

PROPER PROCEDURES FOR ACQUIRING RIGHT OF WAY

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It is a pleasure to again appear before the Kentucky Highway Conference for it was about four years ago, or in fact, on March 13, 1958, that I discussed with you the procedure required of a State to obtain Federal reimbursement for the costs of rights-of-way for Federal-aid projects.



The subject assigned me this time is much broader in scope and has no implication of Federal policy but implies that you wish to get ideas concerning the "Proper Procedures for Acquiring Right-of-Way" regardless of what State may be acquiring such right-of-way.

Right-of-way acquisition is a complex business. Achieving a reasonable degree of uniformity among 50 States, with different basic right-of-way laws and regulations, is no simple task. For me to outline a basic concept of what any state might feel is a proper procedure in right-of-way acquisition could, of course, prompt any state to question what a Bureau representative might say as to the proper procedure which should be established by such State under its own laws and regulations. In fact under Bureau policy that is why we in the Bureau have to review the "35 points" submitted by each State as to what procedures it will follow in the acquisition of right-of-way and see if such procedures are acceptable to the Federal Highway Administrator before Federal reimbursement of such costs are eligible.

Thus it can be seen that any attempt to elaborate on the subject must be on a very broad scale, and confined to some cardinal points which may be considered very helpful if not in fact essential to a good right-of-way organization in any State.

But, before we go further into this phase and in order to emphasize the importance of a State's responsibility for the acquisition of right-of-way it seems appropriate to refer to certain portions of the Federal Highway Act, approved November 9, 1921, which provides in part that each State highway department is (1) required to submit to the Secretary of Commerce (Bureau of Public Roads) programs setting forth the proposed construction or reconstruction of any part of the Federal-aid system which it proposes to improve with Federal-aid; (2) that upon approval of the program by the Secretary of Commerce (Bureau of Public Roads) the State highway department is required to prepare and submit for review and approval, surveys, plans, specifications, and estimates of the proposed construction; and (3) that subject to approval of plans, specifications, and estimates the *actual construction and reconstruction work and labor are performed in each State in accordance with its laws and under direct supervision of the State highway department subject to inspection and approval by the Secretary of Commerce (Bureau of Public Roads) and in accordance with such rules and regulations as he may issue.* Since the amendment of July 13, 1943, the term "construction" has been defined to include the costs of right-of-way incidental to the construction of a highway.

The purpose of my talk, therefore, will be to show the importance of a state highway department "having adequate powers and suitably equipped and organized to discharge the duties required", as required of Federal-aid highway legislation.

As you probably have already noticed from the press there are plenty of people looking over the state's shoulder, investigating, searching for weaknesses and shortcomings, spotlighting and sometimes magnifying the things found. The vast majority of those working in the highway field are honest, dedicated people. This room is full of them.

As I stated before the acquisition of right-of-way is a complex business. Maintaining public confidence and support requires continuing attention. All right-of-way operations are subject to close public scrutiny. All who participate in right-of-way activities are virtually living in a fish bowl. Your actions and decisions must not only be right, they must look right.

First of all a state highway department must have an adequate right-of-way division composed of personnel who have a pride in their organization and are devoted to their duty. They must be honest and up-right and not subject to the many pitfalls placed before them by unscrupulous persons who are out to make a "quick dollar" at public expense. They must be fair to the State and equally as fair to the property owner. They must be diplomatic but firm in their belief.

A state highway department regardless of how well organized cannot, in my opinion, function properly unless it has an active public information medium. A representative of the right-of-way division should participate in the various studies made at the location stage so that he is familiar with the type of terrain through which the highway will run; he should make studies of all alternate routes proposed and give information as to the estimated right-of-way cost of each line; he should study carefully the possibility of construction features in mitigation of severance or other types of damage. The right-of-way representative can, if kept properly informed, be the best public relations agent a state highway department can have—or he can be the worst. Well prepared graphic complete presentations at public hearings are of utmost importance. It is at public hearings where the state has an opportunity to inform the public of the need of a proposed improvement, of the background studies which have been made by the highway department, basic facts collected, alternates considered, and the economic impact upon a community.

The above cannot be adequately accomplished unless there are essential right-of-way plans and maps. A liberal use of photographs and graphic drawings is of great importance. Aerial photographs and large scale drawings with after-construction overlays should be used for the most important cases. These are not only essential to public hearings but of equal importance to the appraiser and negotiator in their dealings with a property owner.

There is another very important step in proper procedure before we go to the appraisal and negotiation phase and that is sufficient time to prepare for your approach to the property owner. It is what we refer to as leadtime. I regret that many state highway departments do not give adequate consideration to leadtime.

Because of the extreme pressure to get highway construction underway some highway administrators and engineers seem to have only one thought in mind; (1) to establish the highway location, (2) complete the design, and (3) advertise the job for letting a contract. Somewhere in this process a right-of-way has to be acquired. Unfortunately too many times the first knowledge the right-of-way "boys" have of this responsibility is upon completion of design at which time in many instances the advertising date has already been set and the people in charge of right-of-way acquisition are admonished that a right-of-way clear of all improvements must be acquired before a contract is awarded. This advertising date is generally set within three or four weeks. This haste creates a complex of panic in which the economy of right-of-way acquisition has to be subservient to the

unrealistic attempt at speed to get the project under construction. I dare say that many times if ample time is not given to acquire the right-of-way in an orderly manner nor to clear the right-of-way, it invariably may result in a claim from the contractor for delay of work for excess of what a little more time for negotiations with the property owner might have saved. This condition exists today as it has in the past and yet I am happy to say highway administrators are recognizing this and many are doing something about it. Even some Bureau representatives are recognizing this situation and are refusing to approve an advertising date for the state until they are assured the right-of-way will be acquired and cleared before concurrence in a Federal-aid contract is given.

Sufficient leadtime between completion of design and advertising for bids must be given the right-of-way personnel to appraise and acquire right-of-way in an orderly manner. It must be realized that in the acquisition of a right-of-way we are bringing into the scope of highway development a new group known as "property owners", whose first paramount interest is—"Why do you have to take my property—I want to see the highway built, but why couldn't some other location have been selected?" If he is convinced that the public has the right to take private property for public use his next question is what are you going to pay me for my property. He has worked hard to acquire his property and he cannot understand why "just compensation" does not mean a complete restoration of his property "money wise".

These are some of the things with which right-of-way people are confronted. Designers do not have to answer these questions but right-of-way people do. With basic engineering information furnished him, as I have indicated, in the early stages of highway development and adequate leadtime would give the right-of-way personnel an opportunity to discuss with and advise the property owner as to how his property may be affected. The negotiator would have more time to advise the property owner as to the adequacy of the appraisal made by the state and to convince him that highway people are trying to rehabilitate his property, money-wise, as nearly as possible to its condition before the highway is built.

Over the years this lack of leadtime has forced negotiators to spend very little time with the property owner and has forced him to indicate that the price offered is all he is allowed to do and unfortunately for the public relations of the highway department many have said: "Well we'll just have to condemn." This works a tremendous burden on the acquiring agency and places the whole highway department in a position of unwarranted and poor public relations.

Throughout the 50 states there are various ideas of what constitutes an appraisal of property. An appraisal must be a supportable estimate of value—an opinion of value—made by an informed person whose training and experience makes his opinion worthy of regard—which is supported with logical, reasonable valuation data and documentation. It should be a written estimate of value, duly signed, sufficiently supported and documented so that a reviewer or auditor can visualize the property and follow the appraiser's presentation of data and judgment to a logical conclusion of value. An appraiser must take into consideration all the uses to which a property is adaptable and for which there is a reasonable demand. Any projected use to a different and higher use must be of a very probable nature, and reasonably likely to occur. It cannot be of a conjectural, fanciful or remote possibility. Appraisers must keep in mind the law of supply and demand.

Every state should have one or more highly competent reviewing appraisers. These men should virtually know conditions both economic and actual, in every community throughout a state. They not only should be able to review every appraisal presented to them to determine whether the appraiser who made it has all the technical knowledge necessary to test any method used and deemed proper by the appraiser, but he must be able to test the judgment of the appraisers as to values set forth. If there appears any doubt in his mind as to

either phase he should inspect the property personally in order that he may come up with a sound figure to be given the negotiator for use in his attempt at reaching a settlement with the property owner.

Likewise a state must have highly competent, honest and diplomatic negotiators. First of all these negotiators must believe, and have faith in the appraisers and reviewing appraisers. If he does not there is either something wrong with the appraiser, the reviewing appraiser or the negotiator. The person who administers right-of-way acquisition in a state highway department must be able to detect any lack of confidence by a negotiator of the state's appraisal process and given the power to rectify any inconsistencies found. In addition to the regular duties of negotiators with a property owner a negotiator should keep a diary or record of his transactions in each case. This should be embodied in the records of the right-of-way division as an item of incalculable benefit in future transactions.

As heretofore stated I have attempted to outline some of the cardinal points which I consider essential to any good right-of-way organization. Those included were: adequate right-of-way organization; public information; sufficient studies at location stage; right-of-way plans and maps; leadtime, appraisals, reviewing appraisers, and negotiators.

Now there is one other phase which I wish to emphasize very greatly. All the above mentioned points may be operating perfectly in your state at the present time with your own personnel, but what assurance has the state given that it will remain so when an administration changes? If and when a man becomes competent in his field through training or indoctrination, not only he but the state highway department should have assurance that his services will be retained. We are in the midst of an enormous highway development program and unless we can have the assurance of the retention of good, conscientious, and loyal personnel we will continuously be faced with all types of investigations, both state and federal.

Competent right-of-way men, staff appraisers and negotiators are not able to obtain a degree that insures complete competency in their field. Neither do they have any one organization that may enforce moral ethics so is it not incumbent upon every state to not only develop by training and apprenticeship personnel adequate to handle the complex right-of-way problems, but be able to protect by some form of civil service such "career" employment from the whims of individuals primarily interested in things not in harmony with an organization devoted to conscientiously carrying out the many detailed "career" duties? These many times lie beneath the policy administration of a state. Each day it is becoming harder to get and retain competent right-of-way personnel. The various right-of-way and appraisal organizations have given full consideration for the need of moral responsibility in their fields by the adoption of splendid "Codes of Ethics."

I appreciate very much the opportunity to meet with you today to consider our mutual interest and responsibilities in connection with the acquisition of private property for public use.