




U.S. Department
of Transportation

**Federal Highway
Administration**

Memorandum

Subject: **INFORMATION:** Temporary
Programmatic Waiver: Waiver of 49 CFR
24.401(b)(1)--Calculation of Replacement
Housing Payment for Negative Equity

Date: April 7, 2009

From: Gerald Solomon, Esq. 
Director, Office of Real Estate Services

In Reply Refer To:
HEPR-10

To: Division Administrators
Attn: Division Realty Professionals

Purpose

Pursuant to its authority under 49 CFR 24.7 to waive any requirement of 49 CFR Part 24 "not required by law if it determines that the waiver does not reduce any assistance or protection provided to an owner or displaced person," and in order to further the congressional intent of The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act) (see Attachment A), the Federal Highway Administration (FHWA) is issuing this temporary programmatic waiver (Waiver), as described below, of the methodology set forth in the implementing regulations at 49 CFR 24.401(b)(1), relative to the manner for determining a replacement housing payment (RHP) for 180-day homeowner-occupants (homeowners) in negative equity situations.

As detailed in the background information in Attachment A, the current and historically unique negative equity housing situation has created circumstances where the methodology to calculate a RHP under 49 CFR 24.401(b)(1) ensures that a comparable replacement house is available to the displaced person as required by the Uniform Act. However, while a comparable is technically available, any administrative settlement agreement typically eliminates the RHP assistance available for these homeowners to purchase the replacement dwelling. As a result, the FHWA Office of Real Estate Services is issuing this temporary Waiver for transportation projects undertaken with Federal-aid pursuant to 23 U.S. Code (USC) Title 23, to be implemented in accordance with the following requirements.

MOVING THE
AMERICAN
ECONOMY



Implementation of Waiver

This temporary Waiver shall commence on April 1, 2009, and remain in effect through January 1, 2011, unless otherwise extended in writing by the FHWA. All other requirements of 49 CFR Part 24 remains in effect.

The implementation requirements of this Waiver are described below. For the purpose of this Waiver, negative equity is defined as a situation in which real property is encumbered by a mortgage (or other qualified liens) that exceeds the current market value of the property. In these situations, the Waiver allows the State department of transportation (State Dot) to calculate a RHP pursuant to 49 CFR 24.401(b)(1) by using the initial written offer of just compensation, prepared in accordance with 49 CFR 24.102, as the "acquisition cost" when calculating the amount by which the cost of the replacement dwelling exceeds the acquisition cost. This allows a State Dot to enter into an Administrative Settlement, when appropriately justified (see Attachment B), for the acquisition of a property with negative equity that would not impact the calculation and reimbursement of a RHP. Examples of this calculation are reflected on Attachment C to this Memorandum.

The use of the Waiver is voluntary on the part of the State Dot, and is subject to the FHWA approval. Should a State Dot elect to utilize this Waiver, it must do so in accordance with the following requirements:

Prior to implementing a Waiver, the State Dot shall:

1. Assure the Waiver will not reduce any assistance or protection to the homeowner.
2. Make a public interest finding that clearly demonstrates that the proposed process for use of the Waiver is fair and equitable. This may include consideration that the homeowners bought their homes during the times of rapidly increasing home values and while they are in negative equity situations they are not in default and continue to meet their monthly payment obligations in a timely manner. Except for the compulsory sale for a public transportation project, these homeowners could continue to make their payments and wait for the market to stabilize and home values to increase before disposing of, or otherwise selling, their property.
3. Assure the State Dot's procedures to justify administrative settlements and obtain adequate title, in accordance with its FHWA approved Right-of-Way Manual, will apply to the Waiver.

The State Dot's proposal for implementation of the Waiver shall be submitted in writing to the Division Administrator for review and approval. The Division Administrator will review the proposal and issue either an implementation approval or, where warranted, the Division Administrator may temporarily withhold approval and recommend revisions to the State Dot's proposal in keeping with this guidance and request that the State Dot resubmit its request.

The Waiver must be implemented fairly and consistently. Implementation shall be subject to Division Administrator oversight. It is anticipated that the Division office will review the use and implementation of this Waiver at least annually to evaluate its effectiveness and ensure that it is implemented in a manner consistent with this guidance. Division office approval may be rescinded upon a determination that the waiver is not being properly implemented.

This Waiver is intended to provide an additional tool to assist State Dots in the relocation of homeowners impacted by negative equity in the acquired property, and is not intended to eliminate the need to comply with other requirements of the Uniform Act and implementing regulations, including but not limited to the requirements for relocation planning, advisory services, and coordination pursuant to 49 CFR 24.205. Moreover, it is intended to supplement other available tools (Attachment B) to assist State Dots in addressing all impacts associated with the acquisition and relocation of the homeowner.

Questions concerning this memorandum may be directed to Marshall Wainright at 202 366-4842 or at marshall.wainright@dot.gov, or by contacting your Office of Real Estate point of contact.

Attachments

Attachment A: Background

Background

As set forth in 42 USC 4621, the Uniform Act was passed, in part, to address the Congressional findings that “minimizing the adverse impact of displacement is essential to maintaining the economic and social well-being of communities” (42 USC 4621(a)(4)) and in order to achieve the primary purpose of ensuring “that such persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons” (42 USC 4621(b)).

Further, the Uniform Act expressly sets forth the intent of Congress that

uniform procedures for the administration of relocation assistance shall, to the maximum extent feasible, assure that the unique circumstances of any displaced person are taken into account and that persons in essentially similar circumstances are accorded equal treatment under this chapter (42 USC 4621(c)).

Over the past several months, the Office of Real Estate Services has conducted outreach with its Division Realty Officers, and with its partners and stakeholders involved in relocation of homeowners displaced for transportation projects undertaken with federal-aid pursuant to 23 USC Title 23 (Title 23). Similar outreach has been conducted with partners at other Federal Agencies that similarly impact homeowners with Federal projects and programs that are subject to the provisions of the Uniform Act.

As a result of its outreach, the Office of Real Estate Services believes that the current and historically unique housing situation has created circumstances where a Waiver pertaining to the methodology to calculate a RHP under the regulations at 49 CFR 24.401(b)(1) is necessary. The Waiver will provide additional support to the Uniform Act’s intent of making funds available to permit displaced homeowners to purchase and relocate to a comparable replacement dwelling.

This Waiver is applicable only to those situations where homeowners have negative equity in the acquired property. In such situations, typically an increase in the acquisition amount to achieve an agreement on the sale of the property reduces the RHP to zero. Further, in the circumstances to be addressed by this Waiver, the need to satisfy the mortgage balance arises as a direct result of the acquisition by the State Dot for Title 23 eligible projects. In other words, but for the displacement caused by the transportation project, the homeowners could continue to remain in the property and pay the periodic mortgage payments pending an increase in real estate values and elimination of the negative equity.

Attachment B: Other Tools

Other available tools, unaffected by this Waiver, include Administrative Settlements as authorized by 49 CFR 24.102(i) and Housing of Last Resort as authorized by 49 CFR 24.404. While extensive discussion of these other tools is beyond the scope of this Memorandum, they are addressed within the documents referenced below. However, the following comments should be considered in evaluating how best to take into account specific facts of a particular situation.

Administrative Settlement

The State Dot may, when appropriate and justified, utilize “Administrative Settlement”. As indicated 49 CFR 24.102(i):

The purchase price for the property may exceed the amount offered as just compensation when reasonable efforts to negotiate an agreement at that amount have failed and an authorized Agency official approves such Administrative Settlement as being responsible, prudent and in the public interest. When Federal funds pay for or participate in acquisition costs, a written justification shall be prepared which states what available information, including trial risks, supports such a settlement.

Accordingly, the amount paid for an Administrative Settlement must be documented and justified, and based upon the value of the acquired property, taking into account such factors as valuation information, trial risks, and litigation costs. It is not intended to be a substitute for relocation benefits. Under this Waiver, the amount of the Administrative Settlement will not be taken into consideration in determining a RHP, which would otherwise offset funds available to the homeowner to acquire a comparable replacement home.

Housing of Last Resort

The State Dot may, when appropriate and justified, utilize “Replacement Housing of Last Resort”. The purpose of Housing of Last Resort is to provide the assistance necessary to ensure that a comparable replacement dwelling is available when no comparable replacement housing is available within the limits specified in 49 CFR 24.401. However, Housing of Last Resort is not intended to be used as a method to provide financial relief to those with negative equity. A comparable replacement dwelling may be “housing of last resort” if there are no comparables available within the specified limits in 49 CFR 24.401. The additional tools under Housing of Last Resort are only available in specific instances where use of Housing of Last Resort is otherwise required for the reasons described at 49 CFR 24.404. These additional tools are incidental to providing an RHP and are not meant to augment the RHP.

Attachment C: Example Calculation

Example 1:

An owner owes \$200,000 for a home purchased 3 years ago*. The real estate market has rapidly declined over the last several months. The State Dot needs the property for a project, appraises the property and presents the owner a written offer in the amount of \$150,000. The State Dot finds a comparable replacement dwelling on the market for \$170,000 because of the market decline. The price differential payment eligibility is \$20,000. The owner and State Dot agree to a settlement of \$200,000 for the purchase of the property. Normally the \$20,000 price differential eligibility is zeroed, per the regulations, because the appropriately justified \$50,000 administrative settlement exceeds the price differential eligibility. However, this Waiver allows the State Dot to pay \$200,000 to the owner to acquire the property and allows the owner to retain the \$20,000 RHP as a down payment on the comparable, provided the remaining requirements of 49 CFR Part 24 are met.

\$170,000 (Comparable Replacement Dwelling) <u>- \$150,000 (Just Compensation Offer)</u> \$ 20,000 (RHP Eligibility)	\$200,000 (Agreement Amount) <u>- \$150,000 (Just Compensation Offer)</u> \$ 50,000 (Increase--Administrative Settlement)
--	---

Normal RHP Determination

\$50,000 (Increase—Administrative Settlement) is greater than the \$20,000 (RHP Eligibility) resulting in a \$0 RHP Payment

Waiver RHP Determination

\$50,000 (Increase—Administrative Settlement) is greater than the \$20,000 (RHP Eligibility) so the Waiver allows a \$20,000 RHP Payment

Example 2:

An owner owes \$300,000 for a home purchased 2 years ago*. The real estate market has rapidly declined over the last several months. The State Dot needs the property for a project, appraises the property and presents the owner a written offer in the amount of \$225,000. The State Dot finds a comparable replacement dwelling on the market for \$260,000 because of the market decline. The price differential payment eligibility is \$35,000. Because a comparable replacement dwelling is not available within the specified limits of 49 CFR 24.401, the comparable is made available under Housing of Last Resort. The owner and State Dot agree to a settlement of \$300,000 for the purchase of the property. Normally the \$35,000 price differential eligibility is zeroed, per the regulations, because the appropriately justified \$75,000 administrative settlement exceeds the price differential eligibility. However, this Waiver allows the State Dot to pay \$300,000 to the owner to acquire the property and allows the owner to retain the \$35,000 RHP as a down payment on the comparable, provided the remaining requirements of 49 CFR Part 24 are met.

\$260,000 (Comparable Replacement Dwelling) <u>- \$225,000 (Just Compensation Offer)</u> \$ 35,000 (RHP Eligibility)	\$300,000 (Agreement Amount) <u>- \$225,000 (Just Compensation Offer)</u> \$ 75,000 (Increase--Administrative Settlement)
--	---

Normal RHP Determination

\$75,000 (Increase—Administrative Settlement) is greater than the \$35,000 (RHP Eligibility) resulting in a \$0 RHP Payment

Waiver RHP Determination

\$75,000 (Increase—Administrative Settlement) is greater than the \$35,000 (RHP Eligibility) so the Waiver allows a \$35,000 RHP Payment

* NOTE: The original purchase price is not a factor in these calculations.