

VI. RIGHT-OF-WAY AND UTILITIES

This chapter outlines the steps the LPA must take to “clear” right of way and utilities and coordinate with railroads for Federal-aid projects.

VI.1. Right-of-Way

The LPA must obtain property interests adequate for the construction, operation, and maintenance of its project and for the protection of both the project and the public.¹

The KYTC Right-of-Way Guidance Manual (current) must be followed on all LPA Projects. This manual can be found here:

<http://transportation.ky.gov/Organizational-Resources/Policy%20Manuals%20Library/RightOfWay.pdf>

The LPA should work very closely with its Administering Office (OLP or District LPA Coordinator) throughout the right-of-way phase to ensure Federal regulations and state policies are followed.

At a minimum, the LPA must understand the following key points in regards to right-of-way:

- The LPA may perform title work (only) in the design phase of a project; quality title work is critical. Before executing any additional right-of-way activities, such as appraising property or making offers, the LPA must ensure that right-of-way funds are authorized (which is always after NEPA clearance), MOA (for ROW Phase) is fully executed, and that a notice to proceed has been provided by its Administering Office.
- The KYTC Division of Right-of-Way and Utilities must prepare an Official Order for every project with a right-of-way phase. This is done at the time of right of way funding authorization.
- If right-of-way is not funded by KYTC, NTP and the Official Order are still required.
- The LPA should work with its Administering Office to understand what approvals are necessary as part of the right-of-way phase. Items likely requiring KYTC review and approval during the R/W phase include, but may not be limited to:
 - Right-of-Way Plans
 - Right-of-Way Estimate (KYTC Form TC90-122), form can be obtained from the Administering Office.
 - Prequalified Acquisition Consultant Fee Proposal
 - Appraisals
 - Range of values for minor acquisitions (MARs)
 - All MARs and Deeds and Grants of Easement
 - Right-of-Way Certificate (must be signed by District R/W supervisor and Director of R/W)
 - Completed Parcel Files

¹ 23 CFR § 710.201(e)

- The LPA must be able to demonstrate on what property the project will be located. If another entity owns the property, the LPA must comply with the applicable federal and state statutes to obtain property rights for its project.²
- **When acquiring property from third parties, regardless of funding source, the LPA is required to follow the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (“Uniform Act”) discussed below. Failure to follow and document adherence to the Uniform Act will jeopardize project funding (all phases).**
- ROW Certification is required for all projects. The required KYTC ROW Certification form can be found here:
<http://transportation.ky.gov/Organizational-Resources/Forms/TC%2062-226.pdf>.
A copy is provided as an attachment to this chapter.
- The LPA must obtain all deeds/ grants of easements, and releases, and record them where appropriate. The Administering Office will review the ROW Certification Form and route to the appropriate parties for signature. Once all signatures are received, the completed form will be forwarded by the Administering Office to the LPA for their files. The final plans submittal, discussed in **Chapter V**, must include a copy of all recorded documents and a copy of the completed ROW Certification form.
- If the LPA’s project is non-infrastructure or located on the LPA’s property, the LPA must indicate on the ROW Certificate that the project requires no new or additional right-of-way acquisitions or relocations and the LPA must route the certificate to the Administering Office for signatures along with the survey or plans illustrating the project location/property ownership.
- No offers for acquisition may be made prior to approval of the environmental document (discussed in **Chapter IV**).
- All consultant right-of-way professionals working on any LPA project should be KYTC prequalified.
- If the LPA would like to hire a relocation agent, acquisition consultant, or appraiser rather than acquiring the property itself, the LPA must use one of the QBS processes discussed in **Chapter III** to procure the appropriate professionals. As mentioned in **Chapter III**, KYTC has statewide right-of-way professionals (hired by KYTC via QBS process) that the LPA may utilize.
- The LPA shall either adopt in writing KYTC’s written Policies and Procedures for Right of Way Acquisition and Relocation Assistance, outlined in the current Right of Way Guidance Manual, or present its own written Policies and Procedures for approval by the KYTC Department of Highways Division of Right of Way & Utilities. If the LPA has not adopted such policies and procedures, all right of way activities (including any payments) should be coordinated and approved by KYTC. The Administering Office will coordinate

² 23 CFR § 710; 49 CFR § 24; and 42 USC § 4601.

with the applicable District and Central Office personnel. The LPA should make all submittals to the Administering Office.

- LPAs may not purchase property in the name of the state.
- **Encroachment Permit:** If the Federal-aid LPA project will require any work within or abutting KYTC right-of-way, the LPA must obtain an encroachment permit from KYTC. There are different types of encroachment permits depending on the type of work to be completed. More information regarding how to acquire an encroachment permit can be found in the KYTC Permits Manual:

<https://transportation.ky.gov/Organizational-Resources/Policy%20Manuals%20Library/Permits.pdf>

As explained in the Manual, the following application must be completed and submitted with final plans:

<http://transportation.ky.gov/Organizational-Resources/Forms/TC%2099-1A.pdf>.

A copy of this form is provided as an attachment to this chapter.

- **The Uniform Act:** As mentioned above, LPAs must follow the Uniform Act when acquiring any property interest from a third party.⁴ The following bulleted paragraphs summarize the LPAs responsibilities related to the Uniform Act:

FHWA Video: Introduction to Right-of-Way Requirements and the Uniform Act

<http://www.fhwa.dot.gov/federal-aidessentials/catmod.cfm?category=righofw>

- There must be a written record of contacts documenting all communication with the property owner or the property owner's representative.
- LPAs are responsible for informing property owners of their rights under The Uniform Act at the time that they make contact with them for the purpose of acquiring the needed property interest.
- The Uniform Act requires the LPA to perform certain relocation planning activities.⁵ The LPA is required to provide notices to displaced persons.⁶ The Uniform Act also requires that the LPA provide relocation assistance advisory services which include interviews with displaced persons to determine their needs and preferences⁷.
- The Uniform Act requires that persons displaced because of a federally funded project receive compensation for relocation expenses⁸.
- The Uniform Act requires that those that are displaced from their property, homes or businesses be given just compensation for that property.
- **Under no circumstances may the LPA enter or take an interest in a third party's property without first making an offer of just compensation.** In order to offer just compensation, the LPA must obtain an appraisal unless the owner is donating the property (see **Section V.1.b** below) or the LPA determines that an

⁴ 42 USC § 4601-4655

⁵ 49 CFR § 24.205(a)

⁶ 49 CFR § 24.203

⁷ 49 CFR § 24.205(c)

⁸ 49 CFR § 34.207

appraisal is unnecessary because the valuation problem is uncomplicated and the anticipated value of the proposed acquisition is estimated at \$10,000.00 or less, based on a review of available data⁹. Appraisers must be prequalified by KYTC.

- Appraisals expire; expiration varies depending on the market.
- When the value of acquisition is less than or equal to \$10,000.00 and non-complex, a Minor Acquisition Review (“MAR”) should be used to determine the amount of compensation that must be offered to the property owner. MARs may also be used when the value of acquisition is greater than \$10,000 and less than \$25,000, but these parcels shall be subject to an appraisal if requested by the property owner(s). MARs must be created by the collection of comparable sales data either independently or from the approved comparable sales book for the project and from a KYTC-approved range of values. A minimum of three (3) comparable sales shall be used to determine the value for the “Offer to Purchase” letter.
 - The MAR form and Comparable Chart outline how to do the calculation of the compensation using the value range. A sample MAR can be found here: <http://transportation.ky.gov/Program-Management/Documents/LPA6%20-%20Attach%203%20-%20Minor%20Acquisition%20Review.pdf>
A copy is provided as an attachment to this chapter. The LPA must submit the forms to the Administering Office; the Administering Office will handle coordination with the District ROW Supervisor who must approve the MAR before an offer is made to the property owner.
- Once the MAR or appraisal is approved by KYTC, the right-of-way agent may contact the property owner to arrange a meeting to make the offer. Offers must be given to the property owner both verbally and in writing.
- If the parcel cannot be acquired through the procedures outlined in the KYTC Right-of-Way Guidance Manual, it may be necessary, after consultation with KYTC, to begin condemnation proceedings. KYTC may be able to assist the LPA with this process. The LPA should alert KYTC to any such problems as soon as possible. There are considerable costs and delays associated with the condemnation process; a negotiated resolution is preferable.
- Adequately documenting the right-of-way phase is critical. Following are examples of essential elements of a completed right-of-way acquisition file:
 - Record of contacts
 - Title report
 - MAR or Appraisal
 - KYTC approval of MAR or Appraisal
 - Written offer
 - Memorandum of understanding between the LPA and the property owner
 - Deed or easement

⁹ If the property owner is donating the property, the LPA must also comply with the provisions of 23 CFR § 710.505 regarding real property donations.

FHWA can approve ROW acquisition without a waiver up to \$25,000 if the LPA offers the property owner the option of having the LPA appraise the property. 49 CFR § 24.102
49 CFR § 24.102(c).

- **Temporary Easement, Permanent Easement, and Fee Simple/Right-of-Way:** The LPA should work closely with the KYTC to determine what type of property interests are needed for its project. The LPA may need a temporary easement, permanent easement, or to purchase right of way in fee simple. The LPA should consider the following:
 - **Temporary Easement:** If the LPA needs to enter property not owned by KYTC or the LPA during the construction phase of a project, a Temporary Easement will be necessary.
 - **Permanent Easement:** The LPA must purchase a permanent easement when a portion of the rights to a property are needed for the construction and/or perpetual maintenance of project improvements, such as slope, drainage, or utilities. A sample permanent easement template can be found here:
<https://transportation.ky.gov/Program-Management/Documents/LPA6%20-%20Attach%204%20-%20Permanent%20Easement-Citizen%20to%20LPA.pdf>
A copy is provided as an attachment to this chapter. The permanent easement must also allow the LPA to later transfer an easement interest to KYTC if KYTC requires it. KYTC may require a maintenance or preservation easement be provided on a case by case basis depending on the amount of the award, nature, or sensitivity of the project. This is discussed further in **Chapter XI**.
 - Permanent easements and fee simple purchases should be acquired free and clear of any liens, taxes, mortgages or other encumbrances except easements, restrictions, or record, and zoning laws.
 - **Consent and Release:** In extremely limited cases, with KYTC approval, the LPA may use a consent and release to enter property not owned by KYTC or the LPA during the construction phase of a project. This option may be appropriate when minimal property access is needed for a brief time and there will be no disturbance of site land improvements (i.e., fence, tree, gravel). Before a Consent and Release is obtained, the property owner must be informed of their right to just compensation (see “The Uniform Act” subsection). A sample form can be found here:
<https://transportation.ky.gov/Program-Management/Documents/LPA6%20-%20Attach%205%20-%20Sample%20Consent%20and%20Release%20Form.pdf>
A copy is provided as an attachment to this chapter. A signed consent and release is generally not recorded on permanent property records which would allow other entities to obtain rights superior to the LPA’s. For example, the property owner could sign the Consent and Release Form, but then, before the construction was over, the owner could sell the property. The new owner would be under no obligation to honor the Consent and Release. Also, if the property is foreclosed on during the construction phase, the party foreclosing is also under no obligation to continue to allow the LPA access to the property. If the need to enter onto the property will be brief, a Consent and Release may be the appropriate option.
- **Donation or Dedication of Property Rights:** The LPA may accept property donated or dedicated for the project as long as, prior to the donation or dedication, the property owner is informed in writing of their right to just compensation for their property¹¹. LPAs may

¹¹ 49 CFR § 24.108 and 23 CFR § 710.505

under no circumstances coerce a property owner into donating his/her property. It has been determined that indicating that a project will not be done if the property is not donated is coercion. It is necessary to assign a value to donated property through the MAR or appraisal process if donated property will be credited towards the LPA's matching funds.¹² Even if the property rights are donated or dedicated, it is still necessary for the LPA to obtain and record deeds or easements documenting the donation.

- **Cemeteries:** If surveys, environmental analysis, or conversations with locals indicate the potential for graves in close proximity to the project, please contact KYTC. KYTC will perform any grave relocation work associated with LPA projects. All associated costs are the responsibility of the LPA.

VI.2. Utilities

If the project touches the ground, the LPA must follow the Utilities and Rails Guidance Manual¹⁴. The manual can be found here:

<http://transportation.ky.gov/Organizational-Resources/Policy%20Manuals%20Library/Utilities%20and%20Rails.pdf>.

The LPA should begin early coordination with utility companies, as soon as the written notice to proceed with the Design phase (discussed in **Chapter V**) is received from the Administering Office, so that the location of existing utilities are included in the preliminary engineering and environmental, and final design decision making processes.

The LPA must understand the following regarding utilities:

- It is important to discuss the utilities policy and relocation process at the project team meeting.
- As mentioned above, the LPA should begin utility coordination as soon as possible so that coordinating with utility companies will not delay the project.
- The LPA must provide its Administering Office the location and limits of the project. The Administering Office will coordinate with the District Utilities Supervisor who will provide to the LPA a list of all the known utility companies that could be in the project area.
- If the MOA between KYTC and the LPA indicates that the LPA will negotiate with the utility companies itself, its representatives will contact each of the known utilities and confirm that the utility is within the project limits. For each utility within the project limits, the LPA must identify any affect the project will have on that utility through reasonable means as identified in the *Utilities and Rails Guidance Manual*. The LPA must also determine which of the utilities it must compensate for relocation work done¹⁵. The utility company must be compensated for the cost of relocating if the utility company is a not for profit company or if the utility equipment is located on private ROW rather than KYTC's

¹² 23 CFR § 710.507 and 23 CFR § 630.106(h)(1). See also Chapter I, Section I.2 "Matching Requirement".

¹⁴ This process is governed by KRS § 177.035; KRS § 416.140; KRS § 179.265; 23 USC § 123.

¹⁵ KRS § 177.035 and KRS § 179.265 dictate when a utility company is due compensation for its relocation costs.

ROW. For further guidance regarding whether or not the LPA must compensate the utility companies please see the Utilities and Rail manual and applicable laws.

- If the utility will not be impacted by the project, but is located within the project area, the utility company must provide a “No Impact” letter to the LPA. The final plans submittal discussed in **Chapter V** must include a copy of all “no impact” letters.
- If a utility company will be impacted by the project and is compensable, the LPA must negotiate the relocation terms and enter into an agreement defining how the utility will be treated and who is to perform any relocation work. The agreement must also estimate how much compensation the utility company is due. There are several forms of utility agreement. To determine which of these forms is appropriate see <https://transportation.ky.gov/Organizational-Resources/Policy%20Manuals%20Library/Utilities%20and%20Rails.pdf> This manual provides all form agreements and sample “no impact” letters.
- If the utility is impacted by the project, but is not due compensation for its relocation costs, the utility must obtain an encroachment permit if any of the relocated utility’s facilities will be located on KYTC ROW.
- Other government permits may be required if the facilities will be located on government ROW other than KYTC ROW.
- For utility companies eligible for compensation, the relocation agreement acts as the encroachment permit.
- In the event the LPA is unable to reach an agreement with a utility company, it should alert and request assistance from its Administering Office.
- In order to open the Project for construction bidding, the LPA must provide the bidders with Utility Impact Notes. (link to template can be found here,) These notes must explain what facilities exist, what facilities are to be relocated and in what stage of relocation the utilities will be when construction is to begin.¹⁶ Utility Impact Notes must also include utility contact information. KY 811 language concerning calling before digging must be included in the construction Bid Proposal¹⁷.
- LPAs constructing projects administered by OLP should note that no more than 25% of the total project cost will be reimbursed for costs associated with utility relocation. Any amount spent on utility relocation which exceeds 25% of the total project cost will be the responsibility of the LPA.

*Information about Kentucky 811 can
be found here:*

<http://kentucky811.org/>

¹⁶ See form Utility Impact Notes in the Utilities and Rails Procedure manual located at <http://transportation.ky.gov/Right-of-Way-and-Utilities/Documents/ROW-Complete%202007.pdf>

¹⁷ KRS § 367.4901 through KRS § 367.4917

- A railroad impact note must be included in the construction bid proposal (discussed in **Chapter VIII**). If there is no impact to any railroad, the following should be included: “There are no railroad facilities or property associated with this project.”

Railroads: Any time a project touches, goes over or under, or is adjacent to railroad ROW property it is necessary that the LPA coordinate with the Railroad in order to comply with state and federal statutes.¹⁸ If the project fits any of these descriptions, the LPA must work with its Administering Office to contact the KYTC Railroad Coordinator immediately so that negotiations between the LPA and the Railroad can begin. The KYTC Railroad Coordinator must participate and support the LPA in these negotiations. The end result of the negotiations is a Railroad Agreement which must be approved by the KYTC Railroad Coordinator. A sample agreement can be found in the KYTC Utilities and Rail manual referenced above. Typically, the railroad is due compensation for design review, construction support, and flagging services. These services may be discussed in special rail coordination notes which must be included in the Bid Proposal.

¹⁸ 23 CFR § 646.