



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

# Memorandum

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

Date: January 7, 2021

From: Harlan Miller, Acting Director  
Office of Real Estate Services

*Harlan Miller*

Reply HEPR-10  
to:

To: Directors of Field Services  
Division Administrators  
Division Directors  
Attn: Division Realty Professionals

## Purpose

This temporary waiver of the 49 CFR 24.401(b)(1) methodology for calculating a Replacement Housing Payment (RHP) for displaced homeowner-occupants supersedes the waiver issued January 6, 2020 and shall remain in effect through June 30, 2021 unless otherwise extended or rescinded in writing by the FHWA Office of Real Estate Services. Given the ongoing real estate market recovery, we anticipate that by June 30, 2021, there will no longer be a need for this national waiver. The Office of Real Estate Services will be gathering additional data in the coming months to confirm whether the real estate market recovery has continued and whether there is a need for a further extension of the waiver. All other requirements of 49 CFR Part 24 continue to apply.

## Background

Since its implementation in 2009, the temporary waiver has been extended for 1 or 2 year periods. The FHWA conducted a 2019 study<sup>1</sup> of the nationwide residential real estate market sales prices to determine if the waiver continues to be necessary. The results of the study indicate that 39 States and the District of Columbia have experienced an overall recovery in residential home values to at least their median pre-crash residential sale prices and 11 States have not fully recovered.

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

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<sup>1</sup> "Nationwide Residential Real Estate Market Data Analysis of Negative Equity". This report will be posted on FHWA's website: [https://www.fhwa.dot.gov/real\\_estate/index.cfm](https://www.fhwa.dot.gov/real_estate/index.cfm). in early January 2021.

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 principle is codified in section 4621 of title 42, United State Code (U.S.C.).

Some State agencies are still 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 U.S.C. eligible projects, the displaced homeowner-occupant should not be deprived of a RHP, thereby 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 historically unique negative equity housing situation still exists in some States and creates circumstances that justify a temporary extension of the methodology to calculate a RHP under 49 CFR 24.401(b)(1). The use of the waiver permits State DOTs to use modified procedures to ensure that homeowner-occupants receive the assistance needed to relocate to a comparable replacement dwelling. 49 CFR 24.7 allows waivers of any requirement in 49 CFR 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 until June 30, 2021, 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 property being acquired. Negative equity is a situation in which real property is encumbered by a mortgage (or other qualified liens) that exceeds the current fair market value of the property. Where applicable, this waiver eliminates the normal requirement that the RHP calculation use the amount finally determined and paid as just compensation for the property. Instead, the RHP calculation uses the appraisal-based just compensation amount in the original offer to acquire, even though the final just compensation amount may have been increased through an administrative settlement that takes into account the amount by which the mortgage/lien balance exceeds the fair market value of the property acquired.

In other words, pursuant to 49 CFR 24.7, in a negative equity situation, this waiver defines "acquisition cost" as used in 49 CFR 24.401(b)(1) to mean the initial written offer of just

compensation when calculating the amount by which the cost of the replacement dwelling exceeds the acquisition cost to determine the RHP amount.

This allows a State DOT, when appropriately justified (see Attachment A), to enter into an administrative settlement for the acquisition of a property with negative equity without affecting 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 on a programmatic or project basis. Should a State DOT elect to use this waiver, it should do so in accordance with the following requirements:

1. Ensure use of the waiver will not reduce any assistance or protection to the homeowner. (49 CFR 24.7)
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. Ensure 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.
4. Ensure that a homeowner-occupant with negative equity has not received and has not applied to receive mortgage debt relief or mortgage reduction to ensure that a windfall is not realized as a result of a negative equity waiver negotiated settlement. If debt relief or mortgage reduction has been received or will be received, the State must have a process in place which would ensure that the State receives reimbursement for any amount paid to the homeowner-occupant as part of the negative equity waiver negotiated settlement that is no longer owed by the homeowner-occupant for the mortgage/s on the acquired property.

The State DOT's proposal for implementation of the waiver should 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 is subject to Division Administrator oversight. It is anticipated that the Division office will continue to review the use and implementation of this waiver 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 Melissa Corder at (202) 366-5853 or at [melissa.corder@dot.gov](mailto:melissa.corder@dot.gov), or by contacting your Office of Real Estate Services Point of Contact.

Attachments:

Attachment A: Other Tools

Attachment B: Example Calculation

## **Attachment A: Other Tools**

Other available tools, unaffected by this waiver, include Administrative Settlements as authorized by 49 CFR 24.102(i)<sup>2</sup> 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 an "Administrative Settlement" as indicated in 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 reasonable, 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.

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<sup>2</sup> The use of administrative settlements in the Federal-aid Highway Program is also subject to provisions in 23 CFR 710.105 and 710.203

## Attachment B: Example Calculation

### Example 1:

An owner owes \$200,000 on the mortgage for a home purchased several years ago<sup>3</sup>. The real estate market has rapidly declined since the purchase and not recovered. 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 out, 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)	\$200,000 (Agreement Amount)
- \$150,000 ( <i>Just Compensation Offer</i> )	- \$150,000 ( <i>Just Compensation Offer</i> )
\$ 20,000 (RHP Eligibility)	\$ 50,000 (Increase-Administrative Settlement)
<b>Normal RHP Payment Determination</b>	<b>Waiver RHP Payment Determination</b>
\$50,000 (Increase-Administrative Settlement) is greater than the \$20,000 (RHP Eligibility) resulting in a \$0 RHP Payment.	\$50,000 (Increase-Administrative Settlement) is greater than the \$20,000 (RHP Eligibility) so the waiver allows a \$20,000 RHP Payment.

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<sup>3</sup>The original purchase price is not a factor in these calculations

**Example 2:**

An owner owes \$300,000 on the mortgage for a home purchased several years ago<sup>4</sup>. The real estate market has rapidly declined since the purchase. 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)	\$300,000 (Agreement Amount)
<i>-\$225,000 (Just Compensation Offer)</i>	<i>-\$225,000 (Just Compensation Offer)</i>
\$ 35,000 (RHP Eligibility)	\$ 75,000 (Increase-Administrative Settlement)
<b>Normal RHP Payment Determination</b>	<b>Waiver RHP Payment Determination</b>
\$75,000 (Increase-Administrative Settlement) is greater than the \$35,000 (RHP Eligibility) resulting in a \$0 RHP Payment.	\$75,000 (Increase-Administrative Settlement) is greater than the \$35,000 (RHP Eligibility) so the waiver allows a \$35,000 RHP Payment.

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<sup>4</sup> The original purchase price is not a factor in these calculations.