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Determination of Right Of Way Types and Boundaries

The ROW needs for each aspect of the project must be determined based on the Federal Highway Administration 23 CFR 1.23(a) requirements **“Interest to be acquired – The State shall acquire rights-of-way of such nature and extent as are adequate for the construction, operation, and maintenance of a project”**. Additional land rights must be acquired if the existing right of way does not provide adequate capacity for these needs. Determining exactly what to acquire is dependent on the particular situation, but the size and type of each acquisition should be justified by one of the needs outlined in the CFR. Because Federal Aid projects must meet these requirements the local public agency may need to acquire land rights beyond what they would normally acquire for a locally funded project.

When establishing new right of way boundaries careful consideration must be given to the need for each tract of land, and of the use to be made of that land by the agency. The acquisitions should be of sufficient size to accommodate the construction, operation, and future maintenance of the highway without being excessive. Whether the needed ROW should be purchased in fee, or in some lesser estate will depend on how the land will serve the agency, and if the acquisition would have any remaining value to the property owner after the agency has employed it for their use. The three primary means to acquire ROW are fee simple, permanent easements, and temporary easements. Typical uses for each are as follows.

Fee Simple

Generally Fee Simple would be desirable to accommodate permanent items that would be critical for the operation and maintenance of the transportation facility. The use of Fee Simple would enable the un-encumbered and complete use of the area by the agency for transportation purposes without being infringed upon or impaired by the underlying fee owners remaining rights. Another consideration for the use of Fee Simple is that often the cost of a permanent easements can be the same, or nearly the same, as Fee Simple since the landowner may have little to no remaining rights for the use of area. The underlying Fee Ownership in an area can also raise concerns of liability of the landowner in certain circumstances. Examples of when fee simple are primarily used are:

- Areas that encompass any public road driving surface along with its associated grading, shoulders, culverts, ditches, foreslopes, backslopes, curbs, bridges, guardrail, traffic signals, street lighting, dikes, berms, sidewalks, curb ramps, retaining walls, permanent erosion control, drainage structures, and all other related aspects of the road that are necessary to ensure the continued operation and maintenance of the highway in the prescribed manner.
- Areas needed to control or accommodate project drainage (ditch bottoms, backslopes, foreslopes).
- Any areas that must be maintained free of obstacles.
- Areas for any construction items that are to be for the public’s use or benefit.
- Areas that cannot be altered at any time in the future without the agency’s consent.

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- Areas that must be continuously maintained in a specific manner to provide sight distance.
- Areas of a parcel that are not needed for construction, but have little or no use to the property owner after highway construction has occurred (Uneconomic Remnants).
- Areas for work needed to fulfill the environmental permit requirements (wetland mitigation sites, channel changes, buffer zones, etc.).
- Any areas that the state must have control over in order to fulfill a purpose required by the project.
- Areas on one property that must be used to provide access to other properties.
- Any other areas that are permanently needed to construct, operate, and maintain the highway or other public road.

Permanent Easements

Permanent easements can be used when only certain property rights are permanently needed to fulfill the projects purpose. They are often used in lieu of Fee Simple when there is some benefit to the property owner to retain some rights in the acquisition, and it does not inhibit the agency's ability to use the property for its intended purpose. When permanent easements are used their purpose must be clearly stated on the plans. The recorded acquisition documents must clearly state the purposes, how the easement can be used by grantor and grantee, and any restrictions. If the landowners use of the easement becomes too encumbered with physical or implied restrictions then the LPA should consider purchasing it in fee. Examples of when permanent easements could be used are:

- Areas on one property that are used to provide access to other properties.
- Areas that are occasionally or permanently under water.
- Situations where an area serves both a public and private purpose. For example a fill area that is both an embankment for a public road, and the bank of a private pond. This permanent easement would be acquired to enable the agency to maintain the road embankment, while still allowing the landowner to use the pond and bank.
- Areas to permanently allow the agency access for maintenance.
- Any areas over which the agency must have certain rights or control over.
- Ditch backslopes so the landowner could still use land for pasture purposes, but agency would still be able to clean out ditches, repair slides, and prevent erosion.
- Underground storm sewer, sanitary sewer, or water lines.
- Any other areas that are permanently needed for a specific purpose.

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Temporary Easements

Temporary easements are used when only particular property rights are needed for a limited time. Primarily they are used to allow the temporary occupation of an area by the contractor while building the road improvement. Examples of when temporary easements are generally used are:

- Private drive construction.
- To allow access to an area during construction.
- Temporary roads to accommodate traffic during construction.
- Areas needed to accommodate construction equipment and/or materials.
- To accommodate the grading beyond any permanent roadway construction items, such as in urban areas where the adjacent properties have already been fully developed, and the adjacent ground will blend into or compliment the roadway grading. For example temporary easements could be used to re-shape a residential yard beyond the sidewalk that is at roughly the same elevation as the road and sidewalk.
- Areas needed to remove structures and/or clear it of improvements.
- Areas to facilitate grading operations.
- To grade areas that are not essential to the continued operation or maintenance of the road.
- Anywhere additional room is temporarily needed to facilitate construction.

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Construct Operate and Maintain Definitions

A critical component of any federal aid public transportation project are the land rights needed to facilitate the construction operation and maintenance of the project in accordance with **Federal Highway Administration 23 CFR 1.23(a) – “Interest to be acquired – The State shall acquire rights-of-way of such nature and extent as are adequate for the construction, operation, and maintenance of a project”**. These land rights ensure that the transportation facility along with any associated appurtenances have a legal right to exist on a parcel of land and therefore cannot be displaced by a competing land use before a return on the investment has been realized.

Definitions

State The term “State” in this regulation is accepted to mean the local public agency who has the jurisdictional authority for the construction, operation, and maintenance of the facility either by being the project sponsor, by operation of law, classification of the transportation facility, or through agreements or other documents legally establishing this responsibility.

Construct Construct is the process of physically building the project according to plan. The land rights acquired for these activities should be of sufficient size to reasonably facilitate the area needed for personnel and required equipment to stage, remove, and construct all items identified in the construction plans without trespassing on private property. The right of way areas for this project need also includes the room required to temporarily alter or accommodate surrounding features such as traffic, drainage, and accesses that facilitate the construction activities. Items to consider when determining the amount of right of way needed for this purpose include adequate room for equipment and personnel to operate beyond the physical footprint of the feature being constructed, grading requirements, access to the site, construction staging, temporary roads, feasible excavation for subterranean items, removal or adjustments of obstructions, clearing tracts, temporary construction items, storage of building materials, component assembly, etc. Areas acquired in fee are available for these construction activities as well as any permanent easements whose purpose is consistent with the proposed use. Any additional areas would only be needed during the construction phase and therefore can be acquired as temporary easements.

Operate This is the process of ensuring that the transportation facility that is under the control, jurisdiction, and responsibility of the public agency continually functions as intended. The permanent land rights for this need permit the safe and efficient operation of the facility, and subsequent use by the public, without being encumbered by competing land use rights. This includes the physical areas occupied by any feature made available for the public’s use such as driving surfaces, public sidewalks, multi-use trails, ADA ramps, stairs, etc. It also includes areas that function or contain features that are in support of these objects such as fill or cut slopes, bridges, curbs, drainage structures, traffic signals, street lighting, clear zones, signs, permanent erosion control, sight distances, ditches, project drainage, retaining walls, joint use drives, etc. Because of the permanent nature of

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these features they must reside on land acquired either in fee or as a permanent easement whose purpose is consistent with its intended use.

Maintain Maintenance is the process of periodically inspecting, repairing, replacing, or restoring individual features of the facility to ensure the overall facility is functioning as intended or to prolong its service life. The permanent land rights should therefore provide the room necessary for personnel and equipment to access and perform expected and routine maintenance activities such as pavement repairs, restoring erosion control features, cleanout of ditches, restoring sideslopes and backslopes damaged by erosion, cleanout of culverts, ensure structures are sound, fix sidewalks, etc. Because these activities are ongoing the lands rights justified by them must be either acquired either in fee or as a permanent easement whose purpose is consistent with its intended use.