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July 06, 2020

Re: A Summary of the Right of First Offer Provisions in the Manufactured Homes and Manufactured Home Communities Act for Community Owners

Dear Community Owners:

One of the duties of the Office of the Manufactured Housing Ombudsperson (“MHO”) is to provide information to both manufactured home owners and manufactured home community owners about their rights and responsibilities under the law. 81 *Del. Laws* ch. 280 § 101 (2018). The Manufactured Homes and Manufactured Home Communities Act, Chapter 70 of Title 25 of the Delaware Code (“Chapter 70”), contains provisions that provide home owners, through a home owners association, with the opportunity to purchase their community when the community owner offers it for sale. Home owners and community owners are often unfamiliar with the requirements of this process because community sales are not common occurrences. In addition, the right of first offer process moves on a very short timeline, and the stakes are very high for the parties. Because of this, the MHO is providing this guidance on the Right of First Offer process so that the parties can familiarize themselves with the process in a leisurely manner. This specific document is targeted at community owners and focuses on information that community owners may need to comply with their part of the process. The companion document to this document provides similar information but with the focus on information for home owners.

The analysis in this letter is the opinion of the Office of the Manufactured Housing Ombudsperson. It is not formal opinion from the Department of Justice and is not binding upon the Department or any division or unit thereof. This letter is provided as a courtesy to inform community owners of some of their rights and responsibilities under the law.

Anyone with questions or concerns regarding the contents of this letter is welcome to contact the MHO at manufactured.housing@delaware.gov. Please be aware that the MHO, as part of the Department of Justice, is unable to provide legal advice to individuals. Within this limitation, we will be happy to answer questions and provide whatever other resources or assistance that we can.

Terminology:

- **Community Owner:** The Community Owner is the owner of the community who makes the decision to sell the community.
- **DEMHRA:** The Delaware Manufactured Home Relocation Authority.
- **HOA:** The Home Owners Association in the community that is registered with DEMHRA. *See 25 Del. C. § 7027(b).*
- **ROFO:** The Right of First Offer provided to registered HOAs by *25 Del. C. §§ 7026-7036*.¹ Although called a Right of First Offer, the ROFO process includes both a right of first offer, *25 Del. C. § 7029*, and a limited right of first refusal. *25 Del. C. §§ 7031-7032*. Because the Code uses “right of first offer” to describe the entire process, this letter uses ROFO to describe all parts of the process.
- **Third-Party Purchaser:** Any entity other than the HOA who makes an offer to purchase the community.

The ROFO Process:

Note: The following is a summary of the ROFO process and is designed to give community owners a better understanding of the overall process. It is not intended to be a detailed analysis of every possible situation. Parties should always consult the Delaware Code and may wish to consult with attorneys prior to moving forward with the sale of a manufactured home community.

Note: If the community is being sold at auction, special rules apply. *See 25 Del. C. § 7035*. Auction sales are beyond the scope of this guide.

The Seven (Potential) Steps in the ROFO Process:

As explained in more detail below, there are seven potential steps in the ROFO process. Depending on the exact circumstances, some steps may not occur. The steps are:

1. The community owner decides to sell the property and determines whether the sale is subject to the ROFO process.
2. The community owner sends the ROFO Notice.
3. The HOA returns the confidentiality agreements and the community owner sends the required confidential information to the HOA.
4. The HOA makes its formal response to the community owner.
5. If the HOA makes an offer to purchase the community at an alternative price, the community owner considers that offer, and the offer sets the limits for the right of first refusal.

¹ Chapter 70 also gives community owners a right of first refusal to purchase a home owner’s home for one percent more than the price that the home owner agreed to sell the home to another party. *25 Del. C. §§ 7013(c)(1)-(5)*. This process is unrelated to the ROFO process and is beyond the scope of this letter.

6. If the community owner receives offers to purchase the community from third parties, the third-party offers are considered in the context of the HOA's right of first refusal.
7. If the community owner accepts an offer from the HOA, the contract for sale of the community is formalized and the matter proceeds to settlement.

Step 1: The Community Owner Decides to Sell the Property and Determines Whether the Sale is Subject to the ROFO Process.

The ROFO process begins when the community owner “reach[es] a decision to sell, transfer, or convey all of part of a manufactured home community.”² 25 *Del. C.* § 7027(a). Unless the sale falls into one of the statutorily excluded categories, 25 *Del. C.* § 7028, this is the point at which the community owner is obligated to begin the ROFO process by sending a ROFO Notice. *Id.* The Code does not define what it means to “reach[] a decision” to sell the community, but logic and the parties’ obligation to negotiate in good faith, 25 *Del. C.* § 7026(a), suggest that this event occurs very early. Specifically, “reaching a decision to sell” most likely occurs prior to publicly marketing the community as available for sale or any solicitation of bids from third-party purchasers. It certainly occurs prior to the acceptance of an offer from a third-party purchaser. Because the penalties for a failure to properly follow the process and negotiate in good faith can be severe,³ the MHO suggests that community owners err on the side of caution and send the ROFO Notice as early as possible.

Certain types of sales are exempt from the ROFO process, including foreclosure sales, transfers to family members, and sales by a partnership to one or more of its partners. 25 *Del. C.* § 7028. If the sale falls into one of the exempted categories, the community owner is not required to send a ROFO Notice or go through any other part of the ROFO process. Community owners selling their communities through an exempted sale may wish to send a courtesy notification to the HOA to inform the HOA that (1) the community is being sold and (2) the sale is not subject to the ROFO process. Such courtesy notifications may help prevent potential conflict or confusion, but community owners are not required to send them.

If the sale falls into one of the exempted categories, there is no further process, and the community owner can continue with the sale. If the sale is not exempt, the community owner must send the ROFO Notice.

Step 2: The Community Owner Sends the ROFO Notice.

The ROFO Notice must be sent to the following parties:

1. The HOA, if one exists
2. DMHOA
3. DEMHRA

² For brevity, “sell, transfer, or convey” is hereinafter referred to as “sell,” and a “sale, transfer, or conveyance” is hereinafter referred to as a “sale.”

³ A party that fails to meet its obligations under the ROFO process or fails to negotiate in good faith can be liable for damages and attorneys’ fees. 25 *Del. C.* § 7026. The aggrieved party can also seek equitable relief, and willful violations are considered a per se violation of the Consumer Fraud Statute. *Id.*

4. The Consumer Protection Unit of the Department of Justice (“CPU”)

25 *Del. C.* §§ 7027(d)(1)-(3). If there is no HOA, the community owner must also provide DEMHRA with a list of names and mailing addresses for home owners in the community. 25 *Del. C.* § 7027(d)(2). The ROFO Notice must be sent “by overnight service with signature receipt.”⁴ 25 *Del. C.* §§ 7027(d)(1)-(3).

The ROFO Notice must contain specific information. The complete list can be found at 25 *Del. C.* § 7027(d)(4). The Notice must include:

1. A statement that the community is being sold and what specifically (i.e., real property, fixtures, etc.) is being sold.
2. The price and any special conditions of the sale
3. A form confidentiality agreement that representatives of the HOA can sign and return to gain access to confidential information (e.g., community operating expenses) that the HOA may need to decide whether to make an offer to purchase the community and what amount to offer. The agreement can include reasonable penalties for a breach of confidentiality.
4. A statement that the confidentiality agreement must be signed by any member of the HOA seeking to utilize the confidential and that the signed agreement must be returned to the community owner by overnight service with signature receipt.
5. A statement that the community owner will send the price, special conditions to the sale, and “all significant and material information” by overnight service with signature receipt once the signed confidentiality agreements are received.
6. A statement that the HOA has 30 calendar days from the date of mailing of the ROFO Notice to respond to the offer.

Step 3: The HOA Returns the Confidentiality Agreements and the Community Owner Sends Information to the HOA.

The HOA may return the signed confidentiality agreements as part of its formal response to the ROFO Notice (Step 4, *infra*) or separate from (most likely prior to) its formal response. The community owner must then send the required information by overnight service with signature receipt. 25 *Del. C.* § 7027(d)(4)e. The information must include “the price and any special conditions material to the transaction for the sale . . . and all significant and material information, including operating expenses and other relevant operating and capital expenditure costs related to the community.” *Id.* The MHO suggests that community owners seeking to meet their obligations under this section provide the same information to the HOA that would be requested by a sophisticated, third-party purchaser who was purchasing the community.

⁴ The Code does not define “overnight service with signature receipt.” Any service that guarantees overnight delivery and requires a signature upon receipt should suffice. The MHO recommends utilizing a service that includes delivery on Saturdays as best practice. This will avoid potential delays in receipt if a ROFO notice is sent on a Friday where the following Monday is a holiday (e.g., Memorial Day or Labor Day).

The receipt of the signed confidentiality agreements and the sending of the relevant information in response does not affect the 30-day deadline for the HOA to provide a formal response to the ROFO Notice.

Step 4: The HOA’s Formal Response to the ROFO Notice.

The HOA’s response must be in writing, sent within 30 days of the date of mailing of the ROFO Notice, and sent by overnight service with signature receipt. 25 *Del. C.* § 7029(a). The HOA response must clearly indicate that it is taking one of the following actions:

1. The HOA accepts the purchase price and special conditions described in the ROFO Notice. 25 *Del. C.* § 7029(a)(1). If this is the response, the parties proceed with the sale of the community as described in Step 7 below.
2. The HOA does not accept the price and any special conditions described in the ROFO notice but intends to offer to purchase the community at an alternative price. 25 *Del. C.* § 7029(a)(2).
3. The HOA has no interest in purchasing the community and does not intend to proceed further. 25 *Del. C.* § 7029(a)(3).

If the HOA fails to respond to the ROFO Notice or fails to respond in material compliance with Section 7029, the community owner, at the end of the 30-day response period, may deem that failure to be notice that the HOA does not wish to purchase the community. 25 *Del. C.* §§ 7029(a)(3), 7029(b). If the HOA states that it is not interested in purchasing the community or fails to respond as required, the community owner must file an affidavit of compliance. 25 *Del. C.* § 7029(c). The community must also file an affidavit of compliance if the HOA fails to respond during other points in the ROFO process. *Id.*

An HOA that fails to respond as required loses its right to purchase the community for “the remainder of the 12-month period that commenced on the date of the [ROFO Notice].”⁵ 25 *Del. C.* § 7029(d).

Step 5: If the HOA Makes an Offer at an Alternative Price.

If the HOA makes an offer to purchase the community at an alternative price (“alternative offer”), the community owner can either accept the alternative offer or not accept the offer. If the community owner accepts the alternative offer, the sale of the community moves forward as described in Step 7 below. If the community owner does not accept the alternative offer, the ROFO process becomes a limited right of first refusal with the limits set by the amount of the alternative offer.⁶

⁵ An HOA that loses its right to purchase the community under the provisions of the ROFO process is not forbidden from purchasing the community. The end of the ROFO process merely terminates the rights that give the HOA special treatment as compared to a third-party purchaser. The HOA, like anyone else who might wish to purchase the community, is always able to make another offer to purchase the community. The community owner is free to accept or reject that offer as it would with any other potential purchaser.

⁶ There is no way for a community owner to affirmatively reject an alternative offer. It is either accepted or it sets the limits of the ROFO process’s right of first refusal.

An alternative offer remains valid for 6 months and can be withdrawn or renewed by the HOA. 25 *Del. C.* § 7030(a). In addition, the current offer can be amended by the HOA at any time.⁷ There is no requirement that an alternative offer be within a certain percentage of the sale price listed in the ROFO Notice or that it accept any special conditions in the ROFO Notice.⁸

The alternative offer becomes void if the community owner notifies the HOA that it is removing the community from the market.⁹ *Id.*

Step 6: Offers from Third-Party Purchasers.

If the community owner receives an offer to purchase the community from a third-party purchaser (a “third-party offer”) that the community owner wishes to accept,¹⁰ the community owner’s obligations depend on whether the third-party offer is greater or less than the HOA’s alternative offer.

A Third-Party Offer that Does Not Exceed the HOA’s Alternative Offer:

If the third-party offer is less than or equal to the HOA’s alternative offer, the community owner must provide the HOA with notice of the third-party offer. The notice must include “the price and any special conditions material to the transaction.” 25 *Del. C.* § 7031(b). The notice must be sent by overnight service with signature receipt. *Id.* The HOA must be given 30 calendar days to match the third-party offer. 25 *Del. C.* § 7031(a)(2). The HOA has the right to receive tangible proof of the third-party offer within three days of the community owner’s receipt of a written demand for such proof. 25 *Del. C.* § 7031(c).

If the HOA matches the price and special conditions of the third-party offer within 30 days, the community owner must move forward with the next step of selling the community to the HOA. 25 *Del. C.* § 7031(d). If the HOA does not match the price and special conditions of the third-party offer within 30 days, the community owner is free to accept the third-party offer.

A Third-Party Offer that Exceeds the HOA’s Alternative Offer:

If the third-party offer exceeds the HOA’s alternative offer, the community owner can accept the higher offer without further obligation to the HOA unless:

1. There have been “significant or material changes in terms and conditions.” 25 *Del. C.* § 7032(a).

⁷ The 30-day response window to the ROFO Notice only applies to the HOA’s initial response. Once the alternative offer is on the table, 30-day window no longer applies, and the HOA can make amendments at any time.

⁸ The HOA is required to negotiate in good faith. 25 *Del. C.* § 7026(a). As such, there are some limitations on alternative offers (e.g., it is unlikely that an offer of one dollar would be acceptable), but there are no specific requirements for alternative offers.

⁹ The community owner can take the community off the market at any time. The community owner would then be obligated to restart the ROFO process with a new ROFO notice prior to placing the community up for sale again.

¹⁰ If a community owner receives a third-party offer that it does not intend to accept, it is not required to take any action under the ROFO process. If it later reconsiders and wishes to accept the offer, it must then proceed with the relevant provisions of the ROFO process.

2. The HOA alternative offer is within a certain percentage of the third-party offer:
 - a. If the third-party offer is less than \$40 million and the HOA alternative offer is within 6% of the third-party offer. 25 Del. C. § 7032(a)(1).¹¹
 - b. If the third-party offer is \$40 million or greater and the HOA alternative offer is within 4.5% of the third-party offer. 25 Del. C. § 7032(a)(2).

If the community owner is not obligated to further negotiate with the HOA and accepts the higher third-party offer, it must send a certification to the HOA and the Consumer Protection Unit. The certification must include whether the accepted offer contained any significant material changes in terms or conditions. 25 Del. C. § 7032(d).

If the community owner is required to further negotiate with the HOA, it must send a notice to the HOA by overnight service with signature receipt. 25 Del. C. § 7032(b). It must include the price and any special conditions material to the potential sale. *Id.* If the community owner receives a written request for tangible evidence of the higher third-party offer, the community owner must send such evidence to the HOA within three business days and by overnight service with signature receipt requested. *Id.*

If the HOA is entitled to notice of the higher third-party offer, it has seven business days to match the third-party offer. 25 Del. C. § 7032(c). If the HOA matches the offer, the community owner must move forward with the next step of selling the community to the HOA. The community owner may not accept or entertain a higher offer from a third party after the HOA matches the third-party offer. *Id.*

If the HOA does not match the higher third-party offer within seven business days, the community owner may accept the higher third-party offer.

Step 7: Contract of Sale and Settlement

If an HOA offer to purchase the community is accepted through one of the processes above, the HOA has thirty days to formalize a contract for sale. 25 Del. C. § 7033(a). This

¹¹ When calculating whether the HOA alternative offer is sufficiently close to the higher third-party offer, the higher third-party offer is the reference number. The relevant question is thus whether the HOA alternative offer is no more than [6% or 4.5%] less than the higher third-party offer. The question is not whether the higher third-party offer is more than [6% or 4.5%] greater than the HOA alternative offer. The difference between these two questions is small but can be significant if the HOA's alternative offer is near the cutoff.

Consider an example: an HOA offer of \$9.4 million and a third-party offer of \$10 million. According to the statute, the HOA is entitled to a chance to match the higher offer. Six percent of \$10 million is \$600,000. The right of the HOA to match the offer is triggered because the HOA offer of \$9.4 million is within \$600,000 of the third-party offer.

If, contrary to the statutory language, the community owner calculates the 6% based on the HOA's offer (instead of the third-party offer), the result is different. The HOA would not be entitled to an opportunity to match the third-party offer, because 6% of the HOA's \$9.4 million offer is \$564,000. The \$10 million third-party offer exceeds the HOA offer by more than 6% because it exceeds \$9.964 million.

period may not be used to renegotiate price or other terms and conditions previously agreed to unless both parties agree to such renegotiation in writing. *Id.*

If the HOA does not formalize the contract within 30 days, the community owner is no longer obligated to negotiate with the HOA for the remainder of the 12-month period that started with the sending of the ROFO notice. *25 Del. C. § 7033(b).*

Settlement must be within 90 days of the date of the contract. *25 Del. C. § 7033(c).* This period can only be extended:

1. By written agreement signed by both parties. The parties are not obligated to agree to an extension. *25 Del. C. §§ 7033(d)(1)-7033(d)(2).*
2. By either party by written notice to the other party at least 5 business days prior to the end of the 90-day period, but only to the extent that there were “unused” days in the two prior 30-day periods (i.e., the 30-day period to respond to the ROFO notice and the 30-day period to enter into a formalized contract).¹² *25 Del. C. § 7033(d)(3).*

If the sale is not completed by the deadline, the HOA’s rights under the ROFO process are terminated for the remainder of the 12-month period that started with the mailing of the ROFO notice. *25 Del. C. § 7034.* The HOA’s rights do not terminate if the failure to complete the sale was due to the community owner’s default. *Id.*

Conclusion:

The MHO hopes that this letter has provided a basic understanding of the ROFO process so that the process will proceed smoothly when community owners decide to sell their communities. The MHO is available to address questions or concerns about this letter or other matters by email at manufactured.housing@delaware.gov. Additional information is available on our website at <https://attorneygeneral.delaware.gov/fraud/cpu/manuhousing/>.

Sincerely,

/s/Brian S. Eng

Brian S. Eng
Deputy Attorney General
Manufactured Housing Ombudsperson

¹² E.g., If the HOA mailed its response to the ROFO notice 20 days after the ROFO notice was mailed (leaving 10 unused days), and the parties formalized the contract in 20 days (leaving 10 unused days), either party could use those 20 unused days to extend the deadline for settlement beyond the 90-day limit.