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## **TxDOT Guidebook for Right-of-Way Valuations and Negotiations**

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# Table of Contents

<b>1. Introduction.....</b>	<b>1</b>
1.1 Purpose.....	1
1.2 Methodology.....	1
1.3 Organization.....	2
<b>2. Right-of-Way Acquisition Process.....</b>	<b>3</b>
2.1 Overview.....	3
<b>3. Valuation.....</b>	<b>7</b>
3.1 Overview and Purpose .....	7
3.2 Valuation Process .....	7
3.3 Guidelines and Best Practices for Valuation .....	9
<b>4. Negotiation.....</b>	<b>15</b>
4.1 Overview and Purpose .....	15
4.2 Negotiation Process .....	15
4.3 Guidelines and Best Practices for Negotiation .....	17
<b>5. Conclusion .....</b>	<b>23</b>
<b>References .....</b>	<b>25</b>



# 1. Introduction

## 1.1 Purpose

In fiscal year 1999, the Federal Highway Administration (FHWA, 2003b) reported that the federal government spent nearly one billion dollars on right-of-way (R/W) acquisition. Because valuations and negotiations can have such a large impact on a project's overall success, they are becoming particularly vital parts of the right-of-way acquisition process.

Successful R/W valuations and negotiations depend on three criteria: time management, cost containment, and a good relationship with the public. However, it is difficult to achieve all three objectives at once because of the complex nature of the process. While project plans, surveys, and construction have relatively finite timelines, condemnation proceedings often make property acquisition last longer than expected or desired (NCHRP, 2000). Furthermore, a series of complex statutes, rules, and regulations creates additional challenges. Given the significance of R/W acquisition and its numerous challenges, it is crucial to evaluate and undertake effective strategies for successful valuations and negotiations.

In order to facilitate effective R/W valuation and negotiation by TxDOT and its agents, this guidebook presents guidelines and documents recommended practices. Also, these guidelines are based on various reviews of the literature, research on the R/W process, analysis of databases, and interviews. They are intended for use by TxDOT's R/W agents and outside consultants.

## 1.2 Methodology

The guidelines and best practices were compiled and synthesized via the following steps:

- review of literature as well as pertinent laws and statutes;
- analysis of a property owners' satisfaction survey;
- interviews and surveys of TxDOT right-of-way personnel.

A review of existing literature and pertinent laws and statutes was carried out in order to categorize, compare, and assess R/W valuation and negotiation practices. In order to obtain all the necessary information, the research team analyzed numerous sources, including academic papers, official federal and state documents, reports, and laws.

Data from TxDOT's property owner's satisfaction surveys were analyzed. These surveys were conducted during the fiscal years of 2003 through 2006. A total of 1,063 owner satisfaction surveys were reviewed. Comments were categorized in order to identify examples of good and bad practices, and shed light on property owner perspectives.

Surveys and interviews with TxDOT right-of-way personnel were conducted, including the R/W administrators, agents, negotiators, appraisers, and appraisal reviewers. Personnel from two District offices were interviewed. As for the TxDOT right-of-way personnel survey, 18 of TxDOT's 25 District offices responded to the mailed survey. These interviews and surveys were designed to collect responses on common problems/issues, to learn recommended practices already in use, and to have opinions on recommended guidelines if implemented.

### **1.3 Organization**

This guidebook is divided into five chapters. Chapter 1 presents the project's the motivation, purpose, and methodology. Chapter 2 provides an overview of the R/W acquisition process.

Chapters 3 and 4 present the recommended guidelines for successful valuation and negotiation during the R/W acquisition processes, including a description of basic steps. Chapter 3 exclusively deals with guidelines and best practices in valuation while Chapter 4 addresses guidelines and best practices in negotiation. Additionally, strategies for avoiding costly schedule delays and for building public trust are given in both chapters.

Finally, Chapter 5 provides conclusions as well as summarizes the guidelines and best practices.

## **2. Right-of-Way Acquisition Process**

### **2.1 Overview**

R/W acquisition is part of the complex process of highway project development. The process begins with preliminary activities that include planning, collection of preliminary R/W and utility data, and request for release. After the preliminary actions have taken place, R/W project is released and the District offices are authorized to acquire the needed properties. Following an accurate valuation of the property to be acquired, the state department of transportation or local agency presents an offer to the property owner and initiates the negotiation process. If the owner accepts the offer, acquisition and, if necessary, relocation, takes place. However, if the owner rejects the offer after a number of negotiations, condemnation proceedings typically follow.

The purpose of this overview is mainly to present background information on the comprehensive and complex R/W acquisition process. According to the Real Estate Acquisition Guide for Local Public Agencies (TxDOT, 2004), the R/W acquisition process comprises five phases:

- Planning;
- Valuation (i.e., Appraisal);
- Negotiation;
- Property Management; and
- Relocation.

These steps also provide the outline for this overview. In this section, each of the R/W acquisition phases will be discussed in detail. And because these processes are governed by a number of laws and regulations, it is important to discuss related federal and state laws and statutes.

#### **2.1.1 Primary Laws for Acquisition and Relocation**

The principal law for R/W acquisition for federal projects is Public Law 91-646, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, which is also called the Uniform Act. This law governs all the R/W acquisition of all federally funded highway projects. Also, the Uniform Act protects property owners whose property and/or improvements are acquired, or who are displaced because of the activity of R/W acquisition (FHWA, 2001).

The Uniform Act consists of three sections (or titles). Title I, “General Provisions,” primarily deals with definitions. Title II, “Uniform Relocation Assistance,” mainly pertains to provisions for displaced persons or businesses. Title III, “Uniform Real Property Acquisition Policy,” governs acquiring real property for federal and federally assisted projects. The provisions of Title III encourage agencies to acquire real property through negotiation and, accordingly, to minimize the possibility of litigation (FHWA, 2001).

According to the Real Estate Guide for Local Public Agencies (LPAs) (TxDOT, 2004), the Code of Federal Regulations (CFR) is “a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal

Government.” In addition to the Uniform Act, 49 CFR Part 24 is the basic regulation pertinent to real property acquisition activities conducted as part of federally assisted projects.

Other than these federal statutes, state and local laws also govern public projects and program activities, including projects that do not receive federal funds. The Real Estate Guide for LPAs (TxDOT, 2004) identifies these principal laws as provided in the Texas Statutes, Transportation Code, Title 6, Chapters 201-250; and in the Property Code, Chapter 21. Moreover, other regulations support these statutes, such as administrative rules provided in the Texas Administrative Code (TAC), title 43, Part 1, Chapters 1, 2, 5, 6, 15, and 21 (TxDOT, 2004). All these federal and state laws greatly affect the process of valuations and negotiations. A brief description of each of the R/W acquisition stages will be discussed in relation to these laws and statutes in the following sections.

### **2.1.2 Planning**

Planning is the first phase of the R/W acquisition process and mainly involves environmental assessments, location and design studies, and public involvement activities. The laws require environmental assessments during the planning phase that primarily measure the social, economical, and environmental impacts of a project’s R/W acquisition and any relocation it might occasion. For instance, these assessments include determining the number of people or businesses displaced by the project, or the impacts on community services, wetlands, and wildlife habitat, etc. (FHWA, 2001).

Public involvement is as critical as the environmental assessment during the planning phase. The purpose of initial public involvement is to notify a community of the agency’s intentions and to communicate the necessity of a project. Moreover, in public forums, the people of affected communities can learn about a project’s possible social and environmental impacts, and they can voice their opinions on the project and on the R/W acquisition process. There are several avenues for such communication with the public: public meetings, newspaper, television advertisements, and letters. However, the degree of public participation can vary depending on the complexity or size of a project and its impact on a community (TxDOT, 2004).

### **2.1.3 Valuation**

The goal of the second phase, valuation, is to establish the amount of just compensation for a parcel by having the land appraised and the appraisal reviewed. Such valuation is the logical next step after the planning phase is complete. The Uniform Act requires calculating an amount that the agency believes to be just compensation. The Uniform Act also requires that the property should be appraised before an acquiring agency begins negotiations to acquire it. It also states that the amount defined in the approved appraisal should be the basis of the offer of just compensation. However, this appraisal requirement can be waived if a parcel is donated, or if the proposed parcel has a value below a pre-defined amount.

Once the appraisal report is prepared, it must be approved by a qualified reviewer. The purpose of the appraisal review is to ensure that the appraisal is complete, meet all requirements, and contains accurate information. If inaccuracies are identified, the reviewer should request their correction. Further description of the valuation phase is presented in Chapter 3 of this guidebook.

### **2.1.4 Negotiation**

The next phase is negotiation, the part of the process in which agencies make offers to property owners for acquisition of real property and improvements. Agencies also make payments for properties and notify property owners to vacate during this phase. If negotiation fails, the phase usually shifts to condemnation proceedings. The Uniform Act requires agencies to attempt to acquire real property by negotiation rather than eminent domain authority. The negotiation process will also be discussed later in this the guidebook.

### **2.1.5 Property Management**

In the property management phase of the acquisition process, clearing of the R/W takes place. This phase can be as time-consuming as the negotiation phase and may involve extensive project schedule delays. Other activities may also take place during this phase, such as assessments of future use of the excess properties (e.g., expansion of R/W). This phase is a process that requires a number of advanced skill sets, for example, time management, marketing, financing, etc.

### **2.1.6 Relocation**

Finally, in the relocation phase, residences, businesses, farms, and non-profit organizations are displaced due to federal or state projects designed for the benefit of the public. According to the Real Estate Acquisition Guide (FHWA, 2001), the relocation process can be divided into four parts. The first part, relocation planning, analyzes the location, size, and schedule of the displaced residents. Second, the Uniform Act requires that relocating residents are given general information on the project, notified of their eligibility for the relocation, and served with written notice of 90-day eviction. Relocated residents also have a right to obtain pertinent information, counseling, and advice from an advisory service provided by the agency. Finally, payments of just compensation must be made to the affected residents.



## 3. Valuation

### 3.1 Overview and Purpose

An appraisal is a professional opinion, usually written in report form, of the market value of a property, such as a home, business, or other asset whose market price is not easily determined. The purpose of appraisals in this context is to appraise land needed for public transportation purposes. Appraisals establish with reasonable certainty the amount of money the property owner is entitled to receive. The Texas Constitution permits the acquisition of private property for public use, but it stipulates that any such acquisition entitles the owner to just compensation. Just compensation is defined as the fair market value of the property. This market value typically does not include legal costs or other amounts such as relocation expenses.

Certain aspects must be determined before an appraisal can be ordered: agencies must outline what is to be appraised, the appraisal techniques and methods to be used, any legal engineering considerations, construction features, definition and date of value, and any property rights involved. Determining these factors before assigning the appraisal helps forestall any misunderstandings with appraisers and lessen the chances of misguided and unacceptable appraisals.

Acquiring agencies must develop and use, as appropriate, at least two appraisal formats: detailed and minimum. Moreover, agencies are encouraged to develop additional forms to meet their needs. Detailed appraisals must be prepared for all acquisitions except those which do not require in-depth analysis and presentation of relevant market information because of either their low value or simplicity.

### 3.2 Valuation Process

Following is a description of the four basic tasks of the valuation (i.e., appraisal) process:

- Conduct pre-appraisal contact;
- Assign appraisers;
- Establish just compensation; and
- Review appraisal report.

#### 3.2.1 Conduct Pre-appraisal Contact

Prior to parcel appraisal, there should be a pre-appraisal in-person meeting with any and all property owners. In this meeting, owners are provided information regarding the overall right-of-way acquisition process, the general type of facility or road to be constructed, and the appraisal procedure that will follow. A commitment must not be made as to value, nor should any offers be made before the approved values are received. During this meeting the property owner should be advised on distinguishing between *realty* and *personalty*. *Realty* is real estate property such as buildings and land. *Personalty* is personal property, that is, property other than real property consisting of things temporary or movable. Any potential controversies that may develop over the project should be addressed in this meeting to avoid future delays or setbacks. Determining whether an item is personalty or realty can be a challenge. As comprehended by the

state of Texas, the term “fixture” is used to indicate an item of personal property that has become so annexed to land or buildings that it has become a part of the realty.

### **3.2.2 Assign Appraisers**

Once the pre-appraisal contact has been made, an appraiser is assigned the task of determining the market value for each parcel. TxDOT right-of-way staff and fee appraisers hired by the Department of Transportation must be state certified or licensed by the Texas Appraiser Licensing and Certification Board. The ROW Division office must approve all staff and fee appraisers. It is the District’s responsibility to determine whether the appraiser assigned to the parcel is qualified to appraise the particular type of property in question.

### **3.2.3 Establish Just Compensation**

Once the fee appraiser has been assigned, the fair market value and just compensation are determined. The *fair market value* is based on an estimate of what a buyer would pay a seller for any piece of property and *just compensation* is a term used to mean a full and perfect equivalent for the property taken. The amount of just compensation will not be less than the approved appraisal amount. The approved appraisal must take into account the value of allowable damages and enhancements to any remaining property. This offer of just compensation may have to be updated or a new appraisal may be needed given certain situations, such as information provided by the property owner, material change in the property’s condition, or significant passage of time since the last appraisal. If the just compensation offer must be changed, the revised written offer must be sent to the property owner and the original offer is annulled.

### **3.2.4 Appraisal Report Review**

Once the completed appraisal report is received, the District office will review it to establish an approved value for the property. The review appraiser will examine the report for completeness, consistency in land values, variations in component values, the appraisal of any *remainders* (a parcel of real property an owner is left with after the partial acquisition of the owner’s property), compensability, and leased properties. Completeness of the report includes the verification of documentation and the determination of any errors or omissions. The consistency in land values for similar parcels should be maintained to assure fair and equal treatment for all parcel owners. When there has been more than one appraisal prepared for a parcel, the variations in component values are reviewed to identify major differences between appraisals. The appraisal of the remainder is reviewed with particular attention to the appraiser’s support for the value of the remainder after taking. The appraisal reviewer should have knowledge of elements of value that may be non-compensable, both with regard to the part taken and the remainder. Last of all, the appraisers’ proper consideration of a leasehold interest should be carefully checked by the reviewer as an appraisal of this type usually requires complicated appraisal techniques.

Upon a satisfied completion of the review, the review appraiser will recommend that the appraised value be approved. The approved value will then be used as the basis of the state’s offer to acquire property.

### 3.3 Guidelines and Best Practices for Valuation

Valuation is one of the initial steps in the process of acquiring a particular property. Its success depends on many aspects, such as quality of appraisers and appraisal reviewers, property owner involvement, and cost/time efficiency. For a successful valuation process, a number of guidelines and best practices are outlined.

**Guideline 1: Regularly train, monitor, and evaluate the expertise of right-of-way staff, fee appraisers, and review appraisers.**

**Recommended Practice 1.1: Offer opportunities for right-of-way staff, fee appraisers, and review appraisers to periodically attend training courses in order to ensure understanding of laws and procedures relating to right-of-way valuations.**

Such professional development supports an acquisition team’s ability to quickly produce high-quality appraisals. The FHWA’s National Highway Institute, the International Right-of-Way Association, and many professional appraisal organizations sponsor appraisal courses and technical assistance workshops for R/W fee appraisers and reviewers.

**Recommended Practice 1.2: Recommend that right-of-way staff, fee appraisers, and review appraisers take refresher courses periodically or develop an ongoing employee development program in-house.**

Frequent seminars within appraisal sections can be of great benefit in sharpening interest and improving proficiency. Such seminars can be tailored the specific needs of a department to maintain expertise levels and work on problem areas.

**Recommended Practice 1.3: Monitor the time required to deliver the appraisal reports.**

The timely delivery of appraisals is critical for expediting the right-of-way acquisition process. Also, establish monitoring procedures, especially when using fee appraisers and reviewers.

**Recommended Practice 1.4: Assign projects according to appraisers’ experience.**

Projects that are more complex or more difficult to appraise should be assigned to appraisers that have more experience. The purpose of this practice is to reduce errors by avoiding mistakes in complicated situations. Requirements regarding the number of complex appraisals completed each year may be used to determine and maintain high expertise levels and professionalism.

**Recommended Practice 1.5: Evaluate appraisers periodically on their performance.**

The purpose of this practice is to ensure the quality and continual training of agency appraisers. The frequency of with which these evaluations are performed as well as specific procedures should be determined by districts offices (e.g., annually, bi-annually, quarterly, etc).

In TxDOT, this procedure has been established and implemented thru forms ROW A-19B Guide for Appraiser Assignment, form A-19A Evaluation of Appraiser (per parcel) and form ROW A-19 Annual Review.

**Recommended Practice 1.6: Emphasize that TxDOT is public-service driven rather than profit driven.**

Public satisfaction and good rapport with property owners are paramount to TxDOT. Also, a good relationship with property owners helps build confidence in the agency and encourages empathy.

***Practices to Avoid:***

- **Use of inadequately trained staff.** Routinely using inadequately trained R/W staff on parcel valuations may affect a project in many ways. It can cause costly delays, damage the agency's reputation, and even create bigger problems by not executing all the legally required activities. This practice may also affect the quality of the appraisal reports, which in turn may cause considerable time delays in the appraisal review process, or leave property owners unsatisfied with just compensation estimates. One NCHRP study (NCHRP, 2000) reported that inadequately trained staff presents one of the biggest challenges to reducing the project delivery time.

**Guideline 2: Involve and contact the property owner personally early on in the acquisition process.**

**Recommended Practice 2.1: Encourage right-of-way staff and fee appraisers to meet property owners in person.**

Meeting property owners personally increases the chance for better valuations and negotiations by creating an open channel of communication; good communication fosters good relationships with property owners. If property owners feel that they can trust the appraiser and that this person is available to help and answer questions, the appraisal process may be completed with little or no complication.

**Recommended Practice 2.2: Ask the property owner (or the owner's designated representative) to accompany the appraiser during the inspection of the property.**

The purpose of this practice is to ensure that the owner has the opportunity to advise the appraiser of any features of the property that might affect its valuation. The owner's familiarity with the project is valuable in this process because the owner can indicate any elements of the property that might not be obvious to the appraiser. This requirement is usually fulfilled by the appraiser typing in the name of the landowner or representative and certifying, on page one of the appraisal form, to the fact that the offer to accompany was afforded.

**Recommended Practice 2.3: Explain to the property owner the offer to purchase the property, including the appraisal basis for the offer and the agency's real property acquisition policies and procedures.**

The better the understanding property owners have of the reasons behind offers that are made, the fewer chances there are of them not accepting the offer.

**Recommended Practice 2.4: Advise the property owner of the appropriate personnel to contact for specific technical or engineering information.**

It is advisable for acquisition personnel not to attempt to answer technical or engineering questions. This practice avoids misunderstandings and limits the communication of incorrect information to the property owners; misinformed property owners are more likely to refuse offers and create acquisition delays.

***Practices to Avoid:***

- **Neglecting to meet in person with property owners.** Because of the shortage of qualified appraisers and appraisal reviewers, appraisers often have workloads that make it difficult for them to meet property owners in person. However, in-person meetings greatly ease the process.
- **Staff answering questions outside their areas of knowledge.** Property owners are sometimes misinformed, what with different people telling them different things about the property and the project. For example, an issue as simple as the responsibility for the construction of a fence can become confused, with the property owner not sure whether the agency will build it or not. Miscommunication may damage the reputation of the agency or relationships with property owners.

<p><b><u>Guideline 3:</u> Streamline the valuation process to maximize production time, cost, and efficiency benefits.</b></p>
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**Recommended Practice 3.1: Prioritize parcels according to complexity/appraisal difficulty and conduct appraisals for the most complex parcels first.**

This practice guards against leaving the potentially most time-consuming parcels for last, dedicating to them the necessary time and attention at the outset of a project. It calls for working on the simple parcels last.

**Recommended Practice 3.2: Provide appraisers with pre-appraisal information.**

This practice saves time for the appraisers as they will not have to search independently for relevant information that is readily accessible through the District office or acquiring agency.

**Recommended Practice 3.3: Obtain and store electronic copies of appraisal reports.**

This practice provides records for future reference by appraisers and reviewers in similar parcel situations. Also, create a user-friendly automated database system that makes information easily accessible. Such database applications may be shared to track the status of the right-of-way process, and different offices can share this information.

**Recommended Practice 3.4: Reduce the time lapse between the appraisal valuation date and the initiation of negotiations.**

Offers to property owners should be made within a few days of valuation. In order for the review appraisers to have adequate time to complete their review, appraisers should submit their reports shortly after the valuation date. This practice enables the negotiation to start out by making a timely offer to the property owner.

**Recommended Practice 3.5: Utilize most appropriate technology to expedite appraisal production.**

This practice improves speed and provides for accuracy in data collection. For instance, the use of cell phones and pagers enhances communication between staff in the field and the central office, improving service and availability, and thus reducing the need for additional field trips.

***Practices to Avoid:***

- **Leaving complex appraisals till the end of the project.** Outsourced appraisers may sometimes prioritize easier appraisals, leaving the more difficult ones for last, especially when the same fee applies to all types of parcel. Properties that are difficult to appraise tend to consume more time than easier ones. If these properties are valued at the end of the time schedule window, this practice can consume valuable schedule floats and may cause project delays.
- **Conducting appraisals before R/W plan is finalized.** Late design and R/W plan changes and revisions affect and slow down the process. Even a small R/W plan change can trigger a significant change to the acquisition of a single property. In such cases, the appraiser will have to perform redundant and time consuming activities such as, re-doing the valuation, updating information to property owners, and executing a new appraisal process from the beginning.

<p><b><u>Guideline 4:</u> Simplify value determinations, reporting protocols, and review procedures.</b></p>
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**Recommended Practice 4.1: Streamline appraisal review procedures.**

A short form review should be developed for low value and uncomplicated appraisals, and the reviewer should be involved in the project scope meetings and in pre-acquisition meetings. On commercial properties, the inspections for appraisals and relocation can be combined. These practices expedite the acquisition process.

**Recommended Practice 4.2: When property values increase or decrease because of the proposed public improvement, the changed value must be disregarded when estimating the ‘before’ value but not in estimating the ‘after’ value of the property.**

The difference between the value of the remaining property immediately before the acquisition and the value of the same remaining property after the acquisition will be the indicated damage or enhancement.

**Recommended Practice 4.3: Encourage agents, when appropriate, to use the Value Finding Report form to reduce appraisal time and costs, instead of a Real Estate Appraisal Report.**

On an inexpensive parcel having a value of \$25,000 or less, the use of the Real Estate Value Finding Report is acceptable, provided the compensation does not include damages to the remaining property other than for items measurable by *cost-to-cure*. *Cost-to-cure* is the cost of

solutions that remedy impacts to the property and its improvements created by a public project. Should there be any damages that cannot be simply documented as cost-to-cure, a Real Estate Appraisal Report will be necessary.

***Practices to Avoid:***

- **Straying from simple or established procedures.** Complicated and lengthy valuation procedures can cause inconsistency among appraisal reports. Also, fee appraisers can resist the introduction of new formats, which can cause problems and delays in the process.
- **Providing low-quality appraisal reports.** Because the appraisal report is the basis of determining reasonable estimates of just compensation, property owners can feel resentful if the report is of a poor quality.

**Guideline 5: Inform property owners at each step of the entire acquisition process.**

**Recommended Practice 5.1: Furnish the property owner with information on the overall anticipated timing of the acquisition process, the general type of facility to be constructed, and the appraisal procedures which will follow.**

The more information provided to the property owners, the fewer the questions and delays that may occur.

**Recommended Practice 5.2: Share and discuss the preliminary R/W map for the project with all property owners.**

Any discrepancies in the map should be noted and changed, if necessary, before appraisal assignments are issued. It should be emphasized that these maps are preliminary and that subsequent changes may occur.

**Recommended Practice 5.3: Inform property owners on the method for selecting qualified appraisers and estimating values.**

If the property owner knows the process and feels like part of it, he/she will be more willing to give helpful information to the appraiser and this will result in better appraisals. Also, request information from the property owner, which can be helpful to the appraiser.

**Recommended Practice 5.4: Identify real property and personal property prior to proceeding with the appraisal.**

Solve any uncertainties of whether or not an item is personalty or realty before the appraisal report is completed and just compensation determined. Advise the owner of the advantages and disadvantages of declaring items as personalty vs. realty. This practice reduces time-consuming confusion and/or subsequent alterations by the property owner.

***Practices to Avoid:***

- **Neglecting to keep property owners updated.** Property owners may feel alienated and resentful towards the appraiser because they do not understand the acquisition

process. This situation can be avoided by keeping the property owners informed of project status.

## **4. Negotiation**

### **4.1 Overview and Purpose**

During the R/W negotiation process, agencies make offers to property owners for acquisition of real property and improvements. Agencies also make the payments for the properties and notify the owners to vacate.

The TxDOT Real Estate Acquisition Guide for Local Public Agencies (TxDOT, 2004) illustrates the basic steps for negotiating process. After the completion of the appraisal and appraisal review for the property to be acquired, the negotiation is initiated with a written offer to the owner. A copy of the appraisal is included in the delivery package, along with an offer to purchase the property for an amount that is not less than the approved appraised value. It is important to determine the date of delivery because it establishes eligibility for relocation assistance, which is the phase following negotiation.

If the offer is accepted by the property owner, the payment is arranged and the process proceeds to closing, or relocation assistance follows if necessary. Either way, the negotiation process is completed. However, if the final offer is declined after several negotiation attempts and if the administrative settlement process has been denied, the acquisition process moves to the next phase: condemnation proceedings.

In taking a needed property, several legal requirements must be met. The Uniform Act states that the agency should attempt to acquire the real property by negotiation rather than condemnation authority. Because the negotiation process is a complex matter governed by a number of laws, such as the Uniform Act and the Code of Federal Regulations, it is worthwhile to further discuss the required negotiation steps in more detail.

### **4.2 Negotiation Process**

Following is a description of five basic aspects of the negotiation process: present written offer, initiate negotiation contacts, eliminate coercive action, conduct administrative settlements, and acquire uneconomic remainders.

#### **4.2.1 Present Written Offer**

Once the amount of just compensation has been determined, the Uniform Act and Texas state law require a prompt written offer for the full just compensation amount to the property owner. The state requires certain information accompany the offer, such as a statement of the amount offered, a description of the R/W parcel to be acquired, a copy of the appraisal report, and an explanation of the administrative settlement process (TxDOT, 2004).

#### **4.2.2 Initiate Negotiation Contacts**

After the written offer is sent to the property owner, or sometimes even before that, the agency contacts the owner or the owner's designated representative. The Uniform Act requires an acquiring agency to make "all reasonable efforts" to personally contact each real property owner and to schedule an appointment at a convenient time and place. The purpose of this contact is to explain the negotiation process to the property owner as well as the responsibilities

of both the acquiring agency and the property owner (FHWA, 2001). Although the requirement seems quite subjective, the Uniform Act and the state law emphasize the importance of contacting the owner in person as a way of maintaining a high level of public trust in the fairness of the acquisition process.

#### **4.2.3 Eliminate Coercive Actions**

During the numerous negotiation contacts with the property owner, it is also critical to conduct negotiations without any force or coercion. The Uniform Act mandates that an agency not “advance the time of condemnation, or defer negotiations or condemnation or the deposit of funds with the court, or take any other coercive action in order to induce an agreement on the price to be paid for the property.”

#### **4.2.4 Conduct Administrative Settlements**

If an initial offer is declined by the property owner, an administrative settlement can be conducted as an alternative to seeking agreement on the amount of just compensation. According to the Uniform Act, this process occurs prior to the agency’s invocation of its condemnation authority, and typically the amount is moderately more than the agency’s approved offer of just compensation. Furthermore, when federal funds are required for acquisition costs, the agency must provide a written justification providing all available information to support such a settlement, including trial risks.

The TxDOT ROW Manual Vol. 2 (2006) explains that, in order to initiate the process, “a written counteroffer is required and must include a property owner’s signed proposal for full settlement setting forth a specific value with information to support the proposal, including a copy of the owner’s appraisal report on the property, if applicable. This counteroffer, or written request from the property owner for an extension of time, must be received in the District no later than thirty days from the property owner’s receipt of the initial offer letter and any counteroffers/administrative settlement requests or requests for extension of time received after the expiration of thirty days will not be considered. The counteroffer will be reviewed by a District administrative settlement evaluation team that will recommend approval or disapproval. If the counteroffer is in excess of \$50,000 per parcel (total compensation proposed to be paid), the District Right of Way Administrator will forward to the ROW Division, for its approval or disapproval, all District evaluation team recommendations to accept the counteroffer. A final offer letter at the original approved value shall be sent within 5 business days if:

- the 30 days have passed, provided no counteroffer or written request for extension of time has been received within said time;
- the administrative settlement is not approved; or
- the property owner decides to reject an approved administrative settlement.

The property owner will be notified by the District of the agency’s decision. If improvements are retained, the retention values will be subtracted from the total settlement amount.”

In addition, the TxDOT ROW Manual Vol. 2 (2006) states that “the District administrative settlement team will consider all timely submitted administrative settlements and will 1) approve or disapprove when the proposed amount of total compensation is \$50,000 or less per parcel, or 2) disapprove when the proposed amount is over \$50,000 and is recommended by the District for disapproval. The Director of the ROW Division or his designee will consider

all proposed administrative settlements above \$50,000 per parcel which the District recommends for approval”. If the administrative settlement counteroffer is rejected, then the process shifts to condemnation proceedings.

#### **4.2.5 Acquire Uneconomic Remainders**

In cases in which partial property acquisitions leave the owner with an *uneconomic remnant* (parcel of real property in which the owner is left after the partial acquisition of the owner's property, and which the agency has determined has little or no value or utility to the owner), the Uniform Act requires the agency to make an offer to acquire this remainder along with the portion of the property needed for the project. Moreover, Transportation Code, §203.0521 gives TxDOT the statutory authority to acquire uneconomic remainders. For TxDOT to acquire the uneconomic remainder, this law requires that the property owner must consent to the acquisition. Furthermore, the Texas Transportation Commission must determine that an uneconomic remainder (1) has little or no value or utility to the property owner, or (2) that the entire tract could be acquired for substantially the same compensation as the partial tract, including damages to the remainder property (TxDOT, 2005b).

### **4.3 Guidelines and Best Practices for Negotiation**

The negotiation phase is a critical aspect of right-of-way acquisition, as successful negotiations can benefit TxDOT by reflecting fair market prices, building good rapport with landowners, and reducing project duration and cost. For successful negotiations, the following guidelines and recommended practices for the process are outlined.

<p><b><u>Guideline 1:</u> Frequently and regularly contact property owners in person to promote confidence in the agency and to reduce delays and negotiation costs.</b></p>
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**Recommended Practice 1.1: Encourage agency personnel to perform in-depth interviews with property owners discussing issues such as the impact of the project, property usage by the owner, etc.**

Interviews may support expert analysis of potential damages on the property. Information from the appraisal report, the interview, and the assessment of the experts help establish a comprehensive estimate of just compensation. Also, presenting this estimate to property owners will assist the negotiation processes.

**Recommended Practice 1.2: Conduct an “open-house” event at public meetings and hearings.**

The potential sellers may gain a better understanding of the project by attending an agency-sponsored event explaining to the public the project’s R/W acquisition process. At this event, agency personnel should make clear which properties the agency would like to acquire, and the potential impact of the project on the area after the acquisition takes place. Also, an R/W agent should be present at the event to answer questions. This type of good communication with property owners is known to be effective in cultivating public trust.

***Practices to Avoid:***

- **Failing to provide open communication.** In many cases property owners were unsatisfied with the amount of contact, complaining that the agent was too difficult to contact, or was not available to meet in person. These kinds of difficulties in communicating with owners may cause delays in the negotiation process. Such avoidable impediments were also cited by property owners as unsatisfactory.

**Guideline 2: Conduct simplified and efficient negotiation processes, including the title acquisition process, in order to minimize schedule delays of the negotiation process.**

**Recommended Practice 2.1: Require negotiators to meet owners prior to the initiation of the negotiation process.**

By meeting the property owners before negotiation begins, activities such as discussing the project, the R/W acquisition process, and justification of valuation results may have the benefit of reducing the later number of questions, calls, and visits. By investing time at the beginning of the process, the negotiator can reduce the overall time and cost of the process.

**Recommended Practice 2.2: Use a streamlined process to provide immediate payment to property owner for low-valued property rights.**

Property owners often complain about how long it takes the agency to make the payment for a property. This complaint echoes the more general criticism about the length of the entire acquisition process. Using a simplified process to make payments for low-valued properties will significantly reduce the time needed for the negotiation process without degrading the quality of the transaction.

**Recommended Practice 2.3: Use sketch maps, if a final map is pending, to accompany the offer on administrative settlements of just compensation.**

In a complicated R/W acquisition project, many plan changes occur. These otherwise trivial changes are known to cause delays in a number of cases. Rather than waiting for the final map to be completed and authorized, send a sketch map along with the offer to minimize project delays.

**Recommended Practice 2.4: Manage the right-of-way negotiation process by keeping track of key milestones of the negotiation process.**

Many significant milestones exist throughout the negotiation process. If the negotiation proceeds without completing each of those activities, the negotiation process will likely be delayed. Using a checklist or other means to manage the negotiation process will allow agents to execute negotiation without missing keystone activities.

**Recommended Practice 2.5: Coordinate plans and schedules with title companies to reduce time spent waiting for title acquisition.**

In many cases, title companies are clogged with high workloads, which make for considerable delays in acquiring the title. This delay can become so significant that it can often

affect the next phase of the R/W acquisition. This problem can be minimized by coordinating R/W acquisition plans and schedules with the title companies early on in the negotiation process.

**Recommended Practice 2.6: Explore the use incentive programs for early completion of the negotiation process (e.g., incentive payments for early completion and penalties for late completion).**

This recommendation may provide consultants with more motivation to acquire the property. By reducing time for acquisition, management overhead costs can be reduced; the overall project schedule can be met. However, it is important to emphasize that getting the landowner to the point of signing a deed or not is only one step toward filing the deed at the courthouse-which is the end result we are looking toward. Other major issues that are involved that the DOT does not have total control over are: the excessive amount of curative work that is often required to get a clear title, the payment process, and the title companies that are not in DOT's schedule.

**Recommended Practice 2.7: Establish the negotiating party (or agent) prior to the completion of the appraisal process (i.e., during project development or during the appraisal preparation).**

Appointing a negotiating party early on in the project is important because the agent may be able to develop a better understanding of the owner and of the minor issues that could possibly cause a major dispute on the property value.

***Practices to Avoid:***

- **Using overly complicated processes.** Requiring unnecessary steps for acquiring low-valued parcels will extend the time for negotiation and may also frustrate property owners. As stated, one of the major complaints from property owners concerns negotiation delays and generally slow processes.

<p><b><u>Guideline 3:</u> Encourage negotiators to execute negotiations in a manner that builds good rapport with property owners and that increases owners' confidence in the agency.</b></p>
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**Recommended Practice 3.1: Require negotiators to present and discuss the offer in person.**

Meeting face-to-face with property owners can contribute to successful negotiations in a number of ways: more information can be obtained from the owner about the property, increasing the chance for better quality appraisal; explaining the payment to the property owner during negotiation is easier in person; and a good relationship with the owners is more easily established in face-to-face meetings. These effects will all have a positive impact on the negotiation process.

**Recommended Practice 3.2: Emphasize the importance of getting to know the property owner at the outset of the negotiation process. Encourage agents to have an introductory conversation before beginning the negotiations.**

People tend to have less difficulty in discussing matters when both parties share the same interests, hobbies, or belong to the same social organization, etc. Therefore, it is important to obtain background information on the property owner before the beginning the first contact. It is also wise to have an informal opening conversation with owners to put the owner at ease and to cultivate his/her trust in the agent.

**Recommended Practice 3.3: Furnish each property owner with a folder that includes comprehensive information related to the project.**

The folder may consist of the written offer of just compensation, a copy of the final appraisal report, plans/maps of the area to be acquired, legal descriptions, and other pertinent information.

***Practices to Avoid:***

- **Neglecting diplomacy in negotiations.** The negotiation process is impeded when negotiators do not keep property owners up to date on the status of the process, or when they are too aggressive at the first meeting. When negotiators are impersonal and overly aggressive, property owners tend to view them as discourteous and unprofessional.
- **Involving too many agency staff in public interactions.** Property owners may lose their trust in the process if they are forced to deal with too many different representatives of the agency. For property owners, it is better to have smaller number of people to interact with throughout the acquisition process.

<p><b><u>Guideline 4:</u> To the greatest extent possible, minimize the possibility of proceeding to condemnation.</b></p>
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**Recommended Practice 4.1: Give the property owner's file to a condemnation specialist or a legal expert before entering the condemnation proceedings in order to assess risks and to determine whether to enter into litigation.**

If an agreement is not reached after the final offer from the agency, generally the acquisition process must enter condemnation proceedings. However, a number of litigation cases can be avoided after careful review of all the documents by experts. It is important to ensure that all possibilities are carefully considered by allowing a condemnation specialist or a legal expert to review all the property owner's files before finally entering condemnation proceedings.

**Recommended Practice 4.2: Encourage negotiators to assist property owners in preparing and negotiating a counteroffer.**

When property owners feel that the amount for just compensation is insufficient, they are often willing to present a counteroffer. However, in numerous cases, the owners have difficulty preparing a proper counteroffer because it involves gathering all relevant information and presenting it professionally. Some owners complain that the thirty-day period allowed to them to present their counteroffer is too short. In many cases, these owners feel so frustrated that they opt instead bring the case to litigation. If the negotiator can assist the property owners in preparing a suitable counteroffer, the acquisition may not lead to time-consuming condemnation proceedings.

Moreover, offering a guidebook or providing an example counteroffer to property owners can be even more valuable.

***Practices to Avoid:***

- **Failing to support property owners' counteroffer efforts.** As stated, some property owners consider the TxDOT time limit on counteroffer insufficient, and thus enter litigation proceedings immediately after rejecting the agency's offer of just compensation. Many owners are not aware that this time limit can be extended if a request is made in writing to the agency.

**Guideline 5: Emphasize the significance of providing property owners not only with legally required information but also with any pertinent information that may enhance public trust.**

**Recommended Practice 5.1: Ensure that all information required by law is provided to the property owner when delivering the written offer to initiate the negotiation process.**

According to the TxDOT Right-of-Way Acquisition Manual (TxDOT, 2005b), Texas law requires as a minimum the inclusion of the following items in the written offer: (1) statement of the established amount believed to be just compensation, including damages; (2) description of the R/W parcel to be acquired; (3) copy of the appraisal report as a basis for justification of the amount offered, and (4) description of the administrative settlement process. These items are statutorily mandated and must be provided.

**Recommended Practice 5.2: Provide notice to property owners of the intent to acquire the property, the function of the acquisition, the agency's need for the property, the possible impact of the improvement on the property, the capability of the agency to accomplish the project, the right to donate the property to the agency, and the owner's legal protections.**

Providing this information to property owners can make the negotiation process smoother and save time by giving the owner a full understanding of the project and by engendering his or her good faith in the agency.

***Practices to Avoid:***

- **Not providing lay-friendly information.** Materials provided to property owners can be too technical and difficult to understand, thus confusing owners about the project, the design, the impact of the property after acquisition, and damages. When providing documents explaining the project, the words must be concise and easy to understand. Take into account that the objective is for property owners to have a full understanding of the project and the intention of the agency.
- **Neglecting to keep property owners updated.** If the status of the negotiation process changes after the first notice has been provided to property owners, the negotiator must keep the owner up to date with new information. When property owners feel they have not been updated and have been left out of the negotiation process, they tend to lose trust and withdraw from the process.



## 5. Conclusions

The right-of-way acquisition process is becoming more complex and costly. In addition, its impact on public is rising. Valuations and negotiations play critical roles in the acquisition process. While there have been previous studies on best practices for right-of-way acquisition at the federal level, research has not focused on the unique legal, environmental, and social characteristics of individual state acquisition processes. Moreover, because Texas acquisition statutes are unique, it is important to identify the best practices for successful valuations and negotiations.

This study has filled this gap by employing various methods. Literature and legal reviews, database analysis, interviews, and surveys were all used here to identify problems experienced by property owners and R/W agencies, the various practices conducted by different TxDOT District offices and states departments of transportation, and the applicability of best practices for Texas conditions.

Researchers synthesized all the information and are presenting in this guidebook the recommended guidelines for valuation in Chapter 3. The main recommendations for improved valuation include training right-of way staff and consultants, including property owners early on in the process, streamlining value determinations and procedures, and informing property owners of project status. These guidelines also are supported by detailed best practices and practices to avoid.

As for negotiation, a description of the negotiation process was presented in Chapter 4 along with recommended guidelines. These recommendations include promoting better communication, streamlining the negotiation process, building good rapport with property owners, avoiding litigation, and providing required information to the property owners. In this section, too, the guidelines were followed by a set of best practices and practices to avoid.

Focusing on two phases of the R/W acquisition process at both the federal and state levels, this research fills an important gap. The application of these best practices, for TxDOT's valuation and negotiation process, is in service to the larger goal of accomplishing successful R/W acquisition across all steps of the larger transportation design and development process.



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