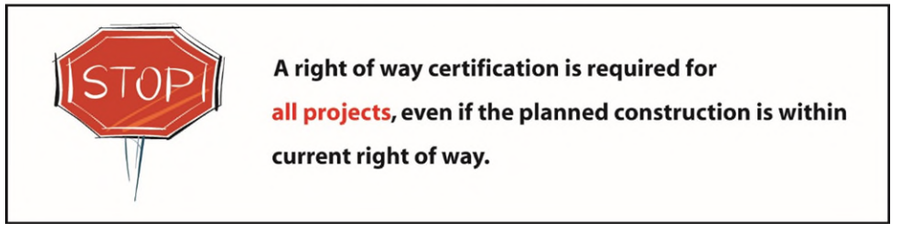
Introduction

This chapter offers a general overview of Right of Way (ROW) activities for managers of Project Development and Environment (PD&E), design and construction projects, and new Right of Way Project Managers (PMs) seeking a general, high-level orientation of the right of way process. It is essential that program understanding and close coordination exists between these areas of the project development process. A consolidation of procedures, directives, or other documents that have officially been adopted by the Florida Department of Transportation (FDOT) is contained in ***Procedure No. 575-000-000***, ***Right of Way Procedures Manual***, located on the ***Office of Right of Way webpage***. This should be the primary technical reference for Right of Way Managers.

General

FDOT frequently acquires property necessary to construct a transportation facility. As a governmental agency, the FDOT has the power of eminent domain, which allows the taking of private property for a public purpose without the concurrence of the property owner. Numerous federal and state laws protect the property owner in this process. ***Article X, Section 6(a)***, ***Florida Constitution*** says: "No property shall be taken except for a public purpose and with full compensation therefore paid to each owner..." As an example of the importance placed on property rights in Florida, there are only two types of trials that require a 12-person jury: cases that may result in a death penalty and cases involving the taking of property through eminent domain. This is a testament to the severity of the process. As a result, right of way acquisition is a fair but expensive and time-consuming process. The cost of right of way often exceeds that of construction and right of way activities are frequently on the critical path of a project schedule. Project Managers throughout the project development process (including planning, PD&E, design, and construction) must understand the importance of right of way considerations and ensure that the right of way professionals are involved early and throughout the development process.

Figure 1
Right of Way Certification



The culmination or goal of the ROW phase is the right of way certification prior to letting. The certification is a testament that the project is ready for construction from a right of way perspective (i.e., title has been acquired, all displacees have been relocated and all improvements have been removed or the removal has been included in the construction contract). **Figure 1, Right of Way Certification**, explains all projects require right of way certification.

Project Management in ROW tends to be at a sub-level to the overall ROW phase, wherein the management of in-house and/or consultant resources are handled within the various ROW disciplines. Although there are activities that must be completed prior to initiating the ROW process, the typical critical path of the right of way phase includes appraisal, acquisition, condemnation, relocation, clearing, and certification. The oversight of the entire process is at the District Right of Way Manager's level; however, delegation from this point may move into more discipline-specific management within the critical path of the overall process for any one project.

The overview ahead will discuss the preliminary activities taking place prior to the ROW phase followed by a general discussion of the specific ROW disciplines

within the process. The sections are generally in chronological order; however, some ROW activities may be performed concurrently.

Pre-Right of Way Activities

Many important actions must take place prior to starting the right of way phase of a project. The parties involved in surveying, mapping, design, and ROW acquisition must coordinate early and closely to ensure success of the project. The ROW PM should assist the PD&E and the Design PM in identifying issues during preliminary and final design so that delays and excessive costs of litigation do not occur later in the ROW phase. It may be wise to expend additional funds in the design and construction phases in order to avoid or minimize ROW, which may result in significantly lower total project cost. Delays in the delivery of ROW maps and documents can result in a delay of ROW acquisition, which could delay the letting.

Surveys: A survey is often performed during the PD&E phase of a project. This survey provides the basic location information on the preferred alignment. Once the preferred alignment is finalized and as additional design information becomes available, more detailed surveys provide information such as profiles and cross sections. Survey information is necessary to develop final design plans and ROW maps.

Conceptual Stage ROW Planning: This effort is typically started when reviewing corridor alternatives during PD&E and should be updated as the project progresses. It provides basic information about the upcoming right of way phase, such as the estimated number of parcels, businesses and displacees. This plan can provide valuable information about the types of parcels to be acquired, the likelihood of business damage claims, the likelihood of litigation, the type(s) of displacements that will occur and the extent and type of ROW clearing activities that may be required.

ROW Project Cost: The cost of right of way and the associated administrative costs are important for the alignment and conceptual design decisions that must be made during the PD&E phase. Project cost updates should be requested so that any changes in the project requirements or the real estate market itself can be communicated to decision makers. When the ROW project cost is prepared, the Design PM and the Right of Way PM should meet to review possible design modifications that may help reduce potential costs.

The ROW project cost must include the costs of land and acquired improvements, severance damages, relocation, business damages, ROW clearing, and attorney fees and costs. A current ROW project cost must be submitted as part of the package to receive Federal Highway Administration (FHWA) authorization to proceed with the ROW phase of the project when the project is to be federally funded.

Title Search: The title search determines the property boundaries and ownerships and addresses other land title issues on the project. The title search should begin as soon as possible during the ROW mapping process. Once property boundaries and ownership information is identified, it can be plotted on the ROW maps.

ROW Mapping: ROW maps are required to initiate the right of way phase of the project. They are essential for the accurate appraisal of the land and establishment of full compensation. ROW mapping begins when the project concept, the preliminary surveying, and the preliminary engineering is complete. As the final design reaches 60% completion, ROW limits are identified. After completion of Phase II (60%) plans, the final ROW maps and preparation of required legal descriptions for title conveyance documents can begin.

Needs Assessment: This required assessment specifically addresses the relocation of displacees on the project. It is conducted as soon as displacees can be identified, usually when the ROW limits are identified in the design plans. This

assessment must be updated when the design is modified or relocation requirements change.

The Right of Way Phase

Figure 2
Federal Aid Authorization & Reimbursement

On projects with federal aid in the right of way phase, federal authorization is required prior to beginning any R/W activities. Any funds expended or costs incurred prior to federal authorization will not be eligible for federal reimbursement.

On projects with federal aid in the right of way phase, federal authorization is required prior to beginning any ROW activities. Any funds expended or costs incurred prior to federal authorization will not be eligible for federal reimbursement. This is further highlighted in **Figure 2**, **Federal Aid Authorization and Reimbursement**. The request for authorization to proceed with the right of way phase must be made to FHWA after completion of environmental documentation (discussed in ***PMG 310, PD&E***) and completion of the ROW maps. A current ROW project cost must accompany the request. ROW phase activities include:

Appraisals: An appraisal is an estimate of the fair market value of the land and improvements to be taken, including severance damages. An appraisal report must be prepared on each parcel. The appraisal must comply with the ***Uniform Standards for Professional Appraisal Practice (USPAP)*** and ***Part 49, Section 24.103, Code of Federal Regulations (C.F.R.)***, and the ***Department's Supplemental Appraisal Standards***. The property owner must be given the opportunity to accompany the appraiser during the inspection of the property.

A review appraiser must review all appraisals to assure they meet appraisal requirements and to recommend approval of the appraisal as a basis for the establishment of compensation to property owners. This procedure must be done before an offer can be made to the property owner. A consultant may perform the review, but approval and establishment of compensation must rest with the FDOT. Compensation for the property to be taken may not be less than the fair market value, as established by the approved appraisal.

Critical steps in scheduling the appraisal are the time required to hire the appraiser, prepare the appraisal, and complete the appraisal review and approval process.

Acquisition: The following steps are required for the process of making an offer and negotiations:

- Provide written notification of the project and recitation of the owner's rights.
- Provide a written offer of approved compensation to purchase the subject property, which may not be less than the fair market value as established by the approved appraisal.
- Negotiate in good faith with the owner and, if applicable, the owner's representative in order to reach an agreement.
- Provide a copy of the appraisal report, right of way maps, and other documents to the owner if requested.
- Reimburse the property owner for reasonable attorney fees and costs, including expert fees.

Amount of Compensation: The FDOT must offer an amount for the land taken, improvements taken or damaged, and severance damages to the remaining property as established by the approved appraisal. The payment of business damages to a qualified business may also be required. The property owner's reasonable attorney fees and costs (including expert fees), and expenses

incidental to the transfer of title must also be paid. The FDOT may not accept donations of property until the owner is advised of his/her right to an appraisal of the property and the right to receive compensation. The FDOT may not take any coercive action to induce an agreement on the price to be paid for the property.

Real Estate Closing: If an agreement can be reached as a result of negotiations, then the parcel will be acquired through a real estate closing. Title will be voluntarily passed from the property owner to the FDOT in return for payment of the agreed upon amount. If an agreement cannot be reached, then a condemnation lawsuit must be filed and the property must be taken through eminent domain proceedings. If an agreement is reached in excess of the amount of approved compensation, the FDOT must provide written justification in support of that amount. Final agency acceptance of the purchase agreement cannot be granted until at least 30 days after the agreement has been executed.

Business Damages: A qualified business may make a claim for damages to the business as a result of a taking. Business damages are not damages to the real estate, but rather damages to the profit-making capacity of the business. There are strict statutory requirements for a business to qualify for damages. The FDOT must give the owner written notice of the project and recitation of the owner's rights, but no initial offer is required. If the business intends to claim damages, it must submit a written offer to settle with the FDOT.

Claims for business damages can result in exposure to large monetary claims. Early participation of ROW experts in the pre-right of way phases of the project can greatly reduce or mitigate these costs.

Condemnation: If negotiations fail, the property must be acquired through eminent domain proceedings in the circuit court. Resolutions by the FDOT identifying the public project and authorizing the condemnation of the parcels for the project are required. The FDOT cannot file a condemnation lawsuit until at least 30 days have elapsed from the date that the property owner received the written offer.

An Order of Taking Hearing must be scheduled and conducted before the court. At this formal evidentiary hearing, the FDOT must prove that the project constitutes a public purpose, that the property to be taken is necessary for this purpose, and that the FDOT has established a good-faith estimate of the value of the property based on a valid appraisal. If the court is satisfied with the evidence, an Order of Taking will be granted; and the FDOT must deposit the good-faith estimate of the value into the registry of the court. Upon deposit, title to the property transfers to the FDOT.

The court may establish the term within which and conditions upon which the defendants will be required to surrender possession of the property. After transfer of the title, surrender of possession and removal of improvements, construction may begin. Jury trials to determine the amount of final compensation are held at a later date. Negotiations to agree upon compensation may continue until the jury renders a verdict on final compensation. Close coordination should occur between the FDOT eminent domain attorneys and personnel involved with right of way mapping, design and ROW activities throughout the pre-right of way and negotiation phases. The process of filing a lawsuit, securing an Order of Taking hearing on the court docket, to the actual surrender of the property is a significant schedule consideration, typically 90 to 120 days or longer.

Relocate Displacees: Relocation is a highly detailed program governed by the ***Uniform Relocation and Real Property Acquisition Policies Act (Uniform Act)***. Adherence to the requirements of the ***Uniform Act*** is mandatory. Failure to do so will jeopardize federal funding on the project. The program requires notification to persons and businesses displaced by the project, relocation advisory assistance, payment of moving costs, identification of decent, safe and sanitary replacement dwellings, and payment of relocation housing costs. No lawful occupant shall be required to move unless he or she has received at least 90 days

advance written notice of the earliest date by which he or she may be required to move. The time required for this process is a significant schedule consideration.

Clear Right of Way: All improvements on the property must be removed prior to construction, or the removal should be included in the construction contract. Improvements must be inspected for Asbestos Containing Materials (ACM) prior to demolition; and if ACM is found, it must be abated. The abatement of ACM may not be included in a construction contract. Any ACM present must be abated prior to letting a construction contract, even if the removal of the building is included in the construction contract. Federal law requires that the regulatory agency (Florida Department of Environmental Protection) be notified of the impending abatement and demolition a minimum of 10 working days prior to its start.

Certify Right of Way Clear and Ready for Construction: The FDOT may not advertise for construction bids until all necessary rights of way for the construction of the project have vested in the state. The District Right of Way Manager or the Assistant District Right of Way Manager must certify that all of the following are complete and that all activities were conducted in accordance with applicable state and federal laws, rules and regulations:

- Title to all ROW must be vested in the FDOT, another state agency or a local government.
- All displacees must be cleared from the project.
- All improvements must be cleared from the project or identified for removal in the construction project.

This certification is required for ALL projects. This certification is submitted directly to the Central Office of Right of Way via the Certification System. The District shall include the ROW certification for construction in the project Plans, Specifications and Estimate (PS&E) package. The District shall also upload a copy of the certification into the Certification System at or before the time the PS&E package is delivered to the Office of Production Management.

Contracting

Appraisal: Appraisals are most often performed by right of way consultants whereas Appraisal Review is most often handled by in-house staff. In the procurement of appraisal and appraisal review contracts, FDOT uses contractual services: more specifically, the Invitation to Negotiate process pursuant to ***Section 287.057, Florida Statutes (F.S.***), and ***DMS Rule 60A, Method B***, to which there is no prequalification process. Appraisers proposing on contracts to prepare surplus property appraisals and for contracts to conduct Local Agency Program (LAP) project appraisal services must be prequalified by FDOT under ***Subsection 003.n, Rule Chapter 14-75, F.A.C.***, Group 20, Appraisal Services. ***PMG 220, PMG 230 and PMG 235*** deal with consultant procurement, negotiations and contract management.

Acquisition/Relocation: The acquisition and relocation process is predominantly handled by in-house staff; however, when handled through a consultant, the ***Consultants Competitive Negotiation Act (CCNA)*** contracting process under Professional Services is followed pursuant to ***Section 287.055, F.S.***, and ***Rule Chapter 14-75, F.A.C.***

Property Management: Abatement and Demolition for the clearing of the right of way is handled solely through consultants and the Invitation to Bid contractual services process provided in ***Section 337.11, F.S.***, and ***PMG 220, Consultant Procurement***.

Expert Witness Services: Expert witness services are services rendered in direct support of litigation for projects entering the eminent domain (condemnation) process of the acquisition of a property pursuant to ***Section 287.057, F.S.***

Right of Way Phase Schedule

The time involved in performing the required right of way activities will depend to some extent on the number of parcels and complexity of each situation. Nonetheless, because of the many legal requirements, even the simplest taking may not be accomplished quickly. Early Right of Way involvement is the key to staying on schedule over the course of the project. **Figure 3**, **Right of Way Acquisition Process**, shows typical durations for key right of way activities.

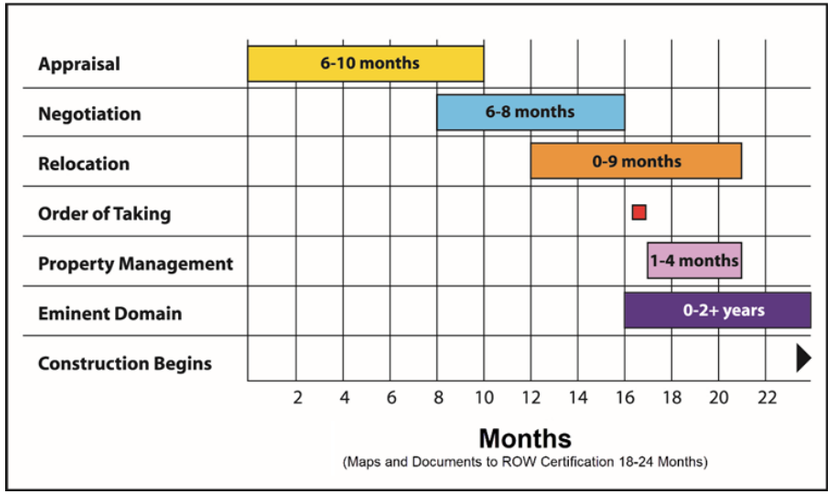



Figure 3
Right of Way Acquisition Process