black residents after attempts to integrate neighborhoods; and
- Enabling predatory home financing in Black, Indigenous, and Other People of Color (BIPOC) communities, further stripping BIPOC of wealth and their homes.

Government actions establishing segregation and the racial wealth divide were prevalent nationwide, including in Montgomery County. For instance, a Planning Department study of 409 Home Owner's Loan Corporation (HOLC) loans made in the County for the Mapping Segregation Project found that 97 percent of loans (400 loans) were made to White residents, while less than 2 percent of loans (7 loans) were made to Black residents.¹⁶ The Project has also found widespread use of racial restrictive covenants in the Downcounty Planning Area.^{17,18} Further, the draft Metropolitan Washington Fair Housing Plan observed that "Montgomery County's zoning laws are a significant impediment to fair housing" as they only "allow apartments on less than two percent of county land and more than one-third of the county is restricted to single family homes."¹⁹

Affordable Housing. The nationwide shortage in affordable housing exacerbates housing insecurity for BIPOC. According to the National Low Income Housing Coalition's (NHL) 2023 "The Gap" report on the shortage of affordable homes:²⁰

- Extremely low-income renters in the U.S. face a shortage of 7.3 million affordable and available rental homes, resulting in only 33 affordable and available homes for every 100 extremely low-income renter households.²¹

RESJ Impact Statement

Expedited Bill 38-23

- Black, Latinx, and Indigenous households are disproportionately extremely low-income renters and are disproportionately impacted by this shortage.

In 2019, the Council unanimously approved a resolution supporting the Metropolitan Washington Council of Governments’ (MWCOG) targets to address the regional housing shortage, which called for the County to produce 41,000 housing units by 2030, 75 percent of which should be affordable to low- and middle-income households.^{22,23}

Several policy organizations – including Local Housing Solutions, ChangeLab Solutions, Grounded Solutions Network, and the Poverty & Race Research Action Council – have identified right of first refusal laws as a tool for local governments to preserve and create affordable housing.^{24,25,26,27} Local Housing Solutions notes that communities extending this right to tenant associations could consider creating “complementary programs that help tenant associations manage the purchase and operation of a housing development” as successfully exercising the right of first refusal often requires substantial financial and technical assistance.²⁸

ANTICIPATED RESJ IMPACTS

To consider the anticipated impact of Bill 38-23 on RESJ in the County, OLO recommends the consideration of two related questions:

- Who are the primary beneficiaries of this bill?
- What racial and social inequities could passage of this bill weaken or strengthen?

For the first question, OLO considered the demographics of renters, the constituents who would most benefit from the preservation or creation of affordable rental units. Data summarized in Table 1 suggests that BIPOC constituents could disproportionately benefit from the Bill. Black and Latinx households are overrepresented among renter households. Native American and Pacific Islander households are proportionately represented, while White and Asian households are underrepresented.

Table 1: Percent of All Households and Renter-Occupied Households by Race and Ethnicity, Montgomery County, MD

Race and ethnicity ²⁹	All Households	Renter-Occupied Households
Asian	14.4	12.2
Black	18.0	30.0
Native American	0.3	0.3
Pacific Islander	0.1	0.1
White	55.0	40.5
Latinx	14.3	18.8

Source: Table S2502, 2021 American Community Survey 5-Year Estimates, Census Bureau.

Further, poverty data summarized in Table 2 suggests Black and Latinx constituents are overrepresented among lower-income constituents in the County that could particularly benefit from the preservation or creation of affordable housing.

RESJ Impact Statement

Expedited Bill 38-23

Table 2: Percent of Population Below by Poverty Level by Race and Ethnicity, Montgomery County, MD

Race and ethnicity	Percent Below Poverty Level
Overall	7.9
Asian	7.9
Black	14.3
White	4.3
Latinx	11.2

Source: Table S2502, 2022 American Community Survey 5-Year Estimates, Census Bureau.

For the second question, OLO considered how the Bill could address racial inequities and disparities in housing insecurity. As described in the previous section, right of first refusal laws have been highlighted as a promising policy for preserving and creating affordable housing.

Of note, the County’s Right of First Refusal (ROFR) program has been used sparingly. From 2015 to 2022, while ROFR notices were received for 343 rental properties, the County exercised the ROFR 12 times.³⁰ In a recent conversation with OLO, the DHCA Director noted that in his nine-month tenure, one limiting factor for exercising the ROFR has been insufficient funds for purchasing rental properties that are up for sale. The Director shared that for FY24, DHCA currently has \$9 million dollars not committed to affordable housing projects and programs that the County could use to exercise ROFR. This budget has made the County unable to consider exercising ROFR, as individual rental properties DHCA could purchase for resale to affordable housing partners are often more costly. The Director argues that allowing the County to assign the ROFR to a qualified affordable housing partner, as proposed in Bill 38-23, would eliminate the funding barrier for DHCA and make the County’s use of the ROFR more feasible.³¹

Taken together, OLO anticipates Bill 38-23 could have a positive impact on RESJ in the County as it codifies a promising practice for preserving and creating affordable housing into County law. OLO recognizes the changes proposed by the Bill will not guarantee that affordable housing will be preserved or created as this will ultimately depend on the willingness of housing developers to apply for the ROFR to acquire rental properties that are up for sale. However, judging by the County’s sparing use of ROFR in recent years and the County’s current barriers to exercising this right, the changes could help to make this policy more viable than it currently is, which would disproportionately benefit BIPOC constituents.

RECOMMENDED AMENDMENTS

The Racial Equity and Social Justice Act requires OLO to consider whether recommended amendments to bills aimed at narrowing racial and social inequities are warranted in developing RESJ impact statements.³² OLO anticipates Expedited Bill 38-23 will have a positive impact on RESJ. As such, OLO does not offer recommended amendments.

RESJ Impact Statement

Expedited Bill 38-23

CAVEATS

Two caveats to this racial equity and social justice impact statement should be noted. First, predicting the impact of legislation on racial equity and social justice is a challenging analytical endeavor due to data limitations, uncertainty, and other factors. Second, this RESJ impact statement is intended to inform the legislative process rather than determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

OLO staffer Janmarie Peña, Performance Management and Data Analyst, drafted this RESJ impact statement.

¹ Definition of racial equity and social justice adopted from “Applying a Racial Equity Lens into Federal Nutrition Programs” by Marlysa Gamblin, et.al. Bread for the World, and from Racial Equity Tools. <https://www.racialequitytools.org/glossary>

² Ibid.

³ [Public Rights of First Refusal](#), The Yale Law Journal, 2020.

⁴ [Rights of First Refusal](#), Local Housing Solutions.

⁵ [Montgomery County Code § 53A-4](#)

⁶ [Introduction Staff Report for Bill 38-23](#), Montgomery County Council, Introduced September 26, 2023.

⁷ Memorandum from County Executive to Council President, Introduction Staff Report for Bill 38-23, August 31, 2023.

⁸ Ibid.

⁹ [RESJS for Bill 30-21](#), Office of Legislative Oversight, September 9, 2021.

¹⁰ Table S0201, Selected Population Profile in the United States, 2022 American Community Survey 1-Year Estimates, Census Bureau.

¹¹ [DHHS Pulse Report: COVID-19 Impact and Recovery](#), Montgomery County Department of Health and Human Services, May 17, 2023.

¹² [Point in Time Survey](#), Montgomery County Interagency Commission on Homelessness.

¹³ Ibid.

¹⁴ [The Color of Wealth in the Nation's Capital](#), Urban Institute, November 1, 2016.

¹⁵ Richard Rothstein, *The Color of Law* (Liveright, 2017)

¹⁶ [“Briefing on the Mapping Segregation Project,”](#) Montgomery Planning, November 23, 2022.

¹⁷ Ibid.

¹⁸ [Racial Restrictive Covenants and Black Homeownership](#), Mapping Segregation Project, Montgomery Planning.

¹⁹ Diane Glauber, et. al, [“Draft Metropolitan Washington Regional Fair Housing Plan, Montgomery County,”](#) Metropolitan Washington Council of Governments, January 2023.

²⁰ [The Gap: A Shortage of Affordable Rental Homes](#), National Low Income Housing Coalition, March 2023.

²¹ In “The Gap” report, the NLHC defines extremely low-income households as households with incomes at or below either the federal poverty guideline or 30% of the area median income (AMI), whichever is greater.

²² [“Council Unanimously Approves Resolution to Support Metropolitan Washington Council of Governments’ Regional Housing Targets for Montgomery County.”](#) Montgomery County Council, November 6, 2019.

²³ [Local Housing Targets Project](#), Montgomery Planning.

²⁴ Rights of First Refusal, Local Housing Solutions.

²⁵ [Preserving, Protecting, and Expanding Affordable Housing](#), ChangeLab Solutions.

²⁶ [What About Housing? A Policy Toolkit for Inclusive Growth](#), Grounded Solutions Network.

²⁷ [An Anti-Racist Agenda for State and Local Housing Agencies](#), Poverty & Race Research Action Council, July 1, 2020.

²⁸ Rights of First Refusal, Local Housing Solutions.

²⁹ Latinx is an ethnicity rather than a race. Therefore, Latinx people are included in multiple racial groups throughout this impact statement, unless where otherwise noted. Estimates for Native American and Pacific Islander constituents not available for all data points presented in impact statement.

RESJ Impact Statement

Expedited Bill 38-23

³⁰ Memorandum from DHCA Director to Council President, Annual Report on the Montgomery County Right of First Refusal Program, February 17, 2023.

³¹ Comments from DHCA Director Scott Bruton in meeting with OLO staff on October 4, 2023

³² Bill 27-19, Administration – Human Rights – Office of Racial Equity and Social Justice – Racial Equity and Social Justice Advisory Committee – Established, Montgomery County Council



DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

Marc Elrich
County Executive

Aseem K. Nigam
Director

MEMORANDUM

February 17, 2023

TO: Evan Glass, President
Montgomery County Council

FROM: Aseem Nigam, Director
Department of Housing and Community Affairs

SUBJECT: Annual Report on the Montgomery County Right of First Refusal Program

The Department of Housing and Community Affairs (DHCA) administers Montgomery County's Right of First Refusal (ROFR) Program. In effect for more than forty years, Section 53A-4 of the Montgomery County Code established that the owner of any rental housing property with four or more units must give the County, the Housing Opportunities Commission (HOC), and any certified tenant organization at the property a right of first refusal to purchase. The ROFR provides the County, the HOC, or a certified tenant organization with the right to match a contract in all executed significant terms.

When DHCA receives a ROFR notice, its Multifamily Housing Division uses five guiding principles to analyze the property:

- **Purpose:** Is there a public purpose associated with the purchase of the property that cannot be met otherwise?
- **Preservation:** Are units at risk of exiting the County's affordable housing stock, and what are the tools that can be used to preserve affordability including the capacity for the purchase be executed?
- **Property:** Does the property have redeeming or important facets to warrant a ROFR purchase, such as is it in a high-cost market area, is it near a metro or other resources, is it a rare vacant property that can meet a public purpose?
- **Price:** Is the price manageable for the County, given that the County must have cash available in the Housing Initiative Fund (HIF) for the full sales price and have HIF loan capacity to support long term affordability in addition to the current pipeline?
- **Partner:** As the County does not retain ownership in multifamily rental properties, does DHCA have a capable partner to whom to transfer ownership who can finance the property with minimal assistance; is fiscally capable and has experience managing/owning multifamily properties; and are the partner's goals compatible with those of DHCA?

Office of the Director

1401 Rockville Pike, 4th Floor • Rockville, Maryland 20852 • 240-777-0311 • 240-777-3791 FAX • www.montgomerycountymd.gov/dhca

DHCA received ROFR notices from 44 rental properties representing 6,696 units in 2022. The properties represented \$2,199,106,100 in total transactions and an average price of \$328,420.86 per unit. The following narrative explanations provide additional details about ROFR outcomes for 2022. Table 1 contains a list of all ROFR notices received in 2022. Table 2 contains comparative ROFR data for the years 2015-2022. Table 3 contains ROFR notices received by location for the years 2015-2022.

Total properties for which DHCA received ROFR notices in 2022: 44 with a total of 6,696 units

Exercised the Right of Refusal: 2 properties with a total of 466 units.

- **Scarborough Square Apartments and Townhouses**
 - The County partnered with the City of Rockville and Rockville Housing Enterprises (RHE) to exercise the ROFR for Scarborough Square Apartments and Townhouses, a 121-unit mixed-income apartment and townhouse complex located at 438 College Parkway in Rockville, MD. The property has 12 one-bedroom units, 36 two-bedroom units, 63 three-bedroom units, and 10 four-bedroom units.
 - The ROFR purchase transferred controlling interest in the Real Estate Investment Trust (REIT) that owns the property. The transfer was within related parties in the REIT. The transfer purchase price is \$40,000,000 or \$330,579 per unit.
 - The property qualified for a By Right PILOT, which requires RHE to keep at least 61 units (50%) affordable to households at 60% of Area Median Income (AMI) for 15 years.
 - RHE intends to add project-based vouchers to the property.
- **Westchester West Apartments**
 - The County received the ROFR notice for Westchester West Apartments (245 units) located at 3020 Hewitt Avenue in Silver Spring on December 21, 2022. The property has 62 one-bedroom units, 187 two-bedroom units, and 96 three-bedroom units.
 - The purchase price is \$67,000,000.
 - The County exercised ROFR for Westchester West on February 17, 2023. The County has 30 days to conduct due diligence at the property during which time the County may elect to terminate the purchase contract.

Issued Certificate of Compliance: 41 Properties with a total of 5947 units

A Certificate of Compliance is a document issued by DHCA that is recorded in the land records certifying that transaction has met the requirements of Chapter 53-A, which enables the planned sale to proceed. Before issuing a Certificate of Compliance, DHCA evaluates each property with the guiding principles detailed above and determined not to act.

Certificates of Compliance were not issued for three properties: one which the County exercised ROFR, one which the County is considering exercising ROFR, and one property for which the transaction did not close.

Preserved Existing Affordable Housing: 2 Properties with a total of 369 units.

The purchasers of 2 properties received short-term acquisition funding from the Affordable Housing Opportunity Fund (AHOF), which resulted in the following affordability restrictions:

- Rollingwood Apartments (283 units) purchased by Montgomery Housing Partnership (MHP)
 - AHOF: \$2 million
 - Amazon: \$28.3 million with the following unit affordability restrictions: 5% at 30% of AMI, 20% at 50% of AMI, 50% at 60% of AMI, and 25% at 70% of AMI for 99 years.
 - MHP plans to seek Low Income Housing Tax Credit financing for a major rehabilitation of the property.
- Parkside Terrace Apartments (87 units) purchased by Enterprise Community Development
 - AHOF: \$5 million
 - All 87 units affordable to households at 60% of AMI for 10 years.

Rental Agreements: 0 properties with a total of 0 units

No new Rental Agreements were signed in 2022.

The purchasers of the Milestone Apartments chose not to renew the property's rental agreement, which resulted in the termination of 50 MPDUs.

Agreement Not to Convert: 0 properties with a total of 0 units

An Agreement Not to Convert, allowed in Chapter 53-A, provides for the retention of affordable housing as an alternative to the ROFR process.

Properties With Current MPDUs: 4 properties with a total of 235 units

These are properties that were under contract with existing Moderately Priced Dwelling Units (MPDU) covenants.

- Ansel Apartments, 112 MPDUs, City of Rockville
- Galvan Apartments, 54 MPDUs, City of Rockville
- Arrowwood Apartments, 37 MPDUs, North Bethesda
- Solaire Apartments, 21 MPDUs, Wheaton

The purchasers of the Milestone Apartments chose not to renew the property's rental agreement, which resulted in the termination of 50 MPDUs.

Transactions Did Not Close: 1 property with a total of 283 units.

Rollingwood Apartments issued a ROFR notice on April 28, 2022, with a price of \$74,000,000; however, the transaction did not close. Another ROFR notice for this property was issued on August 3, 2022, at a price of \$70,500,000, which did close.

Attachments

Table 1: List of All ROFR Notices Received in 2022

Project Name	City	Total Units	Status
712 Maplewood Ave	Takoma Park	4	Certificate of Compliance
8515 Flower Avenue	Takoma Park	5	Certificate of Compliance
The Galaxy Apts.	Silver Spring	195	Certificate of Compliance; Assumed regulatory agreement for 82 units; Existing PILOT; Existing 27-unit Section 8 contract
The Lake Apts.	Chevy Chase	66	Certificate of Compliance
Preston Place	Chevy Chase	67	Certificate of Compliance
8318 Roanoke Avenue	Takoma Park	6	Certificate of Compliance
8324 Roanoke	Takoma Park	6	Certificate of Compliance
The Ansel Apts.	Rockville	250	Certificate of Compliance; 112 City of Rockville MPDUs offsite at HOC's Upton
The Centre at Silver Spring Ap	Silver Spring	256	Certificate of Compliance
Walker House Apts.	Gaithersburg	212	Certificate of Compliance
The Galvan Apts.	Rockville	356	Certificate of Compliance; 54 City of Rockville MPDUs
20 Ritchie Avenue	Silver Spring	9	Certificate of Compliance
12 Grant Avenue	Takoma Park	12	Certificate of Compliance
Villas at Rockville	Rockville	210	Certificate of Compliance
Milestone Apts.	Germantown	576	Certificate of Compliance; rental agreement terminated for 50 MPDUs
HOC ALDON	Bethesda	116	Certificate of Compliance
Willard Towers	Chevy Chase	518	Certificate of Compliance
Rollingwood Apts.	Silver Spring	283	Transaction did not close; owner reissued ROFR
Avalon Grosvenor Tower	North Bethesda	237	Certificate of Compliance
The Grand	North Bethesda	552	Certificate of Compliance; 110 existing LIHTC units
Hampton Point Apts.	Silver Spring	352	Certificate of Compliance
7044 Carroll Ave	Takoma Park	5	Certificate of Compliance
208 Lincoln	Takoma Park	4	Certificate of Compliance
8101 Flower Avenue, LLC	Takoma Park	6	Certificate of Compliance
17 Barkley Apts.	Gaithersburg	315	Certificate of Compliance
Rollingwood Apts.	Silver Spring	283	Certificate of Compliance; AHOF and Amazon w/ 5% at 30% AMI, 20% at 55% at 30% AMI, 20% at 50% AMI, 50% at 60% AMI, and 25% at 70% AMI for 99 years
Arrowwood Apartments	North Bethesda	294	Certificate of Compliance; 37 MPDUs
Scarborough Square Townhouses & Apts.	Rockville	121	ROFR exercised; By Right Pilot
Governor Square Apts.	Gaithersburg	238	Certificate of Compliance
1050/1054/1058 Ruatan Street	Silver Spring	12	Certificate of Compliance
8805 Plymouth	Silver Spring	7	Certificate of Compliance
8807 Plymouth	Silver Spring	6	Certificate of Compliance
Parkside Terrace Apts.	Silver Spring	86	Certificate of Compliance; AHOF w/ all units at 60% of AMI for 10 years
The Village at Gaithersburg Apts.	Gaithersburg	168	Certificate of Compliance; Existing 168 LIHTC units
Villas at Rockville	Rockville	210	Certificate of Compliance
908 Hudson Avenue	Takoma Park	6	Certificate of Compliance
8212 Houston Court	Takoma Park	4	Certificate of Compliance
49 West Diamond	Gaithersburg	35	Certificate of Compliance
20 East Diamond	Gaithersburg	8	Certificate of Compliance
1 Water Street	Gaithersburg	17	Certificate of Compliance
Solaire Apts.	Silver Spring	232	Certificate of Compliance; 32 MPDUs
617 Sligo Ave	Silver Spring	3 commercial units	617 Sligo/8101 Schrider comprise a 6-unit residential property with 3 commercial units
8101 Schrider St	Silver Spring	6	Certificate of Compliance
Westchester West Apts.	Silver Spring	345	ROFR exercise in process

Table 2: ROFR Data 2015-2022

Year	ROFRs Received	Total Units	Total Dollar Amount	Average Cost/Unit	Number of Properties on which ROFR was Exercised	Number of Agreements Not to Convert	Number of Rental Agreements Assumed of Created	Number of No Action Properties with MPDUs	Number of Capital Investments with Regulatory Agreement	PILOT Agreements	Transactions that did not Close
2022	44	6,696	\$2,199,106,100	\$328,421	2 ^a	0	2	4	2	1	1
2021	61	12,765	\$3,632,135,923	\$283,384	1	7	2	12	3	4	2
2020	57	6,243	\$1,366,172,038	\$281,133	1	2	5	0	0	7	6
2019	44 ^b	9,100	\$1,774,603,200	\$195,011	0	0	4	0	0	0	2
2018	36	7,022	\$1,502,158,278	\$220,581	4	0	0	1	3	0	1
2017	33	7,205	\$1,550,786,763	\$215,238	1	1	4	3	1	0	4
2016	39	8,013	\$1,930,850,996	\$240,965	2	0	4	3	1	0	2
2015	29	5,800	\$1,042,992,200 ^c	\$181,453 ^c	1	1	2	1	3	0	3

^a The County exercised ROFR for Scarborough Square Townhouses and Apts. and acquired it in partnership with City of Rockville and Rockville Housing Enterprises (RHE). The County exercised ROFR for Westchester West on February 17, 2023. The County has 30 days to conduct due diligence at the property during which time the County may elect to terminate the purchase contract.

^b DHCA received 48 ROFR notices in 2019 but 4 were determined to be exempt, so their information is not included in ROFRs Received, Total Units, Total Dollar Amount, and Average Cost/Unit.

^c The HOC property RAD6 Sandy Spring Meadows (52 units) filed a ROFR notice for its RAD conversion, which did not include a purchase price. Therefore, those 52 units are included in Total Units but not in Total Dollar Amount or Average Cost/Unit.

Table 3: ROFR Notices Received by Location 2015-2022

Location	2015	2016	2017	2018	2019	2020	2021	2022
Adelphi	0	0	1	0	1	0	0	0
Bethesda	3	4	0	1	0	3	7	1
Chevy Chase	0	0	4	0	1	0	4	3
Clarksburg	0	0	0	0	0	0	1	0
Coleville	0	0	0	0	0	1	0	0
Damascus	0	0	1	0	0	2	0	0
Derwood	0	0	0	0	0	0	1	0
Fairland	0	0	0	0	0	3	0	0
Gaithersburg	3	6	4	2	6	0	7	7
Germantown	0	2	1	6	4	0	7	1
Hillandale	0	0	0	0	0	1	0	0
Montgomery Village	0	0	2	0	0	0	0	0
North Bethesda	1	0	2	0	3	0	0	3
Rockville	0	5	1	0	3	5	8	5
Silver Spring	15	13	11	20	13	19	6	14
Olney	1	0	0	2	2	0	1	0
Takoma Park	6	9	6	5	12	19	17	10
Wheaton	0	0	0	0	3	1	2	0
White Oak	0	0	0	0	0	2	0	0
Total	29	39	33	36	48	57	61	44

Testimony on Behalf of County Executive Marc Elrich on

Expedited Bill 38-23: Tenant Displacement - Right of First Refusal to Buy Rental Housing - Amendments

October 10, 2023

1:30 p.m.

Good afternoon, Council President Glass and Councilmembers, my name is Scott Bruton. I am the Director of the Department of Housing and Community Affairs (DHCA). I am testifying on behalf of County Executive Mar Elrich in support of Expedited Bill 38-23: Tenant Displacement - Right of First Refusal to Buy Rental Housing - Amendments.

Bill 38-23 seeks to address the growing need for affordable housing in Montgomery County by amending sections of the County Code (53A-2 & 53A-4) regarding the right of first refusal (ROFR).

Current law creates significant impediments for the County to exercise ROFR to preserve affordable housing. If the County wishes to exercise ROFR, it must pay the full purchase price for a multifamily rental property, often totaling tens of millions of dollars, and then sell the property to its chosen development partner within a few hours. The County must sell the property immediately because it does not have the capacity to run a multifamily rental property with existing staffing and does not want to take on the liability of doing so for even a day. The requirement to purchase the property forces the County to hold tens of millions of dollars at the ready each year just for the purpose of purchasing a property for a few hours. Further, having to conduct two sales on the same day increases the financing and labor costs for both the County and its chosen development partner. For 2015-2022, the County received 347 ROFR notices but only exercised ROFR 12 times due significantly to these constraints.

Under this bill, a County Executive, after exercising the right of first refusal, would be permitted to assign the contract to purchase a property to an affordable housing developer. The ability to assign the contract would allow the County to expeditiously use the funds annually appropriated to preserve or create long-term affordability without the need to reserve tens of millions of dollars solely to purchase and then transfer properties to affordable housing developers.

To increase accountability and transparency of the ROFR process, a developer would have to become a qualified entity through a rolling application process by demonstrating experience with and commitment to owning and operating affordable housing. A pool of qualified entities thereby would be available to quickly partner with the County when it chooses to exercise ROFR.

DHCA recommends amending Bill 38-23 to include the Rockville Department of Housing and Community Development among the list of automatically prequalified developers. Rockville DHCD's omission from the list was unintentional.

Finally, Bill 38-23 places a 5% cap on the deposit that an owner can charge if the right of first refusal is exercised. The purpose of limiting a required deposit to 5% is to prevent property owners from requiring deposits far in excess of industry norms for the purpose of thwarting the County's ability to exercise the right of first refusal within its 60-day timeline.



Apartment and Office Building Association of Metropolitan Washington Position Statement on Expedited Bill 38-23

October 10, 2023

The Apartment and Office Building Association of Metropolitan Washington (AOBA) is a non-profit trade association representing the owners and managers of more than 133,000 apartment units and over 23 million square feet of office space in Prince George’s and Montgomery Counties. In Montgomery County, AOBA members own/manage over 60,000 of the County’s estimated 83,769 rental units and 20,000,000 square feet of office space.

On behalf of its members, AOBA submits this testimony on Expedited Bill 38-23; Tenant Displacement—Right of First Refusal (ROFR) to Buy Rental Housing—Amendments.

Currently, County law requires the owner of a multifamily property to offer a right of first refusal to the County, the Housing Opportunities Commission, and any certified tenant organization. This ROFR allows those entities to match a contract to purchase the multifamily property within 60 days of the seller receiving that offer. Expedited Bill 38-23 would allow the County to assign its ROFR to a “qualified entity.” This ROFR assignment concept mirrors Prince George’s County’s ROFR law.

AOBA supports the County’s objective of preserving affordable housing. However, our members are concerned with such a broad expansion of the ROFR law and the impact that it will have on property sales in Montgomery County. Attached to this testimony is a letter from Transwestern outlining the negative impact that Prince George’s County’s law has had on sales. As noted in the letter, Prince George’s County’s use of “qualified entities” resulted in a six-month delay to a sale. The property ultimately sold for \$6.5 million less than the initial contract resulting in less transfer and recordation tax revenue to the county.

AOBA offers the following amendments to improve the ROFR law and process:

- 1. Require the county to make an initial evaluation of whether a potential sale is a good candidate for a ROFR.**

As introduced, the bill requires the property to provide a copy of the contract to all qualified entities. Rather than require the property owner to disclose confidential contract information to all qualified entities, the county should be required to make an initial evaluation and provide in writing to the owner a notice of interest within 7 days of the offer. This amendment should expressly include language that makes clear that the initial evaluation does not extend the 60 day offer period. For reference, Montgomery County only exercised its ROFR on 2 out of 44 property sales last year. Similarly, Prince George's County has waived their ROFR on 5 out of the last 7 sales in the county.

2. Shorten the initial offer period from 60 days to 45 days and shorten closing period from 180 days to 90 days.

The 60 day offer and 180 day closing periods add considerable length and potential risk to a property sale as evidenced by the Transwestern sale. Moreover, in the absence of a ROFR law, private transactions take 30-60 days to close. The offer period should be shortened to 45 days to match Howard County's ROFR law, and the closing period should be shortened to 90 days.

3. Require that the ROFR deposit matches the terms of the contract offer and is non-refundable or limit "good faith failure" to obtaining financing.

As introduced, the bill caps the deposit at 5% of the contract price. Instead, the ROFR offer should be required to match the contract terms. The bill also makes the deposit refundable in the event of a good faith failure to perform under the contract, but this provision should be limited to a good faith failure to obtain financing.

4. Create an exception process that allows buyers to enter into written agreements with the county to maintain affordability in exchange for waiving the county's ROFR.

Prince George's County routinely enters into written agreements with purchasers to maintain affordability in exchange for waiving the county's ROFR. This saves all interested parties considerable time and expense.

5. Allow the contract purchaser to provide a best and final offer.

If the goal of the legislation is to maximize affordable housing, then the contract purchaser should be given the opportunity to match or exceed the terms of the ROFR offer.

6. Create a waiver process for sales that result in a price change or fail to close resulting in a subsequent offer that is 10% or less than the initial contract.

Rather than requiring a property to go through a second round of ROFR, if a sale falls through or the price changes, the county should create a waiver process that exempts

the property from ROFR if the price change or subsequent offer is 10% or less than the initial offer.

7. Exempt new construction for 20 years.

New construction sells at a premium that often exceeds the county and any qualified entity's ability to provide affordable housing.

AOBA looks forward to working with the Council on affordable housing solutions. However, AOBA opposes Expedited Bill 38-2023 unless amended for the above reasons. If members of the Council have any questions or comments, please do not hesitate to contact Brian Anleu by emailing banleu@aoba-metro.org or calling (240) 381-0494.

October 6, 2023

Montgomery County Council
Council President Evan Glass
100 Maryland Ave
Rockville, MD 20850

RE: Montgomery County Public Hearing - Expedited Bill 38-23; Tenant Displacement – Right of First Refusal to Buy Rental Housing – Amendments

Dear Council President Glass,

We wanted to share our experiences as the broker for the sale of a 488-unit apartment community in Oxon Hill, MD in Prince George's County.

The property was openly marketed and we received over 8 initial offers from qualified buyers at the end of October 2021.

A buyer was selected and went under contract in December of 2021 at a price of \$90 million with a firm non-refundable deposit of \$1 million and subsequently began their due diligence inspections.

In January of 2022, the seller was notified that Prince George's County planned to exercise and assign its ROFR rights to a new purchaser.

As part of the Prince George's County ROFR regulations, Section VII. A. 1. B. provides the ROFR assignee with up to one hundred eighty (180) days financing contingency even when no financing contingency exists in the original contract.

The new contract purchaser conducted its own due-diligence inspections over the next few months.

In April of 2022, this new purchaser sent a letter stating that:

“Despite Purchaser’s best efforts, Purchaser’s progress in finalizing terms with its debt and equity partners has been slowed by challenges beyond Purchaser’s control” “Based on its debt and equity financing discussions, Purchaser believes the most likely path to Closing would involve the following changes to the terms of the Contract: 1. A Purchase price reduction in the amount of Seven Million Dollars (\$7,000,000) and 2. An outside closing Date of July 1, 2022”

The seller was unwilling to provide the new contract purchaser with any price adjustment and the original contract purchaser at \$90 million was no longer prepared to move forward at that price. Ultimately, we sold the property to a separate group for \$83,500,000 and closed in August of 2022.

Due to the Financing Contingency component of the Prince George's County ROFR regulations, this seller lost over \$6,500,000 and closed approximately six months later than it would have.

In addition, the original contract purchaser lost the money (approximately \$50,000) and time it had spent on Contract negotiation and Due Diligence prior to Prince George's County assigning it ROFR rights to the ROFR assignee.

Many potential purchasers in Prince George's County are no longer willing to risk the time and cost of contracting to purchase a property, because they lose the money and time they have spent if the County exercises its ROFR rights. This has almost certainly had a major impact on Revenues related to Transfer and Recordation taxes in the Prince George's County negatively impacting residents in the County at large. Perhaps more importantly, it has disincentivized investment in Prince George's County as many real estate investment firms (many of which that have a affordable housing preservation focus) cannot take on the risks associated with the County's ROFR rights as currently structured.

This has significantly affected the Multifamily sales volume in Prince George's County over the last two years as many buyers are simply looking at other markets that are less governmentally restrictive. Prior to Q4 2021, Prince George's County had not been opting to exercise their ROFR rights as frequently as they have during 2022 and 2023.

Multifamily real estate values have decreased significantly, which will also severely impact real estate assessment values moving forward.

Sincerely,

Dean Sigmon and Robin Williams
Executive Vice President – Co-Directors
Transwestern Mid-Atlantic Multifamily Group
6700 Rockledge Drive, Suite 500-A
Bethesda, MD 20817
Email: dean.sigmon@transwestern.com or robin.williams@transwestern.com
Phone: 703-851-0126 or 301-922-8731
Fax: 301-571-3423



MONTGOMERY HOUSING ALLIANCE

www.montgomeryhousingalliance.org

A coalition of organizations focused on increasing the rate of preservation and development of affordable housing in Montgomery County

Testimony on Expedited Bill 38-23, Tenant Displacement – Right of First Refusal to Buy Rental Housing – Amendments Montgomery Housing Alliance

October 10, 2023

Good afternoon Council President Glass and members of the Council. My name is Mary Kolar, and I am testifying on behalf of Montgomery Housing Alliance (MHA), a county-wide coalition of affordable housing providers and advocates across the housing continuum.

MHA strongly supports Expedited Bill 38-23. A diverse, vibrant, and economically robust Montgomery County is not possible if we cannot ensure that all residents have access to affordable homes. To meet this goal, we know that we need myriad strategies and tools; the county's right of first refusal is one such tool. Right now, however, its effectiveness is limited. The technical amendments offered in Bill 38-23 will enable the county to exercise the right in a more meaningful way, preventing harmful tenant displacement.

Affordable housing is one of the county's most pervasive and persistent challenges. According to a 2020 study done by the Montgomery County Planning Department, we are at risk of losing 7,000 to 11,000 units of naturally occurring affordable housing (NOAH) by 2030. Losses of this magnitude would further compound the deficit of affordable units we face. As you know, the county must significantly increase housing production over the remainder of the decade to meet the needs of our population. Adequately preserving NOAH units, especially along the Purple Line and other major transit corridors, will prevent need from deepening and, critically, will increase housing stability for the households who reside in these communities. Affordable housing is key to fostering equal access to economic opportunity, ensuring that the benefits of expanded transit accrue to all communities. The opportunity to advance equitable development along the Purple Line Corridor is fleeting; if the county does not act now, affordable homes will be lost.

As it currently operates, the right of first refusal ultimately results in the county transferring a property at risk of losing affordability to a preservation partner. The proposed amendments merely streamline this process. Allowing a County Executive to assign purchase to a qualified entity will alleviate the need to reserve tens of millions of dollars solely to purchase and then transfer a property. This will have a dual effect: it will free resources that can then be used for



The Montgomery Housing Alliance is a coalition of the Community Development Network of Maryland



MONTGOMERY HOUSING ALLIANCE

www.montgomeryhousingalliance.org

A coalition of organizations focused on increasing the rate of preservation and development of affordable housing in Montgomery County

additional housing development and will allow the county to significantly increase the number of units it can preserve through the right of first refusal.

We applaud the Council's ongoing commitment to housing issues, and we especially commend you for recently approving a nonprofit preservation fund. The proposed amendments will work in tandem with these funds to make the preservation process more effective and efficient. Too often, economic development leads to the displacement of low income people and people of color. This outcome is not inevitable, but preventing it requires deliberate policy choices. These technical adjustments, which are in keeping with the spirit of law, will help the county make important strides in preservation, keep communities intact, and ensure that current residents benefit from economic growth and investment in the county.

Thank you for the opportunity to provide input as you consider this matter.



The Montgomery Housing Alliance is a coalition of the Community Development Network of Maryland



**Testimony of Melissa Bondi, Policy Director,
Enterprise Community Partners Mid-Atlantic**

to the Montgomery County Council regarding:

Expedited Bill 38-23

Tenant Displacement – Right of First Refusal
to Buy Rental Housing – Amendments

Submitted Electronically
October 9, 2023

President Glass and Members of the Council:

Thank you for the opportunity to offer comments on Bill 38-23. Enterprise Community Partners is a national nonprofit founded in Maryland that exists to make a good home possible for the millions of families without one. We support community development organizations on the ground, aggregate and invest capital for impact, advance housing policy at every level of government, and build and manage communities ourselves. Since 1982, we have invested more than \$220 million toward the creation or preservation of more than 3,600 homes in Montgomery County—all to make home and community places of pride, power and belonging.

We wish to express our support for the current proposed ordinance to amend the County’s Right of First Refusal (ROFR) code chapter 53A as outlined in the staff report at introduction. These changes will allow municipalities as defined and other qualified entities meeting specific, reasonable criteria and meeting requirements outlined in the regulations.

By expanding the eligible partners who can support ROFR transactions across Montgomery County, the amendments will allow for greater public private partnerships, expanded capacity to respond to the needs of Montgomery residents for quality, committed housing affordability, and increased use of this important tool to help support anti-displacement and preservation efforts in the County.

We also support the 5% cap on deposit to help make fair-market transactions easier to assemble and pay within the short turnaround time required by ROFR execution. Alongside the additional benefits in helping the County to manage its own resources more effectively without reserving millions of dollars in such a short time period, the tool can be deployed more efficiently without loss to the property owner on value or sale.

Across the DC Metro region, we have seen the success of other ROFR programs in preserving housing affordability, increasing its quality, and importantly, doing so while mitigating the threat of resident displacement and loss of access to housing in their chosen locations. We believe these amendments will make the Montgomery County program even more effective in these same important areas of impact.

Thank you for the opportunity to share our views. I would be happy to answer any questions you may have; please contact me at MBondi@EnterpriseCommunity.org. On behalf of Enterprise Community Partners, we appreciate your consideration of our views.

CC: Rev. David Bowers, Vice President and Mid-Atlantic Market Leader

**AMENDMENT
BY
COUNCILMEMBER STEWART**

Expedited Bill 38-23, Tenant Displacement – Right of First Refusal to Buy Rental Housing -
Amendments

Beginning on page 1, insert on line 12, amending Section 53A-2, as follows:

53A-2. Definitions.

* * *

1
2 (f) *Rental housing* means a multiple-family dwelling, or a group of multiple-family
3 dwellings operated as one entity, with a total of at least 4 rental units. *Rental*
4 *housing* [does not] may include a dwelling operated for a religious or charitable
5 purpose.

* * *

6

Expedited Bill No. 38-23
Concerning: Tenant Displacement –
Right of First Refusal to Buy Rental
Housing - Amendments
Revised: 10/25/23 Draft No. 2
Introduced: September 21, 2026
Expires: December 7, 2026
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: _____
Ch. [#], Laws of Mont. Co. [year]

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the Request of the County Executive

AN EXPEDITED ACT to:

- (1) allow the County Executive to designate a qualified entity that may exercise the right of first refusal; and
- (2) generally amend the law regarding the right of first refusal.

By amending

Montgomery County Code
Chapter 53A, Tenant Displacement
Sections 53A-2 and 53A-4

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

27 organization, or ~~[[a qualified entity]]~~ County assignee a right of
 28 first refusal under this Chapter.

29 ~~[(g)]~~ (h) *Tenant* means an individual who lives in a rental housing unit with the
 30 owner's consent and is responsible for paying rent to the owner.

31 ~~[(h)]~~ (i) *Tenant organization* means an association of tenants of rental housing
 32 that:

33 (1) represents tenants of at least 30 percent (30%) of the occupied units
 34 in the rental housing; and

35 (2) is certified by the Department according to Executive regulations.

36 ~~[(i)]~~ (j) *Title* means:

37 (1) a legal or equitable ownership interest in rental housing; or

38 (2) a legal, equitable, or beneficial interest in a partnership, limited
 39 partnership, corporation, trust or other person who is not an
 40 individual, that has a legal or equitable ownership interest in rental
 41 housing.

42 * * *

43 **53A-4. Right of first refusal to buy rental housing.**

44 (a) *Right of first refusal.* An owner must offer the County, HOC, and any
 45 tenant organization the right to buy rental housing before selling the rental
 46 housing to another party, except as provided under Section 53A-5.

47 (b) *Requirements for offer.* An offer required by subsection (a) must:

48 (1) be in writing;

49 (2) be sent by certified mail, return receipt requested, within 5 business
 50 days after:

51 (A) the execution of a bona fide contract of sale, for the County,
 52 HOC, and any existing tenant organization; or

- 53 (B) the Department certifies a tenant organization, for a new
 54 tenant organization formed under Section 53A-3(b);
- 55 (3) include substantially the same terms and conditions as a pending
 56 bona fide contract of sale from a third party to buy the rental
 57 housing; [and]
- 58 (4) remain open for:
- 59 (A) 60 days after it is received, ~~[[for]]~~ by the County~~[[,]]~~ and
 60 HOC~~[[, and any qualified entity that receives an assignment~~
 61 under 53A-4(g)]]; and
- 62 (B) 90 days after it is received by any tenant organization,
 63 including a new tenant organization formed under Section
 64 53A-3(b)~~[[.]; and~~
- 65 (5) an owner must send a copy of the offer to all qualified entities
 66 contemporaneously with providing the offer to the County, HOC,
 67 and any tenant organization.
- 68 (c) *Information and inspection.* The owner must give the County, HOC,
 69 [and] any tenant organization, and ~~[[any qualified entity]]~~ County
 70 assignee:
- 71 (1) any information about the rental housing relevant to exercising the
 72 right of first refusal, such as architectural and engineering plans
 73 and specifications, and operating data; and
- 74 (2) access to the rental housing to inspect the property and conduct
 75 reasonable tests at reasonable times after reasonable notice.
- 76 The County, HOC, [and] any tenant organization, and ~~[[any qualified~~
 77 entity]] County assignee must pay the owner a reasonable deposit for any
 78 architectural and engineering plans that the owner provides. The owner

79 must refund the deposit when the plans are returned to the owner. The
80 County Executive must issue regulations to implement this subsection.

81 (d) *Exercise of right of first refusal.*

82 (1) The County, HOC, [or a] any tenant organization, or any
83 [[qualified entity that receives an assignment under 53A-4(g)]]
84 County assignee may exercise the right of first refusal by accepting
85 the offer within the applicable period under subsection (b)(4). The
86 County, County assignee, and HOC may accept an offer to buy
87 rental housing in a municipality only if the municipality approves.

88 (2) The owner must sell the rental housing under the right of first
89 refusal if the acceptance includes substantially the same terms and
90 conditions contained in the owner's bona fide contract of sale with
91 the third party, including any contract term that provides for a bona
92 fide real estate commission payable to an independent broker.
93 Notwithstanding this general requirement or any term of the
94 contract, the County, HOC, [or] a tenant organization, or any
95 [[qualified entity]] County assignee may condition its acceptance
96 on obtaining financing at any time before the deadline in paragraph
97 [[3]] (4) for completing the sale.

98 (3) The County, HOC, any tenant organization, or any [[qualified
99 entity]] County assignee must not be required to pay [to] the owner
100 a deposit of more than five percent (5%) of the contract price to
101 accept the offer and exercise its right of first refusal. The deposit
102 is refundable in the event of a good faith failure of the County,
103 HOC, any tenant organization, or any [[qualified entity to perform
104 under]] County assignee to satisfy the financing contingency set
105 forth under paragraph (2) [[the contract]].

106 [(3)] (4) The owner and the County, HOC, [or] tenant organization, or any
 107 [[qualified entity that receives an assignment under 53A-4(g)]]
 108 must complete a sale under this subsection within 180 days after
 109 the County, HOC, or tenant organization receives the owner's
 110 offer unless the owner agrees to extend the 180-day period. If the
 111 County, HOC, tenant organization or any County assignee
 112 exercises the right of first refusal and fails to close within the 180
 113 day deadline, then without providing a new offer, the owner may
 114 be permitted to transfer the rental housing to any purchaser within
 115 365 days following the date of the offer, provided that the purchase
 116 price is not less than 90% of the purchase set forth in the original
 117 offer.

118 [(4)] (5) Before a tenant organization completes a sale under paragraph
 119 [(3)] (4), a majority of all [of the] tenants must ratify the purchase.

120 [(5)] (6) The right of first refusal applies in the following order of priority:
 121 (A) the County or County assignee;
 122 (B) [[any qualified entity that receives an assignment under
 123 53A-4(g)]];
 124 [(B)] [(C)] HOC; and
 125 (C) [(D)] any tenant organization.

126 [(6)] (7) The Executive must issue regulations that establish procedures and
 127 guidelines for exercising the County's right of first refusal.

128 (e) *Expiration of right of first refusal.* If the County, HOC, [and] any tenant
 129 organization, or any [[qualified entity that receives an assignment under
 130 53A-4(g)]] County assignee do not exercise their rights of first refusal
 131 within the applicable period under subsection (b)(4), the owner may sell
 132 the rental housing to the third-party buyer under substantially the same

133 terms and conditions offered to the County, HOC, and any tenant
134 organization.

135 (f) *Immunity.* The County, HOC, [and] any tenant organization, or any
136 [[qualified entity]] County assignee are not liable for any damages
137 incurred by the owner, a third-party buyer, a tenant, or any other person
138 in connection with a decision to exercise or not exercise a right of first
139 refusal under this Section.

140 (g) *Assignment.*

141 (1) The County Executive may assign the right of first refusal, or a
142 contract to purchase rental housing, to an entity qualified by the
143 Department to receive such assignment that:

144 (A) has demonstrated expertise in acquiring, maintaining, and
145 managing rental and affordable housing;

146 (B) is a bona fide nonprofit or a for-profit entity in good
147 standing under the laws of the State of Maryland at the time
148 of assignment;

149 (C) is registered and licensed to do business in Maryland;
150 [[and]]

151 (D) commits in writing to maintain the affordability of housing
152 acquired under this subsection[[.]] ; and

153 (E) commits in writing that it must not disclose any information
154 or documentation it receives from an owner pursuant to this
155 Chapter unless required by law.

156 (2) The County Executive must adopt regulations under Method (3) to
157 establish a process for qualifying and selecting entities to receive
158 an assignment under this subsection. The regulations must
159 establish:

- 160 (A) a process that provides entities a fair opportunity to
 161 demonstrate to the County Executive or the County
 162 Executive’s designee its qualifications to receive an
 163 assignment;
- 164 (B) factors that an entity must demonstrate to be deemed
 165 eligible to receive an assignment;
- 166 (C) affordable housing restrictions that an entity must commit
 167 in writing to maintain, if selected as an assignee; and
- 168 (D) criteria the County Executive or the County Executive’s
 169 designee must use for selecting assignees from among
 170 qualified entities.
- 171 (3) An assignment by the County Executive of the County’s right of
 172 first refusal must be accomplished by a written agreement with the
 173 assignee that includes an assignment and assumption of the
 174 County’s rights and obligations under this Chapter as to its right of
 175 first refusal. The County must provide an owner with a copy of the
 176 assignment and assumption agreement within 3 business days of
 177 execution. The County’s option to assign its right of first refusal to
 178 a qualified entity must not extend the sixty (60) day exercise period
 179 under Section 53A-4(b)(4) or the 180 day closing deadline under
 180 Section 53A-4(d)(4).

181 **Sec. 2. Expedited Effective Date; transition.**

182 The Council declares that this legislation is necessary for the immediate
 183 protection of the public interest. This Act takes effect on the date on which it becomes
 184 law and applies to any sale for which the bona fide contract of sale is executed on or
 185 after the effective date.



**MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND**

KATE STEWART
COUNCILMEMBER
DISTRICT 4

November 27, 2023

To: Andrew Friedson, Councilmember Montgomery County Council District 1
Natali Fani-González, Councilmember Montgomery County Council District 6
Will Jawando, Councilmember Montgomery County Council At-Large

From: Kate Stewart, Councilmember Montgomery County Council District 4

Subject: Requested Amendment to Expedited Bill 38-23

Dear Planning, Housing, and Parks Committee Members,

I write today to request an amendment to Expedited Bill 38-23, Tenant Displacement – Right of First Refusal to Buy Rental Housing - Amendments you are considering during your December 4th meeting.

The amendment would be to delete from the Right of First Refusal (ROFR) exclusion of multifamily buildings operated for a religious or charitable purpose.

The proposed amendment language would be:

Rental housing means a multiple-family dwelling, or a group of multiple-family dwellings operated as one entity, with a total of at least 4 rental units. *Rental housing* [does not] may include a dwelling operated for a religious or charitable purpose.

Currently, we have at least 27 multifamily properties that are owned by a religious institution or charitable organization in the County. The SDAT data are not very good or readily accessible to provide an exact count, but the Planning Department staff went through all the exempt multifamily properties in the County and all the parcels owned by institutions, and found that at least 27 properties countywide are owned by a religious institution/charitable organization and have multifamily housing on the parcel.

This past year, the Town of Kensington and the County were unable to move forward with an affordable housing project because the property was exempt by the current language in the County's policy.

Given the need to address our affordable housing crisis and the benefits of ROFR to help tenants become first-time home buyers if the rental where they live is going to be sold, I ask the committee to consider removing this barrier to the County or residents of a multifamily property having the option to purchase the property.

Specifically, the amendment states "may include" because it is not my intent to have the policy cover convents or other housing for members of a religious order, but rather to cover housing that is being rented to tenants.