

ROW Acquisition Manual



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Manual Notice 2019-1

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Manual: ROW Acquisition Manual

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Purpose

This revision is intended to update the manual to match current requirements for right of way acquisition.

Changes

[Chapter 3, Advance Acquisition of Right of Way](#) contains revisions in the following sections:

- ◆ Section 1 - deleted example scenarios;
- ◆ Section 2 - expanded explanation of federal regulations;
- ◆ Section 5 - added subsection regarding reimbursement.

[Chapter 6, Donations and Exchanges](#) contains text added in Section 1 concerning donations in exchange for construction features or services.

[Chapter 11, Section 2, Acquisition Procedures for Federal Lands \(for State\)](#) contains new subsections on “Functional Replacement of Real Property” and “Federal Land Transfers”.

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Archives

Past manual notices are available in a [pdf archive](#).

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Chapter 1 — Administrative Requirements Preliminary to Formal Authority for Right of Way Acquisition

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Section 1 — Delineation between Right of Way Acquisition and Preliminary Engineering

ROW CSJ Costs Versus Construction CSJ Costs

Preliminary engineering includes preliminary work required in preparing right of way data such as right of way surveys, property descriptions, maps, subsurface utility engineering (SUE), preliminary right of way cost estimates, and staking right of way. Charge all preliminary engineering costs to the Construction CSJ function 130. Right of way acquisition costs must be charged to the ROW CSJ. This work can include:

- ◆ appraising
- ◆ negotiation
- ◆ closing of transactions
- ◆ title insurance policies
- ◆ title certificates
- ◆ relocation
- ◆ eminent domain (ED) proceedings
- ◆ utility agreements

Do not incur or obligate any right of way cost without a formal authorization from the ROW Division, Contracts and Finance Section, Project Financial Management Branch. Requirements that must be fulfilled before issuance of such authority are discussed in the following sections.

Section 2 — Requesting a ROW CSJ

Procedures

Prior to authority to proceed, Texas Department of Transportation (TxDOT) personnel should request the ROW CSJ number, which is assigned by the ROW Program Office. To request a ROW CSJ number, TxDOT personnel must submit a completed form [ROW-RM-CSJ/TPC Right of Way CSJ Total Project Cost](#). TxDOT personnel can electronically submit the form to the ROW Program Office. Also, TxDOT personnel must enter the data into the right of way information system (ROWIS). Once all of the required information has been provided the ROW Program Office will assign the ROW CSJ number upon receipt from the Financial Management Division.

Section 3 — Federal Project Authorization and Agreement (FPAA)

Overview

In initiating a right of way project, federal program approval establishes eligibility for federal participation but does not qualify the project for actual reimbursement. Since the state expects to obtain full federal participation, program eligibility requirements **must** be met before the project is given full authority to proceed and any right of way expense is incurred or obligated.

Right of way and construction projects are programmed separately and have different project numbers.

When a project involving right of way is approved by the Texas Transportation Commission (the Commission) and is submitted to the Federal Highway Administration (FHWA) to be included or added to the Statewide Transportation Improvement Program (STIP), the approved limits for right of way acquisition established in the Commission program approval will not be changed.

Right of way projects may cover any number of construction projects, as conditions dictate. However, right of way and advanced planning projects should be programmed over the same limits and should be as close as possible to the construction project limits. Sharing the same limits facilitates project development and program procedure.

Procedures

If any part of right of way work (e.g., a utility adjustment) is included in a construction contract, charge the work to the ROW CSJ. **Detail this cost separate and apart from regular construction items in the construction plans and estimates.**

Projects approved in the STIP by FHWA may be given full authority by the ROW Program Office for right of way acquisition only after FHWA issues a Federal Project Authorization and Agreement (FPAA), if applicable.

The ROW Division, Contracts and Finance Section, Project Financial Management Branch must submit the following information to the Financial Management Division for federal funds approval:

- ◆ Construction CSJ number as shown in the Statewide Transportation Improvement Program (STIP);
- ◆ project environmental clearance;
- ◆ an estimate of total right of way costs, form [ROW-RM-CSJ/TPC Right of Way CSJ Total Project Cost](#), and other information as required.

Give special attention to the following items:

- ◆ **Word Limits:** This should cover only the right of way portion of the project and should agree with the program item. Use of words “approximately” and “near” is permissible to make word limits coincide with terminal points and project lengths.
- ◆ **Financing:** Show the best estimate of total costs and express it in even amounts of \$100. If the amount of the estimate exceeds the total of the authorized funds, make a request for additional funds needed and obtain approval.
- ◆ **Submission:** Submit the form *ROW-RM-CSJ/TPC Right of Way CSJ Total Project Cost* to the ROW Program Office.

Section 4 — Schematic Layout for Transportation Project

Process

Before authorization, a project's schematic layout must be approved by the Design Division and by FHWA. The Design Division notifies TxDOT and the ROW Program Office of schematic approvals. Verify that right of way to be acquired, including control of access, agrees with the approved design and is necessary for project development. Use caution when full schematic design approval is not received or when subsequent design revisions become necessary.

Deviation from the requirement for prior approval of the schematic is allowed only for early acquisitions. See [Types of Advance Acquisition \(for State\)](#), Chapter 3, Section 1.

Section 5 — Environmental Clearance

Process

Before authorization, the project must have environmental clearance by approval of a Final Environmental Impact Statement, Environmental Assessment (EA), Categorical Exclusion (CE), Finding of No Significant Impact (FONSI), or Record of Decision (ROD) or concurrence that it is a non-major action project. This clearance is obtained through the Environmental Affairs Division, Environmental Compliance Oversight System (ECOS). For more information on these clearances, refer to the TxDOT environmental procedures in the *Project Development Process Manual*.

Section 6 — Public Involvement (Public Hearing)

Process

Public involvement, which may require a public hearing, is required before environmental approval. The only exception to this is advance acquisition parcels. Right of way acquisition procedures and relocation advisory assistance, if appropriate, are to be discussed at the hearing and, where pertinent, pass policies should be discussed as described in TxDOT Policy on Passes, Stock Passes, and Cattle Guards, Chapter 9, [Pass Policies \(for State\)](#).

Section 7 — ROW Program Office Formal Authority to Proceed for Right of Way Acquisition

Determination of Eligibility

Before authorization, the ROW Program Office must determine whether all preliminary eligibility requirements are met. The authorization also acts as notice to the Financial Management Division to appropriate funds.

Section 8 — Federal Project Numbers on Records

Requirement

The Federal Project Number, if applicable, should be on all documents, such as agreements, deeds, and correspondence.

Chapter 2 — Types of Project Authorities

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Section 1 — Authority Types

Overview

The following subsections detail the types of authorization TxDOT may receive. Below each type of authorization is a list of additional information TxDOT personnel must provide to the ROW Program Office to obtain that particular authorization.

Advanced Acquisition

- ◆ Commission Minute Order - Project Authorization
- ◆ Commission Minute Order for Approval of Donation
- ◆ TxDOT request for advanced acquisition in accordance with [Types of Advance Acquisition \(for State\)](#), Chapter 3, Section 1
- ◆ Right of way map schematic - identification of parcel number (refer to example 19 in the Parcel Numbering Chart in TxDOT's *ROW Preliminary Procedures for the Authority to Proceed Manual*, ROW Parcel Numbering)
- ◆ Approval by the Chief Engineer

Limited Release for Preliminary Utility Activities

- ◆ Commission Minute Order - Project Authorization
- ◆ TxDOT letter requesting authorization to begin preliminary engineering for utility work in accordance with the *ROW Utilities Manual*.

Limited Authority to Proceed

- ◆ Commission Minute Order - Project Authorization
- ◆ Approved property descriptions

Partial Authority to Proceed

- ◆ Commission Minute Order - Project Authorization
- ◆ Environmental clearance
- ◆ Copy of an approved property description for specific parcel(s) authorization
- ◆ Federal Project Authorization and Agreement (FPAA), if applicable, for federal funding
- ◆ Executable Contractual Agreement with local governments, if applicable; include two copies of the agreement or one electronic copy

- ◆ Copy of the check for the local government's contribution amount
- ◆ Copy of the local government's city ordinance or resolution.

Full Authority to Proceed

- ◆ Commission Minute Order - Project Authorization
- ◆ Environmental clearance
- ◆ Approved property descriptions
- ◆ Federal Project Authorization and Agreement (FPAA), if applicable, for federal funding
- ◆ Executable Contractual Agreement with local governments, if applicable; include three copies of the agreement
- ◆ Copy of the check for the local government's contribution amount
- ◆ Copy of the local government's city ordinance or resolution.

Limited Release for Utility Work Only

- ◆ Commission Minute Order - Project Authorization
- ◆ Environmental clearance
- ◆ Utility only map
- ◆ Federal Project Authorization and Agreement (FPAA), if applicable, for federal funding
- ◆ Contractual Agreement with local governments, if applicable; include two copies of the agreement or one electronic copy
- ◆ Copy of the check for the local government's contribution amount
- ◆ Copy of the local government's city ordinance or resolution.

Section 2 — Authority for Right of Way Acquisition

Additional Requirements

To obtain full authority, the project must have environmental clearance. Refer to [Environmental Clearance](#) for requirements. When ready to initiate work following environmental clearance, receipt of the executed contractual agreement, and federal funds approval (if applicable), the ROW Division, Contracts and Finance Section, Project Financial Management Branch changes project status in ROWIS to Full Authority to Proceed, updates DCIS funding, and initiates electronic extract to Financial Management Division. These actions serve as authorization to incur costs.

All required information must be entered into the right of way information system to obtain authorization.

In addition to the above, the following requirements apply to a local government:

- ◆ The fully executed contractual agreement between the state and the local government establishes the basis for the local government's acquisition of right of way and the state's basis for reimbursement under the terms of the agreement.
- ◆ Any payments made by the local government before the date of the state's execution of the contractual agreement are ineligible for state participation.

Section 3 — Authority for Advanced Acquisition

Procedures

Occasionally, advanced acquisition procedures may need to be used. These procedures are provided by state law to acquire certain properties before TxDOT is ready to initiate work on the entire project.

The District Engineer determines whether advanced acquisition project(s) or parcel(s) are required and requests approval of the Chief Engineer.

See [Types of Advance Acquisition \(for State\)](#).

Chapter 3 — Advance Acquisition of Right of Way

Contents:

[Section 1 — Advance Acquisition \(for State\)](#)

[Section 2 — Policy on Advance Acquisition \(for State\)](#)

[Section 3 — General Requirements for Advance Acquisition \(for State\)](#)

[Section 4 — Additional Requirements for Submissions for Advance Acquisition through Donation \(for State\)](#)

[Section 5 — Approval of Advance Acquisition \(for State\)](#)

[Section 6 — Advance Acquisition of Right of Way \(for LPA\)](#)

[Section 7 — Disposition of Advance Acquired Properties](#)

Section 1 — Advance Acquisition (for State)

Definition

Advance acquisition, as defined in Transportation Code Sections 202.111-202.114, is TxDOT's ability to legally purchase right of way, either outright or through an option contract, prior to environmental clearance or before a determination is made that the property is needed for a particular transportation project.

Advance acquisition parcels may not be acquired through condemnation.

Section 2 — Policy on Advance Acquisition (for State)

Policy

Advance acquisition on a project-wide or parcel by parcel basis requires approval by the Chief Engineer. It should be noted that advance acquisition is entirely based upon state law. See Transportation Code Sections 202.111 through 202.114.

However, federal laws and regulations contain provisions dealing with whether such acquisitions will affect a transportation project's eligibility for future federal assistance, and as well as provisions relating to when a state may be able to obtain future credit or future reimbursement for parcels acquired prior to normal environmental and right of way release and provided such parcels are then actually included within the final alignment and facility as constructed.

Under federal regulations, these types of acquisition are referred to as "Early Acquisition" and are found in 23 CFR 710.501. As of 2018, this CFR section was updated to expand the flexibility of the various types of approved early acquisition. This [chart](#) outlines the available early acquisition alternatives and their respective requirements. TxDOT's advance acquisition of property will only proceed under the requirements of section 23 CFR 710.501. While federal regulations authorize advance acquisition for the purposes of "Protective Buying" and "Hardship Acquisition" under 23 CFR 710.503, TxDOT will only pursue such acquisitions under the terms and conditions of 23 CFR 710.501.

Parcels acquired through advance acquisition shall be numbered according to [example 19](#) in the Parcel Numbering Chart in TxDOT's *ROW Preliminary Procedures for the Authority to Proceed Manual*, on all right of way maps for the relevant project.

There is no difference in title requirements when right of way is acquired through advance acquisition. Adequate title must be obtained.

Section 3 — General Requirements for Advance Acquisition (for State)

Requirements

Advance acquisition must not influence the environmental review of a project, a decision regarding the need to construct the project, or selection of a specific location.

In recommending advance acquisition, give consideration to the ability to secure possession after procurement, since acquisition under these conditions could be far in advance of a need for right of way. Other activities, such as demolition, construction, or utility relocation cannot be performed prior to environmental clearance.

If a property owner initially makes a request for an advance acquisition on a hardship basis, the property (parcel) owner should be initially advised that, in the event the owner is not willing to close by negotiations (accepting the state's offer and/or administrative settlement), the acquisition process will not continue on to the eminent domain process at that time, but would have to wait until the environmental approval for the entire project had been obtained.

Submissions from the District Engineer to the Chief Engineer requesting authority for advance acquisition must contain the following information:

- ◆ The project should be an approved project within the UTP and no more than 6 years away from its "Ready to Let" date.
- ◆ If a project is outside of the UTP it will need a specific Commission minute order granting the ability to use advance acquisition.
- ◆ The legal descriptions for the parcel(s) to be acquired should be completed.
- ◆ Funding for the advance acquisition should have been requested and accounted for in the latest ROW LAR.
- ◆ Only state funds may be used for the advance acquisition, although a matching federal credit may be sought once environmental clearance is achieved and the property is incorporated into the project.
- ◆ The community impacts of acquiring the parcels must be determined prior to the acquisition.
- ◆ All advance acquisitions should be approached as if federal funding will be requested for a project (referred to in the CFR as "State-funded Early Acquisition Eligible for Future Credit"), thus federal requirements to receive federal funding or a federal matching credit under the requirements of 23 CFR 710.501(c)(1)-(5) must be followed, including:
 - The advance acquisition cannot influence (according to the state or the FHWA) the environmental review process for the transportation project including:
 - the need to construct the project

- the consideration of alternative routes
- the selection of design or location of the project
- The property being acquired does not consist of any land protected under Section 4(f) of the Department of Transportation Act of 1966 (i.e. publicly owned land from a public park, recreation area, wildlife and waterfowl refuge, or any land from a historic site of national, state, or local significance as so determined by such officials).
- The acquisition and relocation of any displaced person or business must comply with all federal and state laws including the Uniform Relocation Assistance and Real Property Acquisition Act.
- The acquisition complies with Title VI of the Civil Rights Act.
- ◆ Eminent domain cannot be used to acquire property prior to environmental clearance.
- ◆ Parcels with the presence or likelihood of environmental contamination or other undesirable conditions on the parcel that pose a risk of increase cost to TxDOT for remediation or that could adversely affect construction of the project should not be acquired by advance acquisition.
- ◆ The property being acquired does not consist of any land protected under Texas Parks and Wildlife Code, Chapter 26 (i.e. public land that is designated and used as a park, recreation area, scientific area, wildlife refuge, or historic site.)
- ◆ All project activities proposed to take place on the parcel will be evaluated as part of the environmental review of the transportation project.
- ◆ No activity that could have an adverse environmental impact (e.g., grading, clearing, demolition of structures, moving utilities) will take place on the parcel(s) prior to completion of the environmental review for the transportation project.
- ◆ Everyone with an ownership interest in a parcel, including all tenants, must agree to the advance acquisition and sign the deed.
- ◆ Local public agencies will not be required to participate in right of way acquisition costs for parcels acquired through advance acquisition until the project is environmentally cleared and the parcel is incorporated into the project. If a lump sum agreement for right of way participation is executed prior to the a parcel being incorporated into a project and the environmental clearance, then the local public agency will not have to participate in any parcel acquired through advance acquisition.

Section 4 — Additional Requirements for Submissions for Advance Acquisition through Donation (for State)

Requirements

In addition to the general requirements for advance acquisition, the following information must support a right of way donation:

- ◆ Before a donation can be considered for acceptance, there must be either an existing project under development which would likely require the proposed donated property for at least one of the proposed or possible alignments, or if there is no existing project, then a memorandum from a District Engineer certifying and foreseeing a definite need for the property proposed to be donated as part of a future project associated with either a present highway location or future new location highway. Where there is no existing project or pre-existing right of way CSJ, then a new ROW CSJ associated with that highway and location should be requested (even if there is no Construction CSJ). In such cases where there is no current Construction CSJ, and a stand-alone ROW CSJ is being established, there can be no authority for expenditure of funds related to said ROW CSJ at the time of the donation, due to there being no current project. The ROW CSJ is for the sole purpose of tracking the donation parcel within ROWIS.
- ◆ Acceptance of donations of real property shall be reviewed and processed in accordance with Chapter 6, Section 2 ([Legal Requirements to Accept Donation \(for State\)](#)).
- ◆ Prior to donating land for right of way, property owners must be advised of their right to just compensation as well as their right to have the property appraised.
- ◆ The required environmental document will include an objective environmental review of all social, economic, and environmental factors appropriate to an alternative location/design decision, unprejudiced by the amount or location of donated or protected right of way.
- ◆ Land donations for right of way purposes will be accepted with the understanding that its use will be contingent on objective assessment of other pertinent social, economic, and environmental factors regarding reasonable alternatives, and not singularly on the availability of donated right of way at a location preferred at the time of donation. The provisions of Right of Way Donations ([Procedures for Receiving Donations \(for State\)](#)) policies and procedures must be followed in the acceptance of donations.
- ◆ Instruments conveying real property interests will contain the following special clause:
“It is understood that a final alignment for the proposed highway for which this land may be needed has not been approved at this time and that:
 - **all alternatives to a proposed alignment will be studied and considered pursuant to the National Environmental Policy Act of 1969, as amended;**

- **conveyance of this property shall not influence the environmental assessment of this transportation project including the decision relative to the need to construct the transportation project or the selection of a specific location; and**
- **in the event the land herein conveyed is not required for the alignment chosen after public hearings, if required, and completion of an environmental document, the land herein conveyed shall be revested in the grantor or its successors in interest in accordance with Transportation Code, Section 202.025(6).**

Section 5 — Approval of Advance Acquisition (for State)

Process

Federal regulations, and TxDOT policy and procedure, necessitate the foregoing requirements. However, fulfilling these requirements is not merely a matter of documentation. TxDOT personnel must possess personal knowledge of the situation in all advance acquisition cases to complete submissions properly and to answer possible additional questions.

A district wanting to use advance acquisition on a parcel, or on a project, submits a request from the District Engineer to the Chief Engineer and copies relevant division personnel (TPP, ROW, and FIN). The Chief Engineer reviews the request or delegates the decision as he sees fits. The Chief Engineer can also request information or opinions from various divisions as needed. If approved, the district and various divisions are informed and the project or parcel is given full authority to proceed with the right of way acquisition process.

When advance acquisition is approved, the ROW Program Office will issue a formal release relating to the specific advance acquisition parcel(s). TxDOT may then proceed with the advance acquisition.

Reimbursement

If Federal-aid reimbursement is made for real property interests acquired early and the real property interests are not subsequently incorporated into a project eligible for surface transportation funds within twenty years following the fiscal year in which the request is made, FHWA will offset the amount reimbursed against funds apportioned to the State. See 23 CFR 710.501(g).

Section 6 — Advance Acquisition of Right of Way (for LPA)

Requirements

If a local public agency (LPA) chooses to purchase property with its own funds prior to completion of the environmental process, it may do so without jeopardizing federal participation in future project costs if certain requirements are met. These include:

- ◆ The acquired property must not influence the need for or location of the project.
- ◆ The acquisition must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended.
- ◆ The acquisition must comply with Title VI of the Civil Rights Act of 1964.
- ◆ The acquisition must not include lands protected by Section 4(f) of the DOT Act.
- ◆ The final project must meet all requirements for a normal federal project such as compliance with NEPA, Historical Preservation Act, Endangered Species Act, Wetland Executive Order, etc.
- ◆ Advance acquisitions must not be used to circumvent federal laws or regulations.
- ◆ Federal funds (including future state pass thru repayments) may not be utilized to pay right of way costs incurred prior to final approval of the environmental document.
- ◆ Parcels acquired through advance acquisition shall be numbered according to [example 19](#) in the Parcel Numbering Chart on all right of way maps for the relevant project.

LPAs should be made aware that any advance acquisition would be done totally at their financial risk, including the risk of jeopardizing prospective federal funding if the acquisition prejudices the environmental review process.

Advance acquisition also may cause considerable problems when displacements are involved since relocation funding cannot be set up prior to completion of public involvement and final environmental clearance. The LPA will be responsible for relocation costs.

Section 7 — Disposition of Advance Acquired Properties

Overview

Property which is acquired under TxDOT's Advance Acquisition authority and which is subsequently determined to be no longer needed for state highway purposes must be disposed of according to the specific provisions of Transportation Code Section 202.113. Before the typical disposition priorities can be followed (See the *ROW Property Management Manual*, [Chapter 1](#)), the property must be offered for sale to the person from whom the commission acquired the property at a price that is equal to the lesser of: (1) the price the commission paid the person to acquire the property; or (2) the fair market value of the property at the time it is offered for sale under this subsection, taking into account any damage to the property.

Chapter 4 — Administrative Requirements after Formal Authority for Right of Way Acquisition

Contents:

[Section 1 — State Cost Participation in Local Government Right of Way Acquisition](#)

[Section 2 — Effect of Approved Values on Authorized Right of Way Funds](#)

Section 1 — State Cost Participation in Local Government Right of Way Acquisition

Statutory Authority for State Cost Participation

TxDOT is authorized and directed to pay local governments in accordance with Transportation Code, Section 224.005.

If condemnation is necessary, participation by TxDOT is based on the final judgment, provided that TxDOT is notified in writing before the filing of the suit and prompt notice is given about all action taken. TxDOT has the right to become a party at any time for all purposes, including the right of appeal, at any stage of the proceedings.

Local governments are directed to acquire right of way for highways when requested and authorized by TxDOT, as provided for by existing laws. In the event condemnation is necessary, the local governments are to follow the same procedure as that described in Property Code, Sections 21.001 to 21.065, inclusive.

After delivery to TxDOT of acceptable instruments conveying right of way to the state, TxDOT will reimburse the local government for the state's share of the cost of providing such right of way. The Comptroller of Public Accounts is authorized and directed to issue warrants on the appropriate ROW CSJ covering the state's obligations.

Commission Authorization for Right of Way Project Eligibility

All right of way projects, on which right of way acquisition is approved by the Texas Transportation Commission, by program or individual minutes, are eligible for execution of right of way contractual agreements between TxDOT and the local governments.

Rules and Regulations Governing State Cost Participation

Refer to 43 TAC Sections 15.50 - 15.56, inclusive, for TxDOT's rules and regulations on right of way cost participation.

Local Government Option (for State) Right of Way Acquisition

To provide assistance to local governments, another option regarding right of way acquisition was established by Minute Order No. [80312](#) where the local government may request the state to assume responsibility for the right of way acquisition. Procedures for this type of state acquisition are in [Acquisition Coordination](#).

Section 2 — Effect of Approved Values on Authorized Right of Way Funds

Process

To ensure continuous and adequate right of way fund authorization, project funds will be encumbered by the state's share of each value at the time the project is approved. The state, after release of approved values and establishment of the eligible reimbursement date, is obligated to reimburse the local government whenever a proper reimbursement request is presented. Because of this, **do not make** a commitment for expenditures in excess of the authorized funds. Encumbrance of authorized funds keeps them in line with state obligations incurred through the approval of values.

Chapter 5 — Right of Way Property Acquisition

Contents:

- [Section 1 — Right of Way Property Acquisition Policies and Procedures](#)
- [Section 2 — TxDOT Monitoring of LPA Acquisitions](#)
- [Section 3 — Informational Notice to Owners Required \(for State and LPA\)](#)
- [Section 4 — Pre-Appraisal Contact](#)
- [Section 5 — Establishment of Just Compensation Required \(for State and LPA\)](#)
- [Section 6 — Policies on Appraisal and State Acquisition of Improvements \(for State and LPA\)](#)
- [Section 7 — Landowner’s Bill of Rights and Written Initial Offer to Purchase as Required Elements of a Bona Fide Offer \(for State and LPA\)](#)
- [Section 8 — Owner Retention of Improvements \(for State and LPA\)](#)
- [Section 9 — Negotiation Contacts and Reports \(for State\)](#)
- [Section 10 — Negotiation Contacts and Reports \(for LPA\)](#)
- [Section 11 — Updating Offer of Just Compensation \(for State and LPA\)](#)
- [Section 12 — Control of Access Rights \(for State and LPA\)](#)
- [Section 13 — Policy on “Uneconomic Remainders” \(Excess Takings\) \(for State\)](#)
- [Section 14 — Policy on “Uneconomic Remainders” \(Excess Takings\) \(for LPA\)](#)
- [Section 15 — Overlooked Items in Property Valuation \(for State\)](#)
- [Section 16 — Change in Property Status during Negotiations \(for State\)](#)
- [Section 17 — Adverse Possession Involved in Acquisition \(for State\)](#)
- [Section 18 — Encroachments \(for State\)](#)
- [Section 19 — Acquisition of Undivided Interests in Property Acquired \(for State\)](#)
- [Section 20 — Acquisition of Separate Easement Interests \(for State\)](#)
- [Section 21 — Acquisition of Leasehold Interests \(for State\)](#)
- [Section 22 — Information for Income Tax Purposes for Property Owners \(for State\)](#)
- [Section 23 — Information for Income Tax Purposes for Property Owners \(for LPA\)](#)
- [Section 24 — Rest Areas \(or Roadside Parks\) \(for State\)](#)
- [Section 25 — Irrigation and Drainage Canals \(for State and LPA\)](#)
- [Section 26 — Cemeteries \(for State\)](#)

[Section 27 — Acquisition of TxDOT Employee’s Property \(for State and LPA\)](#)

[Section 28 — Requesting Federal Assistance in Acquiring Private Property \(for State\)](#)

[Section 29 — Administrative Settlements \(for State\)](#)

[Section 30 — Administrative Settlements \(for LPA\)](#)

[Section 31 — Possession and Use Agreements \(for State\)](#)

Section 1 — Right of Way Property Acquisition Policies and Procedures

Basic Acquisition Responsibilities (for State)

TxDOT is responsible for acquiring real property in accordance with the provisions of Title III of the Uniform Act and its associated federal regulations (49 CFR Part 24). Negotiations for right of way conducted by TxDOT personnel, or others on TxDOT's behalf, are subject to this law and these regulations. The policies and procedures set forth in the following sections are applicable to all right of way acquired for the state directly by or for TxDOT.

The following requirements of Title III of the Uniform Act are TxDOT policy:

- ◆ Give the property owner or its designated representative an opportunity to accompany the appraiser during the appraiser's inspection of the property.
- ◆ Make every reasonable effort to acquire right of way parcels expeditiously by negotiation.
- ◆ Make reasonable effort to contact the property owner and explain:
 - the offer to purchase the property, including the appraisal basis for the offer to purchase, and
 - real property acquisition policies and procedures.
- ◆ Give each property owner reasonable opportunity to consider TxDOT's written offer and present material relevant to property value determination. Give appropriate consideration to the property owner's position.
- ◆ No property owner is required to surrender possession of property before payment of the agreed purchase price or deposit is made in the court registry. In some cases, possession may be obtained through a "Possession and Use Agreement".
- ◆ Advise the property owner while making the offer, if it was not informed in the informational notice, of its eligibility for reimbursement of incidental expenses.
- ◆ Include in the appraisal and acquisition process all real property improvements located on right of way parcels, whether owned by landowners or lessees.
- ◆ Never take coercive action to compel agreement on property value. Do not advance the date of condemnation, defer negotiations or condemnation, or delay deposit of funds with the court to induce an agreement.
- ◆ TxDOT representatives will handle all negotiations. The same person may appraise and negotiate a parcel when the approved value is \$10,000 or less. The review appraiser may not negotiate a parcel on which he or she reviewed a formal appraisal report regardless of the value.
- ◆ No person lawfully occupying real property will be required to move from his or her home, farm, or business location without at least 90 days written notice. TxDOT staff is responsible

to ensure that all such written notices are provided. Procedures for notification are in [Notices and Contacts With Displacees](#).

- ◆ All property acquisition procedures must be applied uniformly without regard to race, color, age, religion, sex, national origin, or handicap.

The policy of TxDOT is to acquire right of way and to administer related functions in such manner that no person is excluded from participating in, denied the benefits of, or otherwise subjected to discrimination under any program or activity on the basis of race, color, age, religion, sex, national origin, or handicap. This policy is in conformity with Title VI of the *Civil Rights Act of 1964* and federal regulations. Title VI complaints (i.e., complaints of discrimination in any manner as set out above), if any, are to be processed through the appropriate District Engineer to the Director of ROW Division, with a copy to the local designated Civil Rights Coordinator. The Director of ROW Division then forwards such complaint to TxDOT's Office of Civil Rights.

Although federal regulations do not require personal contact with a property owner by a negotiator, personal contact is TxDOT's standard procedure. However, Section 21.0111 of the Texas Property Code requires the initial offer letter to be sent via certified mail, return receipt requested. Thus, all negotiations should be initiated by mailing the owner (in state or out of state) the following items:

- ◆ An offer letter containing required provisions.
- ◆ A copy of all appraisal reports produced or acquired by TxDOT relating specifically to the owner's property and prepared in the 10 years preceding the date of the offer.
- ◆ A copy of the current version of the *Landowner's Bill of Rights* (see [Landowner's Bill of Rights](#) discussion later in this chapter).
- ◆ An "acknowledgement of receipt of appraisal" form. Include a self-addressed stamped envelope.

Follow negotiations initiated by mail with a timely telephone call to the owner. Further contact depends on the owner's response during initial telephone contact, but personal contact must be made when requested by the owner.

The primary goal is establishment of a favorable relationship and good communication. In all cases, document the reason for not following up a written offer through personal contact.

Where multiple owners reside within Texas, one owner may live on the property, live nearby, or manage the property for all concerned. In such cases, personal contact with this one owner is sufficient. However, advise all owners, in writing, of the offer. To document compliance in the acquisition files, include negotiation reports on personal contacts made by TxDOT personnel.

Basic Acquisition Responsibilities (for LPA)

In general, follow similar procedures as for TxDOT.

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- ◆ With State Participation: The acquisition of right of way will be the responsibility of the LPA with participation by the state as specified by law and agreed upon in the contractual agreement. The LPA shall obtain a title policy. The state's payment for title company services includes the cost of closing services. The benefits of the Relocation Assistance Program will be administered by the state, unless otherwise stated in the agreement with the LPA (see *ROW Relocation Assistance Manual*). Property owner's incidental costs to transfer property to the state may be reimbursed by the state.
 - ◆ Without State Participation on or off the State Highway System: Since acquisition is the responsibility of the LPA, the LPA may choose to purchase a title insurance policy. However, the LPA will be responsible for providing clear title to the acquired property. The state will administer the benefits of the Relocation Assistance Program only if required by the agreement with the LPA.
 - ◆ TxDOT will advise the LPA when all [prerequisites](#) have been met and acquisition can be initiated. Acquisition responsibilities that lay with the LPA, and the amounts disbursed, will be at their discretion subject to certain requirements imposed by Title III of the *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970*, as amended and federal regulations pertaining to said act. For projects with state cost participation the state's approved value sets the upper limit eligible for reimbursement if the parcel is acquired by negotiation. The LPA will not offer less than the state's approved value. While it is permissible for TxDOT right of way personnel to assist the LPA in their right of way acquisition, it is not intended that such personnel actually perform any of the responsibilities.

Section 2 — TxDOT Monitoring of LPA Acquisitions

Procedure

Federal regulations require TxDOT to document that right of way procured by political subdivisions was acquired in accordance with Title III of the Uniform Act. This requirement does not in any way relieve the LPAs of the need to have complete documentation in their files; however, TxDOT staff will obtain and maintain in their files a certification of compliance containing the following clause and signed by the LPA:

"...certify that right of way for XXXXX has been acquired according to policies of the Texas Department of Transportation and in accordance with applicable Federal and State laws governing the acquisition policies for acquiring real property. Documentation for compliance with these requirements is available for audit in our files."

A standard form for this certification has not been printed because some LPAs may prefer to furnish it in the form of a resolution while others may wish to have it signed by a LPA official. Certificates are required for each project.

FHWA policy provides that TxDOT is responsible for LPA compliance with the provisions of Title III. It, therefore, is the responsibility of TxDOT staff to keep the LPAs fully informed of their responsibilities, and to monitor real property acquisition by the LPAs to the extent necessary to ascertain that there is compliance with Title III.

There is no requirement that each parcel on a project be reviewed. However, to support project certification, parcel reviews should be conducted on a random basis. Document the monitoring of these activities in the right of way files using the form [ROW-LPA-IIIPR Title III Parcel Review Checklist for LPAs](#). While this form may be modified or expanded, all items shown thereon are to be included.

Section 3 — Informational Notice to Owners Required (for State and LPA)

Procedure

Federal regulations require that property owners be notified of TxDOT's interest in acquiring right of way. Property owners must also be informed of basic protections provided to them by law, and of TxDOT regulations and procedures.

Provide notice after the project is released for acquisition, and schedule this to provide favorable relations with property owners. The notice may be given before or at pre-appraisal contact. For information, see [Negotiation Contacts and Reports \(for State\)](#) and for [Negotiation Contacts and Reports \(for LPA\)](#).

The notice should be understandable and should include the name and telephone number of a TxDOT representative. Property owners unable to read or understand the notice must be given appropriate translation and counseling. With this informational notice, furnish TxDOT's booklet *State Purchase of Right of Way* or *Purchase of Right of Way by Cities or Counties* which briefly explains the right of way acquisition process to property owners. This notice is not the same as the relocation assistance notice discussed in [Notices and Contacts With Displacees](#) or the Landowner Bill of Rights. Form [ROW N-INTO Informational Notice to Owner](#) is available.

Section 4 — Pre-Appraisal Contact

Procedure

The pre-appraisal contact should be a personal meeting. During this meeting, give the property owner information on the overall timing of right of way acquisition, the general type of facility to be constructed, and the appraisal procedure that will follow. However, do not make a commitment to value or make an offer before receiving approved values. Also, use this contact to initially determine existence of the following items:

- ◆ property improvements
- ◆ leasehold interests in improvements on the property
- ◆ known hazardous materials affecting the property
- ◆ known or evident underground improvements
- ◆ known liens against the property
- ◆ advertising signs on the property.

During pre-appraisal contact, resolve any possible controversy with the property owner by distinguishing between realty being acquired and personalty not being acquired.

Pre-appraisal contact is discussed in TxDOT's *ROW Appraisal and Review Manual*. Complete form [ROW-A-PAC Pre-Appraisal Contact with Property Owners](#) during the pre-appraisal contact.

Section 5 — Establishment of Just Compensation Required (for State and LPA)

Procedure

Before initiation of negotiations, appraise the real property to establish just compensation. Give the property owner or its designated representative an opportunity to accompany the appraiser during inspection of the property.

An exception to this requirement is when a parcel will be donated and the property owner waives the establishment of just compensation through the appraisal process. See [Right of Way Donations and Exchanges](#).

The other exception to an appraisal is when the Memorandum of Value (refer to TxDOT's *ROW Appraisal and Review Manual*) is used to determine just compensation. This option is usually limited to raw land value estimates, and even then it can only be used for purposes of making the initial offer. The final offer **MUST** be based on a full appraisal by a certified appraiser.

The amount of just compensation will not be less than the approved appraisal, taking into account the value of allowable damages or enhancements to any remaining property. For acquisition by negotiation, just compensation is the amount established as the approved value through the appraisal process and shown on form [ROW-A-10 Tabulation of Values](#). See TxDOT's *ROW Appraisal and Review Manual*.

Section 6 — Policies on Appraisal and State Acquisition of Improvements (for State and LPA)

Policy

Include all buildings, structures, or other improvements located on right of way parcels in appraisals, whether owned by the landowners or lessees, when determined to be real property under state law.

If TxDOT acquires improvements, dispose of them according to provisions of [Disposal of Right of Way Improvements](#). See [Owner Retention of Improvements](#) for information on owner retention of real property improvements.

Alternatively TxDOT (or a LPA) may allow the property owner to retain improvements as part of a negotiated purchase. Make appropriate reductions in the parcel price if the property owner retains improvements.

Section 7 — Landowner's Bill of Rights and Written Initial Offer to Purchase as Required Elements of a Bona Fide Offer (for State and LPA)

Landowner's Bill of Rights

Section 21.0112 of the Texas Property Code requires that a copy of the Texas Attorney General's *Landowner's Bill of Rights* must be provided to a property owner whose property may be acquired by eminent domain: 1) not later than the seventh day before the **final** offer (or earlier), and 2) before or at the same time that any TxDOT or LPA representative or employee represents to the landowner in any manner that the acquiring agency possesses the power of eminent domain.

In order to minimize the risk of violating the timing requirement of the statute during negotiations, **it is strongly recommended that the *Landowner's Bill of Rights* be provided to the property owner prior to or at the time the initial offer is made.**

The current version of the *Landowner's Bill of Rights* is available on both the Attorney General's and TxDOT's websites, and any copies prepared for mailing or delivery to property owners should have the exact wording from the Attorney General's website. The revision date is shown at the bottom of the last page of the [Landowner's Bill of Rights](#).

Methods of Providing the Landowner's Bill of Rights

Property Code Section 21.0112(a) provides that “the entity must send by first-class mail or otherwise [such as hand -delivery] provide a landowner's bill of rights statement...to **the last known address of the person in whose name the property is listed on the most recent tax roll** of any appropriate taxing unit authorized by law to levy property taxes against the property.” If the current record owner as listed in the title commitment or other advance title information obtained is a name that is different from the name shown on the tax roll records, a separate (additional) *Landowner's Bill of Rights* statement should be provided in the same manner to such record title owner at the record title owner's address as determined by the negotiator.

Documenting Compliance with the Landowner's Bill of Rights Statute

Documentation should be maintained to establish when and how the *Landowner's Bill of Rights* statement was provided to the property owner. This documentation is very important, as in the event negotiations are not successful and the parcel must be acquired by condemnation, the condemnation petition must allege and the state must be prepared to prove, that it provided the *Landowner's Bill of Rights* to the property owner in accordance with the statute, Property Code Section 21.0112.

Initial Written Offer to Purchase

Make a prompt written offer for the full approved appraisal value to the property owner. Section 21.0111 of the Texas Property Code requires the initial offer letter to be sent via certified mail, return receipt requested. Delivery of the offer constitutes initiation of negotiations and is the principal date for determination of relocation assistance entitlements. Include the following items in or with initial written offers:

- ◆ A statement of the amount offered as just compensation. In the case of partial acquisition, state separately compensation for real property and compensation for damages, if any.
- ◆ A description and location of the right of way parcel and of the type of interest to be acquired. The description and location of the parcel can be in general terms.
- ◆ An identification of buildings, structures, and other improvements considered part of the real property for which the offer is made. Identify any separately held property ownership interest (e.g., public utilities and railroads). Indicate that any such interest is not included in the offer. Generally, the owner is required to negotiate with lessees, mortgagees, private easement owners and any other entity holding a real property interest. Offers to purchase are usually addressed to the real property owner. For situations where improvements are owned by a lessee, see [Acquisition of Leasehold Interests \(for State\)](#).
- ◆ A copy of all appraisal reports produced or acquired by TxDOT or the LPA relating specifically to the owner's property and prepared in the 10 years preceding the date of the offer.
- ◆ The initial offer letter signed by an authorized TxDOT or LPA representative.
- ◆ A copy of the current version of the *Landowner's Bill of Rights* (see [Landowner's Bill of Rights](#) discussion above).

Retain copies of all signed letters in files. For LPA, promptly forward one copy of the initial offer letter to TxDOT right of way staff. See the initial offer letter templates for more information.

Templates of Initial Offer Letters

ROW-N-IOLPT	Partial Taking
ROW-N-IOLWT	Whole Taking
ROW-N-IOLPPST	Partial Taking (for use when property contains petroleum tanks)
ROW-N-IOLWPST	Whole Taking (for use when property contains petroleum tanks)
ROW-N-IOLLPT	to Lessee (Partial Taking)
ROW-N-IOLLWT	to Lessee (Whole Taking)
ROW-N-IOLOPT	to Owner when there is a Lessee (Partial Taking)
ROW-N-IOLOWT	to Owner when there is a Lessee (Whole Taking)
ROW-N-IOLE	for Easements

Templates of Initial Offer Letters

ROW-N-IOL-OAS StructureLand	to an Owner who also owns an Outdoor Advertising Structure
ROW-N-IOL-OAS Land	to an Owner whose property contains an Outdoor Advertising Structure owned by another party
ROW-N-IOL-OAS StructureOnly	to an Owner of an Outdoor Advertising Structure located on property owned by another party

Elements of Required “Bona Fide Offer”

An entity with eminent domain authority that wants to acquire real property for a public use **must** make a "bona fide offer" to purchase the property from its owner voluntarily. A bona fide offer requires **all** of the following:

- ◆ Provide a written initial offer;
- ◆ Provide a written final offer, made 30+ days after delivery of the initial offer, based on a written appraisal from a certified appraiser (final offer must be equal to or greater than the appraised amount). The **final** offer cannot be based on an in-house value finding by a non-certified TxDOT employee;
- ◆ Provide with the final offer or earlier: (a) a copy of the written appraisal on which the final offer is based; (b) a copy of the deed, easement or other instrument by which the property or property right is proposed to be conveyed; and (c) the *Landowner's Bill of Rights* as prescribed by Section 21.0112 (the *Landowner's Bill of Rights* should be provided with the initial offer); and
- ◆ Provide property owner at least 14 days to respond to the final offer before filing eminent domain petition.

Section 8 — Owner Retention of Improvements (for State and LPA)

Procedure

The property owner may retain some or all of the real property improvements located on an improved parcel if the parcel is acquired through negotiation. When improvements are retained by the owner, just compensation for the real property interest acquired will not be less than the difference between (1) the amount determined as just compensation for the owner's entire interest and (2) the salvage value of the retained improvement. The amount deducted from just compensation for a parcel when any improvement is retained is referred to as "retention value." Retention value is usually the same as the salvage value.

An example [Tabulation of Values](#) shows improvements to consider in negotiations and retention values. When a right of way taking bisects an improvement, identify the improvement as either Category I or II on form [ROW-A-10 Tabulation of Values](#). Form *ROW-A-10 Tabulation of Values* and retention value determination are discussed in TxDOT's *ROW Appraisal and Review Manual*.

If improvements are retained, the property owner's deed to TxDOT must properly indicate all retention. Deed clauses required for retention of improvements are discussed in [Approved Special Clauses for Use in Conveyance Instruments](#).

Section 9 — Negotiation Contacts and Reports (for State)

Procedure

Pursuant to Section 21.0111 of the Texas Property Code, the initial offer must be sent by certified mail, return receipt requested. Subsequent to the mailed offer, the personal **negotiation** contact usually consists of more than one meeting with a property owner. During the negotiation contact:

- ◆ present, if necessary, a copy of the initial offer letter previously sent by certified mail, return receipt requested;
- ◆ fully discuss the offer;
- ◆ answer any questions the owner has regarding the offer and acquisition;
- ◆ give the owner a right of way acquisition brochure;
- ◆ give the owner a copy of the Landowner's Bill of Rights, if not previously provided;
- ◆ give the owner a relocation brochure; and
- ◆ have the owner sign [Acknowledgment of Receipt of Appraisal Report](#) if the acknowledgment previously sent with the initial offer letter, via certified mail, was not executed and returned by the owner.

Keep negotiation reports, covering each contact with property owners, in the acquisition file. These reports:

- ◆ allow for better coordination of construction plan preparation, desired letting date, and right of way progress;
- ◆ help the Office of the Attorney General to represent TxDOT in ED proceedings; and
- ◆ serve as proof of negotiation efforts.

Immediately after each contact with a property owner, the negotiator should use form [ROW-N-94 Negotiator's Report](#) to record:

- ◆ the date and place of contact;
- ◆ persons present;
- ◆ dollar amounts of offers made;
- ◆ counteroffers;
- ◆ reasons agreement could or could not be reached; and
- ◆ any other pertinent data.

Submission of these reports to the ROW Program Office is not required **except** for parcels referred for ED action.

Section 10 — Negotiation Contacts and Reports (for LPA)

Procedure

In general, follow similar procedures as for TxDOT. However, no specific negotiations report is required; owner contacts should be documented in the file.

Section 11 — Updating Offer of Just Compensation (for State and LPA)

Procedure

Have an appraisal updated or obtain a new appraisal if any of the following conditions occur:

- ◆ Information provided by the property owner indicates a need for a new or updated appraisal.
- ◆ A material change in the property's condition indicates a need for a new or updated appraisal.
- ◆ Significant time passes since the last appraisal.

If this updated or new appraisal indicates a need to change the just compensation, then submit the revised appraisal to the property owner. If the updated or new appraisal is completed after a petition in condemnation has been filed, submit it to the landowner using the form [ROW-N-PostPetition Post-Petition Updated Appraisal Letter](#). Unless the scope of property rights being appraised has increased, there is no need to restart an otherwise completed Bona Fide Offer process.

Should a post-petition updated appraisal result in an agreement with the property owner and such owner desires to close the transaction by deed, do not terminate ED proceedings until the parcel is completely closed and a waiver of attorney's fees has been obtained.

Section 12 — Control of Access Rights (for State and LPA)

Procedure

The right of access to an existing highway is a part of the rights possessed by the owner of abutting property. These access rights include the right of ingress and egress and the right of direct access to and from the abutting property.

The entire interstate highway system and portions of the state highway system may be designated by the Commission as controlled access highways. Consequently, along these controlled access highways, it may be necessary to either limit or completely deny access to abutting properties.

This access may also be controlled under the state's police power, including at entrance ramps, exit ramps, intersections, and other affected areas. Although this right may be limited or completely denied under the state's police power, property owners may be entitled to compensation for damages suffered due to loss of this access.

Under the provisions of Section 203.034 of the Transportation Code, abutting property owners are denied access to any new location controlled access highway, unless there is a specific grant of access. Damages may not be claimed for denial of access to the new facility. The reasoning is that the owner cannot be damaged by losing something that he never had.

If an existing road is converted into a controlled access facility and the design does not include initial construction of frontage roads, there may be a taking of the owner's access rights. However, there is no taking of access rights if:

- ◆ an existing road is converted into a controlled access facility, and
- ◆ the design includes frontage roads in the initial construction, and
- ◆ the abutting owner is provided access to these frontage roads. (Note that access to frontage roads constitutes access to the facility.)

Further control of movement on the frontage roads may be required. This may include one-way traffic, no U-turns, no left or right turns, denial of direct access to through lanes, or circuitous routes. These controls are covered under the state's police power and place no more control over the abutting owner than is placed on the public. These controls are not compensable. However, Section 21.042 of the Property Code requires compensation when there is a "material impairment of direct access on or off the remaining property that affects the market value of the remaining property."

When only access rights (and no additional right of way) are being acquired, TxDOT will not purchase or condemn unless our appraiser finds a material impairment of direct access on and off the property that affects the market value. Absent that finding, access will be controlled via the police power rather than acquiring the access rights.

Section 13 — Policy on “Uneconomic Remainders” (Excess Takings) (for State)

Policy

Ordinarily, TxDOT should not acquire property in excess of its project right of way requirements. An exception to this is the directive in Section [203.0521](#) of the Transportation Code that TxDOT make an offer to purchase "uneconomic remainders". However, the statute requires that the property owner must consent to such acquisitions.

A potential uneconomic remainder is a parcel of real property that remains after partial acquisition of the owner's property. For TxDOT to acquire the uneconomic remainder, TxDOT will typically **determine** that an uneconomic remainder (1) has little or no value or utility to the property owner, or (2) that the entire tract could be acquired for substantially the same compensation as the partial tract, including damages to the remainder property.

Make an assessment of the potential creation of an uneconomic remainder based on review of the right of way map, inspection of the property (if necessary), and review of the property appraisal.

Consider the following items in making the assessment:

- ◆ Generally, landlocked remainders will be considered to be uneconomic remainders if provision of access is not economically feasible.
- ◆ Partial acquisition from improved properties when the before use will be changed by the taking through substantial loss of parking, change in shape, or other causes should be carefully analyzed to determine the existence of an uneconomic remainder.
- ◆ If a partial taking eliminates the present utility of the remainder but creates a new potential use of value to the owner, normally the remainder is not considered to be classified as an uneconomic remainder.
- ◆ TxDOT is not required to make an offer on a remainder if an appraisal or environmental investigation indicates the presence of hazardous materials or substances. Transportation Code, Section 203.0521(e) provides that TxDOT may legally enter a remainder to conduct an appraisal, survey, or environmental investigation to determine whether TxDOT will offer to acquire the remainder. Per Transportation Code, Section 203.0521(f), if TxDOT determines that hazardous materials or substances are present, and TxDOT documents this determination in the project file, no further action to purchase the remainder is required.

If it is determined that there is no potential uneconomic remainder, document the basis for this determination in the project file.

After identification of a potential uneconomic remainder and determination that there is no indication of the presence of hazardous materials or substances, a recommendation to offer to purchase

the potential remainder, along with the parcel information should be submitted to ROW Program Office for Division Director approval.

If the ROW Division Director determines that the tract is an uneconomic remainder, TxDOT transmits an offer letter to the property owner for purchase of either: (1) the part required for the transportation improvement, plus damages to the remainder or (2) for purchase of the whole parcel.

If the owner accepts the offer for the whole, arrange to obtain a separate legal description and parcel plat of what was the “remainder tract”, and identify this uneconomic remainder tract as “Tract UR” using the same number as that of the parcel tract. For example, if the original parcel was designated as “Parcel 4”, the separately described remainder tract would be “Tract 4UR”.

The portion purchased as an uneconomic remainder is not considered part of the right of way but is surplus property. Any revised ROW map should indicate that the original parcel is part of the right of way but the remainder is outside the right of way. Prepare and submit one executed deed containing two separate property descriptions according to normal acquisition procedures.

Discretionary Remainder Acquisitions

If a proposed acquisition of a tract of land would leave the owner of the property a remainder of the tract, TxDOT may negotiate for and purchase all or part of the remainder if TxDOT and the owner agree on terms for the purchase. This discretionary authority applies whether or not the remainder property meets the criteria to qualify as an “uneconomic remainder”.

However, remainders not meeting the criteria of an “uneconomic remainder” should not be purchased routinely but only in exceptional circumstances, as approved by the ROW Division Director or authorized designee. Remainder properties suspected of having adverse environmental conditions, including the presence of hazardous materials or substances, should not be purchased.

Section 14 — Policy on “Uneconomic Remainders” (Excess Takings) (for LPA)

Policy

TxDOT will not participate in acquiring property in excess of right of way required for the project, unless a parcel is being acquired in the name of the state, and has been approved by TxDOT’s ROW Division Director for acquisition as an uneconomic remainder. The LPA, however, may choose to acquire a whole property when only a portion of the property is in the required right of way. In this case, TxDOT's reimbursement is based only on the predetermined value of the portion required for right of way purposes, plus damages to the remainder. In no case will this amount exceed the total paid by the LPA. For excess takings, title will be vested in TxDOT only for the parcel required for right of way purposes.

In condemnation cases, the LPA may condemn, in its own name, the entire property instead of acquiring only the portion required for the right of way. In this instance, the cost recited in the deed from the LPA to TxDOT will be a proportionate amount. Compute this proportion of the final judgment amount based on the relationship of TxDOT's approved value to TxDOT's predetermined value for the whole property. For example, if the approved value for right of way required for the project is \$6,000, and the value of the whole property based on appraisals is \$10,000, TxDOT's 90-percent participation would be applied to 60% of the final judgment amount. The consideration shown in the deed should be the actual amount reimbursed the LPA.

TxDOT's participation in court costs, costs of Commissioners' Hearings, and other eligible costs of ED proceedings will not be prorated but will be as customary when no excess taking is involved.

If the LPA negotiates title to the entire property, TxDOT's participation is limited to approved costs for the portion of right of way actually required. For example, assume that the LPA paid \$16,000 for the whole parcel and the cost of the part conveyed to the state, plus damages, amounted to \$10,000. The consideration shown in the deed should read: “90% reimbursement of grantor's cost of \$10,000 or value of hereinafter described property under terms of contract.”

If an excess taking involves an improvement bisected by the right of way line and not retained by the property owner, TxDOT reimbursement for the improvement depends on the LPA conveying title to TxDOT for the improvement and for the tract of land needed for right of way purposes. The deed from the LPA must include the approved proper clause for conveyance of [Bisected Improvements](#). TxDOT then sells the improvement through the General Services Division and gives the LPA appropriate credit.

Section 15 — Overlooked Items in Property Valuation (for State)

Procedure

The acquiring agency, through property owner contact and by property examination, must determine if items of value were overlooked in the appraisal process. If items were overlooked, suspend negotiations and determine the need for reappraisal or necessary corrective action to obtain a revised approved parcel value.

NOTE: Private utility facilities, as opposed to public utility and common carrier facilities, are very often overlooked and omitted from consideration in the parcel's approved value. Private utilities, gathering lines, and the like that do not directly or indirectly serve the public should be viewed and valued in the same manner as any other improvement on property to be acquired for highway construction. Refer to [example 14](#) on the Parcel Numbering Chart in TxDOT's *ROW Preliminary Procedures for the Authority to Proceed Manual*.

Section 16 — Change in Property Status during Negotiations (for State)

Procedure

After determining the appraised value and approved value, changes in the property could occur during negotiation which impact its value. This could occur due to:

- ◆ an upward or downward real estate market trend;
- ◆ changes in the property's highest and best use;
- ◆ additional improvements made by the property owner;
- ◆ property owner's neglect of the property, which would result in a depressed property market value; or
- ◆ removal or damage to improvements due to fire, hail, storm, etc.

The negotiator should advise TxDOT of any changes to the property in order to determine the need to suspend negotiations.

On the day of and prior to closing, the negotiator should reexamine the property to determine whether any changes occurred and to determine if any improvements were removed from the property. There should be a clear delineation between realty and its component parts, to be acquired by TxDOT, and personalty to be removed by the property owner. Standard provisions of the memorandum of agreement indicate that either TxDOT or the property owner may terminate the agreement if, for any reason, condition of the property changes.

Section 17 — Adverse Possession Involved in Acquisition (for State)

Procedure

If a “squatter”, possessor, or adverse possessor occupies or uses the premises and this is not previously known, obtain information about its right of occupancy and use, including length of time. Negotiations should be conducted with the record owner. Adverse possessors should be noted in the relevant section of the form ROW-E-49.

Section 18 — Encroachments (for State)

Procedure

When a right of way encroachment is discovered, whether in a project area or not, it must be addressed to comply with state law. Specifically, it is against state law for an encroachment to exist without a formal agreement with the owner of the encroachment. Options to comply with state law are: (1) remove the encroachment; (2) sell the encroached right of way to the owner of the encroachment; or (3) lease the encroached right of way to the owner of the encroachment. To address these requirements, the TxDOT should work with the ROW Program Office, with copies of information sent to the Construction, Maintenance, and Design Divisions. For federal projects, FHWA must approve all encroachments, per 23 CFR Section 1.23.

Section 19 — Acquisition of Undivided Interests in Property Acquired (for State)

Procedure

When two or more undivided interest owners own property, it is preferable to acquire all interests in one transaction. However, if an interest holder is unable or reluctant to execute a conveyance deed for his or her interest and the need to condemn such interest is indicated, the interests held by owners willing to negotiate may be acquired as a separate transaction. This is possible since an undivided interest is an exact fraction of the total interest and pro rata payment of the total approved value can be made. The separate closing and payment for an undivided interest should only be done when the title commitment verifies a specific undivided interest in such party and a title policy can be issued for such interest.

Section 20 — Acquisition of Separate Easement Interests (for State)

Procedure

When a party other than the owner of fee title holds an easement on or across property, use of the same procedure set forth for undivided interests in [Acquisition of Undivided Interests in Property Acquired \(for State\)](#) is permissible provided that the total approved value for the parcel contains approved values for each of the two separate interests.

Section 21 — Acquisition of Leasehold Interests (for State)

Procedure

During the pre-appraisal contact, the fee owner, or its authorized representative, is contacted by TxDOT to determine if there are any buildings, structures, or other improvements located upon the parcel to be acquired which are owned by a lessee. A title examination is also made to determine if there is a recorded property lease. When a valid leasehold exists and it is determined there are real property improvements owned by a lessee, the fee owner is advised that TxDOT may negotiate with him or her for all interests, fee and leasehold. The fee owner is advised TxDOT may negotiate separately with the leaseholder. To do this, the fee owner must sign a waiver stating that he or she has no ownership interest in the leasehold improvements and requesting that the interests be appraised separately and that separate offers be made for the fee and leasehold interests. There must be a clearly separate and defined leasehold interest that can be distinctly appraised separate from the fee interest.

TxDOT will not be expected to attempt separate negotiations when the various interests cannot be clearly defined. If the owner refuses to disclaim the leasehold interest (see form [ROW-N-120 Affidavit and Disclaimer - Owner](#)), then the total offer is made to the owner with the burden of satisfying the lessee being left to the owner. When the owner agrees to disclaim, separate contingent offers are made to the owner for the fee and leasehold interests. See examples of [Templates of Offer Letters](#). If the separate offers are acceptable, separate memorandums of agreement are completed. See [Memorandum of Agreement \(MOA\)](#). Additionally, if both offers are accepted, both interests must be closed simultaneously in the total amount of the approved parcel value. If either offer is unacceptable, then both parties are joined in ED proceedings. If a parcel has to be condemned, then a final offer letter is addressed to the fee owner only, with the consideration being the total approved value.

Even though the total property value remains constant, the separate leasehold value may periodically increase or decrease depending on the lease terms. Where release of a lease is handled as curative work, the title company or TxDOT makes a determination regarding the instrument acceptability, and complete agreement is reached on any temporary right of occupancy by the lessee.

Separate negotiations are conducted for the adjustment of utilities owned by others. Disclaimers are not required for the utility adjustments.

Section 22 — Information for Income Tax Purposes for Property Owners (for State)**Procedure**

During negotiations if questions are asked in regard to income tax, the property owner should be advised to contact the Internal Revenue Service Office that serves the local area or to seek legal counsel. It may be advised, however, of the Internal Revenue Service ruling that for any part of the compensation paid by TxDOT to be treated as damages by the taxpayer in its income tax return, the amount paid for such damages must be agreed to both by TxDOT and the property owner. TxDOT will not, under any circumstances, agree to a damage figure that does not agree with the approved value. Agreement as to the amount of damages paid may be included in the Memorandum of Agreement, or it may be documented by separate agreement after the closing transaction. The suggested wording to be used in the Memorandum of Agreement is as follows:

“It is agreed by and between the parties hereto that the compensation herein provided for includes the sum of XXXXXXXX dollars for damages to grantor's remaining property.”

If retention of improvements is involved, the preceding clause may be used, or the following alternative clause is acceptable, whichever is preferred by the property owner.

“It is agreed by and between the parties hereto that of the total compensation of \$XXXXXX as herein provided, \$XXXXXX is payment for the property conveyed to the State with the remaining \$XXXXXX representing payment for damages the remaining property suffers by reason of the taking and the necessity of property adjustments to accomplish the taking.”

Section 23 — Information for Income Tax Purposes for Property Owners (for LPA)

Procedure

Generally, the state's policy also applies where LPAs are acquiring right of way under contractual agreement with TxDOT. However, the responsibility for and the method of furnishing such information will be as follows:

- ◆ Any breakdown of the total consideration paid between compensation for property acquired and compensation for damages to the owner's remaining property is **not** to be documented in the deed but may be documented in a separate agreement or contract of sale. This separate agreement with the property owner is strictly a responsibility of the LPA.
- ◆ TxDOT's approved value is for the sole purpose of establishing the maximum amount in which TxDOT will participate. This does not in any way restrict the LPA in negotiations or in what they consider to be damages. Therefore, TxDOT will not be party to any agreement or contract of sale between a property owner and the LPA, and TxDOT will not be involved in any monetary breakdown made for tax purposes.

Section 24 — Rest Areas (or Roadside Parks) (for State)

Procedure

Some rest areas and roadside parks are financed as separate projects, while other rest areas and roadside park sites are financed as an integral part of the right of way proper and are handled accordingly. However, if a proposed right of way taking **and** a rest area and/or roadside park site are located within a single property, acquisition is handled in a single transaction irrespective of the method of finance used. Site selection is to be made in cooperation with the Maintenance Division, General Services Division, and/or the Design Division, as appropriate. Contact the ROW Program Office regarding current rest areas and roadside parks funding.

Section 25 — Irrigation and Drainage Canals (for State and LPA)

Procedure

A canal, as defined here, means any open ditch or pipe facility carrying non-potable water for irrigation or drainage purposes. When right of way is required for canal adjustments, such acquisition is handled according to how ownership is held and the physical canal orientation with respect to the highway. Ownership is held either publicly or privately. Canal orientation is either perpendicular or parallel to the highway.

For canals serving the public or having a public function, adjustments are handled similar to utility adjustments. Facilities should be identified as either crossing (perpendicular to the highway) or longitudinal (parallel to the highway). Real property costs will be handled as right of way expenses.

For privately held canals that do not serve the public but rather an individual, handling of costs should follow the real property acquisition process. Facilities should be identified as either crossing (perpendicular to the highway) or longitudinal (parallel to the highway). Real property costs shall be handled through the appraisal process as part of the right of way acquisition parcel.

Additional policies and procedures regarding the removal, relocation, or adjustment of irrigation and drainage canal facilities are in the [ROW Utilities Manual](#). Procedures for appraising canals in private ownership/function are included in the [ROW Appraisal and Review Manual](#).

Section 26 — Cemeteries (for State)

Procedure

Under Section 203.051(e) of the Transportation Code, the Commission **cannot** condemn property used, and dedicated to be used, as a cemetery pursuant to Health and Safety Code, Subtitle C, Title 8. To ensure sensitive and legal treatment of cemeteries within TxDOT right of way, TxDOT will:

- ◆ **Avoid cemetery impacts wherever possible.**
- ◆ Identify cemetery locations as one type of cultural resource that may be affected by proposed transportation improvements.
- ◆ Perform archeological investigations for cemeteries only when proposed transportation activities will impact a known or suspected cemetery and that cemetery is believed to be over 50 years old.
- ◆ Consult with the cemetery association and living descendants and carry out their recommendations in the care and treatment of these properties, where possible.
- ◆ Conform to state law concerning the maintenance, excavation, and removal of cemeteries and human burials.
- ◆ Ensure that reburials are made in a cemetery designated by known descendants, in a cemetery of the decedent's known religion, or in a local cemetery having available space, if no preference is indicated.
- ◆ Erect a monument at the place of reburial indicating the source and date of reburial.
- ◆ Not allow public exhibition of human remains or photographs of human burials.

Impact Categories

Cemetery impacts fall into two categories: (1) unmarked cemeteries believed or suspected to be present in proposed right of way but where no visible evidence is present to confirm; and (2) marked cemeteries within right of way where transportation activities are proposed. Treatment of each category is outlined below.

Category 1 - Avoid impacts where possible. When impacts cannot be avoided, the District will:

- ◆ Notify the county judge, county historical commission, the cemetery association, and known descendants that archeological field investigations will be performed to verify the presence or absence of the cemetery.
- ◆ Request that the Environmental Affairs Division perform mechanical investigations to verify the presence or absence of graves within the area to be impacted. If no graves are identified, the Division will prepare and provide a report to the regulatory authority recommending the

project proceed. TxDOT will provide a copy of the report to the county judge, county historical commission, the cemetery association, and descendants.

- ◆ If graves are identified, they will be plotted on right of way or project maps, covered with plywood or other appropriate material, and covered with soil. TxDOT environmental coordinator will work with TxDOT personnel to determine if this newly identified cemetery will move to category 2 status.

Category 2 - Avoid impacts where possible. When impacts cannot be avoided, the following will apply:

- ◆ If the cemetery has interments less than 50 years old, TxDOT will work with the cemetery association, the appropriate legal descendant, and the county court (see Health and Safety Code, [Section 711.036\(a\)](#)) to remove the dedication for the cemetery, and to disinter and reinter the burials in another cemetery.
- ◆ If the cemetery has interments made over 50 years ago, TxDOT shall have the Environmental Affairs Division consult with the Texas Historical Commission, FHWA, the appropriate legal descendant, and the county court (see Health and Safety Code, Section 711.036(a)) to remove the dedication for the cemetery, and to disinter and reinter the burials in another cemetery.

In some situations, with the cooperation of local officials, a cemetery dedication may be set aside, but generally this is not possible.

Acquiring releases from relatives to remove and reinter bodies, or court orders where releases cannot be obtained, is a difficult, time-consuming operation. Contracting for the removal and reinternment of bodies, and the necessary legal procedures to remove prior dedications, if any, require much additional time.

Section 27 — Acquisition of TxDOT Employee's Property (for State and LPA)

Procedures

When property owned by TxDOT employees or officials is required for right of way, standard procedures are followed in appraising, securing approved values, and offering to negotiate. However, to prevent unjust accusation of collusion, it is desired that such employees and officials voluntarily refuse to negotiate. Thereby, proper compensation will be determined through ED proceedings, as set forth in Minute Order No. [43775](#).

This is in no way an attempt to take away a person's constitutional right to sell his or her property, if he or she so chooses, and it establishes no hard and fast rule. It is simply intended that TxDOT personnel be aware of the Commission's views, and that both the individual and those responsible for the review of right of way values have prior notice that the Commission, as well as the administration, would prefer such property be acquired through ED proceedings.

There will be no sanction imposed on the individual, if, after having knowledge of the foregoing interpretation of Minute Order No. 43775, he or she elects to sell his or her property and, after the review, all is found in order. The minute order was designed to discourage anyone within TxDOT from speculating on right of way.

Section 28 — Requesting Federal Assistance in Acquiring Private Property (for State)

Procedure

Federal law allows federal acquisition of land interests for any project authorized for interstate, defense access, or forest highways where the state is unable to acquire the required right of way or is unable to obtain possession with sufficient promptness.

The state will **not** request federal assistance except for cemetery property and military access road projects which are not part of the designated highway system, and then only when ED proceedings become necessary. Federal assistance is needed in these situations since TxDOT is without authority to condemn cemeteries and lands for other than projects on the designated highway system. When such a situation occurs, the ROW Program Office, through the FHWA, will make the formal request for federal assistance for action by the Department of Justice.

If the need for federal assistance arises, TxDOT should contact the ROW Program Office. A review of current federal regulations will be made and TxDOT will be advised as to what information and materials are to be submitted to the ROW Program Office for processing the request to FHWA for federal assistance in the acquisition.

Section 29 — Administrative Settlements (for State)

Procedure

An administrative settlement is any settlement, the amount of which exceeds the approved value, made or authorized by the responsible acquiring agency, before initiating the ED process. The Administrative Settlement program was developed in order to enhance the acquisition process by adding flexibility to settle reasonable differences in opinion of value and to negotiate the acquisition of required right of way which would otherwise require judicial determinations of fair compensation. The administrative settlement program is not intended as a remedy for incomplete or poor quality valuation determination. The process is not intended to cure appraisal deficiencies or as a forum to debate appraisal methodology. It is also not intended as a mechanism to bypass the potential increased award determination of special commissioners or to meet pressing letting dates. These are issues that are appropriately addressed through quality control and quality assurance applied to approval of values by TxDOT staff or otherwise through the expeditious initiation and conduct of eminent domain proceedings.

The administrative settlement team (see second diamond, next paragraph) will recommend the approval or disapproval of all timely submitted administrative settlements.

Whether approved or disapproved, forward all documentation related to all administrative settlements to ROW Program Office.

The negotiator must make a diligent effort to reach a settlement with the property owner at the approved value. The administrative settlement is one of the tools available to the negotiator with the specific purpose to resolve reasonable differences with the opinion of value supported by the TxDOT 's appraisal. If an agreement on the approved value cannot be reached, the negotiator will explain the administrative settlement process and inform the property owner of the following:

- ◆ A written counteroffer is required and must include a property owner's signed proposal for full settlement setting forth a specific value with information to support the proposal, including a copy of the owner's appraisal report on the property, if applicable. This counteroffer, or a written request from the property owner for an extension of time to submit a counteroffer, must be received by TxDOT no later than thirty days from the property owner's receipt of the initial offer letter and any counteroffers/administrative settlement requests or requests for extension of time received after the expiration of thirty days should not be considered.
- ◆ Only a written counteroffer will be considered, and if an additional offer letter is required due to an updated approved value (prior to a final offer letter having been sent), such additional offer letter must contain the wording that any counteroffer or request for time must be received within thirty days of the date of the property owner's receipt of the additional offer letter or it will not be considered.

- ◆ A timely submitted written request for an extension of time must be approved by TxDOT. The length of time, if approved, will be determined based upon the purpose of the extension, to insure that such extension of time will not jeopardize the construction letting and that the extension of time is in the best interest of TxDOT.
- ◆ The counteroffer will be reviewed by an administrative settlement evaluation team (as described below) that will recommend approval or disapproval unless the team determines the acquisition process should enter into **enhanced negotiations** as described later in this chapter.
- ◆ A final offer letter at the original approved value shall be sent within 5 business days if:
 - the 30 days have passed, provided no counteroffer or written request for extension of time has been received within said time;
 - the administrative settlement is not approved; or
 - the property owner decides to reject an approved administrative settlement.
- ◆ The property owner will be notified by TxDOT, in writing, of the agency's decision.
- ◆ If improvements are retained, the retention values will be subtracted from the total settlement amount.

TxDOT will appoint an administrative settlement team consisting of the Right of Way Project Manager or designee and two or more members who will analyze pertinent information and reach consensus on whether an administrative settlement should or should not be recommended. The recommended team composition is three or five members of which the review appraiser may be a member, except when contract review appraisers are used. Other members might include the condemnation coordinator (if assigned), staff lawyer (if applicable), project engineer (or designated representative), or other right of way staff members. Alternate team members may be chosen and substituted based on individual availability and issues specific to the parcel. The negotiator for the parcel will provide details of the negotiations but **will not** participate in the decision of the team.

Team responsibilities are as follows:

- ◆ The team must meet and complete its evaluation within five working days after receipt of a written counteroffer. After the team approves the [ROW-N-9 Administrative Settlement Evaluation and Approval](#) form, forward the form to Right of Way management within five working days of the approval date.
- ◆ The team must reach a consensus to recommend approval or disapproval of an administrative settlement.
- ◆ Administrative settlement teams will consider any pertinent value information provided by the owner to assess whether to approve the counteroffer.

Upon approval of an administrative settlement, the negotiator will:

- ◆ Notify the property owner of the decision by using form [ROW-N-11 Administrative Settlement Approval Letter](#).

- ◆ Prepare and have the conveyance document signed in the amount of the administrative settlement. Consideration in the conveyance document should contain the following statement immediately after the amount of consideration:
"(The consideration recited herein represents a settlement and compromise by all parties as to the value of the property herein conveyed in order to avoid formal ED proceedings and the added expenses of litigation.)"
- ◆ Submit the following to the ROW Program Office for payment:
 - *ROW-A-15 Payment Request*;
 - conveyance document;
 - copy of [ROW-N-9 Administrative Settlement Evaluation and Approval](#) form; and
 - memorandum of agreement (if applicable).
- ◆ Close the parcel according to standard procedures.
- ◆ If the owner subsequently decides not to accept the approved administrative settlement, send a final offer letter using the original approved value.

Upon disapproval of an administrative settlement, the negotiator will:

- ◆ Notify the property owner of TxDOT's decision by using form [ROW-N-12 Administrative Settlement Disapproval Letter](#).
- ◆ Send a final offer letter to the owner(s) in the amount of the original approved value.

Enhanced Negotiations

The enhanced negotiations process provides additional flexibility in negotiations with the property owner in conjunction with the administrative settlement process.

This enhanced negotiations process allows an additional 30 days for the negotiator to work with the owner to eliminate ineligible items from the counteroffer and to submit a revised counteroffer (if needed). An informal non-binding mediation meeting between all parties involved could occur during the additional 30 days to work toward an administrative settlement.

Enhanced Negotiations Process

After the Administrative Settlement Team reviews the owner's counteroffer, if some but not all issues raised relating to valuation, legal issues, cost savings and project scheduling are considered to have merit, then the counteroffer will be returned to the negotiator with ineligible items marked and/or approval of a lesser amount with ineligible items removed from the counteroffer.

If the Administrative Settlement Team marked ineligible items in the counteroffer and returned it to the negotiator, the negotiator will discuss ineligible items in the counteroffer with the owner and

ask for a revised counteroffer with ineligible items deleted. If the owner submits a revised counteroffer, it will be transmitted to the Administrative Settlement Team who may either approve or disapprove the revision. (In complex and/or unusual cases, the Administrative Settlement Team may refer the revised counteroffer to the Right of Way Project Delivery Manager for review).

If the Administrative Settlement Team approved a lesser amount with the ineligible items marked out, then the negotiator will relay the approved amount and see if it is accepted by the owner.

At the conclusion of this process the negotiator will prepare the [ROW-N-9 Administrative Settlement Evaluation and Approval](#) form as well as either the [ROW-N-11 Administrative Settlement Approval Letter](#) or [ROW-N-12 Administrative Settlement Disapproval Letter](#) which must be signed by the Right of Way Project Delivery Manager or its designee. If the *ROW-N-12 Administrative Settlement Disapproval Letter* is prepared and signed by the Administrative Settlement Team members, then the negotiator prepares the final offer letter for signature by the Right of Way Project Delivery Manager or its designee.

Section 30 — Administrative Settlements (for LPA)

Procedure

On LPA acquisition projects with TxDOT reimbursement, a LPA may make a settlement if an agreement cannot be reached at the approved value. TxDOT will not participate in the settlement (the amount above the approved value) unless the proposed settlement is submitted to TxDOT and approved under TxDOT's administrative settlement procedures.

Section 31 — Possession and Use Agreements (for State)

Procedure

Possession and Use Agreements ([ROW-N-PUAIC Possession and Use Agreement with Additional Payment of Independent Consideration](#)) with an incentive will be offered on every parcel, on every project, on a statewide basis. The incentive is an independent market rental consideration paid to the property owner for the value of the advanced timing of possession. Possession and Use Agreements (PUAs) allow TxDOT to gain irrevocable possession of a parcel while at the same time allowing the landowner to continue contesting the ultimate compensation through the litigation process. This allows TxDOT to possess and construct on a parcel prior to going through a time-consuming special commissioners' hearing process. The market rental payment will make the PUAs a more effective tool as landowners will be more willing to execute the PUA with the market rental payments.

The market rental amount will be calculated at 10% of the initial approved value of a parcel with a minimum amount of \$3,000 and a maximum amount of \$25,000. The incentive percentage was determined based on industry standards for the recommended amount of a typical yearly market rental rate as associated to the total value of a piece of property. This is money the landowner will never have to pay back to TxDOT regardless of the outcome of the litigation.

Along with the market rental payment the property owner can be paid any portion of the approved appraised value (0-100%) of the parcel as appropriately based on the circumstances of each individual parcel. In determining the amount of the approved value to pay to a landowner, consider the title issues on a parcel and the risk TxDOT may subject itself to double compensation or interrupted possession based on outstanding title issues.

The cost of estimated PUA incentives will not be included in the ROW cost estimates for purposes of a fixed price ROW contribution agreement.

For LPA

LPAs are permitted, but are not required, to offer PUA incentives if the LPA is acquiring the ROW through a ROW procurement agreement; however the state will not reimburse any part of elective incentives offered by LPAs which are procuring the right of way.

Chapter 6 — Right of Way Donations and Exchanges

Contents:

[Section 1 — Overview](#)

[Section 2 — Legal Requirements to Accept Donations \(for State\)](#)

[Section 3 — Exchanges \(for State\)](#)

[Section 4 — Procedures for Receiving Donations \(for State\)](#)

[Section 5 — Donation Requests Not Associated With Projects \(for State\)](#)

[Section 6 — Procedures for Receiving Donations \(for LPA\)](#)

[Section 7 — Matching Fund Credits](#)

Section 1 — Overview

For State

A property owner may donate all the needed right of way or any part thereof, or agree to accept a payment that is less than what TxDOT offered. TxDOT can accept the donation if the owner has been fully informed in writing of its right to receive just compensation. The property to be acquired must be appraised unless the owner releases TxDOT from this obligation. A release of the appraisal obligation must be signed by the owner and retained in the parcel file.

A property owner may donate property in exchange for construction features or services. Such agreements must be coordinated with the Contract Services Division. The value of the donation is limited to the fair market value of property donated less the cost of the construction features or services. If the value of the donated property exceeds the cost of the construction features or services, the difference may be eligible for a federal credit to the State's share of project costs.

Government Code, Chapter 575 requires that the Commission acknowledge, in an open meeting, the acceptance of any donation that has a value of \$500 or more within 90 days of such acceptance. The minute order acknowledging the acceptance of the donation must include the name of the donor, a legal description of the property, and a statement regarding the purpose of the donation. The legal description of the property must be signed and sealed by a Registered Professional Land Surveyor (RPLS) and include a parcel plat. The Executive Director or designee will accept and approve all donations. No minute order acknowledging the acceptance of a donation is needed for a donation valued at less than \$500.

The Commission has adopted rules for each donation of real property contained in 43 TAC Sections 1.500-1.506. The donor and TxDOT must execute a donation agreement signed by the Executive Director or ROW Division Director for any donation of property. Use form [ROW-N-143 Donation Agreement](#) or form [ROW-N-145 Partial Donation Agreement](#) for this purpose.

Commission rules also require that a deed conveying any interest in real property to TxDOT be recorded and retained by the ROW Program Office. ROW PD will obtain an agreement and a deed executed by the donor before acceptance by the Executive Director. However, as explained in the agreement, official acceptance of delivery of the deed will not occur until the Executive Director, or designee, executes the agreement. Therefore, the deed must not be recorded until after acceptance and execution of the agreement. The legal requirements for acceptance of donations are provided in [Legal Requirements to Accept Donation \(for State\)](#). ROW PD will forward the proposed donations to the ROW Program Office for submittal of all applicable donations to the Executive Director or ROW Division Director for acceptance and execution of the agreement. Thereafter, the deed will be

deemed "delivered" and can be recorded. The Commission will acknowledge the acceptance by minute order, no later than the 90th day after the date the gift is accepted. The procedures for acceptance of donations are provided in [Procedures for Receiving Donations \(for State\)](#) or in [Procedures for Receiving Donations \(for LPA\)](#).

ROW PD files must be thoroughly documented when right of way is obtained by 100% donation (full donation) or by reduced consideration (partial donation). A written statement from the donor, or an appropriately modified Memorandum of Agreement (MOA) indicating full or partial donation, along with the negotiator's written reports, may constitute sufficient documentation. Whichever method of documentation is used, the offer to donate must include a statement of owner's wish to donate or accept reduced consideration **and** acknowledgment of their right to receive just compensation.

If a written statement indicating a desire to donate right of way is received from the property owner before appraisal of the property, it is not necessary to appraise, unless the property owner desires the appraisal to be made. However, ROW PD must set forth TxDOT's other obligations (e.g., title expense, relocation assistance, incidental expenses, etc.) in writing. A modified agreement is not required, but may be used to clearly set forth the obligations of both TxDOT and the other parties involved.

When TxDOT directly obtains right of way by donation, use form [ROW-N-14 Deed](#) as the deed form. This form permits the owner to retain improvements and contains standard mineral reservation clauses.

Use standard deed forms when partial donations are to be made. Any substantive alteration of the language of standard deed forms must receive prior approval of the ROW Program Office, as set forth in [Standard Conveyance Forms](#).

Include ethnic coding on the transmittal cover to identify the donor, according to codes shown in [Ethnic Coding for ROW-A-15, Payment Request](#).

In most cases, when temporary use of the land is needed for highway construction purposes and the owner is willing to donate such temporary usage, form [ROW-N-TCL Temporary Construction License Agreement](#) can be used.

Form [ROW-N-83 Temporary Easement](#), however, should be used in unusual circumstances when real property improvements or fixtures will have to be removed by the owner or by others. A donation of a temporary easement would convey a valid real property interest and is, therefore, subject to the donation provisions of state and federal law and TxDOT policy. In such a situation, the donation of a temporary easement should be accomplished by the use of a fully executed form *ROW-N-83 Temporary Easement* or similar agreement.

If the form *ROW-N-TCL Temporary Construction License Agreement* or the standard temporary easement form is not utilized, or if there is a situation which warrants exceptional handling, ROW PD must coordinate with the ROW Program Office.

If an owner desires to donate a temporary construction license and/or easement but does not want the instrument recorded, this will be acceptable provided that all requirements of documentation and executed agreement are met. The documents should be acknowledged by a notary public in case recordation becomes necessary. Upon completion of construction, return the original unrecorded instrument to the owner and retain a copy in TxDOT records.

When contracts are let for off-system work, the agency responsible for acquiring right of way must comply with this policy, except that title is to be taken in the name of the appropriate LPA.

If TxDOT suspects that the property proposed to be donated could be contaminated, a right of entry from the owner should be obtained in order for TxDOT to investigate the presence of any contaminants.

Section 2 — Legal Requirements to Accept Donations (for State)

Statutory Requirements

Government Code, Chapter 575

- ◆ This law only applies to gifts equal to or more than \$500 in value.
- ◆ TxDOT may not accept a gift from a donor if the donor is a party to an action in which TxDOT will determine the legal rights, duties, or privileges of the donor. If at the time of the proposed donation the donor is involved in such an action, TxDOT may accept the donation 30 days after a ruling by TxDOT on the action becomes final.
- ◆ Before TxDOT may accept a gift, it must have statutory authority to do so. The Executive Director, or designee, approves gifts made to TxDOT.
- ◆ For gifts valued at \$500 or more, the Commission shall acknowledge the acceptance by minute order, no later than the 90th day after the date the Executive Director, or designee, approves the gift. The minute order must include:
 - The name of the donor;
 - A description of the gift; and
 - A statement of the purpose of the gift.

Transportation Code, Section 201.206

- ◆ TxDOT may accept gifts for the purpose of carrying out its functions and duties.

Rules Requirements

43 TAC Sections 1.500 to 1.505, inclusive

- ◆ Any donation to TxDOT must be approved by the Executive Director, or designee, and acknowledged by order of the Commission no later than the 90th day after the date the gift is accepted, except the Executive Director or designee may approve donations with values of less than \$500.
- ◆ TxDOT may accept a gift upon a determination that:
 - The donation will benefit TxDOT in execution of its responsibilities.
 - The donor is not a party to an action in which TxDOT will determine the legal rights, duties, or privileges of the donor. If at the time of the proposed donation the donor is involved in such an action, TxDOT may accept the donation 30 days after a ruling by TxDOT on the action becomes final.
 - The donor is not subject to TxDOT regulation or oversight, or interested in or likely to become interested in any contract, purchase, payment, or claim with or against TxDOT.

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- Notwithstanding the previous three factors above, the Executive Director, or designee, may approve the acceptance of a donation if the donation would provide a significant public benefit **and** the donation would not influence or reasonably appear to influence TxDOT in the performance of its duties. The Commission must specifically acknowledge this in the minute order, where acknowledgment is required.
 - ◆ A donation agreement executed by TxDOT and the donor is required for all donations of real estate. The agreement must include the following information:
 - Description of donation.
 - Determination of value (must take the form of an in-house valuation if an appraisal has been waived).
 - Statement by donor attesting to its ownership rights in the property.
 - Conditions (if any) restricting the use of the donated property.
 - Donor mailing address and, if donor is a business entity, location of the principal place of business.
 - Statement identifying the official relationship between the donor and TxDOT, if any.
 - Statement advising the donor that TxDOT neither approves nor is responsible for any representations by the donor for tax purposes.
 - Signature of the donor, if the donor is an individual, or the signature of an official representative, if the donor is an entity.
 - Signature of the Executive Director or designee.
 - ◆ Following the execution of the donation agreement, a minute order acknowledging the donation is required.

Section 3 — Exchanges (for State)

Procedure

In the disposal of surplus property interests, the property owner and TxDOT may enter into an exchange agreement involving new right of way and surplus land. If the value of the new right of way exceeds the value of the surplus land, and the landowner waives his right to receive money as part of the consideration for the new right of way, then the conveyance to TxDOT is considered a donation. The rules and procedures established by *Government Code, Chapter 575*, and detailed in Right of Way [General Requirements for Proper Conveyance](#) for On-System Projects also apply to donations in exchange. For more detailed information on exchanges, refer to [Disposition of Right of Way Interests No Longer Needed for Highway Purposes](#) (*ROW Property Management Manual*, Chapter 1). In processing donations in exchange agreements, ROW PD personnel should contact the ROW Program Office for assistance.

Section 4 — Procedures for Receiving Donations (for State)

Procedure

ROW PD is notified that an owner wishes to donate property. ROW PD obtains an original agreement and original deed, both executed by donor.

ROW PD retains the original signed deed and submits to the ROW Program Office a donation package for review and acceptance. The donation package shall contain the following documents:

- ◆ An original donation agreement, form [ROW-N-143 Donation Agreement](#) executed by the donor.
- ◆ A copy of the executed but unrecorded donation deed or easement;
- ◆ A title commitment or other title verification;
- ◆ A copy of the appraisal, unless the appraisal was waived by the property owner;
- ◆ A *ROW-A-15 Payment Request* for partial donations when payment for a portion of the value is to be made.
- ◆ A recommendation memo, which should include the following statements.
 - The donation will benefit TxDOT in execution of its responsibilities.
 - The donor is not a party to a contested case before TxDOT, and was not a party to a contested case within the last thirty days.
 - The donor is not subject to TxDOT regulation or oversight, or interested in or likely to become interested in any contract, purchase, payment, or claim with or against TxDOT. The Commission may, however, approve acceptance if it determines that doing so would provide a significant public benefit and would not influence or reasonably appear to influence TxDOT in the performance of its duties.
 - An explanation regarding acceptance or any exceptions to title in accordance with standard acquisition procedures in [Curative Work and Acceptable Title Insurance Commitment and Title Insurance Policy Exceptions](#).

The ROW Program Office will secure TxDOT's approval and ultimate acceptance of the donation. The donation deed shall not be recorded until TxDOT has accepted the donation as evidenced by the Executive Director's or ROW Division Director's execution of the donation agreement.

The ROW Program Office will notify ROW PD of TxDOT's acceptance by transmittal memo, with attached copy of the executed donation agreement and the warrant if a partial donation is involved.

Upon acceptance of the donation, the ROW Program Office shall prepare a minute order for the Commission's acknowledgment of the donation and places the item on the Commission agenda.

The Commission's acknowledgment must be completed within 90 days of TxDOT's acceptance of the donation. For parcels involving partial donations when payment for a portion of the value will be made by TxDOT, the ROW Program Office will process the payment submission in anticipation of TxDOT approval. This will enable the warrant to accompany the transmittal memo.

ROW PD completes closing procedures at the title company when a partial donation and a warrant are involved. ROW PD then arranges for the recordation of the donation deed in the official property records of the county in which the property is located.

ROW PD sends the original recorded deed to the ROW Program Office for inclusion in the inventory of donated property.

Section 5 — Donation Requests Not Associated With Projects (for State)

Procedure

If TxDOT receives a request from a property owner to donate a tract of land that is not associated with a parcel on any current right of way acquisition project, ROW PD should advise the property owner that TxDOT must determine whether accepting the donation would further TxDOT's responsibilities - as required by 43 TAC Section 1.503. The property owner should be advised that the following procedures must be followed in making this determination:

- ◆ The property owner should present a formal written proposal (or letter) to TxDOT. The proposal should contain (or have attached to it) some form of:
 - a legal description of the property (or other general location description), and
 - a drawing (even informal) locating the property relative to an existing highway (identifying the highway and county).
- ◆ After receiving the request, TxDOT reviews the location to determine if present or future plans for this part of the highway show that acceptance of the donation would further TxDOT's responsibilities such as highway purposes or operation of the highway system (e.g., maintenance or storage sites).
- ◆ If TxDOT determines that the property would be suitable and would further TxDOT's responsibilities, then ROW PD should prepare a formal donation agreement to present to the property owner. The agreement would then be processed in the same manner as for other donations, including obtaining a minute order acknowledging any donation over \$500.

Section 6 — Procedures for Receiving Donations (for LPA)

Procedure

After being informed of the right to receive just compensation for its property interest, a donation may be made, in whole or in part. The local public agency (LPA) must obtain an appraisal of the property, unless the property owner releases the LPA from this obligation.

If negotiations result in a right of way donation, LPA files must document supporting circumstances. See the previous section ([Procedures for Receiving Donations \(for State\)](#)) for suggestions about documentation.

For local participation projects in which right of way acquisition is funded partially by an LPA and partially by TxDOT, the LPA should obtain all donations in its name and not in TxDOT's name. Therefore, standard acquisition forms that identify the State of Texas as grantee must not be used, and the deed must identify the LPA as the grantee. When partial acquisitions for controlled access facilities are involved, deed form [ROW-N-24 Donation Deed, Controlled Access Highway Facility, Partial Acquisition, LPA](#) has been developed for use by LPAs. Should the acquisition not involve a controlled access highway facility, the LPA should use form [ROW-N-25 Donation Deed, LPA, Non-Controlled Access](#).

Subsequent to the LPA acquiring title in its name, the LPA will deed the property to TxDOT, and the deed will not require a minute order or donation agreement. TxDOT must inform LPAs of this procedure before execution of the contractual agreement for right of way acquisition between TxDOT and the LPA.

For LPA projects in which no TxDOT money is used for right of way acquisition, but the right of way is obtained in the name of the State of Texas, the procedure for donated parcels will be the same as in the preceding paragraph.

If the LPA suspects that donated property is environmentally contaminated, a right of entry should be obtained from the property owner to investigate contamination.

Section 7 — Matching Fund Credits

Matching Fund Credits to LPA (State-Funded Project; No Federal-Aid)

Donations. For local participation projects in which TxDOT is acquiring the right of way, the value of right of way donated by the LPA may be used as a credit toward the LPA's matching share of cost of right of way to be acquired for the project. Donation credit will not be applied if the LPA is the acquiring agency.

This credit must be supported by an appraisal indicating the fair market value of the land and improvements, if any, being conveyed to TxDOT, but should exclude any damage to the remainder. The fair market value should be established as of the effective date of the LPA's contractual agreement and should not include any increase or decrease in value caused by the project. The cost of appraisal will be the responsibility of TxDOT. ROW PD will review the submitted documentation and make a final determination of value; provided however, ROW PD may perform any additional investigation deemed necessary, including supplemental appraisal work by independent fee appraisers.

Credit will be given only for property transferred at no cost to TxDOT after the effective date of the LPA's contractual agreement and TxDOT's issuance of a letter of funding authority, and only for property which is necessary to complete the project, has title acceptable to TxDOT, and is not contaminated with hazardous materials. There will be no credit for property which is already dedicated and/or in use as a public road. Donation credit will be in lieu of monetary contributions required to be paid to TxDOT for the LPA's funding share of right of way to be acquired for the project. The total credit cannot exceed the LPA's matching share of the right of way obligation under their contractual agreement, and credits cannot be reimbursed in cash to the LPA, applied to project phases other than right of way, nor used for other projects. In the event the LPA's monetary contributions to TxDOT for acquisition of right of way, when added to its donation credits, exceed the LPA's matching share of the right of way obligation, there will be no refund to the LPA of any portion of its contributed money.

Matching Fund Credits (Federal-aid Project)

Donations. If federal funds are used in any part of a project (PE, right of way, or construction), the value of donated right of way may be used as a credit toward the State's or LPA's matching share on the federal project, provided that additional federal funds are available for the project.

This credit must be supported by an appraisal and should include the value of the land and improvements in the acquisition, but should exclude any damages to the remainder. If federal funds are used in right of way, costs to obtain the donation (e.g., appraisal and negotiations costs) would be eligible for federal reimbursement. If no federal funds are used in right of way but are in PE or

construction, such costs to obtain the donation are ineligible for federal reimbursement. If property is to be donated and the owner waives the right to an appraisal, there is no requirement that the owner be given an opportunity to accompany the appraiser during inspection of the property. This is an exception to the normal negotiation process.

Method of Credit. If an LPA wants to obtain any right of way credits on a federal project, ROW PD should contact the ROW Program Office to discuss the particular circumstances and procedures needed to obtain the credit.

Chapter 7 — Procedures Regarding Advertising Sign Interests

Contents:

[Section 1 — Negotiation for Advertising Signs \(for State\)](#)

[Section 2 — Conveyance of Advertising Sign Interests \(for State\)](#)

[Section 3 — Payment for Negotiated Advertising Sign Interests \(for State\)](#)

[Section 4 — Acquisition of Advertising Sign Interests by Eminent Domain \(for State\)](#)

[Section 5 — Removal and Relocation of Certain Off-Premise Signs \(for State\)](#)

[Section 6 — General Procedures \(for LPA\)](#)

[Section 7 — Leasehold Signs \(for LPA\)](#)

Section 1 — Negotiation for Advertising Signs (for State)

Procedure

The acquisition of off premise advertising sign interests consists of the acquisition of 1) the sign structure and 2) any compensable underlying interest in the land (sign site), whether it be fee ownership (sign owned by fee owner), a sign site easement or a leased sign site (if more than month-to-month).

Ownership of any impacted sign structure must be determined early in the negotiation process. If a sign is owned by a person or entity other than the fee owner, have the fee owner sign [ROW-N-120-OAS Disclaimer of Interest in OAS](#), so that the sign structure may be acquired separately. In lieu of this form, the sign owner may produce a lease evidencing ownership of the sign structure.

The appraiser should be instructed to consider the sign structure itself to be real property and include the value of the structure in the appraisal of the real property. Sign valuations are made in accordance with procedures outlined in the *ROW Appraisal and Review Manual*.

Relocation information should be provided to the owner of the sign structure. However, relocation assistance will NOT include the cost of moving the structure, as the structure is considered to be part of the real property.

When the owner of the sign structure is not the fee owner, negotiate advertising sign interests directly with sign owners using [ROW-N-IOL-OAS StructureOnly Initial Offer Letter - OAS Structure Only](#) and [ROW-N-FOL-OAS StructureOnly Final Offer Letter - OAS Structure Only](#) for offers and handle them separately from fee or other property interests. Use forms [ROW-N-IOL-OAS LandInterest Initial Offer Letter - OAS Land Interest Only](#) and [ROW-N-FOL-OAS LandInterest Final Offer Letter - OAS Land Interest](#) for offers to the fee owner.

If the sign structure and the fee are owned by the same person or entity, use [ROW-N-IOL-OAS StructureLand Initial Offer Letter - OAS Structure and Land](#) and [ROW-N-FOL-OAS StructureLand Final Offer Letter - OAS Structure and Land](#) for offers.

Remove signs erected without property owner permission, or abandoned signs, after parcel acquisition.

Section 2 — Conveyance of Advertising Sign Interests (for State)

Procedure

When a fee owner that also owns the sign structure agrees to the total compensation offered, the owner should execute form [ROW-N-14-OAS, Deed - Outdoor Advertising Structure](#), including any applicable retention or bisection special clauses. However, the owner may accept the State's offer (or negotiate an agreed separate value) for the sign structure only, by executing a [ROW-N-30-OAS StructureOnly, Quitclaim Deed - OAS Structure Only](#) (or, when applicable, a [ROW-N-30-OAS StructureOnlyBisection, Quitclaim Deed - OAS Structure Only - Bisection](#)) while reserving the right to challenge the value of the land through ED.

When a sign owner who does not own any of the fee agrees to the compensation offered, the sign owner must release its interest in the sign structure or its interest in both the sign structure and leasehold property interest, by execution of the appropriate quitclaim deed form. The types of quitclaim deed forms are shown below:

- ◆ [ROW-N-30-OAS StructureLeasehold, Quitclaim Deed - OAS Structure and Leasehold](#) (expected typical situation, where the OAS owner is willing to quitclaim the structure and its leasehold interest in the land);
- ◆ [ROW-N-30-OAS StructureLeaseholdBisection, Quitclaim Deed - OAS Structure and Leasehold - Bisection](#) (where the OAS is bisected and the OAS owner is willing to quitclaim the structure and its leasehold interest);
- ◆ [ROW-N-30-OAS StructureOnly, Quitclaim Deed - OAS Structure Only](#) (when the OAS owner is willing to quitclaim the structure but not its leasehold interest);
- ◆ [ROW-N-30-OAS StructureOnlyBisection, Quitclaim Deed - OAS Structure Only - Bisection](#) (when the OAS is bisected and the OAS owner is willing to quitclaim the structure but not its leasehold interest).

In any event, when the sign structure is retained by the owner, take care to use the applicable form of conveyance instrument, which contain the appropriate retention, removal (notice to vacate) and reversion clauses.

Section 3 — Payment for Negotiated Advertising Sign Interests (for State)

Procedure

When a parcel value has an approved amount for an advertising sign structure, a separate State warrant may be drawn for payment of a sign interest acquired by negotiation. This amount may be for the sign structure only, or for the sign structure and, if applicable, the leasehold or fee interest.

A payment submission will include an AP-152, a title commitment, form [ROW-N-95, Negotiator's Certificate](#), and the applicable conveyance instrument. The MOA is optional.

A warrant may be paid directly to the sign owner or through a closing at a title company. Only one title policy will be purchased in the combined amount of the fee and sign interests after the acquisition of all property interests or, when necessary, only for the value of the fee.

Section 4 — Acquisition of Advertising Sign Interests by Eminent Domain (for State)

Procedure

If the owner of a sign conveyed the sign structure **and** leasehold interest ([ROW-N-30-OAS StructureLeasehold, Quitclaim Deed - OAS Structure and Leasehold](#) or [ROW-N-30-OAS StructureLeaseholdBisection, Quitclaim Deed - OAS Structure and Leasehold - Bisection](#)), the fee owner's interest may be acquired by negotiation or through condemnation without the joinder of the sign owner.

If the sign owner conveyed the sign structure **only** ([ROW-N-30-OAS StructureOnly, Quitclaim Deed - OAS Structure Only](#) or [ROW-N-30-OAS StructureOnlyBisection, Quitclaim Deed - OAS Structure Only - Bisection](#)), the acquisition of the fee owner's interest must be through condemnation with the joinder of the sign site lessee or easement holder, regardless of the fee owner's willingness to convey its interest by deed. This is based on the “unit fee rule”, given that the sign site lessee or easement holder may have a claim to a portion of the unit fee land value, and the state has no legal obligation to negotiate the separate interests in the land.

Notices in ED proceedings and payments are made in accordance with the established procures for other property interests acquired through condemnation.

VALUATION NOTE: In the event that an off-premise advertising sign structure is acquired by the state prior to the valuation date of the land on which it is located (whether the sign is owned by the fee owner or by a sign site lessee or easement holder), any resulting changes in highest and best use or value of the land should be ignored, because they are a result of project influence. For example, to the extent the sign site contributes to the value of the land, the state's acquisition of the sign for the same project cannot be the sole basis of any change in highest and best use or value of the land.

Section 5 — Removal and Relocation of Certain Off-Premise Signs (for State)

Overview

Off-Premise permitted signs displaced by a highway project, but which have been retained as part of a negotiated conveyance, may be eligible for a permit to be relocated to a new location. Such relocation permits must be coordinated by the sign owner with Commercial Signs Regulatory Program personnel and done in accordance with the *ROW Beautification Manual*. The permitting process for the relocation site cannot begin until after the sign has been removed.

Retained signs will be allowed to occupy the site for a period of time, post-conveyance. TxDOT will thereafter provide the sign owner a Notice to Vacate upon a date certain, as outlined in the approved OAS conveyance forms. Except for emergency situations, not less than 30 days (and preferably 60 days) advance notice to vacate should be given to the sign owner. To ensure that the sign does not conflict with construction, such notice should also be given not less than 60 days prior to the date on which the land on which the sign is erected is needed for construction purposes.

If the billboard structure owner does not remove the structure per the deed and Notice to Vacate, the ownership of the structure shall revert back to the state for removal. The sign structure owner will forfeit the salvage value, if any, retained by the state AND their eligibility for a relocation permit under the Outdoor Advertising permitting regulations.

If the billboard structure owner does not choose to retain the structure through a negotiated conveyance, then they will not be provided the ability to apply for a relocation permit under the current Outdoor Advertising permitting regulations and any application by the sign owner would be treated as an application for a new permit.

Section 6 — General Procedures (for LPA)

Overview

The general procedures outlined in Sections 1 - 5 of this chapter will be followed on 90-10 projects.

Section 7 — Leasehold Signs (for LPA)

Procedure

The costs of acquiring leasehold advertising sign interests are eligible for state participation only when a compensable realty interest has been determined and a release or quitclaim of property interests has been obtained. The determination of compensability need not be submitted to the ROW Program Office. However, the release or quitclaim must be submitted, along with the deed from the fee owner, before reimbursement can be made. It is recommended that the LPA follow the procedures outlined in Sections 1 through 5 of this chapter. TxDOT should closely coordinate the LPA's efforts in this regard.

Note: In the event any existing, future, or proposed LPA ordinance, commissioners court order, rule, policy, or other directive, including, but not limited to, those concerning outdoor advertising, are more restrictive than State law, policy, or directive, and thereby result in any increased costs, then the LPA will pay one hundred percent (100%) of all such increased costs regardless of the funding arrangement specified in the State/Local agreement, even if the applicable county qualifies as an economically disadvantaged county.

Chapter 8 — Fencing Policies and Procedures

Contents:

[Section 1 — Fencing Policies \(for State\)](#)

[Section 2 — Control of Access Fences \(for State\)](#)

[Section 3 — Jointly Owned Property Line Fences \(for State\)](#)

[Section 4 — Fencing Procedure \(for LPA\)](#)

Section 1 — Fencing Policies (for State)

Policy

On controlled access highway facilities, TxDOT's policy provides for construction and maintenance of control of access fences as an integral part of the highway facility since they are needed for public safety. The policies and procedures pertaining to control of access fencing are discussed in [Control of Access Fences \(for State\)](#). Control of access fences have an impact on right of way acquisition when they are located along the right of way and eliminate access to remainders. When these fences serve the secondary purpose of property fences, right of way acquisition of these, whether through negotiation or condemnation, should be on the basis that they are constructed and maintained by the state.

On non-controlled access highway facilities, the replacement of privately owned property fences along the right of way is handled as a cost to cure item, as outlined in the [ROW Appraisal and Review Manual](#). The fences are built by the property owner with maintenance and ownership vested in the landowner.

Section 2 — Control of Access Fences (for State)

Procedure

Control of access fences may be built along or immediately inside control of access lines to serve as physical barriers to the through lanes. They may also be built along the right of way to safeguard against traffic hazards caused by intrusion of people, animals, vehicles, machines, etc., from outside the right of way. All control of access fencing will be accomplished as a TxDOT construction item.

If right of way is being acquired, an engineering determination of the need for access fencing is required so that right of way and design requirements can be coordinated. For projects in the preliminary development stage, make this decision at the schematic stage so FHWA approval may be obtained and right of way appraisals made on the proper basis.

When control of access fences are needed as part of the highway facility, acquisition should be on the basis that the fences will be constructed and maintained by TxDOT, and that they will also serve as property fences. Landowners should not be given the option of accepting payment for an unfenced condition. These fences are part of the highway facility.

When access fences are installed by TxDOT and additional right of way is purchased, include a clause similar to the following (but adapted to the specific situation) in the MOA (or purchase agreement):

“The Texas Department of Transportation will install and maintain a fence along the right of way line and no gates will be permitted where access is denied. Where access is permitted, TxDOT's original installation shall include (number) gates (or cattle guards) located as follows: (location description).

Additional future gates or cattle guards shall be located subject to TxDOT approval and will be installed by TxDOT. Grantors agree that they will not install any gates or cattle guards, or cut or otherwise damage the state-owned fence, and that they will deliver at the gate or cattle guard site the required materials meeting TxDOT specifications for TxDOT installation of approved additional gates or cattle guards. The fence and all gates, whether installed originally or in the future, shall be and remain in the ownership of the state.”

Section 3 — Jointly Owned Property Line Fences (for State)

Procedure

Fences between properties are often jointly owned by abutting owners. Negotiators should confirm that interests held are properly reflected in the approved value for each parcel. It is preferable to negotiate simultaneously for both parcels, handling both interests in the jointly owned improvement in the same manner, either by total acquisition or by total owner retention. However, in practice this is often not possible. In these cases, ROW PD shall offer to each adjoining owner one-half of the value of the jointly owned improvements.

Section 4 — Fencing Procedure (for LPA)

Procedure

The local public agency (LPA) will handle right of way fencing in the manner previously established in the approved value.

When right of way or other fencing will be part of the cash consideration paid to the property owner, or will be handled as a property adjustment required by the right of way taking, the appraised value of this fencing is included in the approved value. See the above section for procedures on jointly owned fences.

The LPA may elect to perform right of way fencing on an actual cost or lump sum basis as a part of the total right of way consideration. In this case, neither value for existing fences whose utility is restored by the new right of way fence, nor damages for an unfenced condition are to be included in the approved property owner payment value.

When right of way fencing will be performed on a lump sum or actual cost basis, the type of fence constructed will be limited to that normally constructed by the LPA, or to the type of fence being replaced. If fencing is accomplished as a property adjustment, the fence type constructed is a matter between the LPA and the property owner. TxDOT's financial participation will be the approved value, less any retention.

Chapter 9 — Passes, Stock Passes, and Cattle Guards

Contents:

[Section 1 — Pass Policies \(for State\)](#)

[Section 2 — Guidelines for Land Use Facilities \(TxDOT\) \(for State\)](#)

[Section 3 — Inclusion of Pass Privileges in Instruments of Conveyance \(for State\)](#)

[Section 4 — Permits for Passes \(for State\)](#)

[Section 5 — Conveyance and Title Requirements for Passes \(for State\)](#)

[Section 6 — Negotiation for Passes \(for State\)](#)

[Section 7 — Submission for Payment When Pass Involved \(for State\)](#)

[Section 8 — Cost Charge for Passes \(for State\)](#)

[Section 9 — Pass Policies \(for LPA\)](#)

[Section 10 — Cost Charge for Passes \(for LPA\)](#)

Section 1 — Pass Policies (for State)

Policy

The Commission's policy for passes on the highway system is contained in 43 TAC Section 21.81. Handle pass installations in the right of way transaction with construction and cost responsibilities as outlined in this TAC Section.

TxDOT will conduct land use and ownership studies and determine property owners' need or desire for passes during the project location stage. Also, provision is made for safety studies and analyses to determine the need for passes as a safety measure. Safety passes, if required by a safety study, will be included in public hearing displays and discussed at the hearing.

Negotiations with the property owner shall be based on comparing separate appraisals of market value of the right-of-way parcel and damages to the remainder both with and without the proposed pass to the estimated cost of a pass.

Using the economic difference in damages as established by the appraisals, if such difference equals or exceeds the estimated cost of such a structure, TxDOT will bear all of the costs of the structure, provided the landholder agrees to a reduction in compensation in the amount of damages offset by providing the pass.

It is TxDOT's policy to negotiate with landowners for passes or cattle guards with the objective of continuing farm, ranch, or other agricultural operations when a new highway location or relocation severs the property, or when an existing highway is to be widened into a multi-lane facility. When a drainage structure is adequate for pass purposes, and the landowner is allowed to retain these rights, additional right of way would be acquired on the basis of continued operation.

When use of a pass across the right of way is allowed, it will be accomplished by permit, by contractual agreement with the state, or as a retained right in the right of way conveyance to the state. Use the method that meets the legal requirements pertaining to that particular case.

When pass privileges are part of the right of way transaction, except in cases where an existing pass is to be continued, design approval is required. Such approval will be obtained from the Design Division by the ROW Program Office prior to approval of recommended values, as indicated in [Chapter 3, Section 5](#) of the *ROW Appraisal and Review Manual*. Refer to this manual for pass privilege appraisal procedures and for arriving at values.

Section 2 — Guidelines for Land Use Facilities (TxDOT) (for State)

Overview

In an effort to conform more closely to the requirements of 43 TAC Section 21.81, and to increase the over-all efficiency and coordination between various TxDOT Divisions, the following guidelines are established for TxDOT use.

Passes

TxDOT will authorize these facilities on an individual basis, with consideration of the merits and circumstances of each case.

Procedure

For rural projects, during the initial design a determination is made of the ownership, current usage, and operational requirements of each land use interest affected by the project. A determination is made of the approximate number and location of passes required or desired by landowners and lessees. Passes will be categorized into: (1) those automatically available due to drainage needs, (2) those warranted to meet safety needs, and (3) all other passes where dual appraising under 43 TAC Section 21.81(1)(F) will be required to determine justification and cost participation in order to mitigate damages.

When a pass is proposed as a safety measure, prior to design prepare a special report for the public hearing and forward it to the ROW Program Office for review. The ROW Program Office forwards the report to the Deputy Executive Director for Transportation Planning and Development and the FHWA, when appropriate, for approval. Include the following information in this report:

- ◆ Adequate plans and an accurate and complete right of way ownership map. This letter-size map should describe and show:
 - all public roads;
 - proposed construction features, such as drainage structures and their size, separations, interchanges, and access control features;
 - water sources;
 - leased lands, including type of land involved;
 - location of major improvements; and
 - any unusual topographic features.
- ◆ Land use information such as:
 - fee acreage, separated by land classification;

-
- federal and state leased land acreage, generally described; and
 - private leases, if any.
 - ◆ Present "highest and best use."
 - ◆ Any change in access due to proposed construction.
 - ◆ Water facilities affected and "cost to cure."
 - ◆ Any other available means for livestock and machinery highway crossings.
 - ◆ Ways and means livestock or machinery may or may not cross the proposed highway, including the frequency of crossings and the number and type of livestock or machinery units involved.
 - ◆ How present operations will be changed after construction.
 - ◆ How other ownership may be affected.
 - ◆ The "highest and best use" after the taking, if changed.
 - ◆ List of improvements and approximate value of each, if affected by the taking.
 - ◆ Enhancement of property due to project construction.
 - ◆ Traffic data and estimated cost of the safety pass.
 - ◆ The District Engineer's summary of findings, conclusions, and recommendations.

Section 3 — Inclusion of Pass Privileges in Instruments of Conveyance (for State)

Procedure

Pass privileges may be included in the deed through insertion of the following provision:

"Grantors, their heirs, or assigns shall have the privilege of passage between their remaining lands on either side of the highway facility through a pass provided in the highway construction. It is agreed and understood that the use and maintenance of the pass shall be subject to such regulations as are determined by the Texas Department of Transportation to be necessary in the interest of public safety and in compliance with approved engineering principles and practice. Said passageway across the highway right of way is more particularly described as follows: (Metes and bounds description. This description must be signed and sealed by an RPLS)."

Where pass privileges are included in the deed, use a Memorandum of Agreement (MOA) outlining the transaction terms. Include the following clause in the Agreement:

"Grantors, their heirs, or assigns shall have the privilege of passage between their remaining lands on either side of the highway facility, such passage being delineated in the attached Exhibit "B. " It is agreed and understood that the use and maintenance of the pass shall be subject to such regulations as are determined by the Texas Department of Transportation to be necessary in the interest of public safety and in compliance with approved engineering principles and practice."

Exhibit "B" will consist of a signed and sealed plat showing the pass and necessary fencing with dimensions sufficiently shown to locate the pass with respect to the grantor's property. Show all dimensions, including the height of the pass structure. When the exact size of the structure has not been determined, it may be necessary to specify minimum dimensions so the agreement will show the intentions of both parties. The structure width may have to be indicated by an approximate distance to provide for refinements to preliminary design requirements.

Show the actual cash consideration paid the property owner in the deed. The consideration shown in the MOA will be in accordance with usual procedures.

If a property owner is required to make cash payment to the state, show the phrase "10 dollars and other good and valuable consideration" in the deed, and make the consideration clause in the MOA generally as follows:

"Total Consideration: The state will construct, or cause to be constructed under its supervision, a structure to provide a pass as delineated in attached Exhibit "B" which shall constitute the full consideration for Grantors conveyance of the above property. Since the cost of construction of such structure exceeds the value of said property, it is agreed and understood that Grantors shall deliver simultaneously with their execution of this agree-

ment a cashier's check payable to the Texas Department of Transportation in the amount of \$___, all with the understanding and upon the condition that the state will construct, or cause to be constructed under its supervision, the aforementioned structure.”

Section 4 — Permits for Passes (for State)

Procedure

When pass rights are retained **and** the owner contributes to the pass structure costs, handle pass privileges by retention in the deed or by contractual agreement. However, in some cases, there may be existing structures that the owner desires to use on a permissive basis for pass purposes. As an aid to negotiations, this can be done by including the following clause in the MOA:

"The property hereinabove described is being conveyed for the purpose of construction of a controlled access highway known as (highway name/number). Said highway severs property owned by Grantors with the result that Grantors' remaining property lies on both sides of said highway. Grantors have requested and do hereby request the permissive use of a pass across such highway through the drainage structure as detailed in Exhibit "B" attached hereto, which said Exhibit "B" is incorporated herein and made a part hereof. The Texas Department of Transportation hereby grants such permissive use for pass privileges subject to revocation by the state and at no present or future expense, cost, or liability to the state. Grantors agree to use said pass subject to such regulations as are determined by the Department to be necessary in the interest of public safety and in compliance with approved engineering principles and practice. All work on the highway right of way in connection with pass privileges shall be performed or supervised by the State."

The granting of a revocable permit in the foregoing manner will require approval from the Design Division through the ROW Program Office.

When a revocable permit for use of a structure as a pass is granted after acquisition, follow usual procedures and direct pertinent correspondence to the Design Division through the ROW Program Office.

Section 5 — Conveyance and Title Requirements for Passes (for State)

Procedure

The usual deed and title requirements apply to right of way parcels involving pass privileges with the exception that the title policy, or TxDOT certificate, will except any pass privileges included in the deed. In addition, the consideration amount recited in the deed will be the amount of cash consideration paid the property owner without respect to the pass facility costs. Where pass privileges are included in the deed, appropriate deed clauses will be as outlined previously in [Inclusion of Pass Privileges in Instrument of Conveyance \(for State\)](#). The usual method for indicating a pass on right of way maps is to break the access lines on both sides of the right of way to indicate a right of way crossing where the pass is located. Unless frontage roads are constructed, this does not mean the abutting owner has access to the highway facility. Rather, a limited right of passage under or through the pass facility is provided.

If an owner has existing pass privileges as a property right and such right must be extinguished, the deed and MOA will contain a clause quitclaiming this interest to the state.

Section 6 — Negotiation for Passes (for State)

Procedure

For optional passes, alternate values are obtained for acquisitions with and without pass privileges. The negotiator must obtain these values, as well as the description and location of the pass facility, and leave this data with the landowner so that he can make his choice. However, when a proposed drainage structure can be used as a pass without detriment to highway users, there will be no alternate value. In this case, negotiations will be based on pass privileges provided through the structure. If the approved value was established based on no pass privilege, and the owner requests an offer based upon pass privileges, negotiation must be deferred until the alternate value is established.

Section 7 — Submission for Payment When Pass Involved (for State)

Procedure

When TxDOT is required to make payment to the owner, the payment submission is in accordance with the standards required for the normal right of way parcel.

When TxDOT does not make payment to the owner, follow the normal pay submission standards with the exception that there will be no *ROW-A-15 Payment Request* or requirement for a title certificate. If the owner is required to make a cash contribution, the submission must include a cashier's check payable to the "Texas Department of Transportation," as provided for in the special clause in the MOA. Title evidence will be in accordance with the procedures established for donated parcels.

Section 8 — Cost Charge for Passes (for State)

Procedure

All structures and appurtenant facilities (such as cattle guards) required for passes provided in the right of way transaction will be handled in the construction project as a construction item.

If a special pass structure is provided as the result of a safety analysis, cost charges will be determined by each individual situation.

If a design change requires the alteration of a pass structure after completion of negotiations, when a fixed amount has been established and paid by others, any added cost of the structure will be borne by TxDOT as a construction item.

Section 9 — Pass Policies (for LPA)

Commission Policy

The Commission's policy for passes on the highway system is contained in 43 TAC Section 21.81. Handle pass installations in the right of way transaction with construction and cost responsibilities as outlined in the minute order.

Under provisions of the minute order, land use and ownership studies are to be conducted and property owners' needs or desires for passes are to be determined during the project initial design stage. Also, provision is made for safety studies and analyses to determine the need for passes as a safety measure. Safety passes, if required by a safety study, will be included in public hearing displays and discussed at the hearing. An explanation of administration policy relative to dual appraisals in connection with pass cost participation will also be discussed at the hearing.

When use of a pass across the right of way is allowed, it will be accomplished by permit, by contractual agreement with the state, or as provided in the right of way conveyance to the state. Use the method that allows maximum compliance with policy and the legal requirements pertaining to that particular case.

For LPA acquisition, normally pass privileges will be included in the instrument of conveyance in accordance with procedures outlined in the following section under [Deeds and Title Requirements](#). If the use of a structure for a pass is granted through a revocable permit, this will be handled after acquisition and the usual procedure will be followed with associated correspondence directed by TxDOT to the Design Division.

When pass privileges are part of the right of way transaction, except in cases where an existing pass is to be continued, design approval is required. Such approval will be obtained from the Design Division by the ROW Program Office, prior to approval of recommended values, as indicated in TxDOT's *ROW Appraisal and Review Manual*, [Chapter 3, Section 5](#). Refer to this manual for procedures for appraising pass privileges and for arriving at values.

Section 10 — Cost Charge for Passes (for LPA)

Negotiation

Negotiation is the responsibility of the LPA. The LPA may acquire right of way before obtaining TxDOT's approved value, or acquire a parcel at a cost different from TxDOT's approved values. However, negotiations involving pass privileges are not to be finalized until TxDOT's concurrence is obtained since there can be no commitment for pass privileges without TxDOT approval.

Deeds and Title Requirements

Pass privileges may be included in the deed through insertion of the following provision:

"Grantors, their heirs, or assigns shall have the privilege of passage between their remaining lands on either side of the highway facility through a pass provided in the highway construction. It is agreed and understood that the use and maintenance of the pass shall be subject to such regulations as are determined by the Texas Department of Transportation to be necessary in the interest of public safety and in compliance with approved engineering principles and practice. Said passageway across the highway right of way is more particularly described as follows: (Metes and bounds description. This description must be signed and sealed by an RPLS.)."

The deed is written in the amount of the cash consideration paid the owner without respect to pass costs. Usual title requirements apply with the exception that the title policy or staff attorney's certificate will except pass privileges included in the deed.

If an owner has existing pass privileges as a property right, and such right must be extinguished, the deed will contain a clause quitclaiming this interest.

Special Purchase Agreement

On new or existing locations when neither policy nor design provision requires a pass facility at full TxDOT expense, the fixed amount to provide a pass, as determined in the right of way process, will be financed by the LPA or the property owner. This requires use of form ROW-RM-137, Special Purchase Agreement, which must spell out the exact conditions of the parcel transaction. **Contact the ROW Program Office if this form is needed.** All negotiations are handled directly between the LPA and the owner, with the special purchase agreement requiring that any cash payment due the owner be paid by the LPA. Any cash contribution owed by the property owner is paid directly to the LPA. TxDOT is bound by contract to construct the pass structure.

When the purchase agreement is submitted for execution by the state, it must include the LPA's warrant, payable to the "Texas Department of Transportation," in the full amount of the estimated

pass cost, which is the amount determined in the appraisal process as the added cost to provide the pass. TxDOT will reimburse the LPA for TxDOT's part of this right of way cost at the time of reimbursement for the parcel. When the pass cost exceeds the parcel cost, the LPA may elect to require full contribution from the landowner. However, TxDOT reimbursement will be limited to the LPA's actual cash payment (if any) for the parcel, including the estimated pass cost in an amount not to exceed 90 percent of TxDOT's approved parcel value without a pass facility.

Submit an electronic copy of the special purchase agreement to TxDOT for approval before the closing of a transaction. Since the special purchase agreement provides that the contract will be null and void if owners cannot deliver satisfactory title, title evidence does not need to be furnished when the purchase agreement is submitted for approval.

Cost Charge

Costs for pass structures will be charged as outlined in [Cost Charge for Passes \(for State\)](#).

Chapter 10 — Acquisition of State-Owned Lands for Right of Way

Contents:

[Section 1 — Appraising State-Owned Property](#)

[Section 2 — Property Adjustment Work on State-Owned Lands](#)

[Section 3 — General Submission Requirements for Formal Negotiations](#)

[Section 4 — Texas Departments of State Health Services and of Aging and Disability Services
Lands](#)

[Section 5 — Parks and Wildlife Department Lands](#)

[Section 6 — University of Texas Lands](#)

[Section 7 — Permanent School Fund Lands](#)

[Section 8 — Veterans Land Board Land Under Contract to a Veteran](#)

[Section 9 — TxDOT Lands](#)

[Section 10 — LPA As Acquiring Agent](#)

Section 1 — Appraising State-Owned Property

Valuation

The procedure for appraising and determining values is outlined in TxDOT's *ROW Appraisal and Review Manual* for state-owned properties. If TxDOT and the other state agency involved cannot agree on value, the General Land Office will determine fair compensation per Transportation Code Section 203.058(e).

Section 2 — Property Adjustment Work on State-Owned Lands

Procedure

On occasion, a state agency desires that TxDOT perform right of way fencing, entrance road reconstruction, or other property adjustment work. TxDOT may perform such work as part of the right of way acquisition only if its need is directly attributable to the right of way taking. Additionally, the state-owned land cannot be under contract of sale. The cost of such adjustment plus the cash consideration, if any, cannot exceed the determined parcel value. When work of this nature is desired by a state agency, prepare and submit to the ROW Program Office a work description and an estimate of cost before closing the negotiation.

Such work may be performed by separate contract in accordance with usual procedures, or be included in the highway construction contract, which will require TxDOT's Design Division approval. In either case, the cost is charged to the right of way project.

Any adjustments desired for which need is not attributable to the right of way taking are handled according to customary practice under the statute that authorizes TxDOT to perform work for state agencies, provided they reimburse TxDOT for the cost involved. Such work is handled independent of the right of way transaction.

Section 3 — General Submission Requirements for Formal Negotiations

Procedure

Detailed procedures for negotiations vary, depending on the state agency involved. However, the following materials are usually required for action by the ROW Program Office. Variations from these requirements are as outlined in [Texas Departments of State Health Services and of Aging and Disability Services Lands](#) through [Veterans Land Board Land Under Contract to a Veteran](#), depending on the state agency involved.

A copy of the property description is needed. TxDOT's letter, as well as all items included in the submission, must clearly identify by parcel number all land being acquired in the negotiation. Also, furnish information regarding any access control rights to be acquired. This submission must be made as soon as possible during project development to allow adequate time for state agency action.

Upon receiving the parcel submission, ROW PD makes a formal request to the state agency, forwarding copies of the property descriptions, maps, and sketches. The state agency is kept informed of progress, and the proposed conveyance instrument, including all negotiation terms, is forwarded for state agency's review and approval before TxDOT acceptance. Upon state agency execution and TxDOT acceptance, the instrument is recorded in the respective county records and returned to the ROW Program Office for permanent filing.

Section 4 — Texas Departments of State Health Services and of Aging and Disability Services Lands

Procedure

When fencing and/or alteration of existing facilities are needed for highway construction, the ROW Program Office is to be advised as to any understanding between TxDOT and the local above-mentioned state agencies concerning adjustment work to be performed by TxDOT. Being in a position to advise the agencies of the local contact and any agreements will expedite the handling of TxDOT's request.

Section 5 — Parks and Wildlife Department Lands

Procedure

On occasion, the acquisition of Texas Parks and Wildlife Department (TPWD) land will have an impact on remaining property. TxDOT negotiators may not readily observe these impacts. Therefore, it is important that there is agreement with TPWD concerning alterations or adjustments of existing facilities. It is TPWD practice for a field representative to conduct a site inspection before the matter is ever presented to the TPWD's Commission for its consideration.

Section 6 — University of Texas Lands

Procedure

The University of Texas Board of Regents has requested that negotiations for right of way across Permanent University Fund land be conducted with the University Land Agent in Midland. When these lands are under the University's standard grazing lease, the University obtains the necessary lessee release. When business or residence site leases are involved, TxDOT negotiations with tenants and the University are handled separately. The University requests that any part of the right of way value attributed to water wells and casings be paid to the University. The University is responsible for making a fair settlement with the tenant on the cost of another well if relocated on University land. This requires that approved values be obtained for each right of way interest. Negotiations require close coordination and review by the University's Agent of approved values before any offers are made. The total approved value is paid to the University. However, two separate warrants for each parcel may be requested.

Where right of way is to be acquired from other University owned property, such as campus sites or gift trust fund land, negotiations are handled with the local University Business Manager. If there is doubt as to the proper contact for negotiation purposes, contact the ROW Program Office for assistance.

If the ROW Program Office handles the formal right of way request submission to the University, a copy of the property description must be submitted to the ROW Program Office at least sixty (60) to ninety (90) days before any project work is contemplated. This allows time for consideration, investigation, and action by the Board of Regents of the University.

Section 7 — Permanent School Fund Lands

Procedure

All lands needed from Permanent School Fund Land for use as state right of way will be paid for in cash. The General Land Office (GLO) administers this land, and usually all they will provide to another agency is an easement. For that reason, an approved value will be needed for each parcel in addition to property descriptions for submission to the GLO. Whenever it appears that Permanent School Fund Land is needed, ownership and title information may be obtained from the records of the GLO. In order to expedite the search of the GLO files, TxDOT should lay out the locations of its proposed right of way on county maps, which are published by the GLO. References are contained on their county maps, which correspond to their filing system. The GLO will furnish copies of these county maps direct to TxDOT upon request. These properties are usually owned in fee by the state, but the state may have only obtained an easement. Further, some of these properties may be under lease or subject to a contract for deed with third parties.

After the proposed location has been placed on the GLO county maps, a search of their files will be made to establish the status of title on each property. Their files will indicate any interest under contract of sale, current lessee, or pipeline easements; and in those cases where the land has been sold, to whom the patent was issued. This information, when considered with information gathered on the ground by TxDOT, will be a considerable aid in ascertaining the various rights in the property.

Unpatented parcels not under contract of sale are to be secured by deed executed by the Commissioner of the General Land Office. Title will consist of a certificate from the GLO to the effect that full title rests with the State of Texas and that the land is paid for and patentable. The GLO advises that many tracts of land are under contract of sale; however, many purchasers under these contracts owe 100% of the principal but have kept their rights in the property by merely paying the interest due on the principal.

Unpatented parcels, which are under contract of sale, are to be secured by deed and executed by the owner of contract of sale. On each of these parcels, the GLO will set up a file, and upon receipt of the proper amount of money pro rata per initial contract of sale price, will mark this parcel as paid in full. As a supplement to the title policy, a certificate will be obtained from the GLO to the effect that the original title rests with the State of Texas, and that the parcel is paid for and patentable.

Before execution of a deed by the purchaser-owner, TxDOT should notify the GLO or the ROW Program Office advising them of the fact that TxDOT is to purchase said land and request that they be furnished the amount of the principal to be paid in order that the title may be cleared. Upon receipt of this information, the usual procedure for securing warrants from the State Comptroller's Office can be followed. A separate warrant will be obtained to pay the GLO this money out of the owner's original consideration. In addition to this payment, the GLO must receive the required property descriptions.

As to state owned lands which are under grazing leases, the General Land Office can convey or transfer title as needed for highway purposes to TxDOT in accordance with *Transportation Code, Section 203.053(b)*. It is anticipated that TxDOT will acquire needed title from the GLO prior to closing with the lessee. The ROW Program Office will handle this phase with the GLO if requested to do so by the state agency (Department).

Under the provisions of *Natural Resources Code, Section 51.121* all improvements made by a lessee on such leased lands may be removed by the lessee upon the expiration of the lease or, at the discretion of the Commissioner of the General Land Office, may become the property of the state if, in the original lease, the Commissioner of the General Land Office and the lessee agree on adequate credit to be applied to the rental to be paid the state by the lessee, thereby allowing the lessee an agreed consideration. The standard lease form used by the GLO provides that the lessee shall have the right to remove fences within sixty (60) days after termination of the lease.

Section 8 — Veterans Land Board Land Under Contract to a Veteran

General

Fee title (less oil, gas, and sulfur rights) may be acquired from the Veterans Land Board (VLB) to land which is under contract of sale between the VLB and a veteran. In these cases, the VLB must convey its land interest to the veteran before the veteran can execute a deed to the state. So that the veteran may pay the VLB for its conveyance to him from monies received from TxDOT for his conveyance to TxDOT, arrangements exist between the VLB and TxDOT for the ROW Program Office to simultaneously coordinate the closing of the two separate transactions.

When right of way consists of land from two or more tracts purchased by the VLB, separate conveyance instruments and property descriptions are prepared for each tract. An additional \$75 fee is required for each VLB tract under 40 TAC Section 175.17.

Property descriptions in this category vary slightly from those prepared for normal right of way acquisition. The outside tie reference necessary for partial takings must be an established corner of the veteran's property that he holds under Contract of Sale. Also, if discrepancies exist between the previous property description and the one prepared for the new right of way, the new description must reference and include the earlier data as "called" course data. Further, the VLB requires that the new property description furnished by TxDOT and used for the fractional deed to the veteran include the **original signature and professional seal** of the surveyor, certifying acceptance of the description.

When TxDOT requires an easement, the VLB will not execute a fractional deed to the veteran. In this case, the veteran executes the easement subject to the VLB approval. To meet statutory requirements, the approved easement requires the signature of the Chairman of the VLB.

TxDOT Appraisal Procedure

Property required for highway purposes that is owned by the VLB and under contract of sale between the VLB and a veteran will be appraised by TxDOT in the same manner as any other parcel. Breakdown of interests between the veteran and the VLB is not required.

Negotiations and Procedure for Fee Title

The VLB's fractional conveyances are made for cash consideration based on the VLB's reappraisal of the veteran's whole property, as affected by the fractional conveyance. There are statutory fees the VLB charges the veteran for processing the fractional conveyance, and the veteran must pay these fees. However, they are reimbursable by TxDOT as incidental expenses. See [Incidental Expenses on Transfer of Real Property](#). All consideration paid to the VLB for land is credited to the

veteran's account with the VLB, but the fee charges are not. If the veteran has been in possession of the land three years or less, notify the ROW Program Office in the original submission for parcel processing.

There is no way to predetermine the conditions and charges the VLB will require before making its conveyance to the veteran. Therefore, after a settlement is reached with the veteran, it is necessary to enter into a [ROW-N-8 Tentative Memorandum of Agreement](#) for land owned by VLB, with the veteran.

ROW PD submits the Tentative Memorandum of Agreement to the ROW Program Office along with correspondence from the veteran addressed to the VLB, prepared by ROW PD, requesting the fractional conveyance, and requesting the VLB's notification of the conditions and charges for the fractional conveyance. See sample Letter from Veteran to VLB [Requesting Severance Approval](#). Copies of the tentative agreement and correspondence are prepared for the veteran, the VLB, and the ROW Program Office. The submission includes a copy of the property description.

After reviewing the submission, the ROW Program Office forwards the property description, veteran's correspondence, and agreement to the VLB. Upon receiving the veteran's request, the VLB makes an independent appraisal of the veteran's whole property to determine the consideration they will charge for the fractional deed. Then, the VLB notifies the veteran of the required consideration and fees he/she must pay for the conveyance. The VLB also states that a fractional deed will be issued upon receipt of payment. Copies of the VLB's letter are furnished to the ROW Program Office and ROW PD. The veteran should understand that regardless of the outcome of the transaction with TxDOT, the veteran incurs an obligation to pay the VLB the cost of an appraisal.

After ascertaining the consideration and fees required by the VLB, negotiate with the veteran and submit a payment request to the ROW Program Office. The submission and handling of a pay request supported by an attorney's certificate is different from that supported by a title policy commitment, as set out in subsections [Memorandum of Agreement \(MOA\)](#), and [Billing Assembly/ Submission to the ROW Division/Closing](#) following.

When the veteran executes the MOA, he is requested to sign another letter prepared by the district, requesting final severance. See sample Letter from Veteran to VLB: [Final Request for Severance](#). This letter requests the VLB to execute its fractional conveyance to the veteran in exchange for payment to the VLB per the MOA. It also authorizes the deed to be delivered to the title company if a title policy is to be obtained.

Right of Way Deed

The right of way deed is prepared on standard TxDOT deed forms. No reference is made to the VLB since they will have conveyed their right of way interest to the veteran before the TxDOT deed is executed.

Memorandum of Agreement (MOA)

Prepare the MOA in the usual manner and include the following clause:

“It is expressly understood that this agreement is subject to the herein described property being released to you by the VLB by Fractional Deed and/or the approval of your easement to the state signified by the Chairman of the VLB's signature on the easement instrument.”

The MOA should show that the state warrant will be made payable jointly to the grantor and title company. See example of form [ROW-N-6 Memorandum of Agreement \(for use when Title Insurance is Purchased\)](#).

Title Policy Commitment

In consideration of the letter from the VLB promising to issue a fractional deed, the title company will be requested to furnish their usual commitment, as set out in [Title Policy Commitments](#). The VLB's interest should be considered a lien against the property that is cleared by delivery of the VLB's deed to the title company.

Billing Assembly/Submission to the ROW Program Office/Closing

The billing assembly is the same as used for other state right of way acquisitions with the addition of the veteran's letter to the VLB. Show only the veteran's name under "Name of Payee" on *ROW-A-15 Payment Request*.

Upon receiving the warrant the title company makes the proper disbursements, including sending separate checks to the VLB for payment of the consideration and fees, as shown in the VLB's letter to the veteran. The VLB issues its fractional deed and easement, if any, to the title company for closing.

Negotiations for Right of Way Easements

Following are VLB requirements for easements.

- ◆ The veteran owner of land held under a contract of sale with the VLB may, with the VLB's approval, grant easements for highway purposes. Under procedures established by the VLB, the veteran is required to execute and acknowledge TxDOT's easement forms. If the property is the veteran's homestead, the spouse is to join in executing the easement. In preparing the easement, the veteran and the spouse are grantors. However, a special clause must be inserted in the form that more fully explains the condition of ownership. This clause is to read as follows:

"The land herein described is under Contract of Sale and Purchase to grantor herein who will receive a deed to said land from the Veterans Land Board when all the terms of said

Contract have been complied with. Grantors execute this instrument with the approval of the Veterans Land Board in accordance with the regulations of said Board, which approval is signified by the signature hereon of its Chairman."

- ◆ The recitation in the form relating to the consideration being paid must be explicit and in detail. A statement of purely nominal consideration is not to be made. All cash consideration paid for the easement must be remitted to the VLB, and such consideration is applied in its entirety to the principal of the veteran's account, with the exception that any cash consideration paid for damages, such as injury to crops, may be retained by the veteran. However, a recitation specifically setting out the amount of this payment and its purpose must be made in the easement form. This must be set out in detail following the parcel property description.
- ◆ If the veteran is to be paid any money for labor, materials, or services for moving fences or other structures, this fact must be recited in the form and the money must be deposited with the VLB. The VLB will hold this money in an expense account to be paid back to the veteran when the VLB is satisfied that the veteran has accomplished the necessary work and/or supplied the necessary materials.
- ◆ If the veteran is donating the easement, the consideration clause in the form must show the following statement: "This easement is being donated." In such instances the veteran should explain by letter the benefits to be received from the granting of the easement. Unless the veteran receives some benefit from the donated easement, the VLB will not approve the easement.
- ◆ The veteran must pay a fee to the VLB for servicing and filing each easement. Since all money paid for the easement must be paid to the VLB, the veteran must pay this fee out of funds other than those paid by TxDOT for the easement; however, this fee is reimbursable as an incidental expense for transfer of realty. See [General Payment Policies and Procedures for State and LPA](#).
- ◆ VLB approval is to be indicated on the easement by the signature of the Chairman of the VLB or Acting Chairman of the VLB, together with the seal of the VLB.
- ◆ The standard retention clause used in TxDOT easement forms must be amended to eliminate the provision that the state will acquire title to improvements due to the failure of the seller to remove them within a specified time. This is required by the VLB for easements but is not required if fee title is being conveyed. Exercise caution in permitting retention of improvements when only an easement is being acquired since failure to remove the improvement means that the state cannot remove the improvement, clear title is not obtained, and lengthy and costly litigation may be required to force removal. This is particularly important on LPA acquisition projects when only easements are acquired.

When only a drainage easement is acquired, only one submission is needed. It is not necessary to prepare the Tentative Memorandum of Agreement since it is known beforehand that the VLB requires application of the total consideration paid the veteran to his account, less payment for damages.

If a memorandum of agreement or purchase agreement is used, it must contain the following clause:

"It is expressly understood that this agreement is subject to the herein described drainage easement being approved by the Chairman of the Veterans Land Board as signified by his signature and seal on the drainage easement instrument. "

The agreement must show the total consideration being paid to the VLB, with exceptions for damages as previously noted. Since the VLB requires the whole consideration be paid to the veteran's account, it is necessary in instances where only a drainage easement is acquired that the veteran individually pay VLB any fees for servicing and filing such easement.

TxDOT prepares and requests the veteran to sign a letter to the VLB requesting easement approval. See sample Letter from Veteran to VLB [Requesting Severance Approval](#).

Billing Submission to the ROW Program Office

Submit the executed easement, as set out in the agreement, the *ROW-A-15 Payment Request*, title policy commitment, and the veteran's letter of request to the ROW Program Office.

The ROW Program Office forwards the easement, the agreement, the veteran's letter, and warrant to the VLB. The VLB notifies the veteran and the ROW Program Office that the easement will be approved and delivered upon receipt of the consideration and fee. The title company sends payment for the easement to the VLB in exchange for the approved and executed easement.

If an easement is to be acquired together with a fee parcel, modify the Tentative Memorandum of Agreement to include an easement description in the exhibit attachment, and show the agreed consideration in the space provided. The sample letter accompanies the form [ROW-N-8 Tentative Memorandum of Agreement](#) and is modified by deleting the parentheses bracketing the sentences pertaining to easements.

After the VLB has reviewed the proposed easement and the fee parcel, the veteran will be notified of any condition of the VLB's approval of the easement and the amount of the required fee. The Tentative MOA is completed under the preceding [Billing Submission to the ROW Program Office](#).

Eminent Domain Proceedings

If negotiations fail, the property is acquired through ED proceedings. Address the letter of final offer to the veteran and submit a copy to the ROW Program Office which will be forwarded to the VLB by Certified Mail Return Receipt Requested.

Section 9 — TxDOT Lands

Procedure

Occasionally in the widening or relocation of highways, portions of TxDOT property may be needed for highway right of way. In such cases, determine if the state's land rights permit use for highway right of way, or if the original deed to the state limits its use. If sufficient rights are vested in the state and the Support Services Division - Facilities Management has approved reduction in size of the site, then assign a parcel number to the taking, calculate the size of the parcel and remainder, and notify the ROW Program Office accordingly. Revise the original property description to show the taking and return it to the ROW Program Office. Obtain a copy of the original instrument whereby the property was conveyed to the state in order that this information may be placed on the project right of way map. After this is done, ROW notifies the Support Services Division - Facilities Management and Financial Management Divisions of the reduced size of the site so their records show the current site status.

Section 10 — LPA As Acquiring Agent

Procedure

If an LPA is the acquiring agent on a project, they are responsible for the acquisition of all needed right of way, including state owned property. An LPA may initiate and handle all negotiations for the acquisition of the needed right of way of state-owned land without TxDOT assistance. The LPA must do so under specific statutory authority granted to the LPA.

If an LPA desires TxDOT assistance in the acquisition of right of way from state owned lands, TxDOT can invoke the authority of *Transportation Code, Section 203.053(b)*, and TxDOT will negotiate directly with the state agency involved. If TxDOT handles negotiations, it will offer the full, approved value to the state agency involved.

Under this procedure, TxDOT acts for the LPA. Any proposed conveyance instrument is transmitted to the LPA by TxDOT for review and approval. Any consideration recited in the deed and jointly approved by the LPA and TxDOT is paid directly by the LPA and is eligible for applicable reimbursement by TxDOT.

TxDOT should submit a copy of the property description to the ROW Program Office. TxDOT should state in the transmittal that the LPA requests that TxDOT negotiates the acquisition of the property and the transmittal memo should also state the amount of consideration being offered.

Chapter 11 — ROW Acquisition of Federal Lands

Contents:

[Section 1 — Regulations Governing Acquisition of Federal Lands](#)

[Section 2 — Acquisition Procedures for Federal Lands \(for State\)](#)

[Section 3 — Acquisition Procedures for Federal Lands \(for LPA\)](#)

Section 1 — Regulations Governing Acquisition of Federal Lands

Overview

If federal property is managed or controlled by the Army, Air Force, Navy, or Veterans Administration, TxDOT negotiates directly with these agencies and representatives as follows:

- ◆ Army or Air Force: Installation commander and the appropriate U. S. Army Corps of Engineers district engineer.
- ◆ Navy: District public works officer of the naval district involved.
- ◆ Veterans Administration: Director, Veterans Administration, Washington, D. C.

If federal lands are donated for highway purposes, the Executive Director (or the ROW Division Director) may accept the donation. If the value of the donated federal land/easement exceeds \$500, the Commission must acknowledge the donation by Minute Order (see [Legal Requirements to Accept Donation \(for State\)](#).)

Section 2 — Acquisition Procedures for Federal Lands (for State)

Procedure

ROW PD should negotiate directly with any federal agency, unless the federal agency requests that the negotiations be handled through FHWA. The ROW Program Office makes all requests to FHWA. Federal right of way acquisition must be initiated at the earliest possible point in project development.

ROW PD request to FHWA includes the following information:

- ◆ The purpose for which the lands are to be used.
- ◆ The estate or interest in the land required by state statute.
- ◆ The Federal Project Number.
- ◆ The name of the federal agency with jurisdiction over the land and identity of the installation or activity in possession of the land.
- ◆ A map showing the survey of the land to be acquired.
- ◆ A property description of the land to be acquired.
- ◆ A statement of compliance with the *National Environmental Policy Act (42 U. S. C. 4332, et seq.)*, the *Historic Preservation Act (16 U. S. C. 470(f))*, and provisions for *Preservation of Parklands (49 U. S. C. 1653(f))*, if applicable.
- ◆ A survey of the land desired, properly located on the ground by an RPLS and, if applicable, control of access lines affecting the property with a legend. The area to be transferred must be outlined in red on the survey and the parcel numbers and acreage involved must be indicated.
- ◆ A property description of the desired land either in terms of public land surveys or by metes and bounds, including described acreage. Each description bears a parcel number and, if available, a deed reference setting forth the source of title to the federal agency exercising supervision and control of the lands and the acreage contained within the tract.

When negotiating through FHWA, deeds for conveyance of right of way owned by the federal agencies are prepared by ROW PD, unless FHWA, at its discretion, chooses to prepare them. Such deeds should contain any clauses required by FHWA and the agency involved. When the ROW Program Office in Austin prepares the deed, it is submitted to FHWA for review and execution. Following execution, ROW PD records the deed in the appropriate land record office and provides FHWA with the recorded instrument.

Functional Replacement of Real Property

When publicly-owned real property, including land and/or facilities, is to be acquired for a project receiving federal participation, in lieu of paying the fair market value for the real property, TxDOT may provide compensation by functionally replacing the publicly-owned real property with another facility that will provide equivalent utility.

A functional replacement arrangement will only be considered on a case-by-case basis and requires approval from the ROW Program Office and ROW Legal.

Federal-aid funds may participate in functional replacement costs only if the following conditions are met:

1. TxDOT elects to provide functional replacement.
2. The property in question is in public ownership and use;
3. The replacement facility will be in public ownership and will continue the public use function of the acquired facility;
4. TxDOT has informed, in writing, the entity owning the property of its right to an estimate of just compensation based on an appraisal of fair market value and of the option to choose either just compensation or functional replacement;
5. The FHWA concurs in TxDOT's determination that functional replacement is in the public interest; and
6. The real property is not owned by a utility or railroad.

Federal Land Transfers

Functional replacement of real property in federal ownership shall be in accordance with federal land transfer provisions of 23 CFR 710.509.

Federal-aid participation in the costs of functional replacement is limited to costs that are actually incurred in the replacement of the acquired land and/or facility and are:

1. Costs for facilities that do not represent increases in capacity or betterments, except for those necessary to replace utilities, to meet legal, regulatory, or similar requirements, or to meet reasonable prevailing standards; and
2. Costs for land to provide a site for the replacement facility.

Property Adjustment Work on Federal Lands (by State)

In acquiring federal property, the federal agency may request property adjustment work. Since the state cannot condemn land owned by a federal agency, acquisition by negotiation is mandatory. If negotiation is unsuccessful, the project must be altered to eliminate the federal right of way parcel.

TxDOT policy allows property adjustment work if it is necessary due to the highway improvement. There should be no conflict with applicable state law. If property adjustments are required, the parcel is appraised and the approved value is the basis for determining the limits of state cost participation.

When adjustments are necessary, there should be an agreement with the federal agency regarding adjustments to be performed. If further assistance is needed, contact the ROW Program Office.

To obtain federal participation, adjustment work must be included in the construction contract, which requires Design Division approval. Alternately, adjustment work may be accomplished by preparing a separate PS&E package. The PS&E needs to bear the signature of the authorized federal agency representative. The cost of such adjustment work is charged to the right of way project.

Forest Service Lands

All right of way transfers for federal-aid transportation projects involving Forest Service lands are accomplished using Highway Easement Deeds rather than Special Use Permits. This is in agreement with the FHWA and the USDA Forest Service. Procedures must be in agreement with memoranda issued by FHWA and furnished by the ROW Program Office.

If ROW PD cannot negotiate directly with the Forest Service, the land transfer request must be processed through FHWA if the highway is on the federal highway system or if the project is to be constructed using federal funds. Requirements for the application, maps, and property descriptions to be submitted to the ROW Program Office are included previously under the [Procedure](#) subsection.

Lands under Jurisdiction of Corps of Engineers

In acquiring right of way from the U. S. Army Corps of Engineers, ROW PD should negotiate directly with the Corps unless they request FHWA assistance. If ROW PD requests negotiation assistance from the ROW Program Office, ROW PD will submit a property description of the land.

Lands under Jurisdiction of Bureau of Land Management (BLM)

If ROW PD cannot negotiate directly with BLM, right of way needed from BLM is acquired through FHWA with the ROW Program Office initiating the conveyance request. In addition to submission requirements described under the [Procedure](#) subsection, a property description must be attached to the deed to be executed by FHWA.

Due to the extended time required to obtain title, the conveyance request must be made as soon as right of way requirements are known. If the BLM has a local office convenient to the ROW PD local office, then discuss highway design and acquisition with that office before making formal request for FHWA assistance.

Lands under Jurisdiction of U. S. Fish and Wildlife Service (USFWS)

Lands under jurisdiction of USFWS, such as National Wildlife Refuge property, may be eligible for a right of way easement to be granted (typically, for a 50-year term). Refer to 50 CFR, Part 29, Subpart B - Rights-of-Way/General Regulations. These regulations require that a letter application be sent to the Regional Director of the USFWS.

Section 3 — Acquisition Procedures for Federal Lands (for LPA)

General

At the request of an LPA, ROW PD will assist in the negotiation for needed right of way on federal lands. If ROW PD assistance is requested, procedures and submission requirements contained in [Regulations Governing Acquisition of Federal Lands](#) for federal lands are applicable.

The LPA should negotiate directly with federal agencies, unless the federal agency requests negotiations be handled through application with FHWA.

Property Adjustment Work on Federal Lands (by LPA)

If a federal agency requests property adjustments in lieu of cash payment for a right of way taking, the adjustments are performed by the LPA, except when TxDOT performs work as an integral part of the highway facility (e.g., stock pass).

Agreement must be reached with the federal agency for adjustments to be performed not to exceed the approved acquisition value. To assure state cost participation, the LPA must not make a commitment to the federal agency without prior TxDOT approval. The state can participate in adjustments required by the highway improvement.

If the LPA requests assistance in negotiations from ROW PD, a description of the adjustments is required. The LPA may elect to move buildings, fences, and other improvements from the right of way parcel and build fences along the right of way under authority granted in the contract for handling right of way parcels.

The state must approve any and all property adjustments thru a supplemental agreement between the LPA and TxDOT which must be executed prior to performing any work on the remainder property.

Chapter 12 — ROW Acquisition of County or City Property

Contents:

[Section 1 — For State and LPA](#)

[Section 2 — Acquisition of Property for LPA Exchange](#)

[Section 3 — Acquisition of Replacement Lands \(Federally funded projects\)](#)

Section 1 — For State and LPA

Authority

Legal authority for LPAs to convey land to TxDOT for highway purposes is contained in *Transportation Code, Section 203.055(b)*. Under these provisions, the LPA governing body is authorized to make right of way conveyances to the state of any property needed for, or in connection with, the construction or operation of the state highway system.

General

Lands that have been acquired by LPAs for highway, street, road, or alley purposes before TxDOT authorization for project right of way funding has been obtained, or that are in use for these purposes and needed by TxDOT for construction or operation of the state highway system, should be made available at no cost to the state.

For properties owned by the LPA that were acquired for purposes other than street, highway, or alley construction, such as building sites, excess land acquired along with previous right of way, etc., TxDOT obtains appraisals to determine value. TxDOT will reimburse the LPA for the contractual percentage of the approved value. The instrument conveying title to the State provides the consideration and is based on the LPA's percentage of contribution to the specific project. For example, assuming TxDOT's determined parcel value is \$10,000, and the LPA's contribution is 10%, then the LPA would receive 90% of the agreed value of the property. Title insurance is obtained for the total value, which is \$10,000.

For parcels to be acquired from an LPA, a note is required on the right of way map stating that the parcel was not acquired by the LPA for public road purposes.

Section 2 — Acquisition of Property for LPA Exchange

Authority

TxDOT has the authority to acquire property for the purpose of conveying it to an LPA in exchange for other right of way owned by the LPA that is required for a highway purpose. state statutory authority is included in *Transportation Code, Section 203. 052(b)(11)*. This statute allows TxDOT to acquire property to “accomplish any purpose related to the location, construction, improvement, maintenance, beautification, preservation, or operation of a state highway.”

Section 3 — Acquisition of Replacement Lands (Federally funded projects)

For State and LPA

FHWA may require the purchase, outside of the right of way, of replacement land for certain types of property acquired for the right of way. The extent of replacement land purchased depends on the specific mitigation commitments made in the project's environmental document. *23 CFR 771.135* may require replacement land for a right of way acquisition from a significant publicly owned park, recreation area, wildlife and waterfowl refuge, or any significant historic site. *23 CFR 777.9* may require replacement land for privately owned wetlands acquired for right of way. In addition to the above, refer to *Transportation Code, Sections 201.617* and *203.051*.

Chapter 13 — Instruments of Conveyance for On-System Projects

Contents:

[Section 1 — General Requirements for Proper Conveyance](#)

[Section 2 — Standard Conveyance Forms](#)

Section 1 — General Requirements for Proper Conveyance

Requirements

Deeds, easements, and other instruments of conveyance will be prepared on standard forms by TxDOT representatives in accordance with the provisions of [Standard Conveyance Forms](#). All instruments must show the name of grantors or other parties the same as on the title report, and the cash consideration recited in the deed must be the amount of money actually paid the owner. Signatures and acknowledgments should be in exact agreement with the names of grantors or other parties appearing in the caption or the body of the instrument. The signatures and acknowledgments of **both** married parties named as grantors are required, unless other requirements are made by the title company.

For any conveyance to or from an individual person or persons, the following disclosure notice (in bold text below) must be added in 12-point boldfaced type or 12-point uppercase letters on the first page of the conveyance document, per Property Code, Section 11.008:

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

Exceptions to the laws regarding conveyance are numerous; therefore, when abnormal situations arise, consult the ROW Program Office.

Section 2 — Standard Conveyance Forms

Procedure

There is one deed form ([ROW-N-14 Deed](#)), designed to be used in all acquisitions, both whole and partial acquisitions, as well as both controlled and non-controlled access highway facilities. Due to access rights being an important and valuable property interest, it is necessary that every deed contain a reference to the extent access is allowed or denied (even for non-controlled access highway facilities). Current law (Transportation Code [Section 203.003](#) (a)) provides that access may be controlled at specific locations on any designated state highway (even though the specific segment of the highway facility may not itself be designated as a controlled access facility). As many existing non-controlled access highways on the state highway system are improved, entrance and exit ramps may be designed into such older highways, and some access control may be required in the vicinity of such ramps.

Surveys and property descriptions (including plat maps) being prepared for all state highway projects must contain, within the legal descriptions and at the end of the legal description, a reference to whether access is denied or permitted, and where access is denied. A control of access line (coincident with the right of way boundary line) shall be shown on the parcel plat. Refer to example plats [5A](#) and [9](#). The deed form references that access is governed by the provisions set out in Exhibit “A” (the parcel’s property description that is attached to the deed). Therefore, no separate reference or provision about access is contained within the body of the deed. The property description exhibit must be reviewed carefully to determine if the access provision, and a statement about access, has been included by the surveyor.

Note: For those situations where older property descriptions are being utilized which do not contain access provisions, or the surveyor has failed to include access provisions (including situations relating to a non-controlled access highway where there is no denial of access associated with a specific parcel), it may be necessary to prepare a generic access clause indicating that access is permitted, which may either be placed below the surveyor’s seal at the bottom of the property description if there is room (as part of Exhibit “A”), or if there is no room and to avoid making any type of alteration to a surveyor’s property description’s final page, the following generic access clause may be placed on a separate page (marked Exhibit “B”) to be placed behind the Exhibit “A” property description and parcel plat:

“ACCESS CLAUSE

Access will be permitted to the highway facility from the remainder of the property lying
XXXXX[insert direction, i.e. “north”] of XXXXX [insert highway designation, i.e. U.S.
Highway 277].”

In this case, be sure and change the “Exhibit ‘A’” that appears just prior to and just after the “SAVE AND EXCEPT” on page 2 of the deed form, to “Exhibit ‘B’”.

Where access is in fact being either fully or partially denied, and if the property description being utilized does not contain any access provisions and/or an access clause immediately following the property description, the ROW Program Office should be contacted for assistance, if necessary, in drafting an appropriate clause that describes where the access is permitted and where it is denied. Depending upon how this is described, this may require a surveyor to prepare such a clause, or possibly that the property description be amended by the original surveyor who prepared the survey.

Standard conveyance and related forms are identified in the following table:

Standard Conveyance Forms

For State	For LPA	Form Number	Title
X	X	ROW-N-13	Release and Relinquishment of Access Rights, Controlled Access Highway Facility (No land taking, access to and from abutting property waived, released, and relinquished)
X	X	ROW-N-14	Deed (This form is to be used for all state system highways, both controlled and non-controlled access, for donations, and for Special Warranty Deeds.)
-	X	ROW-N-15	Right of Way Easement (for right of way)
X	X	ROW-N-16	Right of Way Lien Release (All lien release situations)
X	X	ROW-N-17	Release of Easement (Use to acquire utility or any other existing easement interest)
X	X	ROW-N-21	Release of Mineral Surface Rights (All existing surface rights released)
X	X	ROW-N-30	Quitclaim Deed (For release of advertising sign interest(s) and other interests where quitclaim is needed to clear title)
X	X	ROW-N-31	Drainage Easement for Highway Purposes
X	X	ROW-N-83	Temporary Easement (For detour and other construction easement purposes)
-	X	ROW-N-85	Subordination of Mineral Lease (Non-Controlled Access Highway Facility)
X	-	ROW-N-88	Subordination of Mineral Lease (Joint use)
X	-	ROW-N-147	For information on use of Correction Deed, see Use of Form ROW-N-147 . (Partial takings, access control to remainder fully stated in all cases on either new or old location).
X	X	ROW-N-271	Easement for Purpose of Producing and Hauling Materials (Borrow and base material pits)

NOTES

These standard forms have been prepared for conveyance of various property interests to the state. Use all pages of standard forms. Pages from another form should not be combined with the form being used. Each form is separate and stands on its own. Appropriate special clauses, referred to elsewhere in this manual, may be added to the forms as necessary.

Standard state forms are not to be altered for any reason without the written consent of the ROW Program Office. All right of way deeds and forms containing modifications or clauses not contained in this manual must be approved by the ROW Program Office in advance.

If ROW PD assists the owner in performing curative work where interests are conveyed to the owner and not the state, the standard forms may be used as a reference but must be modified accordingly. If the modification represents a substantive change, ROW Program Office pre-approval of the modification must be obtained.

Standard clauses for insertion in the right of way instruments to cover special conditions pertinent to a particular right of way transaction are outlined in [Approved Special Clauses for Use in Conveyance Instruments](#) For Conveyance Instruments. It is the state's responsibility to furnish LPAs with accurate property descriptions and proper forms for deeds, easements, and other instruments necessary for acquisition of each parcel. It is the LPA's responsibility to deliver acceptable instruments, which convey valid title to the state.

In closing the transaction, the conveyance instrument should recite the actual cash consideration paid to the property owner. Any breakdown of the total consideration paid, which separates compensation for property acquired from compensation for damages to the owner's remaining property, should not be documented in the deed. However, this breakdown may be documented in a separate agreement or contract of sale, as outlined in [Information for Income Tax Purposes for Property Owners \(for State\)](#) and [Information for Income Tax Purposes for Property Owners \(for LPA\)](#).

The ROW Program Office must approve, in advance, any revision, deletion, or addition to standard state forms necessary for special conditions. Modified instruments, even though acceptable in personal transactions, may not meet state title requirements. If all instrument revisions originate with or receive prior approval from the ROW Program Office, TxDOT will have determined the acceptability of each instrument before its execution and recording, thereby avoiding difficulties at the reimbursement stage. If there is **any** question concerning the acceptability of a proposed instrument, the instrument must be submitted through TxDOT to the ROW Program Office for review **before** execution and recordation of the instrument. Any instrument submitted to the ROW Program Office and found to be in error will be returned for correction before reimbursement can be made for the cost of parcel acquisition. When submitting any modified instrument **not** previously approved by the ROW Program Office, the transmittal must detail the basis and need for such modification to expedite possible approval as a policy exception.

Special Clause for Reserving Minerals

When an owner is willing to convey to the state but refuses to sign the prescribed deed form conveying all minerals except oil, gas, and sulfur, it will be permissible to substitute the following clause in the deed, which provides for retention of all minerals not necessary for highway construction and maintenance. The use of this special mineral clause is to be limited because its use is essentially a concession to avoid condemnation. No further concession is to be made without prior approval of the ROW Program Office.

“The Grantors reserve all of the oil, gas, sulphur and other minerals in and under said land but waive any and all rights of ingress and egress to the surface thereof for the purpose of exploring, developing, mining or drilling for the same; provided, however, that operations for exploration or recovery of any such minerals shall be permissible so long as all surface operations in connection therewith are located at a point outside the above described property and upon the condition that none of such operations shall be conducted so near the surface of said land as to interfere with the intended use thereof or in any way interfere with, jeopardize, or endanger the facilities of the Texas Department of Transportation or create a hazard to the public users thereof; it being intended, however, that nothing in this reservation shall affect the title and the rights of the state to take and use without additional compensation any water, stone, earth, gravel, caliche, iron ore, gravel or any other road building materials upon, in and under said land for the construction and maintenance of the state highway system of Texas.”

Use of Correction Deeds

A correction deed may be used for correcting errors in negotiated conveyances previously filed of record, when its use has been determined legally appropriate under Texas Property Code Sections 5.027-5.030. ROW legal staff should be consulted on the use and drafting of such deeds.

The following factors should be considered in determination of appropriate use:

- ◆ The “materiality” of the proposed change. Mistakes of a “nonmaterial” or “clerical” nature, which are further described in Property Code Section 5.028, are more easily addressed by a correction deed made by any individual with personal knowledge of the facts relevant to the correction of the recorded original instrument of conveyance. Notice of the nonmaterial correction deed must be provided to the original parties, or their heirs, successors, or assigns, if applicable.
- ◆ “Material changes”, as described in Property Code Section 5.029, require that both parties to the original transaction, or the parties' heirs, successors, or assigns, as applicable, execute the corrective instrument.

In all instances, obtain prior approval of the ROW Program Office before execution of the correction deed. Following execution, the title company that insured the state's parcel must be afforded the opportunity to examine the deed and to amend its policy. The correction deed is then filed for

record and forwarded to the ROW Program Office for permanent filing. Any title insurance policy changes are submitted with the completed instrument.

Special Warranty Deeds

A full warranty deed is preferable. However, additional text may be added to form [ROW-N-14 Deed](#) when the fee owner refuses to sign a full warranty deed, provided that the title company will guarantee title without an exception due to use of this added language. The additional emphasized text below shall be added at the end of the following paragraph, found on the last page of *ROW-N-14 Deed*:

"TO HAVE AND TO HOLD the premises herein described and herein conveyed together with all and singular the rights and appurtenances thereto in any wise belonging unto the State of Texas and its assigns forever; and Grantors do hereby bind ourselves, our heirs, executors, administrators, successors and assigns to Warrant and Forever Defend all and singular the said premises herein conveyed unto the State of Texas and its assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, **by, through, or under Grantors, but not otherwise."**

Possession and Use Agreement

Possession and Use Agreements (PUAs) with an incentive shall be offered on every parcel, on every project, on a statewide basis.

The forms [ROW-N-PUAIC Possession and Use Agreement with Additional Payment of Independent Consideration](#) (or selected pre-approved or pre-approvable alternate provisions from form [ROW-N-PUAALT Possession and Use Agreement for Transportation Purposes \(alternative\)](#)) can reduce delays in the negotiation process, thus allowing TxDOT to provide transportation improvements in a timely manner. This procedure allows partial payment for the parcel once the PUA is signed. The PUA acquires the use of property for transportation purposes prior to completion of a full acquisition or eminent domain process. The PUA is a voluntary and irrevocable agreement transferring the right to use the property to the state before a fee conveyance is made. Use of the PUA allows removal of the parcel from the project letting critical path by providing a conveyance document with monetary consideration that is not a deed.

The “incentive” payment associated with execution of the [ROW-N-PUAIC Possession and Use Agreement with Additional Payment of Independent Consideration](#) is an independent market rental consideration paid to the property owner for the value of the advanced timing of possession. The market rental amount will be calculated at 10% of the initial approved value of a parcel with a minimum amount of \$3,000 and a maximum amount of \$25,000. The incentive percentage was determined based on industry standards for the recommended amount of a typical yearly market rental rate as associated to the total value of a piece of property. This is money the landowner will never have to pay back to TxDOT regardless of the outcome of the litigation.

Along with the market rental payment, the property owner can be paid any portion of the approved appraised value (0-100%) of the parcel as appropriately based on the circumstances of each individual parcel. In determining the amount of the approved value to pay to a landowner, consider any title issues on a parcel and the risk TxDOT may subject itself to double-compensation or interrupted possession based on outstanding title issues.

PUAs are to be recorded in county real property records. Action to complete the acquisition by either negotiated deed or ED must continue to be pursued within the timeline stated in the agreement.

Memorandum of Agreement (MOA)

Use of an MOA is optional when the transfer of property is simple, and specific notations, arrangements, and agreements are unnecessary to ensure property conveyance. When the transfer is not simple, or special agreements are necessary, an MOA should be used for added special provisions.

A written agreement with the property owner, executed at the conclusion of property acquisition negotiation, is preferred for documentation of all transaction terms. Execution of a written agreement documents the process of payment and transaction closing, and protects TxDOT or the LPA against false claims of non-performance.

When title insurance is obtained, agreements provide that the state's payment warrant for the consideration shown in the deed will be made out jointly to the owners of the property and to the state's closing agent, and that the warrant will be delivered to the state's closing agent. The state recognizes only the underwriter as closing agent. Where the underwriter, by its own election, functions through an authorized representative acting as an agent, the state recognizes this agent only with respect to the underwriter. Any action by this agent must be in the capacity as agent for the underwriter.

When title insurance is not obtained, the property owner must state in the agreement that he accepts disbursement of a portion of the consideration shown in the deed for payment of any outstanding encumbrances. This statement provides that in consideration of the state independently discharging obligations of the encumbrances, as provided for in the releases; for making payment of any required taxes; and for paying the balance to the owner, the obligation shown in the deed and pertinent agreement is completely fulfilled.

In **rare** instances, the property owner may be willing to negotiate and execute a conveyance instrument but be unwilling to sign an agreement. When this occurs, write a letter to the owner setting forth the complete content normally embodied in the MOA, and advising him that by signing the state warrant he accepts all details of the transaction. Two copies of this letter should be submitted with the payment submission.

Four Memorandums of Agreement provide the normal method of outlining all terms of a right of way transaction. These forms are used except where any of the Purchase Agreements, form [ROW-N-101 Purchase Agreement](#), form [ROW-N-102 Purchase Agreement \(for use where Attorney's Certificate is used In Lieu of Title Insurance\)](#); and form [ROW-N-103 Purchase Agreement \(Subordination of Lessee's Surface Rights\)](#) are used, and are designed for specific needs as follows:

- ◆ Form [ROW-N-1 Memorandum of Agreement \(Standard\)](#) is the most basic agreement.
- ◆ Form [ROW-N-2 Memorandum of Agreement \(Attorney's Certificate\)](#) is for use when an Attorney's Certificate is used for title purposes.
- ◆ Form [ROW-N-3 Memorandum of Agreement with Owner \(Owner Disclaims Interest in Lessee-Owned Improvements\)](#) is for use when an owner disclaims interest in improvements owned by a lessee.
- ◆ Form [ROW-N-4 Memorandum of Agreement with Lessee \(Owner Disclaims Interest in Lessee-Owned Improvements\)](#) is for use with a lessee when an owner disclaims interest in improvements owned by the lessee.

Chapter 14 — Special Clauses for Conveyance Instruments

Contents:

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Section 1 — Overview

Policy (for State and LPA)

Special clauses that do not have prior approval are **not** to be included in deeds or other conveyance instruments. It is desired that the state secure clear title to the interest covered by the conveyance instrument, and special clauses often cloud title and cause doubt in the future chain of title. If special conditions occur, these are to be covered in the Memorandum of Agreement (MOA) or Possession and Use Agreement (PUA). If a property owner insists on the inclusion of deed clauses not covered by approved procedure, these are to be submitted to a ROW Attorney for consideration as a policy exception before instrument execution.

Special care must be exercised to ensure that the state and the property owner are protected with appropriate deed clauses when needed. Every improvement that is part of the realty must be conveyed in the deed, unless excepted by specific reference. When improvements lying within the right of way acquisition are retained by the owner, the retention clause printed in the conveyance instrument must list each retained improvement and its removal date. This includes advertising signs that are to be retained in the deed when owned by the fee owner, or in the quit claim deed when owned by the lessee. See [Control of Access Rights \(for State and LPA\)](#) for information regarding control of access clauses.

Section 2 — Approved Special Clauses for Use in Conveyance Instruments

Use of Clauses (for State and LPA)

In a right of way transaction, conditions may be encountered that are normal under certain circumstances but not applicable in all cases. Standard clauses established to cover these circumstances are included in either the conveyance instrument or the agreement, or in both, in accordance with the following discussion:

Retention of Improvements

Most standard conveyance forms include an improvement retention clause. Excluding bisected improvements, each improvement retained by the owner is listed in this clause. If no improvement is retained, the clause is stricken or the word "none" (or the words "not applicable") is inserted to confirm that there is no oversight in deed preparation. If a conveyance form doesn't contain a retention clause and improvements are retained, then a retention clause is to be inserted. The retention clause is repeated in the Memorandum of Agreement (MOA). When there is a combination of retained improvements and retained bisected improvements, the appropriate bisection clauses are added to the instrument. Bisected improvements are not listed in the form's printed segment that shows the normal retention clause for retained improvements.

Appointment of Single Payee or Attorney-in-Fact

To eliminate the necessity of circulating the warrant for personal endorsement by each grantor when the owners are widely scattered or distantly located, when executing the MOA, said owners may name and designate one owner as the payee and authorize the state to issue its warrant payable to such owner. In this instance, *ROW-A-15 Payment Request* is prepared accordingly, and the following clause is inserted in the MOA:

“We, the undersigned owners of the premises herein described, hereby appoint (name) as co-owner of said land to receive all of the consideration hereinabove set forth, and the state is hereby authorized to make its warrant payable to said (name) only, which shall constitute full, total, and complete payment for all interest owned and to be conveyed by the undersigned in compliance with the terms of this instrument.”

If the foregoing procedure is not acceptable to the owners, they may eliminate the necessity of circulating the warrant by naming and appointing an attorney-in-fact (who cannot be a TxDOT employee) to receive the warrant, endorse the same for them, cash the warrant, and disburse the proceeds. To accomplish this, it will be necessary to insert the following clause in the MOA:

“We, the undersigned owners of the premises herein described, hereby appoint and designate (name) as our Attorney-in-Fact for the purpose of and with full power of attorney to

receive and accept the state's warrant in the sum of the consideration herein above set forth, payable to us as the owners and grantors, and as our agent the said (name) is hereby authorized and empowered to endorse and cash said warrant and make disbursement of said consideration to each owner in accordance with their interest conveyed. Delivery of said warrant by the state to the above named Attorney-in-Fact shall constitute full performance by the state in said transaction, and the state shall not be held accountable or in any manner responsible for the acts of said agent thereafter.”

Bisected Improvements

When a bisected improvement is classified as “Category I” and is to be acquired in whole by the state, or retained in whole by the owner, clauses for the following situations are used:

If the state acquires title to the whole improvement, the following clause is inserted in the MOA **and** deed:

“And for the same consideration described above, and upon the same conditions, Grantors do hereby bargain, sell, and convey unto the State of Texas that portion of the following improvement(s) located on the remaining property out of which the above-described premises were originally a portion, to wit:(Describe bisected improvement(s) such as (1) two-story, brick residence, (2) two-car frame garage, (3) 20' by 30' frame tool shed, etc.)”

Immediately following such clause in the **agreement**, the following clause is inserted:

"Grantors understand and agree that it will be necessary for the state to enter upon their remaining property out of which the above-described property was conveyed for the purpose of removing that portion of the above-described improvement(s) which is located on such Grantors' remaining property. Grantors hereby authorize the state, its agents or assigns, to enter upon such remaining property for the purpose of removing said improvement(s) and expressly waive all damages or claims that may result to the remaining property of the Grantors as a result of such entry and removal of said improvement(s). "

If the owner retains the whole improvement, the following clauses are inserted in the MOA **and** deed:

“It is understood that Grantors are retaining title to the following listed bisected improvement(s): (Describe bisected improvement(s) such as (1) three bedroom brick residence, (2) 50' by 100' barn, etc.)

Such improvement(s) shall be removed from the premises hereby conveyed by the Grantors on or before the XXth day of XXXX , 2002, subject, however, to such extensions of time as may be granted by the state in writing, but in the event Grantors fail for any reason to remove said improvement(s) within the time herein provided for, title to said improvement(s) including the portion or portions thereof located on the Grantors' remaining

property, shall immediately vest in the State of Texas, all for the same consideration recited.

It is further understood and agreed that in the event title to said improvement(s) vests in the State of Texas under the provisions of the paragraph next above, Grantors authorize the state, its agents or assigns, to enter upon their remaining property for the purpose of removing said bisected improvement(s), and Grantors expressly waive all damages or claims that may result to the remaining property of the Grantors as a result of such entry and removal of said improvement(s).”

When determined that the improvement is classified as "Category II" and is not acquired in whole by the state, the following clauses are used:

If the owner retains that portion of the improvement lying within the taking, the following clause is inserted in the deed **and** MOA:

“It is understood that Grantors are retaining title to the following listed bisected improvement(s):(Describe bisected improvement(s) such as (1) three bedroom brick residence, (2) 50' x 100' barn, etc.)

Such improvements shall be removed from the premises hereby conveyed by Grantors at their own expense on or before the XXth day of XXXX , 2002, subject, however, to such extensions of time as may be granted by the state in writing, but in the event Grantors fail for any reason to remove said improvement(s) within the time herein provided for, title to that portion of said improvement(s) located upon the premises hereby conveyed shall immediately vest in the State of Texas, all for the same consideration herein above recited.”

Immediately following such clause, the following clause will be added in the MOA but **not** the deed:

“Grantors specifically understand and agree that in the event title to the aforesaid portion of the bisected improvement(s) passes to the state, the state will cut said bisected improvements at the line of bisection and remove said portion of the bisected improvement(s) from the above-described property, and Grantors hereby authorize the state, its agents or assigns, to make such cut(s) and additionally, Grantors hereby authorize the state, its agents or assigns, to enter upon the Grantor’s remaining property (out of which the above-described property was conveyed), for the purpose of making such cuts and removing said improvement(s) and Grantors expressly waive all damages or claims that may result to the remaining property of the Grantors or damages that may result to the remainder of said improvement(s) by reason of said entry, cutting, and removal of said improvement(s).”

If the state acquires title to the part of the improvement located within the right of way limits and the improvement will be cut, no reference to the improvement will be made in the deed, but the following clause will be used **in the MOA**:

"It is further understood and agreed that Grantors will cut at the line of bisection the bisected improvement(s) located on the above-described property on or before XXth day of XXXX , 2002.

It is further understood and agreed that in the event Grantors fail to cut the aforesaid bisected improvement(s) in the time allowed, the state will cut said bisected improvements at the line of bisection and remove said portion of the bisected improvement(s) from the above-described property, and Grantors hereby authorize the state, its agents or assigns, to make such cut(s) and additionally, Grantors hereby authorize the state, its agents or assigns, to enter upon the Grantor's remaining property (out of which the above-described property was conveyed), for the purpose of making such cuts and removing said improvement(s) and Grantors expressly waive all damages or claims that may result to the remaining property of the Grantors or damages that may result to the remainder of said improvement(s) by reason of said entry, cutting, and removal of said improvement(s)."

The state may acquire title to the entire improvement at the owner's request, when the owner contends the improvement remainder is of no use to him. However, payment cannot exceed the value of the part of the improvement taken, plus damage to the remainder. The state's taking of the whole improvement can benefit both the owner and the state in that the improvement remainder is cleared from the property owner's land at no cost to the owner.

When this procedure is followed, the property owner should permit the state sufficient time to clear improvements from the remaining land. The MOA must include the two clauses in preceding paragraph for Category I improvements and the deed must include the first clause.

If settlement cannot be reached by negotiation, and eminent domain proceedings become necessary, furnish the Office of Attorney General (OAG) with TxDOT's findings as to whether the bisected improvements fall into Category I or II, so that appropriate special pleadings may be made.

Stock Pass and other Pass Privileges

All special clauses for this subject are set forth in [Passes, Stock Passes, and Cattle Guards](#).

Special Mineral Clause

If a property owner will not sign a deed containing the standard mineral reservation, it is permissible for the property owner to retain all minerals as a concession to avoid condemnation. No further concession can be made without prior approval of a ROW Attorney. Owners who insist on their own wording should be reminded that, if the state condemns, only oil, gas, and sulfur are reserved from the conveyance. When use of a special mineral clause is necessary, the standard mineral reservation clause is to be stricken from the deed and the following language inserted:

"Grantors reserve all of the oil, gas, sulphur, and other minerals in and under said land but waive any and all rights of ingress and egress to the surface thereof for the purpose of exploring, developing, mining or drilling for the same; provided, however, that operations for exploration or recovery of any such minerals shall be permissible so long as all surface operations in connection therewith are located at a point outside the above described property and upon the condition that none of such operations shall be conducted so near the surface of said land as to interfere with the intended use thereof or in any way interfere with, jeopardize, or endanger the facilities of the Texas Department of Transportation or create a hazard to the public users thereof; it being intended, however, that nothing in this reservation shall affect the title and the rights of the state to take and use without additional compensation any water, stone, earth, gravel, caliche, iron ore gravel or any other road building materials upon, in, and under said land for the construction and maintenance of the state highway system of Texas."

Retention of Private Right

When a private right is retained, such as the owner of a private utility line retaining ownership to permit continued operation in the new or improved highway facility, the following clauses, setting forth the rights retained, must be included in the conveyance instrument, and in the MOA:

"Save and Except, however, Grantors reserve unto themselves, their heirs and assigns, title to and the right to operate and maintain XXXXXXXXXXXX subject to such regulations as are determined by the state to be necessary in the interest of public safety and in compliance with approved engineering principles and practice.

Grantors hereby agree that access for servicing their facilities will be limited to access via (1) frontage roads where provided, (2) nearby or adjacent public roads and streets, or (3) trails along or near the highway right of way lines, connecting only to an intersecting road; from any one or all of which entry may be made to the outer portion of the highway right of way for normal service and maintenance operations. The Grantors' rights of access to the through-traffic roadways and ramps shall be subject to the same rules and regulations as apply to the general public, except however, if an emergency situation occurs, and usual means of access for normal service operations will not permit the immediate action required by the Grantors in making emergency repairs as required for the safety and welfare of the public, the Grantors shall have a temporary right of access to and from the through-traffic roadways and ramps as necessary to accomplish the required emergency repairs."

If the line is owned by a party other than the fee owner, then a quitclaim deed, containing the preceding clauses, must be used. The quitclaim deed contains property descriptions identical to those used in the deed conveying the parcel.

Conflict of Title and Encroaching Improvements (for State)

When field surveys and the title search establish conflict in title, grantors should include in the parcel conveyance a quitclaim covering the specific conflict area. This is accomplished by a clause, similar to the following, included in the deed after the general warranty clause and preceding the signature block. Land interests created by encroaching improvements may also be acquired by using such a clause:

"And for the same consideration described above, and upon the same conditions, Grantors do hereby bargain, sell, and quitclaim unto the State of Texas and its successors and assigns forever, all of Grantors' rights, title, and interest in and to XXXXX in the City of XXXXXXXX, Texas, together with all and singular the rights and appurtenances thereto in anywise belonging."

If the property owner is to retain ownership of an encroaching improvement, then the improvement is to be listed in the improvement clause in the deed **and** in the MOA.

Occasionally, improvements that encroach on an abutting property belonging to another owner are encountered. Such an encroachment may occur for a number of reasons. Common examples include errors made in building improvements and unknown boundary lines. By personal contact with the appropriate parties at the mapping or appraisal stage, it is possible to establish ownership of the encroaching improvement. Such ownership should be agreed upon by the involved property owners. This permits correct appraisals and appropriate payments to be made. It is necessary to extinguish any and all interests abutting property owners may have to the improvement that encroaches on their land, and to the land involved in the state's acquisition.

Where improvements encroach upon existing public right of way, a conveyance or quitclaim will be necessary only when the improvement owner has an interest in the land used for right of way. Adverse possession and prescriptive rights do not run against the state. Encroachments located within the proposed right of way are best handled by simultaneous closings of the parcels involved. However, if the parcels are not closed simultaneously, the right of way deed for the parcel to be purchased must be supported by a quitclaim deed from the adjoining owner quitclaiming any interest he may have acquired, due to the encroachment, in the land deeded to the state.

When the misplaced improvement is wholly located on the land of another owner and inside the proposed right of way line, it is necessary for the improvement owner to quitclaim any interest he has in the adjoining owner's land, on which the improvement is wholly located. If, during negotiation for his property, it is determined that the owner of the misplaced improvement is to be paid by the state for the improvement, and there is not a simultaneous closing, the owner of the adjoining land on which the misplaced improvement is either partially or wholly located, should disclaim any improvement interest. This may be done by execution of an instrument granting right of entry to his land by prospective bidders, or for improvement removal.

Another difficulty that may be encountered is an encroachment that is partially outside the right of way line. This will require an instrument granting right of entry, and including a disclaimer from the adjoining owner if title to the improvement is to pass to the state.

If an improvement is jointly owned, the owners must either retain the improvement or concurrently convey full title to the state. The state will not acquire a partial interest anticipating future acquisition of the remaining improvement interest.

If a problem involving encroachments is encountered which is not covered in the foregoing paragraphs, submit the problem in detail, along with necessary maps or sketches, to the ROW Attorney in the designated area for review and guidance.

Conflict of Title and Encroaching Improvements (for LPA)

The procedures for acquiring parcels involving conflicts of title and encroaching improvements will be in accordance with this section, except when the alternative of obtaining quitclaim deeds in lieu of simultaneous closings is applicable. Reimbursement to LPAs for these parcels may be made when quitclaims are not obtained, provided acceptable title to these parcels is furnished the state.

Temporary Right of Occupancy

In the acquisition of right of way, the owner or tenant in possession is allowed a temporary period of occupancy if necessary for relocation purposes. Such temporary occupancy is considered a proper approach in the treatment of displaced families and businesses. Under the state's right of way acquisition program, by which property is acquired well in advance of construction needs, a short period of occupancy will not interfere with the project schedule. However, it is TxDOT's responsibility to safeguard against prolonged occupancy periods that cannot be justified by relocation needs.

Owners and tenants may be allowed a temporary right of occupancy regardless of whether the property is improved or unimproved, and if improved, regardless of whether improvements are retained by the owner or acquired by the state. When a tenant will occupy both state-owned property and retained improvements, tenant's use of retained improvements is a matter between the tenant and the owner of the improvements. The agreement [ROW-N-19 Occupancy Agreement](#) with the state is applicable only to the state-owned portion of the premises. In condemnation cases, temporary occupancy should be held to an absolute minimum since condemnation is not recommended until early possession of the property is needed, and would defeat the advantages of this factor in negotiations. The occupancy agreement is not needed when complying with [Notices Required](#) (in TxDOT's *ROW Relocation Assistance Manual*). Temporary occupancy is permitted only through written agreement in accordance with the following instructions.

The agreement as to right of occupancy by an owner is set forth in the MOA as part of the right of way transaction. Where temporary occupancy by the fee owner is permitted in negotiation, the following clause will be inserted in the MOA, but is **not** to be included in the conveyance instrument:

"In consideration of the state's allowing Grantors to occupy the herein described land after its acquisition by the state, Grantors agree that such occupancy shall terminate not later than (date), subject, however, to such written extensions of times as the state may grant. Such extensions will be granted only upon a showing by Grantors of extenuating circumstances, which in the sole opinion of the state will justify such extension.

Grantors agree that such occupancy shall be for their benefit exclusively, and the Grantors acknowledge that said occupancy hereunder shall be for their sole benefit and that no payment has been made or is to be made to the state for use of said premises, and that any attempt to assign such benefit, or to lease, rent, sublet, or in any manner suffer or permit occupancy of the land or improvements thereon by a third party shall automatically suspend the operation of this provision, and the state shall then have immediate right of possession.

With respect to any improvements located upon said land, title to which is to be acquired by the state, Grantors shall make every reasonable effort to keep such improvements in good repair and shall exercise such diligence as may be necessary to protect same from damage.

Grantors acknowledge that they are occupying the premises "AS IS" with all faults. Grantors hereby waive any and all causes of action, claims, demands, damages, and liens based on any warranty, expressed or implied, including but not limited to any implied warranty of suitability for a particular purpose and any warranty of habitability. Grantors shall indemnify and hold harmless the state, its successors or assigns, and its agents, representatives and employees ("Indemnified Parties"), against any and all proceedings, suits, actions, claims, damages, judgments, liabilities, awards, and expenses whatsoever ("Claims") which may be brought or instituted on account of or growing out of any and all injuries or damages, including death, to persons or property relating to any occurrence in, upon, at, or from the said premises or any part thereof, and all losses thereto, including but not limited to, all costs of defending against, investigating, and settling the Claims.

Grantors agree that the state's employees or agents may make inspections of the premises from time to time, and that the state will be notified at the time Grantors vacate the premises."

If the fee owner does not occupy the premises, no right of occupancy will be granted him in the right of way transaction. However, if the premises are occupied by a leaseholder or a tenant on a month to month basis, and a short period of time is needed for their relocation, this will be handled directly between ROW PD and the leaseholder or tenant by execution of an agreement. Form [ROW-N-19 Occupancy Agreement](#) is available.

If an owner retains a tenant-occupied improvement, an agreement should be reached as to utility continuation and improvement removal. Delivery of the ninety-day and thirty-day relocation notices should be coordinated so that utilities will not be cut off, nor the improvement removed, before ninety days have expired.

In transmitting parcel payment submissions to the ROW Program Office, advise whether the property is owner-occupied, tenant-occupied, or vacant. If a tenant occupancy agreement has been executed, a copy must be included with the submission.

The **Texas Tort Claims Act**, *Civil Practice and Remedies Code*, **Section 101.022**, provides the nature and extent of the state's liability as to premise defects. Under this law, a distinction is made between a paying and a non-paying occupant with greater potential liability to a paying occupant. The occupancy clauses given in this section include an acknowledgment that the owner or tenant is a non-paying occupant.

In setting forth the termination time in the clause included in the MOA, the wording may be altered as follows: "not later than or as of (usually 120 days from date of deed) or 90 days from receipt of state's warrant, whichever is later, subject, however,.."

Time extensions, as provided for in the MOA, and agreements with leaseholders or tenants, should not be granted unless there are positive facts to justify such extensions. If an extension is justified and granted, this action, along with supporting reasons, must be documented in writing. No extension of occupancy right is allowed by unstated permission.

When the right of temporary occupancy terminates, a concerted effort must be made to have the occupants move, and documented in ROW PD files. All possible means of securing peaceful possession should be exhausted before considering forceful eviction. When tenants or owners do not vacate the premises within the allowed time, forceful eviction is to be used as a last resort, and only then with prior administrative approval. Such approval must be obtained by request through the ROW Program Office. In the interim, ROW PD must periodically protest continued occupancy in writing and request immediate vacancy. A request for [eviction proceedings](#) should outline all the facts in the case, including the proposed construction letting date and the last possible date that the construction schedule will allow for deferral of actual eviction. Care should be used so that no job is let where there appears a possibility for eviction until the facts of the situation are made known to TxDOT.

The preceding paragraphs outline procedures for allowing a temporary occupancy period for the purpose of allowing time for displacee relocation. However, when compatible with construction schedules, *Transportation Code*, *Section 202.058*, permits TxDOT to allow extended use of land for the purposes of grazing and cultivation and is limited to the adjacent landowner.

When, in the closing of a transaction, it is desired to allow the owner or a compensable leaseholder an extended period for grazing or harvesting crops, use the same procedures for allowing temporary occupancy for relocation purposes. Modify pertinent clauses to indicate that occupancy is allowed

only for the purposes of cultivating or harvesting crops. The time required for harvesting will govern the occupancy period granted.

This does not affect procedures where crops are involved or grazing privileges are allowed, when no payment is made in the right of way transaction to the individual involved. An example is a short-term leaseholder whose lease expires before the land is needed for right of way, who can harvest the crops within the lease terms. Agreements are not required in non-compensable situations. However, any privilege allowed should be thoroughly understood by the parties involved.

If abutting owners ask for grazing and cultivation privileges after closing the right of way transaction (which is also under the authority of *Transportation Code, Section 202.058*), the agreements do not require approval by the ROW Program Office, and they may be forwarded directly to the Support Services Division. This applies to all transportation projects.

Exceptions to Title

When the fee owner requests that exceptions to title be listed in the deed, TxDOT will insert a special clause of standard exceptions, which will read as follows:

“This conveyance is made by Grantors and accepted by the State of Texas subject to the following:

1. Visible and apparent easements not appearing of record.
2. Any discrepancies, conflicts, or shortages in area or boundary lines or any encroachments or any overlapping of improvements which a current survey would show.
3. Easements, restrictions, reservations, covenants, conditions, oil and gas leases, mineral severances, and encumbrances for taxes and assessments (other than liens and conveyances) presently of record in the Official Public Records of XXXXX County, Texas, that affect the property, but only to the extent that said items are still valid and in force and effect at this time.”

Chapter 15 — Title Requirements and Title Insurance

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Section 1 — Title Requirements: Policy Regarding Title to be Acquired (for State or LPA)

Overview

There are two types of title to parcels that will generally be acquired by TxDOT: fee simple and easement. For all parcels included within the limits of the right of way, fee simple title, less oil, gas and sulfur will normally be acquired. In rare circumstances a right of way easement may be used in acquiring the right of way proper. If this type of easement is to be used, make a written request to the ROW Program Office outlining the reasons for acquiring an easement instead of fee simple title. A permanent easement or right to use the surface area will be acquired for parcels which are needed for drainage, lateral support, slopes, or similar purposes. A temporary easement for a specified period of time will be acquired for parcels that are needed for construction purposes.

Section 2 — Title Insurance Requirements (for State)

General

Title insurance should be acquired for all parcels acquired through a disbursement of state funds, whether acquired by purchase or through ED proceedings. Title insurance requirements for donated parcels follow the procedure set forth in [Title Insurance Requirements: Donations, Taxes \(for State and LPA\)](#). This procedure is modified somewhat when an easement is donated and a fee parcel is acquired by purchase if both parcels are out of the same parent tract. The required title information for the easement will have been furnished in connection with the issuance of a title policy on the fee taking. The title policy, however, will be written to insure the fee parcel only, and will be in the amount of the consideration paid to the grantor for the fee interest in the particular parcel.

The following instructions for purchasing title insurance on transportation projects are to be applied separately to each authorized project:

- ◆ When there are abutting or non-abutting TxDOT-numbered parcels under one ownership, separate closings and separate title insurance policies will be issued for each parcel.
- ◆ When there are abutting parcels under one ownership and some parcels are acquired by negotiation and others by condemnation, each negotiated parcel will have a separate closing and policy, and the condemned parcels will be insured by a separate title insurance policy for each parcel included in each suit.
- ◆ When a single parcel with multiple ownership is acquired partially by negotiation and partially by condemnation, and the percentage of each ownership interest is clearly shown on the title insurance commitment, the negotiated interest should be insured by one title insurance policy and the condemned interest insured by a separate policy. The interest negotiated can be closed and a policy issued prior to the resolution of any ED suit.
- ◆ When a single parcel contains an outdoor advertising sign with ownership different than the fee ownership, one commitment should be obtained. If both interests are to be acquired by negotiation there should be only one title insurance policy issued, even if there are two separate closings at different times. If one interest is acquired by negotiation and the other by condemnation, it is permissible to have separate title insurance policies for both interests. The interest negotiated can be closed and a policy issued prior to the resolution of any ED suit.
- ◆ A separate basic premium may be charged for each policy issued, but no charges for additional chains of title are to be made in any case.

Section 3 — Title Insurance Requirements (for LPA)

General

When an LPA is the acquiring agency for TxDOT on a project and cost participation is requested from TxDOT, title insurance in the amount of the consideration paid for the parcel will be obtained. When an LPA is the acquiring agency, requirements are as set forth in Section 1 above.

When an LPA is the acquiring agency and there is no cost participation by the state, title insurance may be obtained at the sole expense of the LPA, or a statement may be obtained from the LPA informing ROW PD that adequate title has been acquired. In this instance, the LPA is responsible for any cost or expense as a result of any failure of title.

Section 4 — Title Insurance Requirements: Donations, Taxes (for State and LPA)

General Requirements for Lands Acquired

TxDOT will purchase title insurance in the amount of the consideration paid for all parcels acquired, other than donated parcels. For rare situations when title insurance is not available and a delay in securing title insurance will seriously interfere with the proposed letting date, or when other situations arise and ROW PD believes the requirement for title insurance should be waived, contact the ROW Program Office for case by case instructions. Title insurance requirements are outlined in [Title Insurance Requirements \(for State\)](#) and [Title Insurance Requirements \(for LPA\)](#).

Donated Parcels

Title insurance policies are required for donated parcels. In submitting the donation instrument to the ROW Program Office, note in the transmittal that adequate title has been acquired for construction of the highway facility.

Past Due or Delinquent Taxes

Whole Takings

When whole properties are acquired by negotiation, pay all past due or delinquent taxes using funds withheld from the compensation due the owner at the time of closing. If the owner does not agree to such payment and/or withholding, initiate ED proceedings to acquire the property and to join all taxing agencies claiming delinquent taxes. Whether or not taxes are delinquent will be determined by the date ED proceedings are filed. When the amount of delinquent tax exceeds the amount of compensation to be paid to the owner, releases must be secured from all taxing agencies for payment of delinquent taxes on a pro rata basis. If any of the agencies refuse this plan for pro rata payment of delinquent taxes the parcel will be condemned and all agencies claiming delinquent taxes will be made party to the suit. OAG will join all taxing agencies claiming delinquent taxes in the ED proceedings.

Partial Takings

In the case of partial takings by negotiation, every effort should be made to reach a mutually acceptable agreement between the property owner and the taxing agency for payment of delinquent taxes. A partial release should be obtained when possible. TxDOT will permit the amount of this tax to be disbursed from the proceeds due the property owner. If the property owner will not pay delinquent taxes in a negotiated acquisition of a partial taking, or the taxing agency refuses to give a partial release, TxDOT will make payment to the property owner without regard to delinquent taxes, provided there is a sufficient remainder that is worth more than the amount of delinquent

taxes. If condemnation is necessary, taxing agencies are not included in the ED proceedings, even though delinquent taxes may be involved, if the property remainder affords the taxing agencies adequate security against which their tax liens may be assessed. However, if a significant amount of taxes are delinquent, or tax judgments or suits are present or pending, all taxing authorities must be included in the ED proceeding.

Current Taxes

In normal real estate transactions it is customary for current taxes to be prorated between the buyer and seller, but a different situation occurs in a sale to TxDOT because TxDOT is not obliged to pay state or local tax.

Tax Code, Section 26.11, provides for complete tax proration by all taxing agencies on all acquisitions by governmental agencies or any other body politic having the power of ED. Whenever TxDOT or an LPA purchases or condemns land for right of way, current taxes owed by the landowner are to be prorated by the taxing authority or agency involved on the basis of the months the land remained in private ownership or control, until the date of conveyance to TxDOT or date of possession.

Date of possession on condemned parcels is the date the warrant in the amount of the award is deposited in the registry of the court. If no deposit is made before the date the judgment is rendered, the date of the judgment will constitute the date of taking.

In acquiring right of way by negotiation, TxDOT must cooperate with all taxing agencies for payment of current taxes on whole takings on a prorated basis. Prorated taxes will be determined by the taxing agencies. Prorated taxes may be disbursed from the proceeds due the property owner or may be paid prior to closing by the property owner. In partial takings when payment of current taxes is not handled during the closing of the transaction, future settlement of tax liability will be a matter between the taxing agency and the property owner involved. However, if the taxing agency and property owner cannot agree on a method for tax payment, TxDOT has no option other than to make payment to the property owner without regard to current taxes.

When whole takings are condemned, the taxing agencies will be joined, and they will be notified of the proceedings.

Hotel/Motel Occupancy Taxes

When a hotel or motel changes ownership, state law (*Tax Code, Section 156.204*) stipulates that either of the following must occur:

- ◆ the seller must provide a receipt from the State Comptroller showing that all occupancy taxes are paid, or

- ◆ the buyer must withhold sufficient funds from the purchase payment to pay any outstanding occupancy tax.

The Comptroller may hold the buyer responsible for any back taxes due in this regard. Therefore, TxDOT must receive the following documentation before acquiring hotel/motel property:

- ◆ a Comptroller's receipt of occupancy taxes paid; or
- ◆ a statement of occupancy taxes due.

Interested parties may call the Comptroller of Public Accounts, Legal Process Section, Revenue Accounting, to obtain this documentation.

Section 5 — Curative Work and Acceptable Title Insurance Commitment and Title Insurance Policy Exceptions

Curative Work

The property owner is responsible for clearing any questions that may exist regarding title to his property so that clear title can be conveyed to TxDOT. ROW PD personnel should also give as much assistance as possible in the interest of good public relations and in order to expedite right of way acquisition.

The property owner may be required to pay the cost of curative work by:

- ◆ direct payment;
- ◆ distribution of TxDOT's approved compensation on title company's Closing Statement at the time of closing; or
- ◆ obtaining agreement from the title insurance company to make the payment.

For additional information on the cost of recording curative documents, see [Recording of Legal Instruments](#)

Liens, Defects, and Encumbrances

The title insurance commitment and policy **must** show that the property is free of liens, defects, and encumbrances subject to certain listed exceptions.

Restrictive Covenants

TxDOT will accept an exception showing that certain restrictive covenants exist. However, it will be necessary that every restrictive covenant affecting the property be examined by the title company to determine whether reversionary provisions exist that would produce a loss or derogation of title. In such case, it is essential that the title company be instructed to bring such matters to the attention of ROW PD so that necessary curative work may be required of the owner. Exceptions to restrictive covenants involving a loss or derogation of title are not permitted. All restrictive covenants should be reviewed by ROW PD to determine if there are any reciprocal ingress/egress and/or parking easements contained therein. If any are found, partial release must be obtained.

If no restrictive covenants affect the parcel, the title company should omit the section of the commitment and title insurance policy relating to restrictions.

Restrictions

Generally, there is no objection to acquiring title to land subject to outstanding restrictions. However, restrictions containing reverter provisions could result in loss or derogation of TxDOT's title. Therefore, ROW PD should examine all applicable restrictions for such reverter provisions. If reverter provisions are encountered a release must be obtained to insure that TxDOT's title will not be negatively affected.

Survey Exceptions

TxDOT will accept the standard exception to survey. That exception provides for “any discrepancies, conflicts or shortages in area or boundary lines or any encroachments or protrusions or any overlapping of improvements which a correct survey would show.” Check owners in possession against record title holders and authorized lessees or tenants.

Tax Exceptions

The tax exceptions acceptable to TxDOT vary depending on whether the acquisition involves a whole or partial taking. See [Current Taxes](#) and [Past Due or Delinquent Taxes](#) for a discussion of the tax exception allowable in title insurance policies.

Easement Exceptions

Private easements that are not compatible with highway purposes and operations should be released. Releases should be obtained for all compensable leasehold interests, except for mineral leases described in [Minerals Exceptions](#). Do not accept any private easement that is not compatible with use of the right of way for highway purposes. Determine compatibility on a case by case basis. In all cases, the commitment and policy must (1) provide the name of the easement holder, (2) provide the recording information of the easement in the real property records, and (3) identify by description the purpose of the easement. See [Leases and Private Rights Exceptions](#) and [Public Utility Easements Exceptions](#).

In addition, the title company may make an exception regarding “Visible and Apparent Easements Not Appearing of Record.” ROW PD will determine by site inspection of the parcel whether or not there are any visible and apparent unrecorded easements. ROW PD will advise the ROW Program Office that there are no visible and apparent unrecorded easements, or provide a list of easements that includes the name of the holder of the easement, if available, and the nature and purpose of the easement.

Public Utility Easements Exceptions

An exception to an easement held by a public utility is acceptable in a title policy. Easements held by public utility owners do not need to be acquired if joint use is compatible and the utility owner joins TxDOT in execution of a joint use agreement. Detail of procedures for public utility easements involving joint use are contained in *ROW Utilities Manual*.

Lease and Private Rights Exceptions

TxDOT will not accept an exception showing a lease existing against the parcel acquired, except for mineral leases.

Retention of a private right is permissible if it is determined to be in the best interest of TxDOT and the right retained is compatible with highway use.

Examples of possible compatible use are:

- ◆ stock passes;
- ◆ private utilities; and
- ◆ irrigation or drainage canals.

Determination of compatibility for each retained private right will be made by ROW PD as a part of the right of way transaction. See [Approved Special Clauses for Use in Conveyance Instruments](#) for the special clauses that may be used in instruments of conveyance when retention of a private right is involved.

Mineral Exceptions

Commitments and policies may include an exception to all oil, gas, and sulfur leasehold interests and/or other mineral interests, unless the taking impacts active production or otherwise destroys the ability to access the entirety of the mineral estate. In the list of exceptions in title insurance commitments and policies, standard practice is to list “oil, gas, and sulphur as provided for in the deed to the State of Texas.”

Retention of Improvements

If, in the instrument of conveyance the property owner retains title to certain improvements, the standard deed clause therein provides that if the owner does not remove the improvements within the specified time limit, title to such improvements automatically passes to the State of Texas. In such instances, title insurance commitments and policies may include an additional exception according to the following example:

“Property interests and rights reserved by (owner's name) with respect to improvements in deed from (owner's name) to assured.”

Other Property Interests

The title insurance commitment or policy should not contain exceptions to interests which are not located within the boundaries of the insured area(s) and/or which do not affect TxDOT's parcel. However, these exceptions may be acceptable provided ROW PD submits information regarding compatibility with highway use.

Rights of Parties in Possession

An exception regarding "Rights of Parties in Possession" will be acceptable provided that the ROW PD:

- ◆ makes a careful site inspection of the parcel with respect to occupancy;
- ◆ signs any necessary waiver of inspection required by the title company; and
- ◆ advises the ROW Program Office that there are no parties in adverse possession of the property when the title insurance commitment is submitted.

This exception applies only to one or more persons who are actually physically occupying the property when there are no recorded documents evidencing their claim to the property.

Section 6 — Approved Title Insurance Companies

General

A list showing state approved underwriting title insurance companies and the maximum amount they are qualified to insure in any one policy is available from the Texas Department of Insurance. Many agencies represent these underwriting companies throughout the state and one agency may be affiliated with several companies. If the value of a parcel exceeds the maximum that one company can insure, the agency will issue a policy insured by two or more underwriters, as necessary, to come within the combined maximum of the companies. A copy of the reinsurance contract must be submitted with the title insurance policy.

Section 7 — Procuring Title Data

General

Secure the service of an approved title insurance company and furnish it with sufficient preliminary title data to determine the property descriptions of the parent tracts out of which parcels are to be procured. Furnish the names of the property owners. Also furnish the title insurance company schematics, right of way map if available, or property descriptions to assist in determination of the requirements to obtain clear title. Property Descriptions should show the location of fences and all improvements.

Transmit to the title insurance company information with regard to parties in possession, adverse possessors, leasehold interests, tenants, results of survey, and any information not normally reflected in the public deed records. This assists the title insurance company in locating title defects which the owner will be required to cure if they are not permitted as an exception in the title insurance commitment and policy.

When efforts to obtain title insurance or efficient title insurance service are fruitless, ROW PD should obtain instructions from the ROW Program Office.

Section 8 — Title Insurance Policy Commitments

General

After receipt of preliminary data from ROW PD, the title insurance company should issue a current standard industry title insurance commitment, as found in the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas. The commitment should be in the amount of the approved value; show “the State of Texas” as the proposed insured; and contain a complete property description of the property to be acquired, as furnished to the title insurance company by ROW PD. ROWPD must accomplish any change in the property description required by the title insurance company in accordance with current surveying rules and procedures.

A title insurance commitment is valid for only 90 days. Ensure that all commitments are kept current. Request an updated commitment from the title insurance company with an effective date prior to the expiration of 90 days from the effective date of the current commitment.

For special cases involving multiple ownership and multiple commitments on the same parcel, see [Title Insurance Requirements \(for State\)](#).

Notify the title insurance company when a parcel must be acquired through ED proceedings. Request that the title insurance company furnish an updated commitment to be submitted with the ED package required by [ED Submission Requirements](#) in TxDOT's *ROW Eminent Domain Manual*.

Obtain an updated title insurance commitment prior to filing the condemnation petition with the proper court, to ensure that all necessary parties will be joined in the condemnation action. Prior to filing the condemnation petition, OAG should mail a copy of the petition directly to ROW PD for transmittal to the title insurance company. If any change in the petition is necessary, prompt notice will be given directly to ROW PD, which will then notify OAG.

Submission of the title insurance commitment with the parcel payment or award payment assembly is no longer required. ROW PD shall review the most recent commitment to ensure the correct property owner is being compensated.

Section 9 — Title Insurance Policies

For State

Title insurance policies are to be prepared according to the rules promulgated by the Texas Department of Insurance. Since title is vested in the State of Texas through both purchase and ED proceedings, the name of the insured must always be “the State of Texas.” Policies will be written in the amount of:

- ◆ the cash consideration paid for each parcel;
- ◆ the Final Judgment in cases of ED proceedings; or
- ◆ an individual interest acquired.

The effective date of the title insurance policy should be the date of the recording of the instrument of conveyance (i.e. deed or easement) or the date of recording of the final judgment if title is obtained through ED proceedings.

All policies for title insurance will have the provision regarding arbitration deleted by means of executing the Deletion of Arbitration Provision form issued by the Texas Department of Insurance. The arbitration provision is described in Item 14 of the Conditions and Stipulations contained in each title insurance policy. This form can be executed by ROW PD and must be returned to the title insurance company at or before closing. The title insurance company is required to furnish the form to delete the exception upon issuance of a commitment. It is the responsibility of ROW PD to ensure that this form is executed and returned to the title insurance company on each transaction.

All title insurance policies shall contain a complete property description of the property acquired. The property description and parcel plats reflect a boundary survey and must be signed and sealed by a RPLS. Property descriptions consist of a heading with TxDOT identification items, along with a regular metes and bounds description and parcel plats prepared on letter size sheets. The included property description shall match the property description included in the conveyance document.

The title insurance company, at its option, may include a volume and page (or document number) reference to the recorded conveyance document; however, such volume and page (or document number) reference may NOT be used in place of the complete property description, which is to be attached in ALL cases.

For LPA

When the LPA is required to provide title insurance in the name of the State of Texas, the LPA must deliver to ROW PD an acceptable title insurance policy. See [Title Insurance Requirements \(for State\)](#) and [Title Insurance Requirements \(for LPA\)](#). The policy must be obtained in accordance with

the procedures in Title Insurance Requirements (for LPA). When state cost participation is requested, the cost of title insurance will be TxDOT's responsibility, and payment will be made directly to the title insurance company according to customary practices. Title insurance commitments and policies are not required by TxDOT for off-system projects but may be obtained at the option of the LPA.

Section 10 — Fees for Title Services

General

The title insurance policy premium established by the Texas Department of Insurance covers:

- ◆ title examination;
- ◆ five year sales data;
- ◆ issuance of a title insurance commitment and updates;
- ◆ securing and disbursing money;
- ◆ final search of title; and
- ◆ issuance of the title insurance policy.

An additional fee for services that are not specified by the Commissioners of Insurance as being covered by approved title insurance rates may be paid to a title insurance company as a “closing” or “escrow” fee, provided such services are reasonably necessary to complete the closing and the fees are commercially reasonable. Such additional fee may be paid for each state-numbered parcel.

Although, in some instances, circumstances may require that separate policies be written when purchasing a parcel, only one charge for the fee mentioned above may be paid on each parcel. Such Closing Fees vary among title insurance companies in the various areas of the state. Therefore, ROW PD should evaluate the additional fee as they deem appropriate for each situation, based upon what title insurance companies in that area are charging private customers for similar services. Care should be exercised to ensure that the property owner is not charged with any closing expenses incidental to the transaction, other than those set forth under this chapter. Approved title insurance rates can be obtained from any title insurance company.

If ROW PD requests a title insurance company to furnish tax information when title insurance is ordered, the title insurance company may be reimbursed for the documented costs of the required tax certificates. The title insurance company's request for reimbursement must include documentation to support costs for the certificates.

A title insurance company may submit a request for advance payment of the total premium to be paid for a title insurance policy. Only one advance premium charge may be made per title insurance policy to be issued regardless of the number of commitments involved. If, for example, more than one commitment is issued to cover the acquisition of two or more interests in a single parcel, only one advance premium charge will be payable. When a title insurance company requests an advance premium, the company will be required to submit an Owner Title Insurance Policy Commitment.

These commitment forms are in addition to the industry standard title insurance commitment that is issued for each parcel. The Owner Title Insurance Policy Commitment should be submitted elec-

tronically along with the parcel payment request and the advance premium reflected on the *ROW-A-15 Payment Request*, as appropriate. For this purpose, the date of submittal of the commitment is defined as the date TxDOT actually receives the proper commitment from the title insurance company. This commitment must be according to the terms of TxDOT's request to the title insurance company. The submittal date of the commitment, as here defined, must be shown on *ROW-A-15 Payment Request*, as appropriate, requesting payment of the advance premium charge. It is emphasized that “commitment” does not refer to a preliminary title or examiner's report.

The advance premium charge will be credited against the total title insurance premium when the property being insured is acquired within the thirty-six (36) month time period which starts with the date of issuance of the title insurance policy commitment. No credit will be allowed if title is not conveyed within this period of time.

Section 11 — Certificates Required of Title Insurance Companies

General

If the property owner has specified that the executed deed is to be held by the title insurance company pending receipt of the state's warrant, the title insurance company will prepare a copy of the executed deed and will execute thereon its certificate in the form shown below. This certified copy of the deed will be made part of *ROW-A-15 Payment Request*, as appropriate, electronic submission for the parcel payment.

Sample Certification of Title Company that Deed is Held in Escrow

<p>“I do hereby certify that this is a true and exact copy of the original executed deed placed in escrow with us and the original will be turned over to the state upon receipt of state warrant payable to us and seller.”</p> <p>The following are examples of suggested signature blocks for this certification:</p>	
If signed by Agent for Underwriter	If signed by Underwriting Company
XYZ Underwriting Company	XYZ Underwriting Company
By: ABC Abstract Company, Agent	By: John Doe, Vice President
By: Ray Smith, [show title here]	-

Section 12 — Closing by Title Insurance Company

Procedure

The right of way agent who negotiated for a particular parcel should also be TxDOT's representative during the closing of the transaction. In this manner better public relations can be maintained because the owner will have already made the acquaintance of the agent and thus will not be confronted with a stranger during this final transaction. It is preferred procedure for the right of way agent responsible to arrange for the property owner to attend the closing of the transaction at the specified time. Either the owner can be requested to meet the agent at the title insurance company, or arrangements may be made to personally meet and take the owner to the place of closing. It must be noted, however, that the parcel negotiator may not deliver the warrant.

Upon receipt of the state's warrant, immediately take steps to see that the transaction will be promptly closed and that an appropriate title insurance policy is issued. Except in cases where closing services by a title insurance company are not required, or in the case of distantly located owners, the closing procedure should be as shown in the following discussion.

The property owner, right of way agent, and title insurance company representative will personally meet at the title insurance company office or other designated place. The right of way agent should have:

- ◆ the warrant made payable to the owner and title insurance company;
- ◆ the deed for the parcel (if not previously executed and placed in escrow with the title insurance company); and
- ◆ the closing statement forms.

The owner will first be given full explanation of the transaction prior to requesting endorsement on the warrant in payment for the parcel. The warrant number should be entered on the closing statement, along with the payment breakdown. After approval of the deed by the title insurance company, the warrant should be endorsed by the owner with the understanding that the proceeds will be distributed according to the closing statement. The executed deed along with the state's warrant will be delivered to the title insurance company representative and the title insurance company will then make proper distribution of the proceeds of the warrant. The conveyance documents should be recorded immediately.

It is recognized that the prescribed closing procedure cannot be followed where out-of-state or distantly located owners are involved. Conveyance documents, closing statements, and other documents necessary to complete the closing of the purchase may need to be handled by mail without the necessity of the land owner attending the closing. In these situations ROW PD is responsible for ensuring that all procedures necessary to vest title in the State of Texas are complied with. The title insurance company or any other agency or person may be appointed by the owners

as attorney-in-fact to endorse the state's warrant for said owners and make disbursement of the consideration. This should eliminate the need of circulating a warrant for the personal endorsement of several grantors where they are widely scattered or distantly located. Also, the owners may name and designate one owner as the payee and authorize TxDOT to issue its warrant payable to the owner so named. The procedure for appointment of a single payee or attorney-in-fact is outlined in [Appointment of Single Payee or Attorney-in-Fact](#).

Section 13 — Title Insurance Company's Closing Statement

Procedure

When requesting payment for title insurance policy services, the title insurance company must furnish ROW PD with a signed closing statement detailing the disposition of the proceeds from the state's warrant. The statement must note if the proceeds of the warrant are not disposed of and some money is retained in trust. Subsequently, when the money is disposed of, a supplemental statement must be furnished. These statements must show:

- ◆ the amounts paid for settlement of liens, mortgages, taxes, and any other encumbrances;
- ◆ the title insurance policy fee;
- ◆ the fee charged for any additional services; and
- ◆ the net amount paid to the grantor.

These statements should also show the parcel number, right of way account number, state warrant number and amount, and the closing date.

Signed and date stamped copy of the closing statement, date stamped invoice, recorded deed, and *ROW-A-15 Payment Request* must accompany ROW PD's electronic submission to the ROW Program Office requesting payment for title insurance company services.

Section 14 — Recording of Legal Instruments

Procedure (for State)

Instruments conveying any property interest to TxDOT should be recorded immediately following the closing transaction. On state-acquired right of way, TxDOT pays the costs of recording such instruments. The title insurance company should include these costs in their billing for incurred title expenses.

The recording of curative instruments is the responsibility of the grantor. The grantor may pay recording costs directly to the County Clerk, or the costs may be withheld by the title insurance company from TxDOT's approved compensation at the time of closing. The grantor is eligible for reimbursement of recording costs as an incidental expense. However, if the title insurance company agrees to handle the recording and pays the recording costs they must be shown as a state expense on the closing statement. Submission for title expenses must include these expenses as a separate cost distribution item with appropriate incidental expense coding.

The recording of legal instruments is governed by the Property Code. All documents must be recorded in accordance with state law. If any questions arise in this regard, contact the ROW Program Office for further instructions.

Procedure (for LPA)

When an LPA acquires right of way it will be responsible at its own expense for recording deeds, judgments, or other instruments in the real property records of each county in which the property is located.

Section 15 — Escrow Services by Title Insurance Company

Procedure

The disbursement of money in a transaction is part of the closing expense covered by the basic fee charged for title insurance policies. If the property owner makes delivery of the executed deed to TxDOT for use in support of *ROW-A-15 Payment Request*, to secure the state's warrant for payment of the parcel, neither TxDOT nor the property owner will be expected to pay any additional fee for this service. If the owner requests that the executed deed be held by the title insurance company pending receipt of the state's warrant, any charge for this service by the title insurance company will be at no additional cost to TxDOT.

Any charge for such escrow service will be the responsibility of the property owner at no additional cost to TxDOT. Payment procedures when escrow is required are contained in [Payment When Escrow Procedure is Used](#).

If the owner will execute the deed but insists that it be placed in escrow, the billing submission must include an executed copy of the deed bearing a certification, as referred to in [Certificates Required of Title Insurance Companies](#). The certification must indicate that it is a true and correct copy of the deed as placed in escrow. This certification should be placed on the first page of the deed, either in the margin or in the blank space at the heading of the deed.

If the owner will not deliver to ROW PD or escrow an executed deed, an MOA will be executed, and the state's warrant will be placed in escrow with a state or national bank as required by law.

If the owner refuses to execute a deed or an MOA, ROW PD's request that the warrant be placed in escrow should be accompanied by some indication in writing by the owner that the offer and the warrant being placed in escrow is acceptable.

The above process is governed by Transportation Code, Section 203.061. Procedures for payment in this situation are contained in [Payment When Escrow Procedure is Used](#).

Chapter 16 — Hazardous Materials

Contents:

[Section 1 — List of Terms Used in this Chapter](#)

[Section 2 — TxDOT Objectives in Regard to Hazardous Materials](#)

[Section 3 — Procedure Overview](#)

[Section 4 — Petroleum Storage Tank Systems \(PSTS\)](#)

[Section 5 — Asbestos in Buildings](#)

[Section 6 — Hazardous Waste Contamination](#)

Section 1 — List of Terms Used in this Chapter

CERCLA

The Comprehensive Environmental Response, Compensation, & Liability Act of 1980 (CERCLA), commonly referred to as “superfund”, provides the Environmental Protection Agency authority to respond to releases or threatened releases of hazardous substances, pollutants, or contaminants that may endanger human health or the environment. For more information on CERCLA, refer to the TxDOT environmental procedures in the *Project Development Process Manual*.

- ◆ [Petroleum Storage Tank System](#)
- ◆ [Texas Commission on Environmental Quality](#)
- ◆ [Hazardous Materials](#)

Section 2 — TxDOT Objectives in Regard to Hazardous Materials

Preventative or Corrective Action

ROW personnel must bear in mind the distinction between “preventative action” and “corrective action” when addressing TxDOT objectives in regard to hazardous materials. Preventative action refers to cleanup and related activities required as part of construction projects. Corrective action refers to regulated activities not specifically related to construction that are required for the protection of the environment.

Cost Recovery

Cost recovery and division of responsibility for cleanup depend on the motives for cleanup. If the cleanup is motivated solely by TxDOT's construction requirements, and the former property owner would not have been required by regulation to implement corrective action, then the costs of cleanup and future liability should not be borne by the former property owner. If, however, the contaminated property constitutes a health risk to the general public that is not directly related to construction activities (i.e., the site is, or should be, under enforcement), then cleanup costs and future liability should be borne by the former property owner.

Objectives

ROW Division and District objectives in regard to hazardous materials are as follows:

- ◆ To identify impediments to parcel acquisition involving hazardous materials that could adversely affect the ability to acquire ROW.
- ◆ To avoid liability for corrective action, and, when appropriate, to recover the costs of corrective action from responsible parties when acquiring fee or easement interests for contaminated property.

Section 3 — Procedure Overview

Overview

Acquisition of contaminated property is complicated by the adoption of risk-based cleanup regulations that allow property owners to leave contaminants in place as long as it can be shown that the contaminants do not pose a health hazard, given current or projected property uses. As a result, TxDOT is increasingly confronted with the acquisition of, and construction on, contaminated parcels. Contamination may result in high project development costs, including use of specially trained workers, air and water monitoring, and the management of excavated soil and water as hazardous waste material. Therefore, ROW personnel must coordinate with the project manager and the District environmental coordinator to ensure that proper site assessment is performed before ROW acquisition.

The three most common contaminants addressed by ROW personnel are Petroleum Storage Tank Systems (PSTS), asbestos in buildings, and hazardous wastes. Achieving ROW Division and District objectives for each type involves a similar evaluation process. These contaminant types are distinctly different, however, in regard to cleanup procedures and governmental regulation.

See Chapter 1, Section 4-Environmental Procedures in the *Project Development Process Manual*, Roles and Responsibilities for District responsibilities regarding contaminants. Specific procedures for each type of contaminant are listed in the following sections.

Section 4 — Petroleum Storage Tank Systems (PSTS)

Overview

The release of environmental contaminants from petroleum storage tank systems is the most common problem involving hazardous materials encountered during project development. *Water Code*, Section 26.351 and *30TAC* Section 334.12 assigns liability for corrective action for discharges or spills of hazardous substances to the owner of a PSTS at the time the discharge or spill occurs. If the release is not discovered until after TxDOT has acquired the property, it may be difficult to assign responsibility for corrective action to the former property owner. The responsibility would then default to TxDOT in accordance with *Water Code*, Section 26.121.

Commonly encountered problems include the following:

- ◆ An offsite plume has migrated into existing ROW, with possible negative impact on subsurface utilities or proposed construction.
- ◆ A portion of contaminated property is acquired for ROW, the contamination source is on the remainder, and there is the possibility of negative impact on subsurface utilities or proposed construction.
- ◆ A contaminated property, including the contamination source, is acquired for ROW, and there is the possibility of negative impact on subsurface utilities or proposed construction. Moreover, the displacee, and any PSTS declared as personal property, is eligible for relocation assistance.

Petroleum Storage Tank Systems Treated as Personal Property

PSTS may be, under certain limited circumstances, declared as personal property eligible for relocation payments under the *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970* (42 USC Sections 4601-4665). The basis for the declaration could be that the system has been recently installed and can be re-certified prior to reinstallation. Payment to the displacee for relocation is made on an actual cost basis. Use the form [ROW-N-PSTRA Petroleum Storage Tank Removal Agreement](#) when a system is declared as personal property.

Petroleum Storage Tank Systems Treated as Real Property

In the majority of ROW acquisitions involving PSTS, the systems are considered to be real property. Real property is acquired either through negotiation, donation, or by eminent domain proceedings.

Negotiation or Donation. Once an approved value has been determined for the land and improvements of a ROW parcel, the owner(s) of the real property is (are) presented with an offer of just

compensation. The amount of compensation is based on an unimpaired or "as if clean" valuation. If PSTS are located wholly or partially within the acquired parcel, ask the owner to sign a form [ROW-N-PSTRA Petroleum Storage Tank Removal Agreement](#). This agreement provides the owner the opportunity to retain title to the PSTS and to be reimbursed the eligible costs of system removal. The owner is not, however, obliged to sign the agreement, even though failure to sign may constitute failure of acquisition negotiation.

When the offer of compensation is accepted and the agreement executed, normal closing of the transaction can occur. The owner must remove the PSTS before expiration of the time allowance stated in the agreement.

The remaining issue of payment from TxDOT is based on the status of the PSTS site, as determined by the Texas Commission on Environmental Quality. If the site does not have a negative impact on public health and safety, and is not a threat to the environment, then [TCEQ](#) issues a "no further action" letter based on the closure information at the conclusion of the removal phase of the work performed.

If the site is identified with a Leaking Petroleum Storage Tank Identification Number (LPST ID No.), the owner must take corrective action subsequent to PSTS removal. In this case, TxDOT reimbursement to the owner will be based on an uncontested **Fund Payment Report** showing the amount that TCEQ will consider for reimbursement, ineligible expenses, and the owner's deductible amount. Reimbursement can then be made for the ineligible expenses and deductible amount for the PSTS removal. TxDOT's obligation and involvement terminates at this point. Subsequent land use must be considered for a risk-based assessment and closure.

When the owner or his agent is pursuing mitigation activities, an **Indemnification Agreement** can be offered outlining each party's responsibilities and obligations after TxDOT has taken possession of the ROW.

It is not in the interest of TxDOT to accept donation of real property without an assessment of the property's condition. PSTS owners are often willing to donate contaminated land because they believe doing so will end their liability. Minimizing the risk associated with prior land use will reduce the costs incurred by corrective action.

Contact the ROW Division for assistance regarding any use of an **Indemnification Agreement or a Petroleum Storage Tank Removal Agreement**.

Eminent Domain. When condemnation proceedings are initiated for parcels that have PSTS located within or close to the area needed for ROW, process the review of the parcel for eminent domain proceedings with appropriate notation to the OAG.

Once the parcel has been processed through the ROW Division to the OAG, a **Petition or Statement of Condemnation** is filed in the court having jurisdiction in the county where the subject parcel is located. At the Special Commissioners hearing, the property is considered to be unim-

paired or "as if clean," unless adequate information is available to the appraiser or a technical expert in support of an impacted valuation.

An objection to the **Award of the Special Commissioners** can be filed if adequate information exists that indicates the property may suffer a reduction in value due to the presence of a PSTS. After deposit of funds into the registry of the court, the state takes possession of the property. TxDOT can then employ the necessary consultant for an environmental assessment, in order to provide technical data, cost estimates, and testimony for trial. TxDOT can also employ a contractor for removal of the PSTS.

Section 5 — Asbestos in Buildings

Overview

The National Emissions Standards for Hazardous Pollutants (NESHAP) requires an inspection for asbestos prior to renovation or demolition of buildings. If the inspection reveals regulated asbestos containing material (RACM) in excess of action levels of 260 linear feet of pipe insulation or 150 square feet of surfacing material the asbestos must be removed or stabilized by a licensed abatement contractor prior to demolition. Asbestos containing material is considered to be regulated if (1) it contains greater than one percent asbestos, and (2) is friable (easily crumbled), or will become friable under conditions of demolition.

Management

Pre-demolition asbestos management begins with an inspection for asbestos. If the quantity of RACM exceeds NESHAP action levels, the following regulated sequence of events, each performed by contractors licensed by the Texas Department of Health (TDH), must occur:

- ◆ Abatement planning (incorporating the data collected during the inspection);
- ◆ Ten day advanced notification to the appropriate regulatory agency;
- ◆ Abatement and air monitoring; and
- ◆ Reporting.

TxDOT surplus and salvage property procedures entail transferring the title to buildings and other improvements to the salvage contractor before demolition. However, TDH will not necessarily recognize the severability of improvements from the land and may consider TxDOT liable for the salvage contractor's non-compliance with NESHAP requirements.

To avoid potential liability for violations of NESHAP requirements by the salvage contractor, contract for asbestos inspection, abatement planning, notification, air and water monitoring, and reporting. Include the abatement plan (i.e., specification) in the bid package for the salvage contract. The salvage contractor must subcontract abatement activities using the specification developed by TxDOT's asbestos contractor.

In most cases, cost recovery from the former property owner for asbestos abatement is not possible because the requirement for abatement is triggered by demolition of the building before construction. Therefore, the abatement is classified as preventative action instead of corrective action.

Section 6 — Hazardous Waste Contamination

CERCLA Immunity

Health and Safety Code, Section 361.275(e)(2)(C) and federal statutes provide TxDOT immunity from CERCLA liability for hazardous waste contamination in acquiring property through eminent domain proceedings. However, TxDOT loses its immunity should it worsen the contamination after acquisition. This immunity applies only to existing hazardous waste contamination, not to contamination from leaking petroleum storage tanks. It should be noted that the costs of planning and constructing projects on sites contaminated with hazardous waste can be considerable.

See [Task 3280](#) - Perform hazardous materials assessment and investigation, TxDOT *Project Development Process Manual*, and the TxDOT Environmental Procedures in *Project Development Process Manual* for procedures to follow in dealing with contaminated sites.

Chapter 17 — Environmental Covenants for Contaminated Property

Contents:

[Section 1 — Background](#)

[Section 2 — Federal and State Corrective Action Standards](#)

[Section 3 — TxDOT Standards](#)

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[Section 11 — Tracking the Environmental Covenant for Future Reference](#)

Section 1 — Background

Background

Effective September 1, 2009, under the authority of Senate Bill 480 as codified in Transportation Code Section 202.061, the Texas Transportation Commission (TTC) may enter into an environmental covenant for the purpose of subjecting real property in which TxDOT has an ownership interest to a plan or the performance of work for environmental corrective action.

TxDOT may enter its real property into an environmental covenant at its own initiative or at a request from a third party.

Entering into covenants regarding contaminated property is not a common practice for TxDOT.

Definition of an Environmental Covenant

An environmental covenant is a voluntarily imposed servitude on land which limits the uses of and activities on the land in conjunction with a plan or the performance of work for an environmental response (corrective action).

Examples of environmental covenants include covenants that restrict the use of the property (i.e., restricted to commercial use only) or covenants that stipulate the installation and maintenance of engineering controls, such as an engineered cover to prevent human exposure to contaminants located on the property.

Purpose of an Environmental Covenant

An environmental covenant allows performance of cost-effective corrective action and still permits safe and effective use of the property. In this guidance, corrective action refers to regulated activities that are required for the protection of the environment.

The potential negative effects of an environmental covenant include: 1) reduction of property value and 2) limited use of the property to industrial or commercial purposes, unless the covenant is removed by performing additional corrective action.

Roles and Responsibilities for Coordinating an Environmental Covenant

The Environmental Affairs Division (ENV) has primary responsibility for coordinating the execution of an environmental covenant. ENV also is responsible for coordinating all regulatory corrective actions, technical reviews, and regulatory coordination necessary to support an environ-

mental covenant on TxDOT property. The applicable District Office will assist ENV in coordinating the execution of an environmental covenant.

General Overview

In order to successfully execute an environmental covenant, the following actions must occur:

1. Comply with all state and federal corrective action standards.
2. Receive corrective action approval from applicable state and/or federal agencies.
3. Receive TxDOT General Counsel and TxDOT Management approval.
4. Conduct required notices.
5. Receive TTC approval.
6. File the environmental covenant with the county real property records.

Note actions one through three may occur concurrently, and actions four through six occur sequentially.

Section 2 — Federal and State Corrective Action Standards

Standards

All corrective action performed to support an environmental covenant must:

- ◆ Comply with state and federal standards for environmental corrective action.
- ◆ Receive approval from the Texas Commission on Environmental Quality (TCEQ) or a federal agency with approval authority under applicable law.

Section 3 — TxDOT Standards

Standards

The environmental covenant will provide a clear benefit to TxDOT.

As a minimum, the following TxDOT management must approve the environmental covenant before it is presented to the TTC:

- ◆ Environmental Affairs Division Director
- ◆ General Counsel Division

ENV will coordinate an environmental covenant approval with other TxDOT management as each circumstance dictates.

Section 4 — TxDOT Documentation Requirements

Requirements

Before a proposed covenant is submitted to the TTC for consideration, documentation must demonstrate conformance with the requirements and standards listed in Sections 2 and 3.

Documentation must include the following:

- ◆ Correspondence from the TCEQ and/or a federal agency with approval authority clearly stating that the environmental corrective action meets all applicable state and federal standards.
- ◆ Correspondence from the Environmental Affairs Division Director stating approval of the proposed environmental corrective action standards.
- ◆ Correspondence from the General Counsel stating approval of the proposed environmental covenant.

Section 5 — Notice Requirements

Notice Requirements

Not less than 30 days before the date the TTC considers a proposed environmental covenant, ENV will issue a public notice. Before the notice is mailed, ENV will obtain all documentation required in Section 4 and receive GCD approval of the notice language.

Notice Language Requirements

The notice must include:

- ◆ A clear and concise description of the proposal to enter into the environmental covenant,
- ◆ A statement of the manner in which written comments may be submitted,
- ◆ The date the TTC will consider the proposed environmental covenant, and
- ◆ TxDOT contact name and address to which comments are submitted.

Notice Submission Requirements

ENV with the assistance of the applicable District Office will mail or coordinate the mailing of a third party's notice to:

- ◆ Each owner of a property interest in the applicable property,
- ◆ Each adjacent landowner, and
- ◆ Each applicable local government whose territorial jurisdiction includes the property. This includes the county, a municipality (within municipal or extra-territorial boundaries), or entity responsible for groundwater conservation or quality.

ENV is responsible for identifying the above parties and for sending the approved notice to the parties via United States Postal Service utilizing certified mail/ return receipt requested. This receipt will be preserved for documentation. The applicable District Office will assist ENV with these tasks.

For all third party environmental covenant requests, the third party is responsible for identifying the above parties and for sending a TxDOT approved notice to the parties via United States Postal Service utilizing certified mail/ return receipt requested. ENV and the GCD will review and approve the third party notice language before the notice is sent.

Review of Public Comments

ENV will receive public comments and coordinate review of the public comments with GCD and applicable District Office.

Section 6 — Environmental Covenant Information

Environmental Covenant Information

GCD must approve all environmental covenant language before it is submitted to the TTC for consideration.

Each environmental covenant must include:

- ◆ A legally sufficient description of the property subject to the covenant,
- ◆ A description of the nature of the contamination on or under the property, including the contaminants, the source, if known, and the location and extent of the contamination,
- ◆ A description of the activity and use limitations on the property, and
- ◆ Any information required by TCEQ and/or a federal agency with approval authority for the affected property corrective action.

Section 7 — Texas Transportation Commission Review

TTC Review

ENV will prepare the TTC briefing package, including:

- ◆ A cover sheet briefly explaining the environmental covenant process, including the covenant's expected benefits to TxDOT, a summary of public comments received, and TxDOT staff recommendations,
- ◆ Minute order, and
- ◆ Exhibits, including:
 - Proposed language for the environmental covenant.
 - List of property owners notified.
 - Correspondence from the TCEQ and/or a federal agency with approval authority clearly stating that the environmental corrective action meets all applicable state and federal standards.

The ENV Director will present the item at the Commission Agenda Meeting.

Section 8 — Entering the Environmental Covenant

Entering the Environmental Covenant

For each property the TTC has elected to enter into an environmental covenant, the TTC by order may authorize the Executive Director to execute an environmental covenant on behalf of the Commission.

The District Office is responsible for filing the TTC approved environmental covenant with the applicable county property records. The District Office will furnish a recorded covenant to the ROW Division as TxDOT's office of record for TxDOT's real property interests.

Section 9 — Zoning or Land Use Controls by Local Governments

Local Government Controls

In order to execute the environmental covenant, SB 480 requires that the affected property be brought into compliance with zoning or land use controls imposed on the property by each applicable local government whose territorial jurisdiction includes the property. This includes the county, a municipality (within municipal or extra-territorial boundaries), or entity responsible for groundwater conservation or quality. However, Local Government Code Section 211.013(c) provides that a municipality's zoning authority does not apply to a building, other structure, or land under the control, administration, or jurisdiction of a state or federal agency.

Consult with GCD for guidance on this issue.

Section 10 — Cost Recovery for Third Party Environmental Covenants

Cost Recovery

TxDOT will recover all TxDOT expenses associated with a third party request for entering into an environmental covenant, regardless if the TTC approves the environmental covenant or not.

TxDOT may also require reimbursement for any loss in value or use of TxDOT property entered into an environmental covenant. In such an event, the District will coordinate with the ROW Division regarding the review and approval of the appraisal of the value loss to be reimbursed to the state.

Section 11 — Tracking the Environmental Covenant for Future Reference

Tracking the Covenant

Environmental covenant information will be depicted on TxDOT ROW maps for future reference. Environmental covenant information related to district facility property or maintenance section facility property will be filed with property record files at the applicable District Office.

Chapter 18 — General Payment Policies and Procedures for State and LPA

Contents:

[Section 1 — General Payment Policy](#)

[Section 2 — Refund to State Based on Final Judgment](#)

[Section 3 — Billings for Fee Appraisers, Technical Experts, and Expert Witnesses](#)

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[Section 6 — Payment When Escrow Procedure is Used](#)

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[Section 8 — Payments for Leasehold Interests \(for State and LPA\)](#)

[Section 9 — Payment for Title Work](#)

[Section 10 — Payment and Pay Procedures for LPA Acquisition](#)

[Section 11 — State Reimbursement for LPA Acquired Right of Way](#)

[Section 12 — Submission for Reimbursement of Right of Way Fencing](#)

Section 1 — General Payment Policy

Overview

Use form *ROW-A-15 Payment Request* for making payment requests involving right of way acquisition, relocation assistance or utility adjustments. *ROW-A-15 Payment Request* is generated by data entered in the Right of Way Information System (ROWIS). Send *ROW-A-15 Payment Request* to the ROW Program Office for final review. The ROW Program Office submits the forms to the Financial Management Division for issuance of state warrants by the Comptroller's Office. The Financial Management Division forwards warrants for payment requests directly to the right of way staff.

Ethnic Coding for ROW-A-15 Payment Request

See [ROWIS Training](#) videos and documentation.

Where required, include the ethnic code number on *ROW-A-15 Payment Request* to identify the payee as minority or non-minority.

Ethnic Codes for ROW-A-15 Payment Request

Code No.	Classification	Classification Includes Persons:
(1)	Black Americans	having origins in any of the Black racial groups of Africa.
(2)	Hispanic Americans	of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.
(3)	Native Americans	who are American Indians, Eskimos, Aleuts, or Native Hawaiians. Registration as an official member of an Indian tribe recognized by the Bureau of Indian Affairs is required for American Indians.
(4)	Asian-Pacific Americans	whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U. S. Trust Territories of the Pacific, and the Northern Marianas.
(5)	All Other	-
(6)	Unknown	-
(7)	Asian-Indian Americans	whose origins are from India, Pakistan, and Bangladesh.
(8)	Women	-
(9)	Alaskan Native	who are specifically native Alaskans, i.e. Inuits.

Indicate the appropriate code number in parentheses following the payee's name on *ROW-A-15 Payment Request*. These code numbers are different from those that are used in the [Human Resources Policy Manual](#) and are not related to personnel matters.

Complete the printed section at the bottom of each *ROW-A-15 Payment Request* to show the entire distribution of the statement total to the proper accounts or project according to current ethnic coding procedures.

Section 2 — Refund to State Based on Final Judgment

Overview

Do not use rapid deposit for refunds of judgment. Refunds of previously disbursed funds related to acquisition of right of way must be made payable to TxDOT. See also Payments in Advance of Final Judgment in TxDOT's [ROW Relocation Assistance Manual](#). Forward the refund, along with a copy of the judgment, to the ROW Program Office.

If the refund check is drawn on the Clerk of a County Court at Law or District Clerk, include in the submission the date the refund was deposited with the Clerk.

Promptly deliver the refund check so that the ROW Program Office receives it within five working days of its receipt in TxDOT.

Section 3 — Billings for Fee Appraisers, Technical Experts, and Expert Witnesses

Payment for Appraisals for Negotiation Purposes (for State)

After preparing and submitting appraisal reports to TxDOT, the state's fee appraiser must submit an invoice to TxDOT. The appraiser's fee on the invoice must match the predetermined fee established by the previously executed form [ROW-A-3](#), Fee Appraiser Work Order. Review the payment request to see that charges are in exact accordance with the appraiser's work order, the right of way map, the assignments made, and the appraisal reports submitted. If a PIN is not already established, the appraiser must provide information to set up a PIN for payment of service. Review appraisal reports to determine acceptability for payment before (1) authorizing payment of fees and (2) entering necessary data in ROWIS.

Prepare and process payment requests for a revised or second appraisal the same as for an original appraisal; however, indicate the reason for the reappraisal on form ROW-A-3.

Payment for Appraisers' Eminent Domain Services (for State)

An appraiser's invoice for services in preparing an updated report for ED proceedings should be submitted separately from the appraiser's other work in preparing for testimony, providing services in pre-trial conferences, and providing testimony in ED proceedings. The hourly rate established in the appraiser's contract is the only payment basis for these services. The following are instructions for [General Payment Policy](#) and Procedures.

- ◆ Enter "Appraisal Services" and either "Commissioners' Hearing" or "Jury Trial," as applicable, in the Description blank (11).
- ◆ Enter the hourly rate in the Unit Price blank (13), the number of hours worked in the Quantity blank (12), and the extended amount due in the Amount blank (14).

Payment for Appraisers' Eminent Domain Services (for LPA)

When a LPA is the acquiring agency, the state does not participate in ED proceedings except as specified by law and agreed to in the right of way acquisition contractual agreement. Use of state-approved fee appraisers in ED proceedings is provided for in this contractual agreement. In executing the agreement, the LPA pays the appraiser under the terms of his appraisal contract with the state. State participation in this cost is limited as described below.

Before the Commissioners' Hearing The LPA normally pays for appraisal services performed at the request of the LPA in anticipation of ED proceedings. However, the state pays for these services when:

- ◆ a new parcel value is established based upon the appraiser's report, or;

- ◆ the state determines that the report should not be used in the ED proceedings.

If the appraiser's report does not result in a new parcel value and the report is approved for testimony, release it to the LPA for payment of the appraiser's fee. This payment is eligible for state reimbursement as agreed upon in the right of way acquisition contractual agreement.

After the Commissioners' Hearing. The state does not make payments directly to appraisers for services rendered after the Commissioners' Hearing. The LPA makes these payments with prorated state reimbursement, when eligible.

Payment for Appraisals for Design Purposes

Payment for appraisals performed only for design purposes must be according to the appraiser's contract, as authorized by the Design Division and approved by the ROW Program Office. Charge these appraisals to the appropriate construction CSJ account. Enter the lump sum fee agreed to by the appraiser in the Description blank (11) and the Amount blank (14) of *ROW-A-15 Payment Request*.

Payment of Expert Witness

When employing an expert witness under contract form [ROW-A-46 Contract for Services of Expert Witness](#) or [ROW-A-87 Contract for Services of Expert Witness](#), use a *ROW-A-15 Payment Request* for payment of witness services in an amount not to exceed that provided for by the contract.

Payment of Technical Expert

Payment requests for technical experts must be in the contract through form [ROW-A-47 Contract for Services of Technical Expert](#), according to the per hour rate shown, and in an amount not to exceed that provided for in the executed contract.

The following are specific instructions for [General Payment Policy](#) and Procedures.

- ◆ Enter the name, address, and PIN of the technical expert (payee) in *ROW-A-15 Payment Request*.
- ◆ Enter "Technical Expert" in the Description blank (11).
- ◆ Enter the per hour rate in the Unit Price blank (13).
- ◆ Forward *ROW-A-15 Payment Request* for technical expert fees to the ROW Program Office only after receiving and reviewing the technical expert's reports.

Section 4 — Payment Submissions for Negotiated Parcels (for State)

Procedure

Payment requests for negotiated parcels must consist of the following items. The handling of exceptional instances, where the executed deed cannot be included in the submission, is described in [Payment When Escrow Procedure is Used](#).

Components of Payment Request for Negotiated Parcels (State)

Item	Description	Number of Copies	Signer
1	ROW-A-15 Payment Request	3	Right of Way Agent signs original.
2	Owner Title Insurance Policy Commitment	1 - -	Title insurance company must sign.
3	True and Correct Copy of Signed Deed	1	Signed by grantors. Submission must include an executed copy of the deed bearing certification that it is a true and correct copy. This certification should be placed on the first page of the deed, either in the margin or in the blank space at the heading of the deed.
4	Memorandum of Agreement (MOA)	1 (optional)	District Engineer (or authorized representative) and grantors sign one original.

Normally, payment requests for all interests in a parcel must be forwarded to the ROW Program Office together. However, if simultaneous payment cannot be made (e. g., for undivided interests in a parcel), the TxDOT's payment request should include a statement indicating that the payment assembly represents only the interest: (1) in the property indicated on *ROW-A-15 Payment Request*, and (2) in the instruments of conveyance. The remaining interest must be acquired separately by negotiation or ED proceedings. TxDOT's payment request for the remaining outstanding interest must make reference to the interest previously purchased. If the title insurance company issues separate commitments for undivided interests or for fee and leasehold interests, a single title insurance policy should be issued and a statement to this effect must be included in the TxDOT's transmittal of the payment request.

In rare instances, if less than the state's approved value will be paid for a negotiated interest according to the owner's desires, then files must contain information documenting circumstances resulting in acquisition at less than the value approved. (See Chapter 6, Section 1, [Overview](#), of this Volume, for more information).

Section 5 — Payment Procedures for Negotiated Parcels (for LPA)

Procedure

Precede or accompany requests for reimbursement on negotiated parcels (including the cost of land, improvements and property adjustments necessitated by the right of way taking) by or with the instruments of conveyance and assurance of title for the parcels.

Submit requests for reimbursement on eligible negotiated parcel costs to the ROW Program Office on *ROW-A-15 Payment Request*, supported by one copy of form [ROW-N-20AB Tabulation of Cost & Request for Reimbursement](#). The following instructions are pertinent to preparing form *ROW-N-20AB Tabulation of Cost & Request for Reimbursement* for negotiated parcels:

Indicate the parcel number in Column 1.

- ◆ Show the LPA's gross cost in Column 2. This figure is the cash consideration paid directly to the property owner as recited in the deed, and the cost of property adjustments (required by the right of way taking).
- ◆ Compute the LPA's requested reimbursement on negotiated parcel costs shown in Column 3 as follows:
 - Reduce the state's approved value by the retention value applicable to each improvement retained by the owner. The resulting adjusted approved value establishes the basis for determining state reimbursement. The amount shown in Column 3 will be the lesser of the state's pro rata share of the adjusted approved value or the state's pro rata share of the gross parcel cost shown in Column 2.
- ◆ Column 4 is the net credit or loss from the sale of improvements by the LPA.
- ◆ Column 5 is the total of Columns 3 and 4 and is the total reimbursement requested.
- ◆ List the improvements retained by the owner in negotiations in Column 6. These item numbers are identified on form [ROW-A-10 Tabulation of Values](#).
- ◆ The LPA's expenditures for moving or adjusting improvements as required by the right of way taking must be shown in Column 7. The gross cost to be shown in Column 2 is the sum of the amount shown in Column 7 and the consideration recited in the deed.
- ◆ Indicate total acreage conveyed by all instruments supporting the reimbursement submission in the lower portion of *ROW-A-15 Payment Request*.

Section 6 — Payment When Escrow Procedure is Used

Procedure

If the landowner will not execute and escrow the deed but will execute the MOA, the Agreement must be forwarded with the payment request for the parcel. The state warrant must be escrowed with a state or national bank as required by *Transportation Code, Section 203.061*.

If the owner refuses to execute a deed or a Memorandum of Agreement, TxDOT's request to the ROW Program Office for issuance of a state warrant to be placed in escrow must be supported by:

- ◆ the usual copies of a title insurance policy commitment, form [ROW-N-ACA Attorney's Certificate "A" Initial Certificate for Negotiated Parcels](#) (see [Payment Procedures for Negotiated Parcels \(for LPA\)](#)) and, if possible
- ◆ a written indication by the owner that the offer and the placing of the state warrant in escrow is acceptable.

TxDOT's payment request must include:

- ◆ state or national bank's name, street address, and town or city, and
- ◆ the name of the bank official with whom the state warrant can be placed in escrow.

An escrow agreement must be written by the Financial Management Division for use in escrowing the state's warrant and must be transmitted to the right of way staff with the warrant.

Section 7 — Payment for Recording Instruments of Conveyance

Procedure

When title insurance is obtained, the title insurance company's payment request for the title insurance premium should include any recording fees paid by the title insurance company for recording instruments conveying title to the state.

When the title insurance company does not pay for recording fees, the County Clerk may be paid separately for recording instruments of conveyance upon submission of *ROW-A-15 Payment Request*. *ROW-A-15 Payment Request* must indicate the type of instrument recorded (e.g., deed, quitclaim deed, easement).

Section 8 — Payments for Leasehold Interests (for State and LPA)

Payment Procedure When Leasehold and Fee Interests Are Negotiated

When leasehold and fee interests are negotiated in accordance with Acquisition of Leasehold Interests, Chapter 5, Section 24 of this volume, submit a separate MOA or, when applicable, a Purchase Agreement to the ROW Program Office for both the fee owner and the lessee. Payment to each party must be according to these documents. The payment request for parcel(s) must include all interests being acquired, and closing must be made simultaneously, except as noted below, in the total amount of the approved value for the parcel.

Payment requests for negotiated parcels involving both leasehold and fee interests must consist of the following items:

- ◆ *ROW-A-15 Payment Request* for each interest, original and two copies
- ◆ Owner Title Insurance Policy Commitment covering all interests being acquired
- ◆ A deed conveying all interests being acquired by the state (quitclaim from leasehold interest)
- ◆ Memorandum of Agreement or separate Purchase Agreement for each interest
- ◆ Waiver and disclaimer

Note: The payment for a permitted outdoor advertising structure and the leasehold associated with it may be requested separately and prior to the payment request for the fee interest. Payment may be made directly to the owner of the sign and leasehold without closing or may be made simultaneously with the fee closing. Conversely, a request for payment for the fee interest and closing of the fee interest may not occur until after or simultaneously with the acquisition of the leasehold interest.

Section 9 — Payment for Title Work

Payment for Title Insurance Company Expenses (for State and LPA)

When title insurance is obtained, use *ROW-A-15 Payment Request* to prepare the title insurance company's payment request for the title insurance policy premium. The following are specific instructions for *ROW-A-15 Payment Request* in [General Payment Policy](#) and Procedures:

- ◆ Enter the title insurance company's (payee) name, address, and PIN in *ROW-A-15 Payment Request*.
- ◆ Enter the project number, parcel number, and "Title Insurance Policy Premium" in the Description blank (11).

Support each *ROW-A-15 Payment Request* submission with the following:

- ◆ The original recorded deed or a certified copy of the judgment that was recorded in the Deed Records.
- ◆ The Owner Title Insurance Policy issued according to the Owner Title Insurance Policy Commitment.
- ◆ For negotiated parcels, submit one copy of the form ROW-N-72, Title Insurance Company's Closing Statement, signed by the sellers, the title insurance company, and the right of way agent. For condemned parcels, submit one copy signed by the title insurance company.

Section 10 — Payment and Pay Procedures for LPA Acquisition

Overview

The LPA may exercise its option to perform the required right of way acquisition activities and payments with pro-rated cost reimbursement by the state. Under this program (usually US or SH projects), initial payments must be made by the LPA, and state reimbursement is performed according to contractual agreement between the state and LPA.

A contractual agreement form, Contractual Agreement for Right of Way Procurement and Attachment “C”, has been developed for this program.

The state must make direct payment to the fee appraisers (1) for appraisals needed for the state's approval of LPA recommended values and (2) for fee appraisals where the state determines values by use of the contract waiver provisions.

When TxDOT orders a new appraisal report (or updated report) at the request of the LPA for use in a Commissioners' Hearing, the state should make direct payment to the fee appraiser only if: (1) the approved value is revised on the basis of the report, or (2) the state determines that the appraiser and the appraiser's report will not be released for the LPA's use.

If an expert witness obtained for the Commissioners' Hearing is not approved for release (for witness purposes) and some compensable services have been performed before the time of disapproval, direct payment must be made by the state for such services. Payment for the services of technical experts contracted by the state (as necessary to establish values) must be made by the state.

The state must also make direct payment for title information and title insurance.

Section 11 — State Reimbursement for LPA Acquired Right of Way

LPA's Requests for Reimbursement

TxDOT should **promptly** reimburse LPAs under the terms of the contractual agreement. However, all reimbursements must be initiated by a request from the LPA. To verify that all required data is submitted, and to expedite the state's processing of these requests, sample forms are available for the LPA's use in billing the state.

The LPA does not need to complete its acquisitions or expenditures on an **entire** right of way project before requesting reimbursement. Reimbursement requests may be submitted on one or more parcels, when **all** reimbursable expenditures (except right of way fencing, and not less than 80 percent of the state's participation of the award on condemned parcels) are included in one billing. It is generally more practical to group several parcels in each request.

Reimbursement submission requirements for various reimbursable items are described in the following sections. Reimbursement requests may be combined into one request when each individual support requirement is fulfilled.

LPA Reimbursement Forms

All LPA requests for reimbursement by the state must be billed on TxDOT *ROW-A-15 Payment Request*. The Department should prepare and review *ROW-A-15 Payment Request* as described in [General Payment Policy](#). The LPA uses form [ROW-N-20AB Tabulation of Cost & Request for Reimbursement](#) to show agreement with amount to be reimbursed.

All parcel reimbursements (with the exception of those for LPA right of way fencing) done on an actual cost or lump sum basis must be supported by three copies of form *ROW-N-20AB Tabulation of Cost & Request for Reimbursement* sent to the ROW Program Office. The form must include ethnic coding to identify the property owner as minority or non-minority according to [State Responsibility for Making Payment](#).

For condemned parcels, support *ROW-A-15 Payment Request* and *ROW-N-20AB Tabulation of Cost & Request for Reimbursement* with:

- ◆ one copy of form [ROW-N-20C Check Sheet to Support Reimbursement on Condemned Parcel](#)
- ◆ three copies of the breakdown of costs incurred in acquisition by condemnation
- ◆ 80% of the state's participation of the Billing Based on Commissioners' Award
- ◆ Billing based on the final judgment

Support *ROW-A-15 Payment Request* for right of way fencing by the LPA by submitting three copies of County's or City's Support for *ROW-A-15 Payment Request* on [Lump Sum Fencing](#) or, County's or City's Support for *ROW-A-15 Payment Request* on [Actual Cost Fencing](#) to the ROW Program Office.

Section 12 — Submission for Reimbursement of Right of Way Fencing

Lump Sum

The LPA's reimbursement request on the firm commitment for right of way fencing (under the supplemental agreement to the project's contractual agreement) must be made on *ROW-A-15 Payment Request*, (see [General Payment Policy](#) and Procedures) and supported by County's or City's Support for *ROW-A-15 Payment Request*, on Lump Sum Fencing. Fencing must be completed on the entire project and only one billing per project will be processed, unless more than one agreement is authorized.

Actual Cost

If the LPA prefers not to use the firm commitment agreement method for right of way fencing and values for existing fences (or damages for an unfenced condition have not been included in the approved value), the LPA may be reimbursed on the basis of its actual costs instead of entering into the firm commitment agreement. The billing must be made on *ROW-A-15 Payment Request* and supported by a breakdown of the cost of labor, materials, and equipment. If fencing is done by contract, also attach a copy of the successful bid received on a competitive bid basis. Also, support *ROW-A-15 Payment Request* by showing:

- ◆ distribution of the total cost, by parcel,
- ◆ the description of the type of fence constructed,
- ◆ the total linear feet of fencing constructed, and
- ◆ the average cost per linear foot.

Fencing reimbursement on the actual cost basis can be made when right of way fencing on a parcel is complete and paid for. The number of fencing submissions should be kept to a minimum by combining as many parcels as possible in each billing.

Chapter 19 — Incidental Expenses on Transfer of Real Property

Contents:

[Section 1 — General Requirements \(for State and LPA\)](#)

Section 1 — General Requirements (for State and LPA)

Requirements for State and LPA

According to 43 TAC 21.71, owners of real property acquired for state purposes are entitled to reimbursement for reasonable, necessary expenses to transfer their property to the state. Reimbursement of the eligible incidental expenses (paid by the owner) is the state's responsibility.

- ◆ Handle this reimbursement as an item that is a part of the relocation assistance program.
- ◆ Federal participation is limited to federal right of way projects.
- ◆ Expenses of the owner for personal reasons, not necessary for transferring their property to the state, are not eligible for reimbursement.
- ◆ Expenses are not eligible for reimbursement when those expenses are for litigation (1) to establish title or (2) to establish the right to withdraw an award or judgment.

On TxDOT acquisitions, include information to owners about reimbursement of incidental expenses (to transfer their property to the state) in the Initial Offer Letter. Include similar information in the applicable [Memorandum of Agreement \(MOA\)](#).

If an owner is not satisfied with the determination of reimbursement for an incidental expense (to transfer its property to the state), then that owner may request “further review”. There is no standard form to request further review. The request for further review must be filed with TxDOT within six months after the owner receives written notification of TxDOT's determination of reimbursement for incidental expenses.

If the owner makes a written request for further review, then the written request is subject to review by the Relocation Assistance Review Committee.

If full relief requested by the owner is not granted through the Relocation Assistance Review Committee process, then the owner must be advised of its right to seek “judicial review”.

The acquiring agency must advise the owner of eligible incidental expenses through personal contact or written notification. The written notification must include the following text:

"After the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation as determined through eminent domain proceedings to acquire real property, you will be reimbursed for any fair and reasonable expenses necessarily incurred in transferring title to the property for use by the Texas Department of Transportation. Expenses eligible for reimbursement may include (1) recording fees, transfer taxes, and similar expenses incidental to conveying the real property to TxDOT and (2) penalty costs for prepayment of any pre-existing recorded mortgage entered into in good faith encumbering the real property. Voluntary unnecessary expenses or expenses

incurred in clearing questionable title will not be eligible for reimbursement. Eligible incidental expenses will be reimbursed upon submission of a claim supported by receipted bills or other evidence of actual expenses incurred. You may file a written request for review if you believe that TxDOT failed to properly determine the eligibility for or the amount of incidental expenses to be reimbursed. There is no standard form on which to request review of a claim; however, the claim must be filed with this office within six months after you are notified of TxDOT's determination on any claim for reimbursement."

Additional Requirements (for LPA)

On projects using either state or federal funds, reimbursement of incidental expenses is the responsibility of the LPA.

Recording and Transfer Fees (for State and LPA)

Recording fees, transfer fees, and similar expenses incidental to conveying property to the state are eligible for reimbursement. The following are examples:

- ◆ If the property owner normally has to pay a lending agency for execution of release, resurvey, or preparation of a deed, then these costs are eligible incidental expenses.
- ◆ If appointment of a guardian is needed in the process of transferring property to the state, then reasonable costs for related legal services are eligible incidental expenses. It should be noted that, normally, the property owner's attorney's fee would not be eligible.

Mortgage Prepayment Penalty (for State and LPA)

Eligible expenses include penalty costs for prepayment of pre-existing mortgage (entered into in good faith encumbering such real property) if the mortgage was on record at the time of closing. TxDOT's transmittal for these billings must state that the mortgage date was checked for eligibility.

State Responsibility for Making Payment

When it is known that eligible incidental expenses exist, advise owners of their eligibility and assist them in preparing claim forms.

Before closing a parcel acquisition file, review the file to determine if any unreimbursed incidental expenses exist. If there are any incidental expenses, advise and assist the owner in obtaining reimbursement for these expenses.

For LPA acquisitions, establish communication with the acquiring agency so that TxDOT is informed of any incidental expense. Follow through in determining eligibility and provide assistance to the LPA.

When owners are not interested in reimbursement, make an appropriate written notation for documentation in the parcel files.

Payment Requests

TxDOT and LPA requests for payment must be made using *ROW-A-15 Payment Request*. The following are specific instructions for *ROW-A-15 Payment Request* (see [General Payment Policy](#) and [Procedures](#)). Accompany each billing with a supporting form [ROW-RM-110 Property Owner's Claim for Payment of Incidental Expenses of Transfer of Real Property to the State](#).

Chapter 20 — Railroads

Contents:

[Section 1 — Terms Used in This Chapter](#)

[Section 2 — Purpose](#)

[Section 3 — Acquisition of Abandoned Railroad Interests](#)

[Section 4 — Acquisition of Operating Railroad Interests](#)

[Section 5 — Railroad Agreements](#)

[Section 6 — Railroad Relocation Procedures](#)

Section 1 — Terms Used in This Chapter

Terms

Double click on the following terms to see their definitions in the TxDOT Glossary:

- ◆ [Surface Transportation Board](#)
- ◆ [Joint Use Agreement](#)
- ◆ [Crossing Agreement](#)
- ◆ [Common Ditch Agreement](#)

Section 2 — Purpose

Purpose of Chapter

The purpose of this chapter is to set forth the policies and procedures that apply when TxDOT needs ROW for a highway improvement project and the needed ROW is owned in fee or easement by a railroad company. This chapter applies to those instances where abandoned railroad property is to be acquired, property subject to an operating railroad is to be acquired, an agreement is needed for the joint use of railroad lands, or an adjustment of railroad facilities is required.

Section 3 — Acquisition of Abandoned Railroad Interests

Definition of Abandonment

There are two methods by which an interest in property can be abandoned by a railroad company.

Common Law Abandonment. Common law abandonment of railroad ROW can be characterized as a cessation of a railroad company's right to use property for railroad purposes after official abandonment action by the STB. This type of abandonment occurs when a railroad company has an easement interest in land for railroad purposes. The easement document will usually state that upon the cessation of use of the property for railroad purposes, the use of the property reverts to the underlying fee title owner. Even if the easement document does not contain such verbiage, the cessation of use by the railroad company will operate to re-vest the easement interest in the fee title owner. This type of abandonment is a matter of intent. A railroad company is deemed to have abandoned its rights in the property if:

- ◆ A release of the interest is executed by the railroad company.
- ◆ A deed or other instrument of conveyance is executed by the railroad company in favor of the fee title owner.
- ◆ Tracks, ties and other improvements have been removed from the property by the railroad company.
- ◆ The railroad company has ceased to maintain the property for railroad purposes.

Quite often there is a dispute between a fee title owner and the railroad company as to the issue of intent. Unless it is expressly determined that abandonment has occurred, TxDOT must deal with both the fee title owner and the railroad company in acquiring the needed ROW.

Relinquishment of Jurisdiction. Abandonment, or relinquishment, of jurisdiction is the cessation of jurisdiction over a railroad company's operations by the STB. This form of abandonment occurs when the STB issues an order of abandonment. This determination is made when interstate commerce is no longer being served by the railroad company on the property and federal oversight is no longer necessary. This type of abandonment can occur if the railroad company owns fee title to the property or has an easement interest in the property. If an easement interest only is owned, this abandonment does not terminate the easement or any other rights to use the property by the railroad company.

Basic Acquisition Procedures

In situations where TxDOT has determined the necessity of purchasing a real property interest for ROW purposes, the acquisition procedures set out in this manual should be followed. An order of abandonment must have been issued by the STB before TxDOT can acquire needed ROW from a

railroad company. Once the order has been issued, a railroad company is treated the same as any other property owner. If the railroad company owns fee title to the property, TxDOT is required to only negotiate with the company. If fee title is vested in a third party and the railroad company only has an easement interest, TxDOT must negotiate with the fee title owner and the railroad company. If it can be determined with certainty that the railroad company has effectuated a Common Law Abandonment of its interest in the property, TxDOT is required to negotiate only with the fee title owner.

A situation may occur when it is in the best interest of TxDOT to acquire an entire railroad corridor that is subject to abandonment by the STB or a railroad company desires to sell an entire abandoned corridor instead of just a portion. In those instances, TxDOT has developed a Corridor Preservation Policy for Abandoned Railroads. A **Corridor Preservation Task Force Report** has been developed for use in those situations. The policies and procedures set forth therein should be followed in those situations in addition to the basic procedures for ROW acquisition detailed in [Right of Way Acquisition](#).

Acquisition by Eminent Domain

Acquisition of the interest of a railroad company when an order of abandonment has been issued by the STB can be accomplished by the power of eminent domain. The authority of TxDOT to condemn railroad property in this instance is not limited by the fact that a railroad company has an ownership interest in the property. The policies and procedures set forth in [Eminent Domain](#) should be followed in the condemnation of railroad property when an order of abandonment has been issued by the STB.

Section 4 — Acquisition of Operating Railroad Interests

Competing Public Interests

There are instances when TxDOT has determined the necessity to acquire ROW that is currently being used by an active or operating railroad. This is a situation where there has been no order of abandonment by the STB and the railroad company is using the property for railroad purposes. In this instance it is extremely difficult to acquire any interest in the property without cooperation from the railroad company. When TxDOT and a railroad company desire the same property for different purposes, a determination must be made as to the paramount public interest to which the property should be put. Without agreement between the agencies the matter must be resolved in court. Usually the current use of the property would be considered a paramount use. Thus, it is very difficult to change the use from railroad to ROW purposes without consent of the railroad company. In these instances TxDOT should pursue an appropriate Joint Use Agreement with the railroad company. The uses of such agreements are set forth in [Railroad Agreements](#).

STB Requirements

If it is imperative that TxDOT acquire ROW from an operating railroad, an order of abandonment must be issued by the STB. TxDOT cannot acquire a property interest from a railroad company if the property interest is still under the jurisdiction of the STB. If cooperation from the railroad company can be obtained, they may file a petition for abandonment and the section needed by TxDOT can be abandoned by the STB. If the railroad company refuses to cooperate, there is a procedure where TxDOT can file a petition for involuntary abandonment. This is a very complicated, expensive and lengthy procedure and should be avoided except in very rare circumstances. If this procedure must be used, the ROW Division should be contacted for assistance. Once an order of abandonment has been issued, acquisition can proceed in accordance with normal acquisition procedures.

Limitations on Use of Eminent Domain

The general rule is that the power of eminent domain cannot be used against an operating railroad. If a railroad company refuses to cooperate in the acquisition of property that is currently being used for railroad purposes, TxDOT cannot condemn the property until an order of abandonment had been issued by the STB. No condemnation proceeding can be instituted until such order has been issued. Once the order has been issued and the railroad company refuses to accept the offered compensation, condemnation can proceed according to normal policies and procedures.

Section 5 — Railroad Agreements

Overview

Railroad Agreements are joint use agreements (license agreements) entered into between TxDOT and a railroad company for the use of needed ROW. The agreements are customarily used when an active, operating railroad is involved as opposed to abandoned railroad property. These agreements are in the form of a license in that they are permissive and do not create a property interest. The agreements are used in scenarios where TxDOT needs use of ROW presently used by a railroad company and when a railroad company needs ROW presently used by TxDOT. The agreements allow for the joint use of property for a specific purpose at no cost to either party for the use. The two basic instances when a Railroad Agreement will be used are when a highway and railroad intersect and when a highway and railroad run parallel.

Crossing Agreements

A Crossing Agreement is used when highway and railroad ROW intersect. If for example, a current railroad is operating on property owned by a railroad company or on property over which a railroad company has an easement and a highway facility needs to cross the railroad property, then it would be appropriate to execute a crossing agreement by and between TxDOT and the railroad company. The agreement will give TxDOT permission to cross the railroad property at a specific location. The Railroad Section of the Traffic Operations Division is charged with the responsibility of negotiating for and preparation of these agreements. That Division coordinates the agreements with the Railroad Project Coordinator in each District. The Traffic Operations Division Director is the only person authorized to execute such agreements on behalf of TxDOT. A signed and sealed property description and parcel sketch detailing the common usage area must be attached to the agreement. A copy of the agreement should be transmitted by the District to the ROW Division for their records. At the option of TxDOT, the agreement may or may not be recorded in the deed records of the appropriate county. There is no compensation paid to the railroad company for the use of the railroad property in this instance. The area covered by these agreements should be shown on the ROW map for the project and should be designated with a parcel number followed by JUP (Joint Use Parcel). A Crossing Agreement will also be used if a railroad company desires to cross an existing highway.

If the interest owned in the property by the railroad company is only an easement and those rights are abandoned by the railroad, it will be necessary for TxDOT to acquire a property interest from the underlying fee owner. The reason for this is that TxDOT only has a license to use the property for so long as the railroad company has an interest. If the interest of the railroad company goes away, so does TxDOT's interest.

Longitudinal Agreements

Longitudinal or Common-Ditch Agreements are used when highway and railroad ROW run parallel. These agreements usually entail the use of the ditch area that exists between the railroad property and the highway ROW. As in Crossing Agreements, the negotiation and preparation of a Longitudinal Agreement is the responsibility of the Railroad Section of the Traffic Operations Division in coordination with the Railroad Project Coordinator in the District. The Director of the Traffic Operations Division is the only person authorized to execute these agreements on behalf of TxDOT. A signed and sealed property description and parcel sketch detailing the common usage area must be attached to the agreement. A copy of the agreement should be transmitted by the District to the ROW Division for their records. At the option of TxDOT, the agreement may or may not be recorded in the deed records of the appropriate county. The type of agreement entered into by and between TxDOT and the railroad company is similar to the Crossing Agreement and will only give TxDOT a license to use the property. As in the situation of a Crossing Agreement, if the interest owned in the property by the railroad company is only an easement and those rights are abandoned by the railroad, it will be necessary for TxDOT to acquire a property interest from the underlying fee owner. The area covered by these agreements should be shown on the ROW map for the project and should be designated by a parcel number followed by JUP (Joint Use Parcel).

Section 6 — Railroad Relocation Procedures

Overview

There are instances where TxDOT needs ROW currently occupied by an operating railroad and the railroad company is agreeable to transferring the property to TxDOT if TxDOT will effectuate a relocation of the railroad facility to another location. Before any property interest can be conveyed to TxDOT and a railroad facility relocated, a proper order of abandonment and relocation must be issued by the STB.

If it is determined that a railroad is to be relocated, an agreement concerning all aspects of the relocation should be obtained. This agreement will be between TxDOT, the railroad company and the appropriate LPA. The LPA will be a party to the agreement due to their participation in the cost of the relocation. The agreement will detail the property needed by TxDOT and the property to which the railroad will be relocated. The agreement will also state if TxDOT or the LPA will be the acquiring agent for the replacement property. All information necessary to prepare the agreement should be transmitted by the District to the ROW Division. The ROW Division will prepare the agreement in collaboration with the District, Rail Division, and General Counsel Division. Duplicate originals of the agreement should be prepared for all parties.

Once the agreement has been executed, the relocation property will be acquired by TxDOT, by the appropriate LPA acting on behalf of TxDOT or by the railroad company. If TxDOT acts as the acquiring agency, the property should be obtained in the name of the railroad company. If the LPA acts as the acquiring agency, the property may be obtained in the name of the railroad company or in the name of the LPA. If the individual parcels are obtained in the name of the LPA, they should deed all parcels to the railroad company once acquisition has been completed. The railroad company will obtain the property in its own name. Only in very extraordinary circumstances is the relocation property to be obtained in the name of the State of Texas.

The acquisition of the replacement property, whether by TxDOT, the LPA or the railroad company must be done in compliance with TxDOT rules and regulations governing the acquisition of ROW, including compliance with **the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended**. TxDOT shall be responsible for the costs of the acquisition of the replacement property. The appropriate LPA will participate in these costs in accordance with TxDOT policy. Once the replacement property is acquired, the railroad company will deed the property needed for the highway ROW to the state at no additional cost.

If the railroad is to be relocated to property already owned by the railroad company, then acquisition of the needed highway ROW will be acquired under normal TxDOT acquisition procedures. In this situation any agreement concerning the cost of construction for the new railroad facility will not be a ROW function.