

Chapter 16

Local, Non-Traditional Activities

This chapter describes the activities AHFC may develop using its Moving to Work Authority that are categorized as local, non-traditional activities.

1. Authority

Moving to Work Agreement, Attachment D

Use of MTW Funds

AHFC and HUD acknowledge that Section 204(a) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (Pub. L. 104-134) provides that an agency participating in the MTW demonstration program may combine public housing operating and capital funds provided under Section 9 of the U.S. Housing Act of 1937 (the "1937 Act") and voucher program funds provided under Section 8 of the 1937 Act "to provide housing assistance for low-income families, as defined in section 3(b)(2) of the 1937 Act, and services to facilitate the transition to work on such terms and conditions as the agency may propose and the Secretary may approve."

Notwithstanding any language to the contrary, those provisions in this Agreement or its attachments that restrict the use of funds to Sections 8 and 9 are repealed, and AHFC may use the MTW Funds to provide housing assistance for low-income families, as defined in section 3(b)(2) of the 1937 Act, and services to facilitate the transition to work, whether or not any such use is authorized by Sections 8 or 9 of the 1937 Act, provided such uses are consistent with other requirements of the MTW statute [i.e., including but not limited to the requirements to maintain a comparable mix of families and serve substantially the same number of families as would have been assisted if AHFC was not in the MTW demonstration, assuring that housing assisted under the demonstration meets housing quality standards established or approved by the Secretary, that at least seventy-five percent (75%) or new families assisted be very low-income families.

The U.S. Department of Housing and Urban Development issued Public and Indian Housing Notice 2011-45, August 15, 2011, which provides parameters for developing local, non-traditional activities.

PIH Notice 2011-45

MTW agencies have the authority to use their MTW funds to implement local, non-traditional activities, as long as they have this authority formalized in their Standard MTW Agreement (MTW Agreement), serve exclusively families at or below 80% of area median income (AMI) and use the MTW funds for activities that meet one of the three MTW statutory objectives of increasing the efficiency of Federal expenditures, incentivizing self-sufficiency of participating families and increasing housing choice for low-income families. Per the MTW Agreement, MTW agencies prepare and submit an Annual MTW Plan. The Department must approve each Annual MTW Plan, and accordingly has broad authority to accept or reject provisions of the Plan that fail to comport with other applicable laws and such terms as the Secretary may require.

2. Activity Categories

2.A Rental Subsidy Programs

Programs that use MTW funds to provide a rental subsidy to a third-party entity (other than a landlord or tenant) who manages intake and administration of the subsidy program.

2.B Homeownership Programs

Programs in which a PHA uses MTW funds to act as a mortgager in providing homeownership assistance to low-income families.

2.C Housing Development Programs

Programs that use MTW funds to acquire, renovate, and/or build units that are not public housing or Housing Choice Voucher units.

2.D Service Provision

The provision of HUD-approved self-sufficiency or supportive services that are not otherwise permitted under the public housing and Housing Choice Voucher programs, or that are provided to eligible individuals who do not receive either public housing or Housing Choice Voucher assistance from the PHA.

3. Activity Parameters

PIH Notice 2011-45

Parameters, for purposes of this Notice, are defined as the regulations, statutes and guidelines that cannot be waived under MTW, and which serve as the boundaries in implementing all MTW activities, including local, non-traditional activities.

3.A General Parameters

PIH Notice 2011-45

These parameters apply to all local, non-traditional activities implemented under MTW.

3.A.1. Statutory Objectives

Any proposed activity has to meet at least one of the three MTW statutory objectives listed in the MTW Statute, and must receive HUD approval via the Annual MTW Plan prior to implementation.

3.A.2. Income Eligibility

MTW funds can be used only to serve eligible families at or below 80% of AMI, consistent with other requirements (see the last bullet of this section).

3.A.3. Fair Housing and Equal Opportunity

Recipients of MTW funds for local, non-traditional activities are considered recipients of federal financial assistance and must comply with civil rights requirements in 24 CFR 5.105(a), including, but not limited to, the Fair Housing Act; Title VI of the Civil Rights Act of 1964; Section 504 of the Rehabilitation Act of 1973; Title II of the American Disabilities Act of 1990; and regulations to affirmatively further fair housing. It is the duty of the MTW PHA to ensure that recipients of funds for local, non-traditional activities are in compliance with civil rights laws and regulations. The Office of Public and Indian Housing (PIH) and the Office of Fair Housing and Equal Opportunity (FHEO) have jointly published a notice, PIH Notice 2011-31/FHEO Notice 2011-1, that provides detailed information regarding which statutes and regulations are applicable.

3.A.4. Labor Standards

Davis-Bacon labor requirements, pursuant to Section 12 of the 1937 Act, continue to apply at both public housing and non-public housing homeownership properties (at 24 CFR 906.37) as well as at all units acquired, renovated and/or built using MTW funds.

3.A.5. Economic Opportunities for Low- and Very low-Income Persons (Section 3)

Section 3 of the Housing and Urban Development Act of 1968 requires recipients to ensure, to the greatest extent feasible, that training, employment, and contracting will

be directed to low- and very low-income persons, particularly those who are recipients of government assistance for housing, and to business concerns that provide economic opportunities to low- and very-low income persons in the area in which the project is located. Recipients of covered funding are required to comply with the requirements of 24 CFR part 135, particularly subpart B – Economic Opportunities for Section 3 Residents and Section 3 Business Concerns, and Subpart E – Reporting and Recordkeeping.

3.A.6. Community Service Requirement

The community service requirement, detailed in Section 12 of the 1937 Act, applies only to non-exempt adult residents of a public housing project and thus does not apply to non-public housing families assisted through local, non-traditional MTW programs, except for those exempted under Section 12(c) of the Act. However, if an MTW agency creates units through its local, non-traditional MTW authority which are later added to the public housing inventory, families residing in such units would then become subject to the community service requirement.

3.A.7. Court Orders

The PHA will comply with the terms of any applicable court orders, consent decrees or Voluntary Compliance Agreements that are in existence or may come into existence during the term of the PHA's participation in MTW.

3.A.8. Inspections

For any unit receiving assistance from a PHA, the PHA must ensure that the property is safe, decent, sanitary, and in good repair, according to an inspection protocol established or approved by the Secretary. This does not preclude the PHA from using approved alternate MTW inspection protocols as long as such protocol meets the housing quality standards established or approved by the Secretary. Further, this requirement does not necessitate units meeting HUD inspection standards prior to the completion of rehabilitation work, as long as the units are not occupied during the rehabilitation period.

PHAs are still subject to state and local building codes, and housing codes, and state and local public housing law on inspections. Projects must meet HUD Housing Quality Standards (HQS) performance requirements (as provided in 24 CFR 982.401), both at commencement of occupancy and throughout the term of the time restriction on affordable units. This requirement applies to all local, non-traditional MTW units/subsidies, including assistance provided to projects as gap financing.

3.A.9. Expenditure of Federal Funds

PHAs must maintain documentation which verifies compliance with their General Depository Agreement and any other Treasury expenditure requirements related to the

expenditure of Federal funds upon drawdown from the Line of Credit Control System (LOCCS).

3.A.10. Other Requirements

Other federal, state and local requirements applicable to all federally assisted housing shall continue to apply notwithstanding any term contained in a PHA's MTW Agreement or any authorization granted thereunder. Accordingly, if any requirement applicable to public housing contains a provision that conflicts or is inconsistent with any authorization granted in its MTW Agreement, the MTW PHA remains subject to the terms of that requirement. Such requirements include, but are not limited to, the following: Appropriations Acts, competitive HUD notices of funding availability under which the PHA has received an award, state and local laws, Federal statutes other than the 1937 Act, and OMB Circulars and requirements (including regulations promulgated by HUD thereunder in 24 CFR 85).

3.B Rental Subsidy Programs

PIH Notice 2011-45

These parameters apply to all local, non-traditional MTW rental subsidy programs.

3.B.1. Hardship Policy for Rent Reform Activities

MTW PHAs must provide a hardship policy for all rent policies that deviate from the regulations in terms of the way rent is calculated for an assisted household (see 24 CFR 960, Subpart C. Rent and Reexamination for regulations pertaining to the public housing program and 24 CFR 982, Subpart K. Rent and Housing Assistance Payment for regulations pertaining to the Housing Choice Voucher program).

3.B.2. Calculation of Income for Eligibility and Rents

The MTW statute allows HUD to provide MTW PHAs with relief from portions of the 1937 Act and its implementing regulations. However, housing assistance and services can only be provided to low-income families, as defined in section 3(b)(2) of the United States Housing Act of 1937. Additionally, the MTW statute at Section 204(c)(3)(A) states that 75 percent of the families assisted by participating demonstration public housing authorities shall be very low-income families, as defined in section 3(b)(2) of the United States Housing Act of 1937. Finally, the MTW statute also requires that the PHA continue to "assist substantially the same total number of eligible low-income families" (Section 204(c)(3)(C)).

An interpretation of very low-income and low-income to include additional income sources could disqualify families eligible under the section 3(b)(2) definition as being over-income, and conversely excluding income sources could qualify otherwise ineligible families. HUD has defined "Annual Income" at 24 CFR 5.609. This regulation defines what annual income includes and does not include. To ensure that the above

referenced requirements are met; MTW agencies must determine the eligibility of families in accordance with the provisions of that regulation.

However, MTW agencies do have the ability under the MTW statute and their MTW Agreements to calculate rents at variance with statute and regulation, and this could include interpretations of annual income as set forth at 24 CFR 5.609.

Notwithstanding the above, HUD does not have the authority to waive other Federal statutes, so annual income calculations for individuals assisted under MTW programs can not include amounts specifically excluded by any other Federal statute from consideration as income for the purposes of determining either eligibility or rents. Consequently, for any rental subsidy program created with local, non-traditional MTW flexibility, the regulation pertaining to the calculation of income found in 24 CFR 5.609(c)(17) must apply to both eligibility and rent determinations.

3.C Homeownership Programs

PIH Notice 2011-45

These parameters apply to all programs in which a PHA uses MTW funds to act as a mortgager in providing homeownership assistance to low-income families.

3.C.1. Principal Residence Requirement

The property sold to an eligible family must be used as the principal residence of the family, and homeownership assistance may only be paid while the family is residing in the home. (See public housing homeownership regulations at 24 CFR 906.15b and Section 8 homeownership regulations at 24 CFR 982.633a.)

3.C.2. Financial Capacity Requirement

Eligibility for MTW homeownership programs must be limited to families who are capable of assuming the financial obligations of homeownership, under minimum income standards for affordability, taking into account the unavailability of financial assistance from the PHA. A homeownership program may, however, take account of any available subsidy from other sources. (See public housing homeownership regulations at 24 CFR 906.15c.)

3.D Housing Development Programs

PIH Notice 2011-45

These parameters apply to activities that involve the development of local, non-traditional affordable units, including the provision of MTW funds to acquire, renovate and/or build units that are not public housing or Housing Choice Voucher units. Local, non-traditional affordable units are defined as units that will be rented to or sold to families whose incomes are at or below 80% of AMI, but that are not public housing or project-based Housing Choice Voucher units.

If a project includes the development of public housing units, these parameters do not apply and the PHA must follow the regulations for public housing development, as provided in 24 CFR 941. These parameters also do not apply to the allowable use of MTW funds to pay for operating costs related to affordable housing.

3.D.1. Allowable Uses of MTW Funds for Development

1. MTW funds may be used to acquire, renovate and/or develop local, non-traditional affordable units.
2. The local, non-traditional affordable units may be either owned by the PHA, an affiliate or instrumentality of the PHA, or by another public or private entity.
3. MTW funds may be spent directly by a PHA to acquire, renovate or build local, non-traditional affordable units, or MTW funds may be granted or loaned by a PHA to another entity which will acquire, renovate or develop and own the local, non-traditional affordable units. Such units are made available in the project, by regulatory and operating agreement, master contract, individual lease, condominium or cooperative agreement, or equity interest.

3.D.2. Limitations on the Use of MTW Funds for Development

1. As discussed earlier in this notice, the MTW statute only permits MTW funds to be used to fund affordable units. HUD requires MTW agencies to utilize a pro rata calculation to ensure that the percent of MTW funds contributed to total project cost does not exceed the percentage of affordable units in the project (including public housing, Housing Choice Voucher, and local, non-traditional affordable units). For example, if there are 120 units in a project and 50 are affordable, the amount of MTW funds contributed to the project cannot exceed 42% of the total project cost.
2. Projects must be within the HUD Total Development Cost and Housing Cost Cap Limits imposed on the development of affordable units in a project or within a PHA's alternate cost formula for development and redevelopment activities, if approved by HUD. (See also HUD PIH Notice 2010-20, which establishes public housing development cost limits.) All MTW funds being put into the project must be included in the TDC analysis.
3. Projects must comply with the HUD Cost Control and Safe Harbor Standards for Rental Mixed-Finance Development, dated April 2003.
4. Any housing not developed as public housing within a PHA's Faircloth limit (i.e., the statutory limit pursuant to Section 9(g)(3)(B) of the United States Housing Act of 1937, which states that PHAs cannot receive funding for units that they construct, acquire or rehabilitate that exceed the number of units the

PHA had as of October 1, 1999) will not be included as additional public housing units in future Operating Subsidy or Capital Fund calculations.

3.D.3. Time Restrictions on Local, Non-Traditional Affordable Units

PHAs using MTW funds for acquisition, renovation or construction of local, non-traditional affordable units must ensure that the units remain affordable for a specified amount of time. The time restriction may vary from project to project, given the goals of a PHA, the project economics, market conditions and other factors. The following are minimum guidelines:

1. Local, non-traditional affordable units must remain affordable for a minimum of 30 years, unless otherwise approved by HUD.
2. If there is a loan of MTW funds to the project, the local, non-traditional affordable units must remain affordable for the longer of either the term of the loan or 30 years, unless otherwise approved by HUD. For a shorter term to be considered by HUD, the loan of MTW funds to the property would need to be repaid in full by the conclusion of the shortened term.

3.D.4. Legally Binding Commitments

PHAs must record a use agreement, covenant, or other document acceptable to HUD on the property where the local, non-traditional affordable units are located, which sets forth the conditions imposed on the units. If there is an existing agreement or covenant recorded on the property related to the local, non-traditional affordable units, with HUD approval, the PHA may rely on this document rather than record its own.

3.D.5. Continuing Requirements

PHAs developing local, non-traditional affordable units through acquisition, renovation or new construction must comply with the following provisions, which cannot be waived through a PHA's MTW status. PHAs must maintain documentation which verifies compliance with the following:

1. Environmental Review, pursuant to 24 CFR part 58 or part 50, as detailed in Section VII of the FHEO and PIH joint notice on non-discrimination and equal opportunity requirements for PHAs, PIH Notice 2011-31/FHEO Notice 2011-1.
2. Site and Neighborhood Standards, pursuant to 24 CFR 941.202 or any alternate MTW standards for determining the location of existing, newly constructed, or substantially rehabilitated housing to receive subsidy approved by HUD. Any alternate site and neighborhood standards for the location of existing, newly constructed, or substantially rehabilitated housing to receive subsidy must be in compliance with Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. Please see joint PIH-FHEO notice 2011-31.

3. Subsidy Layering Review in relation to the provision of Housing Choice Vouchers and the use of Low Income Housing Tax Credits
4. Demolition and disposition requirements pursuant to Section 18 of the 1937 Act and 24 CFR 970, as applicable to an existing public housing property being demolished or disposed.

3.E Service Provision

PIH Notice 2011-45

These parameters apply to the provision of HUD-approved self-sufficiency or supportive services that are not permitted under the public housing and Housing Choice Voucher programs, or that are provided to eligible individuals who do not receive either public housing or Housing Choice Voucher assistance from the PHA.

General parameters in Section 5.A. of this Notice apply. HUD has not developed additional parameters at this time.

4. HUD Approval Process

PIH Notice 2011-45

PHAs proposing local, non-traditional activities must comply with the following.

4.A Authority to Implement Local, Non-Traditional Activities

PHAs must first receive authority from HUD prior to implementing local, non-traditional MTW activities.

If a PHA does not already have this authorization, the PHA must submit a proposal to HUD describing: a) the proposed local, non-traditional activities, including parameters for implementation, b) how this activity relates to at least one of the three statutory MTW objectives, c) whether more families will be served, d) how the activity will be evaluated e) certifying that the funds will be used to serve families under 80% of AMI, and f) a risk assessment for each non-traditional activity including a cost benefit analysis.. The PHA should (to the extent feasible) include in the proposal information on specific properties identified for acquisition, renovation and/or development. Properties identified for development in the future should be reflected in the MTW Plan and/or MTW Report, as indicated below. No additional proposal will be required.

HUD will review the proposal and, if approved, HUD will produce an Amendment to the PHA's MTW Agreement authorizing the PHA to implement local, non-traditional activities. PHAs must then follow the amendment and public hearing requirements outlined in Section V.A of the MTW Agreement prior to executing the Amendment.

Once the Amendment is fully executed by HUD, PHAs will have the authorization available in the MTW Agreement to implement local, non-traditional activities. PHAs can begin implementation of specific activities upon approval of the activities via the Annual MTW Plan (see below).

4.B Inclusion of Local, Non-Traditional Activities in the Annual MTW Plan

PHAs must include all proposed local, non-traditional activities as Proposed Activities in their Annual MTW Plans. This should include a description of the activity being proposed (including the scope of the activity and the ways in which the activity will comply with applicable HUD requirements), how the activity conforms to at least one of the MTW statutory objectives, and all other required information from HUD-50900.

4.C Term of Local, Non-Traditional Authority

MTW PHAs are only provided approval for the implementation of local, non-traditional MTW activities during the term of the MTW Agreement. At such time as the MTW Agreement expires or is terminated, the PHAs authority to enact such activities is void. If an MTW PHA contemplates a local, non-traditional MTW activity that would require entering into any agreement that extends past the term of the agreement, the PHA should contact the MTW Office to discuss the viability of such an action.

Section V.C. of the MTW Agreement requires MTW PHAs to submit a transition plan to HUD no later than one year prior to the expiration of the MTW Agreement. The termination of all local, non-traditional MTW activities should be articulated in this plan.

5. Reporting Requirements

PIH Notice 2011-45

PHAs must report to HUD on the details of approved local, non-traditional activities through the following mechanisms.

5.A Annual MTW Report

PHAs must include in their Annual MTW Report information on all local, non-traditional activities, including the number of families served and level of assistance provided. For development activities, PHAs must also provide information on each specific property acquired, renovated, and/or developed as part of a local non-traditional activity and as included in the PHA's approved MTW Plan. The information should be provided as required in Attachment B of the MTW Agreement. HUD will use information in the Report to verify that the PHA has complied with all HUD requirements.

5.B Housing Financial Reports

All local, non-traditional activities are still subject to the same financial accounting and reporting standards as all other MTW activities, and must follow the same GASB and FASB pronouncements. PHAs must keep project level budgeting and accounting, report financial statements in the Financial Data Schedule (FDS), and abide by project level management reviews and fees. PHAs are authorized but not required to establish separate books of account under enterprise fund accounting rules for each non-traditional activity. Such activities also must be included in the annual A-133 audit required by the Office of Management and Budget.

PHAs are reminded that any approved non-traditional activities are funded with Federal funds, and thus are subject to any and all other Federal requirements outside of the 1937 Act, as well as other 1937 Act requirements not authorized in its MTW Agreement and approved in its Annual MTW Plan.

5.C Public and Indian Housing Information Center (PIC)

PHAs must submit HUD-50058 or HUD-50058 MTW (or their replacement forms) data into HUD's Public and Indian Housing Information Center (PIC) system, or its successor, for all households receiving assistance through the use of MTW funds. Instructions on including households served through local, non-traditional activities are forthcoming from HUD.

Numbered Memo

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