

5.

EARLY PROJECT DEVELOPMENT

National Environmental Policies Act (NEPA) of 1969, as amended.

Section 306 of the Clean Air Act [42 U.S.C. 1857(h)]

Section 508 of the Clean Water Act (33 U.S.C. 1368)

Executive order 11738

Environmental Protection Agency Regulations (40 CFR Part 15)

Energy Policy and Conservation Act (PL 94-163)

REFERENCES

Early project development is that stage following the inception of the project when much of the preliminary planning is accomplished. This chapter describes the role of Right of Way during this critical phase of a project.

5.1. PRELIMINARY RIGHT-OF-WAY STUDIES

One of the earliest activities involving the acquisition section will be preliminary engineering and the environmental process. Right-of-way estimates and other studies regarding acquisition cost and relocation impacts will be needed and requested periodically.

The following sections outline ROW's responsibility during these early planning stages and the importance of ROW

involvement in early project planning.

5.1.1. RIGHT-OF-WAY COST ANALYSIS AND OTHER STUDIES

During this phase of a project, the ROW organization will become involved in preparing various estimates and other studies, including compiling special information for the environmental impact assessment, required for all projects. The ROW staff will be asked to inspect the various alignments, and make note of special problems or unusual circumstances that are not revealed by aerial photogrammetry. ROW will be expected to

This chapter describes the role of Right of Way during the phase of Early Project Development.

SUMMARY

deliver accurate cost estimates of the property value on the various alignments. A thorough understanding of the real estate market in the project area is important in providing reliable estimates.

ROW may be expected to assist with identifying and providing cost impacts covering the following:

! Noise abatement.

This may involve a cost analysis of appropriate mitigation measures (ie: noise walls, berms, cuts, fills, etc.) to achieve noise reduction on adjacent property.

! Property access.

Caution: Reasonable access must be maintained, if not, appropriate damages may be considered as part of the cost estimate.

! Neighborhood boundaries

! School districts,

! Fire and police protection

! Recreational facilities

! Wetlands and/or floodplain impacts.

! Land use impacts.

Participation in the descriptions of current development trends and researching State/local plans with regard to land use and growth in the project area may be assigned to right-of-way.

! Sites required for disposal or borrow areas.

Acquisition costs are often necessary requirements of the preliminary engineering phases of a project.

! Historic Properties

Right-of-Way personnel should also be involved early in the public meeting phase of the project. Public involvement is advantageous because local reaction to a project is expressed. Public involvement in this function is a method of broadening an agency's knowledge of the project area so as to plan the highway facility to meet the needs of the majority of citizens. This forum provides an excellent opportunity to discuss the general

Wetland and Floodplain impacts are mainly the purview of engineering and environmental personnel, mitigation can be a right-of-way matter where alternatives are needed for properties located in flood plains or wetlands.

IMPACT MITIGATION

ROW acquisition and relocation impacts with those affected persons. It can also serve as an initial relocation contact.

5.1.2. PUBLIC HEARINGS

Public hearings provide a forum through which citizens can have input in the planning process. Regulations currently stress that public hearings shall be held or that an opportunity for a hearing shall be afforded to assure that the public is adequately informed of the project. The importance of the property acquisition phase within the confines of the public hearing can not be understated. The most difficult part of any project is the acquisition of property and/or displacement of people and personalty that results because of the project. Difficult, because it is the phase when one has to deal with the people that are most affected by the project. Most often, the property owners that live directly on and adjacent to the project do not see its importance when balanced against their desires and needs. Often the project to them means disruption of their business, or disruption of their lifestyle with their friends, families, and neighbors. As a result, the property owners from whom the ROW must be purchased are often hostile and unwilling to consider reaching a friendly agreement. The public hearing process is often their first real informational contact with project authorities and therefore is their first forum for information giving and getting.

There are basically three types of hearings:

The Location Hearing.

The location hearing is normally held prior to the selection of an approved route location and prior to the displacing agency commitment to a specific alignment. This type of hearing is to ensure that an opportunity is afforded for effective participation by those interested in the process of determining the location of a highway.

The Design Hearing.

A design hearing may be held to provide a public forum which affords a full opportunity to discuss all major design features including economic, environmental, and other impacts of the alternate designs. It is usually after the design hearing that the acquisition agency requests FHWA authorization to begin right-of-way activities. A design hearing is generally held after the selection and approval of a location.

The Combination Hearing.

An alternative to the two hearing process may involve a combined location and design hearing. This type of public hearing combines the two previously described public hearings into one public hearing where everything from location to design is discussed. This type of hearing is normally reserved for those non-complex projects which do not require an in-depth discussion usually associated with a large, complex project.

Acquisition agents can make a significant contribution in the public involvement process. Through attendance at the public hearings, the agent can be a public relations asset to the highway agency. It is at this stage of the planning process that many citizen concerns can be alleviated by answering questions and making right-of-way acquisition and relocation brochures available. At the hearing the ROW staff will be asked many questions about the effects of the project on the area and properties. The ROW staff should be able to sensitively and accurately answer the questions posed. If an answer cannot be given, the agent should refer the individuals in the right direction for the answer. The agent should be fully informed about the project but should not engage in speculations or assumptions. Misinformation can do much to damage the credibility of the agency, therefore it is important to present the facts in an open manner. This becomes even more important as the acquisition process progresses to the negotiation stage. As the project progresses and the location and design become more defined, the acquiring agency may conduct an additional meeting to address only ROW issues on major projects. This type of meeting offers those property owners affected by the project a more detailed look at the process that lies ahead for them.

5.1.3. WHOLE AND PARTIAL ACQUISITIONS

During the early phase of a project the right-of-way needs may not be defined clearly enough to differentiate between what will be a whole take and what will be a partial take. Cost estimates may consider only whole parcels to be acquired if that would provide useful data. Costs of partial acquisitions including damages to the remaining properties and project overhead can be factored into an estimate, usually based on actual cost experience on completed projects.

5.1.4. ENVIRONMENTAL STUDIES

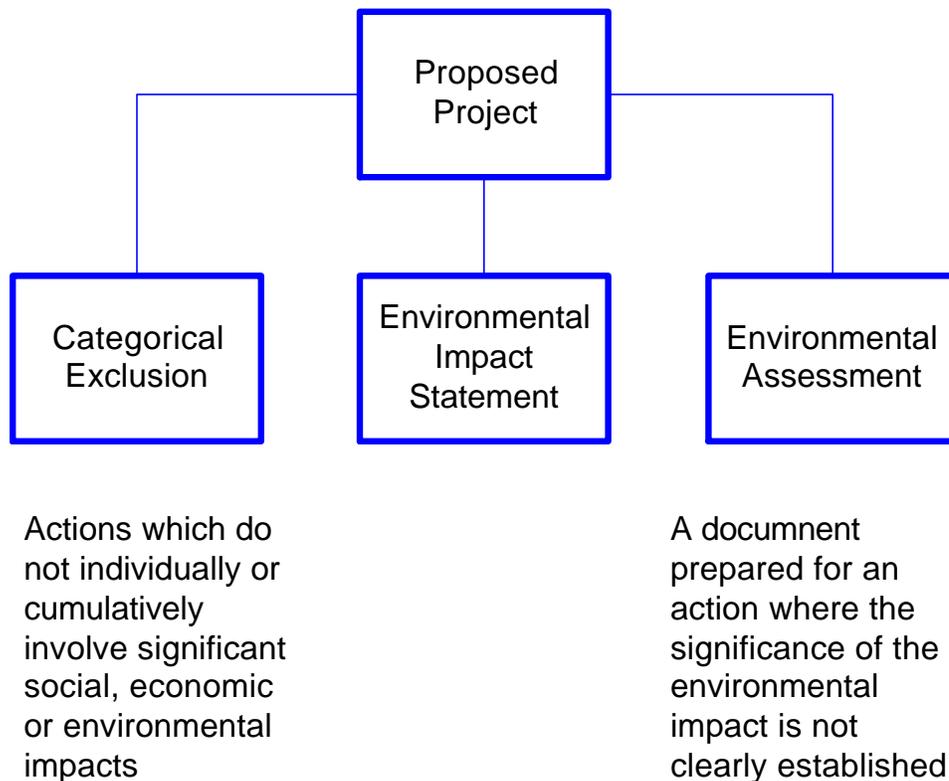
An environmental impact assessment is required by the National Environmental Policies Act (NEPA) of 1969, as amended. The purposes of the Act are generally

"To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere (that life zone, from 1000 feet above the surface to 500 feet below the surface) and stimulate the health and welfare of man...."

The Act mandated that a systematic, interdisciplinary approach be used in assessing the impact of a project. The level of this analysis will vary with the type of project being proposed. For example, a new project on new alignment probably will require an extensive analysis (an environmental impact statement). On the other hand, an environmentally non-complex intersection improvement project, such as a signal project

may not require any analysis (a categorical exclusion). Regardless of the type of project encountered, early involvement in the environmental process by Right-of-Way is necessary. ROW can contribute to the process by assisting in the identification of wetlands, park lands, historical sites (which include land as well as buildings), flood plains, and archaeological sites. By using its knowledge to provide estimates and evaluations when and where necessary, Right-of-Way can play an important role in the early project development process. Right-of-Way should be proactive rather than reactive in this area. Experience dictates that in the environmental area in particular, early identification and verification of sensitive issues can save an enormous amount of pain and aggravation over the long term.

A second mandate of the Act is to insure that presently unquantifiable environmental amenities and values may be given appropriate consideration in the decision making



process along with economic and technical considerations. This means that environmental amenities which may be identified but not measured can be taken into consideration during the decision making process along with the cost to mitigate an impact and the technical ability to mitigate an impact.

A third mandate of the Act is to insure that environmental impacts and project alternatives are developed prior to the implementation of Federal-aid programs.

The primary purpose of this process is to serve as an action-forcing device to insure that the environmental objectives are considered in the highway development process. This process is the basis for decision making and provides a record of supportable actions which are taken to avoid, or at least minimize, adverse impacts or which enhance the quality of the human environment.

Other Federal Acts and regulations which must be abided by are:

- (A) Section 306 of the Clean Air Act [42 U.S.C. 1857(h)]
- (B) Section 508 of the Clean Water Act (33 U.S.C. 1368)
- (C) Executive order 11738
- (D) Environmental Protection Agency Regulations (40 CFR Part 15)
- (E) Energy Policy and Conservation Act (PL 94-163)

In addition to these federal requirements there may be additional state laws and regulations that must also be taken into consideration. With the exception to this is involving hardship and protective buying situations, the environmental process must normally be completed before the right-of-way can be acquired.

During the environmental analysis process, the acquisition agent can assist project development through active participation in identifying environmental problems and solutions caused by:

- ! Social and economic impacts.
- ! Acquisition impacts.
- ! Relocation impacts.
- ! Other Impacts.

The list is not all-inclusive. Rather, it highlights the conventional areas where past involvement has taken place. Another area that should concern right-of-way is possible involvement in Environmental Mitigation. For example, where a dwelling is severed from a large subdivision it still may be acquired due to its isolation from the larger community.

Also, there are requirements when wetlands are involved that no net loss of wetlands occur as a result of a project. This may dictate that the agency buy replacement land for the wetlands taken. These are two examples of ROW involvement with environmental

mitigation. It is important for the right-of-way staff to work closely with their environmental counterparts in order that sensitive environmental areas involving right-of-way issues are addressed appropriately.

5.1.4.1. RELOCATION SURVEYS

The early stage of project development is the best time to identify and estimate the impact of the project on potential displaced persons, businesses and farms. Section 205(a) of the act, as amended, requires that programs or projects be planned so that the problems associated with displacements are identified at an early stage and resolution of those anticipated problems is provided. For relocation, the objective is an orderly and humane relocation of persons displaced by a project without creating adverse impacts or costly delays to the project. Relocation studies should be initiated during the early stages of project development, be continued through the environmental analysis process and culminated in a relocation study appropriate for the particular project. The factual information should indicate if orderly relocation can be achieved. If problems are revealed early in the planning process, various solutions may be considered; such as extension of lead time, alignment and plan changes prior to construction, undertaking clearly defined mitigation measures.

While a formal relocation plan is not required for approval of a project to proceed, relocation planning is required. Therefore, an agency may find it advantageous to document a planning process by preparing a relocation study. Such a relocation study should be performed in concert with the environmental assessment process in mind. Study preparation is not difficult and involves several logical steps:

1. The preparation of an inventory of characteristics and needs of individuals, families, businesses and non-profit organizations and farms to be relocated.
2. A survey of the real estate market to determine if an adequate supply of comparable replacement housing and suitable replacement locations for businesses and farms will be available to meet the needs of the displaced persons in a timely manner.
3. An analysis of the problems anticipated in the relocation of the occupants including any special relocation advisory services that may be necessary.
4. Proposed solutions for resolving anticipated problems.

After the final alignment has been identified the detailed relocation planning process can begin. The first step is to find out who and what will be displaced by the project. A review of the project and surrounding area will provide general information about potential displaced persons. In addition, checking with public and private agencies may provide more information about services to the area.

How data on relocation is compiled will depend on the number of displacements, leadtime to do the work, and its purpose. The best way to ascertain who will be displaced and to learn about potential problems is to conduct personal interviews with those affected by the project. Information so obtained should be accurate, but will require more time than surveying secondary sources such as government offices and securing census data. Census data is usually several years old before it is available and is based on a geographic section of the population which will not necessarily be coincident to a strip acquisition. Information about the project and the potential relocation benefits and assurances should also be provided to counteract rumors or other misinformation.

The survey form designed for obtaining the inventory data should be adequate to address, as a minimum:

- ! Family size,
- ! Owner or tenant status,
- ! Income range,
- ! Special needs (handicapped, elderly, etc),
- ! Dwelling size, and number of bedrooms.

Businesses, farms, and non-profit organizations should also be surveyed to determine the type of operation, number of employees, and relocation needs. Either a preliminary survey form or an occupant needs questionnaire can be used to conduct interviews at this time. If the occupant needs questionnaire is used, only those items necessary for planning purposes need be completed. A sample of a residential relocation occupant needs questionnaire is attached at the end of this chapter.

After completing the survey, a tabulation can be made of replacement housing required based on the standards for comparable replacement housing, including price or rental range, number of bedrooms required, and size. Other correlation items should be added as appropriate, A similar tabulation should be completed for businesses and farms.

The inventory of characteristics and needs should indicate possible problem areas concerning the various methods to be used in providing replacement housing where shortages are discovered. The relocation information should be summarized in sufficient detail to adequately explain the relocation situation including anticipated problems and proposed solutions. The relocation estimates must be accurate enough so that the writers of the environmental documents will be able to assure that all of the requirements

of FHWA Technical Advisory T 6640.8A have been complied with. Basically those requirements are:

(a) An estimate of the number of households to be displaced, including the family characteristics (e.g., minority, ethnic, handicapped, elderly, large family, income level, and owner/tenant status). However, where there are very few displacees, information on race, ethnicity and income levels should not be included in the EIS to protect the privacy of those affected.

(b) A discussion comparing available (decent, safe, and sanitary) housing in the area with the housing needs of the displacees. The comparison should include:

- (1) price ranges;
- (2) sizes (number of bedrooms) and;
- (3) occupancy status (owner/tenant).

(c) A discussion of any affected neighborhoods, public facilities, non-profit organizations, and families having special composition (e.g., ethnic, minority, elderly, handicapped, or other factors) which may require special relocation considerations and the measures proposed to resolve these relocation concerns.

(d) A discussion of the measures to be taken where the existing housing inventory is insufficient, does not meet relocation standards, or is not within the financial capability of the displacees. A commitment to last resort housing should be included when sufficient comparable replacement housing may not be available.

(e) An estimate of the numbers, descriptions, types of occupancy (owner/tenant), and sizes (number of employees) of businesses and farms to be displaced. Additionally, the discussion should identify :

- (1) sites available in the area to which the affected businesses may relocate,
- (2) likelihood of such relocation, and
- (3) potential impacts on individual businesses and farms caused by displacement or proximity of the proposed highway if not displaced.

(f) A discussion of the results of contacts, if any, with local governments, organizations, groups, and individuals regarding residential and business relocation impacts, including any measures or coordination needed to reduce general and/or specific impacts. These contacts are encouraged on projects with large numbers of displaced persons or

complex relocation requirements. Specific financial and incentive programs or opportunities (beyond those provided by the Uniform Act) to residential and business displaced persons to minimize impacts may be identified , if available through other agencies or organizations.

(g) A statement that :

(1) the acquisition and relocation program will be conducted in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended and

(2) relocation resources are available to all residential and business displaced persons without discrimination.

5.1.4.2. SURVEY OF REPLACEMENT PROPERTIES

It is also advisable to prepare a survey of available comparable replacement housing, business and non profit organization sites, and farm properties. The inventory of characteristics and needs should reflect the types of units to be included in a survey of replacement properties. This survey may be prepared at the early stage of project planning and later updated before the acquisition stage of the project.

The survey and subsequent analysis must indicate the availability of sufficient comparable replacement housing for those individuals and families to be displaced. Otherwise the use of Replacement Housing of Last Resort should be considered. The standards for comparable replacement housing must be used as the basis for this inventory and the housing selected must be decent, safe, and sanitary. Listings of currently available, comparable residential units for sale and for rent in the general price range and rental range of the properties to be acquired can be collected from multi-list services, realtors, newspapers and magazines. The listings should be adequate for comparison with the needs inventory and should equal or exceed the number of units being acquired. The determination that an adequate supply of comparable housing and other required properties will be available, should be well-supported. In the same manner, available businesses and farm properties should be analyzed.

If acquisitions and relocations are expected to cover a significant time span, additional consideration should be given to properties that would become available over such a time span. An analysis of the available rental and for sale properties over a representative period in the past and projecting this information to arrive at an availability in the future may be made. Such projections would give recognition to any known social or economic impacts that might affect the projection.

In developing these impacts, social or economic occurrences of the recent past that may have a distorting effect on the present real estate market should not be overlooked.

Problems of today may also affect the real estate market in the near future. Some examples to keep in mind are:

1. Industries coming into or leaving the community.
2. Increasing interest rates affecting home purchases.
3. Tight mortgage money.
4. Increasing prime interest rate affecting builders.
5. Tight money for housing contractors.
6. Industrial and business expansion with increasing employment.
7. Economic recession and increasing unemployment.
8. Economic inflation.
9. Rate of growth or decline of population in the community.
10. Project area population trends.
11. Building moratoriums.
12. Housing starts and rental vacancy rates.
13. Zoning or other land use plans.
14. Local rent controls.

After a sufficient inventory of currently available residential units has been collected, the "for sale" and "for rent" properties should be tabulated to correlate with the requirements of the displaced persons. For example, one category of the needs survey may indicate that 28 single family, three bedroom dwellings between the price range of \$75,000 to \$80,000 are necessary. The survey of currently available housing may indicate that 40 units are available in this category. The tabulation will show 28 required, 40 available. The same procedure will hold true for requirements in other price ranges and types of residential units. A tabulation of the needs and availability of rental units should be recorded similarly, but separately. If the number of displacements warrant, it may also be appropriate to tabulate replacement farm properties, businesses and non profit organizations, even though this is not a requirement.

5.1.4.3. ANALYSIS OF CURRENT GOVERNMENT DISPLACEMENTS

Coordination with Federal, State, and local governmental agencies is necessary to determine if any of their current or planned programs might also cause displacements or conversely, if there are programs planned to increase housing availability. Any planned or concurrent project in the community could have an effect on the supply and demand for replacement properties and could be competing. For this reason coordination with other agencies becomes extremely important.

After the displacement requirements have been compared with available replacement properties, the study will probably indicate that the displaced persons on the project can be relocated in a timely and humane manner. If problems are discovered or anticipated at this stage of the study, ways to resolve the problems, including the use of replacement Housing of Last Resort should be planned.

5.1.4.4. ANALYSIS OF RELOCATION PROBLEMS

At this point, a comprehensive analysis of the anticipated relocation impacts should be relatively simple to make. The facts have been gathered, the displaced persons have been identified, the available or anticipated resources are known, and the factors affecting supply and demand have been analyzed.

A relocation study can now be written, complete with recommendations to resolve anticipated problems and a timetable for orderly and humane relocation of the persons to be displaced.

5.1.5. HAZARDOUS WASTE SITES

During early project development hazardous waste sites need to be identified. Hazardous waste is an area of concern to highway builders, as the the potential liability of a hazardous waste site or sites within the project alignment can seriously affect our proposed projects.

During field reviews, such as for a proposed alignment, the right-of-way agent should be on the lookout for any indications of toxic waste sites or where one may have existed. Gasoline service stations are an example of such a site. Where a site can be identified during the planning stage, the agency will be in a better position to deal with the situation; either by avoiding the site altogether or by requiring the property owner to clean it up prior to the transfer of the property to the State. The state environmental agency can be a key partner in resolving these issues. Early contacts with these organizations are important during the preliminary phase of a project.

One of the most basic concerns in cases involving contaminated sites involves the application of legal requirements. Because of the wide variety of Federal, and State laws that may apply, each hazardous waste problem may present its own unique legal problems. These typically involve the identification and disposal of hazardous wastes, and may touch on property, constitutional, environmental, tort, or bankruptcy law. While it has been stated that any substance generally considered to contain combustible, corrosive, flammable, reactive, or poisonous properties is hazardous, there may be variations among the laws and regulations of differing jurisdictions as to which chemicals or substances are hazardous. Again, the state environmental agency should be of assistance.

The primary thrust of laws dealing with hazardous waste is to prevent the hazardous substance from spreading and to see that sites are cleaned up. Once hazardous waste is identified, consideration should be given to avoiding the site by evaluating alternative

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund) mandates that an action against responsible parties to be brought recover any federal cleanup costs of hazardous waste sites. The government is also given the authority to require private parties to clean up such sites if they can be located and enjoined. Section 9607 of the Act states in part:

"(2) Any person who...owned or operated any facility at which...hazardous substances were disposed,

(3) Any person who...arranged for disposal or treatment or arranged with a transporter for transport for disposal or treatment, of hazardous substances...at any facility...,

(4) ...from which there is a release, or threatened release which causes the incurring of response costs, of a hazardous substance, shall be liable for---

(a) All costs of removal or remedial action incurred by the United States government...

(b) Any other necessary costs of response incurred by any other person...; and

(c) Damages for injury to, destruction of, or loss of natural resource..resulting from such a release."

CERCLA 1980

alignments. However, if a contaminated parcel cannot be avoided, or if it has already been acquired when the hazardous waste is discovered, the main objective generally is to contain the waste and to arrange for its treatment and/or disposal. The cost of the clean up of such sites can be substantial and may involve questions as to the liability of current or former owners for such costs. If hazardous waste is identified before acquisition, its existence and anticipated clean up costs should be considered in the compensation offered to the owner.

This potential for liability has everyone concerned. As a result, the person responsible for field review of proposed alignments should attempt to identify potential hazardous waste sites **as early in the planning stage as possible**; since this affords the planners the maximum opportunity to avoid the site.

Acquiring a contaminated property may result in the State becoming liable for the cleanup costs. In some cases, the cost of cleanup may approach or exceed the entire cost of the right-of-way project.

5.2. TITLE DOCUMENTS

Highway agencies generally acquire fee simple title to property needed for highway projects. Understanding that State requirements vary throughout the country, fee simple may not be possible on all takings. Agencies generally need to be assured that the titles of acquired properties are clear of any liens and encumbrances before constructing the highway project, thus creating the need for title information.

Highway agencies have relied historically on title abstracts and title opinions (commitments), to assure themselves of the "nature" of the property title to be acquired. Title insurance and certificate of title are, however, other forms which can be used for title evidences. A brief discussion of each of these forms of title evidence may provide some insight into streamlining the title information process.

5.2.1. TITLE ABSTRACT AND TITLE OPINION

A title abstract is generally the most detailed, time consuming and costly form of title search. It requires the searching of title records from the original governmental grant, then all subsequent deeds, mortgages, release deeds, wills, judgements, mechanics' liens, foreclosure proceedings, tax sales, and other matters affecting the title. If the abstract discloses a clouded title, an opinion of title or a title commitment may also be required to clarify the defects and encumbrances.¹

Such documentation may be warranted by acquiring agencies on properties involving high value, whole or large partial takings or complex acquisitions. On small strip takings and

¹ Kratovil and Werner, Real Estate Law, Seventh Edition (1979), Prentice-Hall, Inc., pp. 172-177

low value acquisitions where the remainder values exceed the taking, abstracting expenses could exceed the cost of the taking.

5.2.2. TITLE INSURANCE

Title insurance is another form that is utilized for title assurances. It is a contract to make good a loss arising through defects in the title to real estate or liens or encumbrances thereon.² Title insurance provides for the shifting or transferring of risks such as forgery, defective deeds, etc., to a responsible insurer. Companies which provide title insurance, disregard many of the technical objections that would be raised as part of an abstract examination. Through the use of title insurance, a limited abstract can be made of a property's title.

5.2.3. CERTIFICATE OF TITLE

A Certificate of Title is the form of title assurance in which an abstract is dispensed with. An attorney examines the public records and issues his certificate of title which is his opinion of title based on the public records that he has examined.³ The attorney is liable, however, only for damages occasioned by his negligence. The use of this form is usually ideal for the small strip takings and low value acquisitions, even though the State can broaden its applicability.

5.2.4. RECOMMENDED TECHNIQUES

The alternate methods being used by several highway agencies have proven useful in streamlining the title information process on minor or low value acquisitions. Before implementing any of the following recommendations, the acquiring agency should make a risk assessment of the title information process using the guidelines that are outlined in Section 3.5.2. of this Guide. In the title process, the risk involves acquiring property without a complete title abstract on minor takings or easements to reduce the agency's overhead cost and title processing time. The risk is minimal however when the acquisition has little or no effect upon the after value of the property. The recommended techniques may not be applicable under some state laws.

There are several questions to consider before using any of the recommended techniques:

- A) Does there appear to be some irregularity in the title?
- B) Is there a question of ownership?
- C) Is it necessary to determine accurately the location of property lines?

² Ibid., p.174

³ Ibid., p.173

D) Will the acquisition include any improvements?

If all of the above questions cannot be answered with "NO", then the recommended techniques may not be appropriate.

5.2.4.1. TEMPORARY AND PERMANENT EASEMENTS

The agency would determine property title ownership through county tax assessment records. Verification of the ownership would occur through examination of the last deed of record. A staff right-of-way agent or technician could perform this search. The search could be documented on a form similar to the one shown in Figure 5-1.

5.2.4.2. MINOR ACQUISITIONS

The agency could conduct a search of the last owner of record on minor takings of \$2500 or less. This information would be provided to the agency's attorney or a contract attorney on a form similar to the one at the end of this section (See example). The attorney would issue a "certificate of title" based on the information provided on the form. The liability of the "certificate of title" would be borne by the acquiring agency not the issuing attorney. An example of a minor acquisition is a strip taking for highway widening or a taking for a driveway modification.

5.2.4.3. NOMINAL AND LOW VALUE PARTIAL ACQUISITIONS

The agency could establish threshold values in which the title information is either abbreviated or a limited search is made. A threshold value of \$2500 - \$5000 is suggested for these nominal partial acquisitions. An abbreviated title search of the last owner of record or last transaction could be submitted to the agency's attorney who would issue a "certificate of title." This search could be performed by a staff right-of-way agent or technician and documented on a form similar to the one at the end of this section (See Figure 5-1). For acquisitions of \$5,000 - \$10,000, a limited search of at least 5 years, if a detailed appraisal is needed, or the last three (3) title transactions could be made by a qualified right-of-way agent or the agency's attorney or a contract attorney. A "certificate of title" would be issued also by the agency's attorney or a contract attorney. The liability for the certificate would be borne by the acquiring agency not the issuing attorney.

The agency could establish the threshold for values greater than \$10,000 in which title information is either abbreviated or a limited search is made of the title.

5.3. RIGHT-OF-WAY PLANS

Right-of-way plans are the paper drawings which show the project alignment, its centerline, existing and proposed right-of-way, construction limits, terrain features, property lines, and property and other principal above ground improvements among other things.

These plans are vital to the development, explanation, and selling of the project. They give those affected by the project a pictorial view of what the project will look like in a real estate context.

Right-of-Way Agents should be familiar with R/W plan terminology, how to read and interpret plans, and how to explain what is contained in the plans to the property owner. Right-of-way agents may find it necessary to obtain some training in plan reading so that they may be better acquainted with highway plans.

In many State Highway Agencies, it is standard procedure to prepare right-of-way plans that are separate and distinct from highway construction plans. Right-of-way plans should contain all of the information necessary for the acquisition of the required right-of-way that is found on the design plans plus any additional information that will be used in the acquisition process.

Because these plans are the basis for the acquisition of affected properties, it is important to know what information they should contain so that the agent can proceed with negotiations in an intelligent and informed manner. By thoroughly reviewing the plans for a project, the agent may be able to anticipate any concerns a property owner may have about the project such as slope dimensions and proximity of right-of-way lines. Armed with this knowledge, the agent is more likely to successfully complete the acquisition of the property at his/her level.

Right-of-way plans containing all of the essential data needed in connection with appraisal and negotiation activities should show the property lines, topography, right-of-way lines, the widths to be acquired, centerline and stationing with appropriate ties to intersecting property lines and changes in right-of-way widths. The proposed limit of slope should be shown on the right-of-way plans except where it has been determined that such information is adequately depicted on the construction plans or other available documents. The lines and area of any additional easement areas, either temporary or permanent, that are required to accommodate intersecting roads and streets, land, access and temporary roads, drainage areas, material storage areas, utilities, railroads, and for any other special uses, should also be designated and shown.

For each parcel to be acquired, the plans should show:

- ! the project identification number;
- ! a parcel identification number;
- ! property owner names;

! the area in square feet or acres of the property to be acquired and of each remainder of a partial taking.

All pertinent data affecting the cost of the right-of-way such as structures, land service or access roads, improvements, and fences should be shown.

On projects where the access rights have been or are to be acquired, the access control lines and all approved points of entry to or exit from the traffic lanes should also be shown, even where the right-of-way lines and access control lines are coincident.

ABBREVIATED TITLE INFORMATION

I. D. NO. _____
STATE PROJECT _____ F.A. PROJECT _____
PROPERTY OWNER(S) _____ PARCEL NO. _____
Tax Map No. _____ Block & Lot No. _____ Township _____
Property
Address _____
Deed(s) Executed and Recorded: Date _____ Book _____ Page _____
Stamp _____ Plat _____ Book _____
If Lot or Lots, Name of
Subdivision _____
Map Book _____ Page _____
Acreage in Property According to Deed(s) _____
Easements of Record _____

If Acquired by Will: Date _____ Will Book _____ Page _____
Total Acreage Owned by Deed(s) and/or Will: _____
Have There Been Any Out-Conveyances? _____
If so, How many? _____
Approximate Total Acreage Conveyed _____
Date of Out-Conveyance(s) _____
Total Acreage Less any Out-Conveyance(s) _____
Property Bounded By on the: North _____,
South _____, East _____,
West _____
Has Property Changed Hands Within Last Five Years? _____
If Acquired by Intestate, Name of Person Inherited From: _____
If no Conveyance Made to Present Owner, Deed Recorded in: Book _____
Page _____
Name of Spouse of the Deceased: _____
Names and Addresses of all Heirs to the Estate other than the Spouse. If Minors,
give Age.

COMMENTS:

INFORMATION OBTAINED FROM:

FIGURE 5-1

5.4. CORRIDOR PRESERVATION

The nationwide problem of escalating land costs especially in areas of rapid growth and development has focused attention within the highway community on the need to pursue highway preservation strategies more aggressively. This means ensuring that viable locations will exist for building future highways in the developing fringes of the nation's

metropolitan areas. Development activities in or adjacent to planned highway corridors will need and demand early and decisive actions by State and local governments. Corridor preservation concepts afford the best opportunity for State and local governments to overcome the problem of massive development occurring within potential right-of-way project limits of a highway corridor.⁴

The concept of corridor protection can also apply to existing corridors. "Capacity protection" can be applied in almost every state using techniques such as purchasing access control, denying new entrances, requiring greater setbacks for any new buildings, construction of access roads or other alternative access to remove conflicts and preserve the ability of arterial roads to perform their function.

CAPACITY PROTECTION

This subsection will focus on approaches under existing regulation that the State Transportation Departments (STDs) and the local public agencies (LPAs) can use to protect prospective highway corridors from competing with incompatible uses through early right-of-way acquisition. In addition, a number of other techniques have been attempted by governmental agencies with varying degrees of success to protect and preserve open space. These techniques will also be discussed briefly in this chapter.

5.4.1. ADVANCE CORRIDOR APPROVAL⁵

This involves the receiving of location approval from FHWA as soon as possible after planning studies show the definite need for a transportation project in a given corridor. The precise nature of the highway does not have to be fully developed in order to grant location approval. For example, the number of lanes and the degree of access control may not have been finalized. In some instances a final decision may not have been made as to whether a highway or a combined highway/mass transit facility would be advanced. Location approval must, however, be based on the completion of appropriate environmental documentation necessary to show compliance with the National Environmental Policy Act (NEPA). This documentation must assist in making a decision on reasonable alternative alignments; however, it need not fully address all environmental issues provided a mechanism is established for revisiting environmental issues during the design phase.

⁴Anthony R. Kane, Memorandum dated July 1, 1988

⁵Ibid., p.4

Issues that could be deferred might include detailed mitigation proposals, the environmental consequences of various design options, and the application for environmental permits.

5.4.2. LAND USE CONTROLS

Once the FHWA has granted location approval, local governments, and in some cases State highway agencies, may be able to use their land use controls to protect the selected highway corridor. Local land use plans and official highway maps would be used to guide compatible land development.

Local governments would work cooperatively with land owners and developers to advance the highway project through the use of its police powers, where applicable, or by accepting donations and dedications. Agencies should be cautious in the application of land use control or police powers because its use may result in inverse condemnation actions.

Local governments are cautioned that they might face litigation if their actions are considered to go beyond the proper exercise of police power and are judged to be a taking.

BEYOND POLICE POWER

Examples of land use controls include zoning and setback ordinances, and official maps of reservation. Another example of controls is to withhold permits or rezoning for a period of time, such as 3 years, but provide the property owner a tax break during the withholding period. In some instances, developers may construct a portion of the highway or share in the cost of the construction.

Some land use controls can be used earlier. The test to be applied is whether actions taken by the state or local government "predetermine the selected alignment" under the NEPA process. This is very project specific and actions by the state or local government meeting this test can be applied before location approval is granted.

5.4.3. ACCELERATED RIGHT-OF-WAY ACQUISITION⁶

Once location approval is granted, STDs or local governments can begin acquiring right-of-way based on a generalized highway design concept. If location approval is advanced, then acquisition can begin years before it might otherwise.

The critical element in accelerating acquisition is securing a source of funding. There are several options:

1. Use regular Federal-aid funds,

⁶ Ibid., p.4

2. Finance acquisition by the agency or jointly with the local governments and private developer with no FHWA reimbursement, but with FHWA participation in construction so long as requirements of the Uniform Act are met, and
3. Accept donations of land for right-of-way, with a credit to the State's matching share from donations by non-governmental entities under 23 USC 323 as recently amended.

5.4.4. PROTECTIVE BUYING⁷ (See Section 14.1)

Protective buying is a method that States and local governments can use to preclude development from occurring within a potential highway corridor which may limit the choice of highway alternatives. The purpose of protective buying is to keep highway location options open. Protective buying is defined as purchasing a limited number of parcels within the line of a proposed highway corridor, prior to location approval. It should not be undertaken to purposely sway the location decision toward one alternative thereby resulting in line predetermination charges.

Federal-aid funds can be used in costs for protective buying provided (1) FHWA gives prior approval of the proposed protective buying, and (2) public involvement requirements are satisfied or (3) a preferred alignment has been selected and announced by the State. In 23 CFR 771.117(d)(12), protective buying qualifies for a categorical exclusion (CE) only where the acquisition will not limit the evaluation of alternatives. An acquiring agency can finance protective buying without FHWA participation prior to these provisions and not jeopardize future FHWA participation as long as (1) the protective buying is carried out in accordance with the Uniform Act and Title VI of the Civil Rights Act of 1964 and (2) the proposed protective buying would not bias the selection of a preferred alignment.

5.4.5. OTHER APPROACHES TO CORRIDOR PRESERVATION

Other techniques available for preservation and protection may also include the following:⁸

1. Acquisition of some interest in land less than fee simple in or other right in order to preserve the property in a static condition. Examples include conservation easements, preservation easements, scenic easements, and development easements. This could also include the purchase of an "option" on the property for future fee purchase; and
2. Governmental inducement to property owners for maintaining open areas. An example of this is the technique of transfer of development rights which provides a

⁷ Ibid., p.5

⁸ American Association of State Highway and Transportation Officials, "Report of the AASHTO Task Force on Corridor Preservation" (July 1990)

method of compensating property owners in a non-monetary way for maintaining land in a static or undeveloped condition.

The above techniques have limiting conditions which should be considered in light of state and local laws and regulations.

Other options available to corridor control which involve much lower costs and risks than acquisition comes under the police powers of the local government such as:

! Exactions or dedications in connection with zoning, subdivision or building construction permits (mandatory contributions).

! Proffer zoning ("trades" negotiated during the subdivision process).

! Setback ordinances.

! Maps of reservation.

! Moratoriums on rezoning or construction within the project limits.

! Options
! Purchase of development rights
! Transfer of development rights
! Leases
LESS THAN FEE SIMPLE INTERESTS

There are also some voluntary actions which can be solicited of landowners and developers by the local government. These actions may include:

! Transfer of development rights.

! Density transfers and cluster development to provide for comparable density of development while still protecting the needed right-of-way.

! Tax abatements in return for preserving corridor.

! Voluntary platting of highway corridor as a separate parcel in subdivision plans.

A number of opportunities exist also for public/private partnerships actions:

! Property exchanges

! Purchase of fee interest by the state with lease back of fee simple in short term or air rights in the future

