



**KWAZULU-NATAL PROVINCE**

---

**HUMAN SETTLEMENTS**  
REPUBLIC OF SOUTH AFRICA

**REVISED POLICY AND PROCEDURE ON THE PRE-EMPTIVE RIGHT CLAUSE**

**MARCH 2023**

# CONTENTS

ACRONYMS/ABBREVIATIONS .....	3
DEFINITIONS .....	4
1. INTRODUCTION .....	5
2. OBJECTIVES .....	5
3. LEGISLATIVE FRAMEWORK .....	5
3.1 Section 26 of the Constitution of the Republic of South Africa of 1996 .....	5
3.2 Section 36 of the Constitution of the Republic of South Africa of 1996 .....	6
3.3 The National Housing Act 107 of 1997, Republic of South Africa, as amended.....	6
4. KEY FACTORS IN RESPECT OF THE PRE-EMPTIVE RIGHT CLAUSE .....	7
5. REVISED POLICY AND PROCEDURE ON THE PRE-EMPTIVE RIGHT CLAUSE.....	8
5.1. Consent to Mortgage .....	8
5.2. Criteria for Accepting Waivers in respect of involuntary sales.....	8
5.3 Criteria for Accepting Waivers in respect of voluntary sales.....	8
5.4 Criteria for requests of subletting subsidized properties:.....	9
5.5 Operational Implications: .....	10
6. EFFECTIVE DATE.....	10
7. RECISSION OF PREVIOUS POLICY .....	10
8. MONITORING AND EVALUATION .....	10

## **ACRONYMS/ABBREVIATIONS**

**BNG: BREAKING NEW GROUND**

**FLISP: FINANCE LINKED INDIVIDUAL SUBSIDY PROGRAMME (Help me Buy a Home Scheme)**

**HoD: HEAD OF DEPARTMENT**

**MEC: MEMBER OF EXECUTIVE COUNCIL**

**NHDB: NATIONAL HOUSING DATA BASE**

## DEFINITIONS

- Alienation:** Alienation refers to the process of a property owner voluntarily giving (subletting) or selling the title of their property to another party. When property is considered alienable, that means the property is able to be sold or transferred to another party without restriction. Some properties may be subject to a restraint on alienation, that can prohibit the property owner from transferring or selling the property to another party
- Subletting:** Refers to the leasing of part or all of the property held by a tenant, as opposed to a landlord, during a portion of his or her unexpired balance of the term of occupancy
- Waiver:** Denotes the granting of a concession by one party not insisting on the other party's precise performance of its obligations under the contract. It is also where one party gives up its rights to take action or enforce its rights under a contract

## **1. INTRODUCTION**

The Restriction of Sale on State Subsidized Housing commonly referred to as the pre-emptive right clause was introduced into law by means of the Housing Amendment Act 4 of 2001, which came into operation on February 1, 2002. Section 10A and 10B of Act 107 of 1997, contains a restriction on the voluntary and involuntary sale of state subsidized housing within a period of eight years from the date on which the property was acquired. The Kwazulu-Natal Provincial Housing Act, Act 12 of 1998 was thereafter amended to include the pre-emptive right clause. The intended outcome of this legislation was to put an end to the unlawful sale of subsidised houses by beneficiaries as such sales aggravate the housing backlog. Thus it is unlawful for the recipient of a government subsidized house to sell the house before they have lived in it for a minimum period of eight (8) years. However, experience shows that in many instances the houses are used to make quick money by unscrupulous individuals who sell them within the 8-year period. Alternatively, recipients rent out the houses to be used as business premises, while the beneficiaries return to live in informal settlements.

In view of the above, the KZN Department of Human Settlements developed Policy and Procedure on the Pre-emptive Right Clause which was approved by the MEC in January 2006. The said clause is incorporated into all Deeds of Sales of subsidized properties. Should a beneficiary wish to sell his/her property within eight years from the date on which the property was acquired, it must be offered for sale firstly to the Department. The Department must then decide whether to accept or reject the beneficiary's offer.

## **2. OBJECTIVES**

**The objective of the policy is to:**

- 2.1 Ensure transparency and uniformity in terms of the implementation of the terms and conditions of sale agreements.
- 2.2 Ensure that the seller and purchaser are made aware of their roles and responsibilities; and rights and duties as per the sale agreements.
- 2.3 Alleviate and manage the problem associated with illegal sales of housing units prior to the completion of the 8-year pre-emptive right period.
- 2.4 Adopt a standard procedure when addressing requests to waive the pre-emptive right clause.

## **3. LEGISLATIVE FRAMEWORK**

The Policy is informed by the following Legislation:

### **3.1 Section 26 of the Constitution of the Republic of South Africa of 1996**

- (1) Everyone has the right to have access to adequate housing
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right

### **3.2 Section 36 of the Constitution of the Republic of South Africa of 1996**

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) the nature of the right
- (b) the importance of the purpose of the limitation
- (c) the nature and extent of the limitation
- (d) the relation between the limitation and its purpose and
- (e) less restrictive means to achieve the purpose

### **3.3 The National Housing Act 107 of 1997, Republic of South Africa, as amended**

#### **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.

#### **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.

#### **4. KEY FACTORS IN RESPECT OF THE PRE-EMPTIVE RIGHT CLAUSE**

- 4.1 The deed of sale for all subsidized properties must include a pre-emptive right clause.
- 4.2 The policy and procedure having had regard to the relevant legislation currently support waivers of the pre-emptive right only on involuntary sales.
- 4.3 In cases of voluntary sale, the Department through the Head of Department (HoD) will consider each case based on its merit and thereafter decide if the waiver of the pre-emptive right clause should be granted or not.
- 4.4 Any beneficiary, executor or creditor who intends to sell a subsidized property must, in writing, inform the Department of his/her intentions and offer the housing unit to the Department.
- 4.5 The KwaZulu-Natal Housing Act states that the offer of the property for sale must firstly be made to the Department. Once such an offer is accepted, the Department will be required to appoint a valuer, consider compensation in respect of any improvements made to the property, and thereafter negotiate and conclude the sale. This will pose a challenge for the Department and is time consuming, resulting in possible delays and additional costs. The KwaZulu-Natal Housing Act is however inconsistent with the National Act, which was amended to include the restrictive condition. The National Act was amended after the KwaZulu-Natal Act was passed, hence the inconsistency.
- 4.6 The revised policy is drafted in terms of the National Housing Act 107 of 1997. The National Act does not support the rejection of offers as the clause provides that no purchase price or remuneration will be paid to the beneficiary. However, the beneficiary will be removed from the housing database and be allowed to qualify for future assistance. This means that the beneficiary will not be compensated for any improvements made to the house which may be viewed as expropriation without compensation. The National Act is currently under review.
- 4.7 In view of 4.5 and 4.6 above, the province will not exercise the option to purchase subsidized units but will only consider requests to waiver of the pre-emptive right clause.

- 4.8 In respect of the Finance Linked Individual Subsidy Programme (FLISP): The FLISP applicant should complete and sign the Acknowledgement of the Pre-Emptive Right Clause (Addendum A of the application). A pro forma is attached as **Annexure 1**. The FLISP information sheet and undertaking compiled by the conveyancer must clearly include full refund of the FLISP subsidy by the beneficiary should he/she request a waiver on the pre-emptive right clause.
- 4.9 Beneficiaries are not allowed to alienate their subsidized property through subletting prior to the completion of the 8-year pre-emptive right clause. The Handover Certificate (Happy Letter) for low income BNG housing units will now include a clause whereby the beneficiary is made aware that he/she cannot alienate the housing unit through subletting or sale of the property. A pro forma Handover Certificate (Happy Letter) is attached as **Annexure 2**.

## **5. REVISED POLICY AND PROCEDURE ON THE PRE-EMPTIVE RIGHT CLAUSE**

In order for the Department to effectively attend to requests in respect of waivers or offers related to the pre-emptive right clause, the following policy and procedure must be adhered to:

### **5.1. Consent to Mortgage**

Where only a bond is registered over the property, a consent to mortgage should be granted. The financial institution should draw up the consent. This will assist beneficiaries to source funding to undertake improvements to their home and use their property as an asset.

### **5.2. Criteria for Accepting Waivers in respect of involuntary sales**

This form of involuntary sales includes the following circumstances whereby an application for waiver maybe considered by the Department, namely deceased estates, pronouncement of insolvency and divorce matters. The following procedure is applicable:

- a) Department receives a written request to waiver the pre-emptive right clause from the relevant authority.
- b) Department will consider the request based on the outlined reasons and ensure that the beneficiary is not being defrauded and request all relevant and supporting documents.
- c) Once the HoD is satisfied that the beneficiary is not being defrauded he/she accepts the request to waive the clause. The relevant authority may then proceed with the alternate sale or distribution of the property as deemed necessary.
- d) It must be noted that the beneficiary will remain on the national housing database and thus not be able to receive a housing subsidy in the future.

### **5.3 Criteria for Accepting Waivers in respect of voluntary sales**

The following procedure is applicable:

- a) The Department receives a request to waiver on the pre-emptive right clause on a subsidized property.
- b) The HoD will then consider the request based on the outlined reasons may opt to accept the request to waiver the pre-emptive right clause thus allowing the beneficiary to sell the subsidized housing unit. The onus rests with the beneficiary to show good and justifiable reason as to why the request for waiver should be accepted by the Department.
- c) Once the HoD is satisfied that the beneficiary has reasonable grounds for waiver request he/she will then accept the request to waiver the pre-emptive right clause, thus allowing the beneficiary to sell the subsidized property.
- d) The HoD will request the beneficiary of a FLISP subsidy to repay the full subsidy amount to the Department.



- e) Once the Department receives the subsidy amount the beneficiary will be removed from the NHDB to allow him/her to qualify for future assistance.

**5.3.1 The following are examples whereby a waiver or option to purchase by the Department may be considered:**

**a) Nuisance Neighbors:**

The following relevant documents must be submitted in such cases:

- A peace order/restraining order that has been issued against the neighbor.
- Case number/s together with a copy of the court docket indicating that a pending case exists between the beneficiary and neighbor.
- Supporting affidavits from family members and community members indicating and confirming the ongoing problem.

**b) Crime:**

The following relevant documents must be submitted in such cases:

- A case number/s together with a copy of the court docket indicating that the beneficiary has been a victim as a result of the crime rate in the area
- Statistics from the local police station indicating the levels of crime within the area
- Supporting affidavits from family members and community members confirming that the beneficiary has been a victim of crime

**c) Relocation:**

The following relevant documents must be submitted in such cases:

- Affidavit confirming the reasons for relocation.
- Appointment letter if related to new employment.
- Rental agreement if applicable.

**d) Bond Repayment:**

The following relevant documents must be submitted in such cases:

- Bank statement.
- Letter from bank confirming that the beneficiary has either defaulted or is unable to pay the bond amount.
- Affidavit highlighting and confirming the beneficiary's current financial dilemma.

**NB:** *The above mentioned are examples. Reasons may vary and each case should be dealt with based on its merits supported by all relevant documents.*

**5.4 Criteria for requests of subletting subsidized properties:**

Alienation of property via subletting is not allowed. However, requests made to the Department maybe considered under the following circumstances:

- a) The Department receives a written request from the beneficiary requesting that he/she be allowed to sublet the subsidized property.
- b) The onus rests on the beneficiary to show that the subletting is justifiable together with all the relevant supporting documents and further indicate the duration of the proposed subletting.
- c) The HoD will only consider the request if the beneficiary is:
- Relocating to another area for medical reasons. The required documents must be a letter from a registered medical practitioner confirming the medical issue as well as the

duration and area where treatment will commence.

- Relocating for job opportunity. The required documents must be a letter from employee confirming the appointment.
- d) Once the HoD is satisfied that the subletting is reasonable, the beneficiary will be informed that the request has been accepted and he/she can then proceed with subletting the property.

#### **5.5 Operational Implications:**

- a) The Subsidy Administration Directorate will attend to Restriction of Sale on State Subsidized Housing in terms of Section 10A and 10B of the Housing Act. The directorate will deal with waiver request from beneficiaries who have received.
- b) The Head of Department will be responsible for receiving and considering applications to waive the pre-emptive right, and sign consents to mortgage.

#### **6. EFFECTIVE DATE**

The effective date of this policy and procedure will be the date of signature by the MEC.

#### **7. RECISSION OF PREVIOUS POLICY**

This policy will supersede all other provincial policies and processes therein in respect of the pre-emptive right clause.

#### **8. MONITORING AND EVALUATION**

The Departments Policy, Research and Product Development Directorate will undertake the monitoring and evaluation of the policy and will review it as and when required.



**“ADDENDUM A”**

**ACKNOWLEDGEMENT OF THE PRE-EMPTIVE RIGHT CLAUSE**

I, the undersigned applicant hereby acknowledges and confirms that:

1. I am aware of and understand the pre-emptive right clause. Should my application for the subsidy be successful, I cannot sell or otherwise alienate the property or site within a period of eight-years from the date on which the property or site was acquired unless the property or site has first been offered to the Department.
  
2. Should I intend to sell the property or site prior to the completion of the agreed eight-year period, I will firstly offer the property or site to the Department. In the event that the Department considers my application and opts to waive the pre-emptive right clause I will then be liable to pay the full subsidy amount as received upon approval of the Finance Linked Individual Subsidy Program (Help me Buy a Home Scheme) application.

Signed at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
NAME OF APPLICANT

\_\_\_\_\_  
IDENTITY NUMBER

\_\_\_\_\_  
SIGNATURE

Signed at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
NAME OF DEPARTMENT OFFICIAL

\_\_\_\_\_  
SIGNATURE



# (D4) HANDOVER CERTIFICATE

(Happy Letter)

Project Name: \_\_\_\_\_

Project Number: \_\_\_\_\_ Site Number: \_\_\_\_\_

Developer: \_\_\_\_\_

1. I, the undersigned \_\_\_\_\_ beneficiary, hereby declare that I accept and take possession of the above property and that the structure has been completed in accordance with the specifications stipulated in the agreement of sale between myself and the seller/developer.
2. I further confirm that I understand the 8-year pre-emptive right clause which is implemented in terms of the National Housing Act 107 of 1997 and as per the said clause I will not alienate the above-mentioned property either by way of subletting or sale.

Signed at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
PURCHASER/BENEFICIARY

\_\_\_\_\_  
IDENTITY NUMBER

\_\_\_\_\_  
SIGNATURE

LEFT THUMB PRINT

RIGHT THUMB PRINT

*(IF SIGNATURE IS NOT PROVIDED)*

Signed at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
NAME OF DEVELOPER'S REPRESENTATIVE

\_\_\_\_\_  
SIGNATURE