

#### **710.405 ROW use agreements.**

(a) A ROW use agreement for the non-highway use of real property interests may be executed with a public entity or private party in accordance with §710.403 and this section. Any non-highway alternative use of real property interests requires approval by FHWA, including a determination by FHWA that such occupancy, use, or reservation is in the public interest; is consistent with the continued use, operations, maintenance, and safety of the facility; and such use does not impair the highway or interfere with the free and safe flow of traffic as described in §710.403(b). Except for Interstate Highways, where the SDOT controls the real property interest, the FHWA may assign its determination and approval responsibilities to the SDOT in their Stewardship/Oversight Agreement.

(1) This section applies to highways as defined in 23 U.S.C. 101(a) that received title 23, United States Code, financial assistance in any way.

(2) This section does not apply to the following:

(i) Uses by railroads and public utilities which cross or otherwise occupy Federal-aid highway ROW and that are governed by other sections of this title;

(ii) Relocations of railroads or utilities for which reimbursement is claimed under 23 CFR part 140, subparts E and H, 23 CFR part 645, or 23 CFR part 646, subpart B; and

(iii) Bikeways and pedestrian walkways as covered in 23 CFR part 652.

(b) Subject to the requirements in this subpart, ROW use agreements for a time-limited occupancy or use of real property interests may be approved if the grantee has acquired sufficient legal right, title, and interest in the ROW of a federally assisted highway to permit the non-highway use. A ROW use agreement must contain provisions that address the following items:

(1) Ensure the safety and integrity of the federally assisted facility;

(2) Define the term of the agreement;

(3) Identify the design and location of the non-highway use;

(4) Establish terms for revocation of the ROW use agreement and removal of improvements at no cost to the FHWA;

(5) Provide for adequate insurance to hold the grantee and the FHWA harmless;

(6) Require compliance with nondiscrimination requirements;

(7) Require grantee and FHWA approval, if not assigned to SDOT, and SDOT approval if the agreement affects a Federal-aid highway and the SDOT is not the grantee, for any significant revision in the design, construction, or operation of the non-highway use; and

(8) Grant access to the non-highway use by the grantee and FHWA, and the SDOT if the agreement affects a Federal-aid highway and the SDOT is not the grantee, for inspection, maintenance, and for activities needed for reconstruction of the highway facility.

(9) Additional terms and conditions appropriate for inclusion in ROW use agreements are described in FHWA guidance at [http://www.fhwa.dot.gov/real\\_estate/right-of-way/corridor\\_management/airspace\\_guidelines.cfm](http://www.fhwa.dot.gov/real_estate/right-of-way/corridor_management/airspace_guidelines.cfm). The terms and conditions listed in the guidance are not mandatory requirements.

(c) Where a proposed use requires changes in the existing highway, such changes shall be provided without cost to Federal funds unless otherwise specifically agreed to by the grantee and FHWA.

(d) Proposed uses of real property interests shall conform to the current design standards and safety criteria of FHWA for the functional classification of the highway facility in which the property is located.

(e) An individual, company, organization, or public agency desiring to use real property interests shall submit a written request to the grantee, together with an application supporting the proposal. If FHWA is the approving authority, the grantee shall forward the request, application, and the SDOT's recommendation if the proposal affects a Federal-aid highway, and the proposed ROW use agreement, together with its recommendation and any necessary supplemental information, to FHWA. The submission shall affirmatively provide for adherence to all requirements contained in this subpart and must include the following information:

(1) Identification of the party responsible for developing and operating the proposed use;

(2) A general statement of the proposed use;

(3) A description of why the proposed use would be in the public interest;

(4) Information demonstrating the proposed use would not impair the highway or interfere with the free and safe flow of traffic;

(5) The proposed design for the use of the space, including any facilities to be constructed;

(6) Maps, plans, or sketches to adequately demonstrate the relationship of the proposed project to the highway facility;

(7) Provision for vertical and horizontal access for maintenance purposes;

(8) A description of other general provisions such as the term of use, insurance requirements, design limitations, safety mandates, accessibility, and maintenance as outlined further in this section; and

(9) An adequately detailed three-dimensional presentation of the space to be used and the facility to be constructed if required by FHWA or the grantor. Maps and plans may not be required if the available real property interest is to be used for leisure activities (such as walking or biking), beautification, parking of motor vehicles, public mass transit facilities, and similar uses. In such cases, an acceptable metes and bounds description of the surface area, and appropriate plans or cross sections clearly defining the vertical use limits, may be furnished in lieu of a three-dimensional description, at the grantee's discretion.