

**POLICY REGARDING THE PROCEDURE AND EVALUATION OF
APPLICATIONS TO WAIVE THE PRE-EMPTIVE RIGHT APPLICABLE
TO ALL GOVERNMENT SUBSIDISED UNITS
ADMINISTERED BY THE WESTERN CAPE GOVERNMENT
VIA ITS DEPARTMENT OF HUMAN SETTLEMENTS**

1. INTRODUCTION

- 1.1. The sale of subsidised housing units by beneficiaries is a major concern to the Department as well as the National Department of Human Settlements. In many instances the seller does not improve his/her living conditions but usually ends up, after receiving a once off cash injection for the sale, in the same living conditions as they were before receiving a subsidised house.
- 1.2. The pre-emptive right clause is a condition imposed in terms of the Housing Act, Act 107 of 1997, as amended (extract attached as **Annexure A**) (hereafter mentioned the Act), which intends to prevent the flagrant sale of state subsidised housing units.
- 1.3. Section 10A deals with the situation where the **original beneficiary** wants to dispose of the property, whereas 10B deals with the instance where a **successor in title** or **creditor** wants to dispose of the property.
- 1.4. To date this Department has only received applications in terms of s10A, where beneficiaries request the Department to waive its pre-emptive right to allow them to sell their properties to a third party.
- 1.5. The evaluation of such waivers has come under scrutiny once more. In this regard the State Attorney is of the view that the s10A of the Act only makes provision for the Department to decide if it wants to take back a subsidised property or not, and if it decides to accept the property, it will do so without any compensation and that the beneficiary's name will be eligible to go back on the waiting list.
- 1.6. However, the above view is, in many ways, not implementable as it does not make provision for, amongst others, the likelihood that a property might be dilapidated, in which case considerable funding is needed to fix it before it can be allocated to the next beneficiary (and who is going to pay for this); or the property may have been enhanced or extended, in which case the seller would demand compensation for their additional investment.
- 1.7. In light of the Minister of Human Settlements recent decision (dated 21 Nov 2013 attached hereto as **Annexure B**), not to craft a new policy, in terms which the Department should accept unwanted subsidy properties, but to regularize the current practice of waiving the Departments pre-emptive right in certain cases, this policy aims to put in place the procedure in which to apply for such waiver as well as the necessary delegations to approve such requests.

2. DEFINITIONS

In terms of this policy –

- 2.1. “**the Act**” means the Housing Act, 1997 (Act 107 of 1997);

- 2.2. **"Applicant"** means the seller;
- 2.3. **"Creditor"** means name of company that has given the loan;
- 2.4. **"Deeds Search"** means on line research on the Deeds Office website;
- 2.5. **"Department"** means the Western Cape Provincial Department of Human Settlements;
- 2.6. **"Effective Date of Sale"** means the date on which the original beneficiary purchased or occupied the property and pre-dates the date of registration;
- 2.7. **"Original beneficiary"** means first person to obtain subsidy regarding property;
- 2.8. **"Pre-emptive right"** means first option to acquire;
- 2.9. **"Property"** means the immovable property;
- 2.10. **"Site inspection"** means a visit to the property by government officials to establish the condition of the property and who is currently residing on the property;
- 2.11. **"Successor in Title"** means beneficiary once owner is deceased;
- 2.12. **"Waive"** means to overlook the conditions imposed on the sales agreement.

3. PRINCIPLES

- 3.1. In cases where the pre-emptive right has lapsed, in other words 8 years after the effective date of sale, the sale of a subsidy unit will be unconditionally supported.
- 3.2. In a limited number of cases the sale of a subsidy unit within the 8 year pre-emptive right period could be conditionally supported as it would genuinely positively benefit the seller, such as:
 - 3.2.1. Where beneficiaries, who wish to **improve their dwellings**, need to apply for funding at a financial institution, and need to register a mortgage bond over the property, as the financial institution need the pre-emptive right waived, since they need to protect their right to foreclose on a property should the borrower default on the monthly instalments.
 - 3.2.2. Where beneficiaries **need to relocate**:
 - a. To a better area or another town/city, thus improving their living and economic circumstances;

- b. If they lose their employment, they often take up employment in locations that make daily commuting impossible and the only alternative is to relocate permanently to the new place of employment;
- c. Where they find themselves and their families victims of crime and need to relocate to a different the area.

3.2.3. In such cases, support will be on condition that:

- a. The purchaser is a SA citizen,
- b. The purchaser is competent to contract,
- c. The purchaser does not own and has never owned fixed property before,
- d. The seller lived on the property for at least two years after the effective date of sale,
- e. The seller must be improving on his/her current living standards, or prove that it is a matter of extreme detriment to the applicant, if not approved, and
- f. The municipality supports the sale if the property is being sold within the first 5 years of the effective date of sale.

4. PROCESS

4.1. In order to consider the waiving of the pre-emptive right in terms of paragraph 3 above, the applicant is requested to submit the following documents to the Director responsible for pre-emptive right administration:

4.1.1. In cases where the pre-emptive right has lapsed:

4.1.1.1. A certified copy of the Title Deed (Deed of Transfer)

4.1.2. In cases where the pre-emptive right has not lapsed yet:

- 4.1.2.1. A certified copy of the Title Deed (Deed of Transfer),
- 4.1.2.2. A certified copy of the Deed of Sale,
- 4.1.2.3. A certified copy of the seller and the purchaser's identity documents,
- 4.1.2.4. An Affidavit by the applicant indicating the following:
 - that in the event approval is granted for the waiver of the pre-emptive right, that the applicants fully understand and accept the fact that they will no longer qualify for any state housing assistance in the future,
 - the exact reason why the applicant is selling, and
 - where they will be residing in the event of the waiver being approved.
- 4.1.2.5. If the property is being sold within the first 5 years of date of sale, provide written support from the respective municipality, that they have no objection to the proposed sale.

4.1.3. In cases of deceased estates where the 8 year period has not lapsed:

4.1.3.1. A certified copy of the Title Deed (Deed of Transfer),

- 4.1.3.2. A certified copy of the Deed of Sale,
- 4.1.3.3. The Letter of Authority or Letter of Executorship,
- 4.1.3.4. Copy of last Will and Testament,
- 4.1.3.5. A copy of the purchaser's Identity Document,
- 4.1.3.6. A certified copy of the Death Certificate,

4.1.4. In cases where the Divorce Order cedes the property to a particular party, or if the property must be sold and the proceeds split:

- 4.1.4.1. A certified copy of the Title Deed (Deed of Transfer),
- 4.1.4.2. A certified copy of the Divorce Order,
- 4.1.4.3. A copy of Deed of Sale,
- 4.1.4.4. the purchaser's Identity Document, if the property is to be sold.

4.1.5. In cases where the original beneficiary wants to register a mortgage bond against the property:

- 4.1.5.1. A certified copy of the Title Deed (Deed of Transfer),
- 4.1.5.2. A letter from the attorney requesting the waiver must contain the name of the Financial Institution.

4.2. The Department will Investigate and evaluate the application as follows:

4.2.1. In cases where the pre-emptive right has lapsed:

- a. Check if the 8 years has lapsed;

4.2.2. In cases where the pre-emptive right has not lapsed (in terms of paragraph 4.1.2)

- a. Do a deed search on the property;
- b. Determine if the purchaser is a SA citizen;
- c. Do a deed search, to establish if the purchaser(s) own or previously owned fixed property;
- d. Check if at least two years has passed since the effective date of sale;
- e. Do a site inspection on the property, if located within the metropolitan boundary of the City of Cape Town, to establish the identity of the current occupant;
- f. Check if the municipality supports the sale.
- g. Apply its mind to the reason for selling, to establish that the sale will improve the applicant's current living standards, or that it is a matter of extreme detriment to the application is declined;

4.2.3. deceased estates (in terms of paragraph 4.1.3):

- a. Do a deed search on the property;
- b. Check letter of authority or death certificate;
- c. Check last will and testament;
- d. if the property must be sold out of the estate, do a deed search, to establish if the purchaser(s) own or previously owned fixed property;

- e. Apply its mind to the merit of the case.

4.2.4. divorce orders (in terms of paragraph 4.1.4):

- a. Do a deed search on the property;
- b. Check the court order;
- c. If court order states that the property must be sold, do a deed search, to establish if the purchaser(s) own or previously owned fixed property.
- d. Apply its mind to the merit of the case.

4.2.5. mortgage bond (in terms of paragraph 4.1.5):

- a. Do a deed search on the property;
- b. Check the letter from the attorney requesting the waiver as well as the name of the Financial Institution.
- c. Apply its mind to the merit of the case.

4.3. Delegation

4.3.1. In terms of this policy, the Minister delegates the authority to decide on pre-emptive applications, as follows:

- 4.3.1.1 Approval of expired applications, to the Administrative Officer, responsible for pre-emptive rights;
- 4.3.1.2 Approval of applications within the 8 year pre-emptive right period and in line with paragraph 3.2.3, to the Assistant Director, responsible for pre-emptive rights; and
- 4.3.1.3 If not in line with paragraph 3.2.3 (c), (d), (e) or (f), to the Chairperson of a committee, that consist of at least 3 members comprising the Deputy Director responsible for pre-emptive rights (being the chairperson) and 2 other Deputy Directors.

4.4. Implementation Date

This Policy was approved on 19/05/ 2014, and is of immediate effected.



Minister B Madikizela
Western Cape Minister of Human Settlements

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10A Restriction on voluntary sale of state-subsidised housing

- (1) Notwithstanding any provisions to the contrary in any other law, it shall be a condition of every housing subsidy, as defined in the Code, granted to a natural person in terms of any national housing programme for the construction or purchase of a dwelling or serviced site, that such person shall not sell or otherwise alienate his or her dwelling or site within a period of eight years from the date on which the property was acquired by that person unless the dwelling or site has first been offered to the relevant provincial housing department.
- (2) The provincial housing department to which the dwelling or site has been offered as contemplated in subsection (1) shall endorse in its records that the person wishes to vacate his or her property and relocate to another property and is entitled to remain on a waiting list of beneficiaries requiring subsidised housing.
- (3) When the person vacates his or her property the relevant provincial housing department shall be deemed to be the owner of the property and application must then be made to the Registrar of Deeds by the provincial housing department for the title deeds of the property to be endorsed to reflect the department's ownership of that property.
- (4) No purchase price or other remuneration shall be paid to the person vacating the property but such person will be eligible for obtaining another state-subsidised house, should he or she qualify therefor. [S. 10A inserted by s. 7 of Act 4 of 2001.]

10B Restriction on involuntary sale of state-subsidised housing

- (1) Notwithstanding any provisions to the contrary in any other law, it shall be a condition of every housing subsidy, as defined in the Code, granted to a natural person in terms of any national housing programme for the construction or purchase of a dwelling or serviced site, that such person's successors in title or creditors in law, other than creditors in respect of credit-linked subsidies, shall not sell or otherwise alienate his or her dwelling or site unless the dwelling or site has first been offered to the relevant provincial housing department at a price not greater than the subsidy which the person received for the property.
- (2) Any such offer to the provincial housing department shall be made in writing and shall be accepted or rejected by the MEC within a period of 60 days from receipt thereof.
- (3) If such offer is accepted, the purchase price shall be determined, subject to the provisions of subsection (1), by agreement between the MEC and the person or creditor concerned or, in the event of no agreement being reached, by a valuer acceptable to both parties and registered in terms of the Valuers' Act, 1982 (Act 23 of 1982).
- (4) The purchase price as determined in terms of subsection (3) shall be financed by the MEC out of the provincial housing development fund.
- (5) An MEC may grant exemption from the provisions of subsection (1), either conditionally or unconditionally, in respect of any dwelling or site to which the provisions of that subsection apply.
- (6) The Registrar of Deeds concerned shall-

- (a) make such endorsements on the title deeds of any dwelling or site and such entries in his or her registers as may be necessary to indicate that the provisions of subsection (1) apply in respect of such dwelling or site;
 - (b) cancel any such endorsements or entries where an exemption has been granted unconditionally under subsection (5) or where satisfactory proof has been submitted that conditions imposed under subsection (5) have been complied with; or
 - (c) make such endorsements or entries as may be necessary to indicate any conditions subject to which an exemption has been granted under subsection (5).
- (7) No transfer of any dwelling or site in respect of which subsection (1) applies, shall be passed to a person other than the provincial government unless the Registrar of Deeds is provided with a certificate, signed by the head of department, to the effect that such dwelling or site has been offered for sale to the provincial department of housing in terms of subsection (1) and that-
 - (a) the offer has been rejected; or
 - (b) an exemption has been granted under subsection (5), either unconditionally or subject to the conditions set out in the certificate.
- (8) The Minister may, by notice in the *Gazette*, make rules on the granting of exemption in terms of subsection (5) as well as the amount that must be paid by the person or creditor concerned for the granting of such exemption.