

# **Right of Way Manual**

## **Chapter 4**

### **Acquisition**

### **Policies, Procedures and Information**

**Colorado Department of Transportation**

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## EXHIBITS

Exhibit A	Certified Inventory of Real and Personal Property (CDOT Form #433)
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## Section 4.1 – GENERAL INFORMATION

### 4.1.1 – Acronyms Common to the Right of Way (ROW) Manual and CDOT

BLM	Bureau of Land Management (Department of Interior)
BPR	Bureau of Public Roads (Predecessor to Federal Highway Administration)
BuRec	United States Bureau of Reclamation (Department of Interior)
CAD	Computer Aided Drafting
CE	Categorical Exclusion
CDPHE	Colorado Department of Public Health and Environment
CDOT	Colorado Department of Transportation
CFR	Code of Federal Regulations
CHARN	Colorado High Accuracy Reference Network
CJI-Civ. 4th	Colorado Jury Instructions, Civil 4th
CPA	Certified Public Accountant
CPW	Colorado Division of Parks and Wildlife (Colorado Department of Natural Resources)
CRS	Colorado Revised Statutes
DORA	Colorado Department of Regulatory Agencies
EA	Environmental Assessment
EEO	Equal Employment Opportunity
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
EPS	Extended Purchasing System
ESA	Environmental Site Assessment
FEIN	Federal Employer Identification Number
FEMA	Federal Emergency Management Agency (U.S. Department of Homeland Security)
FHA	Federal Housing Administration (United States Department of Housing and Urban Development)
FHWA	Federal Highway Administration
FIR	Field Inspection Review
FIRREA	Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (a federal law enacted in the wake of the savings and loan crisis of the 1980's)
FLPMA	Federal Land Policy and Management Act of 1976 (Public Law 94-579 94th Congress)
FLTC	Federal Land Transfer Coordinator
FMV	Fair Market Value
FONSI	Finding of No Significant Impact
FOR	Final Office Review
FS	Feasibility Study
GLO	General Land Office (US Dept of Interior, Bureau of Land Mgmt.)
GPS	Global Positioning System
HB	House Bill
HBU	Highest and Best Use
HED	Highway Easement Deed
HLR	Housing of Last Resort
HUD	United States Office of Housing and Urban Development
IGA	Intergovernmental Agreement
ISA	Initial Site Assessment
LOC	Letter of Consent

LPA	Local Public Agency
LSCD	Land Survey Control Diagram
MAP-21	Moving Ahead for Progress in the 21st Century, P.L. 112-141
MESA	Modified Environmental Site Assessment
MIDP	Mortgage Interest Differential Payment
MOA	Memorandum of Agreement
MOO	Memorandum of Ownership
MOU	Memorandum of Understanding
NEPA	National Environmental Policy Act
NGS	National Geodetic Survey (National Oceanic and Atmospheric Administration - NOAA)
NHS	National Highway System
NRHP	National Register of Historic Places (National Parks Service, US Dept of the Interior)
NSRS	National Spatial Reference System (National Oceanic and Atmospheric Administration - NOAA)
PBS	Primary Base Series (USGS Mapping Program)
PCD	Project Control Diagram
PL	Public Law
PLS	Professional Land Surveyor (Licensed in the State of Colorado by Colorado Department of Regulatory Agencies)
PLSCD	Preliminary Land Survey Control Diagram
PS&E	Project Specifications and Estimates
PSI	Preliminary Site Investigation
QA	Quality Assurance
QAL	Qualified Appraisers List
QC	Quality Control
QRAL	Qualified Review Appraisers List
RAMP	Real Estate Acquisition Management Plan
REPM	Regional Environmental Project Manager
RFP	Request for Proposal
RHP	Replacement Housing Payment
RI	Remedial Investigation
ROD	Record of Decision (US Environmental Protection Agency)
ROW	Right of Way
ROWPR	Right of Way Plan Review
RS	Revised Statute (Federal - first official codification of the Acts of Congress)
RTD	Regional Transportation Director
SDOT	State Department of Transportation
SPCC	Spill Prevention and Countermeasure Plans
SSN	Social Security Number
State Land Board	State Board of Land Commissioners (Department of Natural Resources)
STIP	Statewide Transportation Improvement Program (4-year transportation planning document required by FHWA)
STURRA	Surface Transportation and Uniform Relocation Assistance Act of 1987
SUP	Special Use Permit
TC	Transportation Commission
TE	Transportation Enhancement (Moving Ahead for Progress in the 21st Century Act (MAP-21) replaced the TE Activities with the Transportation Alternatives Program (TAP))
TEA 21	Transportation Equity Act for the 21st Century (enacted June 9, 1998 as Public Law 105-178)

TMOSS	Terrain Modeling Survey System (InRoads)
Uniform Act	Uniform Relocation Assistance and Real Property Acquisition Policies of 1970, as amended (42 USC 4601 et seq.)
USC	United States Code
USCIS	United States Citizenship and Immigration Services (Homeland Security)
USDOT	United States Department of Transportation
USFS	United States Forest Service
USGS	United States Geological Survey
USPAP	Uniform Standards of Professional Appraisal Practice

#### 4.1.2 – Definitions

Terms defined were copied from 49 CFR Subpart A §24.2 and 23 CFR Subpart A §710.105.

*Access rights* §710.105(b): The right of ingress to and egress from a property to a public way.

*Acquiring Agency* §710.105(b): A State Agency, other entity, or person acquiring real property for title 23, United States Code purposes. When an acquiring agency acquires real property interest that will be incorporated into a project eligible for title 23 grant funds, the acquiring agency must comply with Federal real estate and ROW requirements applicable to the grant.

*Agency* §24.2(a)(1) The term *Agency* means the Federal Agency, State, State Agency, or person that acquires real property or displaces a person.

- i. *Acquiring Agency* (§24.2(a)(1)(i)). The term *acquiring Agency* means a State Agency, as defined in paragraph (a)(1)(iv) of this section (§24.2(1)(i)), which does not have such authority.
- ii. *Displacing Agency* (§24.2(a)(1)(ii)). The term *displacing Agency* means any Federal Agency carrying out a program or project, and any State, State Agency, or person carrying out a program or project with Federal financial assistance, which causes a person to be a displaced person.
- iii. *Federal Agency* (§24.2(a)(1)(iii)). The term *Federal Agency* means any department, Agency, or instrumentality in the executive branch of the government, any wholly owned government corporation, the Architect of the Capitol, the Federal Reserve Banks and branches thereof, and any person who has the authority to acquire property by eminent domain under Federal law
- iv. *State Agency* (§24.2(a)(1)(iv)). The term *State Agency* means any department, Agency or instrumentality of a State or of a political subdivision of a State, any department, Agency, or instrumentality of two or more States or of two or more political subdivisions of a State or States, and any person who has the authority to acquire property by eminent domain under State law.

*Acquisition* §710.105(b): Activities to obtain an interest in, and possession of, real property.

*Alien not lawfully present in the United States* §24.2(a)(2): The phrase “alien not lawfully present in the United States” means an alien who is not “lawfully present” in the United States as defined in 8 CFR 103.12 and includes:

- i. An alien present in the United States who has not been admitted or paroled until the United States pursuant to the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) and whose stay in the United States has not been authorized by the United States Attorney General; and,



- ii. An alien who is present in the United States after the expiration of the period of stay authorized by the United States Attorney General or who otherwise violates the terms and condition as of admission, parole or authorization to stay in the United States.

*Appraisal* §24.2(a)(3): The term appraisal means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property on a specific date, supported by the presentation and analysis of relevant market information.

*Business* §24.2(a)(4): The term business means any lawful activity, except a farm operation, that is conducted:

- (i) Primarily for the purchase, sale, lease and/or rental of personal property, and/or for the manufacture, processing, and/or marketing of products, commodities, and/or any other personal property;
- (ii) Primarily for the sale of services to the public;
- (iii) Primarily for outdoor advertising display purposes, when the display must be moved as a result of the project; or
- (iv) By a nonprofit organization that has established its nonprofit status under applicable Federal or State law.

For CDOT, the term business also means any lawful activity, except a farm operation, that is conducted:

- (i) As an entity licensed to conduct business by the Secretary of the State of Colorado, and which is currently held in good standing by the same;
- (ii) As an entity who has filed State and Federal taxes as a business in the State of Colorado within the last calendar year;

*Citizen* §24.2(a)(5): The term citizen for purposes of this part includes both citizens of the United States and noncitizen nationals.

*Comparable replacement dwelling* §24.2(a)(6): The term comparable replacement dwelling means a dwelling which is:

- (i) Decent, safe and sanitary as described in paragraph 24.2(a)(8) (see *Decent, safe and sanitary dwelling* definition);
- (ii) Functionally equivalent to displacement dwelling. The term *functionally equivalent* means that it performs the same function, and provides the same utility. While a comparable replacement dwelling need not possess every feature of the displacement dwelling, the principal features must be present. Generally, functional equivalency is an objective standard, reflecting the range of purposes for which the various physical features of a dwelling may be used. However, in determining whether a replacement dwelling is functionally equivalent to the displacement dwelling, the Agency may consider reasonable trade-offs for specific features when the replacement unit is equal to or better than the displacement dwelling (also see appendix A, §24.2(a)(6));
- (iii) Adequate in size to accommodate the occupants;
- (iv) In an area not subject to unreasonable adverse environmental conditions;
- (v) In a location generally not less desirable than the location of the displaced

- person's dwelling with respect to public utilities and commercial and public facilities, and reasonably accessible to the person's place of employment;
- (vi) On a site that is typical in size for residential development with normal site improvements, including customary landscaping. The site need not include special improvements such as outbuildings, swimming pools, or greenhouses. (also see §24.403(a)(2));
- (vii) Currently available to the displaced person on the private market except as provided in paragraph (s)(6)(ix) of this section (also see appendix A, §24.2(a)(6)(vii)); and
- (viii) Within the financial means of the displaced person:

(A) A replacement dwelling purchased by a homeowner in occupancy at the displacement dwelling for at least 90 days prior to initiation of negotiations (90-day homeowner) is considered to be within the homeowner's financial means if the homeowner will receive the full price differential as described in §24.401(c), all increased mortgage interest costs as described at §24.401(d) and all incidental expenses as described at §24.401(e), plus any additional amount required to be paid under §24.404, Replacement housing of last resort.

(B) A replacement dwelling rented by an eligible displaced person is considered to be within his or her financial means if, after receiving rental assistance under this part, the person's monthly rent and estimated average monthly utility costs for the replacement dwelling do not exceed the person's base monthly rental for the displacement dwelling as described at §24.402(b)(2).

(C) For a displaced person who is not eligible to receive a replacement housing payment because of the person's failure to meet length-of-occupancy requirements, comparable replacement rental housing is considered to be within the person's financial means if an Agency pays that portion of the monthly housing costs of a replacement dwelling which exceeds the person's base monthly rent for the displacement dwelling as described in §24.402(b)(2). Such rental assistance must be paid under §24.404, Replacement housing of last resort.

(ix.) For a person receiving government assistance before displacement, a dwelling that may reflect similar government housing assistance. In such cases any requirements of the government housing assistance program relating to the size of the replacement dwelling shall apply. (See appendix A, §2(a)(6)(ix).)

*Contribute materially* §24.2(a)(7): Contribute materially means that during the two (2) taxable years prior to the taxable year in which displacement occurs, or during such other period as the Agency determines to be more equitable, a business or farm operation:

- (i) Had average annual gross receipts of at least \$5,000; or
- (ii) Had average annual net earnings of at least \$1,000; or
- (iii) Contributed at least 33 1/3 percent of the owner's or operator's average annual gross income from all sources.
- (iv) If the application of the above criteria creates an inequity or hardship in any given case, the Agency may approve the use of other criteria as determined appropriate.

*Damages* §710.105(b): Damages means the loss in value attributable to remainder property due to the severance or consequential damages, as limited by State law, that arise when only part of an owner's real property is acquired.

*Disposal* §710.105(b): Disposal means the transfer by sale or other conveyance of permanent rights in excess real property, when the real property interest is not currently or in the foreseeable future needed for highway ROW or other uses eligible for funding under title 23 of the United States Code. A disposal must meet the requirements contained in 23 CFR §710.403(b) of this part. The term "disposal" includes actions by a grantee, or its subgrantees, in the nature of relinquishment, abandonment, vacation, discontinuance, and disclaimer of real property or any rights therein.

*Donation* §710.105(b): Donation means the voluntary transfer of privately owned real property, by a property owner who has been informed in writing by the acquiring agency of rights and benefits available to owners under the Uniform Act and 23 CFR §710.403(b), for the benefit of a public transportation project without compensation or with compensation at less than fair market value.

*Early acquisition* §710.105(b): Early acquisition means the acquisition of real property interests by an acquiring agency prior to the completion of the environmental review process for a proposed transportation project, as provided under 23 CFR 710.501 and 23 U.S.C. 108.

*Early Acquisition Project* §710.105(b): Early acquisition project means a project for the acquisition of real property interests prior to the completion of the environmental review process for the transportation project into which the acquired property will be incorporated, as authorized under 23 U.S.C. 108 and implemented under 23 CFR §710.501. It may consist of the acquisition of real property interests in a specific parcel, a portion of a transportation corridor, or an entire transportation corridor.

*Easement* §710.105(b): Easement means an interest in real property that conveys a right to use a portion of an owner's property or a portion of an owner's rights in the property either temporarily or permanently.

*Excess Real Property* §710.105(b): Excess real property means a real property interest not needed currently or in the foreseeable future for transportation purposes or other uses eligible for funding under 23, United States Code.

*Federal-Aid Project* §710.105(b): Federal-aid project means a project funded in whole or in part under or requiring an FHWA approval pursuant to provisions in chapter 1 of Title 23, United States Code.

*Federally Assisted* §710.105(b): Federally assisted means a project or program that receives grant funds under title 23, United States Code.

*Grantee* §710.105(b): Grantee means the party that is the direct recipient of title 23 funds and is accountable to FHWA approval pursuant to provisions in chapter 1 of title 23, United States Code.

*Initiation of negotiations* §24.2(a)(15): Unless a different action is specified in applicable Federal program regulations, the term *initiation of negotiations* means the following:

- (i) Whenever the displacement results from the acquisition of the real property by a Federal Agency or State Agency, the *initiation of negotiations* means the delivery of

the initial written offer of just compensation by the Agency to the owner or the owner's representative to purchase the real property for the project. However, if the Federal Agency or State Agency issues a notice of its intent to acquire the real property, and a person moves after that notice, but before delivery of the initial written purchase offer, the *initiation of negotiations* means the actual move of the person from the property.

- (ii) Whenever the displacement is caused by rehabilitation, demolition or privately undertaken acquisition of the real property (and there is no related acquisition by a Federal Agency or a State Agency), the *initiation of negotiations* means the notice to the person that he or she will be displaced by the project or, if there is no notice, the actual move of the person from the property.
- (iii) In the case of a permanent relocation to protect the public health and welfare, under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (Pub. L. 96-510, or Superfund) (CERCLA) the *initiation of negotiations* means the formal announcement of such relocation or the Federal or federally-coordinated health advisory where the Federal Government later decides to conduct a permanent relocation.
- (iv) In the case of permanent relocation of a tenant as a result of an acquisition of real property described in §24.101(b)(1) through (5), the initiation of negotiations means the actions described in §24.2(a)(15)(i) and (ii), except that such initiation of negotiations does not become effective, for purposes of establishing eligibility for relocation assistance for such tenants under this part, until there is a written agreement between the Agency and the owner to purchase the real property. (See appendix A, §24.2(a)(15)(iv)).

*Mitigation Property* §710.105(b): Mitigation property means a real property interest acquired to mitigate for impacts of a project eligible for funding under title 23.

*Option* §710.105(b): Option means the purchase of a right to acquire real property within an agreed-to period of time for an agreed-to amount of compensation or through an agreed-to method which compensation will be calculated.

*Person* §710.105(b): Person means any individual, family, partnership, corporation or association.

*Real Estate Acquisition Management Plan (RAMP)* §710.105(b): Real Estate Acquisition Management Plan means a written document that details how a non-State department of transportation grantee, subgrantee, or design-build contractor will administer the title 23 ROW and real estate requirements for its project or program of projects. The document must be approved by the SDOT, or by the funding agency in the case of a non-SDOT grantee, before any acquisition work may begin. It must lay out in detail how the acquisition and relocation assistance programs will be accomplished and any anticipated issues that may arise during the process. If relocations are reasonably expected as part of the title 23 projects or program, the Real Estate Acquisition Management Plan (RAMP) must address relocation assistance and related procedures. *Note: CDOT uses the title "Acquisition Stage Relocation Plan" instead of "Real Estate Acquisition Management Plan".*

*Real property or Real Property Interest* §710.105(b): Real property or real property interest means any interest in land and any improvements thereto, including fee and less-than-fee interests such as: temporary and permanent easements, air or access rights, access control,

options, and other contractual rights to acquire an interest in land, rights to control use or development, leases, and licenses, and any similar action to acquire or preserve ROW for a transportation facility. As used in 23 CFR §710, the terms “real property” and “real property interest” are synonymous unless otherwise specified.

*Relinquishment* §710.105(b): Relinquishment means the conveyance of a portion of a highway right of way or facility by a grantee under title 23, United States Code, or its subgrantee, to another governmental agency for continued transportation use. (See part 620, subpart B of title 23, United States Code.)

*Right of Way (ROW)* §710.105(b): Right of Way means real property and rights therein used for the construction, operation, maintenance, or mitigation of a transportation or related facility funded under title 23 of the United States Code.

*ROW Manual* §710.105(b): An operations manual that establishes a grantee’s acquisition, valuation, relocation, and property management and disposal requirements and procedures, and has been approved in accordance with §710.201(c).

*ROW Use Agreement* §710.105(b): ROW use agreement means real property interests, defined by an agreement, as evidenced by instruments such as a lease, license, or permit for use of real property interests for non-highway purposes where the use is in the public interest, consistent with the continued operation, maintenance, and safety of the facility, and such use will not impair the highway or interfere with the free and safe flow of traffic (see also 23 CFR 1.23). These rights may be granted only for a specified period of time because the real property interest may be needed in the future for highway purposes or other purposes eligible for funding under title 23, United States Code.

NOTE: The ROW Use Agreement does not specifically include special use permits. For regulations regarding ROW use agreements for railroads, public utilities, bikeways and pedestrian walkways refer to 23 CFR §140, 23 CFR §645, 23 CFR §646 and 23 CFR §652.

*Settlement* §710.105(b): Settlement means the result of negotiations based on fair market value in which the amount of just compensation is agreed upon for the purchase of real property or an interest therein. This term includes the following:

1. An *administrative settlement* is a settlement reached prior to filing a condemnation proceeding based on value related evidence, administrative consideration, or other factors approved by an authorized agency official.
2. A *legal settlement* is a settlement reached by an authorized legal representative or a responsible official of the acquiring agency who has the legal power vested in him by State law, after filing a condemnation proceeding, including agreements resulting from mediation and stipulated settlements approved by the court in which the condemnation action had been filed. Note: The CDOT ROW Manager is considered a responsible officer for the purpose of participating in mediation and finalizing the resulting legal settlements.
3. A *court settlement* or court award is any decision by a court that follows a contested trial or hearing before a jury, commission, judge, or other legal entity having the authority to establish the amount of compensation for a taking under the laws of eminent domain.

*State Agency* §710.105(b): State agency means a department, agency, or instrumentality of a

State or of a political subdivision of a State; any department, agency, or instrumentality of two or more States or of two or more political subdivisions of a State or States; or any person who has the authority to acquire property by eminent domain, for public purposes, under State law.

*State Department of Transportation (SDOT)* §710.105(b): State Department of Transportation means the State highway department, transportation department, or other State transportation agency or commission to which title 23 of the United States Code funds are apportioned.

Note: or purposes of uniformity in this manual, the State Transportation Department will be referred to as the Colorado Department of Transportation (CDOT).

*Stewardship/Oversight Agreement* §710.105(b): Stewardship/Oversight Agreement means the written agreement between the SDOT and FHWA that defines the respective roles and responsibilities of FHWA and the State for carrying out certain project review, approval, and oversight responsibilities under title 23, including those activities by 23 U.S.C. 106(c)(3).

*Subgrantee* §710.105(b): Subgrantee means a government agency or legal entity that enters into an agreement with a grantee to carry out part or all of the activity funded by title 23 grant funds. A subgrantee is accountable to the grantee for the use of the funds and for compliance with applicable Federal requirements.

*Temporary Development Restriction* §710.105(b): Temporary Development Restriction means the purchase of a right to temporarily control or restrict development or redevelopment of real property. This right is for an agreed to time period, defines specifically what is restricted or controlled, and is for an agreed to amount of compensation.

*Transportation Project* §710.105(b): Transportation project means any highway project, public transportation capital project, multimodal project, or other project that requires the approval of the Secretary. As used in this part, the term "transportation project" does not include an Early Acquisition Project as defined in this section.

*Uneconomic remnant* §710.105(b): Uneconomic remnant means a remainder property which the acquiring agency has determined has little or no utility or value to the owner.

NOTE: CDOT's policy is to offer to purchase the remnant, but the owner may refuse the offer and keep the remnant portion.

*Uniform Act* §710.105(b): The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Public Law 91-646, 84 Stat. 1894; primarily codified in 42 U.S.C. 4601 et seq.), and the implementing regulations at 49 CFR Part 24 and 23 CFR 710.

*Unlawful occupant* §24.2(a)(29): A person who occupies without property right, title or payment of rent or a person legally evicted, with no legal rights to occupy a property under State law. An Agency, at its discretion, may consider such person to be in lawful occupancy.

*Utility costs* §24.2(a)(30): The term *utility costs* means expenses for electricity, gas, other heating and cooking fuels, water and sewer.

*Utility facility* §24.2(a)(31): The term *utility facility* means any electric, gas, water, steam power, or materials transmission or distribution system; any transportation system; any communications system, including cable television; and any fixtures, equipment, or other property associated with

the operation, maintenance, or repair of any such system. A utility facility may be publicly, privately, or cooperatively owned.

*Utility relocation* §24.2(a)(32): The term *utility relocation* means the adjustment of a utility facility required by the program or project undertaken by the displacing Agency. It includes removing and reinstalling the facility, including necessary temporary facilities; acquiring necessary right-of-way on a new location; moving, rearranging or changing the type of existing facilities; and taking any necessary safety and protective measures. It shall also mean constructing a replacement facility that has the functional equivalency of the existing facility and is necessary for the continued operation of the utility service, the project economy, or sequence of project construction.

*Waiver valuation* §24.2(a)(33): The term *waiver valuation* means the valuation process used and the product produced when the Agency determines that an appraisal is not required, pursuant to §24.102(c)(2) appraisal waiver provisions.

Additional definitions for CDOT purposes include the following:

*Local Agency*: For purposes of this manual, a local agency is a political jurisdiction or quasi-governmental entity utilizing any Federal Aid Highway Program or CDOT funds for any part of the acquisition project.

*NHS*: The National Highway System as defined in 23 U.S.C. 103(b).

*Notice of intent to acquire*: Written notice furnished to a property owner of the Agency's interest in acquiring Real Property and the basic protections provided to the owner by law. The Notice of intent to acquire informs the property owner of CDOT's construction plans, CDOT's need to acquire all or a portion of the property, and the planned commencement of an eminent domain action if negotiations fail.

*Personal Property*: In general, property that can be moved. It is not permanently attached to, or a part of, the real property. Personal property is not to be considered in the appraisal of real property.

*Transportation Commission (TC)*: The Colorado Transportation Commission is an 11-member body with each commissioner serving a four-year term once appointed by the Governor and confirmed by the senate. The Transportation Commission formulates general CDOT policy, advises and makes recommendations to the Governor and General Assembly on transportation issues and promulgates and adopts CDOT's budgets and programs. As part of these duties, the Transportation Commission authorizes CDOT ROW Condemnations.

### **4.1.3 – Authorities**

Eminent domain generally refers to the right of the government to “take” private property for public use or public purposes. The right is an inherent power of sovereign entities, and it is necessary for governments to build roads, utilities and other public improvements.

Agencies created by the State to serve the public may exercise the right of eminent domain. The acquisition of private property for public use is governed by a host of rules and regulations.

### Constitutional and Statutory Considerations

Both the Fifth Amendment to the United States Constitution and Article II, Section 15 of the Colorado Constitution limit this inherent right by requiring government entities to pay “just compensation” for the property taken. These form a fundamental principle of eminent domain: government can take private property for public use, but not without providing the owner with just compensation.

The Colorado Department of Transportation (CDOT) has statutory authority to acquire land for highway purposes once the Transportation Commission enters a resolution deciding that highway changes are in the public interest and authorizing negotiations with landowners. Section 43-1-208, 210, and 43-3-106, C.R.S. (2014).

In addition to the requirement that governments pay “just compensation,” federal and state law often require additional payments to landowner’s whose loss of property requires them to move from the premises. Article 56 of Title 24, C.R.S. (2014) governs these “Relocation Assistance and Land Acquisition Policies.”

Federal and State policies establish uniform, fair, and equitable treatment of persons displaced by the acquisition of real property. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and the Surface Transportation and Uniform Relocation Assistance Act of 1987, govern the acquisition of real property. 49 CFR, Part 24 governs the implementation of the Uniform Act and 23 CFR, Part 710 governs right of way regulations. The provisions of Title III of the Uniform Act under Section 305 provide that each state, to the greatest extent practical under State law, will be guided by the land acquisition policies in Section 301 and provisions in Section 302.

One of the fundamental precepts of acquiring private property for public purposes is that an owner of private property must be paid just compensation as required by the Constitution of the United States. The Fifth Amendment of the Constitution provides that private property may not be taken for public purposes without the payment of just compensation.

The Constitution also requires the states to follow due process when they acquire privately owned property.

On January 2, 1971, Public Law 91-646, the “Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970,” was signed into law. This law was amended in 1987 as part of the Surface Transportation and Uniform Relocation Assistance Act of that year and is commonly referred to as the “Uniform Act.” The Uniform Act applies to all real property acquisitions for projects where Federal funds are involved. All agencies acquiring property with Federal funds must be familiar with the provisions of the Act as well as applicable State law. The Uniform act further defines what CDOT must do to assure that property owners are receiving their constitutionally mandated reimbursement and other program benefits. Noncompliance with Federal law can result in ineligibility for reimbursement of project cost.

The Uniform Act contains three titles:

1. Title I contain the general provisions of the law;
2. Title II covers uniform relocation assistance;
3. Title III concerns uniform real property acquisition.



In today's government, whether it be Federal, State, or local, the subject of public accountability is the focus of constant attention. The right of way field entails involvement with the public on various important personal (to the property owners and occupants on a project) issues regarding the acquisition of land, property, and the relocation of occupants. Because of the personal and sensitive nature of these issues, they also tend to be emotional ones that can create unique situations. These, in turn, can delay or even stop a project, thereby damaging the credibility of CDOT and its staff.

Good business practices and honesty are most important when dealing with the public. While it is true that the government sector is not profit-motivated as is the business sector, public agencies are responsible for the infusion of huge sums of money into the economy. Wherever or whenever money is involved there is the potential of, or possible perception of fraud, waste, abuse, and mismanagement.

Public accountability begins with the individual responsibilities of the right of way negotiator and how he or she carries out those responsibilities on the job. Right of way negotiators must be particularly sensitive to the consequences of conflict of interest laws and procedures in their state.

The risks are so great and the penalties so severe that any gains attained through conflict of interest are hardly worth it. Right of way negotiators and their agencies must be on constant guard against even the slightest perception that their activities could be challenged under conflict of interest. The fact that the perception of wrongdoing is often as detrimental as a clear infraction must be recognized and remembered as being of importance in right of way issues.

#### **4.1.4 – Purpose**

This Manual serves as a guide on how right of way acquisition should be carried out. The Manual has been developed to provide information and be a reference for those responsible for the assignment of completing the acquisition on a typical right of way project.

This Manual was prepared in the interest of improving program delivery and efficiency. Additionally, program complexities, changes in law, regulations and policy dictated additional guidance. The user must keep in mind that his/her fundamental responsibility requires that the State laws and regulatory requirements in addition to Federal regulations must be met. This Manual is not intended to alter this responsibility and/or priority.

The CDOT right of way brochure will be available at public hearings/open houses. The brochure/video explain the rights and benefits of property owners whose real property is to be acquired.

The purpose of this Manual is to outline policies and procedures to be followed when acquiring real property to facilitate the construction of public improvements. Policies and procedures have been developed to comply with State of Colorado, CDOT, and Federal Highway Administration (FHWA) requirements. This Manual was prepared in the interest of improving program delivery and efficiency. This Manual is also intended to expand the knowledge and understanding of the program and procedures when acquiring right of way.

#### **4.1.5 – Real Property Acquisition Policies**

To encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners, and to promote public confidence in Federal, State and local land acquisition practices.

The grantees must ensure that all real property interests within the approved ROW limits or other project limits of a facility that has been funded under title 23 are devoted exclusively to the purposes of that facility and the facility is preserved free of all other public or private alternative uses, unless such non-highway alternative uses are permitted by Federal law (including regulations) or the FHWA. An alternative use, whether temporary under 23 CFR §710.405 or permanent as provided in §710.409, must be in the public interest, consistent with the continued operation, maintenance, and safety of the facility, and such use must not impair the highway or interfere with the free and safe flow of traffic (see also 23 CFR 1.23). Park and Ride lots are exempted from the provisions of this part. Park and Ride lot requirements are found 23 U.S.C. 137 and 23 CFR 810.106.

## SECTION 4.2 – PROGRAM ADMINISTRATION

*Sections 4.2.1, 4.2.3 through 4.2.9 and 4.2.11 are from 23 CFR Part 710.*

### 4.2.1 – Grantee and Subgrantee Responsibilities

1. *Program oversight.* States administer the Federal-aid highway program, funded under chapter 1 of title 23, United States Code, through their SDOTs. The SDOT shall have overall responsibility for the acquisition, management, and disposal of real property interests on its Federal-aid projects, including when those projects are carried out by the SDOT's subgrantees or contractors. This responsibility shall include ensuring compliance with the requirements under title 23 §710.201 and other Federal laws, including regulations. Non-SDOT grantees of funds under title 23 must comply with the requirement under title 23 §710.201, except as otherwise expressly provided in title 23 §710.201 and are responsible for ensuring compliance by their subgrantees and contractors with the requirements of title 23 §710.201 and other Federal laws, including regulations.
2. *Organization.* Each grantee and subgrantee, including any other acquiring agency acting on behalf of a grantee or subgrantee, shall be adequately staffed, equipped, and organized to discharge its real property-related responsibilities.
3. *ROW Manual.*
  - A. Every grantee must ensure that its title 23-funded projects are carried out using an FHWA-approved and up-to-date ROW manual or RAMP that is consistent with applicable Federal requirements, including the Uniform Act and 23 CFR §710.201. Each SDOT which receives funding under title 23, United States Code shall maintain an approved and up-to-date manual describing its ROW organization, policies, and procedures. Non-SDOT grantees may use one of the procedures in paragraph (d) to meet the requirements in this paragraph; however, the ROW manual options can only be used with SDOT approval and permission. The ROW manual shall describe functions and procedures for all phases of the ROW program, including appraisal and appraisal review, waiver valuations, negotiation and eminent domain, property management, and relocation assistance, administrative settlements, legal settlements, ad oversight of its subgrantees and contractors. The ROW manual shall also specify procedures to prevent conflict of interest and avoid fraud, waste, and abuse. The ROW manual shall be in sufficient detail and depth to guide the grantee, its employees, and others involved in acquiring, managing, and disposing of real property interests. Grantees, subgrantees, and their contractors must comply with current FHWA requirements whether the requirements are included in the FHWA-approved ROW manual.
  - B. The SDOT's ROW manual must be developed and updated, as a minimum, to meet the following schedule:
    - 1) The SDOTs shall prepare and submit for approval by FHWA an up-to-date ROW Manual by no later than August 23, 2018.
    - 2) Every 5 years thereafter, the chief administrative officer of SDOT shall certify to the FHWA that the current SDOT ROW manual conforms to existing practices and

contains necessary procedures to ensure compliance with Federal and State real estate law and regulation, including this part.

- 3) The SDOT shall update its ROW manual periodically to reflect changes in operations and submit the updated materials for approval by the FHWA.
4. *ROW manual alternatives.* Non-SDOT grantees, and all subgrantees, design-build contractors, and other acquiring agencies carrying out a project funded by a grant under title 23, United States Code, must demonstrate that they will use FHWA-approved ROW procedures for acquisition and other real estate activities, and that they have the ability to comply with current FHWA requirements, including 23 CFR §710.202. This can be done through any of the following methods.
  - A. Certification in writing that the acquiring agency will adopt and use the FHWA-approved SDOT ROW manual;
  - B. Submission of the acquiring agency's own ROW manual to the grantee for review and determination whether it complies with Federal and State requirements, together with a certification that once the reviewing agency approves the manual, the acquiring agency will use the approved ROW manual; or
    - 1) Submission of a RAMP setting forth the procedures the acquiring agency or design-build contractor intends to follow for a specified project or group of projects, along with a certification that if the reviewing agency approves the RAMP, the acquiring agency or design-build contractor will follow the approved RAMP for the specified program or project(s). The use of a RAMP is appropriate for a subgrantee, non-SDOT grantee, or design-build contractor if that party infrequently carries out title 23 programs or projects, the program or project is non-controversial, and the project is not complex.
    - 2) Subgrantees, design-build contractors, and other acquiring agencies carrying out a project for an SDOT submit the required certification and information to the SDOT, and the SDOT will review and make a determination on behalf of FHWA. Non-SDOT grantees submit the required certification and information directly to FHWA. Non-SDOT grantees are responsible for submitting to FHWA the required certification and information for any subgrantee, contractor, and other acquiring agency carrying out a project for the non-SDOT grantee.
5. *Record keeping.* The acquiring agency shall maintain adequate records of its acquisition and property management activities.
  - A. Acquisition records, including records related to owner or tenant displacements, and property inventories of improvements acquired shall be in sufficient detail to demonstrate compliance with 23 CFR §710.202 and 49 CFR Part 24. These records shall be retained at least 3 years from the later of either:
    - 1) The date the SDOT or other grantee receives Federal reimbursement of the final payment made to each owner of a property and to each person displaced from a property; or
    - 2) The date of reimbursement for early acquisition or credit toward the Federal State share of a project is approved based on early acquisition activities under 23 CFR

§710.501.

- B. Property management records shall include inventories of real property interests considered excess to project or program needs, as well as all authorized ROW use agreements for real property acquired with title 23 funds or incorporated into a program or project that received title 23 funding.
6. *Procurement.* Contracting for all activities required in support of an SDOT's or other grantee's ROW services shall conform to 2 CFR 200.317, except to the extent that the procurement is required to adhere to requirements under 23 U.S.C. 112(b)(2) and 23 CFR part 172 for engineering and design related consultant services. Current Policies and Procedures shall be confirmed with CDOT's Procurement Services group and efforts in obtaining consultant services shall be coordinated with said department to ensure that proper contracting methodology is utilized, considering the scope of work, project needs, and dollar threshold being considered.
  7. *Use of other public land acquisition organizations, conservation organizations, or private consultants.* The grantee may enter into written agreements with other State, county, municipal, or local public land acquisition organizations, conservation organizations, private consultants, or other persons to carry out its authorities under this part section. Such organizations, firms, or persons must comply with the grantee's ROW manual or RAMP as approved in accordance with paragraphs (c) or (d) of 23 CFR 710.201. The grantee shall monitor any such real property interest acquisition activities to ensure compliance with State and Federal law, and is responsible for informing such persons of all such requirements and for imposing sanctions in cases of material non-compliance.
  8. *Assignment of FHWA approval actions to an SDOT.* The SDOT and FHWA will agree in their Stewardship/Oversight Agreement on the scope of property-related oversight and approvals under 23 CFR §710.201(h) that will be performed directly by FHWA and those that FHWA will assign to the SDOT. The assignment provision does not apply to other grantees of title 23 funds. The content of the most recent Stewardship/Oversight Agreement shall be reflected in the FHWA-approved SDOT ROW manual. The agreement, and thus the SDOT ROW manual, will indicate for which Federal-aid projects require submission of materials for FHWA review and approval. The FHWA retains responsibility for any approval action not expressly assigned to the SDOT in the Stewardship/Oversight Agreement.

#### **4.2.2 – Right of Way Plan Authorization**

Pursuant to Section 43-1-208, CRS (amended 2019), the Chief Engineer may acquire land by purchase, exchange or through negotiations prior to filing of a petition of condemnation. Authorization of ROW Plans by the Chief Engineer is required for Region staff to begin negotiations for the acquisition of a property.

In order for Right of Way Plans to be authorized, Region Survey staff must provide a set of ROW Plans, Chief Engineer's Cost Estimate and Legal Descriptions to the Survey Program Manager as described in Chapter 2. These documents should be submitted electronically and available in an accessible location within CDOT's Electronic Data Management System. The Survey Program Manager will review the submitted documents, and if acceptable, Project Development Branch, Headquarters ROW will prepare a signature package containing the ROW Plans, Chief Engineer's Cost Estimate and Legal Descriptions. The Chief Engineer will sign both the ROW

Plans and Chief Engineer's Cost Estimate.

Once signed, the Region Survey Supervisor, Acquisition Supervisor and ROW Manager will be notified and the authorized package will be saved electronically with copies of the signature pages placed in the main project file at Project Development Branch, Headquarters ROW.

It is CDOT's Policy that all acquisition of right of way must be pursuant to an authorized project as evidenced by signed Right of Way Plans and Right of Way Plan Approval (Form #462) or non-participating memo, depending on the funding type. The Form #462 or non-participating memo will be prepared once ROW Plans are authorized.

Once Form #462 or non-participating memo has been prepared, the following positions are required to be notified (See Chapter 2):

1. Region Program Engineer
2. Region ROW Manager
3. Authorization Requestor
4. Headquarters Financial Management and Budget Office
5. Headquarters Center for Accounting – Projects and Grants
6. Headquarters ROW – Appraisal; File, and
7. FHWA (Form #462 only).

The Form #462 is required for all Federal Aid project plans, Parcels Acquired in Advance of Plans - (AP) Parcels, Early Acquisition Parcels – (EA) Parcels, and Protective Buying and Hardship Buying - (PB) and (HB) Parcels.

State Only Funded (Non-Participating) Projects do not require Form #462. The signature block on the title sheet of the plan set should still be signed by the Chief Engineer. A non-participating memo will still be prepared to document the authorization.

Temporary Easement Only Projects require ROW Plan Authorization, but do not require a full set of ROW plans or legal descriptions on projects which only have temporary easements, when no permanent easements will occur. They require only the following:

1. Temporary Easement number
2. Name of owner(s)
3. Vesting deed
4. Dimensions
5. Area
6. Topography

#### **4.2.3 – Title 23 Funding and Reimbursement**

1. *General conditions.* Except as provided in 23 CFR 710.501 for early acquisition, a State agency only may acquire real property, including mitigation property, with 23 grant funds if the following conditions are satisfied:

- A. The project for which the real property is acquired is included in an approved Statewide Transportation Improvement Program (STIP);
  - B. The grantee has executed a project agreement recognized under title 23 reflecting the Federal funding terms and conditions for the project;
  - C. Preliminary acquisition activities, including a title search, appraisal, appraisal review and waiver valuation preparation, preliminary property map preparation and preliminary relocation planning activities, limited to searching for comparable properties, identifying replacement neighborhoods and identifying available public services, can be advanced under preliminary engineering, as defined in 23 CFR §646.204, prior to completion of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.) review, while other work involving contact with affected property owners for purposes of negotiation and preliminary relocation assistance must normally be deferred until after NEPA approval, except as provided in 23 CFR 710.501, early acquisition; and in §710.503 for protective buying and hardship acquisition; and
  - D. Costs have been incurred in conformance with State and Federal law requirements.
2. *Direct eligible costs.* Federal funds may only participation direct costs that are identified specially as an authorized real property activity such as the costs of acquiring real property incorporated into the final project and the associated direct costs of acquisition, except in the case of a State that has an approved indirect cost allocation plan as stated in §710.203(d) or specifically provided by statute. Participation is provided for:
- A. *Real property acquisition.* Usual costs and disbursements associated with real property acquisition as required under the laws of the State, including the following:
    - 1) The cost of contracting for private acquisition services or the cost associated with the use of local public agencies.
    - 2) Ordinary and reasonable cost of acquisition activities, such as, appraisal, waiver valuation development, appraisal review, cost estimates, relocation planning, ROW plan preparation, title work, and similar necessary ROW related work.
    - 3) The compensation paid for real property, interest and costs normally associated with the purchase, such as document fees and document stamps. The costs of acquiring an interest in land, rights to control use or development, leases, ROWs, and any other similar action to acquire or preserve rights-of-way for a transportation facility are eligible costs when FHWA determines such costs are actual, reasonable and necessary costs. Costs under this paragraph do not include salary and related expenses for an acquiring agency's employees.
    - 4) The cost of administrative settlements in accordance with 49 CFR 24.102(i), legal settlements, court awards, and costs incidental to the condemnation process. This includes reasonable acquiring agency attorney's fees but excludes attorney's fees for other parties except where required by State law (including an order of a court of competent jurisdiction) or approved by FHWA.
    - 5) The cost of minimum payments and valuation waiver amounts included in the

approved ROW manual or approved RAMP; and.

- 6) Ordinary and reasonable costs associated with closing, and costs of finalizing the acquisition.
- B. *Relocation assistance and payments.* Usual costs and disbursement associated with the following:
- 1) Relocation assistance and payments required under 49 CFR part 24; and
  - 2) Relocation assistance and payments provided under the laws of the State that may exceed the requirements of 49 CFR part 24, except for relocation assistance and payments provided to aliens not lawfully present in the United States.
- C. *Damages.* The cost of severance and/or consequential damages to remaining real property resulting from a partial acquisition, actual or constructive, of real property for a project based on elements compensable under applicable State law.
- D. *Property management.* The net cost of managing real property prior to and during construction to provide for maintenance, protection, and the clearance and disposal of improvements until final project acceptance.
- E. *Payroll-related expenses.* Salary and related expenses (compensation for personal service) of employees of an acquiring agency for work on a project funded by a title 23 grant are eligible costs in accordance with 2 CFR part 225 (formerly OMB Circular A-87), as are salary and related expenses of a grantee's employees for work with an acquiring agency or a contractor to ensure compliance with Federal requirements on a title 23 project if the work is dedicated to a specific project and documented in accordance with 2 CFR part 225.
- F. *Property not incorporated into a project funded under title 23 United States Code.* The cost of property not incorporated into a project may be eligible for reimbursement in the following circumstances;
- 1) *General.* Costs for construction material sites, property acquisitions to a logical boundary, eligible Transportation, Alternatives (TA) projects, sites for disposal of hazardous materials, environmental mitigation, environmental banking activities, or last resort housing; and
  - 2) *Easements and alternate access not incorporated into the right of way.* The cost of acquiring easements and alternate access points necessary for highway construction and maintenance outside the approved right of way limits for permanent or temporary use.
- G. *Uneconomic remnants.* The cost of uneconomic remnants purchased in connection with the acquisition of a partial taking for the project as required by the Uniform Act.
- H. *Access rights.* Payment for full or partial control of access on an existing road or highway (i.e., one not on a new location), based on elements compensable under applicable State law. Participation does not depend on another real property interest being acquired or on further construction of the highway facility.



I. Utility and railroad property.

- 1) The cost to replace operating real property owned by a displaced utility or railroad and conveyed to CDOT for a project, as provided in 23 CFR Part 140, Subpart I, Reimbursement for Railroad Work, and 23 CFR Part 645, subpart A, Utility Relocations, Adjustments, and Reimbursement, and 23 CFR Part 646, subpart B, Railroad-Highway Projects.
- 2) Participation in the cost of acquiring non-operating utility or railroad real property shall be in the same manner as that used in the acquisition of other privately-owned property.
3. Withholding payment. The FHWA may withhold payment under the conditions in 23 CFR 1.36 where the State fails to comply with Federal law or regulation, State law, or under circumstances of waste, fraud, and abuse.
4. Indirect costs. Indirect costs may be claimed under the provisions of 2 CFR part 225 (formerly OMB Circular A-87). Indirect costs may be included on billings after the indirect cost allocation plan has been prepared in accordance with 2 CFR part 225 and approved by FHWA, other cognizant Federal agency, or, in the case of an SDOT subgrantee without a rate approved by a cognizant Federal agency, by the SDOT. Indirect costs for an SDOT may include costs of providing program-level guidance, consultation, and oversight to other acquiring agencies and contractors where ROW activities on title 23 funded projects are performed by non-SDOT personnel.

#### **4.2.4 – Project Development**

Source 81 FR 57729 Aug. 23, 2016, unless otherwise noted.

#### **4.2.5 – General**

The project development process typically follows a sequence of actions and approvals in order to qualify for funding. The key steps in this process typically are planning, environment, project agreement/authorization, acquisition, construction advertising, and construction.

#### **4.2.6 – Planning**

Under the FHWA's planning regulations contained in 23 CFR part 450, state and local governments conduct metropolitan and statewide planning to develop coordinated, financially constrained system plans to meet transportation needs for local and statewide systems, under FHWA's planning regulations contained in 23 CFR part 450. In addition, air quality non-attainment areas must meet the requirements of the US EPA Transportation conformity regulations (40 CFR parts 51 and 93). Projects must be included in an approved State Transportation Improvement Program (STIP) in order to be eligible for Federal-aid funding.

#### **4.2.7 – Environmental Analysis**

The National Environmental Policy Act (NEPA) process, as described in FHWA's NEPA

regulations in 23 CFR Part 771, normally must be conducted and concluded with a Record of Decision (ROD) or equivalent before Federal funds can be placed under agreement for acquisition of right of way. Where applicable, a State also must complete Clean Air Act (42 USC 7401 et seq.) project level conformity analysis. In areas in which the Clean Air Act conformity determination has lapsed, acquiring agencies must coordinate with Federal Highway Administration for special instructions prior to initiating new projects or continuing activity on existing projects. At the time of processing an environmental document, a State may request reimbursement of costs incurred for early acquisition, provided conditions prescribed in 23

U.S.C. 108 (c) and 23 CFR 710.501, are satisfied. These conditions are as follows:

1. The property was lawfully obtained by the State (or local agency);
2. The property was not land described in 23 U.S.C. 138 (Preservation of parklands);
3. The property was acquired in accordance with the provisions of the Uniform Act;
4. The State (or local agency) complied with the requirements of title VI of the Civil Rights Act of 1964;
5. The State (or local agency) determined and the FHWA concurs that the action taken did not influence the environmental assessment for the project, including:
  - A. The decision on need to construct the project;
  - B. The consideration of alternatives; and
  - C. The selection of the design or location; and
6. The property will be incorporated into a Federal-aid project.
7. The original project agreement covering the project was executed on or after June 9, 1998.
8. The State (or local agency) obtained concurrence from the Environmental Protection Agency in items numbered 1 through 7 regarding the NEPA process.

#### **4.2.8 – Project Authorization and Agreement**

As a condition of Federal funding under title 23, the grantee shall obtain FHWA authorization in writing or electronically before proceeding with any real property acquisitions using title 23 funds, including early acquisition under §710.501(e) and hardship acquisition and protective buying under 23 CFR 710.503. CDOT must prepare a project agreement in accordance with 23 CFR part 630, subpart A. The agreement shall be based on an acceptable estimate for the cost of acquisition. Acquisition

1. *General.* The process of acquiring real property includes appraisal, appraisal review, waiver valuations, establishing estimates of just compensation, negotiations, relocation assistance, administrative and legal settlements, and court settlements and condemnations. Grantees must ensure all acquisition and related relocation assistance activities are performed in accordance with 49 CFR part 24 and 23 CFR §710.305. If a

grantee does not directly own the real property interest used for a title 23 project, the grantee must have an enforceable subgrant agreement or other agreement with the owner of the ROW that permits the grantee to enforce applicable Federal requirements affecting the real property interests, including real property management requirements under subpart D of 23 CFR part 710.

2. *Adequacy of real property interest.* The real property interests acquired for any project funded under title 23 must be adequate to fulfill the purpose of the project. Except in the case of an Early Acquisition Project, this means adequate for the construction, operation, and maintenance of the resulting facility, and for the protection of both the facility and the traveling public.
3. *Establishment and offer of just compensation.* The amount believed to be just compensation shall be approved by a responsible official of the acquiring agency. This shall be done in accordance with 49 CFR 24.102(d).
4. *Description of acquisition process.* The acquiring agency shall provide persons affected by project or acquisitions advanced under title 23 of the United States Code with a written description of its real property acquisition process under State law and 23 CFR 710.308, and of the owner's rights, privileges, and obligations. The description shall be written in clear, non-technical language and, where appropriate, be available in a language other than English in accordance with 49 CFR 24.5, 24.102(b), and 24.203.

#### **4.2.9 – Construction Advertising**

1. The grantee must manage real property acquired for a project until it is required for construction. Except for properties acquired under the early acquisition provisions, clearance of improvements can be scheduled during the acquisition phase of the project using sale/removal agreements, separate demolition contracts, or be included as a work item in the construction contract. The grantee shall develop ROW availability statements and certifications related to project acquisitions as described in 23 CFR 635.309.
2. The FHWA-SDOT Stewardship/Oversight Agreement will specify SDOT responsibility for the review and approval of the ROW availability statements and certifications in accordance with applicable law. Generally, for a non-National Highway System projects, the SDOT has full responsibility for determining that right-of-way is available for construction. For non-SDOT grantees, FHWA will be responsible for the review and approval.

#### **4.2.10 – Alternative Project Delivery Methods**

CDOT utilizes two alternative project delivery methods which require special considerations for right of way acquisition. In the traditional design-bid-build method, CDOT is responsible for the design of the project, and then advertises and awards a separate construction contract based on the complete design. In contrast, CDOT procures both the design and construction in the same contract under the design-build method, allowing for the risk of design errors and omissions to be shared between CDOT and the contractor. The Construction Manager/General Contractor (CM/GC) method involves a separate contract for a designer and construction manager which results in the construction manager being a partner in design and development.

For design-build projects, a schedule of right of way acquisitions will be developed and provided when selecting a contractor. CDOT will acquire right of way in the early stages of the project that make up a defined right of way footprint. The selected contractor may develop a project concept requiring additional right of way which must be funded within the contractors guaranteed maximum price. In that case, the contractor will provide research, survey and title work necessary to establish fair market value, and CDOT will generally be responsible for completing the acquisition. The project will be completed through a series of construction packages which are concurrent with design activities. The contractor may be responsible for completing acquisition, however the acquisition must still be performed by a member of CDOT's list of qualified acquisition and/or relocation consultants and follow the procedures described in CDOT's Right of Way Manual and the Uniform Act. The technical requirements for right of way acquisition will be described within Section 8 of the design-build contract.

For CM/GC contracts, the construction manager is identified early through a professional services contract. Typically, only 5% of design is complete at this stage and no right of way acquisition is required. The contract defines to what degree CDOT and the construction manager will be responsible and at risk for the final cost and time of construction, including the completion right of way acquisition. The project is then completed through a series of severable construction packages which are separately and independently procured. It is common for the early construction packages to only include the purchase of materials with long lead times, or activities requiring limited use of the right of way.

See Exhibit T for a visual representation of the different project delivery methods.

#### **4.2.11 – Design Build Projects**

The Real Estate Acquisition Management Plan (RAMP) is the written document that details how a non-State department of transportation grantee, subgrantee, or design build contractor will administer the title 23 ROW and real estate requirements for its project or program of projects. The document must be approved by the SDOT or by the funding agency in the case of a non-SDOT grantee, before any acquisition work may begin. It must lay out in detail how the acquisition and relocation assistance programs will be accomplished and any anticipated issues that may arise during the process. If relocations are reasonably expected as part of the title 23 projects or program, the Real Estate Acquisition Management Plan (RAMP) must address relocation assistance and related procedures.

1. In the case of a design-build project, ROW must be acquired and cleared in accordance with the Uniform Act and the FHWA-approved ROW manual or RAMP, as provided in §710.201(c) and (d). The grantee shall submit a ROW certificate in accordance with 23 CFR 635.309(p) when requesting FHWA's authorization. The grantee shall ensure that ROW is available prior to the start of physical construction on individual properties.
2. The decision to advance a ROW segment to the construction stage shall not impair the safety or in any way be coercive in the context of 49 CFR 24.102(h) with respect to unacquired or occupied properties on the same or adjacent segments of project ROW.
3. The grantee may choose not to allow construction to commence until all property and relocations have been completed; or, the grantee may permit the construction to be phased or segmented to allow ROW activities to be completed on individual properties or a group of properties, with ROW certifications done in a manner satisfactory to the grantee for each phase or segment.

4. If the grantee elects to include ROW services within the design-builder's scope of work for the design-build contract, the following provisions must be addressed in the request for proposals document:
  - A. The design-builder must submit written certification in its proposal that it will comply with the process and procedures in the FHWA-approved ROW manual or RAMP as provided in §710.201(c) and (d).
  - B. When relocation of displaced persons from their dwellings has not been completed, the grantee or design-builder shall establish a hold off zone around all occupied properties to ensure compliance with ROW procedures prior to starting construction activities in affected areas. The limits of this zone should be established by the grantee prior to the design-builder entering onto the property. There should be no construction-related activity within the hold off zone until the project is vacated. The design-builder must have written notification of vacancy from the grantee prior to entering the hold off zone.
  - C. Contractor's activities must be limited to those that the grantee determines do not have a material adverse impact on the quality of life of those in occupied properties that have been or will be acquired.
  - D. The grantee will provide a ROW project manager who will serve as the first point of contract for all ROW issues.
5. If the grantee elects to perform all ROW services relating to the design-build contract, the provisions in §710.307 will apply. The grantee will notify offerors of the status of all ROW issues in the request for proposal document.

#### **4.2.12 – Title VI of the Civil Rights Act of 1964**

Pursuant to 49 CFR 24.8(b), CDOT's implementation of the Uniform Act must be in compliance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq.*). Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities of any entity that receives federal assistance. Since CDOT receives federal assistance from the Federal Highway Administration (FHWA), CDOT's ROW program must be in compliance with Title VI requirements.

FHWA requires CDOT to implement a Title VI compliance program that meets various requirements. 23 CFR 200.5(p). One of the requirements is to develop procedures for the collection of statistical data of participants in, and beneficiaries of, CDOT's activities. In particular, the regulations specify collection of data on relocatees, impacted citizens, and affected communities. 23 CFR 200.9(b)(4). Gathering data is an important part of a Title VI compliance program because it provides CDOT an overview of who is being impacted by CDOT's activities, and also assists in the determination of whether there may be disparate impact resulting from CDOT's programs. FHWA requires the data to be collected and analyzed to see if one protected class is disproportionately impacted compared to other groups. The ROW program's collection of data through demographic surveys provides helpful information in this determination.

## **Section 4.3 – GENERAL REQUIREMENTS OF TITLE III OF THE UNIFORM ACT**

The purpose of Title III is to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners, and to promote public confidence in Federal land acquisition practices.

### **4.3.1 – Implementation of the Uniform Act**

To accomplish these goals, Section 301 (Uniform Act Title III) of the law requires that to the greatest extent practicable under State law:

1. CDOT shall make every reasonable effort to acquire expeditiously real property by negotiation.
2. If CDOT determines an appraisal is unnecessary because the valuation is uncomplicated, and the anticipated value of the acquisition is \$10,000 or less, then CDOT can avoid commissioning its own appraisal if it obtains a waiver from the landowner. However, in such instances, the landowner must have sufficient understanding of the local real estate market to be qualified to make such a waiver. In addition, CDOT can also get a waiver from the landowner if its anticipated value of the acquisition is between \$10,000 and \$25,000 if it complies with each of the above requirements and it obtains prior approval from the FHWA.
3. In all other cases, real property shall be appraised before the initiation of negotiations, and the owner or a designated representative shall be given an opportunity to accompany the appraiser during the inspection of the property.
4. Before the initiation of negotiations for real property, CDOT shall establish an amount which it believes to be just compensation for the acquisition and shall make a prompt offer for the established amount. In no event shall such amount be less than CDOT's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. CDOT shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount established to be just compensation for the real property acquired. Any damages to remaining real property shall be separately stated.
5. No owner shall be required to surrender possession of real property before CDOT pays the agreed purchase price, or deposits with the court, for the benefit of the owner, an amount not less than CDOT's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.
6. The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling, or to move a business or farm operation, without at least 90 days written notice from CDOT, of the date by which such move is required

7. If CDOT permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by CDOT on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.
8. CDOT shall not advance the time of condemnation, defer negotiations or condemnation, delay the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.
9. If any interest in real property is to be acquired by exercise of the power of eminent domain, CDOT shall institute formal condemnation proceedings. CDOT shall not intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of the real property.
10. If the acquisition of only part of a property would leave its owner with an uneconomic remnant, CDOT shall offer to acquire the uneconomic remnant. For the purpose of the law, an uneconomic remnant is a parcel of real property that the owner is left with after a partial acquisition and CDOT determines to have little or no value or utility to the owner.
11. A person whose real property is being acquired in accordance with this title of the law may, after the person has been fully informed of his right to receive just compensation for such property, donate such property, any part thereof, any interest therein, or any compensation paid therefore to CDOT, as such person shall determine.
12. Frequently the property to be acquired contains buildings, structures, or other improvements. From time to time, these buildings, structures, or improvements are owned not by the owner of the land, but by a tenant. Section 302 (Uniform Act Title III) deals with the acquisition of such buildings, structures, and improvements and with the satisfaction of tenant rights. This section provides that to the greatest extent practicable under State law:
  - A. If CDOT acquires any interest in real property, it shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property which:
    - 1) It requires to be removed from the real property; or
    - 2) It determines will be adversely affected by the use to which such real property will be put.
  - B. Just compensation for such building, structure, or improvement shall be the greater of:
    - 1) The fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or
    - 2) The fair market value of such building, structure, or improvement for removal from the real property.
    - 3) The payment of fair market value is to the tenant-owner of such building, structure, or improvement.

- C. No such payment shall be made unless the owner disclaims all interest in the improvements of the tenant. The tenant shall assign, transfer, and release to CDOT all the rights, title, and interest in and to such improvements.

The law also provides in Section 303 (Uniform Act Title III) that CDOT will pay certain expenses incidental to the transfer of property such as recording fees, transfer taxes, penalty costs for prepayment of any preexisting recorded mortgage and a pro-rata share of prepaid property taxes.

Section 304 (Uniform Act Title III) provides that if CDOT institutes condemnation proceedings and it is the judgment of the court that CDOT cannot acquire the real property by condemnation, or CDOT abandons the proceeding, then the property owner shall be reimbursed for reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees actually incurred because of the condemnation proceedings. These provisions shall apply if an owner is successful in an inverse condemnation proceeding, or CDOT effects settlement of such proceeding.

Section 305 (Uniform Act Title III) provides that state agencies administering programs receiving Federal financial assistance must provide assurances that payments described in Sections 303 and 304 will be made and be guided to the greatest extent practicable under state law, by the land acquisition policies in Section 301 and the provisions of Section 302 (Uniform Act Title III), as a condition of such Federal assistance.



## Section 4.4 – PROPERTY OWNER LEGAL RIGHTS

Just as the Government has the right to acquire private property, the owner of the private property also has rights and entitlements. Owner refers to either the fee owner of the realty or, if applicable, the tenant-owner of improvements upon it.

Owners are entitled to:

1. Just compensation for their property, which may not be less than CDOT's approved appraisal of the fair market value;
2. A determination of just compensation by a court of law;
3. An opportunity to accompany the appraiser who appraises the property;
4. A written statement of, and summary of the basis for, the amount established by CDOT as just compensation;
5. A payment of the agreed upon purchase price (or a deposit in the court) before being required to surrender possession of the property;
6. Reimbursement for certain expenses incidental to transfer of title to CDOT;
7. Reimbursement for certain litigation expenses;
8. At least a 90-day written notice to vacate occupied property; and
9. Receive relocation services and payments, where applicable (these may involve residential housing supplements, moving costs, etc.) or business/non-profit/farm payments (reestablishment, moving costs, etc.).

In addition, the Colorado Revised Statutes entitles the owners to obtain an appraisal under certain conditions.

### C.R.S. Sec. 38-1-121 (2014). Appraisals – Negotiations

- (1) As soon as a condemning authority determines that it intends to acquire an interest in property, it shall give notice of such intent, together with a description of the property interest to be acquired, to anyone having an interest of record in the property involved. If the property has an estimated value of five thousand dollars or more, such notice shall advise that the condemning authority shall pay the reasonable costs of an appraisal pursuant to subsection (2) of this section. Such notice, however, need not be given to any such persons who cannot be found by the condemning authority upon the exercise of due diligence. Upon receipt of such notice, such persons may employ an appraiser of their choosing to appraise the property interest to be acquired. Such appraisal shall be made using sound, fair, and recognized appraisal practices which are consistent with law. The value of the land or property actually taken shall be the fair market value thereof. Within ninety days of the date of such notice, such persons may submit to the condemning authority a copy of such appraisal. The condemning authority immediately upon receipt thereof shall submit to such person(s) copies of its appraisals. If the property interest is being acquired in relation to a federal aid project, then the appraisals submitted by the condemning authority shall be those which have been approved by it pursuant to applicable statutes and regulations, if such approval is required. All these appraisals may be used by the parties to negotiate in good faith for the acquisition of the property interest, but neither the condemning authority nor such persons shall be bound by such appraisals.

- (2) If an appraisal is submitted to the condemning authority in accordance with the provisions of subsection (1) of this section, the condemning authority shall pay the reasonable costs of such appraisal. If more than one person is interested in the property sought to be acquired and such persons cannot agree on an appraisal to be submitted under subsection (1) of this section, the condemning authority shall be relieved of any obligation herein imposed upon it to pay for such appraisals as may be submitted to it pursuant to this section.
- (3) Nothing in this section shall be construed as in any way limiting the obligation of the condemning authority to negotiate in good faith for the acquisition of any property interest sought prior to instituting eminent domain proceedings or as in any way limiting the discovery rights of parties to eminent domain proceedings.
- (4) Nothing in this section shall prevent the condemning authority from complying with federal and state requirements to qualify the authority for federal aid grants.
- (5) Nothing in this section shall be construed to limit the right of the condemning agency to institute eminent domain proceedings or to obtain immediate possession of property as permitted by law; except that an eminent domain proceeding may not proceed to trial on the issue of valuation until the ninety- day period provided in subsection (1) of this section has expired or the owner's appraisal has been submitted to the condemning authority, whichever is sooner.
- (6) If the parties involved in the negotiations fail to reach agreement on the fair market value of the property being acquired, the condemning authority, prior to proceeding to trial on the issue of valuation, shall furnish all owners of record a written final offer.

C.R.S. Sec. 38-1-122 (2014). Attorney fees

- (1) If the court finds that a petitioner is not authorized by law to acquire real property or interests therein sought in a condemnation proceeding, it shall award reasonable attorney fees, in addition to any other costs assessed, to the property owner who participated in the proceedings.
- (1.5) In connection with proceedings for the acquisition or condemnation of property in which the award determined by the court exceeds ten thousand dollars, in addition to any compensation awarded to the owner in an eminent domain proceeding, the condemning authority shall reimburse the owner whose property is being acquired or condemned for all of the owner's reasonable attorney fees incurred by the owner where the award by the court in the proceedings equals or exceeds one hundred thirty percent of the last written offer given to the property owner prior to the filing of the condemnation action. The provisions of this subsection (1.5) shall not apply to any condemnation proceeding seeking to acquire rights-of-way under article 4, 5, or 5.5 of this title, article 45 of title 37, C.R.S., or section 7 of article XVI of the Colorado constitution.
- (2) Nothing in subsection (1) of this section shall be construed as limiting the ability of a property owner to recover just compensation, including attorney fees, as may otherwise be authorized by law.

## **SECTION 4.5 – WAIVER VALUATION**

### **4.5.1 – General**

If CDOT determines an appraisal is unnecessary, then Federal regulations allow for a Waiver Valuation. In circumstances where the valuation problem is uncomplicated, only minor site improvements (if any) are involved, and there are no incurable damages to the remnant, then a Waiver Valuation is appropriate.

The Region ROW manager shall make the determination whether to use the appraisal waiver process. However, appraisers may perform the waiver valuations. The Region ROW Manager must have enough understanding of appraisal principles to be able to determine whether or not the proposed acquisition is low value and uncomplicated.

Waiver valuations are not appraisals as defined by the Uniform Act; therefore, appraisal performance requirements or standards, regardless of their source, are not required for waiver valuations by rule 24.102(c) (102). Since waiver valuations are not appraisals, neither is there a requirement for appraisal review (with the exception of condemnation proceedings). However, the Agency must have a reasonable basis for the waiver valuation and an Agency official must still establish an amount believed to be just compensation to offer the property owner(s).

CDOT is approved to use a Waiver Valuation when the reasonable market value of the acquisition is estimated at \$25,000 or less, based on a review of available data (49 CFR § 24.102(c)(2) and 49 CFR § 24.2(33)) and the Region determines the valuation problem is uncomplicated. The \$25,000 amount includes construction contract work and any other obviously minor damages and/or cost to cure considerations.

When CDOT prepares Waiver Valuations up to \$25,000, the following applies:

- \$5,000 or less parcel value estimate, an agent may prepare the waiver valuation, if uncomplicated, using available data.
- \$5,000 to \$10,000 parcel value estimate, the agent must offer the property owner the option of getting their own appraisal paid for (reimbursed) by CDOT, per §38-1-121 C.R.S. If the owner chooses not to obtain an appraisal, document the contact log.
- \$10,000 or more parcel value estimate, the agent must offer the property owner the right to an appraisal paid for (reimbursed) by CDOT, per §38-1-121 C.R.S and first obtain a release from the property owner of CDOT's obligation to prepare an agency appraisal. If not, CDOT cannot prepare a Waiver Valuation and must appraise the real property acquisition. The same person negotiating the acquisition of the parcels may not prepare the waiver valuation.

A landowner may release their right to have an appraisal reimbursed for a parcel value above \$5,000. Such a release is not mandatory, unlike the release of CDOT's obligation to prepare an agency appraisal above \$10,000. It is strongly recommended that CDOT obtain an appraisal if a landowner does not release their right to a reimbursement, regardless of whether the release of CDOT's appraisal obligation is obtained. The decision of whether to obtain an appraisal will be made by the Region ROW Manager.

Waiver valuations on parcels with estimated values of \$25,000 or less shall be prepared on a Waiver Valuations Form (CDOT Form #919, Exhibit F) and must include the following:

1. Project name
2. Project code
3. Location
4. Parcel number
5. Name of owner(s)
6. A brief description of the subject and taking
7. The basis of the estimate;
8. And appropriate signatures.

The waiver valuation may be based on a review of available relevant data, such as comparable data and multiple-listing service data; or opinions of Assessor Office appraisers or real estate brokers. Comparable data pages and sales location maps are not necessary.

When an appraiser is assigned to perform appraisals on other parcels estimated at greater than \$10,000, it is preferable for the negotiator to perform waiver valuation estimates after the FMV has been issued to ensure consistency of values. However, with the approval of the Region ROW Manager or Supervisor, the negotiator may perform waiver valuation estimates prior to the FMV being issued. If a parcel is added to the ownership while negotiations are in progress, the original appraiser/agent should revise the existing appraisal or waiver valuation. If an ownership is closed and a parcel(s) is added, a different agent can prepare the new waiver valuation using the previously established values.

In no instance, should there be two people simultaneously estimating value on the same ownership. In no instance should appraisers be mixed on an ownership that is still under negotiation. The individual performing the review or waiver valuation shall have no direct or indirect interest in the property being valued.

This procedure is intended to assure that values assigned are representative of fair market value and are uniform along the project. Under no circumstances shall the waiver valuation procedure be utilized as a substitute for an administrative settlement.

It is imperative to have an appraisal completed for the agency if the acquisition is referred to the Attorney General's Office for condemnation, no matter the amount. The Waiver Valuation Form (CDOT Form #919, Exhibit F) shall be used for all Waiver Valuations.

Local Public Agencies will be permitted to participate in use of waiver valuations as noted herein up to \$10,000. LPA Waiver valuations up to \$25,000 may be approved on a parcel-by-parcel or project-by-project basis at the discretion of the CDOT Region ROW Manager. The Region ROW Manager must be consulted prior to the preparation of any waiver valuation above \$10,000. The landowner must release the LPA of its appraisal obligation and a person other than the negotiating agent must prepare the waiver valuation. LPAs may perform waiver valuations on donations up to \$25,000.

Any deviation from the established procedures on waiver valuations could result in loss of Federal funds.

## 4.5.2 – Minimum Payment

CDOT's minimum acquisition payment policy recognizes that some right of way acquisitions at fair market value are not motivating to the property owner's time and effort in working with CDOT to come to an agreement for the acquisition.

CDOT ROW acquisitions will follow the minimum compensation payment schedule shown below for acquisitions that meet the described criteria that follows.

### Waiver Value or Appraisal-based Acquisition Payment Minimums

Fee Taking (RW parcel) = \$1000

Permanent Easement (PE, UE, RE, SE) = \$800

Temporary Easement (TE) = \$500

Minimum compensation payments will tie to the eminent domain larger parcel concept – the larger parcel being all that owner's property that generally meets at least two or all three of the following conditions:

- 1) the owner owns all the property subject to the ROW acquisition (unity of title)
- 2) the property ownership is contiguous across all the property subject to the ROW acquisition (contiguity)
- 3) all the property subject to the ROW acquisition has unity of use and/or highest and best use

Minimum acquisition payments are not the sum of minimums for different property rights acquired from the same owner, but it is the minimum payment assigned to the single most significant property right acquired among all rights to be acquired from the same property owner – all tied to the larger parcel concept.

## 4.5.3 – Separation of Functions

The acquisition of private property for public use is a serious matter. Those in government charged with managing and implementing property acquisition programs have a responsibility both to the governmental body and to the public to see that such acquisition programs are professionally and fairly carried out.

To this end, it is imperative that certain functions in the acquisition process be kept separate and distinct.

1. It is the appraiser's function to estimate the fair market value of the property or property interest to be acquired.
2. It is the review appraiser's responsibility to examine the appraisal report to assure that it meets CDOT's appraisal standards and to seek correction or revision if necessary.
3. It is also the reviewer's responsibility to recommend or approve a value for the property or property interest to be acquired.

Neither the appraiser, the review appraiser, nor the negotiator shall have any interest, direct or indirect, in the property which is being acquired.

No appraiser shall act as a negotiator for real property which that person has appraised, except that CDOT may permit the same person to both determine the value of and negotiate an acquisition where the value of the acquisition is \$10,000 or less. However, the determination of value must be approved by another person before the commencement of negotiations. As long as the owner's entitlements are preserved, and where the special circumstances of the project so dictate, initiation of negotiations before review/approval is completed is not inconsistent with FHWA policy.

It is CDOT's procedure that the Real Estate Specialist who performs the acquisition function on a parcel will also provide the initial relocation assistance. A different Real Estate Specialist will prepare the relocation determination. The Real Estate Specialist who performs the initial relocation assistance will also perform the decent, safe, and sanitary (DSS) inspection and the closing.

It is most important that CDOT assure that there is not conflict of interest in the right of way process. All elements of the right of way program should be performed with **discretion and confidentiality**.

## **SECTION 4.6 – DONATIONS, CREDITS, AND DEDICATIONS**

### **4.6.1 General Information on Donations 23 CFR 710.505-507**

A non-governmental owner whose real property is required for a Title 23 project may donate the property. Donations may be made at any time during the development of a project. At the time of the donation, the donor of the property subject to applicable State laws. Prior to accepting the property, the owner must be informed in writing by the acquiring agency of his/her right to receive just compensation for the property, the right to an appraisal or waiver valuation of the real property, and all other applicable financial and non-financial assistance provided under 49 CFR part 24 and applicable State law. All donations of property received prior to the approval of the NEPA document for the project must meet the requirements specified in 23 U.S.C. 323(d).

CDOT requires that an appraisal of the donated property's fair market value be conducted unless the owner releases CDOT from such obligation in writing. Many donations may involve damages to the remnant, access control, construction features, even airspace leases and, while these may not be eligible for a donation credit, they are still considered donations under 49 CFR 24.108.

### **4.6.2 – Donation of Property with Value of \$25,000 or Less**

If the value of the donation is \$25,000 or less, as determined by CDOT, a waiver valuation, as defined under Section 4.5 of this manual, or an appraisal, whichever is deemed appropriate by the Region ROW Manager or designee, of the donated property's fair market value must be conducted unless the owner releases CDOT from such obligation in writing.

If the value of the property to be donated is less than \$5,000, then the owner will have to pay for their own appraisal if an appraisal is required for donation tax purposes. CDOT will pay the reasonable costs of an appraisal made by an independent appraiser for the property owner if the value is \$5,000 or more. The owner should be advised to consult a tax consultant, tax attorney, CPA, or the Internal Revenue Service concerning donation tax implications. At no time shall a CDOT employee provide legal or accounting guidance to the owner.

### **4.6.3 – Donation of Property with Value Greater than \$25,000**

If the value of the donation is greater than \$25,000, as determined by CDOT, an appraisal of the donated property's fair market value must be conducted unless the owner releases CDOT from such obligation in writing.

The owner should be advised to consult a tax consultant, tax attorney, CPA, or the Internal Revenue Service concerning donation tax implications. CDOT will pay the reasonable cost of an appraisal, subject to CRS 38-1-121, made by an independent appraiser for the property owner if the value is estimated at \$5,000 or more.

### **4.6.4 – Appraisal of a Donation**

As stated above, donations of real property may have a separate value for different purposes. For the purpose of establishing a credit to the State's participation in project costs, the fair market value of the property is used. Where a state has an eminent domain appraisal of property which includes donated property, it may use an appraisal made specifically for the purpose of

determining the amount of credit, or the amount may be abstracted from a current eminent domain appraisal made by the State if the conditions listed in the preceding section are met.

The value of the donated property must be estimated by a qualified appraiser. The date of value is the same as the date of donations, i.e., the date the donation becomes effective, or when equitable title vest in the State, whichever is earlier. The appraiser must appraise the property in conformity with the provisions of 49 CFR 24.103 and 24.104 subject to the following conditions:

- Increases and decreases in the value of the donated property caused by the project are to be excluded.
- The appraisal shall not reflect damages or benefits to the remaining property.
- The value of the donated property includes the contributory value of any improvements.

**4.6.5 – Value of a Donation**

A donation of real property may have separate values for differing purposes. Generally, the value of the donation to CDOT by the property owner will be the fair market value of the donated property. A value determined as a result of negotiation with a property owner is not acceptable as a basis for determining a credit to the state’s share of project costs. The value of the donated property must be estimated by a qualified appraiser.

It is the property owner’s responsibility to ascertain the fair market value of the property for tax purposes, since such donations may be tax deductible to the donor. For the donor to claim the value of the property donated to CDOT as a deduction against taxable income, an independent appraiser must determine its value. The independent appraiser must be hired by the donor because IRS regulations prohibit the appraisal for tax purposes from being prepared by an employee of CDOT. This precludes the donor from utilizing CDOT’s fair market value estimate prepared by either its staff or fee appraiser for tax purposes. CDOT will pay the reasonable costs of an appraisal made by an independent appraiser for the property owner if the value is estimated at \$5,000 or more.

**4.6.6 – Donations on Current Projects**

A donation on a current project requires all necessary steps be taken, as with the acquisition of parcels under the Uniform Act. The parcel needs to be identified on the plans. There should be a negotiators log, a donation form, and a conveyance document. The special nature of the parcel does not lessen the need for appropriate documentation. Care should be taken to notify the county of the acquisition by donation, especially to cause the deletion of the property from the property tax rolls.

**4.6.7 – Non-Project Donations**

CDOT may accept the donation of property or property rights (easements) for constructed highway features such as sidewalks or acceleration/deceleration lanes which may be required by zoning regulations of a local governmental entity.

The original deed or other property transfer document for non-project donations, negotiated and



accepted by the Region ROW Manager/Supervisor, will be forwarded to Project Development Branch, Headquarters ROW. The following information should be included:

- Location of the donated property by city, town, or county.
- Project number/project code for adjacent or closest CDOT project (does not have to be a recent project or an open project).
- Plat or map of the donated parcel in relation to the adjacent highway (if not part of a current project).
- Name of Donor.
- Parcel number (if applicable).

#### **4.6.8 – Project Credit for Donations**

Donations of real property may be credited to the State's matching share of the project in accordance with 23 U.S.C. 323. As required by 23 U.S.C. 323(b)(2), credit to the State's matching share for donated property shall be based on fair market value established on the earlier of the following: Either the date on which the donation becomes effective, or the date on which equitable title to the property vests in the State. The fair market value shall not include increases or decreases in value cause by the project. The grantee hall ensure sufficient documentation is developed to indicate compliance with paragraph (a) of 23 CFR §710.505 and with the provisions of 23 U.C. 323, and to support the amount of credit applied. The total credit cannot exceed the State's pro-rata share under the project agreement to which it is applied.

#### **4.6.9 – Environmental Requirements**

A donation made prior to the approval of any environmental document required by National Environmental Protection Agency (NEPA) is subject to certain restrictions. These restrictions must be complied with regardless of whether the donation is used for credit to the State's matching share. The state may not accept a donation prior to approval of environmental documentation required by NEPA if the documents which affect the transfer do not clearly address the conditions described below. If for any reason CDOT cannot comply with these requirements, it may not accept the donation prior to processing and approving the environmental document. If CDOT fails to comply with or enforce those conditions, it could jeopardize the eligibility of the project for Federal-aid funding.

CDOT files must indicate that the donation will not preclude the study and consideration by CDOT of all alternatives to a proposed alignment. Even though the property to be donated is relatively small, the document transferring the property to CDOT must also state that all alternatives to an alignment will be studied and considered.

The acceptance of the donated property must not influence the environmental assessment of a project including the decision about the need to construct the project or the selection of a specific location for the project. In other words, CDOT will not be influenced by the donation of the property in its decision as to which alternative to approve.

The documents transferring the property to CDOT through its donation procedures must include a provision to re-vest the property in the grantor or successors in interest if the donated property is not required for the alignment chosen. If the donated property is not used for the project, CDOT must give it back. However, much of this has to do with State and/or local law. There may be time limits for the return of property, or there may be other factors which may allow CDOT to retain ownership.

#### **4.6.10 – Donation in Exchange for Construction Features**

CDOT may accept a property owner's offer to donate property or a portion thereof in exchange for construction features or services rendered that will benefit the property owner. However, for the purpose of crediting the value of the donation to the State's share of project costs, such donation is limited to the fair market value of the property donated less the value cost of the construction features or services received by the donor.

What must be considered is the value of the agreed upon construction features or services versus the value of the property donated. If the value of the donated property exceeds the cost of the construction features, then the difference may be eligible for a credit to the State's share of project costs. However, if the value of the donated property is less than or equal to the agreed upon construction features, then no credit to the State's share of project costs can be given. An appraisal by a qualified appraiser must be conducted to determine the relative values of the property donated and the agreed upon construction features or services.

#### **4.6.11 – Dedications**

Local governments have land use approval authority and may require exactions or dedications as part of a land development application. CDOT and state agencies have no role in local land use approvals other than to provide factual information. CDOT may not request a dedication for state highway project purposes.

CDOT may accept a parcel of land from a local agency that a developer of a subdivision has dedicated, or proposes to dedicate, for street purposes in developing a subdivision. The property will be treated as a donation from the local agency and must be conveyed by a recorded deed.

CDOT may also accept the land if the dedication is made pursuant to the local planning process or at the request of the property owner for land use concessions. If the property owner seeks to convey property to CDOT during the planning process, the property must be conveyed by a recorded deed prior to the recording of the subdivision plat in order to avoid creating a cloud on title. The recording information will be reflected on the subdivision plat, but CDOT cannot sign a plat to accept a dedication.

Right of way acquired through normal zoning and subdivision procedures requiring the donation or dedication of strips of land in the normal exercise of police power is not considered an acquisition or taking in the constitutional sense. Thus, payment of just compensation or compliance with the provisions of the Uniform Act is not required since police power is not used. This is not a donation.

Land obtained in this manner may be incorporated into a Federally-assisted project without jeopardizing participation in other project costs. However, any dedication undertaken to circumvent Federal requirements is unacceptable and may result in Federal funds being withdrawn from the project.

## SECTION 4.7 – ACQUISITION

This section details the pre-negotiation, negotiation, and acquisition process.

CDOT’s goal during the acquisition process is to acquire property interests from landowners voluntarily, and through cordial negotiations. If CDOT cannot acquire property through negotiations, CDOT may have to initiate an eminent domain proceeding in state court. Eminent domain proceedings allow government entities to acquire private property adversely. Due to eminent domain’s intrusive nature, high costs, and the potential initiating eminent domain will harm CDOT’s relations within communities, CDOT strives to use eminent domain only as a last resort.

If eminent domain is required, CDOT must first obtain a Condemnation Authorization Resolution from the Transportation Commission. The resolution both confirms that the acquisition is in the public interest and authorizes CDOT to initiate and conduct condemnation proceedings. The purpose of the phrase “public interest” is to require the development of a determination of whether the proposed use is consistent with public need and/or interest. Public interest indicators may include, but not be limited to, the following:

- Provides a benefit to the public expected from the proposed use
- Addresses a long standing public need
- Provides a financial benefit to the public for the use
- Provides a social or environmental benefit from the use

Once the Transportation Commission Resolution is passed, CDOT then directs the Colorado Office of the Attorney General to file condemnation paperwork. Colorado eminent domain law allows governments to acquire property by commencing a judicial proceeding in the Colorado District Court of the county in which the property is located. In general, the law favors CDOT in terms of whether CDOT can condemn and how quickly CDOT can obtain possession of property for its projects. However, the law favors landowners in terms of the process CDOT is required to follow before condemnation and the amount of just compensation that must be paid to the landowner.

Accordingly, although most acquisitions are completed voluntarily, negotiators should follow the law and guidelines described in this section strictly and proceed with every acquisition as though it could require eminent domain.

**DUTY TO PRESERVE:** Every acquisition should be approached as though it could require filing of an eminent domain proceeding. Eminent domain proceedings, like other court proceedings, require each party preserve all written and electronic records. Consequently, negotiators and all CDOT staff must save and preserve all letters, e-mails, attachments, maps, plats, surveys, handwritten notes, or any other recorded document related to a property acquisition.

### 4.7.1 – Pre-Negotiation Activities

One of the keys to successful negotiation is preparation. When preparing for negotiations, the negotiator must assemble and prepare certain required acquisition documents and complete various administrative tasks as part of the preparation for negotiations. The negotiator should complete these activities in accordance with the operational manual procedures or RAMP.

There are a number of things a negotiator should have knowledge of before an offer to purchase from the property owner can be made.

1. *Right of Way Plans.* These plans should identify features of the highway construction that may affect the valuation and/or use of the property.
2. *Memorandum of Ownership/Title commitments.* This will give the negotiator the ownership and the nature and holders of all liens and encumbrances.
3. *Construction Items.* The source of this information is the construction plans and specifications. Some of the most often asked questions pertain to the grade and elevation of the roadway, and the structures to be built, such as bridges, culverts, underpasses, or irrigation facilities.

It is important to understand whether items are to be taken care of as part of the construction, or to be settled as a right of way cost, such as the removal or rebuilding of a retaining wall, a cattle guard, etc. The negotiator should be prepared to supply this information. It is generally preferable to have cost estimates and compensation included in the appraisal and the offer of fair market value. It is CDOT's policy to pay the owner, then let them arrange for the work to be done.

4. *Control of Access.* Controlled access may mean a limitation of access or complete denial depending on the needs of the project. In some cases, frontage roads may be providing access for the property owners. The negotiator should completely familiarize themselves with the access control to be exercised. Multi-lane freeways with a dividing median strip sometimes cause considerable concern among adjoining owners. The existence of or lack of crossovers should be known so that traffic movements can be explained. The negotiator should make certain the owner understands that median crossovers may be changed or removed at any time and their locations cannot be guaranteed.

In the interest of public safety, CDOT must reserve the right to change the location of, alter or obliterate any median opening or median crossover. This right is by virtue of established police power; therefore, the inclusion of a median opening at a specific location, as an inducement for settlement with a property owner, cannot be permitted.

5. *FMV and Appraisals.* A copy of the fair market value and appraisal should be available in the Region. The originals should be sent to the Project Development Branch, Headquarters ROW. Negotiators will want to review this information. The negotiator should understand all aspects of the appraisal and FMV. At this time, or at any time during negotiations, should it appear that pertinent facts have escaped the attention of the appraiser, the negotiator should not hesitate to confer with the appraiser and/or the reviewer.
6. *Memorandum of Agreement (MOA).* The MOA must be a complete statement of all the terms of the agreement between the property owner and CDOT. It shall include all money to be paid for land, damages, and improvements, less the approved salvage value of any improvements retained by the owner as part consideration for the settlement and any other agreements or inventories that are a part of the settlement.

Importantly, Colorado Eminent Domain law requires CDOT provide property owners and all parties with an interest in the property with a written notice. This "notice of intent" is a written letter that should be mailed "as soon as" CDOT determines it intends to acquire a property

interest. The notice of intent letter (1) informs the property owner of CDOT's construction plans, (2) CDOT's need to acquire all or a portion of the property, and (3) of the planned commencement of eminent domain if negotiations fail. In addition, by law, the notice must describe the property interest to be acquired, and, if the estimated value of the property to be acquired is five thousand dollars or more, the letter must advise the property owners and other parties with an interest that CDOT will pay the reasonable costs of an independent appraisal of the property if a copy of the appraisal is provided to CDOT within 90 days of the letter. The negotiator should retain the mailing receipt and any other return of service documentation as proof that this mailing occurred.

#### **4.7.2 – Coordination**

In order for CDOT to pay the reasonable costs of an appraisal, the appraisal must be made using, sound, fair, and recognized appraisal practices which are consistent with law. In addition, CDOT must receive a copy of the appraisal within 90 days of the letter. If the appraisal has not been received, the negotiator should inquire as to the status of such appraisal with the owner.

Prior to contacting the property owner to initiate negotiations, coordination should take place with the other offices of CDOT which are associated with the acquisition process. These contacts include Regional Appraisal staff, the Regional Project Engineer, and possibly Regional Environmental depending on the strength of the Project Engineer's information. The property management office and the individual calculating the relocation benefits should be aware of the negotiator's time schedule for initiating parcel negotiations. The negotiator should be aware of any contact, offers, explanations, and assistance the owner has received from the property management agents. Similarly, the negotiator should have all pertinent information relative to property management and relocation benefits which he/she must convey to the property owner during the negotiation process.

In addition, the negotiator should be aware of any design changes in the vicinity of the property which might affect the subject parcel and/or CDOT's estimate of just compensation.

#### **4.7.3 – Negotiation Requirements**

Colorado Eminent Domain law requires that a condemning entity engage in "good faith negotiations" with a landowner prior to filing a condemnation action. The failure of the government to engage in good faith negotiations is grounds for dismissal of an eminent domain proceeding.

The acquisition process is one of the most important parts of CDOT's effort in the construction of a highway and it should be orderly and smooth. Although the process may move expeditiously or drag over a long period of time, established requirements must be adhered to complete the process. These requirements are as follows:

1. *Commencement of Negotiations.* Negotiations must not commence until CDOT has established its estimate of fair market value by an appraisal.
2. *Separation of Functions.* Negotiations must not be conducted by the person who made the appraisal of, or was the review appraiser for the property, except that CDOT can establish procedures which will allow the same person to both appraise and negotiate on those acquisitions for \$10,000 or less. When the appraisal has been waived, the same

person may establish value and negotiate on those acquisitions for \$10,000 or less. However, the determination of value must be approved by another person before the commencement of negotiations.

The Real Estate Specialist who performs the acquisition function on a parcel should also provide the relocation assistance. A different Real Estate Specialist should prepare the relocation determination. The Real Estate Specialist who performs the relocation assistance will also perform the decent, safe, and sanitary (DSS) inspection and the closing.

It is most important that CDOT assure that there is not a conflict of interest in the right of way process. All elements of the right of way program should be performed with discretion and confidentiality.

3. *Reasonable Effort.* All reasonable efforts shall be made to acquire, expeditiously, the real property by negotiations.
4. *No Coercion.* The negotiator should be careful not to imply that the negotiation is a “take it or leave it” situation. Condemnation as a threat shall be avoided. CDOT shall not advance the time of condemnation or defer negotiations or condemnation or the deposit of funds with the court in order to induce an agreement on the price to be paid for the property.

The negotiator should strive to attain rapport with the property owner, inspire confidence in the correctness of the acquisition process and the fairness of the offer being made.

The property owner shall be given a reasonable period of time to consider the offer and obtain advice or assistance. In no event shall CDOT, in order to compel an agreement on the price to be paid for a property:

- A. Defer negotiations;
  - B. Advance or defer condemnation; or
  - C. Take any other action which may be coercive in nature.
5. *Personal Contact.* The negotiator shall make all reasonable efforts to personally contact each state-resident property owner or designated representative.

#### **4.7.4 – Contact with the Owner**

The negotiator shall attempt to make an in-person appointment at a convenient time and place. The owner is entitled to receive an explanation of the right of way acquisition process which may be provided by an acquisition brochure. The owner must be given a written offer of the approved estimate of just compensation for the property to be acquired and a summary statement of the basis for the offer. The owner should be given a reasonable time to consider the offer and to present information which is believed to be relevant in determining the value of the property along with suggested modification in the proposed terms and conditions of the purchase. CDOT must consider the owner’s presentation, even though there is no obligation to accept the same.

The negotiator should maintain a courteous attitude at the onset of his or her contacts with the owner. The owner must be allowed the opportunity to ask questions which the owner feels are

important. If the owner's questions focus on items or issues which the negotiator feels should wait until the personal visit, the negotiator should give a brief explanation and assure the owner that more details will be given during the scheduled meeting.

Every possible effort should be made to meet the owner or the owner's representative in person, however, if all reasonable efforts to make a personal contact with the owner have failed, or if the owner resides out of state and personal contact is impracticable, the owner may be contacted by certified mail or other appropriate means. All reasonable efforts shall be defined as a minimum of two documented attempts to schedule an in-person meeting.

There are times when contact with the owner or the owner's representative become safety sensitive. Negotiations can become emotional for a variety of reasons outside of the negotiator's control. In these instances, it is CDOT's policy that the safety of its employees, contractors and agents prevails and the employee immediately report any threats or concerns to his or her supervisor and remove himself from the situation immediately. If a threat is preminent or immediate, the employee must call 911 immediately. This is a rare occasion but should be addressed. Subsequent, actions should include consultation with the CDOT Regional Safety Officer.

Additionally, if questions are brought by the owner's or others to any CDOT staff attention regarding their civil rights, these issues must immediately be brought to the supervisor's attention and consultation must immediately begin with the Regional Civil Rights Manager. These allegations may include harassment, discrimination, or retaliation based upon protected class status.

#### **4.7.5 – Negotiations by Mail**

Historically, negotiations have been conducted in person when the owner is a state resident. Negotiations by mail is an optional approach intended to provide a benefit to the owner, to reduce manpower and travel cost, and to accelerate the acquisition process. This optional approach may involve complete negotiations by mail without personal contact, or a limited use of this approach such as the first offer by mail with follow-up personal contact. Under this approach, the Region will mail (certified or other appropriate means):

1. The offer letter;
2. Summary statement;
3. Memorandum of Agreement;
4. Property plat or sketch showing the effect of the taking; and
5. A brochure which explains CDOT's acquisition program.

If the Region does not receive a response in a timely manner, there should be a follow-up telephone call. Questions can be addressed on the phone or, at the property owner's election, an appointment for a personal contact can be made. If a personal contact is required, negotiations will follow the normal negotiation process. The owner, however, can still sign the Memorandum of Agreement or deed and return it to CDOT by mail.

Reasonable requests for personal contacts by property owners should be honored. Having the written offer beforehand, allows the discussions to focus on substantial issues when a personal contact is necessary.

This accelerated process may not be utilized on parcels where relocation is involved.

#### **4.7.6 – Offer to Acquire**

Once the property valuation process (appraisal or waiver valuation) has been completed, as soon as feasible, a written offer shall be made of the amount established as just compensation. Such a procedure ensures that the compensation offered is based on current values. The timeliness and completeness of this document is important in that it begins the time frame on which the other members of CDOT and the public, including the owner, await the project completion, and it ensures that the owner has all of the knowledge possible.

Correspondence prepared for the property owner should include:

1. The offer letter;
2. Summary statement;
3. Memorandum of Agreement;
4. Property plat or sketch showing the effect of the taking; and
5. A brochure which explains CDOT's acquisition program.

The delivery of the initial written offer of just compensation to the owner or the owner's representative to purchase the real property for the project establishes the date of initiation of negotiation. The Uniform Act requires that the property owner be provided with a written statement of the amount established by CDOT as just compensation along with a summary of the basis of the offer.

In those instances, where only a portion of the property is to be acquired, the statement must separately indicate the amount of compensation being offered for the property being acquired and a separate amount for damages to the remaining property, if applicable.

A Summary Statement must also be provided to the tenant owner of any buildings, structures, or other improvements affected by the acquisition. The Summary Statement must set forth the minimum information that must be included so that the owner can make a reasonable judgment concerning the amount of the offer.

The following is the minimum that shall be included:

1. The amount established as just compensation. (In the case of a partial acquisition, the compensation for the real property to be acquired and for damages to remaining real property shall be separately stated.)
2. A description and location identification of the real property and the interest in the real property being acquired. The description does not necessarily mean a legal description of the property, but an identification which is understandable to the owner.
3. Identification of buildings, structures, and other improvements (including removable building equipment and trade fixtures) considered to be part of the real property to be acquired. Where appropriate, the statement shall identify any separately held ownership



interest in the property, e.g., a tenant-owned improvement, and indicate that such interest is not covered by the offer.

4. CDOT may include any additional information that deems appropriate or required by State law.

The property owner should be given a reasonable opportunity to consider the offer and to present relevant material to CDOT. The needed time can vary significantly depending on the circumstances. The suggested minimum time is thirty (30) days. Regardless of project time pressures, property owners must be afforded this opportunity.

If the owner intends to provide an appraisal, CDOT should provide the owner with CDOT's appraisal requirements and encourage that the owner's appraisal should be based on those requirements.

#### **4.7.7 – Revised Offers**

If the right of way acquisition is changed or the approved estimate of just compensation is revised, a revised offer and summary statement explaining the basis of the offer must be provided to the property owner. The negotiator must make every effort to complete all negotiation procedures and requirements when making revised offers.

If a lengthy delay is encountered between the time the estimate of just compensation is established and the time an offer can be made to the owner, CDOT should reevaluate the offer amount to assure that the amount to be offered is still representative of the current market value.

Occasionally, additional information may dictate a need for a revision to the offer. If an owner volunteers information, CDOT must give that information appropriate consideration. Any revision should be documented providing an explanation of the reasons. A revised written offer should be made promptly to the property owner.

#### **4.7.8 – Memorandum of Agreement (MOA)**

The MOA, CDOT Form #784 (Exhibit I), must be a complete statement of all the terms of the agreement between the property owner and CDOT. The MOA must include all the rights and responsibilities of the Grantor (Owner) and the Grantee (CDOT). It shall include all money to be paid for land, for damages, and for improvements, less the approved salvage value of any improvements retained by the owner as part consideration for the settlement and any other agreements or inventories that are a part of the settlement. In addition to accurate sums of monies to be paid, the property description must be complete, and all other issues specific to that particular transaction, including attachments, such its Exhibits, must be described and noted.

During negotiations of the MOA the negotiator will specifically indicate what items are included in the final settlement figure. The MOA will list either by attachment or key reference those items included as part of the monetary consideration.

The negotiator will determine if a tenant has a damage deposit with the owner. If so, it must be turned over to CDOT, or withheld from the owner's settlement.

If the property is to be demolished, keys and inventory will be turned over to the Property Management or the Region Property Management Section, who will make any required security provisions.

If property is to be rented, a Monthly Rental form (CDOT Form #445 or #446) will be prepared indicating the amount of rent, security deposit, date of first payment and potential late charges, and will be signed by the tenant. This form will be submitted to the Leasing Agent who will be in charge of leasing project related properties.

If the property is rented to the original owner/tenant, the negotiator will retain responsibility for the final inspection of inventoried trade fixtures until such time as the property is vacated. If the rent is not paid, the negotiator will be responsible for informing the tenants that their relocation benefits are being diminished to make rental payments.

At the discretion of the CDOT Region ROW Manager, changes to the MOA may be authorized. The CDOT Region ROW Manager may wish to gain support from CDOT HQ ROW and the AG. Any changes to the form or edited contents must be initialed by all parties validating said changes.

When the terms of a settlement with a property owner allow the owner to retain certain improvements, fixtures or equipment, not less than the approved salvage value of the same shall be deducted from the full purchase price. If such improvements, fixtures, or equipment are allowed to be retained by the owner for any amount less than the approved salvage value, the settlement must be justified in writing by the Region ROW Manager.

When an owner agrees to remove improvements from the right of way, the MOA will specify a date for removal of the improvements, and a retention of a part of the purchase price to enforce specific performance by the owner. A warrant in the amount of the holdback can be ordered concurrently with the warrant for the amount to be paid for acquisition.

In any case where money has been withheld for the removal of improvements, the owner should be instructed to notify CDOT when the agreement has been complied with. The negotiator should then release the holdback warrant.

The term salvage value means "The probable sale price of an item offered for sale to knowledgeable buyers with the requirement that it be removed from the property at a buyer's expense (i.e. not eligible for relocation assistance). This includes items for re-use as well as items with components that can be re-used or recycled when there is no reasonable prospect for sale except on this basis."

The MOA may include amounts to be paid for moving and rehabilitation of improvements, in lieu of purchase, or amounts to be paid the owner for work to be performed by him/her, such as relocation of ditches, construction of service roads, etc. Any such amounts shall be fully supported by competent estimates of cost.

The MOA shall not include any items which obligates CDOT to remove, rehabilitate or rebuild any buildings, or other improvements to the satisfaction of the owner.

In any case where the location of structures such as irrigation or drainage culverts, gates, road approaches, or other items shown on construction plans are changed by agreement with an owner, the location by center line station and side of survey shall be shown on the MOA.

The types of conveyances and releases must be indicated on the MOA. The names to be placed on the warrants must go on the agreement exactly as they will appear on the warrant(s). If arrangements have been made to get the lien released without their names on the warrant, this must be documented prior to the release of the warrant.

If an owner is unable to sign the agreement for any reason, whether because of health or other incapacity, he/she may sign by mark in the presence of two witnesses. DO NOT permit another person to sign for the owner unless under authority of a Power of Attorney, Declaration of Trust, or other similar documents. If this is the case, the proper documents must accompany the request for warrant.

#### 4.7.9 – Additional MOA Considerations

The following items should be identified in the MOA if applicable:

- A. Uneconomic remnant. An uneconomic remnant is a parcel of the real property in which the owner is left with an interest after the partial acquisition of the owner's property, and which CDOT has determined has little or no value or utility to the owner.
- B. If the acquisition of only a portion of property would leave the owner with an uneconomic remnant, CDOT shall offer to acquire the uneconomic remnant along with the portion of the property needed for the project.
- C. Uneconomic remnants may have utility and/or may have value. The ultimate test is whether they have utility or value to the present owner. It is up to CDOT to make this determination. CDOT is only obligated to make an offer to purchase the uneconomic remnant. The owner may decline CDOT's purchase offer. The Uniform Act only requires that CDOT offer to acquire an uneconomic remnant; however, State law may provide authority to acquire such property using eminent domain if necessary.

##### 1. Trade Fixtures

- A. Copies of all fair market value determinations will include a specific itemization of all the trade fixtures that are part of the consideration offered for the property.
- B. Money to be paid for trade fixtures will be withheld from the settlement until the occupant moves out and final inspection confirms the trade fixtures identified on the inventory are present (and intact). The final check out inventory will be signed by the owner and CDOT's representative.

##### 2. Mineral Estate

- A. CDOT cannot condemn for oil, natural gas or other mineral resources beneath land except to the extent required for subsurface support, per C.R.S. 43-1-208.
- B. Mineral estate, only at the request of the property owner, can be included in the MOA and conveyance of right of way to CDOT.
- C. If an owner requests mineral estate to be included in the transaction, the MOA shall reflect this agreement having the designated checkbox marked and initialed by all parties to the transaction.

#### **4.7.10 – Last Written Offer Letter**

When negotiations have not brought about a settlement and it appears condemnation is imminent, the negotiator must send a final letter with a final written offer. This letter will give the owner ten days to accept the offer. It should reiterate CDOT's believed value of the property, then state the "last and best final offer" CDOT is willing to give the landowner prior to filing its condemnation in the court system.

This last written offer letter is critical under Colorado Eminent Domain law because the dollar figure offered in the letter impacts how much a jury or commissioner must value the acquired property at before the landowner's attorney fees are awarded. According to the law, if the landowner proves an amount of just compensation is 130% of the last written offer, then condemning entity must pay the landowner's attorney fees. Attorney fees in eminent domain proceedings can be substantial, and the amount offered in this last written offer significantly impacts each party's settlement leverage as the case proceeds through the court system.

By way of example: CDOT intends to acquire property its appraiser has valued at \$80,000. The landowner has retained an appraisal as well, and the appraisal estimates the value is actually \$135,000. CDOT makes an \$80,000 offer based on its appraisal. The landowner refuses, requesting the dollar amount in its appraisal. When negotiations continue to fail, CDOT makes a last written offer of \$100,000. The landowner refuses again. At the valuation trial, if the landowner is able to prove that the value of the property acquired is \$130,000 or more (i.e. the last written offer amount times 130%, or  $\$100,000 \times 1.30$ ), then the landowner will be entitled to their attorney fees. As the eminent domain proceeding commences, the ability of the landowner to prove their appraisal figure significantly impacts how much CDOT will continue to increase its offer before electing to proceed to trial.

Finally, as with the "Notice of Intent" letter described earlier, this letter must be sent by certified mail, return receipt requested. The negotiator should maintain any mailing receipt of mailing or any other written records that indicate the landowner received the offer as proof that the offer was made.

#### **4.7.11 – Settlements**

An approved amount above the appraisal or waiver valuation (refer to Chapter 10 – Settlements).

#### **4.7.12 – Agreement for Possession and Use**

It is the policy of CDOT to limit the use of this option agreement to rare and unusual circumstances. This form should be used as a last resort and only when the project must be accelerated and the cost of not using the form outweighs the benefit.

The standard time to be utilized for reaching a settlement shall be 60 days. In some instances, it may be necessary to go to 90 days, but no more than 120 days should be used without prior approval by the Statewide ROW Program Manager. The amount CDOT should tender is 100% of the FMV. However, we can tender 75% when the taking is a very minor taking of a large ownership, and we are certain that the remaining 25% will cover any partial release payment. The Region ROW Manager must approve an Agreement which tenders less than 100% and the file must include supportive documentation for this decision. We should be treating the Possession and Use Agreement like any other closing by getting partial releases, release of interest, etc., and

paying 100% of the FMV.

Tender of less than 100% can make CDOT liable for interest on the full amount, not just the amount awarded over the FMV if we proceed to trial. In some instances, this interest payment can be substantial and FHWA will not participate in the interest costs. The authorized persons that may sign this agreement on behalf of CDOT shall be one of the following: Project Development Manager or Statewide ROW Program Manager in the Project, Regional Transportation Director, Region ROW Managers/Supervisors, Program Engineers, or Resident Engineers.

No modifications will be made to the agreement without the Statewide ROW Program Manager's and the Attorney General's concurrence. Be sure to attach an Exhibit A (description) in all instances and an Exhibit B when acquiring access by deed. **[Note: Exhibits A and B are attachments to Exhibit M in this Manual and are not Exhibits found in this Manual]**. The agreement will be recorded. Please indicate on the request for warrant package who pre-concurred in the agreement when modifications have been made to the form. This will provide Project Development Branch, Headquarters ROW with the necessary information to proceed with ordering the warrant without having to check with the Region on who concurred in the modifications.

#### 4.7.13 – Warrant Request

The signed Memorandum of Agreement (MOA)/settlement/agreement for possession and use will be submitted to the Project Development Branch, Headquarters ROW, with the following documents:

1. Document transmittal to Project Development Branch, Headquarters ROW (Exhibit G)

All items in Exhibit G must be filled in and boxes either checked, or marked "N/A." Similarly, the description box located at the top right of the form must contain the project identifier information. Exhibit G should also include all appropriate attachments. Having all of this information in its complete form assists the Department with audits, CORA, FOIA requests and potential litigation.

2. Right of Way Settlement Checklist (with appropriate documents, data, etc., enclosed; (Exhibit P)

All items in Exhibit P must be "Yes," "No," or "TC." Similarly, the description box located at the top right of the form must contain the project identifier information. Exhibit P should also include all appropriate attachments. It is further important to fill out all items under Number 6 – "IRS requirements." Having all of this information in its complete form assists the Department audits, CORA, FOIA requests and potential litigation.

3. MOA/settlement/agreement for possession and use.
4. FMV or waiver valuation.
5. Agent log.
6. Offer letter.

7. Signed W-9 – request for taxpayer identification number (TIN verification). The W-9 is required in order to obtain a vendor number for CDOT's Accounting office, whether the payment is taxable or not.

The Project Development Branch, Headquarters ROW, will place these original documents in file and order warrants as indicated on the agreement. The Region will prepare deeds. Do not set the closing for the parcel until the warrant is received to avoid any unforeseen problems.

#### **4.7.14 – Payment before Possession**

Both Colorado Eminent Domain law and the Uniform Act requires that no owner shall be required to surrender possession of real property before CDOT pays the agreed purchase price, or deposits (with the Title Company as Escrow Agent or a court for the benefit of the owner), an amount not less than CDOT's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

When an amicable settlement between the property owner and CDOT has been reached, CDOT should present the owner the agreed purchase price, in a timely manner. When the owner and CDOT cannot reach agreement over a reasonable period of time, CDOT will normally institute condemnation proceedings and deposit with the court or otherwise make money available in an amount not less than the approved appraisal. This amount may be withdrawn by the owner, and such action shall not jeopardize the owner's rights in the condemnation proceedings.

CDOT may retain a reasonable portion of the purchase price in order to assure that the acquired property, including fixtures, is transferred to CDOT in reasonably good condition. Such funds would have to be made available to the owner no later than CDOT's taking physical possession of the property.

In some circumstances, with the prior approval of the owner, CDOT may obtain a right-of-entry before making payment available to an owner. This procedure could be used on an emergency project such as a natural disaster, catastrophic failure, emergency repairs, a proclamation, or in the case where a delay in possession would constitute danger to the health or safety of the public. This procedure should not be used on a routine basis. This process should not become the routine but rather be limited to cases where reasonable justification for its use exists.

#### **4.7.15 – Parcel Negotiation Record and Certificate**

The Real Estate Specialist's responsibilities during the negotiation process also encompass record keeping activities (negotiator's log) on a parcel basis. The negotiator must complete a written or electronic log as soon as possible after each contact and the record must be an accurate and comprehensive document. The log must include all discussions or correspondence between the acquisition negotiator and the property owner(s) or their representative(s) only. The log needs to provide the project and parcel numbers. The log needs to provide the names of the property owner(s) and their representative(s) and contact numbers for those individuals. The log must include all accounts of contact or correspondence [telephone, text, e-mails, meetings (phone or in-person)], who initiated the contact, and the pertinent information discussed. Each contact should be a separate entry and should be in chronological order. The log must be dated and signed by the negotiator.

A typical log would include, but not limited to:

- Name, address and telephone number of the property owner(s) or their representative(s)
- Date of all contacts or correspondence
- Type of contact (phone, in-person, email, etc.)
- Date notices or letters mailed (certified number)
- Date items received from the property owner(s) or their representative(s)
- Brochure(s) provided
- Offers and the basis for the offer
- Agreement and all considerations agreed upon for the purchase
- Counteroffer
- Date of Memorandum of Agreement/settlement
- Reason settlement cannot be reached
- Payments made
- Any issues of concerns from the property owner(s) or representative(s)

*In general, these logs and records should be sufficiently clear that at any time in the process an independent layperson, with no knowledge of the ROW procedures, should be able to pick up the documentation trail and be able to understand the history, lines of communication, and the who, what, where, why and how in each transaction. These laypeople could include auditors, judges, or other State or Federal entities. This method of record keeping will also assist in cases where another negotiator needs to take the file.*

To show the “good faith negotiations” legal requirement, the negotiator should maintain adequate records of negotiations on a parcel basis in sufficient detail to demonstrate compliance with the Federal laws. The log should indicate that there were no other promises made and there were no threats or coercion by either party. These logs shall be retained for at least three years from the date of acceptance of the final voucher for the project but may generally follow the requirements of the State, municipal, or private entities if a longer retention period is chosen or required.

Upon completion of negotiations, the above records shall become a part of the project parcel file.

It is important to note that the **relocation log** and the **acquisition log** are two different logs and must be maintained separately. However; any discussions regarding relocation during the negotiation process should be documented.

If additional negotiations are carried out after the original log has been submitted, a supplemental log should be made to cover these additional contacts.

#### **4.7.16 – Conveyance Document**

The negotiator must see to the preparation of the necessary conveyance documents. These documents must be reviewed for accuracy and completeness and should be consistent with the appraisal report with respect to the legal description and extent of the right of way taking.

#### **4.7.17 – Incidentals**

The transfer of the title to CDOT may require the payment of some incidental expenses by the owner. These incidental expenses are reimbursable under Federal regulations. The Federal regulations governing the incidental expenses are found in 49 CFR 24.106. The regulation also

states that “whenever feasible, the agency shall pay these costs directly so that the owner will not have to pay such costs and then seek reimbursement from the agency.”

#### **4.7.18 – County Tax Pro-ration**

A County Treasurer’s Certificate of Taxes Due will be secured for each parcel of right of way to be acquired for the purpose of ascertaining whether any delinquent taxes or unredeemed tax sale certificate remain a lien on the land. Such delinquent taxes must be paid or tax sale certificates redeemed by the owner prior to settlement. Current taxes, levied upon any right of way parcel, are required to be paid by the owner concurrently with settlement and in accordance with the following statutes:

C.R.S. 39-3.124 (2014)  
C.R.S. 39-3-129 through 39-3-132 (2014)  
C.R.S. 43-1-214 (2014)

It is required that a County Tax Pro-Ration Request (Exhibit D), be transmitted to the appropriate County Treasurer requesting pro-ration of the current year’s taxes as of the date of possession according to the Memorandum, or waive collection thereof, so that the amount of the taxes, if any, to be paid according to law may be determined prior to settlement.

The Tax Pro-Ration Request, duly certified by the Treasurer, will then be transmitted to the Project Development Branch, Headquarters ROW with the Memorandum of Agreement for processing. The taxes due may be paid by deducting the amount due from the settlement amount and ordering a separate warrant for this amount to be made in the names of the treasurer and the owner. If this procedure isn’t followed, evidence of taxes paid or the owner’s check for the amount due must be received before payment is made to the owner for the property.

#### **4.7.19 – Parcel Closings**

The final step to the acquisition stage of the project is the closing for the acquired parcel. This step includes obtaining property encumbrance releases, preparation of closing statements and deeds, payment of just compensation, and title insurance.

When title companies close acquisitions for CDOT, the following procedures shall be used in order that the original documents are returned to the Project Development Branch (Headquarters ROW) for filing:

1. The original deeds shall be prepared and recorded by the Region. The original deeds shall be transmitted to Project Development Branch (Headquarters ROW).
2. The original releases may be prepared by the title companies.
3. The warrants shall be transmitted to the Region ROW office.
4. If the title company does the recording, the original deed and releases shall be sent to the county clerk and recorder with the return address of the Region office. A rubber stamp with the address of the Region office should be ordered, to facilitate the process. The Region will make copies for their files and forward the originals to the Project Development Branch, Headquarters ROW.



5. All original closing documents for each parcel including the closing statement shall be transmitted by the title company to the Region office in a package. Copies can then be made for the Region office and the originals forwarded to the Project Development Branch (Headquarters ROW) for filing.

The Project Development Branch (Headquarters ROW) will continue to record documents at the request of the Attorney General's Office. In these cases, the original documents will be returned to the Project Development Branch (Headquarters ROW) from the county clerk and recorder's office for filing. Copies will be sent to the appropriate Region.

#### **4.7.20 – Obtaining Property Encumbrance Releases**

Obtaining property encumbrance releases on acquired property may be necessary in order to clear the title before closing the file. This process can be a simple or a complicated procedure depending on the interest acquired and the type of title information obtained by CDOT. As a cost-saving method, some States have established procedures to close on acquired properties without getting releases of encumbrances such as a partial mortgage release. In order to use such an approach to parcel closing, CDOT needs to evaluate the risk involved.

It is required that any known encumbrance on the land be properly released at such time as CDOT takes title. There are various and sundry kinds of such encumbrances or liens hereinafter enumerated, and each requires a distinctive type of release as will be explained. There are, in Colorado law, certain curative statutes termed "statutes of limitation" which are designated to remove such liens or to nullify them after specific periods of time. These will also be briefly set forth as a guide in those cases where apparent liens or encumbrances may be "outlawed" and of no further effect, thus obviating the necessity of obtaining their release.

##### **1. Mortgage**

Mortgages are a type of encumbrance ordinarily made by a property owner to secure to a creditor the payment or repayment of a debt, usually evidenced by a promissory note. It is, in substance, similar to a deed and contains covenants of warranty but neither conveys title nor does it give the mortgagee a right of possession. The indebtedness, if unpaid, must be sued upon and reduced to judgment whereupon the Court orders the land levied upon and sold by the sheriff to the highest bidder at public auction. A release, either partial or total, must be executed and acknowledged by the mortgagee or his assigned, and must show by whom and when the mortgage was made, when and where recorded, and a legal description of the parcel to be released. If the mortgage is to be fully released, the description may be omitted or the whole parcel originally mortgaged described as it was in the mortgage. A release may be executed by an attorney-in-fact if the power of attorney is recorded.

Mortgages are more often used in some parts of the State than others and some money lenders, notably insurance companies, use them exclusively. The Federal Land Bank of Wichita and the Land Bank Commissioner use so-called amortization mortgages, which, however, differ in few respects from ordinary mortgages except that they provide for repayment over a period of years (amortization). Releases are always provided by the Federal Land Bank, both for its own mortgages and for those of the Commissioner for whom it is an attorney-in-fact.

Mortgages, as encumbrances, are limited by statute to fifteen years after the due date of the last promissory note secured thereby, and any mortgages which have been on record for longer than that period may be ignored.

## 2. Deed of Trust

Deeds of trust are similar to mortgages in that they are given to secure indebtedness. Statutes provide for a public trustee in each county to whom such deeds are executed as grantee and who executes releases of the same. In the City and County of Denver, the Clerk and the Recorder is ex-officio public trustee while in so-called “first class” counties (Boulder, El Paso, Jefferson, Larimer, Las Animas, Pueblo, Weld and others) the public trustee is appointed by the Governor.

In other than the “first class” counties, the county treasurer is ex-officio public trustee. A release must show by whom and when the deed of trust was given, when and where recorded, and describe the property to be released. Whether the release is partial or full, the original deed of trust and the note it secures must be exhibited to the public trustee with the release so that necessary endorsements can be made by him on these documents. If the note and deed of trust have been lost, stolen, or destroyed, the public trustee has the right to require an indemnity bond equal to twice the face value of the note before he will execute a release. A few, however, will accept an affidavit stating the facts. The required documents must be furnished to the public trustee and it is suggested to arrange with the holder of the indebtedness to deliver in person or to mail by registered mail the note and deed of trust, in any case, where a partial release is to be made. If the note is to be fully paid, the holder will undoubtedly deliver these documents for processing.

Deeds of trust, as do mortgages, expire by the Statute of Limitations in fifteen years after the due date of the last promissory note secured thereby.

It is well to note that many modern mortgages and deeds of trust are of the “amortizing” type; of which in a Federal Housing Administration (FHA) or Veterans Affairs (VA) loan, may be as much as thirty years after the original date.

## 3. Mechanics or Material Man’s Liens

If any work has been done or material furnished for the improvement of real property, and remains unpaid for, the person furnishing such labor or material has sixty or ninety days thereafter in which to file or record a statement of lien by which he/she may preserve their claim of indebtedness on the land and establish its priority with respect to other possible claims, depending upon whether he/she is a subcontractor or prime- contractor. Such a lien must be released by the lien holder or their assignee, setting forth the pertinent facts. Any lien expires by statute in six months, investigate whether a Notice Lis Pendens has been recorded to indicate a pending action for judgment, or check the records of the Region Court to determine if an action has been filed. A Notice of Lis Pendens must be disposed of, released, or a court order issued in order for it to be released. If none of these has been done, it will expire after it’s been of record six years.

If such a claim has been adjudicated, a transcript of the judgment will undoubtedly have been recorded.

## 4. Judgments

Judgments are decrees in a Court of Competent jurisdiction, and findings of an amount of money due a creditor from a debtor. Judgments may be based on a past due promissory note, on an open account, or for amounts due for material or labor as above, for personal liability for accident, or for any other type of indebtedness. This type of lien is usually represented by a recorded transcript of the judgment of the court, usually a District Court, or possibly a County Court, a Municipal Court, or a Justice of the Peace. Other evidence of a judgment lien may be represented by a Writ of Execution or by a Certificate of Levy and, in any case, the lien may be released by the judgment creditor by a document which described the judgment debtor, the date of judgment and the date and place of records. A judgment may have been paid and not released and if payment or other satisfaction is shown on the Court's docket, the Clerk of the Court may so certify to operate as a release.

Judgments expire under the Statute of Limitations after five years from the date of record thereof, except that they may be renewed by re-recording for additional like periods for a total time not exceeding twenty years.

## 5. Tax Liens

Tax liens are provided by statutes, both State and Federal, to protect and save the claim of the State and Federal Governments for past-due taxes of various kinds.

- A. Federal income tax liens are for income taxes which have not been paid, plus interest and penalties. They are released by the Director of Internal Revenue in the region of origin, upon payment of the amounts due, or upon compromise.
- B. Nonpayment of any Federal tax, such as social security, excise taxes, or whatever, may result in an appropriate lien appearing of record. Any such lien may be released by the office of origin.
- C. Various State taxes such as income, sales, liquor, compensation, if unpaid, may likewise be made a lien by appropriate action by the Office of Revenue, and may be released by such office upon payment or compromise.
- D. Inheritance taxes are due to the State from the estate of a deceased property owner whenever the gross value exceeds statutory exemptions which may be claimed by the heirs. If there is a tax determined to be due, the lien may be discharged by recording a receipt showing payment, and if no tax is due, a release of inheritance tax lien, executed by the Attorney General, will discharge any apparent lien.

No formal lien will appear of record, since a lien attaches upon the death of the decedent and remains in force until discharge as above.

- E. Real property taxes or special assessments not paid when due, are delinquent and subject the property to sale by the county treasurer. The certificate of tax sale, issued to the purchaser, will be recorded, and the lien of such certificate must be released by payment of the amount of tax due, plus interest, penalties and other charges, and a certificate of redemption recorded as evidence of release.

## 6. Lease

A lease is a document given by a property owner, as lessor to a tenant as lessee, by

which both parties agree to occupancy of the property by the lessee, generally for stated purposes, for a definite period of time and at a specified rental. Leases are most generally cancelable by either party, for cause, and many are renewable for like periods of time at option of the lessee. The lessee's interest, termed the leasehold estate, may closely approach the quality of a fee simple estate if the term of the lease is of great length, and any notice of a lease should be a warning to investigate the record to determine how the leasehold may be released.

CDOT policy dictates that the owner of the property must deal with his lessees and obtain their release of any interest they may have. However, if a lease on property contains an option to purchase the property, the interest is such that it may be converted to a fee simple title merely by the lessee taking up his option. It is, therefore, suggested that the deed from the owner, a deed be secured from the lessee (a quit claim deed will do) setting forth therein that the purpose of the instrument is "to convey any interest the grantor now has or which he might hereafter acquire by virtue of the terms of a certain lease dated between \_\_\_\_\_, as Lessor and the Grantee \_\_\_\_\_, as Lessee." Leases are commonly released by quit claim deed, but a form or release, executed by the lessee and describing the lease, naming the lessor and lessee, the date, date and place of record, and containing a description of the land to be released, if preferable.

CDOT has adopted a form "Release of Interest in Real Estate," (Exhibit O) for the release of this, and several other types of liens and encumbrances.

## 7. Torrens Titles

Although most documents pertaining to or conveying any interest in real property are recordable in the office of the Clerk and Recorder of the county where such real property is located, and when so recorded, constitute notice under the laws of this State, there is, never-the-less, a statutory provision for the title registration under the Torrens System. This system, which originated in England, and is used extensively in Canada and in probably every state in the Union, provides a method of registration of real property titles theoretically guaranteed by the State. A title to be registered is first examined by a court appointed title examiner who make his report to the Court, and after a quiet title action is completed, the Court certifies to the Registrar of Titles (most always the County Clerk and Recorder) that an owner's certificate may be issued in the name of the owner.

Thereafter, no encumbrances upon the land so registered is valid unless a memorial of the same has been endorsed by the registrar on the owner's certificate, which is written in duplicate, one for the owner and the other for the registrar's records. Any conveyance of registered land requires that the deed from the registered owner to his purchaser be presented to the registrar with the owner's certificate, whereupon the current certificates are canceled, and new duplicates issued in the name of the new owner.

Torrens titles are not frequently encountered in this State but should such registration on any parcel be required, the same documents of conveyance are required as above set forth for ordinary uses. The only difference is the further necessity of going through the steps required by registration. If the parcel to be acquired is the total ownership, the owner should readily surrender his duplicate certificate, but if the parcel constitutes a partial taking only, the owner should mail his certificate to the registrar so that when CDOT's deed is filed, new certificates may be issued, one for CDOT on its new acquisition, and the other to the owner for his remaining land. All encumbrances shown on the canceled certificate will be omitted from the new certificate if proper releases are

secured for filing with the deed.

As of January 1, 2018, no new applications to register title under the Torrens Title Registration System were allowed. As of January 1, 2020, the County offices will no longer be able to accept any conveyance instruments for registration in the Torrens System. Land registered under the Torrens Title Registration System was to be removed from that system and recorded with the clerk and recorder pursuant to C.R.S. § 38-36-205(2).

#### Closing Procedure

A negotiator or title company, other than the negotiator who negotiated the parcel will do the closing on acquisitions of \$5,000 or above. The closing will consist of having the proper documents executed, having proper verification of taxes paid and having closing statement and receipt signed. If warrants are held back for any reason, this is again made clear and should be so noted on the closing statement.

The signed and notarized documents must be recorded as soon as possible. This should be done by the Region.

If the owners refuse to sign the deeds, they will not be given the warrant, of course. This, however, does not keep us from taking possession of the property. Barring any restriction put on us by reason of location, we have legal possession at the time we tender payment even though they do not accept it. In this case, the memorandum of agreement must be recorded as soon as possible.

#### **4.7.21 – Progress Status Report**

In order to be fully apprised of the overall acquisition schedule, and to provide for an orderly and timely negotiation phase, the negotiator should maintain a progress status report. The status report enables the negotiator to have better control over his or her duties in administering the negotiation activities on an assigned project. The progress status report serves as an informational document for CDOT in situations where the negotiator is suddenly unable to complete the assignment. It also could help another negotiator pick up where the first left off.

**The progress status report should be arranged to show the normal acquisition tasks to be performed with spaces available to record the dates the tasks were complete. Typical of the tasks which could be shown are contacts with owners, notices issued, date of offer, negotiation documents provided and other acquisition tasks where it is important to show these tasks completed.**

## **SECTION 4.8 – DEEDS**

CDOT will use a general warranty deed in the acquisition of property for highway right of way. In some cases, we may use a lesser deed where title insurance is purchased to where the risk is minimal. The Region must submit written justification to document the file for using a lesser deed.

Types of Deeds: Depending upon the status of the title as finally ascertained, there are a number of different types of deeds acceptable by CDOT, each one suitable or necessary under varying conditions or circumstances. These deed forms and their applicable uses are set forth below.

CDOT should always try to obtain a warranty deed. If that is not possible, CDOT should obtain a special warranty deed. And if a special warranty deed is not possible, CDOT should, without problem, obtain a bargain and sale deed. A warranty and special warranty deed give CDOT the most protection from future claims for property. If CDOT is ever going to accept a bargain and sale or a quitclaim deed, CDOT must make sure it has exceptional title work on the property.

### **4.8.1 – Warranty Deed**

The warranty deed is a document containing all the necessary attributes of a full conveyance from grantor to grantee, by the terms of which the grantor promised and undertakes to warrant or guarantee the title or interest conveyed and to defend the grantee in any attack made on the title or his right of possession, by any person having or claiming any interest therein. The warranty deed may either be:

1. The statutory form, the content being prescribed by statute, a short form, a much abbreviated, but allowing by reference at least, the same protection as the longer and more complex form.
2. The conventional form, which sets out in great detail all the conceivable rights and interests which are or are intended to be conveyed.
3. The limited or special warranty deed is one which warrants and defends against claims rising by, through, or under the grantor.

These deeds are required in any case where the Grantee, CDOT, desires to protect itself from adverse claimants and to reserve some right of action which might arise from a breach of warranty. They must be secured in any case where the property to be acquired is or may be proposed to be sold.

### **4.8.2 – Bargain and Sale Deed**

The Bargain and Sale Deed will convey any interest the grantor has and if s/he is the owner of the fee title, the bargain and sale deed will convey as absolutely as a warranty deed. A bargain and sale deed will convey after-acquired title and is therefore preferable to a quit claim deed which conveys only such title as the grantor owns at the time of execution. When an owner is unwilling to provide a warranty deed, a bargain and sale deed will generally be an acceptable alternative except as noted in subsection 4.8.1 above.

### **4.8.3 – Quit Claim Deed**

The quit claim deed will convey any interest the grantor has and if he is the owner of the fee title, the quit claim deed will convey as absolutely as a warranty deed. No cause of action can derive, however, since no warranty is made or implied. Some owners, not certain of the purity of their title may insist on giving a quit claim deed. If a quit claim deed is used to clear the title of adverse interests, it is well to state the purpose of making the deed. It is customary, for example, in obtaining a conveyance of an equitable interest to make as part of the deed, the statement: “The Grantor executes this deed to convey any interest he now has or which he may hereafter acquire in and to the premises herein described, by virtue of a certain Contract of Sale and Purchase dated \_\_\_ between \_\_\_, as Seller, and \_\_\_ Grantor as purchaser.” This deed may also be used to convey other lesser legal estates such as the Life Estate heretofore mentioned, and to release certain classes of other claims, such as a Homestead, hereafter explained, or perhaps leases.

### **4.8.4 – Executor Deed**

If the real property required is included in the estate of a deceased person, who died testate, the will may have vested in the executor a full power to sell the real property without an Order of Court. In this case, a special form of deed, the executor’s deed, may be executed by the qualified and acting executor duly appointed by the Court. This form of deed contains the facts pertaining to the admission of the will to Probate, the appointment and qualification of the executor and sets forth verbatim the section or article in the will whereby such power of sale is derived. Executed according to law, this deed conveys the interest of the decedent as fully and to the same extent he may have done himself, if living. It is believed necessary, however, or at least advisable, that in the event an executor nominated in the will fails or refused to qualify, or after appointment and qualification dies while serving, and an Administrator Cum Testamentum Annexum (with the will annexed) is appointed by the Court, that an order to sell be obtained from the Court. The nomination of a specific person as executor presumes special faith and confidence in the testator’s nominee, a faith and confidence deposited in no other person.

If, however, the testator has not vested his executor with the power of sale, as above, then it will be necessary to follow the same procedure as set forth at Paragraph 5 below, conveyancing by an Administrator.

### **4.8.5 – Administrator Deed**

If a deceased owner has died intestate, an administrator will be appointed by the Court to take charge of all the assets of the decedent’s estate to pay the indebtedness of the estate and finally to distribute the remaining assets to the persons entitled by law to receive the same. The administrator has no powers to dispose of any of the estate except by Court Order after a hearing. It is, therefore, required that if a parcel or right of way is necessary to be obtained from an estate, the name of the appointed must be ascertained from available information, qualified and acting administrator, and negotiations be carried on through him and his attorney for petitioning the Court for an order of sale. If agreement is reached, furnish the administrator with a copy of the legal description and such information as may be requested in the way of appraisals, etc. Proceedings to sell land are strictly statutory and must be left in the hands of the administrator who will petition the Court in due form and obtain the necessary hearing and subsequent Order of Sale, and have the sale confirmed by the Court.

After these proceedings, the administrator will execute the administrator’s deed which will set forth the pertinent facts of the petition for Sale, the Order of Sale, the Order Confirming Sale, and, of

course, the legal description. This deed, properly drawn and duly executed, will convey the total interest of the decedent as fully as he might have done, if living.

#### **4.8.6 – Deed from Heirs or Devisees**

If an estate has been fully administered and a determination has been made by the Court of the heirs of a decedent, either a warranty deed or a quit claim deed may be taken from the heirs or he devisees, as the case may be. It is best to list all the names as grantors and designate them as “being all the heirs at law and next of kin (or devisees) of deceased.”

#### **4.8.7 – Guardian Deed**

If, however, any of such heirs or devisees are minors, that is to say, under the age of twenty- one years, they are incompetent under the law to execute a conveyance on their own behalf. It is warned, therefore, that since a minor may repudiate any conveyance he has made, it must always be certain that one is not dealing with a minor when accepting an agreement to sell, or accept a deed. If the owner is a minor, a guardian must be appointed, who will petition the County Court for an order of Sale, the proceeding being very similar to that required for the sale of land involved in an estate. The Guardian's Deed will set forth the pertinent facts of the Petition, the Order of Sale, the Order Confirming Sale and the legal description, and will convey the total interest of such minor.

#### **4.8.8 – Conservator Deed**

Any person who has been adjudged insane, or who is an imbecile or an idiot, is deemed incompetent under the law to make a conveyance. In these cases, a Conservator is appointed by the Court to conserve or administer the estate of such incompetence. Proceedings similar to that in the foregoing section are required to convey the interest of the incompetent and the resultant Conservator's Deed made in accordance with the Orders of the Court and quoting the same will convey the total in the incompetent.

#### **4.8.9 – Director Deed**

Although in recent years corporations ordinarily are formed for a “perpetual” period of time, formerly their lifetime was twenty years which was, however, renewable. There have been many cases where a corporation has failed to renew its franchise, pay its corporate tax (annual levy), or when the corporation has dissolved, leaving real property standing of record in the name of the corporation.

Such company being defunct, or dissolved, the last Board of Directors, or the survivor of such board may execute a deed stating therein that the grantor or grantors are surviving members of the last acting Board of Directors of , corporation now defunct (or dissolved), which will serve to convey the interest of such corporation.

#### **4.8.10 – Commissioner's Deed**

It may be necessary at time to obtain a conveyance from one of the various counties in the State.



The Board of County Commissioners may execute such a conveyance, or they may appoint one of their members or some other person as a Commissioner to execute the conveyance on their behalf. In either case, a certified copy of the resolution authorizing execution of the instrument should accompany the deed and be recorded with it

#### **4.8.11 – Treasurer Deed**

Sometimes a record owner of real property may be unavailable because his whereabouts is unknown. This condition is ordinarily curable only by condemnation, but it may be that the county records show an unredeemed tax sale certificate held by the county. If this is the case, the county may be willing to apply for a treasurer's deed itself or assign the certificate to CDOT so that such a deed may be made directly. Either of these courses are open if the certificate is more than three years old.

#### **4.8.12 – Joint Tenants Deed**

In any case where CDOT acquires title from one who holds ownership by reason of the death of a joint tenant, it is best to designate the grantor as \_\_\_\_\_, Survivor in Joint Tenancy with \_\_\_\_\_, deceased. It is important also that a certified copy of the death certificate and a release or receipt of inheritance tax should be secured for recording with the deed. It is also necessary, according to statute, that an affidavit be secured from someone having no interest in the property, but having knowledge of the facts, that the deceased person is the identical person who acquired title to the specific real property as a joint tenant with the survivor. Printed forms are available for this purpose.

#### **4.8.13 – Bankruptcy Deed**

Property owners who have been declared bankrupt in the United States District Court may be divested of their interest by a proper deed executed by the trustee in bankruptcy pursuant to pertinent orders of the Court. The deed conveys the total interest of the bankrupt owner. It is well to point out, however, that if the property to be acquired is an asset of the estate of a bankruptcy and there are existing secured encumbrances upon it, the trustee may abandon or release the asset to the secured lien-holders for foreclosure according to State laws. In this case, the property is no longer under the jurisdiction of the trustee, and it will be necessary to acquire a deed from the record owner, and the necessary releases from the lien-holders.

If foreclosure proceedings are pending, a sheriff's deed or a trustee's deed will subsequently be issued to the purchaser, and a regular deed will then be secured from him as in any normal case.

#### **4.8.14 – Power of Attorney**

Owners of real property, particularly those who live elsewhere sometimes find it convenient to execute a general power of attorney in favor of a trusted friend or agent so that any interest of the principal may be conveyed expeditiously. A power of attorney should be on record before such a conveyance is executed. Such a deed must designate the grantor as \_\_\_\_\_, by \_\_\_\_\_, his Attorney-in-Fact" and the deed is signed and acknowledged in the same manner. Upon the death of the principal (the person who executed the document) a power of attorney is automatically revoked, and most powers are, by their terms, revocable by the

principal. The Attorney General's Office has requested that whenever a conveyance is to be made under a power of attorney, a certified copy of the record thereof be submitted to his office for examination as to validity and sufficiency.

Permanent easements are required by CDOT in any case where work is to be done in construction outside of the right of way limits, and where CDOT desires ingress and egress for future maintenance. Such a document, similar in many ways to a deed so far as execution and acknowledgment are concerned, does not, however, transfer title, but only a right in the land described and the remains in the owner subject to such right. It is customary to state in an easement the purpose for which it is acquired; for example, "for construction and maintaining a change in the channel of Creek" or "for construction and maintaining a water diversion dike," etc.

#### **4.8.15 – General Observations and Cautions**

These suggestions have been designed as a guide in most of the complications which you may encounter. However, it is cautioned that in any case where a title problem appears to be beyond complete understanding should be referred the matter to the Acquisition Supervisor or the Statewide ROW Program Manager who maintains constant contact with the Attorney General's Office. One should observe the following precautions:

1. Be sure to check-read the descriptions contained in any document proposed to be executed before presentation to the owner for his signature, so that errors may be corrected. Compare names of the grantor with the title information and make sure they are the same. Be sure the document is signed the same as in the name in the granting clause.
2. If an owner has been married since acquisition of the property, be sure to describe that person in the grant clause as , formerly known as , using the name here by which s/he acquired title. The deed should be executed and acknowledged by the owner under both names.
3. If the owner is unable to sign his/her name, because of illiteracy or by reason of personal disability, and must make his/her "mark" in lieu of a signature (usually an "X"), be sure that there are two witnesses to such a mark, who will also sign the deed or other document in the space provided.
4. If an owner has two properties, of which we are acquiring parts, and he/she is vested of title under names as "J. D. Jones" on one and "Joseph D. Jones" on the other, the deed to CDOT conveying both parcels should describe the grantor as "J. D. Jones, also known as Joseph D. Jones."
5. If any of the owners are married and their spouses are not named as owners, if practical, the spouses should also sign the deeds "as wife (or husband) of \_\_\_\_\_" Having the spouses sign could prevent a claim by one or the other in the future that the spouse did not have the authority to sell the property.
6. Before a deed is presented for record, be sure the signature and seal of the notary public or other official authorized to take acknowledgments appears thereon, that the jurat is completed (the state and county where acknowledged) and the expiration date of the notary's commission noted.

7. Be sure that arrangements are made with the owner of a deed of trust for presentation of such document, with the note, to the public trustee for endorsement.
8. Finally, use every care to see that all executed documents have a Region Final Review and are processed so that they may be recorded as soon as possible. The importance of recording can hardly be overemphasized since this act is most necessary to provide notice to the world of the transfer of title. Should any owner, after conveying right of way to CDOT, convey the same land to another purchaser who had no notice of CDOT's acquisition because its deed was not recorded, it might be necessary to pay for the same right of way a second time. It would certainly cause confusion, at least, and very probably involve CDOT in a lawsuit.

Real property transactions can be simple or complicated, mostly according to how they are handled, and since we deal with a preponderance of property owners who are unfamiliar with the laws, usages and customs of conveyancing, it is in everyone's interest to simplify wherever possible.

## **SECTION 4.9 – CONDEMNATION**

### **4.9.1 – Filing of Condemnation**

When negotiations have not brought about a settlement and it appears condemnation is imminent, the negotiator must send a final letter. This letter will give the owner ten days to accept the offer.

If the owner does not accept this offer, the condemnation packages must be prepared. It is important that the package is complete and contains all items necessary in order to prevent delays and excessive costs. The original package is sent to the Project Development Branch, Headquarters ROW, and a copy of the package is sent to the Attorney General's Office. The transmittal should note a copy was forwarded to the Attorney General's Office. Each package consists of:

1. Condemnation Memorandum and Checklist (Exhibit C).
2. Memorandum of Ownership form which should be updated to within 90 days of the first negotiation contact.
3. Descriptions of parcels and access.
4. Parcel Negotiation Record and Agent's Certificate (Exhibit K).
5. Fair Market Value.
6. Tax Certificate.
7. Final Letter.
8. Complete and Updated Title Work.
9. Miscellaneous correspondence pertinent to the parcel.

### **4.9.2 – Transportation Commission Condemnation Authorization**

Before the Attorney General's Office files the Petition in Condemnation, CDOT must first obtain a Condemnation Authorization Resolution from the Transportation Commission pursuant to 43-1-208, CRS. The resolution both affirms that the acquisition is in the public interest and authorizes CDOT to initiate and conduct condemnation proceedings.

To request Condemnation Authorization, Region ROW staff must first submit a tracking spreadsheet containing project and parcel details and the current negotiation log for all parcels contained in the spreadsheet to Project Development, Headquarters ROW. Project Development, Headquarters ROW will submit an agenda item request to CDOT's TC Liaison based on the information contained in the tracking spreadsheet.

Under statute, CDOT must provide affected landowners ten days written notice to the affected landowner of the date, time and location of the Transportation Commission meeting. This notice must be sent by first class mail to any known mailing addresses of the affected landowner. The notice may also be sent concurrently by email or other forms of mail. Affected landowners include

any individuals and/or entities who have a recorded real property ownership interest located within the real property area that CDOT is seeking to acquire. Affected landowners who have waived their right to the 10-day notice or any landowners who will not be named in the anticipated condemnation action do not need to receive a notice. A copy of the written notice will be provided to Project Development, Headquarters ROW prior to the condemnation request packet being submitted to the TC Liaison.

For condemnations, a presentation must also be made by the Regional Transportation Director (RTD) or designated staff to the Transportation Commission at the monthly workshop and meeting. Project Development, Headquarters ROW will prepare the presentation after receiving the current negotiation log and tracking spreadsheet from Region ROW Staff. The presentation will be sent to the Region ROW Manager and Region Acquisition Supervisor for comment prior to being submitted.

Project Development, Headquarters ROW will also prepare a Condemnation Contact Summary based on the negotiation log. This form lists dates of first contact, offers and last contacts, as well as summarizing the total number of contacts made and attempted during negotiation. This document will also be sent to the Region ROW Manager and Region Acquisition Supervisor for comment prior to being submitted.

A Chief Engineer's Memo for Condemnation should be prepared and sent to the Attorney General's Office for review. Project Development, Headquarters ROW will prepare a resolution and create a condemnation packet which will also include a copy of the previously approved ROW Plans and legal descriptions. If revisions have occurred since ROW Plan Authorization, the current version of the ROW Plans and Legal Descriptions will be prepared.

The packet containing the proposed resolution, Chief Engineer's memo, ROW Plans, legal descriptions, contact summary, and PowerPoint Presentation will then be brought to the Chief Engineer who will sign the memo and ROW Plans (if applicable)..Project Development, Headquarters ROW will send the packet to the TC Liaison for inclusion in the next month's agenda.

Once a Condemnation Authorization resolution has passed by the Transportation Commission, the Statewide ROW Program Manager will notify Region ROW Managers. The CDOT Transportation Commission Liaison will provide signed copies of the passed ROW TC Resolutions to Project Development, Headquarters ROW in the weeks that follow the TC Meeting. Once received, Project Development, Headquarters ROW will distribute to the appropriate Region ROW Managers and Acquisition Supervisors and place a copy in the parcel file.

#### **4.9.3 – Possessory Interests and Condemnation Authorization**

The 2019 legislative change to CRS 43-1-208 eliminated the requirement for acquisition authorizations to be sent to the Transportation Commission, but also added a requirement that CDOT provide a 10-day written notice to all affected landowners when the TC will consider a condemnation authorization. Affected landowner was defined in the updated Policy Directive 1301.0 (attached) as any real property ownership interest who has not waived their right to receive a notice. Furthermore, if CDOT is seeking to take title subject to a property interest, that property owner's interest will not be considered an affected landowner.

Affected landowners should include any easement holders or other holders

of possessory interests on the subject property, and taking title “subject to” is only possible if an easement will not be physically affected in any way. As a result, easement holders and holders of other possessory interests (“affected” or not) will need to be listed on the Chief Engineer’s Report, along with a description of efforts to accommodate or negotiate with said holders (i.e. utility relocation agreements). All holders must receive a 10-day written notice of TC meetings, unless the right to such a notice has been waived, or CDOT is verified to be taking title “subject to” the interest.

#### **4.9.4 – Review of Condemnation Packet**

At the request of the Attorney General's Office, the Project Development Branch, Headquarters ROW, will review the condemnation packages. The condemnation package shall be compared to the Project Development Branch, Headquarters ROW, files for commissions in either the condemnation package or the Official File.

In line with this concept, the Project Development Branch, Headquarters ROW, in conjunction with the Region Offices are redefining the condemnation process to incorporate these concepts.

1. The Region ROW Plans Supervisor or the Surveyor who stamped the plans and prepared the legal descriptions will be totally responsible for the right of way plans and legal descriptions used in the filing of condemnations. No checking will be done at any level outside their individual unit's quality control process. The surveyor or his/her supervisor may be asked to testify to the accuracy of their work at immediate possession hearings and valuation trials.
2. The condemnation packages will be prepared by the Agent in charge of the parcel acquisition with the original package to the Project Development Branch, Headquarters ROW, for entry into the case load data base and a copy to the Attorney General's Office. The transmittal should indicate that a copy was submitted to the Attorney General's Office.
3. Attorneys in the Attorney General's Office are required to certify that documents they file with a court are complete and accurate to the best of their beliefs. The attorneys are also required to note all parties with an interest in the property taken, and account for how and if their interest will be impacted by the taking. For these reasons, the Attorney General's Office typically insists on reviewing all title work documentation, including the copies of recorded documents mentioned in title work schedules, before filing the Petition in Condemnation. To assist the attorneys, the Agent should ensure title work transmitted to the Attorney General's Office includes all title work documents. Moreover, the Agent should obtain an update to title work prior to sending it to the Attorney General's Office if it is more than 90 days old.
4. Once possession is obtained through an immediate possession hearing, stipulation, or a possession and use agreement, the assigned Agent shall photograph the property, and any and all improvements to be taken or possible damages to the remnant. The Agent may be asked to testify to the photographs at the valuation trial.
5. Once a case is set for a valuation trial, a condemnation team shall be assembled made up of, at a minimum, the Project Leader, Real Estate Specialist, the Region ROW Manager, the Region ROW Survey Supervisor, the Appraiser, and the Review Appraiser. The team shall be led by the attorney in charge of the case. The team shall decide what exhibits shall be used in the case and what strategy CDOT would want to depict in the exhibits. The Project Development Branch, Headquarters ROW, management and the Region ROW Managers will serve in an advisory capacity to the team as required.

## **SECTION 4.10 – ACCESS**

Access applies to an opening through the right of way line, which provides access to abutting land owners, public street or roads.

All decisions regarding the permitting, reconstruction, and relocation of direct access to state highways are controlled by State law, Section 43-2-147, CRS, as amended, the State Highway Access Code, 2 CCR 601-1, and the State Highway Access Category Assignment Schedule. The law states that access to State highways will be in compliance with the Access Code and be controlled by permit. Copies of the Access Code, the Access Category Assignment Schedule, and further information may be obtained from Safety and Traffic Engineering.

New access and access reconstructed or relocated during new construction must be constructed in conformance with the Access Code, and its required legal procedures. The reconstruction or relocation of any access (unless very minor) requires a new permit to be issued in advance of construction. The access permit shall identify the use of the driveway by noting current land use or quantifying access volume and vehicle type. All permits, procedures, and decisions shall be coordinated with the Region access permit manager.

The Memorandum of Agreement (MOA) is not the correct place for access issues because it is a contract, and when access is included it waives CDOT's rights of Police Power to control access. Where access decisions are necessary during acquisition, work with the Region access coordinator for the issuance of CDOT Form #138 or #101. Include the access issues in the terms and conditions of the permit, not the MOA.

Access relocation, modification or closure (temporary or permanent) must be performed in accordance with State law and the State Highway Access Code. The project managers shall coordinate to ensure that all access relocations, modifications and closures are properly coordinated with the project manager and the property owner.

## **SECTION 4.11 – IMPROVEMENTS**

### **4.11.1 – General**

The CDOT acquires all realty within the right of way required. The grantor may want to retain certain improvements. Each situation requires careful consideration and the appraisal must reflect the appropriate analysis.

### **4.11.2 – Owner Retention of Improvements**

CDOT's determination of a salvage value should be available at the initiation of negotiation or within a reasonable period of time after the owner expresses an interest in retention. Salvage value will be established in the appraisal and appraisal review process. When the owner is permitted to retain improvements, an amount sufficient to cover CDOT's cost should be deducted from the just compensation to ensure proper removal of the improvement and cleanup of the premises if the owner fails to perform.

CDOT is not required to offer the owner retention in every instance, since this is a CDOT option. When the owner is retaining items considered part of the realty, the following clause will be included in the Memorandum of Agreement (MOA):

“It is agreed that the grantor shall retain at the State's established salvage value and remove the following items considered as realty (e.g., furnace, water closet, carpeting, etc.). It is further agreed that the items retained by grantor will be removed by (date). If grantor fails to remove said items within the time limit specified, said items shall become the property of the State to dispose of as it sees fit.”

Retention of structural improvements by the grantor relieves CDOT of any responsibility for the removal and clearing of the site. It is advisable to conclude the transactions on the basis that the improvements be removed by the owner as quickly as possible. There may be cases where it will be appropriate that improvements remain for a longer period. The file should contain documentation supporting such a decision.

When there are items that could easily be removed or create misunderstandings such as televisions antennas, Venetian blinds, etc., the following clause will be added to the MOA: “It is understood and agreed by and between the parties that payment includes, but not limited to, payment for which are considered part of the realty and are being acquired by the State in this transaction.”

### **4.11.3 – Tenant Owned Improvements**

Under the provisions of the Uniform Act, when CDOT acquires any interest in real property, it shall, to the greatest extent practicable under state law, also acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property which it requires to be moved from the real property which will be adversely affected by the use for which the real property is being acquired.

In many instances, CDOT will discover that the real property has been leased by the owner to a tenant who has erected a building or installed other improvements. The Uniform Act requires that such tenant receive just compensation for any such buildings, structures or improvements. The



tenant is due this compensation even if the lease requires the tenant to remove any buildings, structures, or other improvements at the end of the lease term.

Any building, structure, or other improvement which would be considered to be real property if owned by the owner of the real property on which it is located shall be considered to be real property for acquisition purposes. Normally, acquisition from the tenant-owner shall follow the same general acquisition procedures as for a fee owner.

Just compensation for a tenant-owned improvement is the amount which the improvement contributes to the fair market value of the whole property or its removal value, whichever is greater. Removal value is considered to be salvage value.

1. The term salvage value means the probable sale price of an item, if offered for sale on the condition that it will be removed from the property at the buyer's expense, allowing a reasonable period of time to find a person buying with knowledge of the uses and purposes for which it is adaptable and capable of being used, including separate use of serviceable components and scrap when there is no reasonable prospect of sale except on that basis.
2. The contributory value consists of:
  - A. The value in place of a building, structure, or other improvement, the present use of which is the highest and best use (HBU) or the land to be acquired, for its remaining economic life; or
  - B. The interim use value of a building, structure, or other improvement, the present use of which is not the projected HBU of the land to be acquired, for a specified interim time period longer than the remaining term of the lease (interim use value includes the salvage value of the buildings, structures, or other improvements at the end of the interim time period); or
  - C. The value in place of a building, structure, or other improvement, the present use of which is not the HBU of the land to be acquired, for the remaining term of the lease plus the worth of its salvage value at the end of the lease term.

No payment shall be made to a tenant-owner for any improvements unless:

1. The tenant-owner, in consideration for the payment, assigns, transfers, and releases to CDOT all of the tenant-owner's right, title, and interest in the improvement;
2. The owner of the real property on which the improvement is located disclaims all interest in the improvement; and
3. The payment does not result in the duplication of any compensation otherwise authorized by the law.

This provision shall not be construed to deprive the tenant-owner of any rights to reject payment under this provision and to obtain payment for such property interests in accordance with other applicable law.

If there is a possibility that the improvements being acquired are contaminated with hazardous materials or waste, other limitations may apply. If there is known contamination

on the property or improvements, the agent in conjunction with Region Environmental shall coordinate with the local Health Department, Fire Marshall or State Environmental agencies. Legal direction may be needed regarding possible retention of these improvements and the potential liability attached thereto.

The Uniform Act requires that if CDOT acquires any interest in real property, then it shall acquire at least an equal interest in all buildings, structures, or improvements located upon the real property acquired which will have to be removed from the real property or which will be adversely affected by the use to which the real property will be put. All owners, whether part-owner, full-fee owner, or tenant-owner, are covered under Section 301(2) of the Act if buildings, structures and other improvements are involved. If buildings, structures or improvements are not involved, then the obligations to the tenant are a matter only of State law. The following general interpretations have been made by FHWA and are paraphrased for easier reference.

- Normally, the appraiser has the initial responsibility to determine the existence of and valuation of tenant-owned improvements.
- The review appraiser has the ultimate responsibility to see that the recommended or approved estimate of just compensation has the appropriate allocation of value between the fee and tenant owners.
- A tenant may be paid for improvements acquired that would revert to the fee owner at the end of the lease. A tenant must have an ownership interest and a disclaimer from the fee owner in accordance with State law.
- Tenant-owners are entitled to a summary statement and an offer of just compensation. If a disclaimer is issued by the fee owner, separate summary statements and offers should be tendered to the tenant and fee owners for their respective interests.
- If a disclaimer cannot be obtained, an offer need not be made to the tenant owner, although the program process and his/her rights under State law relative to compensation for tenant-owned improvements should be explained.
- Tenant-owners may bring an action to recover any interest from the fee owner.
- Where agreement cannot be reached with the tenant owner, procedures may require that any appropriation or condemnation action would also name the tenant as a party of interest.
- Section 302 pertains only to consideration for tenant-owned buildings and special improvements. Leasehold or other tenant owner interests are properly handled under Section 301 (acquisition practices).

Refusal to make an offer to acquire buildings, structures, or other improvements of a tenant-owner when the fee to the land is being acquired may constitute a coercive action under Section 301(7). Failure to offer to acquire these would be 1) a violation of the law; 2) a coercive act by CDOT; and 3) a potential cause for the filing of an inverse condemnation action. The provisions of section 302(a) apply to all buildings, structures and improvements regardless of their ownership.

#### **4.11.4 – Machinery and Equipment**

The offer when properties contain machinery and/or equipment, which are classified as realty, must be made based upon purchase of such at the approved appraised value.

#### **4.11.5 – Acquisition of Personal Property**

It is generally not the policy of CDOT to acquire personal property. There are times when it would work a decided hardship on the owner and only then should it be considered to buy personal property. There is a procedure to pay for tangible loss of inventory or personal property sold at a loss under the relocation law.

If CDOT considers buying personal property, the negotiator should inform the Region ROW Manager. The Project Development Branch, Headquarters ROW, should be contacted to discuss the issues and a decision should be reached.

Whenever CDOT acquires personal property, the MOA must specify and identify the items being acquired. A separate inventory should be attached to the MOA if the items are numerous. The inventory must describe each item so it can be easily identified. The manufacturer's number must be given if available, as well as the brand name or model. Acquisition of personal property must be authorized by the Statewide ROW Program Manager.

It should be understood that the grantor retains responsibility and liability for all taxes on improvements retained.

#### **4.11.6 – Eviction**

CDOT must own the property or have the right to legal possession under a Possession and Use Agreement before eviction proceedings can begin. The negotiator must work closely with the Attorney General's Office to assure that all rules, regulations and laws are complied with. In some instances, the Attorney General's Office should handle the eviction process.

## **SECTION 4.12 – HAZARDOUS WASTE**

The intent of the following guidelines is to describe the process for identifying, evaluating and mitigating hazardous waste during the right of way acquisition process. All projects requiring right of way or easements should consider these guidelines in order to avoid, to the greatest extent possible, the acquisition of contaminated property and to insure protection for employees, workers, and the community prior to and after construction.

### **4.12.1 – Definitions**

1. Hazardous Waste: “A solid waste, or combination of solid wastes, which because of its chemical content as defined in 6 CCR 1007-3, Part 261, concentration, or physical, chemical, or infectious characteristics may:
  - A. Cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness, or
  - B. Pose substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed, or otherwise managed.”
2. Solid Waste: “Any Garbage, refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air pollution control facility and other discarded materials including solid, liquid, semi-solid, or contained gaseous material, resulting from industrial, commercial, mining and agricultural operations.”

### **4.12.2 – ISA - Initial Site Assessment**

This investigation involves reviewing lists and inventories of suspected or known hazardous/solid waste sites. The historical and existing land uses are noted in the records search. This review shall be supplemented with an on-site reconnaissance of the property to determine if surface features indicate the potential for harboring hazardous or solid waste. An ISA shall be performed on those projects where properties are to be acquired by or dedicated to CDOT.

### **4.12.3 – PSI - Preliminary Site Investigation**

This investigation is to be performed on those properties that have been determined (by the ISA) to have the potential for harboring hazardous or solid waste. The PSI will involve a drilling/sampling and analytical program to determine preliminary information regarding the types of contaminants that may be present on the site and the magnitude and aerial extent of the contamination. The PSI should provide sufficient information for critical decisions about evidence of the contaminated property by use of an alternative design. The intent of the PSI is to provide a tool to assist in the decision-making process regarding the potential liability associated with acquiring the contaminated property and provide pertinent information regarding health and safety issues for construction workers and the public.

### **4.12.4 – RI/FS - Remedial Investigation/Feasibility Study**

This investigation/study is performed if the properties cannot be avoided with the project. This

investigation is a detailed, comprehensive investigation that further delineates the magnitude of contamination of the site. The RI/FS details the mitigation and cleanup strategies and provides cost estimates for the cleanup and mitigation. These findings from the RI/FS are used to develop a strategic plan called a hazardous waste management plan. It should be noted that an RI/FS can be very time-consuming and could take considerable time to gain concurrence and approval by the regulatory agencies.

#### 4.12.5 – Procedures

When CDOT is faced with acquiring property with hazardous or solid waste, each property should be handled on a case-by-case basis. The following are guidelines on how to proceed.

CDOT should determine if the property is required to be remediated by any State or Federal law. If the property, by law, requires remediation, whether there is a project or not, the owner should be responsible for the cleanup. The cost of the remediation should be reflected as a cost the property owner would incur and not what CDOT would pay. The cost should be based on what the owner would do, given the time allowed by law to accomplish the cleanup disregarding the highway project.

If no cleanup is required by law, the property should be appraised by comparing the subject property with similarly contaminated properties. This approach should reflect a value as if contaminated. If the property does not require remediation for continued use, the cost of cleanup should be a projected cost, not the responsibility of the owner.

1. *Initial Site Assessment* is made of all ownerships in a project. During the environmental phase of a project, the Region Environmental Manager shall have an ISA made of all ownerships within the project limits. This inventory shall be reviewed by the Project manager, in consultation with the Region Environmental Manager, who shall determine if the project can be accomplished without the property or whether it is necessary to obtain permission to enter the property and perform a PSI. A PSI shall be done only after this review is made. Testing is done routinely in those areas where known or suspected hazardous waste has been stored or where underground storage tanks exist or existed. If the PSI results do not indicate that there is any contamination beyond acceptable levels, the property shall be acquired. Avoidance of contamination is preferred. Estimated remediation costs should be provided to the appraiser. The cost estimate should be the probable cost the property owner would pay in the market to remediate the property's environmental conditions to required standard within the allowed time frame. The appraiser also should be provided CDOT's cost estimate if the department will clean up the property after the acquisition as part of the project.

The appraiser will use the remediation cost information in the appraisal to the degree it is relevant in the appraisal process. The cleanup cost data might be relevant, for example, as an adjustment item to the value of the property as if it were not contaminated, or this cost information might be relevant in the appraisal through other kinds of analyses. The appraiser must carefully review the cleanup cost information for completeness and accuracy. For example, is an entrepreneurial incentive to the cleanup effort appropriate, and if so, accounted for in the cleanup cost estimate?

Even if the environmental conditions on the property and the related cleanup costs are determined not to affect the property value, the remediation cost information still might be referenced in the appraisal report.

2. *Remedial Investigation/Feasibility Study including cleanup costs.* An RI/FS including cleanup costs shall be performed in those areas where potential danger to the public, to workers, or to the environment (e.g., ground-water contamination, leaking underground storage tanks, etc.) would result from the disturbance of the area. The hazardous waste management plan should address worker health and safety items as well as the cost of cleaning up and mitigation. This testing and subsequent estimate shall be done prior to the Final Office Review (FOR) in order to provide basis for project engineering estimate, whichever comes first. The test results shall be made available to the Region ROW office for the appraisal and land acquisition process. The Region ROW office shall be informed of all owner contacts made during this process.
3. *Condemn temporary easement for testing purposes.* If the property owner refuses to give CDOT permission to enter the property for testing, the Region ROW office shall proceed to condemn for a temporary easement for testing purposes only. This process can be very time consuming. Please remember that it requires a minimum of 45 days, from the delivery of the final letter to the immediate possession hearing, before testing can begin.
4. *Transmit test results to appraisers.* The Region shall investigate whether or not a property owner would be required to remediate the contamination in order to continue using the property to its highest and best, present, or future use. The Region ROW office shall transmit the test results to the appraiser with the letter of information for appraisers. If the test results and cleanup costs are not available at the time of the appraisal, the property shall be appraised as if the property were clean and such assumptions shall be expressly stated in the appraisal. Appraisals for properties where test results and cleanup costs are unknown should also contain a statement that the opinion of value is subject to change if contamination or hazardous wastes are found. The Fair Market Value (FMV) should not be written until a cleanup plan has been developed.
5. *Hazardous waste discovered during land acquisition phase.* Any suspected hazardous waste discovered on the property during the land acquisition phase which has not previously been addressed shall be reported immediately to the Region Environmental Manager who shall proceed to have the property assessed. The PSI shall be done by either a project specific Region contact or a non-project specific hazardous waste contract through Property Management's Environmental Services. Any parcel containing hazardous waste which would require further study, shall be flagged by the Region ROW Manager so that CDOT does not take possession of the property before CDOT's potential risk has been determined.
6. *Property owner pays cleanup costs prior to possession.* The cleanup should normally be paid by the property owner prior to CDOT taking possession of the property. CDOT may enter into an agreement to reimburse the owner for certain costs (those normally incurred by CDOT such as tank removal) at the time of settlement.
7. *If property owner will not pay cleanup costs prior to possession.* If the property owner will not agree to perform the cleanup and it is known that the cleanup costs would not exceed the cost of the property, the property shall be condemned. The property shall be appraised with the estimated cost of the cleanup included in the appraisal report and the resulting fair market value shall be deposited in court.
8. *Indemnification clause if cleanup required in future.* If the property is contaminated but not enough to warrant cleanup, the property owner shall be requested to sign an

indemnification clause to hold CDOT harmless if cleanup is required in the future. If the property owner refuses to sign the clause, the Chief Engineer, with the consultation of FHWA, shall assess the risk of proceeding with the acquisition of the property.

9. *Cleanup anticipated to exceed cost of property.* If the cost of the cleanup is anticipated to exceed the cost of the property (e.g., a superfund site or other site which has the potential of enormous cleanup costs), the Chief Engineer with the consultation of FHWA shall review the possibility of changing the alignment or proceeding as planned. CDOT should not take possession of the property either by agreement or Immediate Possession Hearing until a clearance to do so has been given by the Chief Engineer.
10. *Uneconomic remnants.* Under the Uniform Act, an offer to acquire must be made for all uneconomic remnants. In the case of a remnant parcel that would require remediation, it is highly recommended that CDOT require the property owner to clean up the parcel prior to acquisition. If a parcel is acquired and the contamination is not cleaned up by the owner, it would be appropriate for the offer to take into account the contamination and the cost to the State to clean it up. This could result in a zero or nominal value for the remnant.

## **SECTION 4.13 – LAND SURVEY IN MEMORANDUM OF AGREEMENT**

Items included in the agreement requesting monument replacement by CDOT's surveyor are not appropriate due to the liability associated with the monument placement. If the landowner requires that certain monumentation be performed as part of the negotiations, a private land surveyor must perform the work. If CDOT would hire the surveyor, it must be done through the consultant agreement process. The hiring cannot be done through purchasing with a purchase order.

If surveying is required, the negotiator should get an estimate from a reputable surveying company for the required work. The estimate shall be reviewed and approved by the Region Survey Coordinator for reasonableness. The amount of the estimate shall be included on the agreement as expenses incidental to conveying the real property. When the agreement is sent to the Project Development Branch, Headquarters ROW, for the ordering of the warrant, a separate warrant shall be issued for these incidental expenses unless the warrant is issued to a title company for closing.

All monies shall be paid directly to the property owner. It shall be the property owner's responsibility to hire a survey company to perform the work. The property owner shall be reimbursed after the work has been completed.



## **SECTION 4.14 – INTERNAL REVENUE SERVICE (IRS) REPORTING REQUIREMENTS, STATE AND FEDERAL TAX REQUIREMENTS**

### **4.14.1 – State Tax Withholding**

39-22-604.5 C.R.S. (HB 92-1270), requires that title insurance companies and other providing closing and settlement services withhold 2% of the sales price for sales of real estate above \$100,000 in value where the seller is a nonresident of Colorado. The statute lists numerous entities which are charged with withholding such taxes but fails to include government agencies. Despite this omission, the Department of Revenue and their attorney have taken the position that CDOT is subject to the requirements of the statute when it purchases land which qualifies under the terms of the statute.

The Department of Revenue has generated two forms for use in administering the new statute. Form DR 1083 must be completed by the seller whenever a sale of real property valued at more than \$100,000 is completed and the seller is either a nonresident individual, estate, trust, partner or partnership or is an out of state corporation which is not qualified to transact business in Colorado and has no permanent office in Colorado. In addition, Form 1079 is to be completed when monies are withheld pursuant to the statute.

### **4.14.2 – Federal Requirements for Issuing IRS Form 1099-S and IRS Form 1099-Misc on Right of Way Acquisitions**

1. These requirements apply to whoever prepares a closing statement presented to the transferor and transferee in connection with the closing of the transaction, the reporting person. The Project Development Branch, Headquarters ROW, shall work with the Division of Accounting and Finance, Accounting Branch (DAF Accounting) to prepare all 1099-S and 1099-Misc forms on those properties closed by the Region agents or the Attorney General's Office.
2. If no closing statement is used or multiple closing statements are used, the person responsible for closing the transaction is the first listed of the persons that participate in the transaction as:
  - A. The attorney for the transferee who is present at the occasion of the delivery of either the transferee's note or a significant portion of the cash proceeds to the transferor, or who prepares or reviews the preparation of the documents transferring legal or equitable ownership of the real estate.
  - B. The attorney for the transferor who is present at the occasion of the delivery of either the transferee's note or a significant portion of the cash proceeds to the transferor, or who prepares or reviews the preparation of the documents transferring legal or equitable ownership of the real estate.
  - C. The distributing title or escrow company that is most significant in terms of gross proceeds disbursed.
  - D. If there is more than one attorney described in (a) or (b), the one whose involvement is most significant is the person considered responsible for closing the transaction.
3. If no one is responsible for closing the transaction as explained in (2) above, the person responsible for filing is, in the following order: (a) the mortgage lender, (b) the transferor's

broker, (c) the transferee's broker, or (d) the transferee.

4. The amount reported will be the total cash received or to be received by or on behalf of the transferor in connection with the real estate transaction including land, improvements and damages.

Only the amounts paid at the time of possession of the property shall be reported. If possession is acquired by either Possession and Use Agreement or by immediate possession hearing, only the amount of the deposit shall be reported using the transferor's ID number. If at a later date, this amount is increased as a result of a judgment or administrative settlement, the reporting person shall report that amount even though it may exceed the original consideration necessary to acquire title.

5. In the case of multiple owners, the reporting person shall make a separate information return with respect to each transferor.
  - A. The reporting person must request the transferors to provide an allocation of the gross proceeds among the transferors.
  - B. The request must be made at or before the time of closing.
  - C. Neither the request nor the response is required to be in writing.
  - D. If the reporting person receives conflicting allocations from the transferors, the reporting person shall report the entire gross proceeds on each return of information made with respect to the transaction.
  - E. Transferors who are husband and wife at the time of closing and hold the reportable real estate as tenants, in common, joint tenants, tenants by entirety, or community property are treated as a single transferor for purposes of filing.
6. The 1099-S is issued for:
  - A. All fee acquisitions or permanent easements including damages to the remnant. Temporary easements will be reported as part of the gross proceeds.
  - B. All land exchanges.
7. The 1099-Misc is issued for:
  - A. Only temporary easements of \$600 or more.
8. Following are exemptions from the filing requirements for 1099-S and 1099-Misc:
  - A. Temporary easements under \$600.
  - B. Real estate acquired from a corporation or insurance company.
  - C. Real estate acquired from an exempt volume transferor (developer).
  - D. Real estate acquired from a governmental unit.
  - E. A gift or donation.

9. The 1099-S shall contain the following information:
  - A. The name, address, and taxpayer identification number (TIN) of the transferor.
  - B. A general description of the real estate transferred.
  - C. The date of the closing or possession.
  - D. Gross proceeds with respect to the transaction.
  - E. An indication that the transferor received property or services other than cash in trade for the property.

#### **4.14.3 – CDOT’s Procedure on Gross Proceeds**

The review appraiser’s Fair Market Value (FMV) certificate shall be the recommended compensation for the real property rights being acquired and any damages or benefits. It is the responsibility of the review appraiser to ensure that appraisals have been made in conformity with Federal and State laws, rules, policies, and procedures applicable to the appraisal of right of way for transportation purposes, and no portion of the market value consists of items that are non-compensated under the established law.

The review appraiser shall report each allocation of the recommended compensation to land, improvements, damages, and benefits, if any. The value of any tenant owned improvements to be acquired shall be listed separately.

Damages are limited to the loss in value attributable to remnant property due to severance or consequential damages that arise when only part of an owner’s property is acquired. Damages in this instance do not include contractor claims. These damage issues should be handled as part of the construction contract.

The Project Development Branch, Headquarters ROW, tracks and reports the acquisition costs to the Internal Revenue Service (IRS) as gross proceeds. The gross proceeds reported to the IRS should only include land, improvements, and damages from an adequately supported appraisal.

#### **4.14.4 – CDOT’s Procedure for Verifying Taxpayer Identification Numbers**

A taxpayer identification number (TIN) must be verified through the IRS TIN Matching portal prior to payments being made for fee simple or easement acquisitions. Upon receipt of a warrant request, Project Development Branch, Headquarters ROW, will verify the TIN shown on the provided W-9 on the IRS Portal if it has not previously been verified on a prior request. If the provided information does not match, the acquisition or relocation agent will be contacted to obtain correct information prior to a warrant being issued.

Court deposit payments for immediate possession, settlement or entry of a rule and order may be permitted without a valid TIN or W-9 if authorized by the Project Development Branch, Headquarters ROW Acquisition/Relocation Supervisor and the CDOT Controller. Regardless, attempts should be made to obtain a W-9 with valid TIN in these circumstances.

## SECTION 4.15 PROTECTIVE RENT/SUBSEQUENT OCCUPANTS

During negotiations with the owners of a parcel occupied by tenants, there is the possibility the initial displaced person may choose to vacate the premises prior to CDOT obtaining possession of the property.

In order to preclude the possibility of a subsequent occupant, it may be less costly to acquire a leasehold interest in the vacant unit/space for a short period of time rather than have a second relocation on the same unit/space. To pay for this interest for too long a period can be counter-productive to reaching a settlement.

The assigned right of way negotiator is in the best position to know whether a settlement is near or possession is possible. If the negotiator believes it is in CDOT's best interest to keep a rental unit or units vacant for a short period of time, he/she should obtain the following information:

1. The rental rate of the unit/space.
2. Are utilities a part of the rental rate?
3. Estimated average monthly cost of utilities and if they can be individually shut off.
4. Probable length of time before possession.

The negotiator should then coordinate with his/her supervisor to determine the rental rate, duration, and payment date. The agreed upon rental rate may deviate from the rate paid by prior tenants, but such a rate should be justified based on market conditions. Payments for vacant units/spaces should not include utilities that can be shut off or normal vacancy and collection losses.

The negotiator will contact the owner and have a Memorandum of Agreement (MOA) signed. The MOA should include the following language:

Grantee (CDOT) agrees to pay the sum of \$\_\_\_\_\_/month as rental to Grantor (owner) from the date the subject property becomes vacant to the date that Grantee (CDOT) is entitled to possession or takes title to the subject property, whichever first occurs. The monthly rental shall be pro-rated for any periods of less than a full month. Grantor (owner) agrees that the subject property shall not be leased or rented to third parties and shall remain vacant and unoccupied from the date it is vacated until such time that Grantee (CDOT) takes title or possession. Grantor further agrees to maintain insurance on the subject property, to pay utilities and to maintain the premises in a safe and tenantable condition until possession or title is delivered to Grantee (CDOT).

{As additional units become vacant, Grantee (CDOT) agrees to pay rentals on said units at the previously existing lease rate to Grantor (owner) from the time of such vacancy to the date possession or title of such units is transferred to Grantee (CDOT).}

The Region ROW office will then request a warrant from the Project Development Branch, Headquarters ROW, for payment (3114-incidental costs).

## **SECTION 4.16 RELOCATION ASSISTANCE PROGRAM**

When negotiations are initiated with the property owner, the owner's agent or the tenant, the negotiator will explain the Relocation Assistance program. The negotiator must be familiar with the program.

Sometimes land needed for a highway is occupied. In such instances it may be necessary to displace the occupants. These occupants may be families, individuals, businesses, farms, or even non-profit organizations. Uniform Relocation Act and Department of Transportation/Federal Highway Administration (DOT/FHWA) regulations prescribe certain benefits and protections for persons displaced by highway projects which are funded, at least in part, with Federal money.

Although project schedules sometimes are compressed, they should not occur at the inconvenience of the property owner or tenant. The occupant should have a reasonable length of time to find replacement property and effect an orderly relocation, if necessary. The Uniform Act provides that no person lawfully occupying real property shall be required to move from a dwelling or to move a business or farm operation without at least a 90-day written notice from CDOT of the date by which such move is required.

A 90-day written notice might specify the earliest date by which the property must be vacated or include a statement indicating that the occupancy will be given a further written notice indicating, at least 30 days in advance, the specific date by which the property must be vacated. In the latter case, the occupancy shall still be afforded at least 90 days in which to vacate the property. In unusual circumstances, an occupant may be required to vacate the property on less than a 90-day advance written notice if CDOT determines that a 90-day notice is impracticable, such as when the person's continued occupancy of the property would constitute a substantial danger to the person's health or safety. A copy of CDOT's determination shall be included in the parcel file.

A 90-day notice to vacate shall not be given before the notice of relocation eligibility.

A notice to vacate is required in all cases in which a property is occupied or personal property must be moved.

The provisions of the Uniform Act concerning relocation are found in Title II. As stated in the law, the purpose of Title II is to assure fair and equitable treatment of displaced persons so that such persons do not suffer disproportionate injury from projects designed to benefit the public as a whole. It is important to keep this purpose in mind. It will serve as a valuable guide when making decisions on difficult questions.

It is also important to understand that successful relocation is essential not only to the welfare of those to be displaced but to the progress of the entire highway project. Without the relocation of those on site, the project cannot proceed to actual construction and the highway will not be built.

### **4.16.1 – Occupancy Policy**

CDOT will not allow an owner occupant of a residentially improved property to rent subsequent to our acquisition. CDOT will allow up to 30 days from the date of closing without charge. Only under unusual circumstances will CDOT consider renting back to an owner occupant. The Region ROW Manager must approve the renting back to an owner occupant and the file must include supportive documentation for this decision.

Business will be allowed a lease back to the owner or tenant until such time as the properties are needed for construction. In the case of the owner-occupied business, CDOT will allow 30 days from the date of closing before the lease payment begins.

CDOT will not allow any free occupancy for tenants (residential or business).

## SECTION 4.17 – PROPERTY ACQUISITION ALTERNATIVES

The Federal Highway Administration, in cooperation with State and local governments, is involved in a number of special programs that are noted in this section. Among these are the implementation of policies on Hardship and Protective Buying of properties on proposed highway locations; Utility Adjustments in cooperation with public utilities; Joint Development and Multiple Use of highway corridors; Right of Way Revolving Funds for financing cost-effective early ROW acquisition; Functional Replacement of public facilities; and Federal Land Transfers for highway purposes.

### 4.17.1 – Early Acquisition

1. General: A State agency may initiate acquisition of real property interests for a proposed transportation project at any time it has the legal authority to do so. The State agency may undertake Early Acquisition Projects before the completion of the environmental review process for the proposed transportation project for corridor preservation, access management, or other purposes. Subject to the requirement of 23 CFR §710.501, State agencies may fund Early Acquisition Project costs entirely with State funds with no title 23 participation, use State funds initially but seek title 23 credit or reimbursement when the acquired property is incorporated into a transportation project eligible for Federal surface transportation program funds; or use the normal Federal-aid project agreement and reimbursement process to fund Early Acquisition Project pursuant to paragraph (e) of 23 CFR §710.501. The early acquisition of real property interest under 23 CFR §710.501 shall be carried out in compliance with all requirements applicable to the acquisition of real property interests for federally assisted transportation projects.
2. State-funded early acquisition without Federal credit or reimbursement: A State agency may carry out early acquisition entirely at its own expense and later incorporate the acquired property into a transportation project or program for which the State agency receives Federal financial assistance or other Federal approval under title 23 for other transportation project activities. In order to maintain eligibility for future Federal assistance on the project, early acquisition activities funded entirely without Federal participation must comply with the requirements of 23 CFR §710.501(c)(1) through (5).
3. State-funded early acquisition eligible for future credit: Subject to 23 CFR §710.501(b) (direct eligible costs), §710.505(b), and §710.507 (State and local contributions), Early Acquisition Project costs incurred by a State agency at its own expense prior to completion of the environmental review process for a proposed transportation project are eligible for use as a credit toward the non-Federal share of the total project costs if the project receives surface transportation program funds, and if the following conditions are met:
  - A. The property was lawfully obtained by the State agency;
  - B. The property is not land described in 23 USC 138 (parklands);
  - C. The property was acquired, and any relocations were carried out, in accordance with the provisions of the Uniform Act and regulations in 49 CFR Part 24.
  - D. The State agency complied with the requirements of title VI of the Civil Rights Acts of 1964 (42 U.S.C. 2000d-2000d-4).

- E. The State agency determined, and FHWA concurred, the early acquisition did not influence the environmental review process for the proposed transportation project including:
    - 1) The decision on need to construct the proposed transportation project;
    - 2) The consideration of alternatives for the proposed transportation project required by applicable law; and
    - 3) The selection of the design or location for the proposed transportation project.
  - F. The property will be incorporated into the project for which surface transportation program funds are received and to which the credit will be applied.
4. State-funded early acquisition eligible for future reimbursement: Early Acquisition Project costs incurred by a State agency prior to completion of the environmental review process for the transportation project are eligible for reimbursement from title 23 funds apportioned to the State once the real property interests are incorporated into a project eligible for surface transportation program funds if the State agency demonstrates, and FHWA concurs, that the terms and conditions specified in the requirements of ;710.501(c)(1) through (5), and the requirements of 710.203(b) (direct eligible costs) have been met. The State agency must demonstrate that it has met the following requirements as set forth in 23 U.S.C. 108(c)(3):
- A. Any land acquired, and relocation assistance provided, complied with the Uniform Act;
  - B. The requirements of title VI of the Civil Rights Act of 1964 have been complied with;
  - C. The State has a mandatory comprehensive and coordinated land use, environment, and transportation planning process under State law and the acquisition is certified by the Governor as consistent with the State plans before the acquisition;
  - D. The acquisition is determined in advance by the Governor to be consistent with the State transportation planning process pursuant to 23 USC §135;
  - E. The alternative for which the real property interest is acquired is selected by the State pursuant to regulations issued by the Secretary which provide for the consideration of the environmental impacts of various alternatives;
  - F. Before the time that the cost incurred by a State is approved for Federal participation, environmental compliance pursuant to NEPA has been completed for the project for which the real property interest was acquired by the State, and the acquisition has been approved by the Secretary under NEPA 23 CFR §710.501 and in compliance with 49 USC §303, section 7 of the Endangered Species Act, and all other applicable environmental laws shall be identified by the Secretary in regulations; and
  - G. Before the time that the costs incurred by a State is approved for Federal participation, the Secretary has determined that the property acquired in advance of Federal approval or authorization did not influence the environmental assessment of the project, the decision relative to the need to construct the project, or the selection of the



project design or location.

5. Federally-Funded Early Acquisition: The FHWA may authorize the use of funds apportioned to a State under title 23 for Early Acquisition Project if the State agency certifies, and FHWA concurs, that all of the following conditions have been met:
  - A. The State has authority to acquire the real property interest under State law; and
  - B. The acquisition of the real property interest -
    - 1) Is for a transportation; project or program eligible for funding under title 23 that will not require FHWA approval under 23 CFR 774.3;
    - 2) Will not cause any significant adverse environmental impacts either as a result of the Early Acquisition Project or from cumulative effects of multiple Early Acquisition Projects carried out under 23 CFR 710.501 in connection with a proposed transportation project;
    - 3) Will not limit the choice of reasonable alternatives for a proposed transportation project or otherwise influence the decision of FHWA on any approval required for a proposed transportation project;
    - 4) Will not prevent the lead agency from making an impartial decision as to whether to accept an alternative that is being considered in the environmental review process for a transportation project;
    - 5) Is consistent with the State transportation planning process under 23 USC §135;
    - 6) Complies with other applicable Federal laws (including regulations);
      - a) Will be acquired through negotiation, without the threat of condemnation; and
      - b) Will not result in a reduction or elimination of benefits or assistance to a displaced person required by the Uniform Act and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).
  - C. The Early Acquisition Project is included as a project in an applicable transportation improvement project under 23 U.S.C. 134 and 135 and 49 U.S.C. 5303 and 5304.
  - D. The environmental review process for the Early Acquisition Project is complete and FHWA has approved the Early Acquisition Project. Pursuant to 23 U.S.C. 108(d)(4)(B), the Early Acquisition Project is deemed to have independent utility for purposes of the environmental review process under NEPA. When the Early Acquisition Project may result in a change to the use or character of the real property interest prior to the completion of the environmental review process for the proposed transportation project, the NEPA evaluation for the Early Acquisition Project must consider whether the change has the potential to cause a significant environmental impact as defined in 40 CFR 108.27, including a significant adverse impact within the

Note: (e)(2)(vii) FHWA has given approval for the use of condemnation to clear title in cases where the property owner and the acquiring agency have a binding agreement of sale, but cannot clear title for any number of reasons.

meaning of paragraph (e)(2)(ii) of 23 CFR 710.501. The Early Acquisition Project must comply with all applicable environmental laws.

6. Prohibited activities. Exceptions as provided in this paragraph, real property interests acquired under 23 CFR §710.501(e) and pursuant to 23 U.S.C. 108(d) cannot be developed in anticipation of a transportation project until all required environmental reviews for the transportation project have been completed. For the purpose of this paragraph, “development in anticipation of a transportation project” means any activity related to demolition, site preparation, or construction that is not necessary for securing real property interests acquired as part of an Early Acquisition Project, such as limited clearing and demolition activity, if the activities are necessary to protect the public health and safety and are considered during the environmental review of the Early Acquisition Project.

Note: Prohibited activities include, but are not limited to, demolition, site preparation, clearing and grubbing, and construction that may have an adverse environmental impact or cause a change in the use or character of the real property.

7. Reimbursement. If Federal-aid reimbursement is made for real property interests acquired early under 23 CFR §710.501 and the real property interests are not subsequently incorporate into a project eligible for surface transportation funds within the time allowed by 23 U.S.C. 108(a)(2), FHWA must offset the amount reimbursed against funds apportioned to the State.

Note: Local match and offset are not the same concept. Local match allows for a credit based on contributions made towards the local share of the cost of a project. When Federal-aid reimbursement has been made for early acquired real property, the real property must be incorporated into a project eligible for surface transportation funds within the 20-year time periods allowed by 23 U.S.C. 108(a)(2). If the State agency does not meet this requirement, FHWA will offset the amount reimbursed against funds apportioned to the State. Offset in this context means a reduction in the States apportionment of title 23 funds. However, a local match refers to the Federal matching requirement on federally funded or assisted project or program funds – i.e. the portion of the total project cost that a State or local is required to contribute is commonly called the local match. The use of FHWA funds on a project typically requires a 10 percent or 20 percent local match of funds.

8. Relocation assistance eligibility. In the case of an Early Acquisition Project, a person is considered to be displaced when required to move from the real property as a direct result of a binding written agreement for the purchase of the real property interest(s) between the acquiring agency and the property owner. Options to purchase and similar agreements used for Early Acquisition Projects that give the acquiring agency a right to prevent new development or to decide in the future whether to acquire the real property interest(s), but do not create an immediate commitment by the acquiring agency to acquire and do not require an owner or tenant to relocate, do not create relocation eligibility until the acquiring agency legally commits itself to acquiring the real property interest(s).

Early acquisition means acquisition of real property interests by an acquiring agency prior to the completion of the environmental review process for a proposed transportation project, as provided under 23 FR 710.501 and 23 U.S.C. 108. An early acquisition project means a project for the acquisition of real property interests prior to the completion of the environmental review

process for the transportation project into which the acquired property will be incorporated, as authorized under 23 U.S.C. 108 and implemented under 23 CFR §710.501. It may consist of the acquisition of real property interests in a specific parcel, a portion of a transportation corridor, or an entire transportation corridor.

A contribution by a unit of local government of real property which is offered for credit, in connection with a project eligible for assistance under this title, shall be credited against the State share of the project at fair market value of the real property. Property may also be presented for project use with the understanding that no credit for its use is sought. CDOT shall assure that the acquisition satisfied the conditions in 23 CFR 710.501(b), and that documentation justifies the amount of the credit.

The fair market value of real property acquired in advance and incorporated into a property may be based upon either the current fair market value or historic cost of the real property. CDOT shall use historic costs as the primary basis for credit, unless a significant lapse in time since acquisition or a significant change in market conditions not caused by the project has occurred. If the latter is the case, CDOT will have an appraisal performed and a FMV certificate issued to support the change and credit amount requested.

NOTE: CDOT cannot meet the provisions of 23 CFR 710.501(c), (1), (2), and reimbursement is not an option under early acquisition:

23 CFR 710.501 (c) Reimbursement. In addition to meeting all provisions in paragraph of this section, the FHWA approval for reimbursement for early acquisition costs, including costs associated with displacement of owners or tenants, requires the STD to demonstrate that:

- (1) Prior to acquisition, CDOT made the certifications and determinations required by 23 U.S.C. 108(c)(2)(C) and (D); and
- (2) CDOT obtained concurrence from the Environmental Protection Agency in the findings made under paragraph (b)(5) of this section regarding the NEPA process.

The fair market value of donated property incorporated into a project is established as the earlier of the date on which the donation becomes effective or the date on which title vests in the State. The fair market value will not include any increase or decrease caused by the project.

A property owner may donate property in exchange for construction features or services. The value of the donation is limited to the fair market value of property donated less the cost of the construction features or services. If the value of the donated property exceeds the cost of the construction features or services, the difference may be eligible for a credit to the State's share of project costs. Credit for funds, material and services are established at their fair market value. Credits will not be given for lands acquired with any form of Federal financial or lands currently incorporated within the operating right of way limits of a transportation facility.

CDOT should cautiously consider the requirements for early acquisition and on what type of projects it will be used. Risks that the project may never be built or the early acquired property may not be incorporated into the project should be considered. No credit will be given for properties not incorporated into the project. Projects with extremely expensive ROW, sensitive natural or social environmental issues, or complicated relocations would not be good candidates for early acquisition except in the most limited sense.

#### 4.17.2 – Protective Buying and Hardship Acquisition

The provision of 23 CFR 710.503 allows authorization for protective buying and hardship acquisition: FHWA may authorize federal participation prior to completion of the Environmental Impact Study and route selection.

1. *General.* Prior to final environmental approval, the grantee may request FHWA agreement to provide reimbursement for advance acquisition of a particular parcel or a limited number of parcels, to prevent imminent development and increased costs on a preferred location (Protective Buying), or to alleviate hardship to a property owner or owners on the preferred location (Hardship Acquisition) provided the following are met:
  - A. The transportation project is included in the currently approved STIP;
  - B. The grantee has complied with applicable public improvement requirements in 23 CFR parts 450 (Statewide Transportation Planning, Metropolitan Transportation Planning and Programming) and 771 (Environmental Impact and Related Procedure);
  - C. A determination has been completed for any property interests subject to the provisions of 23 USC 138 (Preservation of Parklands); and
  - D. Procedures of the Advisory Council on Historic Preservation are completed for properties subject to (54 U.S.C. 306108), (historic properties).
2. *Protective Buying.* The grantee must clearly demonstrate that development of the property is imminent and such development would limit future transportation choices. A significant increase in cost may be considered as an element justifying a protective purchase.
3. *Hardship acquisitions.* The grantee must accept and concur in an owner's request for hardship based on a property owner's written submission that –
  - A. Supports the hardship acquisition by providing justification, on the basis of health, safety or financial reasons, that remaining in the property poses an undue hardship compared to other property owners; and
  - B. Documents an inability to sell the property because of the impending project, at fair market value, within a time period that is typical for properties not impacted by the impending project.
4. *Environmental Decisions.* Acquisition of property under 23 CFR §710.501 is subject to environmental review under part 771 of 23 CFR. Acquisition under 23 CFR §710.501 shall not influence the environmental review of a transportation project which would use the property, including decisions about the need to construct the transportation project or the selection of an alternative.

### 4.17.3 – Early Acquisition Procedures

#### Early Acquisition

Prior to the passage of MAP-21, States were prohibited from advance acquisition on projects that were federally funded unless a categorical exclusion for the parcel was approved for protective buying, the property was a hardship acquisition by FHWA, or the project associated with the property satisfied the NEPA requirements.

Since the passage of MAP-21, there are two categories of advance acquisition. The first category involves State-funded Early Acquisitions. The second category involves Federally Funded Early Acquisitions.

Section 108 of MAP-21, permits the Secretary to issue rules and regulations related to advance acquisitions of real property. On November 24, 2014, the Secretary published a comprehensive proposed rulemaking that included proposed modifications to 23 CFR §710.501 so that it will be consistent with 23 USC §108 (“NPRM”). The comment period for proposed rules has closed. As of October 2, 2015, the final rule has not been announced. Until a final rule is announced, CDOT is instructed to follow language of MAP-21 because a federal statute will supersede conflicting language in the regulations.

#### State-Funded Early Acquisitions

Pursuant to MAP-21, States may now engage, at their sole expense, in advance acquisition before completion of the NEPA review process. So long as the State meets the eligibility requirements and certain terms and conditions, advance acquisitions will not affect subsequent approvals required for the project by the State or any Federal Agency.

The following costs are eligible for reimbursement under a State-funded early acquisition:

1. Costs incurred by the State for acquisition of real property interests, acquired in advance of any Federal approval or authorization, if the real property interests are subsequently incorporated into a project eligible for surface transportation program funds; and
2. Costs incurred by the State for acquisition of land necessary to preserve environmental and scenic values.

In order to receive reimbursement for these costs, the project must be eligible for surface transportation program funds and the State must demonstrate to the Secretary and the Secretary must find that:

Before the Secretary can authorize federal funding for an acquisition of a real property interest, the Secretary must complete the NEPA review process with respect to the acquisition of the real property interest.

If the State receives Federal reimbursement for real property interest acquired with Federal-aid and the property is not subsequently incorporated into an eligible project, then the Secretary will offset the amount reimbursed against funds apportioned to the State.

The Secretary is permitted to establish any other conditions or restrictions under this category, so it is important to contact FHWA to ensure that there are no new requirements.

### Pre-Environmental Clearance

The Region ROW office must review any early acquisition on a project that is not environmentally cleared. Protective buying and hardship acquisition require a categorical exclusion for the property involved to be eligible for federal funding. These types of acquisitions qualify for a categorical exclusion only where the acquisition will not limit the evaluation of alternatives. The protective buying and hardship acquisitions are intended to be used in limited circumstances and require FHWA approval.

Any early acquisition must comply with the Uniform Relocation Assistance and Real Property Acquisition Act, as amended; Title VI of the Civil Rights Act; and 49 CFR 24.

### Post-Environmental Clearance

To obtain Federal participation in right of way costs on projects with environmental clearance, the Regions should, follow established procedure for authorizations.

### Criteria for Purchase

The Region ROW Managers or their superiors are authorized to approve Protective Buying or Hardship Acquisition requests. The Region should maintain full justification for such purchases in its files. This justification shall also become part of the parcel file at the Project Development Branch, Headquarters ROW.

The Region ROW office must consider the following criteria when evaluating advance acquisition:

- The status of the environmental documentation and location and design acceptance as determined by the Region Environmental Manager.
- A cost/benefit analysis: The estimated benefits CDOT would realize by pursuing protective buying. Consideration should be given to avoidance of potential relocation expenses, potential property management expenses, etc.
- Parcel is a whole or partial taking upon receipt of an owners request for protective buying, hardship and/or other reasons, the Region ROW office will make a written recommendation to accept or refuse the property owners request based upon the aforementioned criteria. The Region ROW office shall make the final decision on proceeding with advance acquisition.

### Response to Owner Request

The Region ROW office should respond in writing, explaining the requirements for early acquisition eligibility.

### Protective Buying

CDOT must clearly demonstrate that development of the property is imminent and such development would limit future transportation choices.

- A letter or other documentation addressed to the Regional Transportation Director (RTD) or the Region ROW Manager, as appropriate, including but not limited to the following:

- Name of present owner
- Location of property
- Information on progress of developers in obtaining permits, filing subdivision maps, and the likelihood of local authority approval
- Statement concerning the potential that hazardous waste would/would not be present on the property
- Any other information that would be useful.

If improvements are to be purchased include:

- Pictures of improvements
- Description of improvements

Status of the environmental documentation:

If the final environmental documentation for the project has not been processed, or if the location hearing has not been held, protective buying can be authorized if it is in the public interest, but only after CDOT has complied with the requirement of 23 CFR 771.117(d)(12). Federal funds can be utilized in the cost of right of way authorized under the above condition.

For additional information see Chapter 2, Plans and Descriptions.

Protective Buying Criteria:

- **Increased costs:** A significant increase in costs to purchase property.
- **Imminent development:** When a property is on the verge of costly development, expansion, or change in its physical character by construction, excavating, etc., that will greatly increase the cost to CDOT.
- **Zoning change:** When a zoning, or future land use map, change is about to occur that would increase the market value of the land.
- **Subdivision plat or site plan change:** When a land subdivision plat or site plan is filed with a local government that would increase the market value of the land.
- **Damaged improvements:** When existing improvements have been severely damaged by fire or disaster and will be reconstructed at considerable cost prior to regular acquisition.

Hardship Buying:

The Region ROW office is responsible for seeing that the information submitted is accurate and appropriately documents the request.

Property owner must submit a written request or statement outlining the reasons why owner must

sell the property at this time. The written request should include:

- Information that supports the hardship acquisition by providing justification, on the basis of health, safety or financial reasons, that remaining in the property poses an undue hardship compared to other; and
- Documents an inability to sell the property because of the impending project, at fair market value, within a time period that is typical for properties not impacted by the impending project.

#### Hardship Acquisition Criteria – Reasons Requiring Immediate Sale

*Medical:* All hardship situations because of illness, disability or chronic medical conditions must be supported by a written authoritative medical finding and recommendation by a physician or other medical authority. Examples of these conditions are:

- Serious illness within the property owner's family (living at subject) which is aggravated by the owner's inability to affect a market sale.
- Illness causing undue economic hardship in meeting financial obligations.
- Illness preventing normal maintenance of property or causing the property to be vacated for an undeterminable period of time.
- Poor health requiring the property owner's relocation to an institution, nursing home, etc.

*Advanced age:*

- The property owner is unable to provide for the safety and maintenance of his property.
- The property owner must relocate to a special living arrangement and is required to sell his residential property for reasons directly related to these circumstances.

*Financial hardship:*

- Job loss or early retirement because of employment or medical reasons that cause the property owner or primary income provider of the property owner's family to be unable to continue to meet ownership obligations and where relief is blocked by the inability to effect a timely sale at market value.
- A significant loss of rental income or the inability to rent because of knowledge of the proposed highway project which adversely affects a property owner's ability to maintain his residence.

Not considered are:

- Self-induced hardships, such as the owner deliberately buying a second home and alleging he cannot afford to pay the mortgage and taxes on both homes, are not a valid basis for providing relief under this procedure.
- Undeveloped land which the property owner has difficulty in selling or the possibility of



incurring a loss in the sale due to a potential buyer's expectation that highway acquisition may occur is generally considered entrepreneurial risk and should not be considered.

- Absentee owners or entrepreneurial landlords whose ownership is a business risk similar to other business risks in the community should not be considered.

#### Refusal of Protective Buying Purchase Offer:

If the acquisition offer is refused on a protective buying parcel, CDOT will proceed to obtain Condemnation Authorization from the Transportation Commission and file an eminent domain lawsuit as soon as possible after a reasonable negotiation period. To do otherwise would defeat the purpose of the protective buying authorization. If the acquisition could be delayed, it should not have been authorized as a protective buying parcel.

#### Refusal of Hardship Acquisition Purchase Offer:

In the case of a hardship acquisition, CDOT has no obligation to file condemnation promptly and, in effect, place the displaced person at an advantage over other persons displaced. If the hardship request is made early in the project development process and CDOT does not plan to proceed to condemnation, the property owner must be advised in writing, at the initiation of negotiations, that negotiations will be terminated if an amicable agreement cannot be reached. If negotiations are terminated, the Region shall provide written notice to the property owner of the termination and new negotiations would not be initiated until the acquisition phase of the project. A hardship acquisition offer is intended to assist the displaced person. If the displaced person declines a reasonable offer of acquisition and relocation benefits as applicable, CDOT has no additional obligation to the displaced person. The project could be delayed or revised for other reasons and it is not necessary to pursue condemnation earlier than the project schedule would otherwise call for.

#### Owner Notification:

Owners should receive service consistent with normal acquisition procedures, including appropriate relocation assistance and sufficient time to consider CDOT's offer.

A property owner notification letter, to be issued in accordance with the ROW Manual or RAMP, is required on all advance acquisition parcels.

If condemnation is not to be immediately pursued in the event negotiations are not successful, the property owner notification letter should be modified to indicate that if a negotiated settlement cannot be reached:

- CDOT may elect to delay acquisition of the property until such time as the entire right of way project is fully funded; and
- The property owner will be responsible for any fees and costs incurred on his behalf.

It is important to ensure that double relocation payments are not made and Federal reimbursement is not lost.

#### **4.17.4 – Real Property Donations (also see 4.6- Donations)**

1. Donations of property being acquired. A non-governmental owner whose real property is required for a title 23 project may donate the property. Donations may be made at any time during the development of a project subject to applicable State laws. Prior to accepting the property, the owner must be informed in writing by the acquiring agency of his/her rights to receive just compensation for the property, the right to an appraisal or waiver valuation of the real property, and of all other applicable financial and non-financial assistance provided under 49 CFR part 24 and applicable State law. All donations of property received prior to the approval of the NEPA document for the project must meet the requirements specified in 23 U.S.C. 323(d).
2. Credit for donations. Donations of real property may be credited to the State's matching share of the project in accordance with 23 U.S.C. 323. As required by 23 U.S.C. 323(b)(2), credit to the State's matching share for donated property shall be based on fair market value established on the earlier of the following: Either the date on which the donation becomes effective, or the date on which equitable title to the property vests in the State. The fair market value shall not include increases or decreases in value caused by the project. The grantee shall ensure sufficient documentation is developed to indicate compliance with 23 CFR §710.505(a) and with the provisions of 23 U.S.C. 323, and to support the amount of credit applied. The total credit cannot exceed the State's pro-rata share under the project agreement to which it is applied.
3. Donations and Conveyances in Exchange for Construction Features or Services: A property owner may donate property in exchange for construction features or services. The value of the donation is limited to the fair market value of property donated less the cost of the construction features or services. If the value of the donated property exceeds the cost of the construction features or services, the difference may be eligible for a credit to the State's share of project costs.

#### **4.17.5 – State and Local Contributions**

1. Credit for State and Local Government Contributions: If the requirements of 23 U.S.C. 323 are met, real property owned by State and local governments that is incorporated within a project receiving financial assistance from the Highway Trust Fund can be used as a credit toward the grantee or subgrantee's matching share of total project cost. A credit cannot exceed the grantee or subgrantee's matching share required by the project agreement. The grantee must ensure there is documentation supporting all credits including the following:
  - A. A certification that the State or local government acquisition satisfied the conditions in 23 CFR 710.501(b) (c)(1) through (6); and
  - B. Justification of the value of credit applied. Acquisition costs incurred by the State or local government to acquire title can be used as justification for the value of the real property.
2. Exemptions. Credits are not available for real property acquired with any form of Federal financial assistance except as provided in 23 U.S.C. 120(j), or for real property incorporated into existing ROW and used for transportation purposes.

3. Contributions without credit. Property may be presented for project use with the understanding that no credit for its use is sought. In such cases, the grantee shall assure that the acquisition satisfied the conditions in 23 CFR 710.501(c)(1) through (6).

#### **4.17.6 – Functional Replacement of Real Property in Public Ownership (also see Chapter 9 of the ROW manual)**

1. *General.* When publicly owned real property, land and/or facilities, is to be acquired for a project receiving grant funds under title 23, in lieu of paying the fair market value for the real property, the acquiring agency may provide compensation by functionally replacing the publicly owned real property with another facility that will provide equivalent utility.
2. *Federal Participation.* Federal-aid funds may participate in functional replacement costs only if the following conditions are met:
  - A. Functional replacement is permitted under State law and the acquiring agency elects to provide it;
  - B. The property in question is in public ownership and use;
  - C. The replacement facility will be in public ownership and will continue the public use function of the acquired facility;
  - D. The acquiring agency has informed in writing, the public entity owning the property of its right to an estimate of just compensation based on an appraisal of fair market value and of the option to choose either just compensation or functional replacement;
  - E. The FHWA concurs in the acquiring agency determination that functional replacement is in the public interest; and
  - F. The real property is not owned by a utility or railroad.
3. *Federal land transfers.* Use of 23 CFR §710.509 for functional replacement of real property in Federal ownership shall be in accordance with Federal land transfer provisions in subpart F of 23 CFR part 710.
4. *Limits upon Participation.* Federal-aid participation in the costs of functional replacement is limited to costs that are actually incurred in the replacement of the acquired land and/or facility and are –
  - A. Costs for facilities that do not represent increases in capacity or betterments, except for those necessary to replace utilities, to meet legal, regulatory, or similar requirements, or to meet reasonable prevailing standards; and
  - B. Costs for land to provide a site for the replacement facility.
5. *Procedures.* When a grantee determines that payment providing functional replacement of public facilities are allowable under State law, the grantee will incorporate within its approved ROW manual, or approved RAMP, full procedures covering review and oversight that will be applied to such cases.

#### 4.17.7 – Transportation Alternatives.

1. *General.* 23 U.S.C. 133(h) sets aside an amount from each State’s Surface Transportation Block Grant apportionment for Transportation Alternatives (TA). The TA projects that involve acquisition, management, and disposal of real property, and the relocation of families, individuals, and businesses, are governed by the general requirements of the Federal-aid program found in titles 23 and 49 of the CFR, except as specified in paragraph (b)(2) of 23 CFR §710.511.
2. *Requirements.*
  - A. Acquisition and relocation activities for TA projects are subject to the Uniform Act.
  - B. When a person or agency acquires real property for a project receiving title 23 grant funds on behalf of an acquiring agency with eminent domain authority, the requirements of the Uniform Act apply as if the acquiring agency had acquired the property itself.
  - C. When, subsequent to Federal approval of property acquisition, a person or agency acquires real property for a project receiving title 23 grant funds, and there will be no use or recourse to the power of eminent domain, the limited requirements of 49 CFR 24.101(b)(2) apply.
3. *Property Management and Disposal of Property Acquired for TA Projects.* 23 CFR part 710 subpart D applies to the management and disposal of real property interests acquired with TA funds, including alternate uses authorized under ROW use agreements. A TA project involving acquisition of real property interest must have a real property agreement between FHWA and the grantee that identifies the expected useful life of the TA project and establishes a pro rata formula for repayment of TAP funding by the grantee if –
  - A. The acquired real property interest is used in whole or part for purposes other than the TA project purposes for which it was acquired; or
  - B. The actual TA project life is less than the expected useful life specified in the real property agreement.

#### Transportation Alternatives Activities

The Transportation Alternatives Program (TAP) was authorized under Section 1122 of MAP-21, and was codified in 23 U.S.C. sections 213(b), and 101(a)(29). Section 1122 provided for the reservation of funds apportioned to a State under section 104(b) of title 23 to carry out the TAP. The FAST Act was signed into law in 2015 and codified in 23 U.S.C. section 133(h). The FAST Act replaced the TAP with a set-aside of Surface Transportation Block Grant program funding for transportation alternatives. These set-aside funds include all projects and activities that were previously eligible under TAP and defined as transportation alternatives, including on- and off-road pedestrian and bicycle facilities, infrastructure projects for improving non-driver access to public transportation and enhanced mobility, community improvement activities, and environmental mitigation; recreational trail program projects; and projects for planning, designing, or constructing boulevards and other roadways largely in the right-of-way of former Interstate System routes or other divided highways.

#### Who May Apply for Transportation Alternatives Funds

Under 23 U.S.C. 133(h)(4)(B), the eligible entities to receive TA funds are:

- Local governments;
- Regional transportation authorities;
- Transit agencies;
- Natural resource or public land agencies;
- School districts, local education agencies, or schools;
- Tribal governments
- A nonprofit entity responsible for the administration of local transportation safety programs; and
- Any other local or regional governmental entity with responsibility for oversight of transportation or recreational trails (other than a Metropolitan Planning Organization (MPO) or a State agency) that the State determines to be eligible, consistent with the goals of subsection (h) of section 133 of title 23.

State DOTs and MPOs are not eligible entities as defined under 133(h)(4)(B) and therefore are not eligible project sponsors for TA funds. However, State DOTs and MPOs may partner with an eligible entity project sponsor to carry out a project. The FAST Act also allows an urbanized area with a population of more than 200,000 to use up to 50% of its suballocated TA funds for any eligible surface transportation block grant purpose described in 133(b)(1), subject to the existing TA-wide requirement for competitive selection of projects. Local government entities include any unit of local government below a State government agency, except for MPOs. Examples include city, town, or county agencies. Transit agencies include any agency responsible for public transportation that is eligible for funds under the Federal Transit Administration (FTA). Natural resource or public land agencies include any Federal, Tribal, State, or local agency responsible for natural resources or public land administration. Examples include:

- State or local park or forest agencies
- State or local fish and game or wildlife agencies
- Department of the Interior Land Management Agencies
- U.S. Forest Service

### Eligible Transportation Alternative Activities and Project Categories

Under 23 U.S.C. 133(h), eligible activities for TA funds consist of the those described in 23 U.S.C. 101(a)(29) and 213(b) prior to the enactment of the FAST Act. For the purpose of simplicity, CDOT has further defined these activities into three project categories.

1. Bicycle/Pedestrian, Non-motorized forms of transportation activities
  - Construction, planning, and design of on-road and off-road trail facilities for pedestrians, bicyclists, and other non-motorized forms of transportation, including sidewalks, bicycle infrastructure, pedestrian and bicycle signals, traffic calming techniques, lighting and other safety-related infrastructure, and transportation projects to achieve compliance with the Americans with Disabilities Act of 1990 (42 USC 12101 et seq.).
  - Construction, planning, and design of infrastructure-related projects and systems that will provide safe routes for non-drivers, including children, older adults, and individuals with disabilities to access daily needs.
  - Conversion and use of abandoned railroad corridors for trails for pedestrians, bicyclists, or other non-motorized transportation users.
  - The Recreational trails program as described in 23 U.S.C. 206.

- The safe routes to school program under section 1404 of the SAFETEA-LU 23 U.S.C. 402.
2. Environmental Mitigation transportation activities
    - Any environmental mitigation activity, including pollution prevention and pollution abatement activities and mitigation to-
      - i. Address storm water management, control, and water pollution prevention or abatement related to highway construction or due to highway runoff, including activities described in sections 133(b)(11), 328(a), and 329 of title 23; or
      - ii. Reduce vehicle-caused wildlife mortality or to restore and maintain connectivity among terrestrial or aquatic habitats.
    - Vegetation management practices in transportation rights-of-way to improve roadway safety, prevent against invasive species, and provide erosion control; and
    - Archaeological activities relating to impacts from implementation of transportation projects eligible under title 23.
  3. Historic/Scenic transportation activities
    - Construction of turnouts, overlooks, and viewing areas.
    - Community improvement activities, which include but are not limited to:
      - i. Inventory, control, or removal of outdoor advertising;
      - ii. Historic preservation and rehabilitation of historic transportation facilities. For more information about the TAP Program, please refer to the TAP Resources on the CDOT website here:  
<https://www.codot.gov/programs/statewide-planning/mpo-rural-planning.html>
    - Planning, designing, or constructing boulevards and other roadways largely in the right-of-way of former Interstate System routes or other divided highways.

#### **4.17.8 – Utility Adjustments**

Under the common practice of jointly-using a common right of way, there are three broad areas of concern to highway and utility officials alike. First is the cost of relocation, replacing, or adjusting utility facilities that fall in the path of proposed highway improvement projects, commonly referred to as Utility Relocations and Adjustments. Second, is the installation of utility facilities longitudinally within or across highway right of way and the manner in which they occupy and jointly use such right of way, commonly referred to as the Accommodation of Utilities. Third, the Congress in passing the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), set forth a series of responsibilities that utilities have in other areas of their activities. (See implementing regulations at 49 CFR §24.307 and 23 CFR 123.) A major issue here concerns the secondary acquisition and displacement activities that may occur as the result of a utility restoring its facilities as the result of its replacement due to a highway project. In such cases a utility receives compensation for its relocation/adjustment costs, in which FHWA participates pursuant to 23 USC 123, and may include the cost of required replacement utility right of way.

The FHWA has concluded that the secondary acquisition of replacement right of way by a utility compensated for its relocation/adjustment costs under 23 USC 123 is not subject to the Uniform Act. FHWA considers this reimbursement made to states pursuant to 23 USC 123 to be a form of compensation to the utility, which is not subject to the requirements of the Uniform Act.

Federal-aid funds may participate in relocating utilities displaced by a proposed highway project when certain conditions have been met. For further details, see 23 CFR Part 645, Subpart A - Utility Relocations, Adjustments, and Reimbursement. Other references include 23 CFR §10.304 and 49 CFR 24.307.

The first step is to check with the appropriate section of the SHA or with the Colorado FHWA Division Office regarding compliance with the appropriate State or agency procedures.

When it is determined that the utility is in fact serving the public, the next step is to determine which of the utility adjustments are potentially eligible for Federal-aid funding. In general, Federal-aid funds may participate in the costs of adjusting utilities where:

- the utility has a legally compensable interest in its present location by reason of holding a fee or easement to the real property; or
- the State is authorized by statute to pay for the utility adjustment; or
- the utility is owned by a governmental unit, is within public right of way, and the governmental unit is not required by law or agreement to relocate its facilities at its expense.

If, after the above is satisfied, it is determined that the new rights of way are required for the utility, there are two options available for obtaining the right of way. First, the utility may obtain the replacement right of way and be reimbursed for its costs. The second option is for CDOT to be the responsible party for obtaining the right of way for the utility. Note: If CDOT acquires the replacement right of way on behalf of the utility, the Uniform Act applies. The responsibility for acquiring the replacement right of way needs to be covered as part of the utility relocation agreement between CDOT and the public utility approved by the Federal funding agency.

#### Termination of the Right of Way Revolving Fund

TEA-21 terminates the right of way revolving fund and adds a transition provision. It provides that funds advanced to a State prior to June 9, 1998 will remain available to that State for acquisition purposes for a period of 20 years. The requirements for the utilization of these funds were not affected. It also provides that a credit to the Highway Trust Fund, in an amount equal to the funds advanced, will be made by the State upon the expiration of the 20-year period, when construction commences, or upon approval of the plans, specifications, and estimates for the project, whichever occurs first.

#### **4.17.9 – Irrigation Ditches**

When a project affects or requires relocation of an irrigation ditch and/or related facilities, the Region may reach agreement with the property/ditch owner or affected ditch owner(s) to compensate the owner(s) the cost to design and construct their own replacement ditch facilities, or that CDOT will restore or relocate the ditch as part of the project.

##### 1. Owner of Ditch

If the property owner is the sole owner and user of the irrigation ditch, the following will apply:

- a) First, the Region should encourage property owners to accept money to replace their own ditch, based upon an engineer's estimate prepared by CDOT for up to \$10,000. Ditch replacements costing more than \$10,000 will require an engineer's estimate prepared by the Region, plus one from a local contractor obtained by the Region.
- b) Second, if the parcel is condemned, CDOT should try to pay the property owner for the ditch and exclude it from condemnation.
- c) If the first approach is not possible, then CDOT should attempt to get the landowner to sign off on the design of the ditch.
- d) If the first and second approaches fail, then CDOT will testify and deposit into the court the estimate to replace the ditch. However, CDOT will not construct the ditch during construction unless CDOT reaches agreement with the owner, or time permits a motion in limine hearing to establish an acceptable design.

## 2. Multiple Owners of Ditch

If the irrigation ditch is owned by more than one owner or the owner of the ditch is someone other than the property owner, the following will apply:

- a) First, the Region should encourage the payment of money to the owners, but it must be agreed to by all parties, either through a Ditch Agreement, or a Memorandum of Agreement. Payment will be based upon a written engineer's estimate prepared by CDOT up to \$10,000 or the lower of two estimates for those over \$10,000.
- b) If the first approach fails, then the Region should send a letter to all concerned stating that this is CDOT's final design, and CDOT will build accordingly with a statement in the letter such as, "If CDOT does not hear from you within ten days, CDOT will conclude your acceptance of our proposal."

This procedure was developed in an attempt to avoid double payment for irrigation systems in condemnation trials. Colorado case law in the Board of County Commissioners of Garfield County and the State Department of Highways v. Delany, 41 Colo. App. 548, 592 P.2d 1338 (1978) states in part, "One whose land is condemned is entitled to compensation in money, and substitute facilities are proper only upon consent of condemnee."

### 4.17.10 – Joint Development and Multiple Use

Highway joint development/multiple use projects have been carried out for many purposes, but the basic objectives have been to achieve better compatibility between the highway and its environment, and to obtain maximum benefits from the use of increasingly scarce real estate. This policy was previously issued as PPM 90-5 in Chapter 7 of the Federal-Aid Highway Program Manual, but has rescinded and not replaced by any other policy statement or regulatory authority. For FHWA funding purposes, the FHWA's responsibilities for this program have been assigned to the Office of Right of Way since June 1989, where the authority for these projects is in 23 CFR 645.111 and 645.209(I) (Joint Use Agreements - Accommodation of Utilities) and other sections (23 CFR 713.201 [Management of Highway Airspace]).

Joint development/multiple use projects can have a major influence on highway location and design. Non-highway activities such as housing, business activities, parking, and recreation can be located in the airspace above or below the highway or on the land adjacent to the highway. The designs for both the highway and the non-highway elements must be developed in close coordination and with a view toward achieving aesthetic harmony, safety, overall economy, and



compatibility with the adjoining neighborhood.

Joint development applies not only to cooperative planning by the highway and the non-highway agencies, but also involves concern for land use beyond the immediate highway right of way. The intent is to encourage coordinated planning within a broad highway corridor to identify opportunities which would benefit the adjoining communities while achieving transportation objectives and overall cost effectiveness. This concept is key to the idea of Corridor Preservation discussed previously, and is a philosophical base for a number of other project development activities.

Federal-aid highway funds are available for joint development and multiple use studies and may be available for certain multiple use activities. Eligibility for Federal funding by FHWA and other funding agency projects is established on a case-by-case basis, taking into account factors such as environmental impacts, degree of mitigation the joint development/multiple use may provide, effects on the transportation objectives, and cost effectiveness. In many cases funding for such features comes from a combination of sources, including Federal, State, local governments, and the private sector.

#### **4.17.11 – Environmental Mitigation**

The acquisition and maintenance of land for wetlands mitigation, wetlands banking, natural habitat or other appropriate environmental mitigation is an eligible cost under the Federal-aid program.

Environmental acquisition or displacements by both public agencies and private parties are covered by the Uniform Act when they are the result of a program or project undertaken by a Federal agency or one that receives Federal financial assistance as described in 23 CFR 710.513.

FHWA participation in wetland mitigation sites and other mitigation banks is governed by 23 CFR 777. Mitigation of Impacts is described in 23 CFR 777.9.

#### **4.17.12 – ADA Curb Ramp Acquisition Option**

1. *Background.* Title II of the Americans with Disabilities Act (ADA) requires that state and local governments make pedestrian routes in the public right of way, including curb ramps, accessible to individuals with disabilities. There are approximately 20,000 curb ramps in the Colorado State Highway System.

A new ADA-compliant curb ramp will often require more area than an existing curb ramp in order to be sufficiently accessible. Some of this area may be located on private property. Even if additional area is not required, CDOT may need to access private property during construction. In standard transportation projects, CDOT must acquire temporary or permanent property interests from private landowners and follow the Uniform Act. Use of the ADA Voluntary Curb Ramp Acquisition Pilot Program (“ADA Pilot Program”) has allowed CDOT to deviate from these standards.

Resolution TC-18-01-16 was approved by the Transportation Commission on January 18, 2018, authorizing use of the ADA Pilot Program to purchase the required ROW for accessible curb ramps. This ADA Pilot Program’s goal was to streamline the acquisition

process for curb ramp projects by obtaining permanent easements and construction occupancy area (COA) agreements from willing landowners on a voluntary basis and removing steps typically required in survey, valuation and acquisition.

2. Applicability. The ADA Curb Ramp Acquisition Option (“ADA Acquisition Option”) uses the procedures developed under the ADA Pilot Program and may only be utilized on projects which are solely for the purpose of constructing curb ramps. No Federal participation is permitted for any projects conducted under the ADA Pilot Program or using the ADA Acquisition Option.
3. Parcel Types, ROW Exhibits and Authorization.

CDOT will only acquire Permanent Easements and Construction Occupancy Areas (COAs) under the ADA Acquisition Option. COAs were a temporary parcel designation used for the ADA Pilot Program, but these property rights may also be referred to as Temporary Easements under the ADA Acquisition Option. Permanent Easements should be acquired whenever a significant amount the new curb ramp area will be located on private property. A COA or Temporary Easement should be acquired when only the use of private property will be required during curb ramp construction, or if an insignificant amount of the new curb ramp area will be located on private property, as determined by the Region ROW Manager or delegate.

Right of Way Plans and legal descriptions are not required under the ADA Acquisition Option. Instead, individual exhibits depicting boundaries and simple property descriptions will be prepared using assessor data, subdivision plats and existing right of way plans. Furthermore, an overview map should be prepared prior to authorization that shows the approximate location of each acquisition.

To authorize a project which will use the ADA Acquisition Option, copies of all exhibits will be provided to Project Development Branch, Headquarters Right of Way, Survey Program Manager. Included in the authorization request should be a Chief Engineer’s Cost Estimate or statement that all acquisitions are anticipated to be under \$10,000, if applicable. The Survey Program Manager will review the exhibits, and if acceptable, Project Development Branch, Headquarters ROW will prepare a memo to the Chief Engineer requesting authorization to acquire the necessary property interests and to use the ADA Acquisition Option.

Once the authorization memo is signed, Project Development Branch, Headquarters ROW will prepare a non-participating memo as described in Chapter 4 Section 4.2.2. Offers may then be made to property owners.

4. Valuation.

A project-wide valuation study is required to establish offer amounts and verify that each owner receives at least just compensation. This study is not required if individual waiver valuations will be prepared for each parcel. The valuation study may take the form of a memo from the staff member or consultant performing the valuation study to the Region ROW Manager. The memo will be transmitted to Project Development Branch, Headquarters ROW, prior to the issuance of the first warrant request for acquisition and placed in the main file. A spreadsheet may be included as an attachment to the memo for support. The valuation study does not need to be signed by the ROW Manager. Each agreement that is approved and signed by the Region ROW Manager must match the

compensation amounts as shown on the valuation study, unless an owner counter-offer is documented and accepted.

A single offer amount can be used for all Permanent Easements or COAs/Temporary Easements on a project, as long as each owner is receiving at least just compensation. When applicable, parcels may be split into multiple valuation groups to reflect different land use types or real estate markets. A single or multiple unit values may also be used across the project rather than a uniform offer amounts. Each project may use minimum payment amounts which exceed those described in Chapter 4 Section 4.5.2.

Individual waiver valuations may still be prepared for particularly unique Permanent Easement or COAs/Temporary Easements that differ substantially from others on the project. These waiver valuations must be approved by the Region ROW Manager or delegate. Individual waiver valuations and project-wide valuation studies may be used for parcels valued up to \$25,000 as long as someone other than the negotiating agent prepares the valuation study and the landowner agreement includes a waiver of rights under the Uniform Act. Waiver valuations may be used for properties in excess of \$25,000 with the written approval of the Statewide ROW Program Manager. Use of waiver valuations above \$10,000 should be limited to instances where there is a high amount of supporting market data.

#### 5. Negotiation.

First contact with the landowner can be made either in person, by phone, or through certified mail. Once a reliable form of contact has been established, the acquisition agent will present the written offer package under the ADA Acquisition Option. This offer package will include the following documents:

- ADA Acquisition Option Offer Letter
- Use of Construction Occupancy Area/Temporary Easement Agreement and Permanent Easement Agreement. In many cases, only one of these two documents will be required, depending on the curb ramp design and existing right of way.
- Permanent Easement (when needed).
- Exhibit showing the approximate location of the curb ramp to be constructed and the area of the Permanent Easement and Use of Construction Occupancy Area
- CDOT ADA Acquisition Option Brochure
- Federal Form W-9
- Self-Addressed, postage prepaid return envelope for return of signed agreements and W-9
- Negotiator Business Card

Since condemnation is not an option under the ADA Acquisition Option, no notification of appraisal rights is required under CRS 38-1-121.

The acquisition agent will explain the following key aspects of the Pilot Program:

- The agreement is voluntary. The property owner may choose to not sign the agreement. If they choose that option, CDOT will seek to acquire the property and construct a curb ramp on a later project as the goal is to make all curb ramps accessible. The future project will follow a conventional acquisition process.

- **CDOT will not seek condemnation on the current project.** A future project to that follows a conventional acquisition process may involve condemnation.
- The property owner will have a fixed amount of time to consider the offer, typically 30 days. This amount of time is uniform across the project.
- The offer amount is not a valuation for the property interest being acquired, but it is likely greater than the amount which would be offered if CDOT determined the just compensation for the property. The ADA Acquisition Option is designed to eliminate time and costs through a streamlined process with those savings then passed on to property owners in the form of a higher offer amount.
- The property owner would typically have rights under the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 which are being waived by signing the agreement. These include the right to have the just compensation for the property determined. The property owner will also typically have the right to obtain an appraisal at CDOT's expense if the value exceeds \$5,000, but this reimbursement is not being offered under the ADA Acquisition Option. If the value exceeds \$10,000, the waiver of rights includes the waiver of CDOT's obligation to appraise the property.

An exemption to the fixed time to accept the offer can be made at the discretion of the Region Acquisition Supervisor when a good faith effort is being made to return the documents or locate the appropriate party authorized to convey property rights. Additional follow-up contacts can be made and are encouraged if they are believed to be likely to result in offer acceptance.

Landowner counter-offers may be accepted at the discretion of the Region ROW Manager, but must be treated uniformly across the project. No negotiations are to take place other than accepting or denying an owner counter-offer. If the counter-offer is accepted, an administrative settlement (Form #227) must be prepared and approved as described in Chapter 10.

If a landowner states that they do not plan to sign the offer, the offer packet may be left with the property owner, and additional follow-up contacts can be made at the discretion of the acquisition agent and Region Acquisition Supervisor.

If the offer period expires without the signed agreement being returned. The parcel file will be closed and a Document Transmittal (Form #236) and Negotiation Log (Form #273) will be sent to Project Development Branch, Headquarters ROW with remarks stating that the parcel was not acquired.

#### 6. Warrant Request and Closing.

Upon receipt of signed agreement(s), signed and notarized easement (if acquiring a Permanent Easement) and W-9, a warrant request package will be submitted to Project Development Branch, Headquarters ROW with the following documents.

- Document transmittal
- Signed agreement(s)
- Copy of executed easement
- Negotiation Log
- Offer Letter

- Waiver Valuation (if no project-wide valuation study has been prepared)
- Signed W-9

Project Development Branch, Headquarters ROW will place these original documents in the parcel file and order warrants as indicated on the agreement and send to the acquisition agent. The acquisition agent will record the Permanent Easement and provide the check and closing statement to the landowner. COA and Temporary Easement agreements will not be recorded as the use of the property will be temporary. Once the signed closing statement is returned, it will be submitted to Project Development, Headquarters ROW with the original recorded Permanent Easement.

#### 7. Clearances.

Conditional clearances may be requested at any point after a project is authorized by the Chief Engineer. At the conclusion ROW activities for the project, a final clearance should be issued (whether or not a conditional clearance was issued) stating which Permanent Easements or Construction Occupancy Areas/Temporary Easements (if any) CDOT failed to obtain. Efforts should be made to ensure that no construction occurs on these properties.

#### **4.17.13 – Incentive Payment**

CDOT Region ROW Managers may decide to use an acquisition incentive payment program for a particular project. The use of acquisition incentive payments is not meant to be used for every project. It is project specific and must be justified for each project.

The Region Right of Way Manager must prepare an Acquisition Incentive Payment Plan for each project on which they intend to use acquisition incentive payments. The Acquisition Incentive Payment Plan must include the following elements:

1. An identification and discussion of factors to be considered in justification of the use of incentive payments on a particular project, including a finding that use of acquisition incentive payments are in the public interest.
2. Description of how payment amounts will be determined, including formula(s) for their computation, payment maximums (caps) and incentive offer expiration limits (for example: Accept the offer within 2 weeks and the incentive is X, accept the offer within 4 weeks and the incentive is X times  $\frac{1}{2}$ ).
3. Description of safeguards in place to eliminate attempts to coerce property owners/occupants.
4. Description of actions to monitor implementation.
5. Identification of those specific performance measures to be used upon project completion to evaluate the effectiveness of incentive payments.
6. Identification of steps to be taken to ensure that the CDOT will not take any action, coercive in nature, in order to compel an agreement on the price to be paid for the property.

The use of incentive payments must not be allowed as a substitute for appropriate project planning and development (including the scheduling of adequate right-of-way lead time).

The addition of an incentive payment must be included in the MOA.

The State must present incentive payment offers to all property owners on the project in conjunction with just compensation offers. The written Acquisition Incentive Payment Plan must be included in each parcel's acquisition file. Property owners must be given reasonable time to consider and act on the just compensation offers. A minimum of 30 days is required, in line with the provisions concerning basic negotiation procedures set out in 49 CFR Part 24.102(f) and Appendix A.

Offer letters must specify that the incentive payment offer is only open to the date of 30, 60, or 90 days after receipt of the offer letter. Acceptable offer language involving an incentive payment is as follows:

"In addition to the fair market value determined to be the amount owed to you as just compensation, CDOT is offering you an incentive payment in the amount of \_\_\_\_\_ if you waive your right to contest CDOT's ability to obtain possession of the property, or, in the alternative, an incentive payment in the amount of \_\_\_\_\_ if you settle this matter entirely at the above just compensation rate. The incentive payment is a one-time payment that is in addition to the amount offered as just compensation. It is designed to reward property owners who settle quickly and allow CDOT to commence its public projects without resorting to costly litigation. The amount of the incentive payments offered is non-negotiable, as each is calculated based upon the fair market value determination of your property. Each of the incentive payments offered in this paragraph is valid for the thirty (30), sixty (60), ninety (90) days from the date of this letter and will immediately and automatically expire if not accepted during that period."

Application of acquisition incentive payments on a project does not preclude the use of administrative settlements. Administrative settlements may be made and should be documented separately on merit. Administrative settlements based on merit are not incentive payments. If a property owner is to receive payment for both an administrative settlement and an acquisition incentive, each should be independently supported and documented. Receipt of an acquisition incentive payment does not affect an owner's entitlement to relocation payments and benefits.

Acquisition incentive methods may vary in approach depending upon the circumstances surrounding the acquisition, such as the needs of the project, the number of owners, the type(s) of property(ies), the disposition of the owner, the market in the area and other mitigating factors. Several methods listed below have been successfully applied. All feature a time element, wherein the incentive amount decreases as a factor of time increasing. Each of the options below is available for consideration. Additional reasonable incentive payment methodologies may also be used at the discretion of the Region ROW Manager.

- A flat percentage (%) above Fair Market Value
- A flat \$ incentive above FMV
- A graduated (declining) \$ incentive above FMV
- A graduated (declining) percentage (%) above FMV

**Example as found in State of Florida's Pilot Program (2001), still in use as of August 2015**

Offer Over	But Not Over	Incentive + % of Offer	Amount Over
\$0	\$1,000	\$1,000	
\$1,000	\$2,500	\$1,000 + 83.3%	\$1,000
\$2,500	\$5,000	\$2,250 + 70%	\$2,500
\$5,000	\$7,500	\$4,000 + 50%	\$5,000
\$7,500	\$10,000	\$5,250 + 45%	\$7,500
\$10,000	\$20,000	\$6,375 + 40%	\$10,000
\$20,000	\$30,000	\$10,375 + 35%	\$20,000
\$30,000	\$100,000	\$13,875 + 32.5%	\$30,000
\$100,000	\$300,000	\$36,625 + 30%	\$100,000
\$300,000	\$513,500	\$96,625 + 25%	\$300,000
\$513,500		\$150,000* or \$230,000*	

\*This figure not adopted from State of Florida.

#### Change in Property Acquisition or Fair Market Value Determination

ROW Managers should take great care when identifying the property to be acquired and the amount of fair market value for incentive payment projects before sending offer letters because changes following initiation or acceptance of incentive payment offers can create significant problems. As a general rule, if either the fair market value determination or the property to be acquired changes, the property owner must be given a new opportunity to enter into a Possession and Use Agreement or Memorandum of Agreement based upon new incentive payment calculations. This requirement derives from the fact that all property on the same project must be treated equally.

## **SECTION 4.18 -- CONSULTANTS**

Consultants are retained by CDOT as needed for overflow work and to supplement the work of Region personnel, and where expert testimony of persons outside CDOT is needed.

### **4.18.1 – Procuring Services from CDOT Qualified Consultants**

When CDOT elects to retain consultants to perform right of way services, CDOT's Procurement office shall be promptly contacted in effort to coordinate said retention under its current procurement rules. Existing statewide contracts, price agreements or master service orders should be consulted to determine there are qualified individuals and established rates for the required services.

Only individuals approved as qualified to perform acquisition and/or relocation services shall be permitted for selection in completing said services, unless they are under the direct supervision and oversight of another individual who is qualified to perform acquisition and/or relocation services. Any firms performing acquisition and/or relocation services must provide the names of the qualified individuals who will be performing the work.

### **4.18.2 – Scope of Work**

The selected consultant shall provide sufficient professional staff and facility to complete the types of services on particular projects that may be awarded and that CDOT authorizes.

The selected consultant will be required to submit periodic status reports to CDOT which shall include at a minimum: date of owner contact, copies of all correspondence to and from the parcel property owner, and any comments or questions the property owner submits during the owner contacts.

### **4.18.3 – Communication and Oversight of Consultant Work**

The selected consultant should communicate primarily with designated Region ROW staff. Region ROW staff are responsible for the content and quality of the consultant's work. Communication between the consultant and Project Development, Headquarters ROW should only be made under the direction of the designated Region ROW staff. Warrant request or other submissions to Project Development Branch, Headquarters ROW should only be made after review by Region ROW staff, unless directed otherwise.

### **4.18.4 – Invoices and Progress Reports for Right of Way Services**

Invoices for right of way services are to be titled as an invoice. To avoid delay in processing of the invoice, the following information is to be shown on the invoice:

1. Project Code
2. Project Number
3. Parcel Number



4. Number corresponding to the engaging document/purchase order
5. Function (3020, 3114, 3116, etc.)
6. Participating (P) or Non-Participating (N)
7. Federal Employer Identification Number (FEIN) or Social Security Number (SSN)
8. Current invoicing period, e.g., From: (date) To: (date)
9. Summary of invoice (billing) status and payment request as follows:
10. Total fee for project as per engaging document / purchase order
11. Previously invoiced (billed) amounts and payments received
12. Partial fee invoiced for current work completed
13. Less required withholding as per engaging document / purchase order
14. Current amount due and payable
15. Summary of parcels submitted with the invoice and/or work completed to date if no reports are submitted
  - Attach a statement to the invoice about the status of the project and if the due date will be met. Key items to state in the attachment are:
  - Progress of the project and/or percentage of project completed
  - Project log indicating status of each parcel
  - Explanation of delays in progress or expected delays
  - Any other pertinent progress factors that should be brought to the attention of CDOT.

#### **4.18.5 – Approval Process for Qualified Consultants**

CDOT Project Development Branch (Headquarters ROW) maintains a list of qualified individuals approved to perform acquisition and/or relocation services on projects for CDOT and/or LPA projects.

1. To become qualified and to be added to the CDOT list of approved acquisition and/or relocation agents, an individual must submit a Qualification Application for Acquisition and/or Relocation Services on Projects for CDOT and/or LPA Projects (Exhibit R) with supporting documentation as require and described in said application. A consultant seeking qualification approval, will forward the application for qualification and supporting documentation through the CDOT Headquarters Acquisition-Relocation-Records Supervisor. CDOT Project Development Branch, Headquarters ROW maintains the qualified agent list and regularly uploads current versions to CDOT's external website.
2. CDOT Headquarters and Region ROW Acquisition Supervisors will evaluate all applications for qualification received in accordance with the evaluation criteria described in the application. Only those individuals who submit applications and supporting documentation proving that they comply with such criteria, as determined by CDOT in its discretion, will be qualified. It is the sole responsibility of all applicants to provide all required information and documentation in sufficient detail for CDOT's evaluation.
3. CDOT will monitor and evaluate the performance of qualified private consultant staff in the

right of way functions for which such staff is qualified. CDOT Region ROW staff will monitor right of way activities throughout each project, from project scoping to completion, to ensure quality assurance and compliance with federal and state laws. CDOT may revoke any qualification allowing private consultant staff to perform certain right of way functions for any violations of practices where correction is considered mandatory. Such revocation shall be at the discretion of CDOT. Individuals who, during the course of their contract with CDOT, whose conduct may affect their ability to do business with CDOT must self-report to the Region ROW Manager or Headquarters ROW immediately.

All qualified individuals shall be permitted to perform the right of way acquisition and/or relocation functions for which they are qualified on a statewide basis.

#### **4.18.6 – Consultant Files**

The consultant will keep two sets of files on each acquisition parcel and relocation parcel, one for the Region and one for the Project Development Branch, Headquarters ROW. Original documents are intended to be kept in the file for ordering the warrants, auditing and electronic archiving purposes with a backup set for the Region files.

In the case of an acquisition file, the consultant shall do a partial transmittal, to the Project Development Branch, Headquarters ROW, via the applicable CDOT Region ROW unit, of the materials from the original document file at the time a warrant is ordered or a condemnation filed. This transmittal should include original agreement, original FMV, original title work, etc., and a copy of the acquisition negotiator's log (complete to date), which will be used as support for the ordering of the warrant. After the closing, the consultant shall perform a Quality Assurance/Quality Control (QA/QC) procedure on the files and transmit the remnant of the original documents to the Project Development Branch, Headquarters ROW, via the applicable CDOT Region ROW unit. This should include the original title policy, original closing statement, original acquisition negotiators log, original correspondence received since the first submittal, etc. Do not duplicate materials from the first transmittal in the second transmittal. The Project Development Branch, Headquarters ROW, shall combine the transmitted file with records previously submitted.

In the case of a relocation file, the consultant shall do a partial transmittal, to the Project Development Branch, Headquarters ROW, via the applicable CDOT Region ROW unit, of materials from the original document file at the time a warrant is ordered. This should include the original determination, original claim form, original estimates, etc., and a copy of the relocation negotiator's log (complete to date), which will be used as support for ordering the warrant. After the closing, the consultant shall transmit the remnant of the original documents in the file folder to the Project Development Branch, Headquarters ROW, via the applicable CDOT Region ROW unit. This should be the original closing statement, original relocation negotiator's log, original correspondence since the first transmittal, etc. As in the case of the acquisition files, no duplicates should be sent. The Project Development Branch, Headquarters ROW, shall combine the transmitted file with records previously transmitted.

## **SECTION 4.19 – RIGHT OF WAY CLEARANCES**

### **4.19.1 Clearance Overview**

Right of Way clearance is issued when either all right of way acquisition and/or relocation necessary for the construction project has been accomplished and the state has legal and physical possession of all property, or no additional right of way is required for the construction project. In both cases, the final construction plans will need to be provided by the project manager to verify that all areas of disturbance will be within the right of way.

Once the construction plans are reviewed, the Colorado Department of Transportation Right of Way Certification is prepared. This form is used to provide Right of Way Clearance, request a Conditional Right of Way Clearance, and provide a synopsis of the right of way acquisition and/or relocation matters specific to the proposed construction project. The issuance of this Right of Way Certification form is the responsibility of the Region's ROW Manager or his/her supervisors. On state funded projects (non-federal money), certification is made similar to federal projects but without CFRs being applicable.

Certification is provided to the Resident Engineer on most typical construction projects. For other circumstances see FHWA and Project Development Branch Manager below.

The certification should be sent to the Region's Resident Engineer. Copies should be sent to HQ's ROW Manager, HQ's Acquisition/Relocation Supervisor, and Project Manager. The issuing ROW Manager should retain a copy for Region's files.

Certification is provided to the FHWA on FHWA oversight Projects (when the proposed construction project is on the interstate (new or reconstruction) and the proposed construction project is in excess of \$1 Million). See Colorado Department of Transportation Federal-Aid Highway Program Stewardship Agreement. The certification should be sent to the FHWA Division Administrator, Attn: Operations Engineer. Copies should be sent to HQ's ROW Manager, HQ's Acquisition/Relocation Supervisor, Region Resident Engineer, and Project Manager. The issuing ROW Manager should retain a copy for Region's files.

Certification is made to the Project Development Branch Manager when all right of way and/or relocation necessary for the construction project is incomplete. This is known as a Conditional ROW Clearance and must be approved by the Program Development Branch Manager.

### **4.19.2 Conditional Clearance**

In some situations, it may be necessary to clear construction projects early, utilizing what is known as a Conditional Clearance. This Certification is made to the Project Development Branch Manager. In order to do this and to receive Federal Participation, all appraisal must be complete, FMVs issued, and all revisions to the right of way must be on the approved FHWA final plan. With this in mind, the Project Development Branch, Headquarters ROW, will clear construction projects with "no work sections" upon receipt of a memo from the Region justifying the following items.

An explanation of the critical need to accelerate the advertisement of the project.

Where acquisition of a few parcels has not been obtained, full explanation and reasons therefore including identification of each such parcel owner, FMV and offer date shall be set forth in the

request along with a realistic date when possession is anticipated as well as substantiation that such date is realistic.

Identify any know outstanding mitigation properties not yet acquired.

A statement that the imposition of the restrictions, the no-work sections, will not delay completion or affect the cost of the project must be included. The Project Engineer should clearly call-out no work sections on the advertisement plans and include restricted parcel information in the project specs.

- When relocation is involved there must be a statement that all occupants of the residences on such parcels have had replacement housing made available to them in accordance with 49 CFR 24.204. CDOT must ensure that occupants of residences, businesses, farms, or non-profit organizations who have not yet moved from the right of way are protected against any unnecessary inconvenience or any action coercive in nature. A written description that essentially identifies the relocation status and the assistance that will be provided to the displaced persons(s) who have not yet moved from the right of way must be set forth in the request.

The above items are offered as a clarification of the policy which has been in effect for many years. 23 CFR, Part 635.309 allows this procedure “only in very unusual circumstances. This exception must never become the rule.”

A Conditional Right of Way Clearance request should be sent to Project Development Branch, ROW Program Manager for processing. Once approved by the Project Development Branch Manager, copies and the approved clearance should be sent to the Region’s Resident Engineer, HQ’s Acquisition/Relocation Supervisor, and Project Manager. The issuing ROW Manager should retain a copy. Project Development Branch, Headquarters ROW will send approval clearance to FHWA.

All Design Build construction project certifications should be made to Project Development Branch Manager as indicated above.

#### **4.19.3 Right of Way Clearances for Alternative Project Delivery Methods**

Design-build and CM/GC projects require modified procedures for the issuance of right of way clearances.

Under the design-build method, a conditional clearance will almost always be required at the time that a Request for Proposal/Request for Qualifications is issued. The conditional clearance request should include all identified parcels within the scope of any potential concept. If parcels are later added by the contractor, the conditional clearance does not need to be revised. The right of way technical requirements from Section 8 of the design-build contract should be included with the request.

For CM/GC projects, a right of way clearance will be required for each procurement of professional services or severable construction packages. The certification contained within each right of way clearance should only pertain to the scope of the service or construction package. For example, the initial procurement of the construction manager as a professional service would typically result in a certification stating that no additional right of way was required. If a construction package for an interchange reconfiguration requires the acquisition of additional right

of way which has been completed, a right of way clearance can be issued, even though there may be pending right of way acquisition on subsequent construction packages. It is common that each individual construction package will be assigned different project codes. In such a case, the clearance request should reference both the project code being advertised, and the project code under which the right of way plans were authorized.

## **SECTION 4.20 – QUALITY ASSURANCE**

CDOT has the overall responsibility for the acquisition, management, and disposal of real property interests on its Federal-aid projects, including when those projects are carried out by local agencies or contractors. This responsibility shall include ensuring compliance with the requirements of Federal laws and regulations.

The CDOT Right of Way Relocation Program will undertake quality assurance efforts to ensure compliance. Such efforts may include, but will not be limited to, inter-regional and intra-regional file reviews, routine distribution of customer service surveys and demographic information forms to displacees with self-addressed stamped envelopes to Project Development, Headquarters ROW.

These surveys shall be kept confidential and used only to improve CDOT's program.

## **SECTION 4.21 – RECORDS MANAGEMENT**

Right of Way Project Records will be retained according to retention periods described in the Right of Way and Survey Record File Plans. The Record File Plan may also indicate the archive location for any documents with a permanent retention period. Record File Plans are maintained by CDOT's Records Management Program.

Most Right of Way acquisition records have either a permanent retention period or a retention period of 3.5 years from the Form 950 project closure date, including local agency projects. Exceptions to the 3.5-year period apply in the case of major CMGC, Design-Build, P3 or other innovative contract projects, projects that are subject to internal or external audit, projects with litigation holds, and projects funded with emergency funding.

Project Development, Headquarters ROW will maintain original copies of all Right of Way acquisition documents as received in warrant request packages, closing packages or other transmittals. Region ROW Units may maintain copies of these documents in electronic or paper format as long as needed, but for no shorter than the duration of the project.

Adobe Sign is the electronic signature and professional seal software selected by CDOT and required for use on project Records. Adobe Sign is not the electronic signature program for use on documents requiring a CDOT Controller or State Controller signature (contracts). Adobe Sign may be used for acquisition documents, except for Memorandum of Agreement or other contracts. If a document required for a warrant request package or closing package is signed electronically, the electronic document should be sent to Project Development Branch, Headquarters ROW or saved in the established EDMS.

Project Development, Headquarters ROW will archive permanent Right of Way acquisition records in an established Electronic Document Management System (EDMS) on an ongoing basis in the necessary formats to ensure accessibility for 100 years. Recorded deeds, easements and other conveyances will be saved electronically upon receipt by Project Development, Headquarters ROW. Other records may be saved or created electronically in an EDMS by Headquarters or Region ROW Units as determined to be necessary. Records with a less than a permanent retention period may be retained solely in paper format if preferred by Region and Headquarters ROW Units.

After the project is closed, final ROW Plans must be scanned in the current archival format at the time form 950 is issued. Tabulation sheets should include recording information of all parcel acquisitions during the project. Destruction of paper copies cannot occur until the archival process has been completed.

The Project Development, Headquarters ROW parcel file and main project files will be evaluated for additional archiving after issuance of a final Right of Way Clearance for the project. Non-permanent records will be identified and prepared for destruction 3.5 years after the Form 950 project closure date.

Original Right of Way acquisition documents, whether permanent or non-permanent, should only be destroyed after a destruction form has been approved by the ROW Program Manager.