

Right of Way Manual

Chapter 9: Functional Replacement of Real Property in Public Ownership

Policies, Procedures and Information

Colorado Department of Transportation

November 2020

Table Of Contents

| | |
|---|---|
| Section 9.1 – General Information | 2 |
| 9.1.1 – Acronyms Common to the Right of Way (ROW) Manual and CDOT | 2 |
| 9.1.2 – Definitions | 4 |
| 9.1.3 – Authorities | 5 |
| 9.1.4 – Purpose..... | 5 |
| Section 9.2 – Functional Replacement Requirements | 6 |
| 9.2.1 – Colorado Department of Transportation (CDOT) Role..... | 6 |
| 9.2.2 – Requirements for Functional Replacement..... | 6 |
| Section 9.3 – Federal Participation | 7 |
| 9.3.1 – FHWA Role | 7 |
| Section 9.4 – Procedures..... | 8 |
| 9.4.1 – Early Involvement..... | 8 |
| 9.4.2 – CDOT Concurrence..... | 8 |
| 9.4.3 – FHWA Concurrence | 8 |
| | |
| Exhibits | |
| Exhibit A | References |
| Exhibit B | Cost Estimate Data Relative to Contemplated Solutions Worksheet |

Section 9.1 – General Information

9.1.1 – 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 |
| 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 | Public Land Surveyor (Licensed in the State of Colorado by Colo Dept of Regulatory Agencies) |
| 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 |
| 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 |
| 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 |
| 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 Computer Software) |

| | |
|-------------|--|
| 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 |

9.1.2 – Definitions

These definitions are per 49 CFR Part 24.

Agency: The Federal agency, State, State agency, or person that acquires real property or displaces a person.

Appraisal: A written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.

Program or project: Any activity or series of activities undertaken by a Federal agency or with Federal financial assistance received or anticipated in any phase of an undertaking in accordance with the Federal funding Agency guidelines.

State: Any of the several States of the United States or the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or a political subdivision of any of these jurisdictions.

Uniform Act: The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91-646, 84 Stat. 1894; 42 U.S.C. 4601 et seq.), and amendments thereto.

The following definitions used in functional replacement context are as follows:

Eligible Betterment: An improvement in structure, material or site that does not exist in the facility being acquired, but is necessary for compliance with existing codes, laws, or reasonable prevailing standards.

Equivalent Utility: Equal attractiveness and usefulness-especially in effect or function.

Functional Replacement: A method of paying the cost necessary to replace the facility being acquired with a similar needed facility that offers the same utility, including betterments and enlargements required by present-day local laws, codes, and reasonable prevailing standards in the area for similar facilities.

Functional Replacement Costs: The present cost of replacing the improvements and/or site with one having the same utility and usefulness in accordance with present-day requirements.

Ineligible Betterment: An improvement in structure, material or site that does not exist in the facility being acquired but is included in a replacement facility to:

- Accommodate goals or objectives other than functional replacement, or

- Meet optional standards which are not mandatory or established by actual usage.

Costs attributed to this type of improvement are considered ineligible for Federal participation.

- **Prevailing Standard:** A rule or criterion established by authority and enforceable or established by custom and is regularly and widely used.
- **Special Purpose Properties:** Generally these are properties which have physical features peculiar to a specific use, have no apparent market, and have no feasible economic use. Criteria necessary to constitute a special purpose property varies by legal jurisdiction and textual material is not in complete agreement.

9.1.3 – Authorities

References to authorities, Code of Federal Regulations (CFR), and Colorado Revised Statutes (CRS) are:

- 23 CFR 710.509
- Colorado Constitution Article II, Section 15
- Colorado Right of Way Manual
- CRS 24-56-101 et seq.
- CRS 38-1-101 through 121
- CRS 43-1-208
- CRS 43-1-210
- CRS 43-3-106

9.1.4 – Purpose

The purpose of this chapter is to provide procedures of functional replacement of real property in public ownership.

The Functional Replacement program was developed by the Federal Highway Administration (FHWA) to provide an alternative method of acquiring real property for any highway or highway related project in which Federal funds will participate in any part of the right of way costs of the project and compensating for publicly owned property providing essential public services. Regulation reference 23 CFR Part 710.509 (Functional Replacement of Real Property in Public Ownership). Examples are schools, police and fire stations, local parks, etc. The provisions of Functional Replacement do not apply to real property owned by utilities and railroads, Also excluded are Federal lands and properties covered under the Historical Preservation Act (16 USC 461) or 49 USC 303(c), commonly referred to as Section 4(f) provisions of the Department of Transportation Act, as revised. These types of properties have other regulations covering their acquisition, relocation, or modification.

Section 9.2 – Functional Replacement Requirements

9.2.1 – Colorado Department of Transportation (CDOT) Role

Where the Chief Engineer determines it is in the public interest, functional replacement of a public facility may be provided instead of a traditional acquisition. Application of functional replacement procedure is at the discretion of CDOT, subject to FHWA approval if federal participation is desired.

Traditional methods of paying for real estate require a deduction for the depreciation of the existing facility that is being acquired for a public project. Functional replacement represents a departure from this tradition. It provides a method of paying the cost necessary to replace the facility being acquired with a similar needed facility that offers the same utility, including betterments and enlargements required by present day local laws, codes, and reasonable prevailing standards in the area for similar facilities.

9.2.2 – Requirements for Functional Replacement

Federal-aid funds may participate in functional replacement costs only if:

- Functional replacement is permitted under State law and CDOT elects to provide it.
- The property to be functionally replaced is in public ownership and use.
- The replacement facility will be in public ownership and will continue the public use function of the acquired facility.
- CDOT has informed the agency 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.
- FHWA concurs that functional replacement is in the public interest.
- The real property is not owned by a utility or railroad.

Federal-aid participation in the costs of functional replacement is limited to costs which are actually incurred in the replacement of the acquired land and/or facility and are:

- Costs for facilities which 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.
- Costs for land to provide a site for the replacement facility.

Section 9.3 – Federal Participation

9.3.1 – FHWA Role

FHWA must concur that functional replacement is in the public interest.

Federal funds may participate in functional replacement costs on the following basis:

- The actual functional replacement cost of the facilities required to be replaced, and
- The appraised current fair market value (FMV) of the land to be acquired for highway purposes when the owning agency has land on which to relocate the facilities, or the reasonable cost of acquiring a functionally equivalent substitute site where lands in the same public ownership are not available or suitable. Costs for increases in capacity and other betterments are not eligible for federal participation except those necessary to replace utility; those required by existing codes, laws, and zoning regulations; and those related to reasonable prevailing standards for the type of facility being replaced.

Where it is found that the appraised fair market value of the property to be acquired exceeds the cost of functional replacement, Federal funds may participate in the FMV amount.

Section 9.4 – Procedures

9.4.1 – Early Involvement

If functional replacement is to be considered, CDOT officials meet with the owning agency to discuss the effect of a possible acquisition and potential application of functional replacement procedures. The results of such discussions and decisions concerning functional replacement should be included in the relevant EA, EIS, and Section 4(f) statement if such documents are required on a given project. If functional replacement is to be considered, CDOT shall have the property appraised at the earliest practical time and establish an amount it believes to be just compensation, and shall advise the owning agency of the amount established. Subject to the requirements of this directive, the owning agency has the option of accepting the amount of compensation established by the appraisal process or requesting functional replacement. The owning agency may waive its right to have an estimate of compensation established by the appraisal process if it prefers functional replacement.

If the owning agency desires functional replacement, it should initiate a formal request to the CDOT, and fully explain why it would be in the public interest.

9.4.2 – CDOT Concurrence

If the Chief Engineer agrees that functional replacement is necessary and in the public interest, Project Development Branch, Headquarters ROW will submit a specific request for FHWA concurrence. The request will include:

- Cost estimate data relative to contemplated solutions (see Exhibit B for a suggested format and items to be covered)
- Agreements reached at meetings between the CDOT and the owning agency,
- An explanation of the basis for its request, and
- A statement that replacement property will be acquired in accordance with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (Uniform Act) as amended and applicable FHWA directives.

9.4.3 – FHWA Concurrence

After concurrence by FHWA that functional replacement is in the public interest, authorization will be granted to proceed with the acquisition of the substitute site and to proceed with physical construction of minor structures, or in the case of major improvements, to proceed with development of detailed plans, specifications and estimates. During development of the plans, Project Development Branch, Headquarters ROW will be responsible for coordination and concurrences by FHWA to assure that all parties concerned agree on the eligible and ineligible betterments.

The plans, specifications, estimates, and modifications shall be submitted by the Project Development Branch, Headquarters ROW to FHWA for review and approval in accordance with established procedures. Where major improvements are involved, advertising for bids and letting of the contract to construct the replacement facility may follow the general procedures utilized by the owning agency, if acceptable to the CDOT and FHWA. The submission, where applicable,

shall include provisions for CDOT inspection during construction of the replacement facility.

Prior to submittal of the final proposed Project Specifications and Estimates (PS&E) to FHWA for approval, an agreement shall be developed setting forth the rights, obligations and duties of each party with regard to the facility being acquired, the acquisition of the replacement site, and the construction of the replacement facility. The agreement shall also set forth how the costs of the new facility are to be shared between the parties. Prior to FHWA concurrence in the award, the agreement shall be executed. If no construction is involved, the agreement shall be executed prior to the acquisition of the replacement land or facility. Any changes or modifications in the planned construction after PS&E approval will be cleared through the Project Development Branch, Headquarters ROW who will secure necessary FHWA approvals. The CDOT's request for final payment shall include:

- A statement signed by an appropriate official of the owning agency and the CDOT certifying that the cost of the replacement facility has actually been incurred in accordance with the provisions of the executed agreement.
- The statement shall also certify that a final inspection of the facility was made by the CDOT and the owning agency and that the CDOT is released from any further responsibility.