

Everyday Counts (EDC) Right-of-Way Flexibilities

Q&A's from EDC Connect - April 19, 2012

Conditional Right-of-Way Certification

What is the CFR citation for right-of-way certifications, specifically a conditional "cert-3," when the right-of-way is not clear and available? The citation is 23 CFR 635.309(c)(3). It is part of the request for project construction authorization.

Regarding conditional right-of-way certifications, should the project sponsor approach FHWA prior to beginning acquisition or later when they realize that some parcels will not be acquired prior to the request to advertise the project? It is not necessary to contact FHWA early in the process, although on major projects that have Federal oversight it is a good idea to discuss possible delays. Each State has a process in place that determines when right-of-way certifications are sent to FHWA.

How are parcels certified? When does it happen in the process? Is a conditional certification based on parcel(s) or on the entire project? The certification that right-of-way has been acquired and is cleared is not required until the project is ready to be advertised for construction. If there are parcels that are not acquired, or relocation is not complete, these must be identified individually. If the project is approved to be advertised with parcels remaining to be acquired or relocation to be completed, the contractor needs to be aware during the bidding process, in case there is a need to work around those parcels.

What is the citation for right-of-way certification on a design-build project? 23 CFR 635.309(p) has instructions for a design-build project. Look at 23 CFR 710.313(d) for other right-of-way requirements that come into play when a design-build contractor is acquiring property for a project.

Right of Entry for Federal Land Transfers

Can a Right of Entry (ROE) be used instead of a Federal Land Transfer when dealing with Federal agencies, such as the U.S. Postal Service? No, it is not a substitute, it is a temporary solution. A right-of-entry can be used to provide access to and use of the property needed for the project while you are negotiating the terms of the Federal Land Transfer. Other Federal agencies have specific legal processes and stipulations which need to be worked out. This process can be long and involved.

Appraisal Waiver Valuation

Where can we get a more detailed explanation of how appraisal waiver works and maximum value? Appraisal waiver information is posted on the FHWA website <http://www.fhwa.dot.gov/realestate/index.htm>. FHWA published the regulation 24 CFR 24.102 which provides for an appraisal waiver up to \$10,000 with an option for the Agency to request an increase of the waiver amount up to a maximum of \$25,000. Appraisal waivers above \$10,000 are conditioned on the acquiring Agency offering the property owner the option of having the property appraised.

Who determines that a waiver valuation is the proper assignment? Normally the State managing appraiser or review appraiser makes appraisal assignments. In the case of a Local Public Agency (LPA), please discuss use of appraisal waivers with your State DOT.

What are the components of an appraisal waiver valuation? A waiver valuation must describe the property interest being acquired; provide an analysis of local real estate values and how these relate to the interest being acquired; and a written finding of the fair market value of the real property interest being acquired. Each State that uses the waiver valuation has the format described in its procedural manual. If you are interested in learning more, contact your State DOT to find out its requirements.

What processes have to be in place for a State to start using the waiver valuation? First, develop a waiver valuation process to be added to the State

right-of-way procedures manual. The State's right-of-way manual and process must be approved by the FHWA Division Office.

Why do appraisal waivers cost so much less than appraisals, say \$100 instead of \$1000? The appraisal waiver makes use of readily available data and a simplified approach. It is used on low value and uncomplicated acquisitions. Each State that uses the waiver valuation has the format and process described in its procedural manual. The person making the appraisal waiver valuation must have a good understanding of the local real estate market and can often support the value with a simple description and analysis, thus keeping the cost of preparation lower than the cost of an appraisal.

Who determines \$10,000, or \$25,000, level of documentation, and quality control? Each State DOT describes its process in its right-of-way procedural manual. The manual is approved by the local FHWA Division Office.

Does an LPA need advance approval from FHWA or the State DOT to use appraisal waivers? Yes; submit your proposal to your State DOT for approval.

What role do certified appraisers provide in guiding the determination in appraisal waiver valuation? The appraisal waiver valuation process does not require a certified appraiser; it requires a person with sufficient understanding of the local real estate market to make a valuation determination. Remember, these are low value and uncomplicated acquisitions.

How does it work for States that use consultants, when the Agency is ultimately responsible for determining the offer of just compensation? Is this duplication of effort? There is no difference when using consultants. The Agency is always responsible for determining the amount offered as just compensation.

Property values can vary greatly such that a property in a metropolitan area may have a greater value than a property in a rural area. Is there an opportunity to raise the waiver valuation threshold to an amount higher than \$25,000? Is there an opportunity to have a pilot program to see if this can bring valuable benefits? FHWA will consider pilots to determine if greater benefits can be derived. Contact your Division Office for further information.

In the April 19 Realty EDC webinar South Carolina mentioned producing a “sales brochure” for a project could take 60 days. What is a sales brochure/ can I use it? Some States collect data on all recent sales in the project area and produce a book of sales, or a sales brochure. This collection of data relevant sales is specific to the location near the project and makes developing appraisals more efficient in that the appraiser can study the sales in the book, or brochure, and determine which are most similar to the property to be acquired. Using a data book of sales in the project area is an efficient approach and is quite common.

Where can we find the forms or formats for appraisal waiver and conditional ROW certification that other States use? We have listed some States who post their right-of-way manual online on our FHWA website <http://www.fhwa.dot.gov/realestate/srowm.htm>.

Legal Authority for Incentive Payments

What is the legal authority for incentive payments? What specific Federal law is cited to allow this? FHWA and FAA use it; FTA does not use it; and FRA claims not to have the authority to use it. This does not appear in the Uniform Act. The FHWA has determined that the FHWA may participate in right-of-way acquisition and/or relocation incentive payments made under an FHWA approved plan or program. Incentive payments are payments that are over and above the just compensation offer or computed relocation benefits provided by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act). The use of acquisition and/or relocation incentive payments is voluntary on the part of the State and the FHWA; as such, use is not required.

The authority for the FHWA to participate in relocation incentive payments is found in 23 CFR 710.203(b)(2)(ii) which allows Federal participation in relocation assistance and payments provided under the law of the State that may exceed the requirements of 49 CFR Part 24. The FHWA has the general authority to participate in the costs of construction that includes both costs of right-of-way acquisition and relocation assistance. (See 23 U.S.C. §101(a)(3)). An incentive payment can be included as a cost of construction when such payments are used on critical projects, or phases of projects; or expedite the completion of a project; and result in overall project cost savings. The use of incentive payments for right-of-way acquisition and relocation is analogous to the use of incentive/disincentive

provisions for early completion in contracts for construction of Federal-aid projects (See 23 CFR 635.127(d)).

This policy is consistent with the intent of the Uniform Act in that it encourages the expeditious acquisition of real property. Language in the implementing regulation focuses on the assurance that property owners and displaced persons receive at least the level of benefits to which they are entitled.

Could you provide State specific samples of legislation which enables use of incentives, either State-wide or project specific? We suggest looking at the State's general authority regarding cost of construction to see if it includes the cost of right-of-way acquisition, which is often defined to include relocation assistance. You can also look at your basic authority to use administrative settlements. Many years ago States were unsure if they had authority to make administrative settlements but over the years they have become more acceptable as a means of expediting the project by avoiding eminent domain proceedings. Incentive payments are similar to administrative settlements.

Are incentive payments reimbursable with Federal-aid project funds? Yes, incentive payments are reimbursable with Federal-aid project funds. They are considered to be similar to an administrative settlement, except that they are offered to everyone on the project according to a pre-approved process or cost schedule. Additionally, Federal-aid funds participate in incentives offered for timely completion of construction projects. The additional cost of acquisition/relocation incentives is usually offset by the project cost savings when a project proceeds to construction in a timely manner.

Incentive Payment Process

Is the amount of the incentive established by the acquiring agency? What documentation is required by FHWA? The agencies using incentives established a procedure, determined what type of project incentives would be used for, and determined the amounts to be offered. This procedure is then sent to the FHWA Division Office for approval to be added to the State's right-of-way procedures manual. The FHWA reviews this procedure in the same manner it reviews other State right-of-way processes.

In the April 19 Realty EDC webinar, a presenter mentioned a hockey arena being built in Pennsylvania. The project sponsor provided half the estimated rental assistance payments upfront and the remainder after the property was vacated. The question was what if the property owner does not follow through and vacate the premises? The Pennsylvania example used during the webinar was a relocation payment to which the tenants and property owners are entitled. It was not an additional payment; it was an alternate form of disbursement. By disbursing half the entitlement early, it allowed the displaced parties to commit to replacement properties in a timely manner. This is especially useful for agencies that experience a one or two month lag time between when a claim is filed and the date the displaced person receives the reimbursement. In the Pennsylvania example everyone vacated in 90 days.

During the April 19 webinar, an example was used from Florida for 330 tenant-owned mobile homes. Wasn't it a relocation incentive rather than acquisition? The agency acquired the mobile homes from the mobile home owners. The incentive amount was based on a percentage of the acquisition offer. If the mobile home owner agreed to the offer within the first 30 days, they received an additional 25% of the offer, up to \$5000.

In the Florida example of acquisition incentive for tenant-owned mobile homes, did the timeframes include the relocation of the occupants? No, the acquisition offers were for 30 and 60 days. Over 200 of the mobile homes had out-of-state owners who were not in occupancy. The 100 residents located on the project used about six months to find replacement housing.

Can a project have both acquisition and relocation incentives? Yes.

How is offering an incentive payment different than coercion? Coercion is a means of forcing someone to do something they might not want to do. An incentive is simply an "if you would do this, then we will pay that." The owner or tenant can freely choose to sign up and move in a shorter period of time. We have found that incentive payments turn out to be very popular. Remember, most negotiations and relocations take much longer than statutory minimums, some taking years to accomplish. Agencies that have offered incentives have seen hundreds of relocations occur within a six-month window. All of these were on a voluntary basis.

How do we speed up the timeframe when some property owners do not accept incentive offers? Is a deadline for condemnation included within the negotiation? Most of the incentive acquisition offers are only on the table for a specific time period, say 30, 60, or 90 days. After that your normal project process and timeline will be in place.

Right-of-Way Pilot Projects

What other pilot projects are established on a national level other than waiver and incentive payments? Pilots of new ideas can be submitted through your FHWA Division Office for consideration. The waiver and incentive payments have already been studied and are available for your use without any more need to pilot them.

How long does it take FHWA to approve a pilot program? It typically takes three to six months, depending on how well developed the proposal is, how long the pilot will go on, how data or results will be captured, what is the control project for comparison purposes, and what the final output is expected to be. If your question refers to a local pilot you want to set up to try an EDC right-of-way flexibility, these can be worked out with your FHWA Division Office.