

1 **BY AUTHORITY**

2 ORDINANCE NO. _____
3 SERIES 2022

COUNCIL BILL NO. 22-1578
COMMITTEE OF REFERENCE:
Finance & Governance

4
5 **A BILL**

6 **For an ordinance authorizing the issuance and sale of an amount not to exceed**
7 **\$25,670,000 of the City and County of Denver, Colorado Multifamily Housing**
8 **Revenue Note (Montbello FreshLo – The Hub), Series 2023A and not to exceed**
9 **\$7,330,000 of the City and County of Denver, Colorado Multifamily Housing**
10 **Revenue Taxable Note (Montbello FreshLo – The Hub), Series 2023B for the**
11 **purpose of financing the acquisition, construction and equipping of an**
12 **affordable multifamily rental housing facility located in the City and County of**
13 **Denver, Colorado and to pay certain expenses of such Notes (as defined below)**
14 **issue; approving and authorizing execution of a Funding Loan Agreement, a**
15 **Borrower Loan Agreement and a Tax Regulatory Agreement (each as defined**
16 **below) with respect to the Notes; making findings and determinations with**
17 **respect to the Project (as defined below) and the Notes; authorizing the**
18 **execution and delivery of related documents; and repealing all action heretofore**
19 **taken in conflict herewith.**

20 **BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:**

21 **WHEREAS**, the City and County of Denver, Colorado (the “City”) is a legally and regularly
22 created, established, organized and validly existing home rule city, municipal corporation and
23 political subdivision under the provisions of Article XX of the Constitution of the State of Colorado
24 (the “State”) and the Home Rule Charter of the City (the “Charter”); and

25 **WHEREAS**, the Charter, the County and Municipality Development Revenue Bond Act,
26 constituting Article 3 of Title 29, Colorado Revised Statutes, as amended (the “Act”) and the
27 Supplemental Public Securities Act, constituting Part 2, Article 57 of Title 11, Colorado Revised
28 Statutes, as amended (the “Supplemental Public Securities Act”), authorize cities and counties in
29 the State to issue revenue notes to finance one or more projects, including any land, buildings or
30 other improvements and all real and personal properties, whether or not in existence, which shall be
31 suitable for residential facilities for low- and middle-income families and persons and intended for
32 use as the sole place of residence by the owners or intended occupants to the end that more
33 adequate residential housing facilities for low- and middle-income families and persons may be
34 provided, which promote the public health, welfare, safety, convenience and prosperity; and

35 **WHEREAS**, the City is further authorized by the Act, the Supplemental Public Securities Act
36 and the Charter to issue its revenue notes for the purposes of defraying the costs of financing any
37 such project, including all incidental expenses incurred in issuing such notes, and to secure the

1 payment of such notes as provided in the Act, the Supplemental Public Securities Act and the
2 Charter; and

3 **WHEREAS**, in addition to its powers under the Act and the Supplemental Public Securities
4 Act, the City is also possessed of plenary powers under the Colorado Constitution and the Charter
5 as to matters of local or municipal concern; and

6 **WHEREAS**, representatives of FreshLo LIHTC LLLP, a Colorado limited liability limited
7 partnership, including any subsidiaries, affiliates, successors or assigns (but only if such
8 subsidiaries, affiliates, successors or assigns are acceptable to the City) (the “Borrower”), has
9 presented to the City a proposal whereby the City will issue its multifamily housing revenue notes
10 pursuant to the Act, the Supplemental Public Securities Act and the Charter to finance the cost of a
11 project under the Act, the Supplemental Public Securities Act and the Charter, which project consists
12 of: (A) the acquisition of a parcel of land located at 12444 East Albrook Drive, in Denver, Colorado
13 (the “Land”); (B) the construction and equipping of an approximately 97-unit affordable multifamily
14 rental housing facility to be known as Montbello FreshLo – The Hub, together with any functionally
15 related and subordinate facilities, in accordance with the Internal Revenue Code of 1986, as
16 amended (the “Code”) and applicable regulations promulgated by the United States Department of
17 Housing and Urban Development (“HUD”) and the Governmental Lender (collectively, the
18 “Improvements”); (C) the acquisition of and installation in and around the Improvements of certain
19 items of machinery, fixtures, equipment and other items of tangible personal property; and (D) the
20 payment of certain costs and expenses incidental to the issuance of the Notes, as defined herein
21 (items (A) through (D) above being hereinafter collectively referred to as the “Project”); and

22 **WHEREAS**, the Project is located within the geographical boundaries of the City; and

23 **WHEREAS**, the City has considered the request of the Borrower and has concluded that the
24 Project will provide low- and middle-income residential rental facilities, promoting the public health,
25 welfare, safety, convenience and prosperity and that the City should issue its multifamily housing
26 revenue notes under the Act, the Supplemental Public Securities Act and the Charter to finance a
27 portion of the Project, subject to the conditions set forth herein; and

28 **WHEREAS**, the City will issue, sell and deliver the City and County of Denver, Colorado
29 Multifamily Housing Revenue Note (Montbello FreshLo – The Hub), Series 2023A in a not to exceed
30 amount of \$25,670,000 (the “Series 2023A Note”) and the City and County of Denver, Colorado
31 Multifamily Housing Revenue Taxable Note (Montbello FreshLo – The Hub), Series 2023B in a not
32 to exceed amount of \$7,330,000 (the “Series 2023B Note”, and together with the Series 2023A Note,
33 the “Notes”), to pay a portion of the cost of financing the Project; and

1 **WHEREAS**, the City and U.S. Bank National Association, as the initial purchaser of the Notes,
2 including all successors and assigns, by merger, acquisition or otherwise (the “Bank”), will enter into
3 a Funding Loan Agreement (the “Funding Loan Agreement”), which will provide for the issuance of
4 the Notes, and it is anticipated that the Notes will be purchased by Citibank, N.A., the permanent
5 lender, pursuant to a Forward Purchase Agreement to be executed among the Borrower, the Bank
6 and Citibank, N.A.; and

7 **WHEREAS**, the City and the Borrower will enter into a Borrower Loan Agreement (the
8 “Borrower Loan Agreement”), which will provide for payments sufficient to pay the principal of,
9 premium, if any, and interest on the Notes and to meet other obligations as herein and therein
10 provided; and

11 **WHEREAS**, the Borrower has applied to the Colorado Housing and Finance Authority for an
12 allocation of low-income housing tax credits (“LIHTC”) under Section 42 of the Internal Revenue
13 Code of 1986, as amended (the “Code”); and

14 **WHEREAS**, there have been presented to the City Council at this meeting substantially final
15 forms of the following documents: (a) the Funding Loan Agreement; (City Clerk’s Filing No.
16 20220114); (b) the Borrower Loan Agreement (City Clerk’s Filing No. 20220116); and (c) the Tax
17 Regulatory Agreement (the “Tax Regulatory Agreement”) (City Clerk’s Filing No. 20220115), by and
18 between the City and the Borrower (collectively, the “Loan Documents”);

19 **NOW, THEREFORE, BE IT ENACTED BY THE CITY COUNCIL OF THE CITY AND**
20 **COUNTY OF DENVER, COLORADO:**

21 **Section 1. Legal Authorization.** The City is a legally, duly and regularly created,
22 established, organized and validly existing home rule city, municipal corporation and political
23 subdivision under the provisions of Article XX of the Constitution of the State and the Charter of the
24 City and is authorized under the Act, the Supplemental Public Securities Act and its Charter to issue
25 and sell its multifamily housing revenue notes in the form of one or more debt instruments, such as
26 the Notes, for the purpose, in the manner and upon the terms and conditions set forth in the Act, the
27 Supplemental Public Securities Act, the Charter, this Ordinance and in the Loan Documents. The
28 Notes are being issued pursuant to the Act and the Supplemental Public Securities Act.

29 **Section 2. Findings.** The City Council has heretofore determined, and does hereby
30 determine, based upon the representations of the Borrower contained in the application form
31 submitted to the City, as follows:

- 32 (a) The Project is an eligible “project,” as defined in the Act.

1 (b) The issuance of the Notes will effectuate the public purposes of the City and carry out
2 the purposes of the Act by, among other things, providing residential facilities for low- and middle-
3 income families and persons in the City.

4 (c) The Notes are special, limited obligations of the City payable solely out of the income,
5 revenues and receipts specifically pledged pursuant to the Funding Loan Agreement and Borrower
6 Loan Agreement. The Notes, the premium, if any, and the interest thereon shall never constitute the
7 debt or indebtedness of the City, the State or any political subdivision thereof within the meaning of
8 any provision or limitation of the State Constitution or statutes; shall not constitute nor give rise to a
9 pecuniary liability of the City, the State or any political subdivision thereof or a charge against their
10 general credit or taxing power and shall not constitute a “multiple fiscal year direct or indirect debt or
11 other financial obligation” of the City, the State or any political subdivision thereof under Article X,
12 Section 20 of the Colorado Constitution. Neither the City, the State nor any political subdivision
13 thereof shall be obligated to pay the principal of, premium, if any, or interest on the Notes or other
14 costs incident thereto. The Notes do not constitute a debt, loan, credit or pledge of the faith and
15 credit or taxing power of the City, the State or any political subdivision thereof.

16 **Section 3. Approval and Authorization of Documents.** The Loan Documents shall be
17 and the same are in all respects hereby approved, authorized and confirmed and the Mayor (or the
18 acting Mayor) is hereby authorized and directed to execute, the City Clerk and Recorder is hereby
19 authorized and directed to affix the seal of the City and to attest, the City Attorney is hereby
20 authorized and directed to execute, and the Chief Financial Officer and City Auditor are hereby
21 authorized and directed to countersign and register the Loan Documents in substantially the forms
22 and content as presented to the City on this date, subject to the approval of bond counsel to the City,
23 but with such changes, modifications, additions and deletions therein as shall to them seem
24 necessary, desirable or appropriate, their execution thereof to constitute conclusive evidence of their
25 approval of any and all changes, modifications, additions and deletions from the forms thereof as
26 before this date.

27 **Section 4. All Actions Heretofore Taken.** All actions (not inconsistent with the provisions
28 of this Ordinance) heretofore taken by the City Council and the officers, employees and agents of
29 the City directed toward the issuance and sale of the Notes therefor are hereby ratified, approved
30 and confirmed.

31 **Section 5. Authorization to Issue and Sell the Notes.**

32 (a) The issuance of the Notes shall be in such principal amount, bearing such date and
33 interest rates and shall mature as set forth in the Loan Documents; provided, however, that the
34 aggregate principal amount of Series 2023A Note issued hereby shall not exceed \$25,670,000 and

1 the aggregate principal amount of Series 2023B Note issued hereby shall not exceed \$7,330,000.
2 The Notes shall be payable, shall be subject to redemption or purchase prior to maturity and shall
3 be in substantially the form as provided in the Funding Loan Agreement and the Borrower Loan
4 Agreement. Furthermore, the Notes shall be payable at such place and in such form, shall carry
5 such registration privileges, shall be subject to redemption, shall be executed, and shall contain such
6 terms, covenants and conditions, as set forth in the Funding Loan Agreement and the Borrower Loan
7 Agreement. The maximum net effective interest rate payable on the Notes shall not exceed 12.0%
8 (such rate being hereinafter referred to as the "Maximum Rate") and the final maturity of the Notes
9 shall not be more than forty (40) years after the closing date of the Notes.

10 (b) The sale of the Notes to the Bank pursuant to the terms of the Funding Loan
11 Agreement shall be and the same are in all respects hereby approved, authorized and confirmed
12 and the Mayor (or the acting Mayor) is hereby authorized and directed to execute the Notes, the City
13 Clerk and Recorder is hereby authorized and directed to affix the seal of the City and to attest, the
14 City Attorney is hereby authorized and directed to execute, and the Chief Financial Officer and City
15 Auditor are hereby authorized and directed to countersign the Notes and each is hereby authorized
16 to deliver the Notes for and on behalf of the City to the Bank pursuant to the Funding Loan
17 Agreement. The Notes shall be sold to the Bank at par.

18 **Section 6. Compliance with the Act.** The following determinations and findings are
19 hereby made in accordance with the Act:

20 (a) that the amounts necessary in each year to pay the principal of and interest on the
21 Notes is dependent upon the rate of interest on the Notes, but in any event shall not exceed the
22 principal amount of the Notes plus interest at the Maximum Rate;

23 (b) that the terms of the Funding Loan Agreement and the Borrower Loan Agreement and
24 related security documents require that the Borrower will cause to be maintained, or maintain, the
25 Project and will cause to be carried, or carry, all proper insurance with respect thereto and require
26 the payment of all applicable taxes with respect thereto;

27 (c) that the nature and amount of any reserve funds necessary to secure payment of the
28 Notes, if any, is set forth in a certain Replacement Reserve Agreement to be entered into by the
29 Borrower and Citibank, N.A. at conversion of the Notes to permanent financing;

30 (d) the revenues and other amounts payable under the Funding Loan Agreement and
31 Borrower Loan Agreement are sufficient to pay, in addition to all other requirements of the Funding
32 Loan Agreement, Borrower Loan Agreement and this Ordinance, all sums referred to in paragraphs
33 (a) and (c) of this Section and all taxes or payments in lieu of taxes levied upon the Project;

1 (e) "Low-and middle-income families and person" means with respect to the Project
2 households that earn less than 30% of the area median income (7 of the units in the Project will be
3 reserved for such households); 50% of the area median income (17 of the units in the Project will be
4 reserved for such households); 60% of the area median income (55 of the units in the Project will be
5 reserved for such households); and 70% of the area median income (18 of the units in the Project
6 will be reserved for such households); and

7 (f) Any inconsistency between the provisions of this Ordinance, the Funding Loan
8 Agreement, or the Borrower Loan Agreement and those of the Act or the Supplemental Public
9 Securities Act is intended by the City Council. To the extent of any such inconsistency, the provisions
10 of this Ordinance shall be deemed made pursuant to the Charter and shall supersede to the extent
11 permitted by law, the conflicting provisions of the Act and the Supplemental Public Securities Act.

12 **Section 7. Investments.** Proceeds from the sale of the Notes and special funds from the
13 revenues from the Project shall be invested and reinvested in such securities and other investments
14 specified in, and otherwise in accordance with, the Funding Loan Agreement, Borrower Loan
15 Agreement and Section 29-3-109 of the Act.

16 **Section 8. Authority To Execute and Deliver Additional Documents.** The officers,
17 employees and agents of the City shall take all action in conformity with the Act, the Supplemental
18 Public Securities Act and the Charter necessary or reasonably required to effectuate the issuance
19 of the Notes and shall take all action necessary or desirable in conformity with the Act, the
20 Supplemental Public Securities Act and the Charter to finance the portion of the costs of the Project
21 to be financed with proceeds of the Notes and for carrying out, giving effect to and consummating
22 the transactions contemplated by this Ordinance and the Loan Documents, including without
23 limitation the execution, delivery and filing of any documents, statements or reports with the United
24 States Internal Revenue Service or with the Secretary of the United States Treasury necessary to
25 maintain the exclusion of interest on the Notes (as applicable) from gross income for federal income
26 tax purposes, the execution of any documents relating to the LIHTC, the execution of any documents
27 relating to the City's private activity bond volume cap allocation and the execution and delivery of
28 any closing documents to be delivered in connection with the sale and delivery of the Notes.

29 **Section 9. Notes are Limited Obligations.** The Notes are special, limited obligations of
30 the City payable solely out of the income, revenues and receipts specifically pledged pursuant to the
31 Funding Loan Agreement and Borrower Loan Agreement. The Notes, the premium, if any, and the
32 interest thereon shall never constitute the debt or indebtedness of the City, the State or any political
33 subdivision thereof within the meaning of any provision or limitation of the State Constitution or
34 statutes; shall not constitute nor give rise to a pecuniary liability of the City, the State or any political

1 subdivision thereof or a charge against their general credit or taxing power and shall not constitute
2 a “multiple fiscal year direct or indirect debt or other financial obligation” of the City, the State or any
3 political subdivision thereof under Article X, Section 20 of the Colorado Constitution. Neither the
4 City, State nor any political subdivision thereof shall be obligated to pay the principal of, premium, if
5 any, or interest on the Notes or other costs incident thereto. The Notes do not constitute a debt,
6 loan, credit or pledge of the faith and credit or taxing power of the City, the State or any political
7 subdivision thereof.

8 **Section 10. No Pecuniary Liability.** Nothing contained in this Ordinance or in the Notes,
9 the Loan Documents or any other instrument shall give rise to a pecuniary liability of, or a charge
10 upon the general credit or taxing powers of, the City, the State or any political subdivision thereof.
11 The breach by any party of any agreement contained in this Ordinance, the Loan Documents or any
12 other instrument shall not impose any pecuniary liability upon, or any charge upon the general credit
13 or taxing powers of, the City, the State or any political subdivision thereof, none of which has the
14 power to pay out of their general fund, or otherwise contribute, any part of the cost of financing the
15 Project or power to operate the Project as a business or in any manner.

16 **Section 11. No Condemnation by City.** The City shall not condemn any land or other
17 property for the Project.

18 **Section 12. Volume Cap Allocation.** The Council acting on behalf of the City hereby
19 awards to the Project an amount not to exceed \$25,670,000 of its private activity bond volume cap
20 from the Statewide Balance and direct allocation. This award of private activity bond volume cap
21 allocation will be revoked by the City if the Notes are not issued on or prior to June 30, 2023.

22 **Section 13. Supplemental Ordinances.** The City may, subject to the terms and conditions
23 of the Funding Loan Agreement and Borrower Loan Agreement, pass and execute ordinances
24 supplemental to this Ordinance which shall not be inconsistent with the terms and provisions hereof.

25 **Section 14. Limitation of Rights.** With the exception of any rights herein expressly
26 conferred, nothing expressed or mentioned in or to be implied from the Ordinance or the Notes are
27 intended or shall be construed to give to any person, other than the City, the Borrower and the Bank,
28 any legal or equitable right, remedy or claim under or with respect to this Ordinance or any
29 covenants, conditions and provisions herein contained; this Ordinance and all of the covenants,
30 conditions and provisions hereof being intended to be and being for the sole and exclusive benefit
31 of the City, the Borrower and the Bank as herein provided.

32 **Section 15. Immunity of Officers.** No recourse for the payment of any part of the principal
33 of, premium, if any, or interest on the Notes for the satisfaction of any liability arising from, founded
34 upon or existing by reason of the issue, purchase or ownership of the Notes shall be had against

1 any official, officer, member or agent of the City or the State, all such liability to be expressly released
2 and waived as a condition of and as a part of the consideration for the issue, sale and purchase of
3 the Notes.

4 **Section 16. Counterparts.** This Ordinance may be simultaneously executed in several
5 counterparts, each of which shall be an original and all of which shall constitute but one and the
6 same instrument.

7 **Section 17. Captions.** The captions or headings in this Ordinance are for convenience only
8 and in no way define, limit or describe the scope or intent of any provisions or sections of this
9 Ordinance.

10 **Section 18. Validity of Notes.** The Notes shall contain a recital that such Notes are issued
11 pursuant to the Act and the Supplemental Public Securities Act and such recital shall be conclusive
12 evidence of its validity and of the regularity of its issuance.

13 **Section 19. Irrepealability.** After the Notes are issued, this Ordinance shall be and remain
14 irrepealable until the Notes and the interest thereon shall have been fully paid, canceled and
15 discharged.

16 **Section 20. Severability.** If any section, paragraph, clause or provision of this Ordinance
17 shall for any reason be held to be invalid or unenforceable, the invalidity or unenforceability of such
18 section, paragraph, clause or provision shall not affect any of the remaining provisions of this
19 Ordinance.

20 **Section 21. Supplemental Public Securities Act.** Section 11-57-204 of the Supplemental
21 Public Securities Act provides that a public entity, including the City, may elect in an act of issuance
22 to apply all or any of the applicable provisions of the Supplemental Public Securities Act to the Notes.
23 The City hereby elects to apply all of the provisions of the Supplemental Public Securities Act.

24 **Section 22. Superseder.** Pursuant to Article XX of the State Constitution and the Charter,
25 all other statutes of the State that might otherwise apply in connection with the issuance of the Notes
26 are hereby superseded for the purposes of this Ordinance and the issuance of the Notes only. To
27 the extent of such inconsistency the provisions of this Ordinance shall be deemed made pursuant to
28 the Charter. All ordinances, resolutions, bylaws, orders, and other instruments, or parts thereof,
29 related to and inconsistent with the issuance of the Notes and this Ordinance are hereby superseded
30 but only to the extent they relate to the issuance of the Notes and this Ordinance and only to the
31 extent of such inconsistency. Any inconsistency between the provisions of this Ordinance and such
32 other ordinances, resolutions, bylaws, orders and other instruments or parts thereof is intended by
33 the Council.
34

1 COMMITTEE APPROVAL DATE: November 29, 2022 by Consent

2 MAYOR-COUNCIL DATE: December 6, 2022

3 PASSED BY THE COUNCIL: _____

4 _____ - PRESIDENT

5 APPROVED: _____ - MAYOR _____

6 ATTEST: _____ - CLERK AND RECORDER,
7 EX-OFFICIO CLERK OF THE

8 PREPARED BY: KUTAK ROCK LLP DATE: November 10, 2022

9 REVIEWED BY: Brad Neiman, Assistant City Attorney DATE: December 8, 2022

10 Pursuant to section 13-9, D.R.M.C., this proposed Ordinance has been reviewed by the Office of the
11 City Attorney. We find no irregularity as to form, and have no legal objection to the proposed
12 Ordinance. The proposed Ordinance is not submitted to the City Council for approval pursuant to
13 § 3.2.6 of the Charter.

14 Kerry Tipper, Denver City Attorney

15 BY: _____, Assistant City Attorney DATE: _____