GPP for Right of Way Acquisition Issues

Resources referred to and used in this document

- City of Lincoln's GPP Website see Right of Way Issues
- LPA Manual: "Real Estate Acquisition Guide For Local Public Agencies" (NDOR website) http://www.dor.state.ne.us/roway/pdfs/lpa/lpa-manual.pdf
- FHWA Realty Website: http://www.fhwa.dot.gov/realestate/index.htm
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act): http://www.fhwa.dot.gov/realestate/ua/

Definitions - All three the items listed below are included in the term ROW used through out this document.

Right-of-Way (ROW)

(1) Land, property or interest acquired for or devoted to storm drainage, sanitary sewer, water, or transportation purposes.
(2) This term can include acquisition of city property by deed, purchase of permanent easements, and/or temporary easements.

In addition to needing to purchase rights (i.e. land, permanent easements, temporary easements) for the project, there may be other impacts to the property as well. For example, lighting, fencing, signage or sprinkler systems may need to be relocated or restored.

Permanent Easement

A strip of land within a larger area to which the property owner grants permanent right-of-access by an individual or legal entity. Permanent Easements are acquired for a specific purpose. Any property right-of-way acquired in this manner remains the City's until it is sold or transferred by the City.

FAQ -- Can the property owner still use the land acquired by Permanent Easement?

Yes. However, the entity acquiring the Permanent Easement has the right to enter onto that land anytime it needs, in order to accomplish the work set forth in the easement contract. If damages to the property, or to items placed in the area, occur as a result of that entrance, the property owner has no legal right to recover damages.

Temporary Easement

A strip of land within a larger area over which the property owner grants a temporary right-of-access to an individual or legal entity. Temporary Easements are acquired for a specific purpose, usually for construction purposes. Any property right-of-way acquired in this manner remains the City's until the construction of the project is complete.

GPP for Right of Way Acquisition Issues

Introduction and Background

One of the most significant challenges in acquiring right of way is the dependence upon factors over which outside of a Project Manager's control. Delays may be encountered from property owners and their legal counsel, title issues, political inference, and the court system, just to mention a few.

The City follows federal, state and local laws for reimbursement and compensation to owners of private property affected by a publicly funded project. The Uniform Act applies whenever federal dollars are used in any phase of a project, such as planning, environmental assessment, right of way or construction. The Uniform Act must be followed even if there is **NO** federal funding in the right of way phase.

This document attempts to discuss the issues and give reasonable guidance in regards to the acquisition process. Remember the best solution is to allow enough lead-time when creating the project schedule in order to give the best chance of success.

Planning Ahead (AKA--ALLOW PLENTY OF TIME FOR THE ROW PROCESS)

Plan very early in the project delivery process to account for ROW issues that affect the project schedule. The general rule of thumb is to use an absolute minimum time period of one year from the legal descriptions being sent to City of Lincoln Real Estate Division to when you want to open bids on most city projects. Nebraska Department of Roads (NDOR) suggests minimum of 21 months for ROW acquisition, and should be completed prior to bid advertisement. Therefore remember projects with Federal Aid requirements or relocations will need even more time. By assuming 1 year for design, 1 year for ROW acquisition and 1 year for construction, and focusing on the ROW driven issues early in the design process means you can probably be turning in legal descriptions sooner than during that first year thus giving yourself a more comfortable 14 to 18 months to allow for the acquisition process to occur.

Think about this: How long does it take to type a letter. Let's assume 10 minutes so then if you are given 3 letters, can one automatically assume all three letters will be done in 30 minutes? If after 15 minutes a short memo that should take only 5 minutes is assigned and takes a higher priority. Where does that leave the third letter for completion? The original 30 minutes is now shot, what if lunch, phone call, walk in customer or previously scheduled meeting is bumping up against the time line. Always, always, always, allow plenty of time for the right of way process to occur. Isn't it better to assume plenty of time and then beat it or find out your title is no good and will require 2 months more research or a difficult property owner lives in Montana in a cabin where they pick up their mail only once a week or the Mayor decides to move fast forward on an great economic development project, sell properties at 48th and "O", build an arena or someone gets ill goes on vacation, or your appraiser has poor performance, or an attorney uses an issue in another part of town as a bargaining chip, the possibilities are endless and most like will occur on your project. So plan for them and allow for plenty of time for the ROW process to occur.

GPP for Right of Way Acquisition Issues

The Process (with discussion on each listed below)

1. **ROW need indentified, Order a Title Search**

2. **Finish design issues related to ROW before tackling other project tasks.**

3. **Write Legal Descriptions and Complete ROW Plan Preparation** ***(Starts the one year acquisition clock)***

4. **Appraisal Process**

5. **Appraisal Review**

6. **Determination of Just Compensation**

7. **Acquisition of Valued Property**

8. **Negotiation Process**

9. **Sometimes Condemnation**
   (End of the one year acquisition clock)

10. **Advertise Project for Bid Letting**

Giving the project adequate time to complete this process is the best way to avoid issues that will cause concerns and problems later. A general minimum rule of thumb is to lay out the project schedule with one (1) year allowed for design, one (1) year allowed for ROW acquisition, then one (1) year for construction. See Scheduling GPP for more information and remember special cases require more time. (ie relocations, federal aid projects, etc.)

GPP for Right of Way Acquisition Issues

1. ROW need indentified, Order a Title Search

As soon as it is known that a tract of property is needed for the project a title search should be ordered. This can and should occur before all of the details regarding the design are known. All that needs to be known is that you are going to need a ROW interest of some kind in that property.

Title Search Tip: If you have a 50% or more certainty that you will need the tract, go ahead and order the title search, the general rule of thumb is you'd rather have two title searches too many, instead of one title search short. But be diligent in not going overboard and ordering too many searches that use up money and resources

With a title search, the project derives the important knowledge that recorded matters have been searched and examined so that current owner and issues covering the property are known. Taking the time to do due diligence now can help you deal all kinds of problems that could potentially kill the project schedule.

There may be matters affecting the property that are not obvious or known, even by the existing owner, which a title search and examination seeks to uncover as part of the process. People undergo changes in their personal lives that may affect title to their property. People get divorced, change their wills, establish trusts, have liens and judgments placed against them personally for various reasons, and engage in transactions that limit the use of the property,. For example, more than one person might claim to have a deed or lease giving them ownership or the right to possess the property. Someone else could claim to hold an easement giving him or her a right of access across the property. Yet another entity may claim a lien on the property securing the repayment of a debt.

What is a Title?
First of all, it is important to understand fully what a title is and why it is so important. Basically, a title is the legal term for an owner's interest in a piece of property. Of course it can also refer to the formal document that proves the ownership of the property. However, title is different from possession, which is a right that comes with ownership, but it may not be able to prove ownership. Having a real estate title is basically providing evidence of who holds the legal ownership of the property. When you buy a piece of real estate, you want to make sure that you have the right to occupy or use the property without any problem.

Three Elements of a Title
You also need to understand the three different elements of a title. First of all there is possession, then the right of possession, and then the right of property. All three of these elements make up what as known as a title.

- Possession -- The possession is that actually holding of the property, whether or not you actually have the right to do so.

- Right of Possession -- Basically the right of possession is the legitimacy of possession, even though you may not actually have the possession of the property. This means that there is evidence that will be upheld by the law showing that you have the right of possession to the property.

- Right of Property -- The right of property is a different right, in which case, if all the facts were actually known, you would be able to defeat all other claims to this property.

It is important to note that a different person could hold all the three different elements of title.

Benefits of a Title Search
It is imperative that you conduct a title search early in the project process. The following are just a few of the benefits of taking the time to do a title search before you actually start writing legal descriptions.

Benefit #1 - Problems will be found early before the critical 1 year clock starts
Benefit #2 – Establishes the current legal owners
Benefit #3 – Helps indentify potential claimants
Benefit #4 – Discovers other easements / rights
Benefit #5 – Gives a heads up to potential tenants

Link to GPP regarding Title Search Request Form and Example

http://www.lincoln.ne.gov/city/pworks/engine/dconst/gpp/gppdisc/row/title.htm

2. Finish design issues related to ROW before tackling other project tasks.

Most private property impacts are known during the second submittal of a project's design, and are negotiated with the owner/tenant before the project goes to construction.

During the design phase of the project, it will cost more money, but potentially save time to work with the property owner regarding the impacts to their property. Concerns regarding access during and after construction, tree and landscaping removal, property restoration practices, fencing, construction activities and work sequencing/phasing are all valid issues for a property owner. If the first time that the property

CAUTION: BE SURE YOU ARE DEALING WITH THE CORRECT PERSON WHO CAN REPRESENT THE OWNER, ORGANIZATION, OR TENANT. GET A SIGNED NOTICE OF REPRESENTATION FORM.

owner is exposed to the project and its impacts to their property is during negotiations then items and issues you were not aware of or changes that may have to occur because of those discussions potentially could slow down project progress.

Helpful Hints: Helping the property owner understand the impacts to the property can be one of the best ways to benefit the ROW acquisition process. Consider:

- Meeting one on one at the property with the owner having staked key elements of the design.
- Creating a three-dimensional (3D) model and/or fly thru to help the owner visualize how the project will look when completed.
- Show photos or suggest locations of similar type improvements the property owner can go look at a comparable situation.

Be mindful that if it becomes necessary to revise the right of way plans after the legal descriptions have been written, this can also extend the appraisal, appraisal review, and negotiation period with property owners. Try to establish a relationship with the property owner early in design rather than letting Real Estate be their first exposure to the project.

Working with an organization, not for profit group, church, or other similar entity make sure the representative can represent the group, is following up with the group, and be aware that process will be slower and more cumbersome as you probably will have to meet multiple times with multiple people.

Document, Document, Document

Keep detailed records regarding issues you have discussed with property owners, including date, who was there, what was promised, action items, follow up needed, caveats, promises, etc. For consistency a form has been prepared on the GPP website to help with documentation. These forms should be stored electronically in the project folder and available for Real Estate's use during appraisal and negotiations. Be sure and to keep copies of everything a property owner has be given in the electronic project file.

IMPORTANT: Be sure your target has stopped moving. Until you have completed the design and finalized the details related to ROW issues for the entire project, it does little good to move to the next step. Involve the property owner if possible.

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3. Writing Legal Descriptions / ROW Plan Preparation

See the GPP website for detailed information regarding both plan preparation and how to write legal descriptions. The City Project Manager should check the written legal descriptions before they are sent to Real Estate Division. Errors and Omissions that need to be changed once again slow down the process and take valuable time from the Real Estate Division abilities to work on other activities and tasks.

Link to GPP regarding plan preparation and legal descriptions

http://www.lincoln.ne.gov/city/pworks/engine/dconst/gpp/gppdisc/row/index.htm

4. Appraisal Process

A Right-of-Way Appraisal is the determination of the market value of property including damages, if any, as of a specified date, resulting from an analysis of facts.

The appraisal, with its review and approval by the acquiring agency, is the cornerstone on which is built the entire effort to provide the property owner with just compensation. The Uniform Act requires the property be appraised and reviewed before an acquiring agency begins negotiations to acquire it, and the amount of the approved appraisal is the basis of the offer of just compensation.

Formal, written valuation reports are required for each parcel of land to be acquired or damaged. The right of way cost estimate determines the type of valuation document needed. The three types of reports are the "Compensation Estimate", the "Short Form" Appraisal, and a "Before and After" Narrative Appraisal.

Who can prepare valuation reports?
Depending on the circumstances, specially qualified appraisers, qualified employees of the City, or NDOR right of way employees. Usually given the workload of the City and State, just qualified appraisers hired by the City.

5. Appraisal Review

Duties of a Reviewer

- Ensure consistency among valuations on a project wide basis.
- See that the City's specifications were followed.
- Ensure accuracy of data, adequate documentation, and appropriately supported conclusions.
- Inspect the appraised property and the comparable sales.

- See that all appraisal principles and techniques were followed in accordance with state and federal requirements.
- Ensure that consideration is given to all compensable items, damages, and benefits, and that compensation is NOT included for items deemed non-compensable by state law.
- Verify or establish fair market value for the acquisition, for partial acquisitions, for real property and for damages, if any, to the remaining property.

If the valuation report is deficient, the reviewer should return the report to the appraiser for correction, with the deficiencies noted.

IF acceptable corrections or revisions to a report cannot be obtained from the appraiser, **AND** the reviewer is unable to approve the report, **AND** the City determines it is impractical to obtain an additional report, **THEN** the reviewer may develop appraisal documentation, either independently or by reference to acceptable relevant information developed by others, to support an approved or recommended value.

Sometimes it is necessary to update a valuation report or appraisal, or even complete a totally new one. A common reason for this would be if there has been a significant delay (one year or more) between the date of the report and the conclusion of the transaction. Another reason would be if the information presented by the owner changed, or if there is a material change in the character or condition of the property. Anytime a valuation report or appraisal is updated, it must be reviewed again.

6. Determination of Just Compensation

Just compensation has been defined by the Right of Way Committee of the American Association of Transportation Officials (AASHTO) as the full and fair equivalent for the loss sustained by the owner as a result of taking or damaging of private property for highway purposes. In an opinion of the Nebraska Supreme Court it is..."that amount of money or its equivalent which will compensate the owner; so that he is in the same financial position as he was before his property was taken or damaged for a public purpose. This is the amount of money which will make the owner no richer or no poorer than he was before the taking or damaging of his property."

The City must determine Just Compensation on each tract. The City will review the appraisals, appraisal reviews and set the Just Compensation on each project tract. Just Compensation cannot be for less than the reviewed appraisal amount.

7. Acquisition of Valued Property

The property has now been valued, the report has been reviewed, and the amount of compensation due the owner (and tenant) has been determined. You are almost ready to begin negotiations with the property owner. But first, you need to prepare all of the informational papers that are required to be given to the property owner, and the documents needed to be signed by the owner.

8. Negotiation Process

Who May Negotiate? -- Any knowledgeable and disinterested employee of the City who has successfully completed the necessary requirements or an approved fee Acquisition Consultant. Due to workload issues, this is almost always hired out.

Who Cannot Negotiate? -- The Review Appraiser or person that approves any valuation report or established Just Compensation cannot act as the negotiator. The appraiser can act as a negotiator but only if a "Compensation Estimate" was used and the compensation is less than $10,000.00 and they meet one of the criteria above.

Negotiator Log (Call Report)

This is simply a written report, kept by the negotiator, of the key elements discussed during a meeting or phone call with a property owner or representative. It will be a permanent part of the tract file.

The negotiator shall maintain adequate records of negotiations or other contacts for every parcel. Therefore, the negotiator needs to enter into every visit or phone call with this knowledge and take what steps are necessary in order to recall the details when they write their report. After each call the negotiator's log or Call Report shall be written in permanent form and completed within a reasonable time after each contact with the property owner or their representative. Information for each contact must include the date and place of contact, parties of interest contacted, offers made (dollar amounts), counteroffers, relevant questions from the owner, list of reasons settlement could not be reached, and any other pertinent data. The initial Call Report should also indicate that a Right of Way Acquisition Brochure was presented to the property owner. The log or report shall be signed and dated by the negotiator. Upon completion of negotiations, the above records become part of the project parcel file.

When negotiations are unsuccessful and further attempts to negotiate are considered futile, the negotiator's record shall include documentation of the negotiator's recommendations for appropriate future action. One of the functions of a negotiator's log is to document that negotiations have been conducted in an appropriate manner. Beyond the negotiating arena, City's increasingly are being required by courts to demonstrate such compliance. Properly completed, the negotiator's log offers key documentation in these cases.

Sometimes the initial negotiator may not complete the negotiations for a particular parcel. Without a complete record of preceding efforts, subsequent negotiations by a new negotiator will be more difficult and probably more time-consuming. In addition, the record contained in the log may assist in determining the prospects for a successful administrative or legal settlement. This supports the Uniform Act's goals of encouraging and expediting agreements with owners, avoiding litigation, relieving congestion in the

courts, assuring consistent treatment for owners in public improvement programs, and promoting public confidence in governments' land acquisition practices.

Contacting the Owner

- Present the Offer in Person (Preferred Method)
- Mailing the Offer

The City will make all reasonable efforts to meet with each property owner individually, or the owner's designated representative, in person. The purpose of this contact is to explain the negotiation process to the property owner as well as the responsibilities of both the CITY and the property owner. This is accomplished by providing the property owner with an acquisition brochure. The negotiator then shows and explains the ROW plans and how their property is affected, followed by presenting the informational letter and contracts that spells out the property rights needed from the owner and the compensation. This kind of personal contact can be of great importance as the negotiator strives to attain rapport with the property owner, which can help inspire confidence in the acquisition process and the fairness of the offer being made. NDOR strongly discourages the City from holding group meetings with all property owners when negotiating the purchase or donation of individual tracts on a project.
If all reasonable efforts to make personal contact with an owner fail, or if personal contact is impracticable, for example, such as when an owner lives in another state, the owner may be contacted by mail. In that mailing you would include everything that you would have presented in person.

This can be an alternative approach for the first contact of the property owner. Sometimes, constraints on manpower and funds make it advisable to affect cost savings and to accelerate the acquisition process. This process allows the initial phase of negotiations to begin with a mailing to the property owner. The packet consists of an introduction letter explaining the acquisition and the offer, the brochure, the ROW plans highlighting the taking, (all appraisal documents – optional), all contracts and deeds clearly marked where they need to sign and have notarized, other documents needing signing, and a postage paid return envelope.

Within a reasonable period after the mailing (usually a week), you should follow up by telephone. A telephone conversation provides the property owner with a means to obtain answers to questions or an opportunity to exercise the option of setting up an appointment for personal contact. All requests by property owners for personal contact should be honored.

When personal contact does occur, the property owner should be able to discuss substantive issues, having had the offer in hand for several weeks. From this point on, negotiations should follow the normal sequence.

Generally, the mailing approach has resulted in positive experiences. It saves both administrative costs and time on minor claims in which no dispute has arisen over the

amount of the offer. The owner signs the contracts in a timely manner which enables the agency to focus negotiation efforts on other parcels.

No Coercive Action

Negotiations must be conducted free of any attempt to coerce the property owner into donating their property. For example, the negotiator shall not imply that the owner must donate their property, "or else". These detrimental factors could be things like the CITY withholding the building of certain construction features beneficial to the owner or the project itself. Other threats prohibited are those that imply that the CITY may "do" harmful things such as remove trees or other property features when it is not necessary.
Similarly, the use of condemnation as a threat must be avoided. Publicly requesting property owners to donate is considered coercive.

Administrative Settlement

This is an increase in payment to the property owner, simply as a means to conclude negotiations on a tract of land. It is purely at the discretion of the City's Real Estate Agent(s) and need not be based on a specific element of the property valuation. However, it must be in the best interest of the City and the public and is usually accompanied by a written report.

A reasonable effort must be made by the negotiator to induce the owner to sign for the offer presented to them. However, when the owner refuses to sign, or presents a counter offer, it is sometimes in the public interest to accomplish a settlement in excess of the established just compensation. Such a settlement is called an Administrative Settlement because it is not an admission on the City's part that there is a need to raise the offer of just compensation, but rather, is the result of an administrative decision. In all instances, caution, discretion, and proper judgment shall be applied at all times. The Administrative Settlement has long been a part of the FHWA regulations.

The City can consider factors utilized in the appraisal process and, likewise, factors omitted from it. Some of these factors could be the time span between the appraisal completion and the offer, other appraisals, additional estimates or bids, valuation problems, recent court awards, or the contrast between an increase vs. the estimated trial cost.

Consistency and fairness to the City taxpayers and all property owners, especially those on the project who have already accepted the initial offer, should be considered when making Administrative Settlements. The practice of agreeing to settlements above the established just compensation, merely because a property owner "holds out," is strongly discouraged. These increases would soon become common knowledge and there would be but few future agreements by the negotiator based on just compensation.
In making a counter offer, the owner may request certain construction items as a condition for settlement. Many of these items would often mitigate at least some of the damages that were originally in the City's offer. In order to avoid a double payment that would include both the cost of the construction item and damages mitigated by those items, acceptance must be carefully weighed and be based on the elimination of the

damages that are mitigated by the construction items. Attempts are sometimes made by the owner to obtain agreement on construction items by first proposing only one item and after obtaining approval, following up with others in similar fashion. This type of counter offer on a piece meal basis should be avoided. It is best to give consideration only to complete counter offers and remain noncommittal on requests for construction items until all conditions of the counter offer are definitely stated.

9. Condemnation: the City's Right of Eminent Domain

Condemnation, also known as the Eminent Domain Procedure, was established as a way to protect both the City and the property owner in a dispute. It allows the City to continue on with their project while protecting the property owner in receiving fair compensation. It should be viewed as a very positive protection, rather than as a negative threat.

If negotiations have failed and an administrative settlement is not successful, it may be necessary to acquire the property rights by exercising the City's power of eminent domain. At this point, the negotiator shall give the owner a copy of the Eminent Domain Procedure, (update their working file and turn the acquisition over to legal counsel to institute condemnation proceedings.

In Nebraska, the law provides the property owner (and tenant) a hearing in County Court before a board of "appraisers" who have been appointed by the court. The owner (and tenant), and/or their legal counsel, and the counsel for the CITY are permitted to present information to the appraisers along with a viewing of the property.

Once the appraisers make their determination by completing the Award of Appraisers, the City's attorney must immediately prepare the Condemnation Report which includes the recommendation regarding whether to appeal the award to the District Court. Appeals must be filed within 30 days.

It is very important that items agreed to by the City in call reports or easement agreements make it on the plans or special provisions for communication to the contractor.

Other Related ROW Issues

Relocations:
Sometimes land needed for a public project is occupied. In such instances, it may be necessary to displace the occupants, who may include individuals, families, businesses, farms, or even nonprofit organizations.

The Uniform Act and U.S. DOT/FHWA regulations prescribe certain benefits and protections for persons displaced by public projects funded, at least in part, with federal money. Nebraska State Law covering Relocation Assistance, which closely follows the

Uniform Act, needs to be followed even if there is no federal funding in any aspect of your project. You can see Nebraska Rules and Regulations at the NDOR website. (http://www.nebraskatransportation.org/roway/relocate.htm)

Right of Entry

CAUTION! -- In exceptional circumstances, with the prior approval of the owner, the City may obtain a right of entry for construction purposes before executing an agreement. This should be done as a matter of last resort and this will not relieve the city from following the Uniform Act or going through any Right of Way steps.

Concluding Statement

It is the policy of the City of Lincoln that to the maximum extent feasible that all right of way issues are resolved prior to the project being advertised for construction.

It is recognized that there are rare circumstances that it may be in the public's best interest to allow for a project to move ahead without certain non-key tracts of right of way totally acquired, however there should be a direct discernable path and date in which those outstanding tracts will be completed.