CLTs and the Law: How Did We Get Here and Where Do We Go?
2022 Montana Shared-Equity Housing Summit

Presented by:
Lori Freeman Esq., General Counsel, Trust Montana
(406) 546-3873
lori@trustmontana.org
Back in the Beginning...

- 1969 New Communities Inc.
- 1992 – National Affordable Housing Act defined a CLT & opened federal funding
A Movement Takes Hold

Two Different Models

1. CLT owns title to the land and uses a ground lease to enforce use and resale restrictions, ensuring homes serve the population who needs them most and that the homes remain affordable in perpetuity.

2. CLT holds an interest in the property as a covenant holder, where the property owner grants restrictive covenants, akin to the ground lease provisions, that attach to the property and “run with the land.”

• Connecticut - An Act Concerning Community Land Trusts, enacted June 1990

• Maine - Affordable Housing Covenants, enacted June 1991
Continuing Forward…

- 2002 – ICE updated the Legal Manual
- 2011 – National CLT Network/Academy (now Grounded Solutions) published the CLT Technical Manual with Model Ground Lease

- Maryland, Texas, and S. Carolina, followed Connecticut in enacting comprehensive Acts for CLTs using ground leases

- Other state’s statutes allow for deed restrictions in support of affordable housing, such as Maine (1991) and Oregon (2007) - Affordable Housing Covenants

- 2021 - Grounded Solutions published Model Declaration of Affordability Covenants with Refinance and Resale Restriction and Purchase Option
Progress in Montana

- By 2017, there were a handful of active CLTs in Montana operating pursuant to the guidance of the 2011 CLT Technical Manual with Model Ground Lease.

- With the encouragement of CLT practitioners for state recognition, Representatives Fern and Garner introduced House Bill 200 which was enacted April 20, 2017.

- House Bill 200 proposed to amend Title 70, Chapter 23 – The Unit Ownership Act – to include a definition of community land trusts.
What CLTs Got in 2017

Title 70, Chapter 23, Section 102 (MCA 70-23-102)

(5) “Community Land Trust means a nonprofit organization exempt from taxation under section 501(C)(3) of the Internal Revenue Code that holds title to land beneath individually owned housing units for the purpose of preserving affordable housing.”

(6) Definition of a condominium “does not include a ... community land trust, or a housing unit located on land belonging to a community land trust.”
Practical Results of 2017 Law

**Positives**
- CLTs are nonprofit organizations exempt from taxation
- CLTs hold title to land (separate from housing units)
- CLTs preserve affordable housing

**Negatives**
- CLT holds title to land beneath individually owned housing units.
  - does not include land under multi-family units, whether owned or rented
  - does not include farm land
  - does not include commercial buildings
- A condominium **does not include** a housing unit located on land belonging to a community land trust.
To keep it simple, the new definition provides:

(6) “Community land trust” means a nonprofit organization under section 501(c)(3) of the Internal Revenue Code that holds title to land beneath individually owned units, including but not limited to single-family homes, townhomes, condominiums, and multi-unit rental properties for the purpose of preserving affordable housing.

The definition of condominium was returned to its former language, prior to the 2017 CLT statute, with no reference to CLTs.
According to current Montana law, CLTs can now hold title to land beneath both townhomes and condominiums.
What Do the Changes Mean?

**Townhomes**
- Townhome - Person owns unit and separate title to the land under the unit. CLT can hold title to the footprint while the townhome owner holds title to the improvements - the same as with a single family home.
- CLT owns the land under the entire townhome development. The land would not be a common element subject to the HOA but the CLT would be responsible for it.

**Condominiums**
- CLT owns the land under an entire condominium project and leases an undivided interest in that land to each individual owner of a unit. The land would not be a common element subject to the condo association.
- CLT owns the land under an entire condominium project and then enters into a ground lease agreement with the condominium association. The ground lease could make the association responsible for the land but the CLT would then be relying on the condo association to enforce the terms of the ground lease as to each unit owner.
- CLT owns the entire property under the condominium and the project itself and sells the right to a long term lease in the individual unit (sells a leasehold interest, with ownership rights, in the condominium units).
Restrictive Covenants in Montana

- Can a CLT contract with a homeowner to impose restrictive covenants on the homeowners property?
- MCA 70-17-203: a covenant contained in a grant of an estate in real property that is made for the direct benefit of the property then in existence runs with the land. Covenants running with the land must be appurtenant to the estate and they pass with it to future owners.
- Montana Supreme Court has eroded the strict language of the statue and seems to allow restrictive covenants.
Model Declaration of Affordability Covenants with Refinance and Resale Restriction and Purchase Option (Plus Commentary)

- Program Manager or homeowner must own the property at the time the Declaration of Covenants is signed and recorded.
- Deed conveying title should explicitly reference the covenants.
- Program Mortgage required.
- Must have consideration for the homebuyer to sign the covenants (reduced price, dpa, low interest rate).
- Covenants “run with the land” for the term and are binding on homeowner and successors and assigns.
- Program Manager should work with homeowner at time of resale to make sure the buyer signs a new Declaration of Covenants and Program Mortgage.

Shared equity homeownership programs can use a declaration of covenants (also known as a deed restriction or deed covenant) as their legal agreement with a homeowner. This model declaration of covenants also includes the companion 2021 Model Subordinate Program Mortgage.
What is Next?

- Keep thinking creatively but proceed cautiously.
- Rely on current legislative recognition of the CLT model (thoughtfully and strategically consider future amendments or an Affordable Housing Act).
- Look to model forms and comprehensive legal analysis provided by Grounded Solutions.