

Changes, Clarifications and Additions for all the Local Public Agents concerning Right of Way:

Some terms and language definitions:

Local Public Agents/Agencies = **LPAs**

Arizona Department of Transportation = **ADOT**

Federal Highway Administration = **FHWA**

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and Thereafter Amended = **Uniform Act**

Right of Way = **ROW**

Code of Federal Regulations = **CFR**

Full Market Value = **FMV**

Note: The Uniform Act must be followed on all LPA Projects when Federal funds are used in any phase of a project. The Uniform Act must be followed for any LPA Project affecting, improving, or modifying any federal or State transportation facility.

LPA Staff Members

At least one permanent, fulltime LPA staff member **MUST** be deemed qualified to perform acquisition agent tasks for an LPA to become qualified to perform its own ROW acquisition work (qualification from ADOT ROW Liaison). An additional LPA staff member **MUST** be qualified to perform relocation agent work if the LPA project requires relocation. An LPA may have their own qualified staff member perform the acquisition tasks, and hire a fee agent or coordinate with ADOT ROW Liaison (if available) to perform relocation work. ADOT ROW Liaison **MUST** qualify the LPA's staff members.

ADOT ROW Liaison will monitor and evaluate the performance of qualified LPA staff in the right of way functions for which such staff members are qualified.

Such monitoring and evaluation will be conducted on a project basis consistent with the criteria set forth in the ADOT Manual. ADOT ROW Liaison may revoke any qualification allowing LPA staff to perform certain right of way functions for any violations of practices where correction is considered mandatory. Such revocation shall be at the discretion of ADOT ROW Liaison in conjunction with ADOT ROW staff.

Contract / Fee Agents and Consultants

The LPA, which enters into a contract with the fee agent or private consulting company for the performance of right of way work, retains ultimate responsibility for the actions of the fee agent or consulting company. ADOT has established broad criteria for use in evaluating the qualifications and selecting consultants for specific right of way functions. However, ADOT is not responsible for devising such criteria or for the performance of ADOT approved fee agent and consulting companies. The LPA is totally accountable for all action of the consultant, positive or negative. In the event the actions or performance of the consultant result in a loss of Federal funds for the project, it is the sole responsibility of the LPA to pay back these funds.

Fee agents and consulting companies **MUST** perform right of way functions to the same standards, practices, rules, and regulations as ADOT. The LPA will have the fee agents and/or consultants submit their name, contact information for the fee agent/consultant and a copy of the agreement between the LPA and fee agent/consultant to the ADOT ROW Liaison for review prior to them starting any work.

The ADOT ROW Liaison using the ADOT ROW Manual guidelines will monitor the work products of the fee agents and the consultant companies.

Administrative Settlements

The Uniform Act requires that the head of a governmental agency shall make every reasonable effort to expeditiously acquire real property by negotiation. Negotiation implies an honest effort by the acquiring agency to resolve differences with property owners.

Negotiations should recognize the inexact nature of the process by which just compensation is determined. Further, the law requires an attempt by agencies to expedite the acquisition of real property by agreements with owners and to avoid litigation and relieve congestion in the courts.

In addition to the mandates of the Uniform Act, there are significant cost savings, which can be realized through an increased use of administrative and legal settlements. Cost savings are in the areas of salaries, witness fees, travel, per diem, court costs, etc.

FHWA and ADOT encourage LPAs to carefully consider and maximize use of administrative settlements in appropriate situations.

An administrative settlement is a negotiated settlement of a right of way acquisition case in which the LPA and ADOT have administratively approved payment in excess of the FMV.

If the LPA anticipates requesting federal participation in the portion of the administrative settlement over the FMV, the administrative settlement must be approved by ADOT prior to the LPA finalizing the settlement. In this scenario, when the LPA agrees to the administrative settlement it should notify the landowner or landowner's representative that the settlement is subject to ADOT approval.

The LPA should then notify the ADOT ROW Liaison of the amount of the administrative settlement and the reasons for entering into the settlement. If the settlement is within certain delegated limits (each LPA may have a different amount based on experience) and the ADOT ROW Liaison determines that the settlement is reasonable, the ADOT ROW Liaison can verbally approve the administrative settlement. A written justification and approval signature will follow.

Administrative settlements shall describe the acquisition, state the offer of just compensation and the proposed negotiated settlement, introduce information which supports the settlement and request approval from the proper authority. The settlement may also include information on recent court awards for similar type property, the property owner's appraisal data, an estimate of trial cost or an opinion of legal counsel.

The settlement **MUST** be approved by an officer of your agency having responsibility for the right of way acquisition (not the negotiator). The person approving the settlement **MUST** be able to judge the risk/benefit issues of a potential court action.

If the settlement is outside of certain delegated limits, a written request to approve the administrative settlement will be required. The ADOT ROW Liaison can provide the LPA with the ADOT wording to be used for such written request. After the request is completed, it should be tendered to the ADOT ROW Liaison.

If the portion of the administrative settlement is under 10% of the FMV, the ADOT ROW Liaison may approve the settlement for Federal participation immediately.

If the participating portion of the settlement is over 10% of the original FMV, the ADOT ROW Liaison will consider it for approval based on documentation provided.

If an administrative settlement is approved by the ADOT ROW Liaison, the entire amount of the settlement is eligible for federal participation. If an administrative settlement is rejected, the LPA can request ADOT to notify it of an acceptable administrative settlement.

If the LPA then agrees to an administrative settlement higher than the ADOT approved settlement amount, the LPA can agree to the higher settlement with the understanding that the amount of the settlement above ADOT's approved settlement will not be eligible for federal participation.

ADOT Guidance and Assistance

ADOT is committed to an ongoing program, which will provide effective assistance and guidance to LPAs. ADOT ROW Liaison can provide information and establish appropriate state staff contacts; provide training and educational opportunities for LPAs; and provide mutually acceptable technical and advisory services as necessary to accomplish the acquisition program.

ADOT ROW Liaison will consult and advise the LPA concerning real property acquisition activities to ensure that right of way is acquired in accordance with provisions of state and federal laws and FHWA directives.

At the earliest possible date, the LPA should advise the ADOT ROW Liaison of the need for ADOT assistance.

Certification Forms / ROW Certification / Clearance

The LPA must certify that all Uniform Act requirements and other state and federal requirements have been met on all LPA Projects. This is the reason for the ROW Certification Form, page 2 under "CERTIFICATE" item # 5 "We certify all applicable state and Federal rules and regulations including the Uniform Act has been complied with. **Please initial here >>>>>>>>>**" **this MUST be initialed by a LPA official or ADOT ROW will not accept the ROW Certification and ROW Clearance will not be given.**

A separate right of way certification must be completed by LPAs for each LPA Project even if no right of way is required for the project. All certifications should be prepared using forms specified by ADOT. ADOT furnishes this form upon the LPA asking for it.

The certifications and supporting documentation will be reviewed, and if acceptable, an ADOT right of way clearance for the project will be issued by the ADOT ROW Liaison. If the certification and/or supporting documentation are not acceptable, the ADOT ROW Liaison will notify the LPA of required changes or missing documentation.

A Conditional Clearance May be Requested. In some situations, it may be necessary to clear construction projects early.

In order to clear the construction project and receive Federal Participation, all appraisals must be complete, full market value issued, ADOT ROW Liaison agrees that these conditions have been met, the ADOT ROW Liaison may issue conditional clearance memo request. A meeting with the LPA's project engineer/manager, the ADOT ROW Liaison and ADOT Project Manager to review the LPA's memo justifying the following items:

1. An explanation of the critical need to accelerate the advertisement of the project.
2. Where acquisition of a few parcels has not been obtained, full explanation and reasons therefore including identification of each such parcel owner, full market value and offer date shall be set forth in the request along with a realistic date when possession is anticipated as well as substantiation that such date is realistic.
3. A statement that the imposition of the restrictions, the no-work sections, will not delay completion or affect the cost of the project must be included. Remember, any additional costs to the project due to the increased bid prices or construction claims caused by the no-work sections will be non-participating by the Federal Funding.
4. When relocation is involved a statement that all occupants of the residences on such parcels have had replacement housing made available to them in accordance with 49 CFR 24.204. ADOT ROW Liaison must ensure that occupants of residences, businesses, farms, or non-profit organizations who have not yet moved from the right of way are protected against any unnecessary inconvenience or any action coercive in nature. A written description that essentially identifies the relocation status and the assistance that will be provided to the displaced persons(s) who have not yet moved from the right of way must be set forth in the request.

Dedications

The LPA may accept a parcel of land that a developer of a subdivision has dedicated, or proposes to dedicate, for street purposes in developing a subdivision. The LPA may also accept the land if the dedication is made pursuant to the local planning process or at the request of the property owner for land use concessions as long as the LPA has a City Ordinance that allows “dedications”. A copy of that ordinance must accompany the ROW Certification.

Right of way acquired through normal zoning and subdivision procedures requiring the dedication of strips of land in the normal exercise of police power is not considered an acquisition or taking in the constitutional sense.

Thus payment of just compensation or compliance with the provisions of the Uniform Act is not required since police power is not used. This is not a donation.

Land obtained in this manner may be incorporated into a Federally-assisted project without jeopardizing participation in other project costs and may be eligible for obtaining the cost sharing/credit.

However, any dedication undertaken to circumvent Federal requirements is unacceptable and may result in Federal funds being withdrawn from the project.

Monitoring

The ADOT ROW Liaison will monitor right of way activities throughout the project. A general discussion of ADOT ROW requirements and procedures as well as a discussion of unique project complexities usually occurs at the project-scoping meeting.

ADOT ROW Liaison may also perform quality assurance/quality control monitoring on a post-audit, spot-check basis to ensure that all LPA right of way activities are performed in compliance with federal and state laws and regulations.

Acquisition and relocation activities must be in conformance with the Uniform Act, FHWA/ADOT Stewardship Agreement, the FHWA Project Development Manual, Local Public Agency Guide, and the ADOT Right of Way Manual. All right of way functional areas are subject to review.

Advance Acquisition

There are three circumstances under which LPAs can acquire or obtain right of way in advance of NEPA clearance, in all cases all acquisition is to follow the Uniform Act:

1. An agency may use its own funds to purchase right of way prior to NEPA clearance and may apply the purchase price (or if donated, the fair market value) toward its share of project costs, as long as it meets the requirements of 23 CFR 710.501. However, if any right of way is purchased in advance of NEPA clearance, the LPA cannot request or receive federal reimbursement toward any portions of the acquisition costs. If an LPA desires to pursue early acquisition of right of way in advance of NEPA clearance under 23 CFR 710.501 (see attached), the LPA must discuss such acquisition activities with the ADOT ROW Liaison.

2. An agency may purchase right of way prior to NEPA project clearance under the protective buying and hardship acquisition provisions set forth in 23 CFR 710.503, and be eligible for federal reimbursement for the costs associated with such acquisitions.

However, a categorical exclusion authorizing the early acquisition activity (which is a separate clearance from the project clearance) is required for protective buying and hardship acquisitions. In this scenario, acquisition of certain individual parcels will be cleared prior to the greater project receiving a formal clearance. Protective and Hardship acquisitions require prior approval from the ADOT ROW Liaison. Application for such approval must be submitted to the ADOT ROW Liaison.

3. LPAs can require private landowners to dedicate portions of their property as right of way for transportation projects as part of the

local agency zoning approval process. Formal NEPA clearance is not required for dedications exacted through a local agency zoning approval process.

However, conveyances of private property through dedications are not considered to be completed until a written agreement for such dedication is approved and executed by the local agency and the private landowner.

If the proposed time frame for completing such agreements is projected to exceed the right of way clearance date for the LPA Project or if a proposed dedication fails to be consummated for any reason; the LPA must acquire the needed right of way in compliance with state and federal requirements, including the Uniform Act.

Plans Requirements

Right of Way plans are required for all LPA Projects where acquisition of right of way is required. For additional detail refer to 23 CFR 710; the FHWA Project Development Guide, ADOT ROW Manual, Urban and Statewide Section, 4.02 Contacting the Owner, 2. (a) & (c). ADOT ROW Manual, Project Management Section, 2.07 Project Control and Scheduling, 2.07 (c).

ROW Plans for LPA Projects must be prepared in compliance with ADOT requirements when the LPA is requesting Federal participation in Right of Way acquisition and relocation or when the LPA is proposing a program or project that will improve or modify any portion of a federal or state highway, regardless of the source of funding.

Draft plans must be submitted to the ADOT ROW Liaison for approval.

APPRAISALS

All LPAs MUST use the appraisal services for all appraisals and review appraisals chosen from pool that has been qualified by ADOT ROW and approved by FHWA. FHWA is not allowing any non-approved appraisers to do Federally Funded work.

Any work performed ahead of a Notice to Proceeds' Effective Date will not be reimbursed

For your convenience we have provided a list of the minimum records you will need to retain.

All Correspondence

Title Documents

Design Summary Information and Plats

Appraisals and review Appraisals

Negotiator's Notes

Administrative Settlement (if used) Signed Contracts

Conveyance and Closing Documents

Relocation Forms

Relocation Agent's Notes

Condemnation Documents (if used)

Right of Way Checklist

Proof of Payment to Landowner (s) and Tenant (s)

Notes/Documentation

The agent/negotiator **shall maintain** a written account of each and every contact relating to the parcel in such detail that if another agent/negotiator had to take the file over, they could just pick it up and continue as he had worked on the parcel file all along. The log/diary shall show the date of contact, person contacted and the matters discussed and any and all outcomes. It must also provide an accurate record of communications and the log/diary must show that the acquisition was done in an appropriate manner.

The log/diary must be signed/initialed at the bottom of each page by the agent and if more than one agent all must sign and designate who made the entry. (49 CFR 24.9 (a))

It is important that after each call, your negotiator completes a negotiator's contact report, sometimes called negotiator's notes summarizing the interview with the property owner. Each report should contain as a minimum:

Project number,

Parcel number,

Date of contact,

Type of contact (phone or in person),

Name, address and telephone number of person contacted,

Special instructions, if necessary, for locating that person,

Names of all other persons present,

Names, addresses and phone numbers of attorney or other representatives,

Main points discussed and commitments made by agent,

Principal objections to offer or taking,

Whether offer was accepted or rejected,

Requests made by owners,

Any other feature of the contact including special instructions for closing, relocation or property management,

Negotiator's signature and date.

The agent also needs to keep all written correspondence, including copies of all pertinent e-mails in the same chronological order as the log, in order to better understand the issues of the project.

In order to utilize these reports they need to remain in your parcel file.

Remember that these reports will eventually become available for inspection by the public and/or needed for a Federal/ADOT audit.

An audit by ADOT and/or FHWA is not “if”, but **WHEN!**

