

MEMORANDUM

HOME Investment Partnerships Program (HOME) Policy Guidance

This policy remains effective until it is amended, superseded, or rescinded.

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SUBJECT: Policy and Procedure regarding homebuyer agreements, recapture of HOME funds under homebuyer agreements, ongoing monitoring, and use of funds recaptured under homebuyer agreements.

This policy memorandum describes the policies and procedures of the Department's HOME Investment Partnerships Program (HOME) regarding homebuyer agreements, recapture of HOME funds under homebuyer agreements, ongoing monitoring, and use of funds recaptured under homebuyer agreements. In the event of any conflict between this policy memorandum and any other relevant guidance published by the Nebraska Department of Economic Development, this document controls. In the event of any conflict between this policy memorandum and the following, the following control: relevant guidance published by the US Department of Housing and Urban Development, federal statutes, or federal regulations.

Applicable Regulation and Guidance

24 C.F.R. § 92.254 Qualification as affordable housing: Homeownership.

(a) Acquisition with or without rehabilitation. Housing that is for acquisition by a family must meet the affordability requirements of this paragraph (a).

(5) Resale and recapture. The participating jurisdiction must establish the resale or recapture requirements that comply with the standards of this section and set forth the requirements in its consolidated plan. HUD must determine that they are appropriate and must specifically approve them in writing.

(ii) Recapture. Recapture provisions must ensure that the participating jurisdiction recoups all or a portion of the HOME assistance to the homebuyers, if the housing does not continue to be the principal residence of the family for the duration of the period of affordability. The participating jurisdiction may structure its recapture provisions based on its program design and market conditions. The period of affordability is based upon the total amount of HOME funds subject to recapture described in paragraph (a)(5)(ii)(A)(5) of this section. Recapture provisions may permit the subsequent homebuyer to assume the HOME assistance (subject to the HOME requirements for the remainder of the period of affordability) if the subsequent homebuyer is low-income, and no additional HOME assistance is provided.

(A) The following options for recapture requirements are acceptable to HUD. The participating jurisdiction may adopt, modify or develop its own recapture requirements for HUD approval. In establishing its recapture requirements, the participating jurisdiction is subject to the limitation that when the recapture requirement is triggered by a sale (voluntary or involuntary) of the housing unit, the amount recaptured cannot exceed the net proceeds, if any. The net proceeds are the sales price minus superior loan repayment (other than HOME funds) and any closing costs.

(1) Recapture entire amount. The participating jurisdiction may recapture the entire amount of the HOME investment from the homeowner.

(2) Reduction during affordability period. The participating jurisdiction may reduce the HOME investment amount to be recaptured on a prorata basis for the time the homeowner has owned and occupied the housing measured against the required affordability period.

(3) Shared net proceeds. If the net proceeds are not sufficient to recapture the full HOME investment (or a reduced amount as provided for in paragraph (a)(5)(ii)(A)(2) of this section) plus enable the homeowner to recover the amount of the homeowner's downpayment and any capital improvement investment made by the owner since purchase, the participating jurisdiction may share the net proceeds. The net proceeds are the sales price minus loan repayment (other than HOME funds) and closing costs. The net proceeds may be divided proportionally as set forth in the following mathematical formulas:

(4) Owner investment returned first. The participating jurisdiction may permit the homebuyer to recover the homebuyer's entire investment (downpayment and capital improvements made by the owner since purchase) before recapturing the HOME investment.

(5) Amount subject to recapture. The HOME investment that is subject to recapture is based on the amount of HOME assistance that enabled the homebuyer to buy the dwelling unit. This includes any HOME assistance that reduced the purchase price from fair market value to an affordable price, but excludes the amount between the cost of producing the unit and the market value of the property (i.e., the development subsidy). The recaptured funds must be used to carry out HOME-eligible activities in accordance with the requirements of this part. If the HOME assistance is only used for the development subsidy and therefore not subject to recapture, the resale option must be used.

24 C.F.R. § 92.504 Participating jurisdiction responsibilities; written agreements; on-site inspection.

(b) Executing a written agreement. Before disbursing any HOME funds to any entity, the participating jurisdiction must enter into a written agreement with that entity. Before disbursing any HOME funds to any entity, a State recipient, subrecipient, or contractor which is administering all or a part of the HOME program on behalf of the participating jurisdiction, must also enter into a written agreement with that entity. The written agreement must ensure compliance with the requirements of this part.

(c) Provisions in written agreements. The contents of the agreement may vary depending upon the role the entity is asked to assume or the type of project undertaken. This section details basic requirements by role and the minimum provisions that must be included in a written agreement.

(5) Homebuyer, homeowner or tenant receiving tenant-based rental or security deposit assistance. When a participating jurisdiction provides assistance to a homebuyer, homeowner or tenant the written agreement may take many forms depending upon the nature of assistance. As appropriate, it must include as a minimum:

(i) For homebuyers, the agreement must conform to the requirements in § 92.254(a), the value of the property, principal residence, lease-purchase, if applicable, and the resale or recapture provisions. The agreement must specify the amount of HOME funds, the form of assistance, e.g., grant, amortizing loan, deferred payment loan, the use of the funds (e.g., down-payment, closing costs, rehabilitation) and the time by which the housing must be acquired.

24 C.F.R. § 92.503 Program income, repayments, and recaptured funds.

(c) Recaptures. HOME funds recaptured in accordance with § 92.254(a)(5)(ii) must be used in accordance with the requirements of this part. Recaptured funds must be deposited in the participating jurisdiction's HOME Investment Trust Fund local account unless the participating jurisdiction permits the State recipient, subrecipient, or community housing development organization to retain the recaptured funds for additional HOME projects pursuant to the written agreement required by § 92.504. If the jurisdiction is not a participating jurisdiction when the recaptured funds are received, the funds must be remitted to HUD and reallocated in accordance with § 92.454.

Notice CPD-12-003: Guidance on Resale and Recapture Provision Requirements under the HOME Program

VII. IMPOSING RESALE AND RECAPTURE PROVISIONS

Compliance with resale and recapture provisions is not only required by statute and regulation, but it is also vital to operating a successful homebuyer program. PJs are responsible for ensuring that homebuyers maintain the housing as their principal residence for the duration of the applicable affordability period. If the home is sold during the period of affordability, the PJ must be notified of the sale, and the applicable resale or recapture provisions must be employed. Consequently, it is important that PJs use effective enforcement mechanisms to secure the resale and recapture requirements on specific HOME-assisted properties. It is also important that the PJ understands its repayment obligations in the event of noncompliance, whether voluntary or involuntary. Finally, PJs should be aware that ongoing monitoring will help ensure that HOME-assisted homebuyer projects qualify as affordable housing for the duration of the affordability period.

a. Written Agreements

Regardless of whether a PJ uses resale or recapture, it must execute a HOME written agreement that accurately reflects the resale or recapture provisions with the homebuyer before or at the time of sale. A clear, detailed written agreement ensures that all parties are aware of the specific HOME requirements applicable to the unit (i.e., period or affordability, principal residency requirement, terms and conditions of either the resale or recapture requirement), and helps the PJ enforce those requirements.

The HOME written agreement must be a separate legal document from any loan instrument and must, at a minimum, comply with the requirements at §92.504(c)(5) of the HOME rule. If the PJ provides HOME funds to a subrecipient, State recipient or CHDO to develop and sell affordable housing, the PJ must prepare and

execute the agreement with the buyer, or be a party to the agreement along with the entity it funded. In all instances, the PJ is responsible for ensuring that it can enforce the written agreement.

b. Enforcement Mechanisms

2. Recapture

The written agreement between the homebuyer and the PJ, as well as mortgage and lien documents are typically used to impose the recapture requirements in HOME-assisted homebuyer projects under recapture provisions. The purpose of these enforcement mechanisms is to ensure that the PJ recaptures the direct subsidy to the HOME-assisted homebuyer if the HOME-assisted property is transferred. Unlike the resale option, deed restrictions, covenants running with the land, or other similar mechanisms are not required by the HOME rule to be used in homebuyer projects under the recapture option. However, many PJs choose to use these mechanisms for enforcing the affordability period and as notification of the transfer of the property.

g. Ongoing monitoring

For HOME-assisted homebuyer projects under resale or recapture agreements, HUD strongly recommended that PJs perform ongoing monitoring of the principal residency requirement during the period of affordability. Ultimately, it is the PJ's responsibility to ensure that the HOME-assisted housing qualifies as affordable housing under §92.254 during the period of affordability.

Confirmation that the buyer is using the property as his or her principal residence can often be accomplished by verifying that the buyer's name appears on utility company records or insurance company records for the home. In addition, postcard or letters mailed with "do not forward" instructions can demonstrate whether the buyer is receiving mail at the home.

Policy and Procedure

Based on the regulatory requirements and administrative guidance indicated above, the State of Nebraska, as the Participating Jurisdiction is required to enter into a written agreement before disbursing any HOME funds to HOME-assisted homebuyers and ensure that homebuyers maintain the HOME funded housing as their principal residence throughout the required affordability period. If the home is sold during the period of affordability, the State must be notified of the sale, and the required recapture must take place.

As such, the State will enter into a written agreement with any homebuyer assisted with HOME funds. This agreement will be a separate legal document from any loan instrument and will comply with the requirements of 24 C.F.R. § 92.504(c)(5). As part of its responsibilities in administering the HOME program, the State has prepared a template Homebuyer Agreement for such purposes. This template agreement must be executed anytime HOME funds are to be disbursed to HOME-assisted homebuyers. The only allowable exception to the requirement that the State's template written agreement must be used is in the event that the State has provided HOME funds to a CHDO to develop and sell affordable housing and the State is included as a party to a qualifying agreement along with the CHDO under which the State can enforce that written agreement.

The written agreement between the homebuyer and the State and the recapture provisions contained therein will be enforced under a Deed of Trust and resulting lien arising therewith. The purpose of the Deed of Trust is to ensure that the State is able to recapture the subsidy to the HOME-assisted homebuyer if the HOME-assisted property is transferred. Deed restrictions, covenants running with the land, or other similar mechanisms are not required by the HOME rule to be used in

homebuyer projects under the recapture option and the State chooses not to use these mechanisms. In the event the State is included as a party with a CHDO to the relevant written agreement, it must also be included in the accompanying Deed of Trust or the State must record its own Deed of Trust. The State must be provided an executed copy of the homebuyer agreement and the accompanying Deed of Trust. The executed homebuyer agreement must be provided to DED before any HOME funds are disbursed to a homebuyer. The homebuyer agreement and the recorded Deed of Trust must be provided to DED within 30 days of closing.

Aware that ongoing monitoring will help ensure that HOME-assisted homebuyer projects qualify as affordable housing for the duration of the affordability period, the State in partnership and under agreement with CHDOs as relevant, will perform ongoing annual monitoring of the principal residency requirement during the period of affordability. Confirmation that the buyer is using the property as his or her principal residence will be accomplished by annually verifying that the buyer's name appears on utility company records or insurance company records for the home, with a postcard or letter mailed with "do not forward" instructions, or any other means which may demonstrate that this requirement is being met.

In the event HOME funds are recaptured pursuant to 24 C.F.R. § 92.254(a)(5)(ii), the recaptured funds must typically be deposited in the State's HOME Investment Trust Fund local account. However, pursuant to 24 C.F.R. § 92.503(c), the State permits CHDOs to retain recaptured funds for additional HOME projects pursuant to their written agreement.