

760 CMR 19.00: FACILITIES CONSOLIDATION FUND PROGRAM

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19.01: Scope, Purpose, and Applicability

(1) The Facilities Consolidation Fund (FCF) program was created by St. 1993, c. 52, § 2 (budget line item 4000-8200), as modified by St. 1993, c. 493, § 15, and further modified by St. 1993, c. 494, § 4 (Original FCF Legislation), and modified and continued by St. 2002, c. 244, §§ 15 through 19 (FCF 2 Legislation), St. 2004, c. 290, § 2E (budget line item 4000-8200) (FCF 3 Legislation), St. 2008, c. 119, § 2 (budget line item 7004-0029) and § 11 (FCF 4 Legislation), St. 2013, c. 129, § 2 (budget line item 7004-0040) and § 19 (FCF 5 Legislation), and St. 2018, c. 99, § 2 (budget line item 7000-0050) and § 30 (FCF 6 Legislation) which authorized the Department of Housing and Community Development to use certain general obligation bond funds for the creation of Community-based Housing, or if funded under the FCF 5 Legislation or FCF 6 Legislation, Community-based Housing or Supportive Housing, for Individuals with Mental Illness and Individuals with Intellectual Disabilities. The FCF program provides loans, or if funded under the FCF 4, FCF 5, or FCF 6 Legislation, loans or grants for Eligible Projects developed by one or more Nonprofit Corporations, organizations in which one or more Nonprofit Corporations have a controlling financial or managerial interest, or, if funded under the FCF 4 Legislation, FCF 5 Legislation, or FCF 6 Legislation, For-profit Organizations; provided that preference for subcontracts shall be given to Nonprofit Corporations.

(2) 760 CMR 19.00 does not change the rights and obligations of an Owner of a project on which construction began before December 13, 1996. The provisions of Regulatory Agreements entered before December 13, 1996 shall remain in full force and effect according to their terms.

(3) In the event of any actual or potential inconsistency between or among the provisions of 760 CMR 19.00, the applicable FCF Legislation, the Facilities Consolidation Plan, and/or the FCF Guidelines (both as hereinafter defined), and the documents evidencing a loan or grant under the FCF program, such provisions shall be interpreted, to the extent reasonably possible, so as to reconcile any such inconsistencies. If such provisions cannot reasonably be reconciled, the provisions of the applicable FCF Legislation, the Facilities Consolidation Plan, 760 CMR 19.00, the FCF Guidelines, and such loan or grant documents, in the foregoing order of priority, shall control.

19.02: Definitions

Application. An application for a loan or grant, in the format specified by the FCF Guidelines, including a description of a proposed Project, all financing sources, and all other matters required by 760 CMR 19.00 and the FCF Guidelines.

Area Median Income. Income, adjusted for family size, and for the pertinent region, as determined by the United States Department of Housing and Urban Development.

Community-based Housing. A non-institutional Residential Housing Development, or unit therein, that is reserved for clients of the Executive Office of Health and Human Services (EOHHS) who have been found eligible for such housing by DDS or DMH, of one of the following types:

- (a) Group Home or Single Room Occupancy Housing. A residence that provides separate sleeping facilities for each resident. The building must also provide facilities for living, eating, cooking and sanitation for all residents; however, these facilities may be shared;
- (b) Scattered Site Housing. A residence that provides separate facilities for living, sleeping, eating, cooking and sanitation for each resident; or

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(c) Independent Integrated Housing. A residence reserved for Low Income Households or Individuals located in a Residential Housing Development on a single site or multiple sites, in which no more than  $\frac{1}{3}$  of the housing units are reserved for Low Income Households or Individuals and which complies with any additional requirements that may be specified in the FCF Guidelines, as approved by DHCD.

DCAM. The Division of Capital Asset Management and Maintenance of the Executive Office of Administration and Finance (which term shall encompass its predecessor, the Division of Capital Planning and Operations).

DDS. The Department of Developmental Services of the Executive Office of Health and Human Services.

Deferred Payment Loan (DPL). A loan secured by a mortgage on a Project which defers the repayment of principal and interest (if any) for a defined or undefined period of time.

Developer. The Developer of an Eligible Project satisfying the requirements of 760 CMR 19.03, and its permitted successors and assigns. The Developer may also be the owner of the Eligible Project, but need not be the owner, so long as:

- (a) such Developer has control of the site on which the Eligible Project is located pursuant to a ground lease or other instrument acceptable to DHCD, in its discretion, for a period at least equal to the term of any applicable FCF loan; and
- (b) the owner assents to the Developer's execution, delivery and recording of the Land Use Restriction and executes and delivers the Land Use Restriction and/or such additional documentation as DHCD may require, in its discretion, regarding the rights of DHCD and/or any Financial Intermediary with respect to the site.

DHCD. The Department of Housing and Community Development (including, where applicable, its predecessor, the Executive Office of Communities Development).

DMH. The Department of Mental Health of the Executive Office of Health and Human Services.

Eligible Project/Use (Project). The acquisition, construction, renovation and/or rehabilitation and operation of Community-based Housing for Individuals with Mental Illness or Individuals with Intellectual Disabilities that meets the requirements of 760 CMR 19.03. An Eligible Project supported by an FCF loan or grant is sometimes referred to herein as a "Project".

EOHHS. The Executive Office of Health and Human Services.

FCF Guidelines. Guidelines issued by DHCD setting out, clarifying and further explaining 760 CMR 19.00, program policy and procedure. The FCF Guidelines shall apply to all FCF financing programs (subject always to 760 CMR 19.01(3)).

Facilities. Institutional Facilities owned or operated by the Commonwealth for either Individuals with Mental Illness or Individuals with Intellectual Disabilities, which are more specifically identified in the Report of the Special Commission.

Facilities Consolidation. The closure and consolidation of Facilities and the reorganization of community service systems by the Commonwealth in accordance with the Report of the Special Commission.

Facilities Consolidation Plan. The December 1993 Facilities Consolidation Plan prepared by the Secretary of EOHHS, which has been reviewed and approved by DHCD and filed with the Secretary of Administration and Finance of the Commonwealth and the House and Senate Ways and Means Committees.

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FCF Legislation. Collectively, the Original FCF Legislation, the FCF 2 Legislation, the FCF 3 Legislation, the FCF 4 Legislation, the FCF 5 Legislation, and the FCF 6 Legislation, or where the context so requires, the specific legislation applicable, respectively, to Original FCF, FCF 2 or FCF 3 loans, or to FCF 4, FCF 5 or FCF 6 loans or grants, as appropriate.

FCF Units. The housing units of an Eligible Project that are supported by the FCF loan or grant and reserved for Individuals with Mental Illness or Individuals with Intellectual Disabilities that meet the requirements of 760 CMR 19.03.

Financial Intermediary. For all Projects funded under the FCF Legislation, a local housing authority or a redevelopment authority, the Community Economic Development Assistance Corporation, the Massachusetts Housing Finance Agency, the Massachusetts Development Finance Agency (formerly the Massachusetts Government Land Bank), or only for Projects funded under the Original FCF or FCF 2 Legislation, a community development corporation, which serves as the conduit for FCF loan funds, or funding under the FCF 4, FCF 5, or FCF 6 Legislation, or loan or grant funds, and is not a member of the development team.

Financially Feasible Project. An Eligible Project that is likely to secure binding financing commitments from other funding sources which, together with the FCF funds, total the budgeted amount necessary to develop and operate the Project.

For-profit Organization. An entity, including a corporation, partnership or trust organized under the laws of the Commonwealth or another state. The For-profit Organization must also demonstrate, to the satisfaction of DHCD, the capability of managing all of its responsibilities to the Eligible Project.

Gross Cash Expenditures. All expenses paid out by the Project, including all payments of principal and interest (if any) and any other debt service on outstanding loans, all operating and maintenance expenses, and reasonable payments into capital and operating reserves for the Project.

Gross Cash Receipts. All cash collections received by the Project from all sources, with the exception of documented contributions, donations and grant proceeds.

Individual with Mental Illness/Individual Served by DMH. A person DMH determines is eligible to receive services and subsidies provided by DMH.

Individual with Intellectual Disabilities/Individual Served by DDS. A person DDS determines is eligible to receive services and subsidies provided by DDS.

Land Use Restriction. An agreement by a Developer (and, as required by DHCD, by the owner of the site on which the Eligible Project is located, if other than the Developer), running with the land for the benefit of the DHCD, DMH and DDS, and restricting a Project to use as Community-based Housing, or for funding under the FCF 5 or FCF 6 Legislation, Community-based Housing or Supportive Housing, for Individuals with Mental Illness or Individuals with Intellectual Disabilities. Such agreement, as further described in 760 CMR 19.04(2)(f), shall include such terms and conditions as are imposed under the FCF Legislation and/or the FCF Guidelines or are otherwise required by DHCD, and shall be recorded and/or registered in the Registry of Deeds and/or Registry District of the Land Court where the Project is located.

Lease-purchase Agreement. In the case of Projects funded under the Original FCF and FCF 2 Legislation, an agreement between the Developer and DCAM, as further described in 760 CMR 19.04(4), under which DCAM leases an Eligible Project for the benefit of DDS or DMH for 30 years. The Lease-purchase Agreement may be for a shorter period if the DCAM Commissioner, in consultation with DDS or DMH, as applicable, determines that the amortization of such agreement for a shorter period would be as cost-effective as a 30-year term. The Lease-purchase Agreement may be extended for up to ten years, if the DDS or DMH commissioner recommends an extension to DCAM to satisfy repayment of an FCF loan. The Lease-purchase Agreement may incorporate a Title Transfer Agreement.

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Low Income Household or Individual. An individual or family, including one or more Individuals with Mental Illness or Individuals with Intellectual Disabilities, whose adjusted income is less than or equal to 80% of the Area Median Income.

Nonprofit Corporation. A corporation organized under M.G.L. c. 180, which may also be required by DHCD to be a 501(c)(3) organization under the Internal Revenue Code at the time of Application or loan closing. To qualify as a Nonprofit Corporation for purposes of the FCF program, no member, shareholder, officer or employee of the corporation or its board of directors can profit, in any way, from the FCF assistance or from the Project. The Nonprofit Corporation must also demonstrate, to the satisfaction of DHCD, the capability of managing all of its responsibilities to the Project.

Report of the Special Commission. The report entitled "Actions for Quality Care" dated June, 1991, together with the subsequent report dated May, 1992 by the Governor's Special Commission on the Consolidation of Health and Human Services Institutional Facilities in the Commonwealth.

Residential Housing Development. Property which is predominantly used for housing and is in compliance with applicable laws and ordinances.

Supportive Housing. Community-based Housing that provides residents with supports and services linked to their housing.

Title Transfer Agreement. In the case of Projects funded under the Original FCF and FCF 2 Legislation, an agreement reflecting the option granted by the Developer/owner for the Commonwealth to acquire title to the Project:

- (a) when the FCF loan becomes due and payable; or
- (b) upon the expiration of a Lease-purchase Agreement with DCAM, as applicable (except that the commissioners of DDS and DMH may recommend that title be transferred to the provider of housing or other services at the Project, subject to a Land Use Restriction, in accordance with the requirements of the FCF Legislation). The option shall be granted by the Developer to DCAM, as agent for the Commonwealth. The Title Transfer Agreement shall run with the land, and shall be recorded in the appropriate Registry of Deeds or Registry District of the Land Court at the closing of the FCF loan, or at the time of the execution and delivery of the Lease-purchase Agreement, as applicable (or upon the earlier of the foregoing events, if an FCF loan is being made for an Eligible Project that is also (or will also be) the subject of a Lease-purchase Agreement). If an exception described in 760 CMR 19.04(2)(i) applies, no Title Transfer Agreement shall be required. When an FCF loan is made in conjunction with a Lease-purchase Agreement, DHCD may require that the Title Transfer Agreement be incorporated into the Lease-purchase Agreement.

Total Development Costs. Total hard and soft costs of developing an Eligible Project, including the costs to purchase, design, construct and finance the Project.

19.03: Eligible Projects/Uses

An FCF loan, or grant funded under the FCF 4, FCF 5, or FCF 6 Legislation, may be made only for a Residential Housing Development that is a Financially Feasible Project and which:

- (1) complies, or upon completion will comply, with the FCF Legislation and all other applicable federal, state or local requirements, including the Americans with Disabilities Act of 1990, and 105 CMR 410.00: *Minimum Standards of Fitness for Human Habitation State Sanitary Code: Chapter II*; and
- (2) in accordance with the Facilities Consolidation Plan, provides Community-based Housing for Individuals with Mental Illness or Individuals with Intellectual Disabilities, or, solely in the case of funding under the FCF 4 Legislation, provides Independent Integrated Housing for Low or Moderate Income Households or Individuals served by DMH or writes down building costs of Independent Integrated Housing or other Community-based Housing for Low or Moderate Income Households or Individuals served by DMH, all of whom are either:

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- (a) current or former residents of Facilities who have been adversely affected by the Facilities Consolidation Plan;
  - (b) awaiting Community-based Housing due to historically high costs needed to maintain Facilities, as certified by DDS or DMH in connection with an Application; or
  - (c) living in Community-based Housing but are underserved due to historically high costs needed to maintain Facilities, as certified by DDS or DMH in connection with an Application.
- (3) is developed and owned by one or more Nonprofit Corporations (or by an entity or entities in which one or more Nonprofit Corporations have a controlling financial or managerial interest); or by one or more For-profit Organizations, provided that preference for subcontracts shall be given to Nonprofit Corporations; and
- (4) has been approved by DDS or DMH, as applicable, prior to submission of an Application, as evidenced by the DDS or DMH letter of certification described in the FCF Guidelines.

19.04: Types of Loans and Grants and Their Terms and Conditions

- (1) Loan Types. Eligible Projects may receive FCF assistance in three areas: acquisition loans, construction/rehabilitation loans, and permanent loans. All FCF loans are structured as Deferred Payment Loans (DPL). Developers shall complete the Application process in accordance with the FCF Guidelines.
- (2) Loan Terms. All loans under the FCF program shall be made upon the following terms and such other terms as are included in the FCF Guidelines and/or DHCD's loan documents:
- (a) Loan Proceeds. The proceeds of the loan shall be used solely for the development of the Eligible Project permitted under the applicable FCF Legislation and approved by DHCD.
  - (b) Loan Amount. The amount of any FCF loan granted under the Original FCF Legislation shall not exceed 30% of the Total Development Cost of the Project, and the amount of any FCF loan granted under the FCF 2, FCF 3, FCF 4, FCF 5, or FCF 6 Legislation shall not exceed 50% of the Total Development Cost of the Project; provided, however, that DHCD may establish per-unit and per-Project dollar limits in the FCF Guidelines to which the loan would also be subject.
  - (c) Loan Period. The original term of the loan shall be up to 30 years. At the maturity date, the term may be extended for additional periods of up to ten years each at the discretion of DHCD, with the consent of the owner, if the Project continues to meet the FCF requirements and the requirements for an extension under the FCF Legislation, the FCF Guidelines, and the loan documents for such loan have been satisfied (including, with respect to loans granted under the FCF 2, FCF 3, FCF 4, FCF 5, or FCF 6 Legislation, DHCD's determination, in consultation with EOHHS, that there still exists a need for the Community-based Housing, or with respect to loans granted under the FCF 5 or FCF 6 Legislation, Supportive Housing, and that there is continued funding available for the provision of services to the Project, and the continuing applicability of the Land Use Restriction for the duration of the loan term, as so extended).
  - (d) Interest Rate. The interest rate shall be set by DHCD in consultation with the Treasurer of the Commonwealth. To the extent required under applicable versions of the FCF Legislation, the interest rate shall be equal to the rate anticipated to be paid by the Commonwealth for bonds issued pursuant to the applicable FCF Legislation.
  - (e) Loan Payments. Because all FCF loans are structured as DPLs, payments of principal and interest (if any) will be deferred for the loan period unless:
    - 1. a Project defaults on the terms of the loan; or
    - 2. except with respect to loans granted under the FCF 5 Legislation or FCF 6 Legislation, a Project has Gross Cash Receipts for a fiscal year exceeding Gross Cash Expenditures by 105% or more, in which event within 45 days after the end of each Project's fiscal year, the owner shall supply DHCD or the Financial Intermediary with the necessary financial statements needed to determine the amount of payment necessary for the period.All amounts paid pursuant to 760 CMR 19.04(2)(e) shall be applied first to the payment of interest and costs, and then to principal

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(f) Land Use Restriction. The Developer/owner of the Project shall execute and record at the appropriate Registry of Deeds or Registry District of the Land Court a Land Use Restriction. The Land Use Restriction shall only be released:

1. upon payment in full of all amounts due under the FCF loan (provided, however, that no prepayment shall be allowed under the loan prior to the maturity date as defined in the promissory note for such loan, as such maturity date may be extended from time to time); and if applicable, the written determination by the Secretary of EOHHS, the Secretary of Administration and Finance, and the Commissioner of DDS or DMH, as appropriate, that there is no longer a need to maintain the Project's use as Community-based Housing or Supportive Housing, as applicable, for Individuals with Mental Illness or Individuals with Intellectual Disabilities; or
2. upon foreclosure of the subject Project by the holder of a *bona fide* first-priority mortgage; or, with DHCD's consent, a *bona fide* mortgage that was senior to the lien of the FCF mortgage loan at the time of loan closing, or to which the FCF mortgage loan has been duly subordinated; and if applicable, a certification by the Secretary of EOHHS as to the inability of EOHHS to locate a purchaser or manager for the Project who can maintain the Eligible Use of the Project. The failure of the Secretary of EOHHS to locate such a purchaser or manager and notify the foreclosing mortgagee of the identity of the buyer or manager, within 60 days prior to such foreclosure sale by the foreclosing mortgagee, shall be deemed to be a certification as described in the preceding sentence. The recording of a sworn affidavit by the foreclosing mortgagee certifying as to the failure to meet this deadline will release the Land Use Restriction, provided that the foreclosure deed is recorded not more than six months after the receipt by the Secretary of EOHHS of the foreclosure notice.

(g) Mortgage Lien. The loan shall be secured by a mortgage lien against the Project, which may be junior only to such senior mortgage liens permitted by DHCD.

(h) Refinancing of FCF Loans. An FCF loan may be refinanced during the term of the loan only subject to the prior written approval of DHCD.

(i) Title Transfer Agreement. A Title Transfer Agreement shall be required for each FCF loan funded under the Original FCF and FCF 2 Legislation, unless one or more of the following shall apply:

1. mortgage amortization expenses for the Project are not paid directly or indirectly through reimbursements or rates paid by the Commonwealth on behalf of Individuals with Mental Illness or Individuals with Intellectual Disabilities who are residential clients of DDS or DMH; or
2. where income for the Project is from an agreement between the owner of the Project and DCAM, DDS or DMH, and the agreement is:
  - a. for a term not to exceed five years;
  - b. consistent with law governing contracting for Community-based Housing services; and
  - c. consistent with the provisions of the FCF Legislation.

A Land Use Restriction shall be duly recorded and/or registered, as described in 760 CMR 19.04(2)(f), regardless of whether or not the Property is subject to a Title Transfer Agreement, or qualifies for one of the foregoing exceptions. When DCAM exercises the Commonwealth's right to take title to a Project under a Title Transfer Agreement and the title is transferred, the Undersecretary of DHCD may determine that the FCF loan has been satisfied in full, provided that the loan is not in default.

(j) Facilities Consolidation Plan. All loans must be in accordance with the Facilities Consolidation Plan.

(k) EOAF Approval. The Secretary of the Executive Office of Administration and Finance must approve, in advance, all expenditures under the FCF program.

(3) Use of FCF Loan Proceeds for Refinancing Outstanding Loans. FCF loans may be made to refinance an outstanding mortgage loan to an Eligible Project if:

- (a) the Eligible Project was in existence on or before May 21, 1993, and the Eligible Project was purchased or developed in accordance with the Report of the Special Commission for former residents of:

19.04: continued

1. the Belchertown State School, or
  2. the Norfolk Street Project in Cambridge, Massachusetts; or
- (b) the Undersecretary of DHCD determines that the making of an FCF loan to the Eligible Project will allow for a substantial change in the residential population, the physical structure, or the service program such that the completed Project can be considered a new Project.
- (4) Lease-purchase Agreement. In the case of Projects funded under the Original FCF and FCF 2 Legislation, an FCF loan may be made to an Eligible Project for which DCAM has agreed to enter into a Lease-purchase Agreement with the provider of Community-based Housing for clients of DDS and DMH. The terms of the Lease-purchase Agreement shall be as prescribed by DCAM, consistent with the FCF Legislation and the provisions of 760 CMR 19.00. Requests for assistance under the FCF program shall be subject to the underwriting and selection requirements of DHCD. Of those FCF loans involving a Lease-purchase Agreement, 65% of all Projects approved for clients of DDS must be for new construction, and 35% must be for the acquisition and rehabilitation of existing structures. In addition, 20% of all Eligible Projects approved for clients of DMH must be for new construction, and 80% must be for the acquisition and rehabilitation of existing structures. In no event may the needs of the clients of DDS or DMH be compromised by these selection criteria, nor may the cost of a successful Application be uncompetitive with other proposals under consideration.
- (5) Grants. In addition to Deferred Payment Loans, in the case of funding under the FCF 4, FCF 5, or FCF 6 Legislation, Eligible Projects may also receive FCF assistance in the form of grants to provide Independent Integrated Housing for Low Income Households or Individuals served by DMH whose adjusted income is less than or equal to 15% of Area Median Income or write down building costs of Independent Integrated Housing or other Community-based Housing for Low or Income Households or Individuals served by DMH whose adjusted income is less than or equal to 15% of Area Median Income. Developers shall complete the Application process in accordance with the FCF Guidelines. 760 CMR 19.04(2)(a), (b), (f), (j) and (k) shall apply to all such assistance.
- (6) Repayment. As a condition of each FCF 3, FCF 4, FCF 5, or FCF 6 loan, or FCF 4, FCF 5, or FCF 6 Grant for an Eligible Project, the agreement for use of the affected property shall provide for repayment to the commonwealth at the time of disposition of the property in an amount equal to the commonwealth's proportional contribution from the Facilities Consolidation Fund to the cost of the development through payments made by the state agency making the contract.
- (7) Purchase Option and First Refusal Option. As a condition of each FCF 3, FCF 4, FCF 5 and FCF 6 loan, and each FCF 4, FCF 5, and FCF 6 grant, DHCD shall be granted a purchase option and a first refusal option to purchase the Project, in accordance with the following terms:
- (a) Purchase Option. Upon the expiration of the term of the affordability restrictions imposed in the Land Use Restriction for a Project funded under the FCF 3 or FCF 4 Legislation, DHCD shall have an option to purchase the Project from the Developer/owner at a price equal to the then-current appraised value of the Project less the total outstanding balance of all principal, interest and any other charges payable under the FCF Loan. Upon the expiration of the term of the affordability restrictions imposed in the Land Use Restriction for FCF Units developed with funds under the FCF 5 or FCF 6 Legislation, DHCD shall have an option to purchase the FCF Units from the Developer/owner at a price equal to the then-current appraised value of the FCF Units less the total outstanding balance of all principal, interest and any other charges attributable and payable under the FCF Loan. The appraised value of the Project shall be determined in the manner described in the FCF Legislation and in accordance with the FCF Guidelines and DHCD policies, as applicable. DHCD may exercise the Purchase Option by sending notice to the Developer/owner of its intention to exercise the Purchase Option by certified mail and recording/filing a copy of such notice in the Registry of Deeds or Registry District of the Land Court within 120 days after the expiration of the term of the affordability restrictions imposed by the Land Use Restriction. If DHCD fails to exercise the Purchase Option by such option exercise deadline, DHCD shall automatically be deemed to have waived the Purchase Option, and such Purchase Option shall automatically terminate.

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(b) First Refusal Option. If at any time the Developer/owner of a Project funded under the FCF 3 or FCF 4 Legislation wishes to sell, transfer or otherwise dispose of (transfer) the Project, or any part thereof, prior to DHCD's exercise of the Purchase Option, and receives a *bona fide* third-party offer for the same, the Developer/owner shall send a notice to DHCD by regular and certified mail, return receipt requested, setting forth the Developer/owner's intention to transfer all or part of the Project and the terms of any *bona fide* offer by a third-party to purchase the Project (or the applicable portion(s) thereof). If at any time the Developer/owner of a Project funded under the FCF 5 or FCF 6 Legislation wishes to sell, transfer or otherwise dispose of (transfer) FCF Units, prior to DHCD's exercise of the Purchase Option, and receives a *bona fide* third-party offer for the same, the Developer/owner shall send a notice to DHCD by regular and certified mail, return receipt requested, setting forth the Developer/owner's intention to transfer all or some of the FCF Units and the terms of any *bona fide* offer by a third party to purchase the FCF Units. DHCD shall have the right to purchase the Project (or the portion(s) thereof to which such offer relates) at the same price and on the same terms as those contained in such offer. DHCD may exercise the First Refusal Option by sending notice to the Developer/owner of its intention to exercise the First Refusal Option by certified mail and recording/filing a copy of such notice in the Registry of Deeds or Registry District of the Land Court within 120 days after its receipt of the Developer/owner's notice. If DHCD fails to exercise the First Refusal Option by such option exercise deadline, DHCD shall automatically be deemed to have waived the First Refusal Option, and such First Refusal Option shall automatically terminate, (but only with respect to the portion(s) of the property to which the third-party offer relates); however, if the sale contemplated in the third-party offer is not effected on the same terms and conditions as those contained in the offer, as described in the Developer/owner's notice, within six months after DHCD's receipt of the Developer/owner's notice, or if any of the material terms of such third-party offer shall be revised, DHCD's First Refusal Option shall be revived. If a Developer/owner's notice relates to a proposed transfer of only a portion of the Project for Projects funded under the FCF 3 or FCF 4 Legislation, or only some but not all of the FCF Units, for Projects funded under the FCF 5 or FCF 6 Legislation, the First Refusal Option shall remain in effect with respect to all remaining portions of the Project or FCF Units, as applicable.

(c) DHCD May Assign the Purchase Option or the First Refusal Option to a Qualified Developer. A Qualified Developer is a Developer who:

1. is a Nonprofit Corporation;
2. has completed an Application with respect to its proposed purchase of the Project, in the format specified by DHCD (the Purchase Application) (DHCD will issue a "Notice of Project Availability" that will include instructions for completing a Purchase Application for this purpose);
3. has been selected to purchase the Project based on DHCD's review and underwriting of the Purchase Application;
4. agrees that upon purchasing the Project, it will execute a Land Use Restriction providing for the Project to remain a Project for a term of at least 40 years; and
5. provides any additional due diligence materials not part of the Purchase Application that may be required by DHCD.

(d) If DHCD exercises the Purchase Option, DHCD or its assignee shall have 120 days after the expiration of the option exercise deadline specified in 760 CMR 19.04(7)(a) (and not less than 240 days after the expiration of the term of the affordability restrictions imposed by the Land Use Restriction) to purchase the Project. If DHCD exercises the First Refusal Option, DHCD or its assignee shall have 120 days after the expiration of the option exercise deadline specified in 760 CMR 19.04(7)(b) (and not less than 240 days after DHCD's receipt of the Developer/owner's notice) to purchase the Project. Promptly upon request by DHCD or its assignee, the owner will provide DHCD or its assignee with such due diligence material and such opportunity to inspect the Project as would be reasonably required by a third-party purchaser. The date for the acquisition closing under the Purchase Option or the First Refusal Option, as applicable, may be extended by agreement of the parties and the agreed-upon extension shall be recorded/filed in the Registry of Deeds or Registry District of the Land Court.



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DHCD or its assignee may extend the date for the acquisition closing to a reasonable date, if it determines that additional time is needed due to delays in closing preparations caused by the Developer/owner. After delivering notice of its intent to exercise the Purchase Option or First Refusal Option, DHCD may at any time terminate its exercise of the Purchase Option or the Right of First Refusal, in its discretion, without incurring any damages or other liability, if it determines it is not in the best interests of DHCD to effect the purchase, (but such termination right shall apply to DHCD only, and not to any assignee).

(8) Application Process. DHCD shall specify application procedures for FCF loans and grants in the FCF Guidelines. DHCD reserves the right to hold competitive funding rounds for FCF loans and grants.

19.05: Statutory Exemptions

Loans and grants provided under the FCF program are exempt from the following provisions of state law:

- (1) M.G.L. c. 111, §§ 25(C) through 25(G), and any other general or special law requiring determination of need;
- (2) M.G.L. c. 7, §§ 38A½ through 38O;
- (3) M.G.L. c. 30, § 39M; and
- (4) M.G.L. c. 149, §§ 44A through 44J.

19.06: Waiver Provisions

If any provision in the FCF Legislation, 760 CMR 19.00 or the FCF Guidelines or any other requirement of the FCF program would preclude the use of federal funds that would otherwise assist in meeting the goals of the FCF program, the Undersecretary of DHCD may, as provided in the FCF Legislation, modify, waive or negotiate such modifications to the rules as may be required to allow the use of such federal funds; provided, however, that the interests of the Commonwealth shall remain protected. In the event that the terms of repayment detailed in the FCF Legislation, 760 CMR 19.00, the FCF Guidelines or loan documents evidencing an FCF loan would cause a Project authorized by the FCF Legislation to become ineligible to receive federal funds which would otherwise assist in the development of that project, the Undersecretary may waive the terms of repayment which would cause the Project to become ineligible. The Undersecretary may also waive any provision of 760 CMR 19.00 not required by the FCF Legislation, if the Undersecretary determines that such action is advisable and in the public interest.

19.07: Reporting Requirements

Within 30 days after the end of each calendar quarter, DHCD and EOHHS jointly shall submit to the House and Senate Committees on Ways and Means a report detailing all financial activities under the FCF program during the calendar quarter just ended. Such report shall include descriptions of all loan agreements, grant awards, expenditures, encumbrances, debt issuances and debt service incurred.

REGULATORY AUTHORITY

760 CMR 19.00: M.G.L. c. 23B; c. 6A; St. 1993, c. 52, § 2, budget line item 4000-8200, as modified by St. 1993, c. 493, § 15, and St. 1993, c. 494, § 4, and as further modified by St. 2002, c. 244, §§ 15 through 19; St. 2004, c. 290, § 2E, budget line item 4000-8200 and St. 2008, c. 119, § 2, budget line item 7004-0029 and § 11; St. 2013, c. 129, § 2, budget line item 7004-0040 and § 19; and St. 2018, c. 99, § 2 (budget line item 7000-0050) and § 30.