

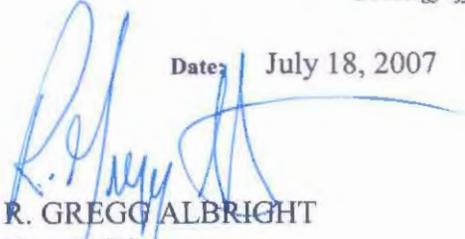
Memorandum

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To: DISTRICT DIRECTORS

Date: July 18, 2007

From: 
RICHARD D. LAND
Deputy Director
Project Delivery


R. GREGG ALBRIGHT
Deputy Director
Planning and Modal Programs

Subject: Alternatives for Right of Way Acquisition Prior to Environmental Approval for Local Agency Projects on the State Highway System and Local Agency Federal-Aid Projects off the State Highway System

The Division of Right of Way and Land Surveys Acquisition Reference File 04-1, "Alternatives For Right of Way Acquisition Prior to Environmental Approval for Local Agency Projects on the State Highway System" (SHS) dated November 2, 2004, (copy attached) is hereby revised, expanded, and superseded to include both projects on the SHS for which the Local Public Agency (LPA) is the lead agency, and Early Acquisition Alternatives for Local Public Agency Projects off the State Highway System with a Federal Funding Component.

PART 1 – PROJECTS ON THE STATE HIGHWAY SYSTEM

There are three alternatives available to a LPA for acquiring right of way prior to environmental approval:

- A. Hardship Acquisition or Protective Buying (23 CFR 710.503): The LPA may request approval for Hardship Acquisition or Protective Buying in accordance with current policies/procedures (requires Federal approval). To be considered for Hardship Acquisition the property owner must be under unusual personal circumstances aggravated by the project. To be considered for Protective Buying, imminent substantial building activity or appreciation will cause the land value to increase substantially faster than the State Transportation Improvement Plan (STIP) inflation rate for construction projects. Hardship Acquisition and Protective Buying are further explained in Right of Way Manual Chapter 5. (See <http://www.dot.ca.gov/hq/row/rowman/manual/ch5.pdf>.)
- B. Open Market Transaction: The LPA may expend funds to purchase an individual property for sale on the open market. The property owner's decision to sell must be unsolicited by the LPA and the title must be taken in the LPA's name. The file must be fully documented with proof of the open market transfer. Examples of appropriate documentation may include, but are not limited to:

- Proof from listing agent that property is listed.
- Photo of “For Sale” sign on property.
- Letter of intent from property owner.

Note: If the file is not appropriately documented, the State of California (State) will not accept title to the property, nor will the property qualify as a soft match as discussed later herein, until full compliance with the Federal Uniform Relocation Assistance and Real Properties Acquisition Policies Act, as amended, (Uniform Act) is achieved.

C. Early Acquisition: The LPA may request approval for “Early Acquisition” on the project, after completion of environmental studies and the selection of a preferred alternative, in accordance with the following criteria:

1. LPA must expend its own funds (capital and capital support) on the right of way element of the project.
2. The request for approval must include substantiation that the project is not controversial. There must be a determination that the acquisition will not limit the choice of mitigation measures, and that the LPA has conditioned its future use of the property on California Environmental Quality Act (CEQA) compliance. This documentation must be in writing and maintained in the project file.
3. If a Federal-Aid Project (i.e., \$1 of Federal-Aid on any portion of the project), Federal funding options shall be preserved through compliance with Federal Regulations concerning Early Acquisition [see 23 CFR 710.501 (a) (b) and (c)].
4. The project must either be a programmed or an authorized project.
5. The preferred alternative has been made public at a public hearing, or other public forum if a public hearing is not required.
6. Freeway Agreements, if required, or a resolution from the local governing body, must be obtained in accordance with Sections 100.1 through 100.4 of the Streets and Highways Code.
7. The design will have progressed sufficiently to be able to accurately convey right of way requirements for preparation of appraisal maps and deeds.
8. The property may not change from its current use. On new alignments, acquisitions shall be limited to full parcel acquisitions only. Partial parcel acquisitions are not permitted, except for existing route widening or other minor system improvements.
9. Notices to Owner for utility relocations shall not be issued.
10. Removal of improvements, including utilities, shall only be conducted when public safety is an issue. See Right of Way Manual Section 11 for Property Management procedures.
11. Laws, regulations, policies and procedures, including the Uniform Act, must be followed throughout the appraisal and acquisition process.

12. Grantors shall be notified in writing that Resolutions of Necessity will not be sought prior to final environmental approval. Owner occupants shall be advised of their right to buy back the property at fair market value in the event the property is not used for the proposed project, and they do not relocate (see Right of Way Manual Section 16.10.04.00).
13. Title to the property shall be taken in the name of the LPA, not the State. Title shall be in fee and free and clear of all encumbrances. Any exceptions shall be reviewed and approved by District/Region Right of Way prior to transaction being completed. Acceptance of said title by State is subject to a review of a Policy of Title Insurance in State's name.
14. It is strongly recommended that a cooperative agreement be fully executed to address, at a minimum, the early acquisition activities. However, if the Department is performing the work for the LPA under reimbursement authority, a fully executed cooperative agreement must be in place prior to any work being performed.
15. The LPA and Project Manager must ensure that right of way expenditures of local agency funds do not exceed the project's total available local-only funds.
16. The attached "Check Sheet – Local Agency Request for R/W Acquisition Prior to Final Environmental Approval on SHS Projects" shall be submitted with the Letter of Qualification (LOQ).

A LPA requesting to qualify a project under Alternative C must meet all of the criteria listed above. A LOQ approved by the Headquarters Chief, Office of Appraisals and Local Programs (Office) is required prior to proceeding with the right of way acquisitions. The LOQ shall be prepared by the LPA and must be recommended for approval by the District/Region Right of Way Manager, before being forwarded to the Office.

Expenditures under Alternatives B and C are not eligible for reimbursement from future STIP funds programmed for the project, if any. However, when local funds are expended on a Federal-Aid project, consistent with this policy, the capital costs may serve as a "soft match," i.e., credit for the non-Federal match for the remaining Federal-Aid project. The soft match credit will be based on the acquisition cost (unless exception granted for current appraised value) of the portion of the parcel (land and buildings) actually incorporated into the project. No other typically reimbursed cost, e.g., relocation assistance, loss of good will, damages and/or capital support, is included toward the soft match credit.

Strict compliance with this policy is strongly emphasized. It is a Right of Way tool to assist in delivering projects, not a tool for scheduling projects.

PART 2 – PROJECTS OFF THE STATE HIGHWAY SYSTEM WITH A FEDERAL FUNDING COMPONENT

LPA's have expressed an interest in acquiring property early for local transportation projects while retaining the option to federalize the project. 23 CFR 710.201 requires the State Transportation Agency to develop guidance and provide oversight on Federal-aid projects. Therefore, Right of Way Local Programs Reference File LP 04-1 "Alternatives For Right of Way Acquisition Prior to Environmental Approval for Local Agency Projects on the SHS" dated November 2, 2004, (copy attached) is hereby revised, expanded, and superseded in this Part 2 to include Local Agency Projects off the SHS.

This policy applies when a LPA wishes to expend its own funds (capital and capital support) on the Right of Way element of a local transportation project prior to final environmental document/determination approval. Expenditures for federally approved Hardship Acquisition and Protective Buying are eligible for reimbursement. [See 23 CFR 710.503(a).] Expenditures for other early acquisitions are not eligible for reimbursement from future STIP or Federal Transportation Improvement Plan (FTIP) funds programmed for the project, but may be eligible for soft match. [See 23 CFR 710.501.]

Properties acquired prior to approval of the Environmental Document or Determination for a Federal-aid project, regardless of when they are acquired, are all subject to and must be acquired in full compliance with all federal regulations including 49 CFR 24 (The Uniform Act), and Title VI of the Civil Rights Act. (See 23 CFR 710.501.)

There are two alternatives available to a LPA for acquiring right-of-way prior to completion of the environmental document or determination:

- A. Hardship Acquisition or Protective Buying (23 CFR 710.503): The LPA may request approval for Hardship Acquisition or Protective Buying in accordance with current policies/procedures (requires Federal approval). To be considered for Hardship acquisition the property owner must be under unusual personal circumstances aggravated by the project. To be considered for Protective Buying, imminent substantial building activity or appreciation will cause the land value to increase substantially faster than the STIP inflation rate for construction projects. Hardship Acquisition and Protective Buying are further explained in Right of Way Manual Chapter 5.
(See <http://www.dot.ca.gov/hq/row/rowman/manual/ch5.pdf>.)

B. Early Acquisition: LPAs can proceed to acquire properties with their own funds at any time they have legal authority to do so, with the exception of properties subject to 49 USC 303 and 23 USC 138, related to preservation of parklands (Section 4(f)), including properties subject to 16 USC 470(f) related to national historic preservation, recognizing that potential future Federal funding is always at risk for loss of funding at either a parcel or project level. LPAs are cautioned NOT to consider early acquisition in the following cases:

- Historic structures, archaeological properties, or anticipatory demolition of historic structures in conflict with the National Historic Preservation Act;
- Section 4(f) properties (publicly owned public parks and recreation areas, wildlife and waterfowl refuges, and historic sites regardless of ownership);
- Properties with Environmental Justice (Executive Order 12898) issues (e.g. acquiring corridors through economically depressed areas);
- Substantial public controversy;
- Properties contaminated with hazardous waste or parcels that have not been adequately evaluated for the presence of contaminants;
- Properties that would entail consultation under the Endangered Species Act;
- Properties that would entail acquisition of individual 404 Permits; and
- Properties that would require Coastal Commission or Local Coastal Zone permits.

Early acquisition of property may not influence the selection of the final alternative, nor may it preclude the “no build” alternative. The State must be able to provide documentation to satisfy Federal Highway Administration that the acquisition did not influence the National Environmental Policy Act (NEPA) decision. (See 23 CFR 710.507(d)(1).)

The acquisition must not be made under threat of condemnation and the owner must be clearly informed in writing that the LPA will not use eminent domain to purchase the property prior to an approved environmental document.

Prior to initiating early acquisition, a LPA is strongly urged to consider all the elements of risk involved and to perform a risk analysis. The LPA should notify the Caltrans Right of Way Local Programs liaison in letter form concerning the proposed acquisition prior to taking any action for purposes of providing guidance and consultation. Caltrans Right of Way will contact Caltrans Environmental for comment. Notification does not constitute approval and does not ensure eligibility for soft match credit if the activity is deemed non-compliant at a later date. LPAs maintain the risk and may be risking not only their own funds in the acquisition of the parcel, but future Federal participation in the project as well.

The LPA must request approval from their appropriate local body (City Council or County Board of Supervisors, as appropriate) for “Early Acquisition” on the local project in accordance with the following criteria:

1. LPA must expend its own funds (capital and capital support) on the parcel.
2. The request for approval by the appropriate local board must include substantiation that the project is not substantially controversial. There must be a determination that the acquisition will not limit the choice of alternatives or mitigation measures, and that the local agency has conditioned its future use of the property on CEQA compliance. Documentation of these items must be in writing and maintained in the project file. The environmental document shall contain the statement: **“The early acquisition of Right of Way for this project has not influenced the environmental assessment, including the decision relative to the need to construct the project or the selection of a specific location.”**
3. The acquisition of the parcel must comply with Federal regulations concerning Early Acquisitions if the LPA wishes to preserve federal funding options (see 23 CFR 710.501(a)(b) and (c)).
4. The property may not change from its current use. On new alignments, acquisitions shall be limited to full parcel acquisitions only. Partial parcel acquisitions are not permitted, except for existing route widening or other minor system improvements.
5. Notices to Owner for utility relocations shall not be issued.
6. Removal of improvements, including utilities, shall only be conducted when public safety is an issue. See Right of Way Manual Section 11 for Property Management procedures.
7. Laws, regulations, policies and procedures, including the Uniform Act must be followed throughout the appraisal and acquisition process.
8. Grantors shall be notified in writing that Resolutions of Necessity will not be sought prior to final environmental approval. Owner occupants shall be advised of their right to buy back the property at fair market value in the event the property is not used for the proposed project, and they do not relocate (see Right of Way Manual Section 16.10.04.00).
9. Title shall be in fee and free and clear of all encumbrances. Any exceptions shall be reviewed and approved by the appropriate local body.
10. The LPA must ensure that right-of-way expenditures of local agency funds do not exceed the project’s total available local-only funds.

A parcel acquisition by the LPA must meet all of the criteria listed above under Alternative B. The risk analysis should be prepared by the LPA and included in the documentation package submitted for approval by the appropriate local agency body. Early Acquisition Approval by the appropriate local agency body is required prior to proceeding with right of way acquisitions. Documentation of the approval including the risk analysis, which addresses items 1 through 10 above will be maintained in the project file.

Expenditures under Alternative B are not eligible for reimbursement from future STIP and FTIP funds programmed for the project, if any. However, when local funds are expended on a Federal-aid project consistent with this policy, a LPA may request credit for soft match if the acquisition meets eligibility requirements outlined in 23 CFR 710.501(b).

The soft match credit will be based on the acquisition cost (unless an exception is granted to allow use of the current appraised value) of the portion of the parcel (lands and buildings) actually incorporated into the project. No other typically reimbursable costs, (e.g., relocation assistance, loss of goodwill, damages and/or capital support) are included toward the soft match credit. The provisions of 23 CFR 710.507(e) apply when a local agency requests soft match credit

Following the steps outlined in this policy will improve the LPA's ability to obtain soft match credit. Failure to meet the requirements of this policy could place Federal participation for the entire project at risk. Funds expended could possibly end up being ineligible for soft match credit.

If you have any questions concerning this policy, please contact Terry Abbott, Chief, Division of Local Assistance at (916) 653-1776 or Bimla Rhinehart, Chief, Division of Right of Way and Land Surveys at (916) 654-5075.

Attachment

- c: R/W Deputies
- Karla Sutliff, Project Management
- Tim Craggs, Design
- Terry Abbott, Local Assistance