



Board of County Commissioners

To: Town of Lyons
Date: September 8, 2016
Re: Restrictions on Transfer and Use of HMGP and CDBG-DR buyout properties

Restrictions on Transfer of HMGP and CDBG-DR Buyout Properties

The County and the Town of Lyons have agreed that, for buyout properties purchased with Hazard Mitigation Grant Program (HMGP) and Community Development Block Grant – Disaster Recovery (CDBG-DR) funds in the Lyons Planning Area, the County will transfer ownership of such properties upon the request of the Town.

The HMGP and CDBG-DR programs impose restrictions upon the transfer of properties purchased with the grant funds of each. The consequences for violating the restrictions for use of the property are reimbursements of the grant funds used to acquire the properties at issue or court action to compel performance. These requirements are briefly summarized below.

HMGP

Under the HMGP program, FEMA requires a model deed restriction be imposed on each buyout property. The deed restriction requires that the county obtain written approval of the FEMA Regional Administrator, through the State, prior to any transfer. After transfer, the property will be subject to the restriction on the use of the property and to applicable FEMA regulations, rules, and requirements. The FEMA regulations that the deed restriction mirrors require that the proposed transferee sign a statement acknowledging and agreeing to be bound by the terms of the regulations. (*See* 44 C.F.R. 80.19(b)(1).) Either FEMA or the State may enforce the terms of the agreement against both the County and Lyons in the event of a violation of the deed restriction. The FEMA-approved deed restriction is attached.

CDBG-DR

Under the CDBG-DR program, transfers are not restricted by the use covenant required by program rules, but the County may wish to consult with the agency administering the CDBG-DR grant funding agreement prior to transfer to ensure the County remains in compliance with the grant agreement. The restrictions on the allowable uses of the property, however, will continue. A change in use of the property would likely require reimbursement from the County of the grant funds used for purchase. (*See* 78 Fed. Reg. 14,329 (March 5, 2013), which states: “Any property

Cindy Domenico County Commissioner **Deb Gardner** County Commissioner **Elise Jones** County Commissioner

acquired, accepted, or from which a structure will be removed pursuant to the project will be dedicated and maintained in perpetuity for a use that is compatible with open space, recreation, or wetlands management practices.” *Also see* 24 C.F.R. §§ 570.208 & 570.205.) The approved covenant for CDBG-DR buyout properties is attached.

Restrictions on Use of HMGP and CDBG-DR Buyout Properties

In addition to the HMGP deed restriction and CDBG-DR use covenant (*see attached*), other regulations and rules restrict the post-buyout use of property. Please also note that as long as the properties remain in the unincorporated County, the Boulder County Land Use Code, including the Boulder County Floodplain Regulations, apply.

HMGP

In addition to the deed restriction, the use of properties purchased with HMGP funds is subject to 44 C.F.R. § 80.19, attached, which contains additional clarification on allowable uses and specifics on what allowable uses do not include. (*See, e.g.*, 44 C.F.R. 80.19(a)(1) & (2).)

CDBG-DR

78 Fed Reg 14329 (5 March 2013), attached, specifies additional restrictions on buyout properties (*see attached*). Properties purchased through a buyout program may not be redeveloped, except as specified in the use covenant. (See 78 Fed Reg 14345, Paragraph 31.b.).

HMGP SAMPLE MODEL DEED RESTRICTION

In reference to the property described in Exhibit A to the attached Warranty Deed (“Property”) from [name] participating in the federally-assisted acquisition project (the “Grantors”), and the County of Boulder, (the “Grantee” or the “County”), its successors and assigns, the undersigned Parties agree as follows:

Recitals

- A. The Robert T. Stafford Disaster Relief and Emergency Assistance Act, ("The Stafford Act"), 42 U.S.C. § 5121 et seq., identifies the use of disaster relief funds under § 5170c, Hazard Mitigation Grant Program, including the acquisition and relocation of structures in the floodplain;
- B. The mitigation grant program provides a process for a local government, through the State, to apply for federal funds for mitigation assistance to acquire interests in property, including the purchase of structures in the floodplain, to demolish and/or remove the structures, and to maintain the use of the Property as open space in perpetuity;
- C. The State of Colorado has applied for and been awarded such funding from the Department of Homeland Security, Federal Emergency Management Agency and has entered into a mitigation grant program Grant Agreement with FEMA which is incorporated herein by reference; making it a mitigation grant program grantee;
- D. The Property is located in Boulder County, and the County participates in the National Flood Insurance Program and is in good standing with NFIP as of the date of the Deed;
- E. The County, acting by and through the Boulder County Board of County Commissioners, has applied for and been awarded federal funds pursuant to an agreement with the State of Colorado dated August 13, 2015 (“State-Local Agreement”), and herein incorporated by reference, making it a mitigation grant program subgrantee;
- F. The terms of the mitigation grant program statutory authorities, Federal program requirements consistent with 44 C.F.R. Part 80, the Grant Agreement, and the State-Local Agreement require that the Grantee agree to conditions that restrict the use of the land to open space in perpetuity in order to protect and preserve natural floodplain values;

Now, therefore, the grant is made subject to the following terms and conditions:

1. Terms. Pursuant to the terms of the Hazard Mitigation Grant Program statutory authorities, Federal program requirements consistent with 44 C.F.R. Part 80, the Grant Agreement, and the State-Local

Agreement, the following conditions and restrictions shall apply in perpetuity to the Property described in the attached deed and acquired by the Grantee pursuant to FEMA program requirements concerning the acquisition of property for open space:

- a. **Compatible uses.** The Property shall be dedicated and maintained in perpetuity as open space for the conservation of natural floodplain functions. Such uses may include: parks for outdoor recreational activities; wetlands management; nature reserves; cultivation; grazing; camping (except where adequate warning time is not available to allow evacuation); unimproved, unpaved parking lots; buffer zones; and other uses consistent with FEMA guidance for open space acquisition, Hazard Mitigation Assistance, Requirements for Property Acquisition and Relocation for Open Space.
- b. **Structures.** No new structures or improvements shall be erected on the Property other than:
 - i. A public facility that is open on all sides and functionally related to a designated open space or recreational use;
 - ii. A public rest room; or
 - iii. A structure that is compatible with open space and conserves the natural function of the floodplain, including the uses described in Paragraph 1.a., above, and approved by the FEMA Administrator in writing before construction of the structure begins.

Any improvements on the Property shall be in accordance with proper floodplain management policies and practices. Structures built on the Property according to paragraph b. of this section shall be floodproofed or elevated to at least the base flood level plus 1 foot of freeboard, or greater, if required by FEMA, or if required by any State, Tribal, or local ordinance, and in accordance with criteria established by the FEMA Administrator.

- c. **Disaster Assistance and Flood Insurance.** No Federal entity or source may provide disaster assistance for any purpose with respect to the Property, nor may any application for such assistance be made to any Federal entity or source. The Property is not eligible for coverage under the NFIP for damage to structures on the property occurring after the date of the property settlement, except for pre-existing structures being relocated off the property as a result of the project.
- d. **Transfer.** The Grantee, including successors in interest, shall convey any interest in the Property only if the FEMA Regional Administrator, through the State, gives prior written approval of the transferee in accordance with this paragraph.
 - i. The request by the Grantee, through the State, to the FEMA Regional Administrator must include a signed statement from the proposed transferee that it acknowledges and agrees to be bound by the terms of this section, and documentation of its status as a qualified conservation organization if applicable.
 - ii. The Grantee may convey a property interest only to a public entity or to a qualified conservation organization. However, the Grantee may convey an easement or lease to a private individual or entity for purposes compatible with the uses described in paragraph (a), of this section, with the prior approval of the FEMA Regional Administrator, and so long as the conveyance does not include authority to control and enforce the terms and conditions of this section.

- iii. If title to the Property is transferred to a public entity other than one with a conservation mission, it must be conveyed subject to a conservation easement that shall be recorded with the deed and shall incorporate all terms and conditions set forth in this section, including the easement holder's responsibility to enforce the easement. This shall be accomplished by one of the following means:
 - a) The Grantee shall convey, in accordance with this paragraph, a conservation easement to an entity other than the title holder, which shall be recorded with the deed, or b) At the time of title transfer, the Grantee shall retain such conservation easement, and record it with the deed.
 - iv. Conveyance of any property interest must reference and incorporate the original deed restrictions providing notice of the conditions in this section and must incorporate a provision for the property interest to revert to the State, Tribe, or local government in the event that the transferee ceases to exist or loses its eligible status under this section.
2. Inspection. FEMA, its representatives and assigns including the state or tribe shall have the right to enter upon the Property, at reasonable times and with reasonable notice, for the purpose of inspecting the Property to ensure compliance with the terms of this part, the Property conveyance and of the grant award.
3. Monitoring and Reporting. Every three years on September 30, the Grantee (mitigation grant program subgrantee), in coordination with any current successor in interest, shall submit through the State to the FEMA Regional Administrator a report certifying that the Grantee has inspected the Property within the month preceding the report, and that the Property continues to be maintained consistent with the provisions of 44 C.F.R. Part 80, the property conveyance, and the grant award.
4. Enforcement. The Grantee (mitigation grant program subgrantee), the State, FEMA, and their respective representatives, successors and assigns, are responsible for taking measures to bring the Property back into compliance if the Property is not maintained according to the terms of 44 C.F.R. Part 80, the property conveyance, and the grant award. The relative rights and responsibilities of FEMA, the State, the Grantee, and subsequent holders of the property interest at the time of enforcement, shall include the following:
 - a. The State will notify the Grantee and any current holder of the property interest in writing and advise them that they have 60 days to correct the violation.
 - i. If the Grantee or any current holder of the property interest fails to demonstrate a good faith effort to come into compliance with the terms of the grant within the 60-day period, the State shall enforce the terms of the grant by taking any measures it deems appropriate, including but not limited to bringing an action at law or in equity in a court of competent jurisdiction.
 - ii. FEMA, its representatives, and assignees may enforce the terms of the grant by taking any measures it deems appropriate, including but not limited to 1 or more of the following:
 - a) Withholding FEMA mitigation awards or assistance from the State or Tribe, and Grantee; and current holder of the property interest.
 - b) Requiring transfer of title. The Grantee or the current holder of the property interest shall bear the costs of bringing the Property back into compliance with the terms of the grant; or
 - c) Bringing an action at law or in equity in a court of competent jurisdiction against any or all of the following parties: the State, the Tribe, the local community, and their respective successors.

- 5 Amendment. This agreement may be amended upon signatures of FEMA, the State, and the Grantee only to the extent that such amendment does not affect the fundamental and statutory purposes underlying the agreement.
- 6 Severability. Should any provision of this grant or the application thereof to any person or circumstance be found to be invalid or unenforceable, the rest and remainder of the provisions of this grant and their application shall not be affected and shall remain valid and enforceable.

[Signed by Grantor(s) and Grantee, witnesses and notarization in accordance with local law.]

[Signature Page to Follow]

CDBG-DR RESTRICTIVE COVENANT

THIS RESTRICTIVE COVENANT RUNNING WITH LAND is entered into by and between [Sellers] (“Sellers”), and the **County of Boulder**, a body corporate and politic (“County”).

RECITALS

Pursuant to that certain warranty deed dated _____, 2016, and recorded at Reception No. _____ of the real property records of Boulder County, Colorado (the “Deed”), the Sellers conveyed to the County that certain real property described on Exhibit A attached hereto and incorporated herein by reference (the “Property”);

The County received assistance towards the purchase of the Property from a United States Department of Housing and Urban Development Community Development Block Grant for Disaster Recovery, which funds were allocated to the State of Colorado, which, in turn, granted funds to the County as part of a flood buyout program (“Buyout Program”);

Conditions of the Buyout Program, pursuant to 78 Fed. Reg. 14,329 (March 5, 2013), require that real property purchased with Buyout Program proceeds must be used as open space, recreational, or wetland management purposes in perpetuity (“Program Requirements”); and

Sellers and County each desire to restrict the future use of the Property in accordance with the Program Requirements.

AGREEMENT

NOW, THEREFORE, in consideration of the recitals, promises, covenants, and undertakings described above and hereinafter set forth, Sellers and the County agree as follows:

1. The use of the Property shall be limited to uses that are compatible with the Program Requirements.
2. No new structures or improvements may be erected on the Property other than:
(a) a public facility that is open on all sides and is functionally related to a designated open space or recreational use; (b) a public rest room; (c) flood control measures; or (d) a structure that the local floodplain manager approves in writing before the commencement of construction of the structure.

The restrictions contained herein shall run with and burden the Property, shall bind all future owners of the Property, and shall be enforceable by Sellers against the County and any successor in interest.

[Signature Page to Follow]