

Memorandum

Date: November 10, 2022

To: Statewide Real Estate Services and Mega Programs

From: Heather Lindstrom, Acquisition Program Manager
Headquarters Real Estate Services

Subject: Early and Advance Acquisition and the Use of Eminent Domain

The purpose of this memorandum is to (1) establish the basis for a revision to the WSDOT's Right of Way Manual regarding the use of eminent domain for certain early and advance acquisitions as authorized by federal regulations and, to (2) authorize the immediate use of eminent domain in certain early and advance acquisitions in advance of the revisions to WSDOT's Right of Way Manual, provided such acquisitions are undertaken consistent with federal regulations.

Effective immediately, WSDOT may use eminent domain in certain early and advance acquisitions in a manner consistent with federal regulations, notwithstanding the prohibition set forth in the current version of Chapter 6-3 of WSDOT's Right of Way (ROW) Manual.

Chapter 6-3 of the current ROW Manual and 23 CFR 710.501 describe the four methods of early acquisition and two methods of advance acquisition. The ROW Manual currently prohibits the use of eminent domain in all methods of early and advance acquisitions. (See 6-3.2 and 6-3.3.).

Under 23 CFR 710.501, the only method of early acquisition for which eminent domain may **not** be used is federally funded early acquisition. The use of eminent domain in 23 CFR 710.503 is allowed for the two methods of advance acquisitions - protective buying and hardship acquisition, however, additional requirements must be satisfied. (See Right of Way Manual Section 6-3.3). The purpose of the guidance set forth herein and the future revisions to the ROW Manual is to align WSDOT's early and advanced acquisition practices with federal law.

Prior to proceeding with any early or advance acquisition, WSDOT staff should consider a variety of other factors, including but not limited to the following:

- The acquisition must comply with all the mandatory conditions set forth in the Right of Way Manual Chapter 6-3.2.
- For early or advance acquisitions under the threat of eminent domain, WSDOT must be able to prove public use and necessity for the real property being acquired.
- The acquisition cannot influence the environmental review process.
- Environmental Site Assessment (hazardous waste) must be completed on the specific parcel prior to acquisition. (Updates to the Design Manual, Environmental Services Manual and the Right of Way Manual are forthcoming to identify the scope of the Environmental Site Assessment).
- If the property involves a relocation, a relocation plan must be completed and approved prior to the early acquisition.
- If WSDOT acquires a temporary easement through the use of early or advance acquisition, WSDOT must ensure that the duration of the easement is consistent with project timelines and must compensate the owner for the entire duration of the easement not just the construction period.
- Property management considerations, including but not limited to, maintenance costs for the property prior to actual use, displacee lease, and the need to dispose of property acquired that is surplus to project needs.

Based on these factors, and other factors specific to the parcel or project, an informed decision can be made to move forward using early or advanced acquisition.

Approval by the Acquisition Program Manager is required to proceed with any early or advanced acquisition. Generally, FHWA prior approval of the use of early acquisition is not required, however there may be circumstances that necessitate prior approval by FHWA. This may include, but is not limited to, projects with a federal nexus. If there are questions of whether the project has a federal nexus, confirm with the project office, HQ RES and/or FHWA. Any requests for advance acquisition for a federal project must be approved by FHWA. This action cannot be assumed by the State. All required approvals to proceed with early or advance acquisition shall be documented in the acquisition parcel file.

Condemnation:

In the event WSDOT fails to acquire the property through negotiation and the environmental review of the preferred alternative for the project is not yet complete, the decision to proceed to final action and condemnation will require approval of the Acquisition Program Manager and by the Attorney General's Office.

RCW 47.12.180 provides that real property cannot be condemned in advance of "programmed construction" and "until the department has complied with hearing procedures required for the location and relocation of the type of highway to be condemned." To determine if construction has been "programmed" for a project staff should consult the current Statewide Transportation Improvement Program (STIP) and confer with WSDOT's Capital Program Development and Management (CPDM) staff. Reference to compliance with the "hearing procedures" in RCW 47.12180 refers to the hearings required to establish a limited access highway under RCW

47.52.133. Region Real Estate Services or the project right of way lead for those projects where the Region is not the lead must confirm that construction funding has been programmed and that limited access hearing procedures have been completed before the parcel may be considered for condemnation.

Right of Way Manual:

Chapters 6-3.2 and 6-3.3 of the ROW Manual will be updated to provide that WSDOT Real Estate Services may use eminent domain in certain early and advance acquisitions in a manner consistent with federal regulations and state law as part of Real Estate Services' next scheduled manual revision.

Early Acquisition (EA) Options & Requirements

(23 CFR 710.501)

Acquiring ROW Options	Require NEPA Decision	Allow 4F Properties	Start Acquisition	Request Reimbursement/Credits	Comply w/ Federal Law*	Subject to Condemnation	Requirements
1) State-funded early Acquisition without Federal Credit or Reimbursement 23 CFR 710.501(b) 23 USC 108(c)(1)	NO	No, if the State wishes to maintain Federal eligibility for future Federal assistance on any part of the transportation project.	When legally permissible by State Law.	N/A	Yes, if the project maintains Federal eligibility.	YES, if State law allows	A State may carry out early acquisition entirely at its expense. However, a State may maintain eligibility for future Federal assistance on a project. To maintain eligibility, early acquisition must comply with the following requirements of 23 CFR 710.501(c)(1)-(5): <ul style="list-style-type: none"> • Property lawfully obtained by the State agency; • Not 4F property; • Acquisitions and relocations comply with the Uniform Act; • State agency complies with Title VI of the Civil Rights Act; • FHWA concurs with the State that the Early Acquisition did not influence the NEPA decision for the proposed project including: <ul style="list-style-type: none"> ○ The need to construct, ○ The consideration of alternatives, or ○ The selection of design or location.
2) State-funded Early acquisition eligible for future credit 23 CFR 710.501(c)	NO	NO	When legally permissible by State law.	Request credit for the portion of the property after incorporated in the Federal-aid project	YES	YES, if State law allows	<ul style="list-style-type: none"> • Property lawfully obtained by the State agency; • Not 4F property; • Acquisitions and relocations comply with the Uniform Act; • State agency complies with Title VI of the Civil Rights Act; • FHWA concurs with the State that the Early Acquisition did not influence the NEPA decision for the proposed project including: <ul style="list-style-type: none"> ○ The need to construct, ○ The consideration of alternatives, or ○ The selection of design or location; • Property is incorporated in the project to which the credit will be applied; and • The amount of the credit may be current fair market value <u>or</u> historic acquisition cost to acquire; however, this credit must be applied consistently within the project. 23 U.S.C. 323(b)(2).
3) State-funded Early Acquisition Eligible for future reimbursement 23 CFR 710.501(d) 23 USC 108(c)	NO	NO	When legally permissible by State law.	After NEPA is completed and real property interests are incorporated in a Title 23 project and all applicable requirements are met.	YES	YES, if State law allows	<ul style="list-style-type: none"> • Property lawfully obtained by the State agency; • Not 4F property; • Acquisitions and relocations comply with the Uniform Act; • State agency complies with Title VI of the Civil Rights Act; • FHWA concurs with the State that the Early Acquisition did not influence NEPA for the proposed project including: <ul style="list-style-type: none"> ○ The need to construct, ○ The consideration of alternatives, ○ The selection of design or location; • State has a mandatory, comprehensive, and coordinated land use, environmental, and transportation planning process under State law, and the Governor has determined in advance that the acquisition is consistent with the State transportation planning process; • The State actually selects the alternative for which the real property interest is acquired pursuant to NEPA; • Prior to approval for Federal participation, NEPA is completed; and • Reimbursement is based on the usual costs to acquire—23 CFR 710.203(b)(1).

<p>4) Federally funded Early Acquisition (Stand-alone project)</p> <p>23 CFR 710.501(e) 23 USC 108(d)</p>	<p>YES, NEPA decision required for the early acquisition, stand-alone project only (not the transportation project).</p> <p>(Usually a CE)</p>	<p>NO</p>	<p>After NEPA is complete for the Early Acquisition Project</p>	<p>This is a reimbursable, stand-alone, Federal-aid Project based on FHWA authorization to proceed with acquisition</p>	<p>YES</p>	<p>NO</p>	<ul style="list-style-type: none"> • State certifies and FHWA concurs that the following requirements have been met: <ul style="list-style-type: none"> ○ State has authority to acquire under State law; ○ Is for a Title 23 eligible transportation project and does not involve 4F properties; ○ Will not cause significant adverse environmental impacts as a result of the EA project or from cumulative effects of multiple EA projects; ○ Will not limit the choice or otherwise influence the NEPA decision of FHWA; ○ Will not prevent the lead agency from making an impartial decision as to alternatives; ○ Is consistent with the State transportation planning process under 23 U.S.C. 135; ○ Complies with other applicable Federal laws (including regulations); ○ Will be acquired through negotiation, without the threat or use of condemnation. ○ Will not reduce or eliminate relocation benefits under the Uniform Act and Title VI of the Civil Rights Act; ○ The Early Acquisition project is in the Transportation Improvement Plan; and ○ NEPA for the Early Acquisition project is complete and approved by FHWA. • Real property interests acquired cannot be developed in anticipation of the transportation project until a NEPA decision for that transportation project has been completed. No development activity related to demolition, site preparation, or construction that is not necessary to protect health or safety may be undertaken. • If reimbursement is made and the real property interests are not incorporated in a project within 20 years, FHWA must offset the amount against Federal-aid funds apportioned to the State. • Eligibility for Relocation Assistance—a person is considered displaced when required to move from the real property as a direct result of a binding written agreement for the purchase of the real property interest. Options to purchase and similar agreements do not create an immediate commitment and do not create eligibility. <p>Note: The “Option” to purchase the property at a later day allows the property to remain occupied limiting the risk of blight in the neighborhood due to vacant buildings.</p>
--	--	-----------	---	---	------------	-----------	--

Advance Acquisition (AA) Options & Requirements

(23 CFR 710.503)

Acquiring ROW Options	Require NEPA Decision	Allow 4F Properties	Start Acquisition	Request Reimbursement/Credits	Comply w/ Federal Law*	Subject to Condemnation	Requirements
<p>1) Protective Buying</p> <p>23 CFR 710.503</p>	<p>**Yes typically a CE. See 23 CFR 771.117(d)(12)</p>	<p>Yes, if consultation is completed on 4F.</p>	<p>Usually during the NEPA process.</p>	<p>After property is incorporated in the Federal-aid project.</p>	<p>YES</p>	<p>YES, if State law allows</p>	<p>Development of the property is imminent.</p>
<p>2) Hardship Acquisition</p> <p>23 CFR 710.503</p>	<p>**Yes typically a CE. See 23 CFR 771.117(d)(12)</p>	<p>Yes, if consultation is completed on 4F.</p>	<p>Usually during the NEPA process.</p>	<p>After property is incorporated in the Federal-aid project.</p>	<p>YES</p>	<p>YES, if State law allows. See comment →</p>	<p>A request for hardship acquisition based on a property owner’s written submission.</p> <p>Note: While the agency may condemn if a settlement cannot be reached on a hardship acquisition, great care should be taken to ensure that the decision is warranted both for the property owner and the agency.</p>

* Relevant Federal Law includes the Uniform Act, Title VI Civil Rights Act, and Federal Regulations (primarily, 23 CFR Part 710).

****Note:** Protective Buying and Hardship Acquisitions usually occur during the transportation project’s NEPA phase. However, prior to approving an AA, NEPA clearance is necessary for the AA parcels. This requires the AA parcels to be carved out from the overall project so that NEPA clearance provided on those parcels, typically in the form of a CE.