

CHAPTER 5

Real Property Acquisition

5-1 INTRODUCTION

- A. Purpose of Chapter. This chapter provides policies and guidance relating to the acquisition of real property (real estate) for HUD funded programs and projects under the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) and other HUD requirements. The policies and guidance found in this handbook supplement the statutory and regulatory requirements of the URA. Recipients must ensure compliance with the URA statute and implementing regulations at 49 CFR Part 24.
- B. General URA Acquisition Process (Appendix 23).

5-2 APPLICABILITY OF URA ACQUISITION REQUIREMENTS

- A. Voluntary vs. Involuntary Acquisition. 49 CFR Subpart B sets forth the real property acquisition requirements for Federal and federally-assisted programs and projects under the URA. Generally, the URA regulations have different requirements for acquisitions of a voluntary nature and for acquisitions under threat or use of eminent domain (condemnation). For ease of understanding, this chapter refers to the different types of acquisitions as: 1) Voluntary acquisitions (transactions with no threat or use of eminent domain meeting the criteria set forth in 49 CFR 24.101(b)(1) through (5)); and 2) Involuntary acquisitions (acquisitions subject to threat or use of eminent domain). Under the URA, voluntary acquisitions which satisfy the requirements of 49 CFR 24.101(b)(1)-(5) are not subject to the acquisition requirements of 49 CFR Part 24 Subpart B. A common misconception is that a “willing seller” or “amicable agreement” means a transaction is “voluntary.” This is not necessarily true under the URA and the applicable requirements of 49 CFR 24.101(b)(1)-(5) must be satisfied for a transaction to be considered a “voluntary acquisition” for purposes of the URA.
- B. Understanding the difference. Recipients must understand the critical differences between “voluntary” acquisitions and “involuntary” acquisitions prior to acquiring real property for a HUD funded project. See the aforementioned regulations and Appendix 23 to determine how your proposed acquisition should be handled. If you are uncertain or have questions how your proposed acquisition should be treated under the URA regulations, contact your local HUD Regional Relocation Specialist for assistance. A list of HUD contacts is accessible on HUD’s Real Estate Acquisition and Relocation web site at: <http://www.hud.gov/relocation>.

- C. Temporary Easements. 49 CFR 24.101(c)(1) provides that the subpart B requirements apply to the acquisition of permanent and/or temporary easements necessary for the project. However, 49 CFR 24.101(c)(2) provides an exception for the acquisition of temporary easements which exclusively benefit the property owner. 49 CFR 24.101(c)(2) states that, *“The provisions of this subpart do not apply to temporary easements or permits needed solely to perform work intended exclusively for the benefit of the property owner, which work may not be done if agreement cannot be reached.”* The acquisition of temporary easements which do not satisfy the exception provided in 49 CFR 24.101(c)(2) above remain subject to the regulatory requirements of 49 CFR part 24 subpart B. It is also important to note that “voluntary acquisitions” of temporary easements which satisfy the applicable requirements of 49 CFR 24.101(b)(1)-(5) are not subject to the full URA regulatory requirements of 49 CFR part 24 subpart B.
- D. Greatest Extent Practicable Under State Law (49 CFR 24.4(a)).¹ The phrase “greatest extent practicable under state law” means: if the State is not specifically precluded by its law, compliance with the URA and regulatory provisions of sections 24.102, 24.103, 24.104 and 24.105 is required.

5-3 VOLUNTARY ACQUISITIONS (49 CFR 24.101(b)(1)-(5))

- A. Persons Acting on Behalf of Agency. In cases where persons (e.g., private developer, agent, non-profit organization, etc.) pursue the acquisition of real property “officially or unofficially” on behalf of an agency for a federally-funded project, such persons must satisfy the applicable voluntary acquisition requirements of 24.101(b)(1)-(5). In the event the person is acting on behalf of an agency with eminent domain authority, all applicable requirements of 24.101(b)(1) must be satisfied. In no case is it permissible for an agency to subsequently undertake the acquisition under threat or use of its eminent domain authority in the event initial negotiations for a voluntary acquisition fail. If the agency cannot ensure the applicable requirements of 24.101(b)(1)(5) will be satisfied, then such acquisitions must not be pursued as a “voluntary acquisition” and must instead be pursued as an involuntary acquisition under the full requirements of 49 CFR 24 Subpart B.
- B. Non-Profit Organizations (NPOs). The acquisition activities of NPOs are subject to Uniform Act coverage if such activities are for a Federal or federally-assisted program or project. Pertinent considerations in determining whether an acquisition is “for” a program or project include (but are not limited to) (1) when HUD assistance was requested and (2) whether the acquisition is integrally related to the program or project.

¹ U.S. Department of Transportation-Federal Highway Administration **Federal-Aid Policy Guide**; February 16, 2006, Transmittal 35

- 1) An NPO usually does not have recourse to the power of eminent domain. Under such circumstances, the obligation imposed by the Uniform Act would be limited. The NPO would ordinarily comply with 49 CFR 24.101(b)(2) in the acquisition of property and 49 CFR 24.2(a)(9)(ii)(H) in providing relocation assistance. See also paragraph 5-3A.
- 2) The requirements for acquisition under Section 24.101(b)(2) are: (1) The owner must be advised that the property will not be acquired in the event negotiations fail to result in an amicable agreement, and (2) the owner must be advised, in writing, of what is believed to be the market value of the property. The regulations do not require that relocation assistance be offered to an owner-occupant. However, any resulting displacement of a tenant is subject to the regulations in 49 CFR Part 24.

C. Property Owner Notification. Based on requests from recipients, sample letters which may serve to provide required information to property owners in voluntary acquisitions under 24.101(b)(1) & (b)(2) are included as Appendices 31 & 32. These sample letters are not required to be used, however, they are useful guides to help recipients satisfy the regulatory requirements of this section. See also paragraph 5-4A.

D. Tenant Notification. If a voluntary acquisition of tenant-occupied property will result in the displacement of the tenant-occupants, they will generally be eligible for relocation assistance. Upon issuance of a voluntary acquisition informational notice (see Appendix 31 & 32) and entering into negotiations for the property, tenant-occupants must be fully informed in writing of their potential eligibility for relocation assistance.

- 1) The preliminary tenant notification may be accomplished through a General Information Notice (GIN) (see Appendices 3 & 3a). Such tenant-occupants must also be promptly informed in writing of their eligibility for relocation assistance, if negotiations are successful and result in a written agreement binding the acquiring agency to purchase the property from which the tenant will be displaced. In order to trigger a tenant-occupant's eligibility for relocation assistance, the written agreement must subject the acquiring agency and owner to legally enforceable commitments to proceed with the purchase. In the event negotiations are unsuccessful, tenant-occupants must also be promptly informed in writing of their ineligibility for relocation assistance. See 49 CFR 24.2(a)(15)(iv) Initiations of Negotiations and Appendix A.
- 2) Prior to entering into any agreement to purchase property in connection with a voluntary acquisition, agencies should ensure they are allowed access to tenant-occupants who may be displaced as a result of the acquisition. Agency access to tenant-occupants should be made part of any offer or option contract for voluntary acquisitions. Tenant access is

necessary to not only ensure required notifications are provided, but also so that interviews with tenant-occupants may be conducted. Interviews are necessary for early identification of potential relocation challenges and to accurately estimate relocation costs associated with tenant displacement. Information obtained as a result of tenant access and interviews provides agencies with useful information to determine whether to proceed with a proposed acquisition or to pursue alternate properties.

- 3) Where a property owner will not allow an agency to have tenant access, the agency should pursue alternate properties where such access will be granted.

E. Estimates of Market Value. In cases of voluntary acquisitions under 49 CFR 24.101(b)(1)(iv) & (b)(2)(ii) agencies must inform the property owner in writing of what it believes to be the market value of the property (See 49 CFR 24 Appendix A). Although an appraisal is not required by regulation in these circumstances, HUD encourages the use of an appraisal in order to establish the agency's estimate of market value, especially for high value and/or complex property acquisitions. In some cases it would be both prudent and appropriate to conduct a technical appraisal review of such appraisals in accordance with section 24.104 as part of the recipient's market value determination process. If an appraisal is not prepared, the estimate of market value must be prepared by a person familiar with real estate values. The agency's files must include an explanation, with reasonable evidence, of the basis for the agency's estimate of market value.

F. Negotiations. In the case of voluntary acquisitions under the URA, there is nothing in the regulations to preclude negotiations resulting in agreements at, above, or even below the agency's estimate of market value after the property owner has been so informed and all applicable requirements have been satisfied. See 49 CFR part 24 - Appendix A 24.101(b)(1)(iv) & (2)(ii) & HUD RAP Vol. 1 No. 2 - dated 11/2005.

- 1) Recipients should consider alternative properties available for purchase prior to entering into any agreement for property which exceeds the original estimate of market value. Subject to applicable program requirements, alternative properties must be pursued when proposed agreements which exceed the recipient's original estimate cannot be legitimately supported and justified.
- 2) Documentation and support for all agreements (at, below, or above the original estimate) must be at an appropriate level to satisfy a HUD technical review. All such agreements are subject to HUD review and corrective action when deemed necessary (see also paragraph 5-4 H).

G. Title Issues. In voluntary acquisitions, agencies should not pay costs required to perfect the owner's title to the real property to be acquired. Agencies should require owners to transfer the property with clear title; without heirship, title dispute, or other title problems such as liens.

H. Noncompliance with Voluntary Acquisition Requirements. In those cases where an agency has entered into a purchase option or contract for an acquisition but has not satisfied all applicable requirements of a voluntary acquisition under 24.101(b)(1)-(5), the agency must, in writing, provide the seller the opportunity to withdraw from the existing agreement. After the applicable requirements have been satisfied by the agency and the seller has been so informed in writing, the seller may elect to void or affirm the original agreement in writing. If the seller voids the original agreement, the agency can negotiate a new agreement with the seller. Additional corrective action may be required based on the circumstances as determined by the local HUD Regional Relocation Specialist.

5-4 INVOLUNTARY ACQUISITION BASIC REQUIREMENTS

A. Notice to Owner (49 CFR 24.102(b)). This acquisition notice usually serves as an agency's initial written communication to an owner whose property may be acquired for a federally-funded project under threat or use of eminent domain. This notice is required to be issued in writing and provides information on the basic protections for property owners under the Uniform Act and regulations. Agencies may satisfy this requirement by providing, as appropriate, the HUD information brochure, "When a Public Agency Acquires Your Property" (HUD-1041-CPD) available through HUD Field Office locations or from HUD's web site at <http://www.hud.gov/relocation>. Records of when this written notice was issued must be maintained for HUD monitoring purposes. Sample language for a "notice to owner" is included as Appendix 30.

- 1) Agencies must understand the difference between a "notice to owner" and a "notice of intent to acquire" (49 CFR 24.203(d)). Whereas a "notice to owner" sets forth minimum rights and protections for property owners under the URA, a "notice of intent to acquire" is specifically intended to establish eligibility for relocation assistance and payments in advance of the usual URA triggering actions.
- 2) If the agency does not know whether or not the property is tenant-occupied, the notice to owner should ask for this information. Tenant-occupants would be considered displaced persons and could impact the agency's decision to go forward with the purchase because of the financial implication of relocation costs.

- 3) If the property is tenant-occupied, a General Information Notice should be issued to each tenant as soon as feasible (which may be at the time of the Notice to the Owner or, if the agency was unaware that the property was tenant-occupied, as soon as the agency becomes aware of the tenant(s)).

B. Notification Requirements for Time Share Condominium Owners.[□]

Acquisition notification of property owners in a time-share condominium may be accomplished by advising the homeowners' association, which in turn may notify the condominium owners via a homeowners' association meeting. The appraiser may participate in the meeting to satisfy the requirement that the homeowners be given the opportunity to accompany the appraiser during the property inspection.

C. Establishment of Just Compensation Cannot be Delegated (49 CFR

24.102(d)).* The establishment of an amount believed to be just compensation for federally-funded projects cannot be delegated to a private consultant. It would be an improper delegation of a public function to a private entity. Establishment of the amount believed to be just compensation to be offered the property owner must be by an appropriate official of the acquiring agency.

D. Property Owner with Conflict of Interest. A conflict of interest exists whenever the owner of an interest in real property that is to be acquired for a HUD-assisted project serves as an officer, employee, or agent of the recipient or its designated acquiring agent or exercises any other responsible function in connection with that project. See, e.g., 24 CFR 570.611. A recipient must establish safeguards to prohibit employees, officers, and agents from using their position for a purpose that is, or gives the appearance of being, motivated by a desire for private gain for themselves or others, particularly those with whom they have family, business, or other ties. The recipient must document its files to enable HUD to review the adequacy of actions taken. Recipients should refer to applicable HUD program regulations for applicable conflict of interest requirements.

- 1) Examples of Safeguards: Among the various measures which a recipient could adopt to prevent the possibility of undue personal enrichment by real property owners who may be in a conflict of interest position are:²

- a) Disclosure. The recipient may require disclosure of any potential conflict of interest to the governing body of the locality, to the recipient's legal counsel, and as otherwise may be appropriate.

□ "See footnote 1 on p. 5-2"

² The following safeguards are intended to supplement (not replace) any applicable program requirements for addressing conflicts of interest (see, e.g. 24 CFR 570.611(d)).

- b) HUD Price Concurrence. The recipient may request that HUD review the appraisals and the determination of just compensation and concur in the proposed and final acquisition prices.
- c) Condemnation. The recipient may acquire the property through condemnation and let the court determine just compensation for the property. This is especially appropriate if the owner is unwilling to sell his or her property for its appraised fair market value.

E. Waiver Valuations. An appraisal is not required for cases involving acquisition by sale or donation of real property with a low fair market value (Section 301(2)). This provision of the law is further defined and implemented by the URA regulations at 49 CFR 24.102(c), which in part sets forth that an appraisal is not required when the "...Agency determines the appraisal is unnecessary because the valuation problem is uncomplicated and the anticipated value of the proposed acquisition is estimated at \$10,000 or less, based on a review of available data." If these criteria are met, the Agency may prepare a waiver valuation, provided the person performing the waiver valuation has sufficient understanding of appraisal principles and the local real estate market to be qualified to prepare it. The term "Waiver Valuation" is defined at 49 CFR 24.2(a)(33).

- 1) A waiver valuation is not appropriate when:
 - a) The anticipated value of the proposed acquisition is expected to exceed \$10,000 (unless granted prior approval by HUD and the acquiring agency offered the owner the option of an appraisal);
 - b) Possible damages to the remainder property exist;
 - c) Questions on highest and best use exist;
 - d) The valuation problem is complex;
 - e) The use of eminent domain is anticipated;
 - f) Hazardous material/waste may be present; or
 - g) For other reasons, the agency determines an appraisal is required.
- 2) Written procedures for use of a waiver valuation should be established by an Agency prior to its use. When a waiver valuation is determined to be appropriate, adequate documentation of the valuation data used must be maintained in the acquisition file for HUD monitoring purposes.

F. Exclusion of Cost-to-Cure From Waiver Valuation Limits.^{*} Generally, the cost-to-cure cannot be excluded from the \$10,000 waiver valuation limit. However, under certain circumstances, specified items may be excluded from the waiver valuation limits. Some common costs-to-cure related to repetitive contracting for the restoration of items, such as well and septic systems, may be considered for exclusion from waiver valuation limits. The acquiring

* "See footnote 1 on p. 5-2."

agency's procedures should include a definitive policy for handling such items to ensure that there is no duplication of payment in the valuation process.

G. Waiver Valuations – Exceeding \$10,000 Limit. If the anticipated amount of a waiver valuation is expected to exceed \$10,000 but is less than \$25,000, the agency may request HUD prior approval to exceed the \$10,000 regulatory limit. However, in cases where an increased threshold is granted, the agency must still offer the property owner the option of having the agency appraise the property (see 49 CFR 24.102(c)(2)(ii)(C)).

- 1) All requests for approval of a threshold above \$10,000 (not to exceed \$25,000) for a HUD-funded project should be submitted to the appropriate HUD Regional Relocation Specialist who has responsibility for the State in which the project is located. A list of the HUD Regional Relocation Specialists located in the Office of Community Planning and Development (CPD) can be found on HUD's relocation website at: www.HUD.gov/relocation under "Contacts."
- 2) The agency request must include its written waiver valuation operating procedures and documentation to support the waiver request including: identification of the project or projects for which a higher threshold is requested, the threshold amount requested, identification of the person or persons who will be authorized by the agency to perform the waiver valuation in lieu of an appraisal, a description of the qualifications of each named person to perform such a valuation based on sufficient understanding of the local real estate market, and proof that the agency offered the property owner the option of having the agency appraise the property.
- 3) The Regional Relocation Specialist will review the request and consult with appropriate staff from the HUD program area(s) funding the project (CPD, Public and Indian Housing, and/or Housing). The Regional Relocation Specialist will prepare a memorandum addressed to the Field Office CPD Director in whose jurisdiction the project is located, recommending approval or disapproval of the request with appropriate justification. Copies will be provided to the appropriate HUD program areas.
- 4) The Field Office CPD Director in whose jurisdiction the project is located will approve or disapprove of the request.
- 5) If an increase in the waiver valuation threshold is granted by HUD, it is strongly recommended that the agency secure the property owner's agreement to accept a waiver valuation (in lieu of an appraisal) in writing, prior to preparation of the waiver valuation. In any event, the property owner's signature acknowledging the agency's offer of an appraisal and

the property owner's acceptance of a waiver valuation must be included in the agency's acquisition file whenever the waiver valuation amount exceeds \$10,000.

H. Administrative Settlements. Two acquisition related objectives of the URA are "...to encourage and expedite acquisition by agreement..." and "...to minimize litigation and relieve congestion in courts....". The administrative settlement provisions of 49 CFR 24.102(i) are intended to help acquiring agencies achieve these objectives when warranted. Administrative settlements may be considered when reasonable efforts to negotiate an agreement at the amount offered have failed and a settlement would be deemed reasonable, prudent, and in the public interest. Although not a requirement, agencies should consider preparing another appraisal and appraisal review to help determine if a proposed administrative settlement is warranted. Preparation of an additional appraisal and appraisal review can be a cost effective tool used in the administrative settlement process, especially in cases where a substantial increase over the amount of the original offer is under consideration.

- 1) Under the URA administrative settlement provisions, when federal funds pay for or participate in acquisition costs, agencies must document and maintain written justification for the higher amount. The justification must state what available information, including trial risks, supports exceeding the original estimate of market value. The level of documentation should fit the situation. A minor increase in the purchase price will typically require less support than larger increases. Documentation and support for administrative settlements must also be at an appropriate level to demonstrate compliance with applicable program requirements in the case of such reviews or audits as may be necessary and appropriate. All such agreements are subject to HUD review, and failure to provide such documentation may lead to corrective action when determined necessary.
- 2) Acquiring agencies must also comply with applicable HUD program regulations and/or policies in negotiating agreements for a property which exceeds the agency's market value determination. If there is a conflict, HUD program regulations and/or policies prevail.
- 3) If HUD grant funds are used to acquire properties, acquiring agencies must also be guided by the applicable OMB Circulars when considering the original estimate of market value and any agreement which exceeds that amount. A fundamental requirement in the OMB Circulars is that costs charged to a federal grant must be reasonable. OMB Circular A-87 "Cost Principles for State, Local and Indian Tribal Governments," in particular, provides that costs must "[b]e necessary and reasonable for proper and efficient performance and administration of Federal awards."

Each OMB Circular provides additional guidance on determining whether a cost is reasonable.

- a) For states, local, and Indian tribal governments, OMB Circular A-87 provides as follows:
 - (1) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when governmental units or components are predominately federally-funded. In determining reasonableness of a given cost, consideration shall be given to:
 - (a) Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the Federal award,
 - (b) The restraints or requirements imposed by such factors as: sound business practices; arms-length bargaining; Federal, State and other laws and regulations; and, terms and conditions of the Federal award,
 - (c) Market prices for comparable goods or services,
 - (d) Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government,
 - (e) Significant deviations from the established practices of the governmental unit which may unjustifiably increase the Federal award's cost.
- 4) Use of Administrative Settlements in Acquisitions.* Negotiation implies an honest effort to resolve differences with property owners. Negotiators should recognize the inexact nature of the process by which just compensation is determined. Administrative settlements may expedite agreements with owners. The administrative settlement process should be maintained separate from the appraisal/appraisal review function. If the support for a settlement is to be based on appraisal-related issues, then a revised fair market value/just-compensation determination should be made. Administrative settlements are simply that; i.e., settlements made for administrative reasons considered to be in the public interest and properly documented. The law requires acquiring agencies to attempt to expedite acquisitions by agreements with owners so as to avoid litigation and relieve congestion in the courts. There are also significant cost savings in the use of administrative settlements as shown by cost data from the Department of Justice.

* "See footnote 1 on p. 5-2."

- 5) Justification for Administrative and Legal Settlements.* Any administrative settlement is a management decision with advantages and disadvantages. Trial costs can be substantial and must be weighed against the impact that a settlement may have on subsequent negotiations with other owners. Agencies are given considerable discretion in how to deal with such circumstances. The requirements of 49 CFR 24.102(i) are intended to ensure that an acquiring agency explains the reasoning behind its decision, which then serves as documentation for participation in the cost above the initial offer. Such documentation is also required for legal settlements.

- 6) Prohibition of Inclusion of Relocation Payments as Support for Administrative Settlements.* Section 203 of the Uniform Act defines a replacement housing payment as "the amount, if any, when added to the acquisition cost of the dwelling acquired by the Federal agency equals the reasonable cost of a comparable dwelling...." 49 CFR 24.401(b) contains similar language. The acquisition cost of a dwelling includes the amount of just compensation determined through the appraisal process, and those additional amounts paid by the acquiring agency as an administrative settlement, legal settlement, or condemnation award. Relocation payments are not an acquisition cost and cannot be used to support an administrative settlement in whole or in part. Administrative settlements must be justified on acquisition issues only.

- 7) Administrative Settlements on Parcels Where Waiver Valuations are Used (49 CFR 24.102(i)). Section 24.102(c)(2)(ii) provides for the acquisition of parcels without an appraisal when the estimated just compensation for the parcel is \$10,000 or less. Section 24.102(i) provides for administrative settlements when negotiations at the initial offer have failed. An administrative settlement can be made for an amount greater than \$10,000, with proper justification and documentation. When the estimated just compensation for the parcel is \$10,000 or less, the regulations do not require that an appraisal be prepared for a reasonable administrative settlement figure in excess of \$10,000. If the acquiring agency and the owner cannot reach agreement on an amount that the agency deems reasonable, an appraisal and a review would then seem advisable. The URA regulations do not place a monetary limit on administrative settlements that would automatically trigger the requirement for an appraisal. The agency may elect to impose such a limit (see also subparagraph 3). Title III of the Uniform Act and 49 CFR Part 24 clearly allow some administrative discretion when the amount in question is relatively minor. An administrative settlement may be the most prudent course of action available.

* "See footnote 1 on p. 5-2."

I. Condemnation.

- 1) Waiver of Rights relative to Withdrawal of Court Deposit.* In some jurisdictions, if a property owner withdraws any portion of a court deposit in a condemnation action, the withdrawal of deposit causes the property owner to automatically waive the right to challenge the taking. An automatic waiver of the right to challenge the taking is inconsistent with the requirements of the Uniform Act. The withdrawal of funds should not prejudice the property owner's right to request a judicial review of the necessity of the acquisition. Deposited funds may be the only resources available to the property owner, since the property has been encumbered by a condemnation filing.
- 2) Withholding of Payment in Lieu of Security.* The procedure of withholding a portion of the salvage value of owner-retained improvements in lieu of a security deposit or bond to guarantee clean-up of the acquired site is permissible. Every property owner is to be offered the full amount of just compensation, but may elect to retain improvements. When improvements are retained in this manner, it is considered good business practice to hold sufficient funds to ensure proper clean-up of the premises. Additional benefits are also provided through reduced administrative costs.
- 3) Compensation Funds Deposited with Court at Time of Filing for Condemnation. Filing condemnation actions without concurrent deposit of just compensation funds has a clear potential for coercion of affected property owners. The conclusion of condemnation proceedings and physical possession normally take place sometime later. In the intervening period, the landowner must pay the property taxes, is precluded from selling or refinancing the property, or benefiting from any appreciation in value of the property. This practice, particularly where long delays are experienced between the initial filing of condemnation action and the deposit of just compensation funds, is contrary to the intent of the Uniform Act.
- 4) Escrow of Acquisition Payment.* An agency may retain a reasonable portion of the purchase price to ensure that the acquired property, including fixtures, is surrendered to the agency. Such funds must be made

* "See footnote 1 on p. 5-2."

available to the property owner simultaneously, with the agency's taking physical possession of the property.

- 5) Owner has Right to Withdraw Full Amount Deposited with Court Prior to Surrendering Possession.* When condemnation is used, owners must be allowed to withdraw the full amount of the court deposit before being required to surrender possession of the property. This is based on the phrase "for the benefit of the owner," which is found in 49 CFR 24.102(j) and means the owner has the right to withdraw the full amount of the court deposit for the owner's use, in the same sense that the owner has the use of the full amount of the agreed purchase price in instances where condemnation is not involved.

- 6) Condemnation of Uneconomic Remnants.* If the acquisition of a portion of a parcel leaves the owner with an uneconomic remnant, the acquiring agency shall offer to acquire the uneconomic remnant along with the portion of the property needed for the project. While it would be acceptable to condemn an uneconomic remnant to resolve title issues where the property owner consented to the acquisition, condemnation of uneconomic remnants over valuation issues should not be used on federal-aid projects. The condemnation of uneconomic remnants without the owner's consent is inconsistent with both the letter and the intent of the Uniform Act. The law states that the "head of the Federal agency concerned shall offer to acquire that remnant." The law intentionally limits the acquiring agency to "offering" to acquire an uneconomic remnant. To permit the condemnation of uneconomic remnants would effectively allow the taking of private property not required for a defined public purpose. Many, if not most, States would consider the condemnation of real property, in excess of that actually required for a public facility, to be improper as it would not meet the necessity (for taking) test.

J. Appraisal. (see Appendix 19 for a URA Guide for Preparing an Appraisal Scope of Work and Appendix 20 for a sample Agreement for Appraisal Services.)

- 1) The agency must provide the owner with an opportunity to accompany the appraiser during his/her inspection of the property to be acquired. All reasonable requests to meet with the appraiser must be honored. Agencies should include this requirement as part of any appraisal scope of work and all appropriate documentation, including the property owner's release of this obligation (if applicable) must be maintained in the acquisition files for HUD monitoring purposes. NOTE: Owners of tenant-owned improvements proposed for acquisition must also be offered the opportunity to accompany the appraiser during their property inspection.

* "See footnote 1 on p. 5-2."

- 2) When conducting a waiver valuation, the agency is not obligated to invite the property owner to accompany the waiver valuation preparer during the property inspection. Waiver valuations do not meet the definition of an appraisal under the URA and are not subject to URA appraisal requirements.
- 3) Release of Appraisal(s) to Property Owner. State laws govern the release of appraisal documents. There is no specific requirement under the URA for agencies to provide a property owner with a copy of an appraisal document. The URA regulations require that the agency give the property owner a written statement of the basis for the offer of just compensation often called a summary statement.
- 4) Appraisal Data.* Appraisals should rely on factual information or assumptions supported in the market. Cost or income methods not derived from the market data are unacceptable.
- 5) Appraisal of Hazardous Waste Contaminated Property.* Increasingly, agencies are faced with the necessity of acquiring properties that contain or have been exposed to hazardous waste. Any necessary cleanup of waste disposal costs is normally reflected in a property's market value. If the property has been cleared of hazardous waste material by the property owner in accordance with applicable government requirements prior to the acquisition of the property by the public agency, the property is to be appraised and valued as if exposed for sale on the open market without regard to costs incurred clearing the waste material. FHWA lead agency policy on the appraisal of contaminated properties reflects Uniform Standards of Professional Appraisal Practice (USPAP) Advisory Opinion AO-9. (See: <http://commerce.appraisalfoundation.org/html/2006%20USPAP/ao9.htm>.)
- 6) Comparable Sales and Tax Assessor Records.* A comparable sale verified by tax assessor records could be used as a last resort provided that (1) all reasonable efforts to verify the sale with a party to the transaction such as a grantor, grantee, or broker were first exhausted, and (2) it would be used in conjunction with other properly verified sales, and only if its inclusion leads to a better documented estimate of value.
- 7) Appraiser's Certification Statement.* The appraisal certification contains the limiting conditions, i.e. the conclusions and the appraiser's signed statement certifying that to the best of his/her knowledge and belief his/her

* "See footnote 1 on p. 5-2."

conclusions are correct. In the preparation of detailed appraisals where the acquiring agency uses contract (fee) appraisers to perform the appraisals, such appraisers will be state licensed or certified in accordance with Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).

- 8) **Contribution of Specialists in Appraisal Reports.** While the Uniform Act and 49 CFR Part 24 are silent on the issue, general appraisal practice, including practice under the Uniform Act, embraces and even requires specialists' input to the appraisal in situations where the appraiser is not competent to consider or value a certain aspect of the appraisal problem. The appraiser must be competent and qualified to perform the appraisal. See Appendix A, 24.103(d)(1). In this regard, the USPAP Competency Rule provides, in part, that an appraiser must "take all steps necessary or appropriate to complete the assignment competently;" and that this may be accomplished in several ways, including "... association with an appraiser reasonably believed to have the necessary knowledge or experience, or retention of others who possess the required knowledge or experience."
- 9) **Use of Certified Appraisers.** Federal law and regulations do not require that a review appraiser be either licensed or certified to do work on federally-funded projects. If a contract (fee) appraiser is hired to perform an appraisal, then that person must be a State-licensed or certified real estate appraiser. State licensing or certification, and professional designations, however, can help provide an indication of an appraiser's abilities. Therefore, certifications, licenses, and designations must be considered by an Agency in determining the qualifications of an appraiser (or review appraiser).
- 10) **Quality and Validity of Appraisal Products.*** Agencies are encouraged to avail themselves of the services of major professional appraisal organizations' professional practices and ethics panels when confronted about the quality and/or validity of the appraisal products they receive. Such organizations would appreciate submission to them for official review of suspect appraisals made by their members and for appropriate disciplinary action, if warranted.
- 11) **Qualifications of Appraisers and Review Appraisers.** To help identify the best qualified appraisers for particular assignments, the Agency should make appropriate inquiries to users of appraisal services, particularly other public agencies and/or condemnation trial attorneys for the Agency and other public agencies. State highway agencies can be an excellent resource to help identify qualified appraisers and review appraisers since most State highway agencies maintain a qualified list of appraisers and reviewers for their projects.

* "See footnote 1 on p. 5-2."

K. Appraisal Review.*

- 1) Documentation Standards for appraisal/appraisal review should be commensurate with the complexity of the appraisal problem. Review appraisers are expected to prepare an appropriate written explanation supporting the reviewer's estimate of fair market value (see 49 CFR 24, Appendix A)
 - a) When reconciling divergent appraisal reports or establishing an independent estimate of value, the review appraiser must provide a written explanation sufficient to convey the basis for the approved amount.
 - b) Where possible, it is highly recommended for agency staff review appraisers to participate in the planning and scheduling of acquisition activities, evaluation of fee appraisal proposals, and the evaluation of performance of staff and contract appraisers.
- 2) Use of Contract (Fee) Review Appraisers. While Section 24.104 requires the agency to have an appraisal review process and a qualified review appraiser, it does not specifically address the status of the review appraiser, e.g., staff, contract, or fee review appraiser. Because the review appraiser's activity is closely connected with the offer to be made to the property owner on behalf of the acquiring agency (essentially amounting to a commitment of public funds), it is recommended and encouraged that the review appraiser should be a member of the staff of the acquiring agency with all the requisite authority and responsibilities of such public employment. Each funding agency decides whether to use fee review appraisers. If contract or fee review appraisers are permitted, an official of the acquiring agency must approve the estimate of just compensation before any offer to acquire is made.
- 3) Appraisal Review Requirements. The review appraiser must examine all agency appraisal requirements and address any items that fail to meet the requirements of the agency.
- 4) Low Value Appraisal Reviews. All appraisals must be reviewed, including those being handled by a single appraiser/negotiator.
- 5) Review Appraiser Qualifications. The Federal requirements for review appraiser qualifications are found in 49 CFR 24.104 and 103(d)(1), where the acquiring agency is required to have an appraisal review process and, "A qualified review appraiser shall examine the presentation and analysis of market information in all appraisals...". The agency determines what

* "See footnote 1 on p. 5-2."

constitutes being a qualified review appraiser considering 24.103(d)(1) and 24.104 requirements.

L. Acquisition of Tenant-Owned Improvements.* It is clearly the intent of the URA that tenant-owners of buildings, structures, or other improvements be given status equal to owners of real property and are thus entitled to an offer of just compensation. A written offer should be made directly to the tenant-owner for his or her property if the landowner's disclaimer of all interest in the tenant-owned improvements is obtained. Where separate offer letters are tendered to the fee owner and tenant-owner, each would specify only the offer of just compensation for the respective ownership interests. If a disclaimer pursuant to Section 302(b)(2) of the Act cannot be obtained, separate offers to the parties for their respective interests need not be made if the agency attempted but failed to obtain a disclaimer from the landowner regarding the tenant's ownership interest. Payments may be made to tenant-owners only after the landowner has provided a disclaimer of all interest in the improvements of the tenant and, in consideration for any such payment, the tenant assigns, transfers, and releases to the acquiring agency all rights, title, and interest in the improvements.

- 1) Landowner Notice to Vacate to Owner(s) of Tenant-Owned Improvements. When the owner(s) of land know that it is to be acquired under Title III of the Uniform Act, notice should not be issued requiring the owner(s) of tenant-owned improvements to vacate the premises prior to the acquisition of the property by the acquiring agency. Such action is considered to be an attempt to circumvent the rights and entitlement of the tenant-owners under Title III of the Uniform Act.
- 2) Tenant-Owned Improvements with no Right of Removal. To be covered by Section 302(b) of the Uniform Act, a tenant must have an ownership interest in property to be acquired. The interest of a tenant who constructs an improvement on leased land, but does not have the right to remove it, will not be covered by this section of the Uniform Act. A tenant must have an ownership interest and ownership interests must be determined in accordance with state law. In the absence of proof of ownership and a disclaimer by the landowner, a tenant-owner's recourse is with the property owner, assuming there is no subsequent agreement on ownership and a disclaimer by the property owner after negotiations have started.
- 3) Refusal to Make Offer for Tenant-Owned Improvements is Coercive. Refusal by the acquiring agency to make an offer to acquire buildings, structures, or other improvements of a tenant-owner when the fee to the land is being acquired constitutes a coercive action under Section 301(7) of the Uniform Act. Presuming that the buildings, structures, or improvements meet the tests prescribed in Section 302(a) of the Uniform

* "See footnote 1 on p. 5-2."

Act, i.e., that they must be removed from the real property, or that they will be adversely affected by the use to which the real property will be put and the owner is willing to disclaim all interest in the improvements of the tenant, failure to offer to acquire them would be: (1) a violation of the law; (1) a coercive act on the part of the acquiring agency; and (3) a potential cause for the filing of an inverse condemnation action. The provisions of Section 302(a) of the Uniform Act apply to all buildings, structures, and improvements, regardless of their ownership.

- 4) **Written Offer of Just Compensation to Landowner and Owner of Tenant-Owned Improvements.** Tenant-owners are entitled to a written offer and summary statement. However, the content of the offer will vary depending upon the landowner signing a disclaimer, or recognizing the existence of a leasehold interest. If a disclaimer has been signed because there is agreement as to ownership interests, the tenant-owner's offer would cover only his/her interest with the same principle applying to the landowner. The offer of just compensation and summary statement should reference the requirements of Section 302(b)(2) of the Uniform Act, i.e., the landowner's disclaimer and the tenant-owner's assignment of ownership rights. In the case of a leasehold interest where the tenant does not own any buildings, structures, or improvements, State law would govern whether the tenant would be entitled to a written offer and summary statement.

- 5) **Valuation Premise for Tenant-Owned Improvements.** When estimating the value of tenant-owned improvements, value in place and contributory value are essentially the same. The following procedure is used to estimate the value of tenant-owned improvements:
 - a) Determine highest and best use of the property and then allocate value of tenant-owned improvements from the value of the whole.

 - b) Consider full value or interim use value of tenant-owned improvements as follows:
 - (1) Full contributory value in place of building, structure, or other improvements for their remaining economic life when such building, structure, or other improvements are consistent with the highest and best use of the land, or
 - (2) Interim use value of the buildings, structure, or other improvements which is not the highest and best use of the land for a specific time period longer than the lease term (include present worth of salvage value), or
 - (3) Value in place of the building, structure or other improvement, plus the present worth of the salvage value at the end of the lease term.

- c) Specialty reports should be obtained for the valuation of items not readily measured in the marketplace.
 - d) In instances where a situation may not fit accepted appraisal guidelines/ techniques, an administrative settlement may be used with a written justification and explanation.
 - e) In some cases where the contributory value and the salvage value of a tenant-owned improvement is of minimal value or equal to zero, the agency may at its discretion elect to determine and offer the depreciated value in place of the improvement as installed, however, the agency is under no obligation to do so under the regulations at 49 CFR 24.105(c).
- 6) Tenant-Owner Retention Value of Improvements. When the contributory value of a tenant-owned improvement exceeds its salvage value, a tenant-owner may elect owner retention and be paid the difference in the two values.
- 7) Allocation of Value to Tenant-Owned Property. The appraiser or review appraiser must allocate separately owned property rights in his/her evaluation. Agency procedures should make both appraisers and review appraisers responsible for determining the existence of, and estimating the value of, any tenant-owned buildings, structures, and other improvements. The reviewer has the ultimate responsibility to see that the recommended or approved estimate of just compensation contains the appropriate allocation. The review and approval process should be the same, regardless of whether tenant-owned interests are involved.
- 8) Tenant-Owner Accompaniment During Appraisal Inspections. The purpose of the Uniform Act is, in part, "To insure consistent treatment for owners." Therefore, all owners, whether part-owner, full-fee owner, or tenant-owner, are covered by the provisions of Section 301(2) of the Act. For tenant-owners where buildings, structures, and improvements are not involved, such as a tenant-owned leasehold in realty, then the obligations to the tenant are a matter of State law.
- 9) Salvage Value vs. Value for Removal. The fourth edition of "The Dictionary of Real Estate Appraisal", dated 2002, defines salvage value as "The price expected for whole property, e.g., a house, or a part of a property, e.g., a plumbing fixture, that is removed from the premises, usually for use elsewhere." Thus, salvage value and value for removal are considered to be synonymous.
- 10) Landowner Disclaimer of Tenant-Owned Improvements Required Prior to Payment to Owner of Tenant-Owned Improvements. In acquiring

properties with tenant-owned improvements, a payment may be made to a tenant-owner only after the landowner has provided a disclaimer of all interest in the improvements of the tenant and in consideration for any such payment, the tenant assigns, transfers, and releases to the acquiring agency all right, title, and interest in and to such improvements in accordance with Section 302(b)(2) of the Uniform Act. While the provisions of Section 302 of the Uniform Act do not necessarily apply to life estates or leaseholds when the value is created by a favorable rental rate, releases by the owner of the real property should be obtained prior to making payment directly to the tenant-owner in these instances. State law may govern how to proceed with such acquisitions.

11) Leaseholds and Life Estates. Section 301 of the Uniform Act provides for payment of just compensation to any owner of real property. A leasehold interest (leasehold estate) and a life estate are legally recognized real property interests. If the leasehold interest has value because of a favorable rental rate, the lessee may be entitled to a written offer, along with the real property owner, depending on the requirements of State law. Such a leasehold interest in itself would not invoke the provisions of Section 302(b) of the Uniform Act itself. To be covered by Section 302(b), the tenant must have an ownership interest in physical property improvements.

M. Payment of Incidental Expenses by the Acquiring Agency for the Transfer of Real Property.* An agency may pay for the incidental expenses incurred for the transfer of real property to the acquiring agency in one lump sum directly to the property owner or to an escrow service, which then allocates the funds. The purpose of the direct payment is to ensure that (to the extent feasible) the owner does not have to settle such claims with personal funds and then later seek reimbursement from the agency. Property owners should be informed of this provision early in the acquisition process.

5-5 DONATIONS*

A. Appraisal Waiver – Donations. In the case of a property donation covered under 49 CFR 24.108, an appraisal is not required if the property owner releases the Agency from its obligation to appraise the property and is informed of his/her right to receive just compensation. All releases must be signed by the property owner and must be maintained in the Agency's file for monitoring purposes.

B. Date of Value of a Donation. The fair market value of a donation shall be established as of the date that the donation becomes effective, or when equitable title vests in the acquiring agency, whichever is earlier.

*“See footnote 1 on p. 5-2.”