U.S. Department of Transportation
Federal Highway Administration

Memorandum

Subject: **INFORMATION:** Temporary Waiver of Methodology for Calculating Replacement Housing Payment for Negative Equity

Date: November 10, 2010

From: Janis Gramatins
Acting Director, Office of Real Estate Services

In Reply Refer To: HEPR-10

To: Division Administrators
Attn: Division Realty Professionals

Purpose

This temporary waiver of the Title 49 of the Code of Federal Regulations (CFR) § 24.401(b)(1) methodology for calculating Replacement Housing Payments (RHP) for displaced homeowner-occupants supersedes the waiver issued April 7, 2009, and shall remain in effect through December 31, 2012 unless otherwise extended in writing by FHWA Office of Real Estate Services. All other requirements of 49 CFR Part 24 apply, including the $22,500 statutory cap on the RHP.

Under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act), persons displaced by a Federal financially-assisted project are entitled to specified benefits designed to minimize the hardship caused when they are forced to relocate to accommodate a public improvement project. One such benefit is the RHP provided to homeowner-occupants to help bridge the gap between the just compensation they are constitutionally entitled to receive for the acquisition of their property and the additional costs they may incur to obtain a comparable replacement property. In describing one of the fundamental objectives of the Uniform Act, the legislative history makes clear that a displaced homeowner should not be left worse off economically than he or she was before displacement and should be able to relocate to a comparable dwelling that is decent, safe, and sanitary -- that sentiment is codified in Title 42 of the United States Code (USC) § 4621.

In today's real estate market, many state agencies are faced with the prospect of displacing homeowner-occupants who hold negative equity in what is commonly referred to as "upside-down" mortgages where the fair market value of the property (or just compensation) is less than the outstanding debt (the mortgage). In these circumstances, an administrative settlement negotiated to acquire the property for a Federally-assisted project may eliminate the RHP otherwise available to the homeowner-occupant to assist in relocating to a replacement dwelling. Since the need to satisfy the mortgage balance arises as a direct result of the acquisition by the State DOT of the property for Title 23 USC eligible projects, the displaced homeowner-occupant should not be deprived of a RHP, making his or her situation worse than it was before displacement. In other words, but for the displacement caused by the transportation project, the homeowner-occupant could continue to remain in the property, pay the periodic mortgage payments until real property values recover to eliminate the negative equity, and avoid the disruption caused by relocation.

The Office of Real Estate Services has conducted outreach with its Division Realty Officers, and with its partners and stakeholders involved in relocation of displaced homeowner-occupants. Similar outreach has been conducted with partners at other Federal agencies that similarly impact homeowner-occupants through Federal projects and programs that are subject to the Uniform Act. 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) must be waived to ensure that homeowner-occupants receive the assistance needed to relocate to a comparable replacement dwelling. The Uniform Act regulations allow waivers of any requirement in 49 CFR Part 24 not required by law if the funding agency determines that the waiver "does not reduce any assistance or protection provided to an owner or displaced person." For the above reasons, the Office of Real Estate Services is issuing this temporary waiver to be implemented in accordance with the requirements set forth below.

Implementation of Waiver

This waiver is applicable only to those situations where displaced homeowner-occupants have negative equity in the acquired property. 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 defining acquisition cost to mean the initial written offer of just compensation (not all costs associated with acquisition, which would include payment of outstanding debt) prepared in accordance with 49 CFR 24.102 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 A), 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 shown in Attachment B to this memorandum.

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

1. Assure use of 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 should include a finding that the homeowner-occupants 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 acquisition of their property for a public transportation project, these homeowner-occupants 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 use of 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 these requirements and request that the State DOT resubmit its request.

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 six month intervals to evaluate its effectiveness and ensure that it is implemented in a manner consistent with this memorandum. 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 homeowner-occupants 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 A) to assist State DOTs in addressing all impacts associated with the acquisition of property and relocation of the homeowner.

Questions concerning this waiver 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.

Attachment

Attachment A: 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.

<u>Administrative Settlement</u>

The State DOT may, when appropriate and justified, utilize an "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 a being responsible, prudent and in the pubic 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.

<u>Housing of Last Resort</u>

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 <u>no</u> 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 a RHP and are not meant to augment the RHP.

Attachment B: 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 downpayment on the comparable, provided the remaining requirements of 49 CFR Part 24 are met.

$170,000 (Comparable Replacement Dwelling)
- $150,000 (Just Compensation Offer)
$ 20,000 (RHP Eligibility)

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

$200,000 (Agreement Amount)
- $150,000 (Just Compensation Offer)
$ 50,000 (Increase--Administrative Settlement)

Waiver RHP Payment 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 downpayment on the comparable, provided the remaining requirements of 49 CFR Part 24 are met.

$260,000 (Comparable Replacement Dwelling)
- $225,000 (Just Compensation Offer)
$ 35,000 (RHP Eligibility)

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

$300,000 (Agreement Amount)
-$225,000 (Just Compensation Offer)
$ 75,000 (Increase--Administrative Settlement)

Waiver RHP Payment 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.