

## **Right-of-way Procedures**

### **1. Background**

Highway Occupancy Permit (HOP) applicants are often required to provide State highway Right-of-way to the Department in connection with obtaining a permit. The engineering districts should address Right-of-way and related issues and procedures early in the HOP process, utilizing the scoping meeting approach if appropriate. It is important to complete these transactions correctly to insure the Department's new property interest is properly documented for the future.

The districts should utilize appropriate resources within the district to accomplish these transactions, including but not limited to the Right-of-way, utilities, plans, and bridge units as appropriate. The Office of Chief Counsel will assist with legal issues but is not a Right-of-way acquisition unit.

Obtaining necessary Right-of-way is the responsibility of the permit applicant. The Department will not acquire Right-of-way for an applicant amicably or by condemnation on permit projects. There is a procedure, however, for local municipalities to acquire Right-of-way for an applicant amicably or by condemnation as discussed below.

Following are some of the important Right-of-way related issues in the permit process:

- a. Acquisition procedures for HOP projects involving private, local, state, or federal funding;
- b. Determination of the type and amount of Right-of-way required;
- c. Right-of-way plan requirements;
- d. Deed forms and approval;
- e. Title documentation;
- f. Plot plans and deed descriptions;
- g. Other conveyance and recording procedures;
- h. Condemnation by a municipal entity;
- i. Title searches and title insurance/certification;
- j. Utility relocation or elimination issues;
- k. Environmental issues.

An outline of the procedures explained below is included as Appendix C.

### **2. Application of procedures and general requirements**

These procedures apply to the acquisition of highway Right-of-way by an applicant as part of a permit project. They apply only as appropriate where the project involves the use of Federal highway funds in any phase of the project; where the project involves the use of State highway funds in any phase of the project; or where a local government may condemn land for State highway Right-of-way in connection with the permit project.

The following procedures apply in the various types of projects mentioned; the last one being the most common on permit projects:

- a. Project involving the use of Federal highway funds in any phase of the project.

All acquisitions by local government agencies or private persons must conform to the Uniform Real Property Acquisition and Relocation Assistance Policies Act of 1970, as amended, and the regulations promulgated thereunder. 42 USC §4601 et seq., and 49 CFR Part 24 (“the Uniform Act”).

If the agency or person undertaking the project has the power of eminent domain, all requirements of the Uniform Act apply. Among other general requirements, negotiations must be held based upon an approved appraisal. 49 CFR §24.102. The “[LPA Brochure: A Guide for Local Public Agency Acquisition of Right-of-way](#)” (Publication 98) is a good publication explaining the necessary procedures.

If the agency or person undertaking the project does not have the power of eminent domain, the general requirements of the Uniform Act do not apply. However, a written offer to purchase must be made advising the landowner that the agency or person does not have or will not exercise the power of eminent domain if negotiations fail and what the agency or person believes to be the fair market value of the property. 49 CFR §24.101(a)(2).

- b. Projects involving the use of State highway funds in any phase of the project.

All acquisitions by local government agencies or private persons that have the power of eminent domain and intend to exercise it if necessary must conform to the Department’s Right-of-way Manual. These procedures are generally consistent with the Uniform Act requirements. The “[LPA Brochure: A Guide for Local Public Agency Acquisition of Right-of-way](#)” (Publication 98) is a good publication explaining the necessary procedures.

If the agency or person undertaking the project does not have the power of eminent domain or does not plan to exercise it for the project in question, the Right-of-way Manual procedures need not be followed. However, a written offer to purchase must be made advising the landowner that the agency or person does not have or will not exercise the power of eminent domain if negotiations fail and what the agency or person believes to be the fair market value of the property.

- c. Projects not involving the use of Federal or State highway funds where a local government may condemn land for State highway Right-of-way.

All acquisitions by local government agencies or private persons must conform to the Department’s Right-of-way Manual. These procedures are generally consistent with the Federal Uniform Act requirements. The “[LPA Brochure: A](#)

[Guide for Local Public Agency Acquisition of Right-of-way](#)” (Publication 98) is a good publication explaining the necessary procedures.

- d. Projects not involving the use of Federal or State highway funds or the possible condemnation of highway Right-of-way by a local government.

Acquisitions need not conform to the Federal Uniform Act or the Department Right-of-way Manual. However, the landowner must be informed in writing prior to the start of negotiations that although the land may eventually become part of a State highway, the Department is only involved because of its authority to issue highway occupancy permits for driveways onto State highways and will not exercise its power of eminent domain in the event negotiations fail.

- e. All projects.

The applicant must also follow the procedures set forth below.

### **3. When is Right-of-way required and what type of interest should be required?**

Whenever a proposed highway facility, highway drainage structure, or other highway related structure falls outside of the existing legal Right-of-way, new Right-of-way will be required. The nature and interest the Department should require the applicant to acquire is set out in the Design Manual, Part 3 (Publication 14M). See specifically DM3, Chapter 3, [Section 3.1.EE](#) (Highway Occupancy Permit Plans) and generally DM3, Chapter 3, [Section 3.1](#) (Interest to be Acquired).

The general policy is to have the permittee include all State highway features within required Right-of-way and to have the Right-of-way acquired in fee simple. If appropriate, Right-of-way can be acquired as an easement for highway purposes. A highway easement may be appropriate where the local municipality will require the applicant to subdivide if fee simple title is acquired. The acquisition of traffic signal easements on behalf of the local municipality is also permitted on HOP projects, if the municipality has agreed to accept the easement and to apply for a signal permit ([DM3, 3.1.Y](#)). Slope easements, drainage easements, and other lesser property interests may be acquired by a permittee in contravention of the general policy to acquire required Right-of-way when approved by the District Executive based on special circumstances.

Special circumstances meriting acquisition of interests less than required Right-of-way would include, but not be limited to, slope easements in commercial areas where a fee take would adversely impact parking and drainage easements for ditches other than parallel ditches. Other considerations would be impacts to the remainder, possible environmental issues, open space and setback requirements of a municipality, and minor cuts and fills that will not jeopardize the integrity of the road. The District Executive should make these determinations with the advice of their supporting units based on the administrative risks.

If land has been previously dedicated to public use but not accepted, the Department may be able to accept that dedication as part of the HOP acquisition process. In other situations the dedication would need to be accepted by the local government and transferred to the Department. The appropriate approach depends on the nature of the previous dedication. The Department will only accept dedications of areas required to maintain the State highway system. A complete discussion of this topic is set forth in the Right-of-way Manual, Appendix C, Article 10 (Dedications and Ordainments). As discussed below, the Department does not accept dedication deeds as part of the HOP acquisition process.

#### **4. Right-of-way Plans**

A Right-of-way plan, in Department approved design format, is required for every HOP application where Right-of-way will be conveyed to the Department. This serves several purposes, including documentation of the highway Right-of-way for future use by the Department and others and a means to insure that appropriate Right-of-way is acquired for the HOP project. The Right-of-way plan will generally be drafted by the consulting engineer/surveyor after the HOP construction plan is approved. As such, it is one of the last plan approval steps in the HOP process.

In accordance with DM3, Chapter 3, [Section 3.0.H](#) (Highway Occupancy Permit Plans), there are three types of plans related to the highway occupancy permit process: drawings depicting Right-of-way to be deeded to the Department; drawings authorizing acquisition by local governments; and drawings accepting dedications. These plans must conform to the requirements of this Chapter and be reviewed at the District level by the appropriate Central Office Field Liaison Engineer. The District permit and Right-of-way units should also review the plans.

- a.** *Drawings Depicting Right-of-way to Be Deeded to the Department.* The most common HOP-related plan is that developed to document Right-of-way deeded to the Department as part of the HOP process. These deed plans do not transfer title. The permittee must transfer title to the Department by deed. The deed plan only documents the State highway Right-of-way for future reference.

Deed plans must be filed with the District plans unit and forwarded to the Bureau of Design, Plans and Reproduction, for appropriate filing. Deed plans must also be recorded at the appropriate county courthouse to document the highway Right-of-way.

- b.** *Plans Authorizing a Local Government to Acquire Land for a State Highway.* This type of plan is also sometimes required in the HOP process. Local authorization plans also do not transfer title. They only authorize the local government to acquire interests in land for a State highway and document the State highway Right-of-way for future reference.

Local authorization plans must be filed with the District plans unit and forwarded to the Bureau of Design, Plans and Reproduction, for appropriate filing. Local

authorization plans must also be recorded at the appropriate county courthouse to document the highway Right-of-way.

- c. *Plans Accepting the Dedication of Right-of-way.* This type of plan is available in the HOP process, but is typically not appropriate. The best practice is to have the land deeded to the Department and documented with a plan depicting Right-of-way to be deeded to the Department.

A deed and deed plan should always be used for land owned by the permittee. For land owned by a neighboring owner, but previously dedicated to public use for a State highway, the best practice is to have the local government accept the dedication and then deed it to the Department. Whether the land is being deeded by a private permittee or a local government, the normal permit deed (either fee simple or easement for highway purposes) should be used, not a deed of dedication.

The acceptance of dedication plan may only be used if the offer of dedication is general or to the Commonwealth. It may not be used if the dedication is to the local municipality or, even if general, the local municipality has already accepted the dedication. Use of this plan is not encouraged. The deed process should be used if at all possible.

If the acceptance of dedication plan is used, it must be filed with the District plans unit and forwarded to the Bureau of Design, Plans and Reproduction, for appropriate execution by the Secretary and then filing. The acceptance of dedication plan must also be recorded at the appropriate county courthouse because it is evidence of an actual title transfer. Designation of the dedication on the subdivision or land development plan is the offer of dedication and execution of the plan by the Department is acceptance of the dedication; there is no need for a separate deed of dedication.

- d. *General Guidance.* These special highway occupancy permit plans may not be used for other functions. For example, the Department may not designate areas to be vacated or abandoned on them or attempt to authorize acquisition by the Department through them. Separate procedures must be used for these purposes. By the same token, a regular title sheet authorizing the Department to acquire property may not be used for plans reflecting land to be deeded to the Department during the HOP process or authorizing another government entity to condemn for a State highway.

Where the majority of the HOP construction is within existing Right-of-way, only a few properties are involved and the areas to be acquired are minor, the Right-of-way plan can be a simple, one or two page plan that need not depict related proposed highway construction features. See DM3, Chapter 3, [Section 3.0.G](#) (Simplified Right-of-way Plans).

HOP Right-of-way plans must contain an approval block for the Secretary of Transportation to approve the plan for himself and the Governor, as well as a District Executive approval and recording block. Appropriate personnel, such as the District Plans Engineer, District Chief of Surveys, District Permit Manager and/or District Right-of-way Administrator, should review the plan prior to signature. DM3, Chapter 3, Sections 3.2.I.6 and 7. See also DM3, Chapter 3, Sections 3.3.A.14 (legend on index sheet), 3.4.H.5.m (special general note), and 3.5.X and Y (additional special directions) on plans presentation for HOP Right-of-way plans.

HOP Right-of-way plans should be reviewed and approved before any deeds are reviewed and accepted by the Department. The plan should designate the property owners as they exist before the applicant purchases the necessary Right-of-way. See Section 5a below on the conveyance process. Temporary construction easements are not to be shown on plans depicting Right-of-way to be deeded to the Department because the permittee will not be conveying rights to the Department in such areas. See DM3, Chapter 3, Section 3.4.H.5.i.

Please note that HOP Right-of-way plans submitted by consultants do not always correctly reflect the proper legal Right-of-way lines. It is important to obtain and review the Right-of-way plans on file in the district plans room, as well as straight line diagrams. The Right-of-way Administrator may also be of help in this determination. See generally DM3, Chapter 3, Section 3.8 (Determination of Legal Right-of-way Widths).

Please also note that consultants often show dedicated and ultimate Right-of-way areas as legal Right-of-way. This is not correct because until properly accepted by some government entity, the property owner still owns these areas subject to the offer of dedication. See generally Right-of-way Manual, Appendix C, Article 10 (Dedications and Ordainments) and subsection c above on plans accepting the dedication of Right-of-way.

## **5. Conveyance of Right-of-way to the Department**

**Amicable conveyance by applicant to the Department** - Needed State highway Right-of-way should be conveyed to the Department from the applicant, usually in a single deed. That is, the applicant must purchase any areas not owned by it and then deed it to the Department. The main reason for this requirement is to have the warranty of title be from the applicant rather than an unrelated third party. Exceptions to this requirement have been made when the land is under the control of other government entities. For example, jurisdiction of Commonwealth-owned land can be transferred to the Department directly from other Commonwealth agencies by memorandum of understanding.

The Right-of-way plan should be used to insure the correct areas are included in the conveyance. The plan will contain a numbered list of property parcels, identified by a circle (indicating that land is required from that parcel) or a circle inside a triangle (indicating no land is required). There will also be a Right-of-way Information Block for each parcel for each property from which land is required, containing a tabulation of required areas.

It is recommended that the Permit Manager meet with the District Right-of-way Administrator or other appropriate District real estate expert to review the proposed deed in conjunction with the Right-of-way plan. This review would include insuring that all required deeds have been provided and that each deed is properly executed and suitable for recording at the County Recorder of Deeds Office. It may be appropriate to have the applicant's attorney present at this review to answer questions where the conveyance is significant.

**Form of deed** - Use Deed M-950 D1 (Deed, Fee Simple) if required Right-of-way is being acquired in fee simple and Deed M-950 D2 (Deed of Easement) if required Right-of-way is only being acquired as a highway easement or the acquisition of a drainage or other easement has been approved. The Right-of-way Plan will reflect the nature of the title to be acquired.

The deeds are interactive and may not otherwise be altered without review and approval of the District Right-of-way Administrator or other District personnel with real estate expertise. Permit personnel should consult with the District Right-of-way Administrator or other District personnel with real estate expertise when completing the deeds. They are much like deeds used when the Department is acquiring Right-of-way for a highway project.

The District can consult with the Office of Chief Counsel as appropriate. The deeds do not need to be approved as to form and legality because they are not being executed by the Department. If the District would like a deed approved as to form and legality, the deed should be entered into the Legal Approval Tracking System (LATS) and forwarded to the Office of Chief Counsel, Real Property Division, Permit Section.

The Deed M-950 D1 (Deed, Fee Simple) provides for use of a metes and bounds description if it is used only to transfer fee title. However, see the subsection below entitled "Plot plans and written descriptions" for concerns in this regard.

**Documentation of title** – The applicant must provide an investigation of title to the property being conveyed based on courthouse records. That is, no deed may be accepted without documentation and review of the title through a record owner and lien certificate, an abstract of title or title report based on a title search. The purpose of these documents is to ascertain the history and present condition of the title with reference to liens, encumbrances, easements, etc., to determine if there is marketable title. This is a legal term meaning title that is free from reasonable doubt, can be sold or mortgaged, and will not expose the owner to potential litigation or conflicts regarding use or ownership of the land.

The title documentation may be from a title company or an attorney at law. A record owner and lien certificate is the best document but an abstract of title or title report is acceptable. The District Permit Manager should consult with the District Right-of-way Administrator or other District real estate expert to review the documentation for any title defects that must be cleared before the deed can be accepted by the Department. Such defects could include utility easements, liens of record, mortgages, etc. The Department must be identified as a beneficiary of the title work certificate.

The executed deed and title information must be reviewed and accepted by the District Right-of-way Administrator or other District real estate expert prior to recording. A bring down/update of the title should be provided within 15 days of the date the permit is to be issued.

Title insurance to be paid for by the applicant can be required but is not recommended. Under such a policy the title insurance company protects the insured from losses caused by defects in the title of the property which have not been excluded from coverage. The Department must be named as an insured or beneficiary to be protected. Examples of items not usually excluded would be losses resulting from title being vested in someone else, unmarketability of the title, and lack of the right of access to the land conveyed. As a practicable matter most policies exclude the defects that are problematic for the Department such as utility easements and liens of record and the existence of the policy may not even be discovered if a problem arises later unless some tracking system is established. The District would also be required to approve the amount of coverage based on the estimated value of the property being conveyed. There is also added cost to the applicant to provide the insurance.

Please note that the title documentation need only apply to the property being conveyed to the Department. It does not need to cover the entire property. Indeed, documentation covering the entire property often causes undue problems by noting easements and other issues that do not apply to the property being conveyed. Limiting a record owner and lien certificate to only the property being conveyed is highly recommended.

**Mortgages and other liens and judgments** – Mortgages and other liens and judgments on the property should be released as to the area conveyed at the expense of the applicant. This will insure that the Department is not included on foreclosures or other legal actions relating to the mortgage or other lien. With the approval of the District Executive, a deed may be accepted without release of a mortgage or other liens under the following circumstances: 1) the value of the land being conveyed is \$25,000 or less and the District Right-of-way Administrator or other District real estate expert certifies that the land being conveyed is sufficiently minor that it does not materially affect the ability of the remainder of the property to provide security for liens and judgments. The applicant must prove to the District that the value of land is \$25,000 or less based on the purchase price, an appraisal, or other documentation deemed acceptable to the District.

**Utility and other easements** – Utility and other easements on the property should be eliminated as to the area conveyed at the expense of the applicant. This will insure that the utility or other easement owner does not retain private property rights within the highway Right-of-way which the Department may be required to acquire in the future. As to utilities, they would retain the right to substitute Right-of-way and reimbursement for future relocations from the Right-of-way because they would have private status. Not eliminating the easement would also allow the utility or other easement owner to argue it has rights within the Right-of-way not controlled by the Department's police powers, including the utility occupancy regulations.

In exceptional circumstances and with the approval of the District Executive, a deed may be accepted without elimination of an easement on the land being conveyed. An example of an exceptional circumstance would be when a utility already has private status for its facility within legal Right-of-way or perhaps where there are no actual facilities within the easement. The risks and possible future costs to the Department by not eliminating the easement should be considered in making the determination.

If a utility is allowed to remain in place without private status, a new or amended utility HOP should be made a condition of issuing the driveway HOP. If a utility is allowed to remain in place with private status, a private status agreement should be executed to insure the utility is subject to the Department's regulation.

**Proper execution of the deed** – The information block and all blanks on the deed form should be filled in. The proper party must execute the deed on behalf of the applicant. See Signature Authority Guide, Appendix F to the Right-of-way Manual.

**Plot plans and written descriptions** – Department Right-of-way acquisition forms do not typically use metes and bounds descriptions, but rather use plot plans. This approach has been incorporated into the M-950 deed forms. A metes and bounds description is not required by Pennsylvania law and it is simpler to compare a plot plan to the approved Right-of-way plan for accuracy than to have a metes and bounds description reviewed by the survey or other district unit for accuracy. Using only a plot plan avoids problems with discrepancies between a plot plan and a metes and bounds narrative. Under Pennsylvania law, if both are attached to a deed, the words take precedence over the plan.

The best approach is where the plot plan is part of the Right-of-way plan and is reviewed as part of the plan review. However, if not part of the Right-of-way plan, the plot plan must be reviewed for accuracy when reviewing the deed.

A metes and bounds description may be included in the deed if the District requests or approves of this approach. In that case, however, the description should be supported by a sealed survey for Department review. In any event, the description must be reviewed by someone in the District with sufficient knowledge to assure it accurately describes the property being transferred to the Department as depicted on the plan. Such a review may be impractical from a staffing standpoint. There is also the risk that the description may not close.

**Timing** – Deeds and related documentation should be provided for review as soon as practicable after the Right-of-way plan is approved, but well before issuance of the HOP. The Right-of-way plan should not be prepared until the HOP construction plans are prepared to insure proper Right-of-way is acquired.

Executed deeds for all necessary State highway right-of-ways should be provided to the Department before a permit is issued. Conditioning an HOP on acquisition of required Right-of-way is not advisable because the District will then be required to insure work is not performed under the permit on lands of third parties and may never obtain title to where

highway features have been constructed. If allowed in view of special circumstances approved by the District Executive, the condition must be clear that the permittee is not allowed to do work depicted on the HOP plan that is outside the applicant's land before that Right-of-way is conveyed to the Department. The start of work must be conditioned on delivery of acceptable deeds and appropriate documentation. An example where it may be appropriate to issue an HOP conditioned on the completion of Right-of-way acquisition would be if the applicant's financing entity will not release funds to purchase the property without issuance of an HOP and leases with tenants are put in jeopardy. Another example would be where a local government has agreed to use its power of condemnation if necessary. These issues must be approached on a case by case basis.

**Recording** - The Right-of-way plan must be recorded in the County Recorder of Deeds Office where other such plans are recorded. It must also be filed in the District Plans Room, with copies forwarded to the Bureau of Design in accordance with standard procedures for plans showing Department Right-of-way.

The deed conveying the Right-of-way to the Department must be separately recorded in the County Recorder's Office where other deeds are recorded. Deeds should not be recorded prior to Department approval.

The applicant must pay all fees necessary for recording the documents.

Right-of-way Units in some districts assist in recording plans and deeds.

**Acquisition of required Right-of-way by condemnation** - The Department will not acquire Right-of-way for HOP projects by amicable acquisition or by condemnation. However, in exceptional circumstances with the approval of the District Executive, the Department will authorize local governments to acquire State highway Right-of-way for an applicant. Exceptional circumstances exist where the applicant is unable, after reasonable efforts, to acquire Right-of-way from third parties which the Department deems essential to safe design requirements for the HOP project. Execution of a plan authorizing a local government to acquire land for a State highway (see Section 4b above) shall constitute the Department's consent for the municipality to acquire Right-of-way for the State highway.

Where the Department executes a plan authorizing condemnation of State highway Right-of-way by a local municipality, all acquisitions by the local government and the applicant must conform to the Department's Right-of-way Manual. The "[LPA Brochure: A Guide for Local Public Agency Acquisition of Right-of-way](#)" (Publication 98) is a good publication explaining the necessary procedures. See Section 2c above. The Department should also follow the review procedures that apply to acquisitions by local governments under the LPA procedures.

Authorizing a municipality to acquire Right-of-way for a State highway does not obligate the Department to assume any liability for costs associated with condemnation or other acquisition of the land in question. The applicant or municipality is solely liable for all such costs and expenses.

## **6. Environmental concerns**

Once it accepts a deed, the Department can become responsible for environmental conditions on the property conveyed. Consequently, all environmental issues such as hazardous materials, wetlands, or historic preservation should be thoroughly investigated and evaluated prior to acceptance of a deed. In all situations the District should conduct a thorough visual inspection of the property for evidence of environmental issues before accepting a deed.

An environmental report should be required if there is any concern. For example, at least a Phase I environmental report would be appropriate if the property has been put to a prior commercial use that could cause issues (e.g. a factory, dry cleaner, automotive repair garage, gas station, tannery, chemical plant, etc.) or there is evidence of possible contamination due to fuel tanks above or below the surface, dumping, or storage of chemicals. Guidance from the District environmental unit may be appropriate if there is any concern.

Note that additional environmental studies may be required if Federal or State funds are being provided for the project or if a point of access issue is involved.