

Choice Limiting Actions

Projects receiving certain federal sources of funds from MaineHousing (e.g. FedHOME, 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 MaineHousing 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 MaineHousing 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 MaineHousing 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. (The construction management project delivery method must still be approved by MaineHousing Construction Services prior to entering into a construction management contract, as provided in MaineHousing's *Quality Standards and Procedures Manual*.)
 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. MaineHousing will not proceed with the environmental review of a project if a non-complying agreement 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 MaineHousing'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.

**ADDENDUM TO
AIA DOCUMENT A133™ - 2009 STANDARD FORM OF AGREEMENT
BETWEEN OWNER AND CONSTRUCTION MANAGER AS CONSTRUCTOR**

THIS ADDENDUM TO AIA DOCUMENT A133™ - 2009, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONSTRUCTION MANAGER AS CONSTRUCTOR (the "Addendum") is entered into by and between

Owner: _____
(Insert Name of Owner)

and

Construction Manager: _____
(Insert Name of Construction Manager)

for a project located at _____ (the "Project").
(Insert street and city of Project)

Owner and Construction Manager hereby enter into this Addendum and acknowledge and agree as follows:

1. Owner and Construction Manager acknowledge and agree that:
 - a. Maine State Housing Authority ("MaineHousing") proposes to provide funds from the U.S. Department of Housing and Urban Development ("HUD") to the Owner for the Project.
 - b. As a condition of providing HUD funds to the Owner for the Project, MaineHousing must complete a satisfactory environmental review of the Project under HUD's environmental review rules at 24 C.F.R. Part 58. The Project's environmental review may require compliance with certain conditions that may be applicable to the Project, including but not limited to construction conditions dealing with the protection of historic and archaeological resources, remediation of environmental contamination on the Project site, addressing impacts to any wetlands or a 100-year floodplain, and protecting the Project's occupants from explosive and flammable hazards.
 - c. In addition to completing a satisfactory environmental review, MaineHousing must apply to HUD for the release of the HUD funds for the Project and obtain HUD approval of the release of the HUD funds ("Environmental Clearance").
 - d. Until Environmental Clearance of the Project, HUD's rules prohibit the Owner and the Construction Manager from taking certain actions, referred to as "choice-limiting actions", in connection with the Project, including but not limited to construction-related activities.
 - e. HUD's environmental review rules prohibit MaineHousing from providing any HUD funds for the Project if the Owner, the Construction Manager, or any other participant in the development process for the Project takes a choice-limiting action prior to Environmental Clearance.
 - f. Owner and Construction Manager are simultaneously entering into AIA Document A133™ - 2009 Standard Form of Agreement between Owner and Construction Manager as Constructor (referred to in this Addendum as the "CM Contract").
 - g. To ensure that no choice-limiting actions are taken in connection with the CM Contract, Owner and Construction Manager are entering into this Addendum to the CM Contract, which is effective as of the date of the CM Contract.

2. Notwithstanding any contrary or inconsistent provision of the CM Contract or of any other document incorporated by reference into the CM Contract, this Addendum is and at all times shall be and remain an integral part of the CM Contract as if each and every one of the terms and provisions of this Addendum were expressly stated and contained within the CM Contract. In the case of any inconsistency between the CM Contract and this Addendum, this Addendum shall take precedence and shall govern. Owner and Construction Manager shall be bound by and comply with the terms of this Addendum.

3. Notwithstanding any contrary or inconsistent provision of the CM Contract or of any other document incorporated by reference into the CM Contract, prior to written notification by MaineHousing to the Owner of the Project's Environmental Clearance, the Owner and Construction Manager agree not to take, and shall not actually take, any of the following actions:

- a. Commence the Construction Phase or undertake the Work or any other Construction Phase responsibilities.
- b. Order or otherwise take steps to procure any construction equipment or materials.
- c. Incur or pay any costs or enter into any other agreements (including but not limited to any subcontracts) relating to the Work or any other Construction Phase responsibilities.
- d. Enter into or execute the Guaranteed Maximum Price ("GMP") Amendment (AIA Document A133™ – 2009 Exhibit A) to the CM Contract.
- e. Issue a Notice to Proceed for the Project.

4. In the event that the environmental review of the Project requires compliance with any conditions, including but not limited to one or more of the conditions listed in Section 1.b above, Owner and Construction Manager shall ensure that the Work includes compliance with such conditions, including any measures required by MaineHousing.

5. Capitalized terms not defined in this Addendum are defined in the manner provided in the CM Agreement.

This Addendum is entered into and is effective as of the date of the CM Contract.

OWNER (Signature)

CONSTRUCTION MANAGER (Signature)

Printed Name and Title

Printed Name and Title

Date

Date