

Guidance Document 9

RIGHT OF WAY ENCROACHMENTS

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RIGHT OF WAY ENCROACHMENTS

PURPOSE

This Guidance Document sets out a process for protecting FDOT rights of way from unauthorized use. This is necessary to avoid potential loss of title to previously acquired rights of way and to avoid delays to transportation projects caused by the necessity to recover possession of rights of way prior to lettings. This Guidance Document is not intended to suggest that the districts must allow existing encroachments, but it is merely a tool that provides options for how to handle encroachments whether the decision is made to remove or authorize their existence.

AUTHORITY

Section 337.25(5), Florida Statutes
Section 337.406, Florida Statutes

REFERENCES

Guidelines for the Use of Florida Transportation Rights of Way
Right of Way Manual, Section 10.6, Right of Way Property Leases
Rule 14-20, General Use Permits

DEFINITIONS

Authorized Use: The occupation of department's rights of way by virtue of an executed permit, lease or easement document.

Encroachment: An occupation or use of department rights of way which has not been authorized by the execution of a permit, lease or other appropriate document.

9.1 General

The basic principle underlying this document is that no person or entity may lawfully occupy or use the department's rights of way without authorization to do so. Discovery of persons "in possession" or things built in or occupying FDOT rights of way are a red flag that action is needed. Once identified, such encroachments must either be removed or authorized.

9.2 Identifying Encroachments

All FDOT employees should be alert to the possible existence of encroachments. When identified, the encroachment should be reported to the appropriate Office for handling. Historically, the following offices have been delegated responsibility:

- Signs - Central Office Right of Way;
- Temporary encroachments such as vendors, parked vehicles, etc. - District Maintenance Office;
- Permanent structures - District Right of Way Office.

Each district has the authority to vary or establish different areas of responsibility to meet the district's operational needs.

9.3 Making the Decision to Allow the Use to Continue

An encroachment which has existed for an extended period of time, which poses no safety hazard or operational impediment and which does not interfere with a transportation project may be a candidate for consideration of a permit, lease or easement authorizing the use. By specifically authorizing previously existing encroachments, FDOT exercises control of its rights of way which is important in demonstrating the Department's legal right to possession. The authorizing document specifies the terms and conditions under which the use will be allowed and provides a method for the termination of the use should it become necessary for any transportation related purpose.

In determining whether to authorize an encroachment or require its removal, the following factors should be considered:

- Whether the encroachment has been in place for a long period of time or was recently added. NOTE: This may be a consideration, but is not a controlling factor;
- Whether the encroachment presents a safety hazard. In general, a safety hazard should be presumed to exist if an above ground improvement is located within the clear recovery zone established for the transportation facility. The District Maintenance Office should make the final determination as to whether a safety hazard exists;

- Whether the property on which the encroachment exists will be needed for transportation purposes within the near future;
- Whether the encroachment presents an operational impediment;
- Whether the encroachment benefits the department or advances transportation objectives.

9.4 Removing the Encroachment

If the District determines that the encroachment should be removed, the first step in requiring removal is to deliver a copy of the department's brochure, ***Guidelines for Use of Florida Transportation Rights of Way***, along with a courteous request to remove the encroachment. The request may be verbal or written and should allow a reasonable time for compliance.

If the initial request does not result in removal of the encroachment, a second request, in writing, should be delivered. This request should emphasize that the unauthorized use of the Department's rights of way is defined as a second degree misdemeanor under the law. The owner of the encroachment should again be afforded a reasonable time to comply with the request.

If the previous actions do not result in removal of the encroachment, the matter should be referred to law enforcement. Police, Sheriff and FDOT Motor Carrier Compliance Officers have the authority to issue citations for unauthorized use of the rights of way under ***Section 337.406(3) and (4), Florida Statutes***.

Repeated instances of encroachment at the same location should be referred to the District General Counsel's Office for initiation of legal proceedings.

9.5 Authorizing the Encroachment

When a determination has been made to allow an encroachment to remain, a decision must be made as to the appropriate document to be used. Each decision should be coordinated with the District General Counsel.

9.5.1 Determining the Appropriate Document

Selecting the appropriate document for authorizing uses of FDOT rights of way depends on the purpose, type and duration of the use. The following may be used as a guide:

- Commercial uses of rights of way which do not benefit the department or advance transportation objectives should be leased for a fair market rental as required by **Section 337.25(5), Florida Statutes**;
- Only leases to a governmental entity for a 'public purpose' is allowed without requirement of receiving fair market value rental compensation. This does not include non-profit or charitable uses or entities;
- Leases of federal-aid rights of way (called airspace agreements) also generally require receipt of fair market rental value;
- Uses which primarily benefit the department or advance transportation objectives, even if they also secondarily advance a commercial purpose may be authorized, either by permanent or temporary easements or by general use permits. Refer to **Rule 14-20 F.A.C.** for guidance on use of General Use Permits;
- Easements constitute an interest in real estate and should be used for major improvements built in the rights of way which are permanent or which are intended to continue for a long period of time. Easements should contain appropriate language establishing limiting uses, conditions, liability, etc. Compensation for an easement should be secured pursuant to **Section 337.25(4), Florida Statutes** if the long term use of the right of way is primarily commercial in character. An example might be a pedestrian overpass constructed between a commercial operation and a parking facility;
- Permits should be used for shorter term or temporary non-commercial uses (see **Rule 14-20 F.A.C.**). Permits may also be issued by municipal or county governments for temporary uses of the state road system within such local jurisdictions for purposes identified in **Section 337.406, Florida Statutes**.

9.5.2 Signs

Signs generally must be authorized by lease and not by permit, since advertising signs are not authorized on the operational rights of way by **Chapter 479, Florida Statutes**. All advertising signs must obtain a state outdoor advertising sign permit unless it is exempt from the statutory permitting requirements. It is important to coordinate all sign issues with the Outdoor Advertising Section in the Right of Way Office in Tallahassee.

An exception to the lease requirement may be made for temporary signs which do not pose a safety hazard or operational impediment. These may be authorized by permit issued by the department, a city or a county for a limited period of time. This type of sign is generally associated with a limited term event such as a public festival, fair or parade. Signs which carry advertising of commercial entities or events should not be authorized under this provision.

9.5.3 Short Form Lease Agreement

A special Short Form Lease Agreement has been developed for use in authorizing pre-existing encroachments and is available from the forms library on Right of Way's intranet web site. This document is for use **ONLY** for this purpose and should never be used for leases executed under **Section 10.6, Right of Way Property Leases**.

Note: Copies of all executed leases, standard or short form should be provided to the appropriate District Maintenance Office.

9.5.4 Leasehold Valuation

Section 337.25(5), Florida Statutes, requires that department property must be leased at market value. Market value may be established through a formal appraisal process or through an estimate prepared by a qualified department staff member. The type of process used should be based upon the complexity of the valuation issue.

HISTORY