

Choice Limiting Actions

Projects receiving certain federal sources of funds from Housing (e.g. CDBG HOME, Section 8 Project-Based Vouchers) must undergo an environmental review under 24 CFR Part 58.

From the application submittal date, or from the date that Housing determines that it may use the federal funds for a project, until completion of the environmental review process, HUD's environmental review rules prohibit all participants in the development process for a project, including the applicant and any developer or sponsor of the project and any of their affiliates participating in the project, any construction manager, and any other consultants and contractors, from taking certain actions. These prohibited actions are called "choice-limiting actions." HUD's prohibition on taking choice-limiting actions continues in effect until the project has received its environmental clearance, which means the completion of an environmental review of the project and, if necessary, HUD approval of the release of the federal funds for the project after completion of the environmental review. In the information below, the period extending from the application submittal date, or from the date that Housing determines that it may use the federal funds for a project, to the date of environmental clearance is referred to as the "Choice-Limiting Action Prohibition Period."

The list of choice-limiting actions set out below is not all-inclusive and applicants are strongly urged to consult Housing prior to taking any action that could be a prohibited choice-limiting action.

IMPORTANT NOTE: Taking a choice-limiting action during the Choice-Limiting Action Prohibition Period will disqualify a project from receiving the funds or other HUD financial assistance.

A. Prohibited Choice-limiting Actions

During the Choice-Limiting Action Prohibition Period, the applicant and all other participants in the development process are not allowed under HUD's environmental review rules to do *any* of the following, except to the limited extent described below.

1. Spend or commit *any* funds for the project, whether those funds are federal, state, local, bank, equity, or private funds, grants, loans or any other source or type of funds, except for the following activities:
 - a. Environmental, geotechnical and other studies
 - b. Site inspection and testing
 - c. Engineering services
 - d. Architectural and design services
 - e. Permitting and zoning approvals
 - f. Financing applications
 - g. The payment of the option price under an option agreement complying with the requirements of Section B.1 below.

- h. The payment of an earnest money deposit under a conditional purchase and sale agreement complying with the requirements of Section B.2 below.
2. Enter into a binding contract or agreement for any purpose, except as follows:
 - a. The activities listed in subsection 1.a through f above.
 - b. An option agreement complying with the requirements of Section B.1 below.
 - c. A conditional purchase and sale agreement complying with the requirements of Section B.2 below.
 - d. A construction management contract, **but only if** an Addendum required by HUD (attached hereto) is executed as part of and simultaneously with the construction management contract.
3. Enter into a binding contract or agreement for any of the following or actually undertake or do any of the following:
 - a. Enter into an option to buy or lease all or part of the project site or to purchase an easement for the benefit of the project site, or amend, extend or renew an option, unless the option agreement complies with the requirements of Section B.1 below.
 - b. Enter into, amend, extend or renew a purchase and sale agreement that does not comply with the requirements of Section B.2 below.
 - c. Purchase or lease all or part of the project site, including but not limited to any small additional parcel that may be needed to meet density or other local or state requirements.
 - d. Purchase or grant an easement or right-of-way.
 - e. Enter into an Agreement to Enter into a Housing Assistance Payments Contract (AHAP) or a Housing Assistance Payments (HAP) Contract.
 - f. Purchase or otherwise procure construction materials for the project.
 - g. Go out to bid for any work relating to the project, including but not limited to construction, rehabilitation, demolition or environmental remediation.
 - h. Excavation or earth removal.
 - i. Demolition.

- j. Environmental remediation activities on, in or affecting the land or building(s) on the project site, including but not limited to lead paint, mold, asbestos, or soil remediation or other clean-up.
- k. Utility or infrastructure construction or installation, e.g., sewer, water, electric or gas lines, drainage, stormwater management facilities, roads, sidewalks, etc.
- l. Paving.
- m. Grading, filling or clearing.
- n. Dredging or draining.
- o. Construction of buildings or other structures.
- p. Moving, rehabilitation, renovation or alteration of existing buildings.
- q. Burying, replacing or relocating a propane, oil, kerosene or other stationary above-ground tank, or a fuel conversion of a heating system, on an abutter's property or on the project site as a way of mitigating hazards to your project or for any other reason.
- r. Any other activity that has a physical effect on the land or buildings on the project site.

B. Site Control Agreements – Options and Conditional Purchase and Sale Agreements

During the Choice-Limiting Action Prohibition Period, HUD permits option agreements and conditional purchase and sale agreements that meet certain requirements. HUD and MaineHousing strictly enforce these requirements. Housing will not proceed with the environmental review of a project if a non-complying element exists. In that case, MaineHousing will require that the non-complying agreement be either rescinded and replaced with an agreement meeting HUD's requirements or amended to bring it into compliance with HUD's requirements.

1. Option Agreements

If a project site currently is

- (i) vacant land, *or*
- (ii) occupied by a non-residential building, *or*
- (iii) occupied by a building with mixed non-residential and residential uses, *or*
- (iv) occupied by a building that was formerly a residential building but is no longer used for residential purposes, *or*
- (v) does not otherwise meet the requirements for using a conditional purchase and sale agreement

an applicant may enter *only* into an option agreement that states that it is subject to the buyer's decision on the desirability of the project site based on the results of the

environmental review and provides for an option price that is only a nominal portion of the purchase price. HUD does not define "nominal" but states that any reasonable interpretation is acceptable and recognizes that what is nominal will vary depending on the local real estate market and the purchase price.

IMPORTANT NOTE: HUD's environmental review rules DO NOT allow an applicant to enter into a conditional purchase and sale agreement for ANY of the types of project sites above during the Choice-Limiting Action Prohibition Period.

2. Conditional Purchase and Sale Agreements

Single-family (1 to 4 Unit) Properties

For a project site that is currently occupied by an existing single-family residential building (defined by HUD as having one to four units), applicants may enter into (i) an option agreement that meets the requirements described above, or (ii) a conditional purchase and sale agreement complying with **all** of the following HUD requirements:

- a. There is an existing single-family building on the site.
- b. The proposed project on the site is for single-family residential use.
- c. The proposed project involves either
 - (i) rehabilitation of the existing single-family building that does not increase the number of units beyond four (4); or
 - (ii) demolition of the existing single-family building and reconstruction of another single-family building on the site.
- d. The purchase and sale agreement includes the following language, which cannot be deleted or amended or modified during the Choice-Limiting Action Prohibition Period:

Notwithstanding any other provision of this Agreement, Purchaser shall have no obligation to purchase the Property, and no transfer of title to the Purchaser may occur, unless and until Maine State Housing Authority has provided Purchaser and/or Seller with a written notification that it has completed a federally required environmental review and its request for release of federal funds, if required, has been approved and, subject to any other contingencies in this Agreement, (a) the purchase of the Property may proceed, or (b) or the purchase may proceed only if certain conditions to address issues in the environmental review shall be satisfied before or after the purchase of the property.

- e. The purchase and sale agreement provides for one of the following deposits:
 - (i) \$1,000 or less if the deposit is non-refundable, *or*
 - (ii) a reasonable amount if the deposit is refundable (taking into account the local real estate market, the purchase price and any other relevant factors), *or*
 - (iii) in circumstances in which auction rules require all bidders to deposit \$5,000 and the successful bidder to enter into a purchase and sale agreement

requiring a \$5,000 earnest money deposit, the deposit may be a \$1,000 non-refundable deposit plus a \$4,000 refundable deposit in order to comply with auction rules.

- f. The applicant does not close on the purchase of the project site or otherwise acquire title to the project site during the Choice-Limiting Action Prohibition Period.

Multi-family (5 or more Unit) Properties

For a project site that is currently occupied by an existing multi-family residential building (defined by HUD as having five or more units), applicants may enter into (i) an option agreement that meets the requirements described above, or (ii) a conditional purchase and sale agreement complying with **all** of the following HUD requirements:

- a. There is an existing multi-family building on the site.
- b. The proposed project on the site is for multi-family residential use.
- c. The proposed project involves rehabilitation of the existing multi-family building (i) that does not increase or decrease the number of units by more than 20% and (ii) for which evidence satisfactory to MaineHousing demonstrates that the estimated cost of rehabilitation is less than 75% of the total estimated replacement cost after rehabilitation.
- d. The building is not in a Special Flood Hazard Area (100-year floodplain, shown as any zone with an "A" or "V" designation on FEMA's flood maps).
- e. The purchase and sale agreement includes the following language, which cannot be deleted or amended or modified during the Choice-Limiting Action Prohibition Period:

Notwithstanding any other provision of this Agreement, Purchaser shall have no obligation to purchase the Property, and no transfer of title to the Purchaser may occur, unless and until Maine State Housing Authority has provided Purchaser and/or Seller with a written notification that it has completed a federally required environmental review and its request for release of federal funds, if required, has been approved and, subject to any other contingencies in this Agreement, (a) the purchase of the Property may proceed, or (b) or the purchase may proceed only if certain conditions to address issues in the environmental review shall be satisfied before or after the purchase of the property.

- f. The purchase and sale agreement provides for one of the following deposits:
 - (i) 3% or less of the purchase price if the deposit is non-refundable, *or*
 - (ii) a reasonable amount if the deposit is refundable (taking into account the local real estate market, the purchase price and any other relevant factors).
- g. The applicant does not close on the purchase of the project site or otherwise acquire title to the project site during the Choice-Limiting Action Prohibition Period.