



U. S. Department of Housing and Urban Development Public and Indian Housing

Special Attention of:

Public Housing Agencies (PHAs);
Public Housing Resident Management Corporations;
HUD Public Housing Program Directors;
HUD Regional Counsels

NOTICE PIH-2009-01 (PHA)

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Cross References

Subject: Guidance for Obtaining HUD Consent for Takings of Public Housing Property by Eminent Domain

- 1. Purpose.** This Notice provides guidance on the factors that HUD will consider in determining whether to consent to a taking of public housing property that was developed/acquired by, or is maintained with funds from the United States Housing Act of 1937 (the “Act”) by a governmental or quasi-governmental body using eminent domain authority (“Taking Body”). For purposes of this Notice, public housing property does not include the property of an Indian Housing/Tribally Designated Housing Entity. Most public housing property is owned by PHAs, but units owned by private entities in a mixed-finance arrangement may also be operated as public housing pursuant to 24 CFR 941 (Subpart F).
- 2. Background.** Eminent domain is an exercise of the power of a Taking Body to take property for a public use upon just compensation to the owner. Taking Bodies may include not only State or local government agencies, but also entities such as airport authorities, highway commissions, community development agencies, and utility companies. A Taking Body may propose to exercise its eminent domain authority to take public housing property. Public housing property is unique in that both HUD and the respective PHA have an interest in the property—the PHA has a direct interest as legal owner of the property and HUD has an interest under the Annual Contributions Contract (ACC) and the Declaration of Trust (DOT). Because this interest is property of the United States, HUD’s consent to the taking of public housing property is necessary.

HUD does not impose requirements on Taking Bodies since they are free at any time to proceed in the courts. This Notice acknowledges that the rights of the parties involved in an eminent domain proceeding, including HUD, will ultimately be determined by courts if the parties are in disagreement. This Notice is intended only to provide guidance on some of the factors that HUD may choose to consider in deciding, on a case-by-case basis, whether to consent to a taking of public housing property. An agreement between the parties (e.g., PHA and Taking Body) on the terms of a taking does not negate the requirement to obtain HUD’s consent. If HUD does not agree to a taking, it may choose to enforce its interest in the public housing property by requesting that the Department of Justice intervene in the eminent domain proceeding or petition the court to dismiss the proceeding on jurisdictional grounds.
- 3. Relation to HUD’s demolition/disposition regulations in 24 CFR Part 970.** Takings under eminent domain are exempt from HUD regulations at 24 CFR part 970, which implement Section 18 of the Act. However, HUD may consent to eminent domain proceedings on a case by case

basis if the interests of public housing residents, PHAs, and HUD are adequately protected.

- 4. Use of Eminent Domain.** Under the ACC, PHAs “shall at all times develop and operate each project solely for the purpose of providing decent, safe, and sanitary housing for eligible families.” A proposed action is an exercise of eminent domain subject to this Notice when:
- a) The Taking Body has been authorized to acquire real property by eminent domain under State law; and
 - b) The Taking Body announces its intent to use its power of eminent domain to take a PHA property.

Because eminent domain takings are typically highly expedited proceedings, PHAs are required to begin the process of securing HUD approval as soon as possible.

- 5. Factors for Determining HUD Consent.** Some of the factors which HUD may consider in making its determination of whether to consent to a taking of public housing property include:
- a) *Agreement Between the PHA and the Taking Body.* HUD will consider if the PHA has agreed to the taking and/or has entered into an agreement with the Taking Body for the taking;
 - b) *PHA Board Support.* HUD will consider evidence (e.g., Board Resolution) showing the PHA Board supports the taking;
 - c) *Authority of the Taking Body.* HUD will consider the legal sufficiency of the evidence of the Taking Body’s authority under applicable State laws to acquire the public housing property;
 - d) *Compensation for the Dwelling Units Taken.* The Taking Body may provide either monetary compensation or replacement housing as compensation to the PHA for the units taken. HUD should generally consider the following factors when assessing its consent based on the adequacy of the compensation.

If the Taking Body chooses to provide monetary compensation, HUD staff should consider the compensation offered and the cost of replacement housing for all units taken. HUD staff may base its consideration of the adequacy of compensation on the cost of creating the same kind and number of units of housing, facilities, and other property on a one-for-one basis, or the fair market value (FMV) of the public housing property (as determined by an independent appraiser). The cost of replacement units should be based on comparable size and unit configuration to those taken, except where the Taking Body or PHA can demonstrate, and HUD concurs, that there is a lack of need for the unit configuration or size or configuration of units taken, or there is a greater need for another unit size.

If the Taking Body is proposing to provide replacement property instead of monetary compensation, HUD may evaluate the description of the replacement property, together with an appraisal of the FMV of that property. HUD should generally consider the compensation adequate if the appraisal shows that the FMV of the replacement property is not less than the FMV of the public housing property being taken. However, other factors may be considered as well; for example, if the FMV of the replacement property is of a lesser value than the FMV of the public housing property being taken, HUD may approve the replacement property if the Taking Body is willing to adequately compensate the PHA. All replacement units must meet HUD's construction/acquisition standards for public housing development. The replacement housing may be provided either through direct replacement of units, construction/acquisition, or transfer to the PHA under the turnkey method;

- e) *Other laws.* HUD will consider whether, if it consents to the taking, such consent would violate or lead directly to the violation of other federal laws or regulations.
- f) *Compensation for Vacant Land, Non-Dwelling Structures, and Facilities Taken.* The Taking Body may provide either monetary compensation or actual replacements for vacant land, non-dwelling structures, non-dwelling spaces and other facilities (such as community buildings, administrative offices, basketball courts, playgrounds, maintenance facilities, etc) that are lost to the PHA and its residents as a result of the taking. If the Taking Body is providing monetary compensation, HUD staff may base its consideration of the adequacy of compensation on the cost of (i) developing or acquiring replacement structures/facilities, or (ii) the FMV of the structures/facilities taken;
- g) *Compensation for Severance Damages.* As a factor in determining whether to consent to a taking, HUD may also consider whether the Taking Body should provide the PHA with compensation for severance damages, which should include any loss of assessed value caused by a partial taking of a parcel of public housing property. Severance damages may also include compensation for any mitigation or reconstruction costs required to correct any damage to public housing property caused by the taking;
- h) *Appraisal of the FMV of the Public Housing Property.* The FMV of the public housing property being taken should be determined by an independent state-licensed or state-certified appraiser. The Taking Body, with HUD's approval, may use other independent means to determine the FMV of the public housing property proposed to be taken if the PHA and/or Taking Body can show that obtaining an appraisal would not be economical. In addition, pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) and its implementing regulations at 49 CFR 24.102(c)(2), a waiver valuation may be used instead of an appraisal if HUD, in its sole discretion, determines that an appraisal is unnecessary;
- i) *Resident Consultation.* HUD will not consent to a taking of public housing property unless the residents of the affected Development have been notified of the taking (by either the Taking Body or the PHA), as required by any applicable Federal, State and local law;
- j) *Evidence that the Taking Body Will Pay for the Costs of Relocating the Residents to Comparable Housing for any Displacement that Occurs as a Result of the Taking.* When the proposed taking is of a federally assisted development, any resulting displacement is subject to the URA. It is the responsibility of the Taking Body to ensure it is in compliance with all applicable URA requirements. When the proposed taking is not a federally assisted development, but includes a building with occupied units, the Taking Body must nonetheless provide relocation and housing assistance to the residents of that building that is equivalent to the assistance required under the URA. An agreement between the Taking Body and the residents, pursuant to which the residents agree not to challenge the eminent domain action in exchange for the type of relocation assistance described in the preceding sentences, will enhance the likelihood that HUD will consent to the taking;
- k) *Satisfaction of all Applicable Environmental and Historic Preservation Requirements for the Public Housing Property and any Replacement Units.* Before HUD releases its interest in a public housing property to a Taking Body, HUD must conduct an environmental review in

accordance with 24 CFR part 50 to satisfy the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.) and other related laws. The environmental review under 24 CFR part 50 must include an inquiry into and review of any intended re-use of the public housing property. HUD may use information provided by the PHA or Taking Body to conduct the environmental review; and

- l) *HUD Site and Neighborhood Standards Shall Apply to All Replacement Properties Irrespective of the Manner of Development (e.g., Acquisition or Construction)*. The local HUD Office of Public Housing shall conduct a site and neighborhood standards review of all proposed replacement properties in accordance with 24 CFR 941 and/or other HUD regulation(s), as applicable.

6. Acquiring HUD Consent.

HUD's determination to consent to a taking will be based on information provided from the PHA (and Taking Body) describing the proposed action. If the PHA's ability to carry out its mission is threatened by an eminent domain action, the PHA should notify the HUD Regional/Field Counsel and the HUD Director of Public Housing in its jurisdiction of the proposed taking. In all other cases, at the time the Taking Body has either asked the Field Office for HUD's consent to a taking or has taken the first step required under state law for a taking by eminent domain to occur (see 24 CFR 970.3(b)(8)), the PHA should submit an electronic application via the PIH Information Center (PIC) to HUD's Special Applications Center (SAC). The PHA's request for HUD consent should include all requested attachments (including documentation from the Taking Body). The SAC will then forward the request and its recommendation to the Assistant Secretary for Public and Indian Housing.

The SAC will review the PHA's request for HUD consent to the taking, along with all accompanying information. The SAC will consult the HUD Regional Counsel in the jurisdiction where the public housing property is located. After reviewing relevant state law, considering all local conditions, and consulting the applicable HUD Director of Public Housing, the Regional Counsel shall submit recommendations to the SAC. Regional counsel and the SAC are encouraged to consult with HUD's Office of Litigation. If the taking is acceptable to the SAC, that office will prepare a recommendation indicating that HUD should consent to the taking. If the taking is not acceptable to HUD, the SAC will prepare a recommendation indicating that HUD should not consent to the taking. The Office of General Counsel will be included in the concurrences for all HUD consent letters involving takings. The Assistant Secretary for Public and Indian Housing (or other Headquarters Office of Public Housing official with delegated authority) shall make the final decision and notify the PHA.

7. **PIC Requirements.** The SAC will inform local HUD Offices of Public Housing of all HUD consents to takings of public housing property. Local HUD Offices of Public Housing will be responsible for the implementation of the takings and for reporting the actual data in PIC.
8. **Paperwork Reduction Act.** The information collection requirements contained in this document are approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C 2501-3520). The OMB control number is 2577-0075. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

- 9. Technical Assistance.** Technical Assistance is available for PHAs from the SAC and from HUD Offices of Public Housing.

U.S. Department of HUD
Special Applications Center
77 West Jackson Blvd.
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(312) 353-6236
<http://www.hud.gov/sac>

/s/

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