



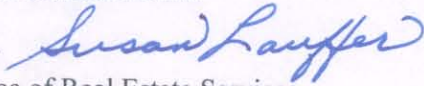
U.S. Department
of Transportation

**Federal Highway
Administration**

Memorandum

Subject: **INFORMATION:** Guidance On Hardship
Acquisition and Condemnation

Date: November 5, 2004

From: Susan Lauffer 
Director, Office of Real Estate Services

Reply to
Attn. of: HEPR

To: Directors of Field Services
Division Administrators
Attn: Division Realty Officers

The purpose of this memorandum is to provide guidance for implementing existing policy under 23 CFR 710.503(c), hardship acquisitions. Recent questions and comments from the Divisions illustrate a need to provide guidance regarding hardship acquisitions by State Departments of Transportation (State DOTs) and Local Public Agencies.

GUIDANCE:

Hardship acquisitions are permissive and not mandatory. Each State DOT may elect to conduct hardship acquisitions or not to utilize this advance acquisition technique.

When a State DOT accepts and concurs with a hardship acquisition request by a property owner, FHWA does not require the State DOT to accelerate condemnation if agreement on price cannot be reached with the property owner. If a negotiated agreement cannot be reached with the property owner, the State DOT may defer acquisition of the property to the time it would occur in the normal project schedule. The State DOT should inform the property owner of this possibility when it accepts for processing a hardship acquisition request.

ANALYSIS:

Hardship acquisition assists property owners who will experience a justified hardship, based on health, safety or financial reasons, if they continue ownership of a parcel until the acquisition phase of the project is initiated. Hardship acquisition has been used most frequently for owner-occupied residential parcels. Some State DOTs have been reluctant to use hardship acquisition because they did not want to, or were legally unable to, proceed to early condemnation if negotiations failed at the preliminary stages of a project. Removing this obstacle ensures that justified cases of hardship acquisition would be considered and acted on in a timely way to relieve hardship caused by a proposed project. Deferring acquisition when a negotiated agreement cannot be achieved has raised some concerns about the potential for property owners to feel coerced into accepting an offer that they otherwise consider insufficient. However, we



believe a policy requiring early condemnation would discourage State DOTs from accepting hardship acquisition requests in some instances and thus perpetuate the hardship. Further, in some cases it may be so early in the project development process that the State DOT may not be able to prove necessity in a condemnation case.

In accordance with FHWA regulation 23 CFR 710.503(c), an owner of a property must meet certain requirements for a State DOT to accept and concur in a hardship acquisition. These provisions also can provide the starting point for ensuring that owners are not placed in a coercive situation. An objective evaluation is required to determine whether the health, safety or financial requirements of Section 710.503(c) are satisfied. General knowledge of an upcoming project may affect the ability to sell a property; however, this knowledge affects every property owner along the proposed project and is not a justifiable reason for accepting and concurring in a property owner's hardship acquisition request.

In addition to the health, safety and/or financial hardship, the owner must also document an inability to sell the property for fair market value within a typical period of time. Whether the price at which the property has been offered for sale is, in fact, representative of fair market value is a key part of this test. If the property has been offered at an unrealistic price, then it is not possible to find that the requirements of Section 710.503(c)(2) have been met. Factors to consider include whether:

1. The owner openly marketed the property through a realtor, a listing service or through other means.
2. The owner or realtor conducted a market analysis to determine a listing price disregarding any increase or decrease in value caused by the project.
3. The property has been on the market for an amount of time typical in the area and available for inspection by prospective buyers.

This marketing approach would support the property owner's inability to sell the property at current fair market value in the area and provide good information for comparison purposes in evaluating the State DOT's offer of just compensation. Another approach would be for the owner to obtain an appraisal of the property that supports the offering price. Where an owner claims inability to sell based on an offering price for which there is no reasonable supporting documentation, extra care is warranted to ensure that the offering price meets the "fair market value" test.

If the property has in fact been offered at fair market value, then the difference between the just compensation offered by the State DOT based on the State DOT's approved appraisal and the owner's expectation about the property's value should reflect a reasonable range for negotiation. The opportunity for coercion is limited because both parties are working from informed and supportable starting points.

When a State DOT determines a hardship exists and elects to proceed with hardship acquisition, the offer of just compensation must be based on an appraisal of fair market value, and negotiations must be in good faith with sufficient information provided to the property owner for making an informed decision. The State DOT should follow all of the customary acquisition

procedures, including the use of administrative settlements and any other negotiating and dispute resolution tools available. We particularly encourage State DOTs to consider the use of some form of dispute resolution in difficult hardship cases. Those measures often can achieve a successful solution for both parties. Even where mediation fails, the fact that the State DOT pursued dispute resolution provides additional evidence that no coercion was intended or applied. If a State DOT will not proceed to early condemnation if agreement on price cannot be reached for a hardship acquisition request, it must advise the property owner in writing when it accepts the hardship acquisition request, that negotiations will be terminated if an amicable agreement cannot be reached. If negotiations are terminated, the State DOT should provide written notice to the property owner that further negotiations and condemnation, if necessary, will be deferred until the time they would occur in the normal project schedule.

The Voluntary Transaction provisions in 49 CFR 24.101(a)(1) do not apply to hardship acquisitions. Because hardship acquisitions are parcels identified to be acquired for an intended, planned or designated project area they do not qualify as voluntary transactions.

The State DOT policy and procedures for hardship acquisition must be consistent and clearly described in the State's Right-of-Way Manual.

Questions on hardship acquisition or this guidance can be directed to Wayne Coil at (202) 366-2038 or David Walterscheid at (720) 963-3073, HQ Office of Real Estate Services.