Background
State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. The NCHRP Legal Research Digest and the Selected Studies in Transportation Law (SSTL) series are intended to keep departments up-to-date on laws that will affect their operations.

Foreword
Public-use property is property that is in use for a public purpose or that is set aside for a specific public purpose with the intention that the property be used for the specified purpose within a reasonable time. As the digest explains, state transportation departments appear to have sufficient authority to take public-use property for their highway and other transportation projects. However, there are some kinds of public-use property, such as parks and recreational areas, for which a transportation department may need specific statutory authority or legislative approval and/or must comply with statutory conditions and requirements before taking the public-use property.

The digest discusses four principal condemnation hierarchies that may be applied to takings of property for transportation projects. The hierarchies are based on (1) the identity and authority of the condemnor (e.g., the state) vis-à-vis other condemnors (e.g., municipalities and counties); (2) the identity of the owner of the public-use property (e.g., federal, state, or local government or a public agency) sought by eminent domain; (3) the relative importance of a proposed use in comparison to the public-use property’s present use (e.g., as a park, parkland, recreational area, wildlife refuge, or historic site); and (4) the inherent importance of a highway or other transportation project in comparison to a property’s current public use.

The digest analyzes state constitutional provisions and state statutes that apply to takings of public-use property. The digest analyzes in some detail § 4(f) of the Department of Transportation Act of 1996 as well as the impact of the Land and Water Conservation Fund Act (LWCFA) on takings for highway projects. The digest discusses whether the Interstate Commerce Commission Termination Act (ICCTA) and the jurisdiction of the Surface Transportation Board (STB) preempt a transportation department’s taking of railroad property and whether the Natural Gas Act (NGA) and the jurisdiction of the Federal Energy Regulatory Commission (FERC) would preempt a department’s taking of a gas or oil pipeline.

The digest explains how transportation departments may acquire land or an interest in land from the United States for a project and discusses the availability of FHWA assistance.

The research should serve as useful guidance to state and federal legislators, as well as administrators and lawyers, having an interest in the acquisition of public-use properties. The research also should be useful to property owners or others with an interest in property that is subject to condemnation by a governmental authority, be it federal, state, or local.
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CONDEMNATION HIERARCHY—COMPETING PUBLIC USES

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I. INTRODUCTION

The digest analyzes issues that may arise when a state transportation department needs to take property by eminent domain that has already been devoted to another public use for a transportation project. The digest analyzes situations when a transportation department or other condemnor, such as a municipality, whether because of state constitutional or statutory law or judicial precedents, is unable to condemn property because of the public-use doctrine. One court has stated that the rationale for the public-use doctrine is that, if the doctrine did not exist, “property could be condemned back and forth indefinitely.”

Among the issues the digest considers are whether state transportation departments have sufficient authority under state law to take property by eminent domain for a transportation project that is already dedicated to another public use. In most states, notwithstanding the public-use doctrine, it appears that state transportation departments do have sufficient authority to take public-use property for their highway and other transportation projects. However, there are some kinds of public-use property, such as parks and recreational areas, for which a transportation department may need specific statutory authority or legislative approval and/or must comply with statutory conditions and requirements before taking a public-use property by eminent domain.

As discussed in the digest, the federal government may take property belonging to a state or local government; a state may acquire property owned by the United States but only when the United States, or an agency or department thereof owning or controlling the property, consents to the acquisition or use; a state, subject to applicable state law, may take property in its own state owned or controlled by a municipality, county, or local public agency; and a municipality, county, or local public agency may take property in the same state of another municipality, county, or local public agency. Nevertheless, as the digest discusses, there are exceptions to the above rules, as well as a lack of uniformity among the states.

Section II of the digest discusses the meaning of the public-use doctrine that applies to property already dedicated to a public use.

Section III discusses several condemnation hierarchies that may be applied to takings of property, including public-use property, for transportation projects. The condemnation hierarchies are based on: (1) the identity and authority of a condemnor vis-à-vis other condemnors; (2) the owner of the public-use property sought to be taken by eminent domain; (3) the relative importance of a taking of public-use property for a proposed use in comparison to the property's present public use; and (4) the inherent importance of a transportation project when the project necessitates a taking of public-use property, including property protected by federal or state law.

Section IV analyzes state constitutional provisions that apply to takings of public-use property. With a few exceptions, the provisions reviewed for the digest apply to takings of private property or to “any property” and do not distinguish between property, be it publicly or privately held, and public-use property.

Section V analyzes state statutes that apply to takings of property by eminent domain, including public-use property, beginning with an analysis of state statutes that grant unconditional authority to state transportation departments to take public-use property. However, in contrast, statutes in California and in a few other states grant conditional authority to the transportation department to take public-use property. Some states authorize condemnation of replacement property that may be used to exchange for other property, such as public-use property. Some state statutes authorize the transportation department to petition the state to obtain custody of state-owned property and permit other state agencies, as well as municipalities, counties, and local public agencies, to consent to the use of their property for highway purposes. In some states, it may be necessary to obtain legislative approval before taking certain public-use property by eminent domain. Some states specifically authorize a transportation department to acquire or take property owned by a utility or a railroad. However, as discussed in Sections IX.C and D of the digest, federal law may preempt in whole or in part

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2 Nichols on Eminent Domain § 5.06[9] (Julius L. Sackman ed., 3d ed. 2018), hereinafter referred to as “Nichols.” See City of Worthington v. City of Columbus, 100 Ohio St. 3d 103, 108, 796 N.E.2d 920, 924 (2003) (holding that a municipality could not condemn parkland owned by another municipality for the purpose of expanding a cemetery when the taking would destroy the property’s existing use and the state constitution did not expressly or impliedly authorize the taking).

3 See City and County of Delaware v. Quest Corp., 18 P.3d 748 (Colo. 2001).

4 Nichols, supra note 2, §§ 5.06[8][a] and [9]. Atlantic State Legal Found. v. Onondaga County Dep’t of Drainage & Sanitation, 233 F. Supp. 2d 335 (N.D.N.Y. 2002), affirmed by, in part, question certified by City of Syracuse v. Onondaga County, 464 F.3d 297 (2d Cir. 2006).
state statutes that permit the use of eminent domain to take property owned by a railroad or pipeline company.

Section VI analyzes whether constitutional provisions and statutes, in the absence of explicit language, may be interpreted to permit takings of public-use property. For example, the digest discusses whether the grant of a general power of eminent domain impliedly authorizes takings of public-use property or whether a condemnor’s power to take private property may be construed to permit a taking of public-use property.

Section VII discusses the effect of restrictions imposed by statute, a deed of dedication, or a conservation easement on takings of public-use property. In some states, even when land has been dedicated for use as a park or as a nature or forest preserve, the applicable statute, deed of dedication, or conservation easement may permit another use of the property, such as for a highway project.

Section VIII discusses whether municipalities, counties, or local public agencies may take public-use property, including public-use property either owned by the state or that belongs to another municipality, county, or local public agency. Section VIII also addresses various proscriptions that exist in the states, either by statute or at common law, against taking public-use property, such as when the taking conflicts with state law, when a proposed use will destroy an existing public use, when a proposed use is substantially inconsistent with a property’s present public use, when a taking is not for use that is a more necessary use than the property’s present use, or when a taking for a proposed use will impair or interfere with a public-use property’s existing use or be detrimental to the public interest.

Section IX analyzes transportation departments’ takings of property owned by utilities, railroads, and pipelines. First, the section discusses takings of utilities’ property for highway projects and reimbursement of state transportation departments for utilities’ relocation costs pursuant to 23 U.S.C. § 123 that applies to federal-aid highway projects. Second, the section discusses whether the Interstate Commerce Commission Termination Act and the jurisdiction of the Surface Transportation Board preempt transportation departments’ takings of railroad property. Third, the section discusses the Natural Gas Act and the jurisdiction of the Federal Energy Regulatory Commission and whether takings of gas or oil pipelines are preempted.

Section X analyzes takings of public-use property for temporary construction and other easements.

Section XI analyzes the effect of § 4(f) of the Department of Transportation Act of 1996 on takings or constructive uses of public-use property, namely of park and recreational property, wildlife and waterfowl refuges, and historic sites. The section explains how a transportation program or project may be approved if the transportation department establishes that there is no prudent and feasible alternative to the taking and if the department’s program or project includes all possible planning to minimize harm to the protected property at issue. The section analyzes the authority of the Secretary of Transportation to determine whether a transportation program or project will have a de minimis impact on an area protected by § 4(f). Among other issues, the section discusses whether a transportation department’s constructive use of protected property, such as by noise or pollution caused by a highway or other transportation improvement, will trigger a § 4(f) analysis.

Section XII analyzes the effect of the Land and Water Conservation Fund Act on acquisitions of land for highway projects.

Section XIII explains the process for transportation departments to acquire land or an interest in land from the United States for a project and the availability of FHWA assistance.

Section XIV deals with the issue of compensation of owners for takings of their public-use property, beginning, however, with the question of whether a state transportation department as a condemnor is required to pay compensation to a public owner for a taking of its public-use property. State transportation departments were asked to respond to a survey conducted for the digest. Among other questions and requests, transportation departments were asked whether they have sufficient constitutional and/or statutory authority to take public-use property and were asked to provide information on their takings of public-use property. The transportation departments’ responses to the survey identified the fair market value approach based on comparable sales as their usual method of determining the value of public-use property. A court’s discretion to allow, when appropriate, the use of another method of valuation, which is usually the replacement cost method or the income method, is discussed.

Section XV discusses several takings of public-use property as case studies for the digest, such as a condemnor’s pretextual use of eminent domain to take public-use property to prevent expansion or development of a property.

Section XVI reviews provisions of transportation departments’ right-of-way manuals applicable to the acquisition or taking of property, including public-use property, for a highway project.

Section XVII discusses what the transportation departments responding to the survey perceive are their best practices when their department needs to acquire or take public-use property for a project.

Appendices A, B, and C, respectively, to the digest identify the transportation departments responding to the survey, include a copy of the survey, and provide a summary of the departments’ responses to the survey. Appendices D and E are compendia, respectively, of state constitutional provisions and statutes that apply to takings by state transportation departments by eminent domain of real property, including public-use property. Appendix F provides links to state transportation agency right-of-way manuals. Appendix G includes a copy of documents provided in response to the survey of state transportation departments.

II. MEANING OF THE PUBLIC-USE DOCTRINE

The term property appropriated or dedicated to a public use means “property either already in use for a public purpose or set aside for a specific public purpose with the intention of using
it for such purpose within a reasonable time.” The term “does not require actual physical use[] but may be satisfied by formal dedication or facts indicating a reasonable prospect of use within a reasonable time.” A public entity may own property that is not dedicated already to a public use. Property owned by an individual, a corporation, or a trust may be dedicated to a public use. It has been held that “[t]he character of [a property’s] use and not its extent[] determines the question of public use.”

According to *Nichols on Eminent Domain*, there is a lack of uniformity among the states on what is public-use property, because property in one state may qualify as public-use property when the same property in another state would not be considered public-use property.

The public-use doctrine applies between entities having an equal right to exercise eminent domain under state law; the doctrine generally does not apply to a state’s exercise of eminent domain to take property owned by a municipality, county, or local public agency. As “creatures” of the state, all municipalities, counties, and local public agencies, including county park commissions or the equivalent, owe their existence to the state. When a municipality, county, or local public agency, as condemnor, seeks to take property already devoted to a public use, the condemnor’s action may be enjoined, for example, when the proposed use will destroy the present use of public-use property or interfere with its present use to such an extent as to be “tantamount to destruction....” Sections VIII through XII of the digest discuss cases in which courts have applied various statutes and common law rules to determine whether a public-use property may be taken for another use.

Except when property is owned by the United States, the fact that public-use property is owned by a government entity does not inexorably prevent its taking by eminent domain by the state or a state agency or department thereof. For example, in *State by State Highway Commissioner v. Union County Park Commission*, the Union County Park Commission, pursuant to section 40:37-33 of the New Jersey Statutes Annotated, had the authority to locate and acquire land for parks. The state sought to condemn land subject to the Park Commission for an interstate highway. A New Jersey state court held that “under general authority to condemn for public use[,] it is settled that property devoted to one public use may be condemned for another which is of superior rank in respect to public necessity.”

The court considered whether another New Jersey statute, section 27:7-36, limited the state’s power to acquire parkland. Section 27:7-36 provided, in part, that when locating state highway routes, the State Highway Commissioner shall not locate, lay out, construct, use or improve any route in, over, under, through or across a park, reservation or parkway owned by or under the control and jurisdiction of any park commission organized under the provisions of sections 40:37-96 to 40:37-174 of the title Municipalities and Counties[ without the consent of the park commission.]

The court held that section 27:7-36 did not prevent the Commissioner from acquiring parklands by condemnation. The statute prohibited “the Commissioner from entering park lands and taking the property in advance of compensation without the consent of the owner....” The court ruled that for the statute (N.J. Stat. Ann. § 27:7-36) to prevent the taking the statutory language would have to preclude explicitly the Commissioner’s right to condemn parklands, a right that is “inherent in the sovereign and given to the Commissioner by the express terms of N.J.S.A. 22:7-22....”

When there is litigation concerning a taking because of competing uses of a public-use property, one could expect that the courts would apply a balancing test to decide whether one use is more important than, or is superior to, another public use. Nevertheless, only one case, *Township of Readington v. Solberg Aviation Co.*, was located for the digest in which the court, in the context of a taking of public-use property, expressly endorsed a “balancing of public interests” test. A New Jersey appellate court held that the trial court should have compared the public purpose served by the airport in that case “to the public purpose to be achieved through the condemnation.” However, as discussed in Section XV.B of the digest, the appeals court held that the Township’s attempt to take the airport’s property was pretextual, because the true purpose of the Township’s exercise of eminent domain was to thwart any expansion of the airport or its operations.

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6 See id. (Law Revision Commission cmt.) (citations omitted).
7 See id. (citations omitted).
8 See id. (citations omitted).
10 Id. at 215, 214 A.2d at 453.
11 City of Worthington v. City of Columbus, 100 Ohio St. 3d 103, 105, 796 N.E.2d 920, 922 (2003) (citations omitted). See also Union Cty. Park Comm’n, 89 N.J. Super. at 213, 214 A.2d 452 (citing the state that “property devoted to one public use may be condemned for another that is of superior rank in respect to public necessity”).
12 State ex rel. State Pub. Works Bd. v. Los Angeles, 256 Cal. App. 2d 930, 64 Cal. Rptr. 476 (1967). When the United States or a state “seeks to acquire property by eminent domain, the character of the res as public property generally has no inhibiting influence upon the exercise of the power.” Union Cty. Park Comm’n, 89 N.J. Super. at 212, 214 A.2d at 451 (citation omitted).
In sum, the public-use doctrine applies to government entities and companies having the right to exercise eminent domain under state law. The doctrine generally does not preclude a state’s exercise of eminent domain to take property owned by a municipality, county, or local public agency, which are creatures of, and owe their existence to, the state.

III. CONDEMNATION HIERARCHIES FOR TAKINGS OF PUBLIC-USE PROPERTY

Based on state constitutional and statutory provisions and case law, as well as the transportation departments’ responses to the survey, takings of property, including public-use property, may be ordered or structured according to one or more condemnation hierarchies.

The first, and probably most widely recognized, condemnation hierarchy is based on the identity and authority of the condemnor. In descending order, the federal sovereign is superior to a state sovereign or an agency or department thereof. A state sovereign is superior to a municipality, county, or local public agency, regardless of whether a property being taken is public-use property.23 “[T]he character of the ‘res’ as public property, generally, has no inhibiting influence on the exercise of the [condemnor’s] power.”24

Under the first condemnation hierarchy, the federal government may take property owned by a state, including property devoted to a public use, “subject only to the requirement of compensation, and the limitation that the condemnor exercise discretion in a manner that is not arbitrary and capricious.”25 However, a state, or an agency or department thereof, has no power to take federal land within the state’s territorial limits, regardless of the property’s existing federal use.26 Before a state transportation department may acquire federal land, the federal government must consent to the acquisition.27 A state condemnor, subject to any restrictions imposed by law, is superior to municipalities, counties, and local public agencies. A municipality, county, or local public agency, again subject to any restrictions imposed by law, is superior to other owners of public-use property, including owners of utilities, railroads, and pipelines except in those situations when a taking is preempted by federal law.

In accordance with the first condemnation hierarchy, which is derived from the identity and authority of the condemnor, a state may use eminent domain to take property, “whether held in a governmental or proprietary capacity,”28 of a municipal corporation, county, or local public agency. A state’s authority must be granted by law, either expressly or by necessary implication.29 A state’s use of eminent domain “is not inhibited by statutes that declare … municipal property to be inalienable.”30 The reason is that municipalities are mere agencies of the state, or rather units into which the state has divided itself, in order that the business of government may be more conveniently handled. In this character, municipal corporations execute the functions and possess the attributes of sovereignty, which have been delegated to them by the legislature.31

If a municipal corporation acquired a property in fee “by gift, devise, or special dedication for a designated purpose, the legislature cannot require the use of the property for a different purpose without the exercise of the power of eminent domain with all its incidents.”32 When municipal corporations acquire property for the private benefit of their inhabitants, the property “is protected by the constitution[] and can be taken only by eminent domain[] and upon payment of its value.”33

The second condemnation hierarchy is based on who owns the public-use property that a state or a municipality, county, or local public agency seeks to take by eminent domain. On the one hand, a state transportation department may acquire property belonging to the United States only by the consent of the federal government or an agency or department thereof.34 On the other hand, a state transportation department may take public-use property owned by a municipality, county, or local public agency, because the power of the state, the sovereign, is superior to that of a municipality or other unit of local government.35 As for the authority of municipal and of other units of local government, the transportation departments’ responses to the survey were not uniform on whether in their respective state municipalities, counties, or local public agencies are empowered to take by eminent domain public-use property owned by another municipality, county, or local public agency for a transportation project.36

The third condemnation hierarchy is based on the relative importance or necessity of a taking of a public-use property for a proposed use in comparison to the property’s current use. State transportation departments responding to the survey provided information on their relative difficulty taking various kinds of public-use property, such as property used for schools, parks, recreational areas, historic sites, and other public uses.37 In some instances, the departments must rely on negotiations

23 Nichols, supra note 2, § 2.17, at 2-56 (rel. 98-8/2010).
24 Id. (footnote omitted).
25 Id. § 2.18, at 2-114 (rel. 98-8/2010) (footnote omitted).
26 Id. § 2.22, at 2-127 (rel. 98-8/2010), § 2.22[3], at 2-129 (rel. 98-8/2010), and § 2-131 (rel. 98-8/2010).
27 See Section XIII of the digest.
28 Nichols, supra note 2, § 2.27[1], at 2-142.1 (rel. 98-8/2010) (footnote omitted).
29 Id. at 2-145-46 (rel. 98-8/2010).
30 Id. at 2-146-47 (rel. 98-8/2010) (footnotes omitted).
31 Id. at 2-143 (rel. 98-8/2010).
32 Id. § 2.27[2], at 2-148 (rel. 98-8/2010) (footnote omitted).
33 Id. § 2.27[1], at 2-147 (rel. 98-8/2010) (footnote omitted) (emphasis in original).
34 Id. § 2.22[4], at 2-131 (rel. 98-8/2010).
35 Id. § 2.17[4], at 2-87 (rel. 98-8/2010).
37 See Summary of Transportation Departments’ Responses to the Survey, responses to question number 9(b), infra (App. C) pp. C-11 to -12.
to obtain the specific public-use property that they require for a transportation project.  

The fourth condemnation hierarchy is predicated on the recognized importance of a proposed highway or other transportation project that necessitates a taking of public-use property. It appears that there are fewer restrictions on takings of public-use property for a highway project, because a “highway … cannot in the nature of things be constructed for any considerable distance through an inhabited country without crossing other ways.” Although a transportation department’s use of property may be superior to other public uses and even justify “the condemnation of crossings over other ways,” implicit authority may not be presumed to take park property, public buildings, or cemeteries, particularly when a “slight deviation” may avoid encroaching on an existing public use. Some public-use property (e.g., parks and recreation areas, wildlife refuges, and historic sites) are protected by federal and/or state law from both categorical takings and constructive uses by a transportation project.

Although a court may have to interpret the legislature’s intent when deciding whether a statute permits a taking of a specific kind of public-use property, transportation departments responding to the survey stated that, with some exceptions (e.g., parkland), their state’s constitution or statutes were sufficiently broad to permit them to take public-use property by eminent domain.

In summary, this section of the digest identifies four hierarchies that may be applied to takings of property, including public-use property: (1) the identity and authority of a condemning vis-à-vis other condemnors; (2) the identity of the owner of public-use property sought to be taken by eminent domain; (3) the relative importance of a taking of public-use property for public-use property sought to be taken; and (4) the inherent importance of transportation projects that may necessitate taking public-use property, including public-use property protected by federal or state law. The sections of the digest that follow illustrate how one or more of the foregoing hierarchies apply to takings of public-use property that have competing uses.

### IV. State Constitutional Provisions Applicable to Takings of Public-Use Property for Transportation Projects

There appears to be no general constitutional barrier in the states to a transportation department’s taking of public-use property by eminent domain. Although a government entity “may not … condemn public property or property devoted to a public use unless such authority is expressly or impliedly granted by statute,” “[t]here is no question that the legislature, in the absence of a constitutional prohibition, has the power to authorize the taking of land devoted to one public use for a different public use.” As for the role of the courts, the Minnesota Court of Appeals has stated that “[t]he judiciary’s role in reviewing condemnation determinations is limited” and that the “[c]ourts may interfere only when the [condemnor’s] actions are … taken capriciously, irrationally, and without basis in law or under conditions which do not authorize or permit the exercise of the asserted power.”

Most state constitutional provisions reviewed for the digest apply to takings by the government of private property rather than of publicly owned or public-use property. With a few exceptions, state constitutions do not address takings of public-use property for another public use, including for a transportation project. A majority of state constitutions state that private property may not be “taken or damaged” for public use without just compensation. For example, the Georgia Constitution states that, except as otherwise provided, “private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.” A minority of state constitutions omit the term “damaged,” stating that private property may not be taken for a public use without compensation. At least one state constitution prohibits a person’s property from being “taken or applied” to a public use without compensation. Most state constitutions require the payment of “just compensation.”

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38 See Summary of Transportation Departments’ Responses to the Survey, responses to question number 21(a), infra (App. C) p. C-27.
39 Nichols, supra note 2, § 2.17[1], at 2-71 (rel. 98-8/2010).
40 Id. at 2-72 (rel. 98-8/2010) (footnote omitted).
41 Id. at 2-76 (rel. 98-8/2010).
42 See Sections XI and XII of this digest.
43 Nichols, supra note 2, § 2.17[1], at 2-80 (rel. 98-8/2010).
44 See Summary of Transportation Departments’ Responses to the Survey, responses to questions number 2 and 3, infra (App. C) pp. C-1 to -4.
45 Town of Fayal v. City of Eveleth, 587 N.W.2d 524, 528 (Minn. Ct. App. 1999) (citation omitted).
46 Nichols, supra note 2, § 2.17[7], at 2-94 (rel. 98-8/2010) (footnote omitted).
47 Town of Fayal, 587 N.W.2d at 527 (citations omitted).
tion” for private property taken, or taken or damaged, for a public use, but several state constitutions specify that a condemnor must pay “full compensation” for any property taken for public use. Some state constitutions permit takings of property for the purpose of exchanging one property for another property that the government needs. Although some state constitutions provide that private property may not be taken for private use except by the owner’s consent, several state constitutions permit takings for private ways of necessity, drains, or ditches.

Some state constitutions specifically authorize the state and/or municipal corporations to take private property for public use; and some specifically apply to takings for highways and streets. Several states have constitutional provisions that permit the taking of the property and franchises of incorporated companies. For example, the West Virginia Constitution, article XI, section 12 states: “The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the legislature, of the property and franchises of incorporated companies already organized, and subjecting them to the public use, the same as of individuals.”

A majority of the transportation departments responding to the survey reported that there is no constitutional provision in their state that specifically authorizes the use of eminent domain to take public-use property for a highway project. As the Pennsylvania Department of Transportation (PennDOT) stated, although PennDOT’s authority to take public-use property is not specific, “Article I, Section 10, of the Pennsylvania Constitution provides the general power of eminent domain.” Likewise, the South Dakota Department of Transportation (DOT) advised that there is no “explicit authorization in the South Dakota Constitution.”

In conclusion, most state constitutional provisions reviewed for the digest apply to takings by the government of private property rather than of publicly owned or public-use property. With a few exceptions, state constitutions do not address takings of public-use property for another public use, including for a transportation project. As discussed in the next section, more common are state statutes that authorize the use of eminent domain to take public-use property for highway or other transportation projects.

V. STATE STATUTES APPLICABLE TO TAKINGS BY EMINENT DOMAIN OF PUBLIC-USE PROPERTY

A. State Statutes and Cases Holding That the Transportation Department Has Unconditional Authority to Take Public-Use Property

1. Authority to Take State-Owned Property

Section XVI of the digest discusses provisions of state right-of-way manuals that set forth procedures by which state transportation departments may obtain property owned by the state or a state agency or department thereof. Most of the transportation departments responding to the survey reported that in their state the department may acquire or take state-owned public-use property.

In Connecticut, the transportation department may petition the state to obtain custody of state-owned property:

When the Commissioner of Transportation finds it necessary that real property, the title to which is in the state of Connecticut and which is under the custody and control of any state department, com-

52 See Ariz. Const. art. II, § 17; Fla. Const. art. X, § 6(a); Kan. Const. art. 12, § 4; N.D. Const. art. I, § 16; Ohio Const. art. XIII, § 5 (stating that “[r]ight of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money or first secured by a deposit...”) (emphasis supplied); Wash. Const. art. I, § 16.
53 See Idaho Const. art. IX, § 8; Mont. Const. art. X, § 11(4) (stating that “[a]ny public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.”).
56 See Ky. Const. § 242 (stating in part that “[m]unicipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction’); N.Y. Const. art. XVIII, § 8; N.Y. Const. art. XVIII, § 9 (stating that “[s]ubject to any limitation imposed by the legislature, the state, or any city, town, village or public corporation, may acquire by purchase, gift, eminent domain or otherwise, such property as it may deem ultimately necessary or proper to effectuate the purposes of this article, or any of them, although temporarily not required for such purposes”) (emphasis supplied); Pa. Const. art. X, § 4; Wis. Const. art. XI, § 2 (“No municipal corporation shall take private property for public use, against the consent of the owner, without the necessity thereof being first established in the manner prescribed by the legislature.”); Wis. Const. art. XI, § 3a.
57 See Mass. Const. pt. first, art. X (“The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street; provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.”); Pa. Const. art. X, § 4.
58 See also Ala. Const. art. 1, § 24; Ark. Const. art. 17, § 9; Idaho Const. art. XI, § 8; Ky. Const. § 195; Mo. Const. art. XI, § 4; N.D. Const. art. XII, § 5; Neb. Const. art. X, § 6; N.M. Const. art. XI, § 18; Ohio Const. art. XVIII, § 4; Wash. Const. art. XII, § 10; Wyo. Const. art. 10, § 9.
60 See id. (emphasis supplied).
61 See id. (citing S.D. Const. art. VI, § 13).
mission or institution, be taken for the purpose of drainage, construction, alteration, reconstruction, improvement, relocation, widening and change of grade of any highway to be constructed under his supervision, he shall petition the Secretary of the Office of Policy and Management that custody of such real property be transferred to him as Commissioner of Transportation.\textsuperscript{69}

In response to the survey, PennDOT stated that, under Pennsylvania law, there is "no special protection or exemption for most types of public use property."\textsuperscript{64} A South Carolina statute specifically provides that certain public-use property is not exempt from condemnation:

No lands, rights-of-way, easements, or any interests in real or personal property which have been, or may be acquired for schools, churches, graveyards, municipal corporations, or subdivisions of them, or for the construction or use of any highway, railroad, railway, canal, telegraph, power line, telephone, or other public service use are exempt from condemnation.\textsuperscript{65}

2. Authority to Take Any Property, Including Public-Use Property

Some state statutes explicitly grant authority to a state, or its agencies or departments, to take property of any kind by eminent domain.

For example, a Connecticut statute authorizes the state highway commissioner to take any land that the commissioner finds to be necessary for the improvement of any state highway.\textsuperscript{66} In \textit{Hiland v. Ives},\textsuperscript{67} the defendant highway commissioner sought to take about 47 acres of Hubbard Park for the relocation and improvement of a state highway. The plaintiffs argued that the defendant lacked the statutory authority under section 13a-73 of Connecticut General Statutes to take any of the park. The Connecticut Supreme Court held that "[i]t is obvious that the language of the statute is broad enough to embrace land held by either a public or a private owner and whether devoted to a public or a private use."\textsuperscript{68} "The fact that Hubbard Park was held for a public use under authority granted by the state, which was the case here, does not, of course, remove it from the state's sovereign power of eminent domain."\textsuperscript{69}

In Kentucky, several statutes grant broad authority to the state highway department to take property needed for a highway project without regard to whether the property to be taken is public-use property. First, when the department has, by official order, designated the route, location, or relocation of a highway, limited access highway, bridge, roadside park, borrow-pit, quarry, garage, or other property or structure deemed necessary for the construction, reconstruction, or maintenance of an adequate system of highways, [the department] may, if unable to contract or agree with the owner or owners thereof, condemn the lands or material, or the use and occupancy of the lands designated as necessary.\textsuperscript{70}

Second, the department may acquire by purchase, whenever it shall deem such purchase expedient, solely from funds provided under the authority of KRS 177.390 to 177.570, such lands, structures, property, rights, rights-of-way, franchises, easements and other interests in lands, including lands lying under water and riparian rights, which are located within the Commonwealth, as it may deem necessary or convenient for the construction and operation of any project, upon such terms and at such prices as may be considered by it to be reasonable and can be agreed upon between it and the owner thereof, and to take title thereto in the name of the Commonwealth for the use and benefit of the department.\textsuperscript{71}

Third, the department may use eminent domain to acquire … any lands, property, rights, rights-of-way, franchises, easements and other property, including public lands, parks, playgrounds, reservations, highways or parkways, or parts thereof or rights therein, of any person, copartnership, association, railroad, public service, public utility or other corporation, or municipality or political subdivision, deemed necessary or convenient for the construction or the efficient operation of any project or necessary in the restoration of public or private property damaged or destroyed.\textsuperscript{72}

In Louisiana, a transportation authority established under the Louisiana Transportation Development Act may acquire by eminent domain or otherwise "such public or private lands, including public parks, playgrounds or reservations, or parts thereof or rights therein, rights-of-way, property rights, easements, and interests, as it may deem necessary."

In Missouri, state law grants the State Highways and Transportation Commission the power to purchase, lease, or condemn land, including the acquisition of right-of-way needed “for the location, construction, reconstruction, widening, improvement or maintenance of any state highway.”\textsuperscript{73}

In \textit{State ex rel. State Highway Commissioner v. Hoester},\textsuperscript{74} the Missouri State Highway Commission commenced a condemnation proceeding to take property owned by the Ballwin Fire Protection District (Fire District). The Fire District argued that its land could be condemned only for a use that would “not materially interfere with the present use being made by it.”\textsuperscript{75}

The Supreme Court of Missouri held that a general authority to exercise the power of eminent domain was insufficient to overcome the rule that property already devoted to a public use may not be taken for another public use that will totally destroy or materially impair or interfere with the former use.\textsuperscript{76} However, there is an exception when the legislature has manifested its intent in express terms or by necessary implication that such property may be taken.\textsuperscript{77} Furthermore, “the general rule does


\textsuperscript{64} See Summary of Transportation Departments’ Responses to the Survey, response of PennDOT to question number 4, \textit{infra} (App. C) p. C-5.


\textsuperscript{67} 154 Conn. 683, 228 A.2d 502 (1967).

\textsuperscript{68} Id. at 685, 228 A.2d at 503.

\textsuperscript{69} Id. at 687, 228 A.2d at 504 (citations omitted).


\textsuperscript{71} Id. § 177.420(1).

\textsuperscript{72} Id. § 177.420(2) (emphasis supplied).


\textsuperscript{74} Mo. Rev. Stat. § 227.120.11(1) (2018).

\textsuperscript{75} 362 S.W.2d 519 (Mo. 1962).

\textsuperscript{76} Id. at 521.

\textsuperscript{77} Id. at 522.

\textsuperscript{78} Id.
not ordinarily apply where the power of eminent domain is being exercised by the sovereign itself, such as the state or federal government, for its immediate purposes, rather than by a public service corporation or a municipality.”

Although the Fire District’s property was devoted to a public use, the Missouri Supreme Court held that state law empowered the State Highway Commission to condemn it.

In Massachusetts, the transportation department may use eminent domain to take any public land or a fee simple absolute or lesser interest in private property “as it may deem necessary…” Likewise, in Pennsylvania, PennDOT has “broad authority…to use the power of condemnation for all transportation purposes.” Moreover,

[taken in totality, and in combination with the general acquisition authority already found in Pennsylvania’s Eminent Domain Code, 26 Pa. C.S. § 101, et seq., [the department’s] experience has been that sufficient constitutional and statutory authority exists in Pennsylvania for PennDOT to complete its mission of providing safe, efficient transportation.

In South Dakota, although there is no explicit authorization to take public-use property, “the statutory language permitting eminent domain does not contain a limitation to private property.”

A Texas statute provides quite broadly that the Texas Transportation Commission’s “power of eminent domain is not affected by the location of the real property, the location of the real property right, or the location of the material” and that the power “applies without regard to whether the location is in or outside a municipality.” The Commission may exercise its power of eminent domain without regard to whether the real property, property rights, and materials that belong to the public are “under the jurisdiction of the state, a state agency, a county, a municipality, including a home-rule municipality, or an entity or subdivision of a county or municipality.”

In a case decided by the Supreme Court of Washington, State ex rel. Eastvold v. Superior Court of State, the issue was “the power of a sovereign state to condemn for highway purposes the property of a municipal corporation already devoted to a public use.” The state sought to appropriate the right of way of a municipal drainage district to convert an existing state highway to a four-lane limited access highway. The Washington Supreme Court reversed the dismissal of the state’s petition. The court stated that “the state, acting as a sovereign, has many inherent powers not possessed by municipal corporations, and few of their limitations.”

Therefore, in the state of Washington, the state highway authority may condemn municipally owned property already in public use.

In Virginia,

[the Commissioner of Highways is vested with the power to acquire by purchase, gift, or power of eminent domain such lands, structures, rights-of-way, franchises, easements, and other interest in lands, … of any person, association, partnership, corporation, or municipality or political subdivision, deemed necessary for the … public highways of the Commonwealth and for these purposes and all other purposes incidental thereto may condemn property in fee simple and rights-of-way of such width and on such routes and grades and locations as the Commissioner of Highways may deem requisite and suitable.”

Although the statutory language varies, many state codes authorize a state transportation department or local highway authority to condemn any property, be it private or public, for the purpose of constructing or improving streets and highways.

\[80\] Id. at 607–08, 269 P.2d at 560.
\[81\] Id. at 608, 269 P.2d at 561.
\[82\] Id. at 609, 269 P.2d at 561 (quoting Wash. Rev. Code § 47.52.050) (internal quotation marks omitted) (emphasis in original).
\[83\] Id. at 610, 269 P.2d at 561.
\[85\] See Ala. Code § 23-3-5 (2018); Alaska Stat. § 19.05.080 (2018); Ark. Code Ann. §§ 27-67-301(a), 27-67-312(a) (2018); Cal. Sts. & High. Code § 302(a) (2018) (providing that the state “may acquire by eminent domain any property for state highway purposes”) (emphasis supplied); Colo. Rev. Stat. § 43-1-217(1) (2018) (stating that “state highways or county highways may be designated, established, and constructed in, into, or through cities and counties, cities, or towns when such highways form necessary or convenient connecting links for carrying state highways or county highways into or through such cities and counties, cities, or towns …”) and § 43-2-204 (2018); Conn. Gen. Stat. § 13a-73(b) (2018) (stating that “[t]he commissioner may take any land [he] finds necessary for the layout, alteration, extension, widening, change of grade or other improvement of any state highway …”) (emphasis supplied); Del. Code Ann. tit. 17, § 132(c)(4) (2018) (stating that “the Department may: Acquire by condemnation or otherwise any land, easement, franchise, material or property, which, in the judgment of the Department, shall be necessary …”) (emphasis supplied); Fla. Stat. § 334.0446(6) (2018) (stating that the department of transportation may use eminent domain to acquire “all property or property rights, whether public or private …”) (emphasis supplied); Ga. Code Ann. § 32-3-1(a) (2018); Ind. Code Ann. § 8-23-8-3(a) (2018) (stating that the department or a highway authority may “acquire ‘private or public property’” (emphasis supplied); Iowa Code § 306A.5(1) (2018) (applicable to cities and highway authorities); Ky. Rev. Stat. Ann. § 177.4201(1) (2018); Md. Transp. Code Ann. § 8-313(a)(1) (2018) (stating that “[a]ny land may
In their responses to the survey, all except three of the transportation departments reported that there has been no occasion when their department has been unable, because of state constitutional and/or statutory authority, or the lack thereof, to use eminent domain to take public-use property for a transportation project.96

B. State Statutes Granting the Transportation Department Conditional Authority to Take Public-Use Property

As discussed in the preceding Section V.A.2, in many if not most states, eminent domain authority for the taking of property needed for a transportation project is not limited to takings of private property but rather applies to any property needed for a highway project.97 Usually, legislative approval is not required prior to the taking of property for a highway. California is one state that has specific statutes that apply to takings of public-use property for transportation projects.

In California, the state may take any real property that the state considers essential, in fee or in any lesser estate or interest, for state highway purposes, such as for rights-of-way including for state highways within cities, to exchange for other real property needed for rights-of-way and drainage, for maintenance of an unobstructed view of any portion of a state highway, and for construction and maintenance of “stock trails” and nonmotorized transportation facilities.98 Because the transportation department determines the necessity for property to be condemned, or otherwise acquired, an owner’s assertion that a property is not suitable, or is in excess of the property needed for an improvement, does not present an issue. A challenge to the transportation department’s determination “become[s] important only where it can be shown that the [Department] acted in bad faith or abused its discretion.”99

However, consistent with some statutes and case law from other states, discussed in Section VIII of the digest, several California statutes permit the taking of property already dedicated to a public use when the proposed taking would not unreasonably interfere with or impair the prior use, when the proposed use is compatible with the existing public use, or when the proposed taking is for a more necessary public use. For example, California Civil Procedure Code section 1240.510 provides that

[98] any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future.100

According to the California Law Revision Commission, section 1240.510 “does not contemplate displacement of the existing use by the second use” but rather “authorizes common enjoyment of the property where the second use does not unreasonably interfere with the existing use.”101 Section 1240.510 is independent of, and is not limited in any way, by a use that is a “more necessary public use,” discussed below. Section 1240.510 authorizes a taking of anyone’s property by a condemnor that is able to satisfy the requirement that its proposed use will be compatible with the existing use.102

Section 1240.610 of the California Civil Procedure Code implicitly authorizes the balancing of competing public uses to determine whether a proposed public use is a more necessary use than the existing public use of the subject property. Section 1240.610 states that “[a]ny person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated.”103 Section 1240.610, thus,

97 See State Statutes Applicable to Takings of Property, Including Public-Use Property, infra Appendix E.
99 People ex rel. Dept of Pub. Works v. Lagiss, 160 Cal. App. 2d 28, 35, 324 P.2d 926, 931 (1958), petition for rehearing denied (holding that the trial court erred in refusing the property owner’s offer of proof, because he had specifically pleaded fraud, bad faith, and abuse of discretion, and that the trial court was not precluded from determining whether the Highway Commissioner’s resolution was tainted by fraud, bad faith, or abuse of discretion).
100 Cal. Civ. Proc. Code § 1240.510 (2018) (emphasis supplied). The statute also states that when “property is sought to be acquired pursuant to this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.”
101 Id. (Law Revision Commission cmt.).
102 Id.
103 Cal. Civ. Proc. Code § 1240.610 (2018) (emphasis supplied). The statute states that when “property is sought to be acquired pursuant to this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.”
“permits a plaintiff to exercise the power of eminent domain to displace an existing public use.”102 However, a condemnor still has to prove that its proposed use is a more necessary public use.103

Section 1240.700(a) of the California Civil Procedure Code also permits takings of parks and recreational and other areas by cities and counties of property for a use that is a more necessary public use. The statute permits regional park districts responsible for the areas to bring an action to determine which public use is the best and most necessary public use.

When property described in Section 1240.680 is sought to be acquired for city or county road, street, or highway purposes, and such property was dedicated or devoted to regional park, recreational, or open–space purposes prior to the initiation of road, street, or highway route location studies, an action for declaratory relief may be brought in the superior court by the regional park district which operates the park, recreational, or open–space area to determine the question of which public use is the best and most necessary public use for such property.104

A taking of land for highways is recognized universally as being for a public use. In California, it has been held that a taking for a state freeway is a “more necessary public use” than the use of a property as a city park, particularly when the freeway constitutes a federal defense highway of concern to the city, state, and nation.105

California Streets and Highway Code section 103.5 states that “[s]ubject to Sections 1240.670, 1240.680, and 1240.690 of the Code of Civil Procedure, the real property which the department may acquire by eminent domain, or otherwise, includes any property dedicated to park purposes, however it may have been dedicated, when the commission has determined by resolution that such property is necessary for state highway purposes,”106 Section 103.5 of the California Streets and Highway Code grants the Commission exclusive authority to determine what is a “more necessary use” by resolution, a decision that is not subject to judicial review.107

In Rolfe v. California Transportation Commission,108 the issue was whether the California Department of Transportation (Caltrans) could acquire part of the Sweetwater Regional Park from the county of San Diego without first obtaining legislative approval.109 The county had purchased the property pursuant to the Cameron-Unruh Beach, Park, Recreational, and Historical Facilities Bond Act of 1964 (Cameron-Unruh Act).110 The appellate court affirmed the decision of the trial court to grant summary judgment in favor of Caltrans; thus holding that section 5096.27 of the Act did not require Caltrans to obtain legislative approval before acquiring park property from the county and converting it to nonpark use. Section 5096.27 did not address a state agency’s acquisition of park property previously purchased by a local public agency pursuant to the Cameron-Unruh Act.111 The court held that, if the legislature had wanted, it could have amended § 103.5 of California Streets and Highway Code to make legislative approval a prerequisite to Caltrans’s acquisition of parkland purchased by a local agency pursuant to the Act.112

C. Statutes Authorizing the Transportation Department to Acquire or Condemn Replacement Property to Exchange for Public-Use Property

Numerous states authorize the use of eminent domain to acquire privately or publicly owned land for the purpose of exchanging it for property already dedicated to or held for another public use.113 For example, in Alaska, when property that is devoted to or held for another public use for which the power of eminent domain may be exercised is taken for highway purposes, the department may acquire by purchase or otherwise privately or publicly owned land or an interest in it for the purpose of exchanging it for privately or publicly owned land which the department is authorized by law to acquire.114

Furthermore, in Alaska, when the commissioner formally declares that it is in the best public interest of the state to do so, the department may acquire by purchase or otherwise privately or publicly owned land or an interest in it for the purpose of exchanging it for privately or publicly owned land which the department is authorized by law to acquire.115

In Florida, when property is needed for a transportation purpose, but the property is “held by a federal, state, or local governmental entity and used for purposes other than transportation, the department may compensate the entity for such properties by providing functionally equivalent replacement facilities.”116 However, the use of replacement facilities is permitted only when there is an agreement with the affected governmental entity.117

Another Florida statute provides that the department may “acquire any land,” including by exchange, for a right-of-way:

The department may purchase, lease, exchange, or otherwise acquire any land, property interests, buildings, or other improvements, including personal property within such buildings or on such lands,

102 Id. (Law Revision Commission cmt.).
103 Id.
105 People ex rel. Dept of Public Works v. Los Angeles, 179 Cal. App. 2d 558, 564, 4 Cal. Rptr. 531, 535 (1960), petition for a hearing by Supreme Court denied (holding that the state could acquire property already dedicated by a municipality as a park pursuant to Cal. Civ. Proc. Code § 102 and Cal. Sts. & High. Code §§ 102 and 103.5 when the condemned land was for a more necessary public use as a state highway).
109 Id. at 244, 127 Cal. Rptr. 2d at 874.
111 Rolfe, 104 Cal. App. 4th at 244, 127 Cal. Rptr. 2d at 874.
112 Id. at 245, 127 Cal. Rptr. 2d at 875–76.
114 Alaska Stat. § 19.05.110 (2018). The statute provides also that “[i]t is not the province of the department [of transportation] to acquire, other than by condemnation, property for that purpose in any other manner.” Id.
115 Id. § 19.05.120 (2018) (emphasis supplied).
117 Id.
necessary to secure or use transportation rights-of-way for existing, proposed, or anticipated transportation facilities on the State Highway System, on the State Park Road System, in a rail corridor, or in a transportation corridor designated by the department.\footnote{Id. § 337.25(1)(a) (2018).}

In Utah, with respect to public-use property that may be taken by eminent domain, "the department may, with the consent of the person or agency in charge of the other public use, condemn real property to be exchanged with the person or agency for the real property to be taken for state transportation purposes."\footnote{Utah Code Ann. § 72-5-115(1) (2018).}

D. Statutes Requiring Prior Legislative Approval Before Taking Public-Use Property by Eminent Domain

A majority of the transportation departments responding to the survey reported that there are some kinds of public-use property in their state for which the department must obtain prior approval from the legislature, or from a state or local regulatory authority, before taking the property, or an interest therein, by eminent domain for a transportation project.\footnote{See Summary of Transportation Departments’ Responses to Survey, response of District DOT to question number 5, infra (App. C) p. C-3 to -7.}

Whenever the District of Columbia Transportation Department (District DOT) needs to acquire land from a federal agency, such as the National Park Service, approvals for a transfer must be obtained from the National Capital Planning Commission and the District of Columbia City Council.\footnote{See Summary of Transportation Departments’ Responses to Survey, response of District DOT to question number 5, infra (App. C) p. C-6.} In Missouri, when the transportation department needs "state park property, [it] must get a deed from the state of Missouri, which is facilitated by the legislative process."\footnote{See Summary of Transportation Departments’ Responses to Survey, response of Missouri DOT to question number 5, infra (App. C) p. C-6.} In New Hampshire, “[s]tate law requires that a quasi-judicial body appointed by the governor and executive council make a finding of necessity for the highway layout in order for the department to use eminent domain.”\footnote{See Summary of Transportation Departments’ Responses to Survey, response of PennDOT to question number 5, infra (App. C) p. C-6.}

In Pennsylvania, for a conversion of Project 70 lands, discussed in Section VII of the digest, special legislation is needed "granting authority to transfer the property to PennDOT and [for] in-kind mitigation for replacement lands"; for highway/railroad crossings, an Application of Appropriation must be filed with the Pennsylvania Public Utilities Commission; and for railroad takings "for other than operating highway right-of-way (non-grade crossings),"\footnote{Id.} railroad consent is required.

In Tennessee, when a property is publicly held, specific authorization from the legislature is required before taking the property by eminent domain.\footnote{See Summary of Transportation Departments’ Responses to Survey, response of Tennessee DOT to question number 5, infra (App. C) p. C-7.}

In some states, the legislatures have created special-purpose authorities that may need prior legislative approval before exercising eminent domain. The Delaware River and Bay Authority may not exercise its power of eminent domain to condemn any property, devoted to a public use, of the State, or any municipality, county, local government, agency, public authority or commission thereof, or any one or more of them, for any purpose other than a crossing without having first secured legislative authorization and approval of each specific condemnation of property by act of the General Assembly.\footnote{Del. Code Ann. tit. 17, § 1727 (2018).}

Virginia took a different approach when establishing the Chesapeake Bay Bridge and Tunnel District. The Commission is authorized to acquire land without any prior approval of the Virginia General Assembly. If the Commission is unable to reach an agreement on a reasonable price for property that the Commission needs, the Commission appears to have unlimited authority. That is, the Commission is authorized and empowered to acquire by condemnation … any lands, property, rights, rights-of-way, franchises, easements, and other property, including public lands, parks, playgrounds, reservations, highways, or parkways, or parts thereof or rights therein, of any person, partnership, association, railroad, public service, public utility or other corporation, municipality, or political subdivision deemed necessary or convenient for the construction or the efficient operation of the project or necessary in the restoration of public or private property damaged or destroyed.\footnote{Va. Code Ann. § 33.2-2206 (2018).}

E. Statutes Authorizing Municipalities, Counties, and Local Public Agencies to Transfer Real Property to the State Transportation Department

Some state statutes provide that municipalities, counties, and local public agencies may lease, lend, and grant real property to a state transportation department, including "public roads and other real property already devoted to public use."\footnote{36 Pa. Cons. Stat. § 652.9(c) (2018). See also Ohio Rev. Code § 5593.21 (2018); 24 R.I. Gen. Laws § 24-12-6 (2018); Tex. Transp. Code § 203.055(c) (2018) (stating that "at the request of the department, a political subdivision or a state agency may lease, lend, grant, or convey to the Pennsylvania Turnpike Commission any real property, "including public roads and other real property already devoted to public use," on terms that the parties "deem reasonable and fair.").}

In Pennsylvania, all cities, counties, and other political sub-divisions of Pennsylvania, as well as public agencies and commissions of Pennsylvania, are authorized to lease, lend, grant, or convey to the Pennsylvania Turnpike Commission any real property, “including public roads and other real property already devoted to public use,” on terms that the parties “deem reasonable and fair.”\footnote{36 Pa. Cons. Stat. § 652.9(c) (2018). See also Ohio Rev. Code § 5593.21 (2018); 24 R.I. Gen. Laws § 24-12-6 (2018); Va. Code Ann. § 33.2-2206 (2018); Wash. Rev. Code § 47.12.040 (2018).}
In Texas, “[t]he governing body of a political subdivision or public agency . . . may consent to the use of its property for highway purposes.” In addition, “a political subdivision or a state agency may lease, lend, grant, or convey to the department real property, including a highway or real property currently devoted to public use, that may be necessary or appropriate to accomplish the department’s purposes.”

In Utah, in regard to existing public-use property that could be taken by eminent domain, the transportation “department may, with the consent of the person or agency in charge of the other public use, condemn real property to be exchanged with the person or agency for the real property to be taken for state transportation purposes.”

In summary, state statutes may grant unconditional or conditional authority to take property, including public-use property, for highway or other transportation projects. State statutes also may authorize the transportation department to acquire or condemn replacement property to exchange for public-use property, as well as authorize state agencies, municipalities, counties, and local public agencies to transfer real property to the state transportation department. Notwithstanding the public-use doctrine, state transportation departments responding to the survey indicated that they have sufficient authority to take public-use property for their highway and other transportation projects.

VI. WHETHER STATE CONSTITUTIONAL PROVISIONS AND STATUTES MAY BE CONSTRUED TO PERMIT TAKINGS OF PUBLIC-USE PROPERTY

A. Whether a General Power of Eminent Domain Impliedly Authorizes a Taking of Public-Use Property

In cases in which there is doubt regarding whether a constitutional provision, or, more likely, a statute, is sufficiently broad to sanction the taking of public-use property, the courts have considered whether a general grant of the power of eminent domain impliedly authorizes a taking of public-use property.

In Town of Fayal v. City of Eveleth, decided by the Minnesota Court of Appeals, a Minnesota state district court had decided that the town of Fayal had the requisite authority to condemn the city of Eveleth’s property (waterlines, hydrants, and “appurtenant easements lying within Fayal’s borders”) under both its general grant of eminent domain power and its express grant of authority to acquire private property by eminent domain. The district court held “that Eveleth held the water lines in a proprietary capacity”; that the property “was, therefore, private property rather than property devoted to a public use”; and that Eveleth’s property was, thus, subject to condemnation under Faya’s express authority to acquire private property pursuant to Minn. Stat. § 368.01, subd. 27 (1996), or under implied authority pursuant to Minn. Stat. § 365.02 (1996).

On review, the Minnesota Court of Appeals reversed the district court’s decision, holding that the “mere general authority to condemn is insufficient to interfere with authorized public uses” Under section 365.02 of Minnesota Statutes, the grant of eminent domain is broad and not expressly limited to private property. Nevertheless, “[a] state agency to whom the right of eminent domain has been delegated may not condemn public property or property already devoted to public use unless the authority is expressly or impliedly granted by statute.”

The appeals court stated that, “[g]enerally, property already devoted to a public use cannot be condemned for an identical use in another party’s hands. In such an instance, the property merely takes new ownership without any new benefit inuring to the public.” The court recognized “that a municipality may take property of a quasi-public entity and put it to an identical use when a greater public use and benefit would result from purely public ownership or operation.” However, the appellate court held that, because Eveleth’s property was “already purely governmentally owned and operated, no new benefit inures to the public by simply transferring ownership from one governmental entity to another governmental entity.”

B. Whether Authority to Take Private Property Permits a Taking of Public-Use Property

At least one court has considered the issue of whether a state constitutional provision that authorizes a taking of private property may be construed to permit a taking of public or public-use property. In Department of Transportation v. Atlanta, the Supreme Court of Georgia considered whether under the Georgia Constitution a state agency has the power or authority to condemn “land in current public use owned by a municipal corporation.” First, the court held that article I, section III, paragraph I of the Georgia Constitution, which applies to takings by eminent domain, permits only takings of private property. Second, the court held that municipal corporations, being creatures of the state, do not have a constitutional right to own property. Third, although the state “possesses the inherent power to limit those property rights through condemnation ...

131 Id. § 203.055(c).
133 587 N.W.2d 524 (Minn. Ct. App. 1999), petition for further review denied.
134 Id. at 526.
135 Id. at 528.
136 Id. (citation omitted).
137 Id.
138 Id. at 529 (citation omitted).
139 Id. at 530 (citation omitted).
140 Id.
142 Id. at 130, 337 S.E.2d at 332.
143 Id.
the state may not, by fiat, operate in any manner in which it pleases.\textsuperscript{144}

In Virginia, the takings clause of article I, section 11 of the Virginia Constitution applies only to private property.\textsuperscript{145} In\textsuperscript{146} Continental Casualty Co. v. Town of Blacksburg, the plaintiff Continental Casualty Company (Continental) was the subrogee of Virginia Polytechnic Institute and State University (Virginia Tech) that sought recovery for property damage losses paid to its insured, Virginia Tech, because of a storm and subsequent flooding. Continental alleged that a "single, temporary flooding constituted a compensable taking by the town of Blacksburg of property from Virginia Tech,"\textsuperscript{147} a state-supported public university. The takings clause of the Virginia Constitution applies only to private property, as does Virginia Code § 15.1-31(b).\textsuperscript{148} However, Continental argued that there was statutory authority for its claim because "the second reference to takings in Virginia Code § 15.1-31(b) uses the phrase 'any lands of any other person' rather than 'private property...'."\textsuperscript{149} On the basis of the difference in language, Continental argued that "if Blacksburg's construction of a dam or levee to impound or control fresh water caused tidal erosion, flooding or inundation of VPI's property, the use of public property for public purposes would constitute a compensable taking."\textsuperscript{150}

A federal district court in Virginia rejected Continental's argument, stating that how the state's real property is allocated in Virginia is a "legislative matter invested in the General Assembly."\textsuperscript{151} Neither could the Commonwealth of Virginia take property from itself, nor could an entity of the state take property already owned by the state.\textsuperscript{152} "A municipal corporation is a subordinate agency of the state."\textsuperscript{153} It would be "illogical for a state to 'take' property from itself and then owe itself compensation..."\textsuperscript{154} The court held that Continental as subrogee of Virginia Tech had no cause of action against the town of Blacksburg under either article I, section 11 of the Virginia Constitution or Virginia Code section 15.1-31(b).\textsuperscript{155}

To conclude this section, the courts have considered whether a general grant of the power of eminent domain implicitly authorizes a taking of public-use property. There is authority that a government entity having the power to exercise eminent domain may not take public property or property already devoted to a public use unless the authority to do so is expressly or impliedly granted by the applicable statute. There is also judicial precedent holding that a general authority to exercise eminent domain is not sufficient to permit a public entity to take public-use property that would prevent or interfere with the public-use property's present or existing use.

\section*{VII. Effect of Restrictions Imposed by Statute, a Deed of Dedication, or a Conservation Easement on Takings of Public-Use Property}

As discussed in Section III, three of the four condemnation hierarchies identified for the digest are based on the identity of the owner of the public-use property sought to be taken by eminent domain; the relative importance of a taking of public-use property for a proposed use in comparison to the public-use property's prior or present use; and the inherent importance of transportation projects that may require takings of public-use properties, including public-use properties protected by federal or state law. All three condemnation hierarchies may apply when public-use property is dedicated as a park, as a nature or forest preserve, or when the property is dedicated to a similar public use. However, even when land has been dedicated to such uses, the applicable statute, deed of dedication, or conservation easement may permit another use of the property.

For example, in \textit{Department of Transportation v. Atlanta},\textsuperscript{156} supra, a proposed parkway would traverse portions of four parks owned by Atlanta and located in DeKalb County. At issue was whether the dedication of the land as parkland prevented its transfer. A Georgia statute, section 36-37-6.1(b) of the Georgia Annotated Code, grants municipalities with a population of more than 300,000 the "authority to sell, exchange, or otherwise dispose of any real or personal property comprising parks, playgrounds, golf courses, swimming pools, or other like property used primarily for recreational purposes..."\textsuperscript{157} The statute does not authorize an alienation [of property] where such would be in derogation of rights, duties, and obligations imposed by prior deed, contract, or like document of similar import or where such alienation would cause divesting of title to a park, playground, golf course, swimming pool, or other like property that had been dedicated to public use and not subsequently abandoned.\textsuperscript{158}

The Supreme Court of Georgia stated that the statute, although not an affirmative bar to the "alienation of the parklands in question," did "incorporate the bar established in the conditions included in the deeds granting the parks to the city and the bar established by the dedication and the public's acceptance of the parks in question."\textsuperscript{159} The court held that the city did not have the power to alienate the parklands in question, and, because the transfers to the department conflicted with state law,
the City Council’s transfer of the land was ultra vires. The transfer was ultra vires due to the conflict with state law, rather than with the city charter or the city ordinances as the trial court ruled.

Elsewhere, under Illinois law, "[p]roperty owned by a forest preserve district and property in which a forest preserve district is the grantee of a conservation easement or grantee of a conservation right" may not be taken by eminent domain. In addition, the Illinois Natural Areas Preservation Act protects nature preserves from condemnation for another use by declaring that they are held in trust for the benefit of present and future generations. Under the statute, "nature preserves are declared to be put to their highest, best and most important use for the public benefit.

Nevertheless, there is an exception that permits nature preserves to be put to another use. "[E]xcept as may otherwise be provided in the instrument of dedication, the Illinois Nature Preserves Commission (Commission) may find that there is an "imperative and unavoidable public necessity" for another public use. In such a situation, an instrument of dedication is not necessarily a complete impediment to putting the property to another use. "The owner of an interest or right in a nature preserve may amend the instrument of dedication, with the approval of the Commission and the Governor, after the Commission has determined that the amendment will not permit an impairment, disturbance, development or use of the nature preserve or the natural features therein in a manner inconsistent with the purposes of this Act."

In some instances, transportation uses of protected property may be consistent with or facilitate the intended purpose of the public-use property. For example, PennDOT’s response to the survey discussed lands in Pennsylvania that are "deed-restricted" to protect the property for their intended use, namely, property developed under title 32, sections 2011–2024 of the Keystone Recreation, Park and Conservation Fund Act (Act 50 land) and public parkland acquired with funding pursuant to title 72, sections 3946.1–.22 of the Project 70 Land Acquisition and Borrowing Act (Project 70 land). Both Act 50 lands and Project 70 lands are deed restricted. The public entities owning the lands "are entrusted with preservation and oversight responsibilities to ensure they are put [to] the intended public use."

As for Act 50 lands, PennDOT has been able to reach "[a]micable agreements… resulting in deed-restricted permanent interests in land for transportation purposes, along with temporary construction easements." That is, rather than acquiring land in fee simple, PennDOT has acquired "easements for highway purposes with agreed-upon restrictions placed in the deeds." As for Project 70 lands, environmental agencies with jurisdiction over these lands have agreed in principle that PennDOT acquisitions for highway purposes —where the road improvements would benefit the public use—are actually for recreational purposes within the intent of the use restrictions. Such transfers are thus not seen as sales of restricted land but, instead, the transfer of jurisdiction over land owned by the Commonwealth from one state agency to another.

However, a conversion of Project 70 lands "require[s] special legislation [granting] authority to transfer the property to PennDOT and in-kind mitigation for replacement lands."

Furthermore, "[m]itigation requirements are worked out in advance, and included within the law, to ensure the legislation is universally supported."

In sum, state legislatures may exclude or exempt certain kinds of public-use property by statute, a deed of dedication, or a conservation easement, such as property designated as parks or nature or forest preserves, from categorical takings by eminent domain. However, even when land has been dedicated to such public uses, the applicable statute, deed of dedication, or conservation easement may permit another use of the property, including a highway or highway improvements.

VIII. WHETHER MUNICIPALITIES, COUNTIES, OR LOCAL PUBLIC AGENCIES MAY TAKE PUBLIC-USE PROPERTY

A. Constitutional or Statutory Authority of a Municipality, County, or Local Public Agency to Take State-Owned Property

Sections IV through VII of the digest have dealt primarily with the authority of state transportation departments to take public-use property. This subsection analyzes whether there must be state constitutional or statutory authority for a municipality, county, or local public agency to take state-owned property. Subsection A also illustrates the second condemnation hierarchy—when the identity and authority of the owner (i.e.,
the state) of the public-use property sought to be condemned is preeminent. Subsections VIII.B through G illustrate the third condemnation hierarchy—whether the proposed use of the public-use property to be taken is more important than the property’s present public use.

In Elizabeth Board of Education v. New Jersey Transit Corp., the Elizabeth Board of Education (Board) sought to condemn property owned by the New Jersey Transit Corporation. The Board argued that it could condemn the property, because there were no statutory restrictions in title 18A of the New Jersey Statutes Annotated, on the Board’s power of condemnation. The Board argued that “N.J.S.A. 40A:12-4, which bars counties and municipalities from ‘acquiring’ State property, including by condemnation, N.J.S.A. 40A:12-2(a), without the State’s express consent, [is] evidence that had the Legislature wanted to restrict boards of education from condemning State property, it would have done so.” However, a New Jersey appellate court held that there was no express grant of authority that permitted school boards to condemn state property. “[A] general grant of the right of condemnation does not include State property, … unless the State is expressly mentioned therein.” The fact that the legislature had withheld the power of eminent domain from counties and municipalities to condemn state property did not imply that boards of education could acquire state property by eminent domain.

The limitations discussed in subsections VIII.B through VIII.G herein on the right of municipalities, counties, and local public agencies to take private-use property from another unit of local government do not apply to the state as condemnor. For example, in Hiland v. Ives, supra, the plaintiffs objected to the defendant Highway Commissioner’s taking of land from a public park to use for a highway. The Connecticut Supreme Court rejected the plaintiffs’ argument that a general grant of eminent domain authority did not confer on the state highway commission the power to take land of Hubbard Park that was devoted already to a public use. The limitation on the power to exercise eminent domain only applies when the condemnor is a municipal or private corporation; the limitation does not apply when “the sovereign itself is the condemnor and is taking the property on its own behalf and for its own sovereign purposes.”

In the Hiland case, because the park was “held by an inferior governmental corporate subdivision,” a general power of condemnation was sufficient for the state to take 47 acres of Hubbard Park. Moreover, the term “any land” in the state statute applied to land held for public park purposes.” The fact that Hubbard Park was held for a public use under authority granted by the state … does not … remove it from the state’s sovereign power of eminent domain.”

A majority of the transportation departments responding to the survey reported that municipalities, counties, or local public agencies in their state have the authority to take public-use property by eminent domain from another municipality, county, or local public agency for a highway project.

B. No Takings by Municipalities, Counties, or Local Public Agencies of Public-Use Property That Conflict with State Law

It has been held that a municipality may not use eminent domain to take or regulate public-use property when the taking or regulation conflicts with state law. In City & County of Denver v. Qwest Corp., the Supreme Court of Colorado held that, even if the city’s ordinance were a legitimate exercise of its police powers, the ordinance was invalid “to the extent that it conflicts with a state statute concerning a matter of mixed statewide and local concern.”

The Qwest Corp. case involved an action to declare that sections 10.5-1 to 10.5-41 of Denver’s Revised Municipal Code were invalid. In April 1996, Colorado enacted legislation that granted telecommunications providers a right to occupy public rights-of-way without any requirement of additional authorization or a franchise from local municipalities. The rationale for the state legislation was that it would be “unreasonable, impractical, and unduly burdensome” to require telecommunications companies to obtain authority from every political subdivision within Colorado to conduct business. Notwithstanding the state legislation, in November 1997, Denver enacted a “comprehensive regulatory scheme” that required, inter alia, telecommunications providers to obtain a “Private Use Permit” and to pay annual fees before the providers could occupy or use (or continue to occupy or use) public rights-of-way in Denver.

Denver appealed a state court’s judgment that granted declaratory relief to a number of telecommunications companies and dismissed Denver’s counterclaim for inverse condemnation. Although Denver is a “home rule municipality,” under article XX, section 6 of the Colorado Constitution, home

176 Id. at 264, 776 A.2d at 822.
177 Id. at 266, 776 A.2d at 823.
178 Id. at 267, 776 A.2d at 824.
179 Id. at 268, 776 A.2d at 825 (citations omitted).
180 Id. at 269, 776 A.2d at 825.
181 154 Conn. 683, 228 A.2d 502 (1967).
182 Id. at 685, 228 A.2d at 503 (citing Conn. Gen. Stat. § 13a-73).
183 Id. at 688, 228 A.2d at 504.
184 Id. (citation omitted).
185 Id. at 690, 228 A.2d at 505.
rule cities may legislate in an area "only if the constitution or a statute authorizes such legislation."

"[A] home rule city's power to grant franchises does not limit the state's authority in matters of statewide or mixed local and statewide concern." The court held that Denver's requirement of a private use permit conflicted directly with the state legislature's decision that telecommunications providers operating under the authority of the Federal Communications Commission or the Colorado Public Utilities Commission could not be required to comply with a municipality's requirement that they obtain additional authorization from the municipality or obtain a municipal franchise.

C. No Takings by Municipalities, Counties, or Local Public Agencies of Public-Use Property When a Proposed Use Will Destroy an Existing Public Use

In general, unless the legislature has granted the power expressly or by implication, the public-use doctrine precludes municipalities, counties, or local public agencies from condemning public-use property when the condemnor’s proposed use would destroy an existing public use.

The foregoing rule applies to a taking by a municipality of land of another municipality, county, or local public agency. As stated in Section VIII.A of the digest, the foregoing prohibition on taking public-use property does not apply when the condemnor is either the federal or a state sovereign.

A general power of eminent domain may not necessarily permit a municipality, county, or local public agency to take public-use property, unless it can be inferred that, under the circumstances, "the legislature intended to authorize [such] property to be taken." An inference that a municipality, county, or local public agency has authority to take public-use property from another unit of local government may be difficult to argue when the taking would "practically … destroy" the property’s existing use, unless the "intended use is of 'paramount' public importance…." In City of Worthington v. City of Columbus, the city of Worthington sought to condemn 5 acres of real property owned by the city of Columbus. The Supreme Court of Ohio held that the city of Worthington’s claim to a right to take property by eminent domain failed.

The eminent domain power of a chartered municipal corporation vested by Section 3, Article XVIII of the Ohio Constitution does not include the power to condemn property when the use proposed by the municipality will destroy its existing public use, unless the Ohio Constitution authorizes the acquisition either expressly or by necessary implication.

Similarly, in Texas, "condemnees may prevent a condemnation when the property [to be taken] is already devoted to another public use and the condemnee establishes that the new condemnation 'would practically destroy the use to which it has been devoted.'" When a condemnee is able to "show that the condemnation would practically destroy the existing use, then to succeed with the condemnation the condemnor must show that the necessity of the taking is "so great as to make the new enterprise of paramount importance to the public, and it cannot be practically accomplished in any other way.""}

D. No Takings by a Municipality, County, or Local Public Agency of Public-Use Property for a Proposed Use That Is Substantially Inconsistent with a Property’s Present Public Use

In some jurisdictions, unless a condemnor’s authority is expressly or implicitly granted by statute, a municipality, county, or local public agency may not take property already devoted to a public use. However, when a "condemnor’s [proposed] use is not substantially inconsistent with that of the condemnee," there may be an implied right to condemn public-use property under a general grant of condemnation authority.

As stated in Town of Fayal v. City of Eveleth, supra, [generally, property already devoted to a public use cannot be condemned for an identical use in another party’s hands. In such an instance, the property merely takes new ownership without any new benefit inuring to the public…. The rule against taking property already devoted to a public use, in the absence of express authority, generally does not apply when the second use does not materially or seriously interfere with the first use, or, when the second use is consistent[,] and the two uses may be enjoyed together without interference with the first use."

This implied power may not be invoked when the proposed use of the property would destroy or essentially impair the existing use. For example, in In re Suburban Hennepin Regional Park Dist. of Certain Lands, the Minnesota Court of Appeals held that a condemnor may not rely on an implied power "when the
The proposed use of… railroad property would destroy or essentially impair the railroad’s existing use of the property.”

The Suburban Hennepin Regional Park District (Park District) sought to condemn approximately 6.26 miles of the Union Pacific Railroad’s (Union Pacific) right-of-way to complete the acquisition and development of a recreational trail. The Park District’s right-of-way would parallel the railroad tracks. Union Pacific argued that the recreational trail, not only would be “substantially inconsistent” with its existing use of the right-of-way, but also would pose an increased risk of injury to the public, result in more litigation for the railroad, reduce the space for railroad business, and increase pedestrian-created dangers, such as persons throwing rocks or placing objects on the tracks. First, the court held that an “increased expense, danger, or inconvenience [was] insufficient, as a matter of law, for a finding of substantial inconsistency.” Second, the court held that “the proposed recreational trail [would] not substantially interfere with the railroad’s existing use of the right-of-way.”

E. Whether a Taking of Public-Use Property Is Permitted for a More Necessary Use than the Property’s Present Use

There is authority holding that a taking of public-use property is permitted, when the taking is for a more necessary use than the property’s present use. In State by Department of Highways v. Standley Bros., the Montana Department of Highways (preceding agency of Montana Department of Transportation (Montana DOT) sought to acquire an interest in a leasehold for the purpose of reconstructing a rural highway. Pursuant to section 60-4-103 of the Montana Code Annotated, before initiating eminent domain proceedings, the department had to adopt an order declaring that:

(a) public interest and necessity require the construction or completion by the state of the highway or improvement for one of the purposes set forth in section 60-4-103, MCA;
(b) the interest described in the order and sought to be condemned is necessary for the highway or improvement; [and]
(c) that the proposed highway or improvement is planned or located in a manner which will be most compatible with the greatest public good and the least private injury;.

The adoption of an order creates a “disputable presumption”

(a) of the public necessity of the proposed highway or improvement;
(b) that the taking of the interest sought is necessary therefor; [and]
(c) that the proposed highway or improvement is planned or located in a manner which will be most compatible with the greatest public good and the least private injury.

The property owner may be able to overcome the above presumption “by showing clear and convincing proof of fraud, abuse of discretion, or arbitrary action.”

In Standley Bros., the evidence was “that the Highway Department was notified, prior to its completion of the location survey, that there was a possible conflict between the road improvement and a planned irrigation system on [the] leased State lands,” but the department apparently did not “appreciate[] the seriousness of the conflict.” Because the department did not consider the possible injury to the private interest when deciding on the final location of the highway, the Supreme Court of Montana reversed. The court’s decision remanding the case to the district court directed that the department “consider whether there is an alternate route, reasonably equal in terms of public good, that would avoid the destruction of irrigated acreage on the school land leased by defendants.”

In a later case, Montana Power Co. v. Burlington Northern Railroad, the Montana Supreme Court held that an existing public use and the proposed public use of a property must be found to be incompatible before the “more necessary use” rule may apply. A Montana statute provides that:

(1) Before property can be taken, the condemnor shall show by a preponderance of the evidence that the public interest requires the taking based on the following findings:
(a) the use to which the property is to be applied is a public use pursuant to 70-30-102;
(b) the taking is necessary to the public use;
(c) if already being used for a public use, that the public use for which the property is proposed to be used is a more necessary public use; [and]
(d) an effort to obtain the property interest sought to be taken was made by submission of a final written offer prior to initiating condemnation proceedings and the final written offer was rejected.

The Montana Power Company (MPC) had contracted with various railroads using wire-line permits to construct, operate, and maintain electric transmission lines through railroad rights-of-way for over 50 years. MPC had offered to purchase an easement for a transmission facility through Burlington Northern Railroads’ (BN’s) property, but BN offered to grant only a wire-line permit. MPC rejected BN’s offer on the basis that the permit’s revocability and indemnification clauses were “onerous.” BN argued that an easement for MPC over BN’s railroad right-of-way was a greater interest than necessary for MPC’s intended use and that an unrestricted easement was “too great an interest when a wire-line permit will permit the desired

212 Id. at 197 (citations omitted) (emphasis supplied).
213 Id. (citations omitted).
214 Id.
216 Id. at 478, 699 P.2d at 61.
217 Id. at 478, 699 P.2d at 61–62 (quoting Mont. Code Ann. § 60-4-104(3)).
F. Whether a Taking of Public-Use Property Is Permitted When the Proposed Use Will not Materially Impair or Interfere with the Existing Use or Be Detrimental to the Public Interest

In other jurisdictions, the question is whether a taking of public-use property is permitted when the proposed use will not materially impair or interfere with the existing use or be detrimental to the public interest. Chapter 65, section 5/11-61-2 of Illinois Compiled Statutes authorizes municipalities, for the purposes of establishing and improving streets, parks, and other public grounds,

"to take real property ... belonging to the taking municipality, or to counties, school districts, boards of education, sanitary districts or sanitary district trustees, forest preserve districts or forest preserve district commissioners, and park districts or park commissioners, even though the property is already devoted to a public use, when the taking will not materially impair or interfere with the use already existing and will not be detrimental to the public."235

The above statute was at issue in Village of Woodbridge v. Board of Education of Community High School District 99.234 The Board of Education of Community High School District 99 (District) appealed a trial court’s order that denied a motion to dismiss an eminent domain proceeding brought by the Village of Woodbridge (Woodbridge). After Woodbridge sought to acquire a parcel of property owned by the District adjacent to Woodbridge’s village hall, the District adopted a resolution affirming the District’s continued need for the property. On review, the appellate court had to determine whether the property that Woodbridge sought to take was committed to a public use, and, if so, whether the taking would materially impair or interfere with an existing use or be detrimental to the public.235

First, regarding Illinois statute 5/11-61-2, the court held that a municipality in Illinois has the authority to take land for development already held by other governmental entities. The District argued that the taking would interfere materially with existing uses of its property and also that the District’s holding of the property for a future use is an existing public use. The court rejected the District’s arguments, because the Illinois statute “directs that a taking of publicly held property may take place only where it ‘will not materially impair or interfere with the use already existing’ of the property sought to be condemned.”236

Second, the court held that the holding of real estate as an investment does not constitute an existing use.237 Thus, Woodbridge had the authority, pursuant to section 5/11-61-2, to condemn the District’s property.238

G. Whether a Taking of Public-Use Property Is Permitted When the Property Is Not Dedicated to a Specific Use

At least one court has held that property must be dedicated to a specific public use to come within the meaning of the term public-use property.

In a Nebraska case, Metropolitan Community College Area v. City of Omaha,239 the Metropolitan Community College Area (Metro) sought to enjoin the city of Omaha (Omaha) from condemning a portion of Metro’s Elkhorn Valley campus to improve Metro’s entrance/exit and connect a new street. The trial court stated that a Nebraska statute “very clearly provides the City the authority to take public property only if that property is not devoted to a specific public use.”240 The trial court concluded that the Metro entrance was currently being used as a street but that the use was not a specific public use.

The Supreme Court of Nebraska reversed and remanded. In Nebraska, a city may use the power of eminent domain to take “private property or public property which is not at the time devoted to a specific public use, for the following purposes and uses: (1) [f] or streets, avenues, parks, recreational areas, parkways, playgrounds, boulevards, sewers, public squares, market places, and for other needed public uses or purposes authorized by this act, and for

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226 Id. at 228, 900 P.2d at 891.
227 Id. at 229, 900 P.2d at 892.
228 Id. at 230, 900 P.2d at 892.
229 Id. at 233, 900 P.2d at 894 (emphasis supplied) (citations omitted).
230 Id. at 234, 900 P.2d at 894 (citations omitted).
231 Id. at 226, 900 P.2d at 889.
232 Id. at 238–39, 900 P.2d at 897.
235 Id. at 572, 933 N.E.2d at 404 (citation omitted).
236 Id. at 577, 933 N.E.2d at 408 (citation omitted).
237 Id. at 578–79, 933 N.E.2d at 409.
238 Id. at 583, 933 N.E.2d at 413.
239 277 Neb. 782, 765 N.W.2d 440 (2009).
240 Id. at 786, 765 N.W.2d at 442 (emphasis supplied).
adding to, enlarging, widening, or extending any of the foregoing; and (2) for constructing or enlarging waterworks, gas plants, or other municipal utility purposes or enterprises authorized by this act.\textsuperscript{241}

The city argued that the Metro property at issue was “not devoted to a specific public use, because Metro’s mission is to provide educational services.”\textsuperscript{242} The Nebraska Supreme Court disagreed, holding that Metro’s entrance/exit was devoted to a specific public purpose, because, without an entrance/exit, Metro would be unable to provide educational services.

To conclude this section of the digest, subsection VIII.A exemplifies the second condemnation hierarchy, namely, the preeminent authority of the state, the sovereign, vis-à-vis a local government that attempts to take the state’s public-use property by eminent domain. Subsections VIII.B through G exemplify the third condemnation hierarchy—the relative importance of the proposed use of public-use property sought by eminent domain in comparison to the public-use property’s present use. Condemnors, other that the state as condemnor, may be proscribed by statute or judicial precedents from taking public-use property when a proposed use will destroy an existing public use; when a taking for a proposed use will impair or interfere with a public-use property’s existing use or be detrimental to the public interest; or when a taking by a unit of local government conflicts with state law. In some states, a taking of public-use property is permitted when the proposed use is for a use that is more necessary than the property’s present use.

IX. ACQUISITION OF PUBLIC-USE PROPERTY OWNED BY PUBLIC UTILITIES, RAILROADS, AND PIPELINES

A. Introduction

This section of the digest analyzes whether state transportation departments have the authority to take public-use property belonging to a utility, railroad, or pipeline. The section illustrates the second condemnation hierarchy—the identity and authority of the owner of public-use property when a condemnor seeks to condemn it.

Incidentally, the section also illustrates the importance of definitions in federal and state statutes, such as of the term “utility.” In Oregon, for example, with respect to the state statute authorizing exchanges of property for utility property, the term “utility” means any person or entity operating plants or equipment

(a) For the conveyance of telegraph or telephone messages, with or without wires;
(b) For the transportation of water, gas or petroleum products by pipelines;
(c) For the production, transmission, delivery or furnishing of heat, light, water, power, electricity or electrical impulses; or
(d) For the transmission and delivery of television pictures and sound by cables.\textsuperscript{243}

A Rhode Island statute on the jurisdiction of the state’s Public Utilities Commission defines the term public utility to mean “every company that is an electric distribution company and every company operating or doing business in intrastate commerce and in this state as a railroad, street railway, common carrier, gas, liquefied natural gas, water, telephone, telegraph, [or] pipeline company.”\textsuperscript{244}

Although some statutes define the term “utility” to include common carriers, such as railroads and pipelines, this section of the digest discusses railroads and pipelines separately.

B. Utility Property

1. Statutory Authority to Take Utility Property

Some state statutes explicitly authorize the taking of utility property. A Kentucky statute states that the Department of Highways is hereby authorized and empowered to acquire by condemnation … any lands, property, rights, rights-of-way, franchises, easements and other property, including … public utility or other corporation, or municipality or political subdivision, deemed necessary or convenient for the construction or the efficient operation of any project or necessary in the restoration of public or private property damaged or destroyed.\textsuperscript{245}

Some states require prior approval by a public utility commission or the equivalent before a condemnor takes property belonging to a utility. For example, in Illinois, [n]o land or interests in land now or hereafter owned, leased, controlled, or operated and used by, or necessary for the actual operation of, any common carrier engaged in interstate commerce, or any other public utility subject to the jurisdiction of the Illinois Commerce Commission, shall be taken or appropriated under this Section by the State of Illinois, the Illinois Toll Highway Authority, the sanitary district, the St. Louis Metropolitan Area Airport Authority, or the Board of Trustees of the University of Illinois without first securing the approval of the Illinois Commerce Commission.\textsuperscript{246}

A Rhode Island statute provides that a taking of land or an interest therein devoted to a public use shall be effective provided that no land or interest therein, belonging to a public utility corporation may be acquired without the approval of the administrator of public utilities or other officer or tribunal having regulatory power over the corporation. Any land, or interest therein, already acquired by the authority may nevertheless be included within the taking for the purpose of acquiring any outstanding interests in the land.\textsuperscript{247}

\textsuperscript{244} R.I. Gen. Laws § 24-12-17(2) (2018) (emphasis supplied).
2. Acquisition or Condemnation of Property to Exchange for Utility Property

Some states authorize the transportation department to acquire or take property to exchange for utility property. In Oregon, when utility facilities are located on property needed for a city street, public road, or state highway, but the utility is willing to convey its property “for other real property within a reasonable distance, the state, through the Department of Transportation, may acquire by purchase, agreement or by the exercise of the power of eminent domain, other real property, except that of another utility, within a reasonable distance.” After acquiring the necessary property, “the state, through the department, may convey it to the utility in exchange for the real property required from the utility for city street, public road or state highway purposes.” In making an exchange, the transportation department must consider “[t]he difference in the value of the respective real properties...”

3. Highway Projects and Responsibility for Utility Relocation Costs

An issue that has arisen involving utilities is whether the transportation department or the utility is responsible for the utilities’ relocation costs when utilities must be moved from a highway or highway right of way because of a highway project.

In City of Chandler v. Arizona Department of Transportation, the question was whether the city of Chandler was required, as the trial court held, to pay the costs of relocating its utility lines under a roadway that had been dedicated to the public. The city argued that it was entitled to reimbursement because its utilities were present in the right-of-way prior to the highway construction. However, in Arizona, “the common law rule is that a public utility has the duty of relocating its lines when such is made necessary by street improvements.” The court held that, “in the absence of an agreement to the contrary, the cost of relocating utility lines placed in the right-of-way of public streets must be paid by the owner of the utility when the relocation is necessitated by road maintenance or construction, unless the utility was in place before the public acquisition of the roadway.”

The court held also that because the Arizona Department of Transportation (Arizona DOT) permitted the city to relocate its utilities, the city had not suffered a compensable taking. The court affirmed the entry of a summary judgment for the Arizona DOT.

A federal statute, 23 U.S.C. § 123(a) (2018), provides that if a state pays a utility’s relocation costs necessitated by a construction project on a federal-aid highway, “[f]ederal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project.” However, reimbursement is not permitted under § 123(a) if payment would violate state law or “a legal contract between the utility and the State.” There must be satisfactory evidence that a state has paid the relocation costs from its own funds with respect to federal-aid highway projects for which federal funds are obligated.

The federal regulations applicable to utility relocations, adjustments, and reimbursement define the term utility to mean: a privately, publicly, or cooperatively owned line, facility or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public. The term utility shall also mean the utility company inclusive of any wholly owned or controlled subsidiary.

As for state statutes that authorize reimbursement of utility relocation costs, a Delaware statute requires the transportation
department to reimburse the owner of a public utility for its expense to relocate its facilities necessitated by any project where the State is to be reimbursed by at least 90% of the cost of such project from federal funds or by the federal government or any agency thereof, such expense to be the amount paid by such owner properly attributable to such relocation after deducting therefrom any increase in the value of the new facilities and any salvage value derived from the old facilities.260

In responding to the survey, the Arkansas Department of Transportation (Arkansas DOT) stated that in Arkansas a utility ordinarily will have an easement and that when the Highway Commission condemns an "area encompassed by a utility easement" the Commission may have to pay for a replacement easement and pay the cost to relocate the utility.262 If a utility is located in or on the Highway Commission's right-of-way by permit but must be moved because of a project, "the utility generally must move at its own expense"; however, "often companies on Highway Commission right of way by permit but must be moved because of a project, "the utilis located in or on the Highway Commission’s right-of-way may be defunct or have no funds to be moved and [their removal or relocation] poses a problem and delay for highway projects."263 The Kentucky DOT "enters into relocation agreements with utilities and other common carriers."264 The Utah DOT stated that the department relocates utility facilities.265

C. Railroad Property

1. Whether State Transportation Departments’ Condemnation of Railroad Property Is Preempted by Federal Law

When Congress enacted the Interstate Commerce Commission Termination Act of 1995 (ICCTA),266 Congress established the Surface Transportation Board (STB) to administer the Act.267 The STB has exclusive jurisdiction of

(1) transportation by rail carriers, and the remedies provided in this part [49 U.S.C. §§ 10101 et seq.] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and [if]

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State....268

Except as otherwise provided, the Act’s provisions applicable to the regulation of rail transportation preempt any other provisions of federal or state law.269 Nevertheless, it appears that not all state regulation or takings of railroad property are preempted. Preemption applies in those situations when “a regulation prevents or unreasonably interferes with railroad transportation.”270

As held by the Seventh Circuit in Union Pacific Railroad v. Chicago Transit Authority,271 an action may be preempted by the ICCTA and the STB’s exclusive jurisdiction either on a categorical or on an “as applied” basis.272 Union Pacific Railroad Company (Union Pacific) owned a 2.8-mile-long right-of-way that it had leased to the Chicago Transit Authority (CTA) for almost 50 years. When the parties could not agree on a new rental rate, the CTA sought to obtain a perpetual easement by commencing condemnation proceedings with the Illinois Commerce Commission.

The Seventh Circuit explained that

[c]ategorical preemption occurs when a state or local action is pre-empted on its face despite its context or rationale…. If an action is not categorically preempted, it may be preempted “as applied” based on the degree of interference that the particular action has on railroad transportation—this occurs when the facts show that the action "would have the effect of preventing or unreasonably interfering with railroad transportation."273

The district court enjoined the CTA’s condemnation action on the grounds that the ICCTA preempted the action both categorically and as applied.274 However, because of the facts of the case, the Seventh Circuit held that the CTA’s condemnation action was preempted only on “as applied” basis. The reason is that “a condemnation is not a rule of general applicability because each instance necessarily varies with the facts of the case and the specific property subject to the condemnation.”275 The court observed that in other condemnation cases, such as those concerning railroad crossings, the courts relied on an as applied analysis.276 That is, the courts “framed the issue by asking whether the action prevents or unduly interferes with railroad operations,” an approach that “corresponds to the ‘as applied’ analysis.”277

The Seventh Circuit held that the CTA’s condemnation sought to do more than change the terms of the parties’ agreement. Rather, the CTA’s condemnation of the property would change the status quo. Post-condemnation, Union Pacific would lose certain property rights, because CTA would have “perpetual control of the property.”278 Thus, CTA’s use of condemna-

261 See Summary of State Transportation Departments’ Responses to the Survey, response of Arkansas DOT to question number 9(c), infra (App. C) p. C-12.
262 See id.
263 See Summary of Transportation Departments’ Responses to the Survey, response of Kentucky DOT to question number 9(c), infra (App C) p. C-12.
264 See Summary of Transportation Departments’ Responses to the Survey, response of Utah DOT to question number 9(c), infra (App C) p. C-13.
268 Id.
269 Id. Union Pac. R.R., 647 F.3d at 682.
270 647 F.3d 675 (7th Cir. 2011).
271 Id. at 679.
272 Id. (citations omitted) (footnote omitted).
273 Id.
274 Id. at 679–80.
275 Id. at 680 (citing New Orleans & Gulf Coast Ry. Co. v. Barrois, 533 F.3d 321, 332–33 (5th Cir. 2008)).
276 Id.
277 Id. at 683.
tion, rather than an agreement with Union Pacific, to obtain the right to use the property had "a significant impact on railroad transportation."287

According to the court, most cases in which the courts have held that there was no unreasonable interference with railroad transportation concerned "instances of non-conflicting and non-exclusive easements across railroad property such as road crossings and utility easements."288 The court cited other cases in which takings were not preempted because the takings were "sufficiently distant from railroad operations to present no unreasonable interference."289 The preemption issue may arise "even if the relationship and property rights of the parties are the same both before and after the condemnation."290

In City of Girard v. Youngstown Belt Railway Co.,291 the question was the extent to which the ICCTA preempts a state's eminent-domain action to take a parcel of railroad property. Youngstown Belt Railway Company (Youngstown Railway) owned Mosier Yard, a 55-acre parcel of land on which the Railway operated an active track along the border of the Yard. In 2004–2005, Youngstown Railway and Total Waste Logistics of Girard, LLC (Total Waste Logistics) entered into an agreement whereby Total Waste Logistics would purchase Mosier Yard. The agreement was contingent on the purchaser being able to obtain permits to use the property as a construction-and-demolition-debris landfill. However, in June 2006, the city of Girard commenced an action to appropriate a portion of Mosier Yard. The parcel of property that would remain included the Railway's existing track and right-of-way, as well as space for storage or construction of an additional track.

The trial court held that the ICCTA preempted the city's action to take the property because of the Railway's use of a portion of the appropriated land. The Supreme Court of Ohio reversed. Although the ICCTAs's "broad, sweeping language shows Congress's intent to preempt any state effort to regulate railroad transportation," the Act's "legislative history indicates that Congress did not intend to preempt any and all state laws that might touch upon or indirectly affect railroad property."292 The court held that the ICCTA did not categorically preempt the city's eminent-domain action to take a portion of Mosier Yard.293 "Clear-cut examples of categorically preempted state actions include state and local permitting laws and zoning regula-

tions" and "eminent-domain actions that seek to take property containing active rail lines...."294

Regarding "state or local actions that are not facially preempted, ... preemption analysis [under 49 U.S.C. § 10501(b)] requires a factual assessment of whether [the] action would have the effect of preventing or unreasonably interfering with railroad transportation."295 A taking of the Railway's present use of Mosier Yard did not result in preemption, because the part of the property sought by the city contained no active or abandoned tracks, no portion of rights-of-way of any rail lines, and no permanent structures, and the property was "undeveloped as a whole."296 The court cited other cases in which the courts had held that there was preemption of an action because of interference with a railroad right-of-way.297 Moreover, Total Waste Logistics' activity on the property did not constitute transportation by a railway carrier.298 Finally, Youngstown Railway's claims that it had future, unspecified uses of the property were too vague to be considered.299

An example of a taking of railroad property held to be preempted by the STB's jurisdiction is City of Lincoln v. Surface Transportation Board, decided by the Eighth Circuit.300 The City of Lincoln, Nebraska sought to take a portion of the right-of-way of a rail line for a bicycle and pedestrian trail and for the city's storm drainage system. The city petitioned the STB for a declaratory order that federal law did not preempt the city's taking, because the city's proposed action was not a regulation of rail transportation under 49 U.S.C. § 10501(b). However, the STB ruled that federal law preempted the taking, a decision that the circuit court affirmed.

In brief, Lincoln Lumber Company ( LLC), the only rail customer on a dead-end line, received approximately 50 carloads annually. LLC received rail service because of an operating agreement it had with the Omaha, Lincoln & Beatrice Railway Company that owned a connecting line.301 Although Lincoln argued that LLC's rail operations would be unaffected by its proposed taking, the issue for the STB was "whether the proposed taking would prevent or unduly interfere with railroad operations and interstate commerce. If so, it would be preempted by

287 Id. at 682.
288 Id. at 682 n.9 (emphasis supplied) (citing Lincoln Lumber Co.—Petition for Declaratory Order, No. 34915, 2007 STB LEXIS 467 (S.T.B. Aug. 10, 2007) (sewer easement) and Maumee & W. R.R. Corp., No. 34354, 2004 STB LEXIS 140 (S.T.B. March 2, 2004) (road crossing)).
290 Id. at 683.
291 Id. at 682.
292 134 Ohio St. 3d 79, 979 N.E.2d 1273 (2012).
293 Id. at 85, 979 N.E.2d at 1281 (citation omitted). The Ohio Supreme Court held that state courts have jurisdiction to determine the issue of preemption under the ICCTA. Id. at 83, 979 N.E.2d at 1280.
294 Id. at 85, 979 N.E.2d at 1282.
49 U.S.C. § 10501(b), as broadened by the ICC Termination Act of 1995 ....

The STB found that Lincoln failed to refute "LLC's contention that it needed all of the right of way to satisfy its present and future rail needs."296 The Eighth Circuit, in upholding the STB's decision, agreed that the STB was entitled to rely on its own expertise in rail operations and that of the rail user to determine that losing a 20-foot strip from the right of way along four blocks of the line would leave insufficient room for storage, loading, and unloading, as well as access to the track for maintenance and derailment response.297

The STB also was correct to "consider the railway's future plans as well as its current uses and make its own evaluation of how likely it is that the plans will come to fruition."298

The STB has jurisdiction to determine not only whether a department of transportation may acquire property of a railroad but also whether in doing so it would be assuming the duty of a common carrier. For a resolution of such issues, a department of transportation may file a petition with the STB for a declaratory order as the Wisconsin DOT did in Wisconsin Department of Transportation—Petition for Declaratory Order—Rail Line in Sheboygan County, WI.299 The Wisconsin DOT sought a ruling from the STB on whether the STB had jurisdiction of the sale by the Union Pacific Railroad Company (Union Pacific) of a segment of its rail line to the Wisconsin DOT, a segment over which the railroad had not provided service for many years. The Wisconsin DOT wanted to acquire the 10.95-mile segment but subject to Union Pacific's grant of an exclusive, permanent, freight rail operating easement to the Wisconsin & Southern Railroad Company (WSOR). WSOR would use the operating easement to provide common carrier freight rail service to industries interested in shipping by rail.300

WisDOT and Union Pacific structured the transaction so that the sale complied with the terms and conditions set forth in Maine, Department of Transportation—Acq. Exemption, Maine Central Railroad Co., 8 I.C.C.2d 835 (1991).301 The STB held that the Wisconsin DOT did not need the STB's authorization "when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred to the purchaser."302

In responding to the survey conducted for the digest, the Arkansas DOT stated that railroad defendants in condemnation cases use 49 U.S.C. § 10501(b) to remove state condemnation actions to federal courts that may dismiss the actions based on federal preemption.303 The Kentucky DOT stated that the department "does not condemn railroads."304 The Texas Department of Transportation (Texas DOT) reported that it has had "substantial difficulty" acquiring real property for highway rights-of-way from railroads because of the STB's "exclusive jurisdiction over rail operations and the expense, delay and difficulty involved in obtaining a no impact determination from [the] STB."305 The department advised that it "typically pays a premium for these kinds of acquisitions."306

2. Acquisition or Condemnation of Property to Exchange for Railroad Property

Some state statutes authorize the condemnation of other property to exchange for railroad property. In Michigan, when the state highway commissioner wants to acquire property of a railroad, railway, or public utility having the right of eminent domain, the commissioner is authorized to enter into negotiations with such railroad, railway or public utility for the purchase of said property, rights of way, or any part thereof or interest therein, and to enter into an agreement with any such railroad, railway or public utility to exchange other designated property or interests in property for such property, rights of way, or any part thereof or interests therein, whenever such other designated property or interests in property shall be acquired by him; and whenever any such agreement has been entered into, the said state highway commissioner shall be authorized and he is hereby empowered to acquire such other property or interests in property by purchase or condemnation, and when acquired to execute the necessary conveyances and releases thereof to such railroad, railway or public utility for its use, and to take in exchange therefor the railroad, railway or public utility property, rights of way or any part thereof or interests therein for such public highway purposes in accordance with such agreement.307

A New Hampshire statute permits the use of eminent domain as a last resort when the transportation commissioner is unable to acquire railroad property "by purchase or otherwise..."308 The statute provides that in a condemnation proceeding, a legislative determination is prima facie evidence that the acquisition is for a public use and is reasonably necessary.309

In other states, the approval of a state regulatory authority may be required before taking property of a common carrier. For example, in Illinois, no real property owned or used by "any common carrier engaged in interstate commerce, or any other public utility subject to the jurisdiction of the Illinois Commerce Commission," may be taken by the state or other

296 Id. at 860.
297 Id. at 861.
298 Id. at 862.
299 No. 35195, 2009 STB LEXIS 141 (April 20, 2009).
300 Id. at *2.
301 Id. at *1.
302 Id. at *6 (citation omitted). See also City of Woodinville, Wash.—Petition for Declaratory Order, STB, FD 35905 (Oct. 7, 2015), available at https://www.stb.gov/decisions/readinglearningroom.nsd/988551f1b354da09b85257f1b00b57973b8a460774cb9c385257cd7004983ae7?OpenDocument.
304 See Summary of Transportation Departments' Responses to the Survey, response of Kentucky DOT to question number 9(c), infra (App. C) p. C-12.
305 See Summary of Transportation Departments' Responses to the Survey, response of Texas DOT to question number 9(c), infra (App. C) p. C-13.
306 See id.
309 Id.
The benefit of a private property owner is railroad property for the purpose of constructing a crossing for the trial court could determine whether to include any condition on the circumstances, also may preclude a taking of railroad property.

3. State Court Decisions on Takings of Railroad Property

State laws that limit takings of public-use property, depending on the circumstances, may preclude a taking of railroad property. As noted, in In re Suburban Hennepin Regional Park District of Certain Lands, the Minnesota Court of Appeals held that a condemnor may not take railroad property when “the proposed use ... would destroy or essentially impair the road's existing use” of the property. In contrast, in Montana Power Co. v. Burlington Northern Railroad, supra, because the court found that the existing use and the proposed public use were compatible, the court affirmed a trial court's condemnation order that approved the Montana Power Company's (MPCs) taking of an easement through Burlington Northern Railroad's property. The court remanded the case only so that the trial court could determine whether to include any conditions in its order.

An example of an unconstitutional taking under state law of railroad property for the purpose of constructing a crossing for the benefit of a private property owner is State Department of Highways v. Denver & Rio Grande Western Railroad Co., decided by the Supreme Court of Colorado. The issue was whether the court of appeals committed error when it held that the Department of Highways "could not condemn a private way of necessity" over railroad tracks owned by the Denver & Rio Grande Western Railroad Company. To obtain a parcel for a rest area, the Department had agreed with the owner, Bair, the operator of a sheep ranch, to build a crossing over the railroad's tracks to another parcel and to construct an access road from a bridge. After the railroad refused to allow the crossing, the Department sought to condemn a local service road for the crossing. The railroad argued "that the condemnation was an unconstitutional taking, because it was for a private use, and that, if the taking were for a public use, the trial court lacked jurisdiction because a public crossing is within the primary jurisdiction of the [Public Utilities Commission]."

The question was whether the Department could condemn a private way of necessity pursuant to article II, section 14 of the Colorado Constitution. On several grounds, the court of appeals reversed the trial court's decision that the condemnation was constitutional because of the property's relationship to the highway construction project. The court of appeals found that the facts did not warrant the taking of property for a private way of necessity, that the Department did not have the requisite statutory authority to condemn railroad property for a private way of necessity, and that the public purpose requirement for a condemnation did not exist in the case.

The Supreme Court of Colorado, although affirming the judgment of the court of appeals, held that the common law on a private way of necessity, as interpreted by the appeals court, did not apply, because the condemnation had to be based on article II, section 14 of the state constitution. The Department argued that, because the state's statutes authorized the "condemnation of private property in connection with the construction of a highway," the Department had statutory authority under sections 43-1-208 and 43-1-210 of the Colorado Revised Statutes to condemn the property. In addition, the Department argued that section 43-2-118 of the Colorado Revised Statutes was a legislative grant of authority to condemn a private way of necessity. The Colorado Supreme Court held that neither did the property to be condemned have any connection to the alteration of the highway, nor did the statutes expressly or impliedly authorize condemnation of railroad property for a private way.

D. Pipeline Property

In 1977, Congress established the Federal Energy Regulatory Commission (FERC). FERC has "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." In Schneiderwind v. ANR Pipeline Co., the United States Supreme Court held that the Natural Gas Act (NGA) preempts state law that conflicts with the NGA.

Insofar as oil pipelines are concerned, Tesoro Alaska Co. v. FERC, involved a challenge to FERC’s authority to approve a

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978 P.2d 1088 (Colo. 1990).
Id. at 1089 (citation omitted).
Id. at 1090 (citations omitted) (footnote omitted).
cost pooling agreement with respect to fixed costs “on the basis of each Carrier’s share of combined interstate and intrastate utilization of” the Trans-Alaska Pipeline System (TAPS). The petitioners, Tesoro Alaska Co. and Anadarko Petroleum, challenged FERC’s approval of a settlement (effective August 1, 2012) that governed TAPS rates.

The petitioners argued that, “although the Interstate Commerce Act (ICA) empowers FERC to regulate interstate commerce, it does not grant FERC authority to regulate intrastate commerce, to pool intrastate costs, or to eliminate competition among intrastate carriers through the pooling of intrastate costs.”\(^\text{15}\) Thus, the question for the D.C. Circuit was “whether the [ICA]—and the 1977 transfer of oil pipeline jurisdiction to FERC—conferred the statutory authority to approve pooling of intrastate costs as well as interstate costs.”\(^\text{16}\) The D.C. Circuit denied the petitions for review, finding, inter alia, that the ICA “permits incidental regulation of intrastate commerce pursuant to approval of a pooling agreement under § 5(1) [of the ICA]” and finding “that any regulation of intrastate commerce challenged here was incident to the Pooling Agreement that FERC found just and reasonable for interstate commerce.”\(^\text{17}\)

In the responses to the survey, all transportation departments except one stated that neither the NGA nor FERC had affected or precluded their department’s ability to acquire or take public-use property owned by a pipeline for a highway project.\(^\text{30}\) No cases were located for the digest that involved a taking of pipeline property for a highway or other transportation project that was subject to FERC’s jurisdiction.

In summary, this section of the digest illustrates primarily the second condemnation hierarchy—the identity of the owner of public-use property when a condemnor seeks to take the owner’s public-use property. In some states, it may be necessary to obtain approval by the legislature or by a public utilities commission or the equivalent before taking utility property by eminent domain. Some state statutes authorize the transportation department to acquire or condemn property to exchange for utility or railroad property. However, the ICC and the STB’s jurisdiction preempt a taking under state law of railroad property when the taking would prevent or unreasonably interfere with railroad transportation. Likewise, although transportation departments responding to the survey did not report any takings of gas or oil pipeline property, federal law preempts state law that conflicts with the NGA and/or FERC’s jurisdiction.

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\(^\text{32}\) Id. at 1035.
\(^\text{33}\) Id. at 1037–38 (internal quotation marks omitted).
\(^\text{34}\) Id. at 1038.
\(^\text{35}\) Id. at 1042 (emphasis supplied).
\(^\text{36}\) See Summary of Transportation Departments’ Responses to the Survey, responses to question number 10, *infra* (App. C) pp. C-13 to -14. Only the West Virginia DOT stated that the NGA or FERC had affected or precluded its department’s takings or acquisitions of property owned by pipelines, because “[p]ipeline location is a material consideration in the development and construction of roadway projects and is a routine issue in many of the agency’s condemnation activities.”

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**X. Takings of Temporary Construction and Other Easements**

This section of the digest, inasmuch as it analyzes state transportation departments’ use of eminent domain to take temporary construction or other easements, exemplifies the first condemnation hierarchy, which is based on the identity and authority of the condemnor, that is, the state transportation department acting on behalf of the state, the sovereign.

In *Division of Administration, Etc. v. Decker*,\(^\text{37}\) the Florida DOT appealed an award of damages for its taking of a temporary construction easement. However, an appeals court held that the trial court “properly admitted the plans and specifications [for the project] for the purpose of providing a positive declaration from [Florida DOT] of the manner in which the condemned property will be utilized” and that it was correct for the “witnesses to base their valuation estimates on the use of the easement as limited by the plans and specifications.”\(^\text{38}\) If the Florida DOT were to fail to construct the project in accordance with the plans and specifications, which were received in evidence, the landowner may be able to claim additional damages.\(^\text{39}\)

An award for damages for a taking of a temporary easement may include damages for a loss of access caused by the temporary easement that diminished the remaining property’s value. However, in *118th St. Kenosha, LLC v. Wisconsin Department of Transportation*,\(^\text{40}\) the Supreme Court of Wisconsin held that, because the temporary easement in that case did not cause a loss of access to the remaining property, compensation for the temporary easement could not include damages for any diminution in value of the remaining property.\(^\text{41}\)

As for the calculation of damages for the taking of a temporary easement, in *Decker*, supra, the parties presented expert testimony on the fair market value of the interest taken.\(^\text{42}\) In contrast, in *Ronmar Realty, Inc. v. State of New York*,\(^\text{43}\) the Court of Claims stated that in New York the damages recoverable for the taking of a temporary easement are measured by the property’s rental value for the effective period, plus any damage to the remaining property, including consequential damages.\(^\text{44}\) The court held that, because the claimant failed to prove any other damages caused by the temporary easement, the claimant’s recovery was limited to the temporary easement’s rental value.\(^\text{45}\)

In responding to the survey, with two exceptions, the transportation departments reported that their departments have used eminent domain to take public-use property or an interest

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\(^\text{38}\) Id. at 1058 (citations omitted).
\(^\text{39}\) Id. at 1059 (citation omitted).
\(^\text{40}\) 359 Wis. 2d 30, 856 N.W.2d 486 (2014).
\(^\text{41}\) Id. at 36, 856 N.W.2d at 489.
\(^\text{42}\) *Decker*, 408 So. 2d at 1058.
\(^\text{44}\) Id. at *15 (citations omitted).
\(^\text{45}\) Id. at *17.
therein (e.g., a temporary construction or other easement) for a highway project.346

In sum, this section of the digest illustrates again the first condemnation hierarchy, which is based on the identity and authority of the condemnor, namely, the state transportation department acting on behalf of the state, the sovereign. As departments of transportation responding to the survey reported, they may use eminent domain to take temporary construction and other easements for a highway project. As the section notes, an award for damages for the taking of a temporary easement, if the owner proves by a preponderance of the evidence that the easement impaired the owner’s access to the property, may include damages for the diminution in value caused by the temporary easement and loss of access to the remainder of the property.

XI. TAKINGS OR CONSTRUCTIVE USES OF PROPERTY PROTECTED BY § 4(f) OF THE DEPARTMENT OF TRANSPORTATION ACT OF 1996

A. Introduction

Sections XI and XII of the digest illustrate two of the condemnation hierarchies discussed in Section III—the relative importance or necessity of a taking of public-use property for a proposed use compared to the property’s current use, such as for a park, recreational area, or historic site, and the recognized importance of highway or other transportation projects that necessitate a taking of public-use property.

Section XI analyzes the impact of federal law protecting parks, recreational areas, wildlife and wildlife refuges, and historic sites on takings by transportation departments. Section XII analyzes the effect of the Land and Water Conservation Fund Act of 1965 (LWCFA) on acquisitions of land for highway projects.

B. Congressional Policy on the Preservation of Public Park and Recreation Lands, Wildlife and Waterfowl Refuges, and Historic Sites

In the Department of Transportation Act of 1996,447 Congress declared that “[i]t is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.”448 The Act included § 4(f) precisely for that purpose: to protect public park and recreation lands, wildlife and waterfowl refuges, and historic sites.449

The most common situations when § 4(f) applies are when it is necessary to incorporate land from property protected by § 4(f) into a transportation project; when it is necessary to occupy such property temporarily; or when there is a constructive use of § 4(f) property because of a transportation project’s close proximity to the property.451

Section 4(f), originally codified at 49 U.S.C. § 1653(f), is codified presently at 49 U.S.C. § 303(c). Section 4(f) mandates that FHWA and other U.S. DOT agencies cannot approve the use of land from publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and private historical sites unless the following conditions apply:

- There is no feasible and prudent avoidance alternative to the use of land; and the action includes all possible planning to minimize harm to the property resulting from such use; or
- The Administration determines that the use of the property will have a de minimis impact.452

For § 4(f) to apply to a proposed transportation project, all four of the following conditions must be “true”:

1. The project must require an approval from FHWA in order to proceed;
2. The project must be a transportation project;
3. The project must require the use of land from a property protected by Section 4(f) (See 23 U.S.C. § 138(a) and 49 U.S.C. § 303(a)); and
4. None of the regulatory applicability rules or exceptions applies (See 23 C.F.R. 774.11 and 13).453

Federal regulations in 23 C.F.R. pt. 774 implement § 4(f).454 Section 774.3 of the regulations applicable to § 4(f) approvals reiterates the requirements stated in the two preceding paragraphs.455 In regard to a § 4(f) analysis, when the analysis concludes that there is no feasible and prudent alternative, an alternative may be approved that causes the least overall harm based on the statute’s preservation purpose. Before approving an alternative, the following factors must be balanced:

1. The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);
2. The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;
3. The relative significance of each Section 4(f) property;
4. The views of the official(s) with jurisdiction over each Section 4(f) property;
5. The degree to which each alternative meets the purpose and need for the project;

350 Id. § 303.
355 Id. § 774.3(a)–(b).
The alternative selected has to include all possible planning, as defined in 23 C.F.R. § 774.17, so as to minimize the harm to § 4(f) property.362

Prior to making a § 4(f) approval under 23 C.F.R. § 774.3(a), the § 4(f) evaluation must be provided to the officials with jurisdiction over the § 4(f) resource, to the Department of the Interior, and, as appropriate, to the Departments of Agriculture and Housing and Urban Development for coordination and comment with a minimum of 45 days allowed for the receipt of comments.358

Agencies are required to complete an evaluation under § 4(f) for an entire project prior to issuing a record of decision;359 thus, federal or state highway authorities are not to avoid § 4(f) by splitting what is, in effect, a single project into several segments.360

The FHWA’s responsibility for compliance with § 4(f) may be assigned to a state in accordance with 23 U.S.C. §§ 325, 326, 327, or similar applicable laws.361 For example, the Texas DOT’s response to the survey stated that in December 2014 the FHWA delegated to the department the authority to make § 4(f) determinations for federally funded highway projects in Texas under a program known as a “NEPA assignment.”362 Under the NEPA assignment program, the Texas DOT makes the required § 4(f) determinations, not the FHWA, except for determinations of a constructive use under § 4(f), the authority for which the FHWA retained in the memorandum of agreement for the NEPA assignment. Thus, the department “does not request approval” by FHWA of TxDOT’s Section 4(f) determinations.363

In any given year

TxDOT may make these determinations with [respect] to multiple projects that involve a use of a Section 4(f) resource that does not qualify as de minimis. For non-de minimis uses of a Section 4(f) resource, TxDOT typically uses one of the programmatic Section 4(f) evaluations established by FHWA (see 23 C.F.R. 774.3(d)), such as the Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges.364

C. The Meaning of Key Terms in § 4(f)

1. The Meaning of the Term “Publicly Owned Land”

The term publicly owned land in § 4(f) applies only when two conditions are satisfied by the land in question: “first, except for land from an historic site, the land to be used by a project must be publicly owned, and, second, the land must be from one of the enumerated types of publicly owned land, i.e., a public park, recreational area, or wildlife and waterfowl refuge.”365

An opinion by a state Attorney General that certain lands are not publicly owned lands used as a public park, recreation area, or wildlife and waterfowl refuge within the meaning of § 4(f) is not binding on the U.S. Secretary of Transportation. The national policy reflected in § 4(f) would be frustrated if authority were vested in state or local officials to make a final, binding determination of local significance. However, after “the appropriate jurisdictional officials … have made the initial determination of whether potentially protected § 4(f) lands are used for one of the purposes enumerated and are of national, state or local significance[,] [the] decision is reviewable and reversible by the Secretary of Transportation.”366

In Stewart Park & Reserve Coalition, Inc. v. Slater,367 the Second Circuit held that publicly owned land surrounding an airport, which was used as property for a public park for almost 30 years, was “parkland” subject to the protection of § 4(f), 49 U.S.C § 303(c), notwithstanding the fact that the property was not permanently designated as parkland. The Second Circuit reversed the district court’s decision “to the extent it declared that the Defendants were not required to perform the analysis set forth in Section 4(f) before approving construction of the interchange….”368 The Second Circuit remanded the case to the district court “with instructions to enter judgment for Plaintiffs with respect to this issue and to remand to the Secretary

358 Id. § 774.3(c)(1)(i)–(vii).
359 Id. § 774.3(c)(2).
360 Id. § 774.5(a).
361 N. Idaho Cnty. Action Network v. U.S. DOT, 545 F.3d 1147 (9th Cir. 2008) (holding that, although the agencies violated 49 U.S.C. § 303(c) by failing to evaluate § 303(c) properties for all four phases of the project prior to issuing the record of decision, it was necessary to enjoin only the three remaining phases of the project while the agencies completed the necessary evaluation).
362 River v. Richmond Metropolitan Authority, 359 F. Supp. 611, 635 (E.D. Va. 1973), aff’d, 481 F.2d 1280 (4th Cir. 1973) (finding that “[u]pon the undisputed facts in the record before it, the court could not conclude that I-195 and the Downtown Expressway constituted a single, unified project”).
363 Section 4(f) Policy Paper, supra note 351, at 1.1. The foregoing guidance states that “[i]n situations where a State has assumed the FHWA responsibility for Section 4(f) compliance, this guidance is intended to help the State fulfill its responsibilities. Such situations may arise when Section 4(f) responsibilities are assigned to the State in accordance with 23 U.S.C. §§ 325, 326, 327, or a similar applicable law. Unless otherwise noted, references to “FHWA” in this document include a State department of transportation (State DOT) acting in FHWA capacity pursuant to an assumption of FHWA responsibilities under such laws.
364 See Summary of Transportation Departments’ Responses to the Survey, response of Texas DOT to questions number 14(a) and (b), infra (App. C) pp. C-19 to -20.
365 See id.
366 See id.
367 Nat’l Wildlife Fed’n v. Coleman, 529 F.2d 359, 370 (5th Cir. 1976) (reversing the district court’s order dismissing the complaint by the appellant wildlife preservation associations, because the appellee state and federal agencies had not complied with the requirements of the Endangered Species Act in planning the disputed highway).
368 Id. at 369 (citations omitted).
369 352 F.3d 545 (2d Cir. 2003), on remand, summary judgment granted, stayed, 358 F. Supp. 2d 83 (N.D.N.Y. 2005).
370 Id. at 562 (citation omitted).
of Transportation … for the purpose of conducting the analysis required by Section 4(f).” 369

In contrast to the Slater case, in Bitters v. FHA, 370 Caltrans on behalf of the FHWA in May 2014 approved the use of federal funds for a project to reintroduce vehicular traffic to the Fulton Mall in Fresno, California, in an effort to revitalize economic activity in the downtown area. Among other objectives, the proposed project would increase mobility and access in the Fulton Mall area by providing more convenient options for multimodal access. The amended complaint alleged violations of NEPA and the Administrative Procedure Act (APA) 371 based on the defendants’ failure to prepare an environmental impact statement (EIS) for the project and failure to make an adequate evaluation of impacts in the environmental assessment. The amended complaint alleged that the § 4(f) analysis was inadequate, as well as violated California Government Code § 11135.

One of the plaintiffs’ arguments in Bitters was that Caltrans violated § 4(f) by not analyzing Fulton Mall as a public park. The court, rejecting the contention, found that the plaintiffs failed to show that the Mall was ever a public park. Although a city ordinance in 1964 established Fulton Mall pursuant to the California Pedestrian Mall Law of 1960, 372 there was no evidence that the city of Fresno ever designated Fulton Mall as a park or that the Mall was ever used as a public park. 373

2. The Meaning of the Terms Feasible and Prudent

The Supreme Court stated in Citizens to Preserve Overton Park, Inc. v. Volpe 374 that for the not-feasible exemption to apply, “the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route.” 375 The Secretary is required to scrutinize proposed highways for the protection of parklands, but the Secretary has no affirmative duty to specify any particular route as a feasible and prudent alternative to a proposed route. An alternative is imprudent under § 4(f) if it does not meet the transportation needs of a project. 376 “[A]n alternative that does not effectuate the project’s purposes is, by definition, unreasonable; and need not be evaluated in detail under § 4(f).” 377

In Bitters, supra, the court held that Caltrans’s rejection of the alternatives was not arbitrary or capricious, 378 that Caltrans “properly balanced the factors” identified in 23 C.F.R. § 774.3(c) (1), and that Caltrans “provided a detailed explanation” why proposed alternatives were not acceptable. 379

D. Approval of a Transportation Program or Project if There Is No Prudent and Feasible Alternative and the Program or Project Includes All Possible Planning to Minimize Harm

In accordance with § 4(f), 49 U.S.C. § 303(c), subject to § 303(d) on de minimis impacts and § 303(h) regarding historic sites, the Secretary of Transportation may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) that requires the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

1. there is no prudent and feasible alternative to using that land; and
2. the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use. 380

The Secretary may approve the construction of a highway partially on park property when there [are] no other feasible and prudent alternatives, and whether the Secretary could have reasonably believed that no such alternatives exist… [T]he court must inquire whether the Secretary’s decision was arbitrary, capricious or an abuse of discretion, that is, whether the decision was based on consideration of relevant factors and whether there has been a clear error of judgment. … [T]he court must determine whether the Secretary’s actions followed the requisite procedural requirements. 381

Prairie Band Potawatomi Nation v. Federal Highway Administration, 382 decided by the Tenth Circuit, involved a challenge to the FHWA’s selection of a route for the South Lawrence Trafficway, a proposed highway project in Lawrence, Kansas. As discussed, unless the government determines that there is no feasible and prudent alternative, § 4(f) prevents highway construction on or near historic properties. One of the appellants’ claims was that the FHWA’s analysis under § 4(f) improperly concluded that there was no feasible and prudent alternative to the selected route. 383 The appellants alleged that the government was arbitrary and capricious when it determined that one alter-

369 Id. (citation omitted).
372 Bitters, 2016 U.S. Dist. LEXIS 4400 at *59 (citation omitted).
373 Id. at *61.
375 Id. at 411, 91 S. Ct. at 821, 28 L. Ed. 2d at 151 (Court rejecting respondents’ argument that the Secretary is required “to engage in a wide-ranging balancing of competing interests”: “to ‘weigh the detrimen"
native, identified as “42A,” was not a prudent alternative. Under the regulations, a ‘prudent avoidance alternative’ [is] one that ‘avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweigh[] the importance of protecting the Section 4(f) property.”

According to the Tenth Circuit, courts hearing a § 4(f) challenge typically engage in a three-step inquiry:

First, the reviewing court is required to decide whether the Secretary acted within the scope of his authority under § 4(f). In this initial inquiry, we must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems....

Second, the court must decide whether the Secretary’s ultimate decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. This inquiry involves determining whether the [Secretary’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment....

Finally, the Supreme Court instructs reviewing courts to determine whether the Secretary’s action followed the necessary procedural requirements.

The Tenth Circuit stated that the court’s role is not “to decide the propriety of competing methodologies in the transportation analysis context[,] but instead [to] … determine simply whether the challenged method had a rational basis and took into consideration the relevant factors.” The court held that “the government took a ‘hard look’ at several relevant factors—project goals, cost, floodplain impacts, accelerated development, and environmental impacts—and reasonably demonstrated that 42A posed enough problems … to render [the] alternative imprudent.”

In Bitters v. FHA, supra, a California federal district court stated that the NEPA process is parallel to, but distinct from, the § 4(f) process that seeks “to preserve historic sites as far as practicable.” Before approving the use of § 4(f) property for a project, an agency must determine whether there is no feasible and prudent alternative to the use of the property. When “there is no feasible and prudent avoidance alternative, the agency may approve, from the remaining alternatives that use Section 4(f) property, only the alternative that ‘[c]auses the least overall harm in light of the statute's preservation purpose.”

“[T]he alternative selected must include ‘all possible planning’ to minimize harm to Section 4(f) property…. ‘All possible planning’ means that the project must include all reasonable measures identified in the evaluation to minimize harm or mitigate for adverse impacts and effects.”

A majority of the transportation departments responding to the survey reported that with respect to one or more of their programs or projects the U.S. DOT and/or FHWA had concluded that there was no prudent and feasible alternative to using § 4(f) land. Likewise, the same transportation departments said that the U.S. DOT and/or FHWA had concluded that their programs or projects had included all possible planning to minimize harm to a park, recreation area, wildlife and waterfowl refuge, or historic site.

The departments responding to the survey reported that there were no occasions when the U.S. DOT and/or FHWA, pursuant to § 4(f), denied their department's request for one or more transportation programs or projects that required the use of publicly owned land of a public park, recreation area, or wildlife or waterfowl refuge of national, state, or local significance, or land of an historic site of national, state, or local significance. A majority of the departments also stated that they had had no administrative claims or litigation challenging a decision of the U.S. DOT and/or FHWA that approved their department’s use of publicly owned land of a public park, recreation area, or wildlife or waterfowl refuge, or land of an historic site for a highway project. Transportation departments that had experienced claims or litigation provided information on claims or cases against their department and how they resolved them.

The transportation departments provided information on some of their requests that were approved, including the approximate date of the approvals and the planning required to minimize harm to the public park, recreation area, wildlife or waterfowl refuge, or historic site. For example, the Arkansas DOT received approval for land to be acquired from the Buffalo National River on February 6, 2018. The Arkansas DOT stated that measures to minimize harm to important recreational and historic sites were agreed upon through consultation with the National Park Service (NPS) and included aesthetic considerations, such as the use of native stone and other measures.

In 2007, the District DOT, FHWA, and NPS entered into a Programmatic Agreement (PA) and a Net Benefit Agreement (NBA) for the 11th Street Bridge. The Project impacted

384 Id. at 1015 (citation omitted).
385 Id. (citation omitted).
386 Id. at 1017 (citation omitted).
387 Id. at 1022–23.
389 Id. at *14 (citation omitted).
390 Id. (citing 49 U.S.C. § 303(c)(1)).
391 Id. at *16 (citation omitted).
392 Id. at *16–17 (citations omitted).
Anacostia Park (Park), a national park administered by NPS. Under Section 4(f) of the Federal Highway Act, [the department] had to mitigate the harm caused by the Project, and the NPS and FHWA had to agree to the mitigation. The 2007 PA and NBA … documented the agreed-upon mitigation measures and a series of enhancements to the Park. The documents were subsequently amended in 2015.\(^\text{406}\) Other transportation departments responding to the survey provided examples of their departments’ measures to minimize harm to any park, recreation area, wildlife and waterfowl refuge, or historic site resulting from their department’s proposed uses.\(^\text{401}\)

E. De Minimis Finding Under § 4(f)

1. Satisfaction of § 4(f) if the Secretary Determines That a Transportation Program or Project Will Have a De Minimis Impact on a Protected Area

Section 4(f) allows the Secretary to determine, “in accordance with [the] subsection, that a transportation program or project will have a de minimis impact on the area.”\(^\text{402}\) Virtually all the transportation departments responding to the survey stated that there have been occasions when the U.S. DOT and/or FHWA, pursuant to § 4(f), approved one or more of their department’s transportation programs or projects that required the use of publicly owned land of a public park, recreation area, or wildlife or waterfowl refuge, or land of an historic site, because the impact of the proposed program or project was determined to be de minimis.\(^\text{403}\) Indeed, PennDOT said that “most of the section 4(f) evaluations that PennDOT and FHWA do are de minimis determinations.”\(^\text{404}\) The transportation departments responding to the survey provided examples of projects for which the U.S. DOT and/or FHWA determined that their department’s proposed program or project would have a de minimis impact on publicly owned land used as a public park, recreation area, or wildlife or waterfowl refuge, or on land of an historic site.\(^\text{405}\) As noted, the Texas DOT, not FHWA, makes section 4(f) de minimis determinations under the NEPA application program. Thus, “[i]t is not uncommon for TxDOT to make a dozen or more such determinations in a given year.”\(^\text{406}\)

2. Criteria for Findings of De Minimis Impact on Parks, Recreation Areas, and Wildlife and Waterfowl Refuges

According to § 4(f), 49 U.S.C. § 303(d)(1)(B), which applies to parks, recreation areas, and wildlife and waterfowl refuges, the requirements of subsection (c)(1)—that there is no prudent and feasible alternative to using the land—shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.\(^\text{407}\)

Section 303(d)(1)(C) specifies that “the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.”\(^\text{408}\)

Regarding de minimis impact determinations on uses of parks, recreation areas, and wildlife or waterfowl refuges, a de minimis impact finding may be made only when

- (A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and
- (B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.\(^\text{409}\)

Prior to a de minimis impact determination, the regulations also require coordination with officials having jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.\(^\text{410}\) The officials must be informed of the intent to make a de minimis impact finding.\(^\text{411}\) The regulations mandate that public notice must be provided together with an opportunity for public review and comment on a project's effects on the protected activities, features, or attributes of the property.\(^\text{412}\) The requirement may be “satisfied in conjunction with other public involvement procedures, such as a comment period provided on a NEPA document.”\(^\text{413}\)

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\(^{401}\) See Summary of Transportation Departments’ Responses to the Survey, response of District DOT to questions number 14(a) and (b), \textit{infra} (App. C) p. C-18.


\(^{403}\) See Summary of Transportation Departments’ Responses to the Survey, response of District DOT to questions number 14(a) and (b), \textit{infra} (App. C) pp. C-19 to -20.


\(^{406}\) See Summary of Transportation Departments’ Responses to the Survey, responses of PennDOT, the South Dakota DOT, and the West Virginia DOT to questions number 14(a) and (b), \textit{infra} (App. C) pp. C-19 to -20.

\(^{407}\) Id. § 303(d)(1)(C).

\(^{408}\) Id. § 303(d)(1)(D).


\(^{410}\) Id. § 774.5(b)(2)(i).

\(^{411}\) Id. § 774.5(b)(2)(ii).

\(^{412}\) Id.

\(^{413}\) Id.
3. Criteria for Findings of De Minimis Impact on Historic Sites

Under § 4(f), 49 U.S.C. § 303(d)(2), which applies to historic sites, the Secretary may make a finding of *de minimis* impact only when

(A) the Secretary has determined, in accordance with the consultation process required under section 366108 of title 54, United States Code, that—

(i) the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

Section 303(h)(1) applies to historic rail and transit sites, but there are exceptions in subsection (h)(2) for certain stations, bridges, and tunnels.

The regulations require once more that there be coordination with other officials when making a § 4(f) *de minimis* impact determination affecting an historic property. Besides consulting the parties identified in 36 C.F.R. pt. 800,

[t]he Administration must receive written concurrence from the pertinent State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO), and from the Advisory Council on Historic Preservation (ACHP) if participating in the consultation process, in a finding of "no adverse effect" or "no historic properties affected" in accordance with 36 C.F.R. pt. 800. The Administration shall inform these officials of its intent to make a *de minimis* impact determination based on their concurrence in the finding of "no adverse effect" or "no historic properties affected."

In *Friends of the Capital Crescent Trail v. Federal Transit Administration*, the FTA issued a Record of Decision in March 2014 approving the Purple Line Project, a planned 16.2-mile light rail transit system in Montgomery and Prince George’s counties, Maryland. The plaintiff alleged, first, that the FTA violated § 4(f), because it failed to evaluate the project’s impacts on Elm Street Park in Bethesda, Maryland, under the "no feasible alternative" standard. Elm Street Park is a small, 2.1-acre park in Bethesda that qualified for protection under § 4(f). A construction easement for the project would occupy 0.02 acres of the park temporarily and use a portion of an existing path. "The regulations governing Section 4(f) permit the FTA to conclude that a 'temporary occupancy' of park land is 'so minimal as to not constitute a use within the meaning of Section 4(f)', and thus exempt it from the 'no feasible alternative' standard." The court ruled that the use of the park was exempt from the no feasible alternative standard.

Second, the plaintiff alleged that the FTA failed to assess the impacts of the Purple Line Project on the Georgetown Branch Interim Trail and its forested buffer between Bethesda and Lyttonsville. The court found that the interim trail was "a temporary recreational trail that currently exists within the Georgetown Branch right of way." Because "[t]he regulations implementing Section 4(f) clearly state that 'when a property is formally reserved for a future transportation facility temporarily for park … purposes in the interim,' interim activity does not subject the property to § 4(f).

Third, the plaintiff alleged that, "even though the defendants recognize that the private partners need to obtain a special use permit from the National Park Service," the FTA wrongly concluded that the Purple Line’s use of parkland was *de minimis*. However, the court found that the Purple Line Project temporarily would use less than 4 acres of parkway land and less than 3 acres of parkway road and permanently would use 0.61 acre of parkway property. The FTA concluded that the use of the park would be *de minimis* in that the "use will not adversely affect the features, attributes, or activities qualifying the property." The court held that the FTA’s *de minimis* determination was neither arbitrary nor capricious.

F. Avoidance Alternative Analysis

Section 303(e)(2) governs the concept of "avoidance alternative analysis." When an analysis is required under NEPA, but the Secretary determines that there is no feasible or prudent alternative to avoid using a historic site, the Secretary may include the determination in the analysis required under NEPA and give notice of the determination under 49 U.S.C. § 303(e)(2)(A)(i) and (ii). If there is concurrence with the Secretary’s determination, as provided in 49 U.S.C. § 303(e)(2)(B), then "no further analysis under subsection (c)(1) is required."
G. Taking of Property to Mitigate Environmental Impact of a Transportation Project

PennDOT’s response to the survey stated that Pennsylvania has an “express mitigation statute” that enables the department “to acquire property—that would otherwise not be impacted by the transportation project—for the purpose of mitigating adverse effects on other land adversely affected by its proximity to such highway or other transportation facility.” The term “other land adversely affected” contemplated by the law may be public property put to public use. PennDOT stated that the department “has the legal authority to acquire property for and on behalf of these public agencies” and that “confirmatory deeds can then be provided to public agencies following certain types of mitigation acquisitions.”

Utah Department of Transportation v. Coalt, Inc. is an example of a transportation department taking property to mitigate the impact of a transportation project. In connection with the construction of the Legacy Parkway Project to ease traffic congestion between Salt Lake and Davis counties, the Utah DOT reached an agreement with public-interest litigants to resolve a taking of property in Davis County. The Utah DOT agreed to acquire approximately 125 acres of land west of the Legacy Parkway as mitigation property that included parcel 84 belonging to Coalt, Inc.

A state district court upheld the Utah DOT’s authority to condemn Coalt’s property that was necessary to vacate the Tenth Circuit’s stay of the construction of the parkway. The district court held that, because at some point the Coalt property would be required for the Project, the taking of Coalt’s property was within the scope of the project.

Coalt argued that § 72-5-102(12) of the Utah Code, which authorizes the use of condemnation to mitigate the impact of public transportation projects, does not authorize “the condemnation of property for the sole purpose of settling public interest litigation that is interfering with completion of a project.” The question for the Utah Court of Appeals was whether the Utah DOT’s condemnation of land, which was not required for environmental mitigation by the federal government, either in the final EIS or the final supplemental EIS for the completion of the Legacy Highway Project, was for a state transportation purpose.

The Utah Court of Appeals affirmed the district court’s decision. Although “the acquisition of the Mitigation Property was ostensibly unrelated to the federal permitting process for the Legacy Parkway Project, [the] property was certainly associated with it.” The Utah DOT, the FHWA, and the U.S. Corps of Engineers saw the acquisition as “related both in location and environmental effect to the Legacy Nature Preserve (a part of the Legacy Parkway Project) and as essential to resolution of the ongoing litigation.” The appeals court held that, inasmuch as the courts have given the term public use in the eminent domain statute a liberal interpretation, “UDOT’s decision to acquire additional property was pervaded with public purpose and intimately related to the viability of a public transportation project.”

H. Transportation Department’s Constructive Use That Triggers § 4(f)

1. Use of Park and Recreation Areas and Wildlife and Waterfowl Refuges

To constitute constructive use so as to come within the meaning of the term use under § 303(c), the off-site activities of a proposed project must impair the value substantially of a protected site’s environmental, ecological, or historical significance. The regulations give further meaning to the term constructive use of a § 4(f) property and prescribe when a constructive use must be evaluated in accordance with 23 C.F.R. § 774.3(a).

The Ninth Circuit has held that “[t]he term ‘use’ is to be construed broadly, not limited to the concept of a physical taking, but [the term] includes areas that are significantly, adversely affected by the project.” Section § 4(f) is “triggered” when the Secretary is requested to approve a transportation program or project utilizing federal funding that will use land belonging to a public park, recreation area, wildlife or waterfowl refuge, or an historic site. Section 4(f) land is used “whenever land from or buildings on the site are taken by the proposed project, or whenever the proposed project had significant adverse air, water, or noise impacts.”


See id. (citing 71 Pa. Cons. Stat. § 513(e)(2)(ii)).


Id. at 606 (citation omitted).

Id. at 607.

Id. at 608.

Id. at 609.

Id. at 610.

Id.

Id. at 606. (emphasis supplied).

Adler v. Lewis, 675 F.2d 1085, 1092 (9th Cir. 1982) (citations omitted).
water, noise, land, accessibility, aesthetic, or other environmental impacts on or around the site...". Even off-site activities are governed by § 4(f) if they could create sufficiently serious impacts that would substantially impair the value of the site in terms of its prior significance and enjoyment.\footnote{\textit{Id.} at 1092 (citation omitted) (some internal quotation marks omitted).}

In \textit{Coalition on Sensible Transportation, Inc. v. Dole},\footnote{\textit{Id.} (citations omitted).} the D.C. Circuit held that a transportation project that involved the widening of a highway constituted a use within the meaning of § 4(f) when the project would last 5 years, affect four parks, permanently change 10 acres of parkland, cause the removal of 50-year-old oak trees, and alter the parks’ topography. Similarly, a federal district court in Vermont held that the close proximity of a proposed highway project to a wilderness area would constitute the use of publicly owned recreation land as defined in § 4(f).\footnote{826 F.2d 60, 63 (D.C. App. 1987).}

In \textit{Arkansas Community Organization for Reform Now v. Brinegar},\footnote{Conservation Soc’y of S. Vermont v. Sec’y of Transp., 443 F. Supp. 1320, 1323 (D. Vt. 1978).} the plaintiffs argued that a highway construction project would result in the constructive use of McArthur Park and Kanis Park in the city of Little Rock, Arkansas, and that the Secretary of Transportation had not made the required § 4(f) finding for either park.\footnote{398 F. Supp. 685 (E.D. Ark. 1975).} Although no part of any park’s physical property was being taken, the freeway would border or be near the south line of McArthur Park and would constitute the north boundary of Kanis Park.\footnote{Id. at 688.}

The plaintiffs claimed that the freeway would be so close to the parks “that the adverse environmental impacts ... will be so severe as to amount to a ‘constructive use’ of both parks.”\footnote{Id. at 690.} A federal district court in Arkansas held that “a public park ... cannot be used actually or constructively for federal highway purposes until a proper statutory finding has been made.”\footnote{Id. at 692 (citations omitted).} However, the evidence did not preponderate that the impact of the freeway would amount to a constructive use of either park.\footnote{Id.}

The court found that, rather than there being a constructive use of park property, the city was “making a constructive use of the freeway”\footnote{Id. at 693.} to improve access to the parks.

In \textit{Alder v. Lewis},\footnote{675 F.2d 1085 (9th Cir. 1982).} involving litigation over a highway corridor, the issues were whether the Secretary relied on “improper considerations” in making a § 4(f) determination, whether there were no feasible and prudent alternatives, and whether there was an incorporation of all possible planning measures to minimize harm.\footnote{Id. at 1091.} The U.S. DOT and FHWA completed an extensive § 4(f) analysis of 50 sites when considering the land that could be used for a proposed I-90 project in the state of Washington.\footnote{Id. at 1092 n13.} The Ninth Circuit stated that, although “the Secretary’s decision is entitled to a presumption of regularity, the reviewing court still engages in a substantial inquiry because the presumption does not ‘shield his action from a thorough, probing, in-depth review.’”\footnote{Id. at 1091 (citation omitted).}

The court rejected the appellants’ argument that § 4(f) requires that all measures that are technically possible must be implemented when there is no feasible and prudent alternative to the use of protected land.\footnote{Id. at 1094.} The term “all measures” implies that the measures must be feasible and prudent or reasonable.\footnote{Id. (citations omitted).} The record supported “the reasonable belief that no feasible and prudent alternatives exist and that all possible planning to minimize harm has been undertaken.”\footnote{Id. at 1095.} The court held that there were “no grounds to disturb the Secretary’s conclusion that there are no feasible and prudent alternatives to the use of such § 4(f) lands.”\footnote{Id. at 1091.}

In responding to the survey, only the Texas DOT reported that there had been administrative claims or litigation against the department, the U.S. DOT, and/or FHWA alleging that one or more of the Texas DOT’s programs or projects constituted a constructive use of publicly owned land of a public park, recreation area, wildlife or waterfowl refuge, or land of an historic site in violation of § 4(f).\footnote{See Summary of Transportation Departments’ Responses to the Survey, response of Texas DOT to question number 18, infra (App. C) p. C-24.}

2. Use of Historic Sites

In \textit{Coalition Against a Raised Expressway, Inc. v. Dole},\footnote{835 F.2d 803 (11th Cir. 1988).} decided by the Eleventh Circuit, the Alabama Highway Department sought to construct a raised expressway near historically protected buildings and a park in Mobile, Alabama.\footnote{Id. at 811.} The plaintiffs appealed a district court’s findings that the FHWA made a good-faith study of the impacts of the project for an elevated downtown expressway and the alternatives and that the FHWA complied with the cooperative planning process mandated by 23 U.S.C. § 134.\footnote{Id. at 805.} The defendants appealed the district court’s decision to enjoin the construction of the expressway until they complied with § 4(f).\footnote{Id.}
As previously noted, § 4(f) is “triggered” when a highway, either directly or indirectly, will use protected land.\textsuperscript{467} Possible indirect uses and impacts include “noise pollution, general unsightliness, and the reduction of access to the protected area.”\textsuperscript{468}

The administrative decision to comply with section 4(f) is very similar to the decision to comply with NEPA. Under NEPA, an agency must complete an EIS if a federal action “significantly affect[s] the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (1982). When an agency decides that it need not complete an EIS because it believes that the project will not cause significant effects, then this circuit has consistently reviewed the agency’s decision under a reasonableness standard.\textsuperscript{469}

The Eleventh Circuit held that the negative impacts from the raised expressway were substantial enough to constitute a constructive use of city hall, the railroad terminal, and the park and that the FHWA’s claim that the expressway would not constitute a use of the aforesaid public-use properties was “unreasonable.”\textsuperscript{470} The defendants had to comply with § 4(f) and “find a ‘feasible and prudent alternative’ to the expressway, or if that fails begin all possible planning to minimize [the] harm.”\textsuperscript{471}

3. Noise or Pollution as a Use

In Coalition Against a Raised Expressway, Inc., supra, the Eleventh Circuit held that noise or pollution that would result from a proposed transportation project may be a use of protected property that requires a § 4(f) analysis.\textsuperscript{472} In City of Bridgeton v. Slater,\textsuperscript{473} decided by the Eighth Circuit, two cities and a county located near St. Louis Lambert International Airport petitioned for review of the FAA’s approval of federal funding for a proposed westward expansion of the airport.\textsuperscript{474} Under § 4(f), 49 U.S.C. § 303(c), the FAA must “take certain measures if it determines that a transportation project will ‘use’ natural and historic resources protected by the statute.”\textsuperscript{475} The city of St. Charles argued that the FAA’s decision violated § 4(f) “because the noise impacts of Alternative W-1W will constitute a use of St. Charles’s unique Historic District.”\textsuperscript{476} Although noise impact may be a use within the meaning of § 4(f), “no use occurs ‘where an action will have only an insignificant effect on the existing use of protected lands.’”\textsuperscript{477}

The plaintiffs argued that “the St. Charles Historic District is a protected use unlike any of the uses”\textsuperscript{478} in the FAA’s guidelines in Part 150, Noise Compatibility Program, for determining significant noise impact. Although the historic district was located near Interstate 70, the St. Charles’s Historic District was not a wildlife refuge or a rustic village.\textsuperscript{479} The court held that “the FAA was not arbitrary and capricious in applying its Part 150 analysis to determine that Alternative W-1W will not constitute a § 4(f) use of the St. Charles Historic District.”\textsuperscript{480} In response to the city of Bridgeton’s § 4(f) attack on the FAA’s findings that other alternatives were not “prudent and feasible,”\textsuperscript{481} the court found that the FAA eliminated the alternatives, either “because they would not meet the project’s transportation purposes and needs,”\textsuperscript{482} or because they would require the use of § 4(f) resources. In addition, the court found that “the agency developed detailed plans to avoid, reduce, or mitigate adverse § 4(f) impacts, including, with regard to historic properties....”\textsuperscript{483}

I. Exceptions to § 4(f)

1. Joint Planning

There are exceptions to the application of § 4(f), one of which is when the § 4(f) property at issue was established at the same time as the planning of the transportation project connected to the protected property.

Under the joint planning exception, when a property is reserved for a future transportation facility before or at the same time as a [Section 4(f)] property is established and concurrent or joint planning or development of the transportation facility and the Section 4(f) resource occurs, then any resulting impacts of the transportation facility will not be considered a use....\textsuperscript{484}

In Defenders of Wildlife v. North Carolina Department of Transportation,\textsuperscript{485} decided by the Fourth Circuit, the North Carolina Department of Transportation (North Carolina DOT) sought to replace portions of a highway (NC-12) and construct elevated portions of the highway through the Pea Island National Wildlife Refuge (Refuge).\textsuperscript{486} The plaintiffs argued that the North Carolina DOT and FHWA violated § 4(f) by failing to allow the public to review the project and its impact on the environment and by rejecting alternatives that would not have used wildlife land.\textsuperscript{487} The FHWA argued that the Refuge and the existing Bonner Bridge were jointly planned and, therefore, a § 4(f) analysis was not required.\textsuperscript{488}

A federal district court in North Carolina held that the 4(f) exception for joint planning did not apply because the evidence presented was insufficient to support the application of the ex-

\textsuperscript{467} Id. at 810 (citation omitted).
\textsuperscript{468} Id. (citations omitted).
\textsuperscript{469} Id. (some citations omitted).
\textsuperscript{470} Id. at 812.
\textsuperscript{471} Id. (citation omitted).
\textsuperscript{472} Id. at 810.
\textsuperscript{474} Id. at 452.
\textsuperscript{475} Id. at 460.
\textsuperscript{476} Id. (citation omitted).
\textsuperscript{477} Id. at 461.
\textsuperscript{478} Id. at 461.
\textsuperscript{479} Id. at 461.
\textsuperscript{480} Id.
\textsuperscript{481} Id.
\textsuperscript{482} Id.
\textsuperscript{483} Id.
\textsuperscript{484} Id. at 462.
\textsuperscript{485} Def. of Wildlife v. North Carolina Dep’t of Transp., 762 F.3d 374 (4th Cir. 2014).
\textsuperscript{486} 762 F.3d 374 (4th Cir. 2014).
\textsuperscript{487} Id. at 384–85.
\textsuperscript{488} Id. at 381.
\textsuperscript{489} Id. at 388.
The Fourth Circuit reversed the district court's decision that a 4(f) analysis was not necessary before an acquisition of land for the bridge project. The court remanded the case to the district court to determine whether NC-12 "was formally reserved and concurrently or jointly planned at the same time as the Refuge was established." 490

In Sierra Club v. U.S. Department of Transportation, 491 the Ninth Circuit had to interpret the word use in § 4(f) when there was joint planning. 492 The appeals court decided that a road does not "constructively" use a park if the road and park were planned jointly. 493 The case arose out of a proposed project to bypass a section of SR-1 in California known as "Devil's Slide." In July 1988, the district court entered a partial summary judgment in favor of the Sierra Club on the § 4(f) issue and enjoined the construction of the bypass until the Secretary completed a § 4(f) study. 494 The district court found that the planned bypass constructively used McNee Ranch Park; thus, a § 4(f) study "was necessary to determine if any 'prudent and feasible alternative to using' park land existed." 495 On appeal, the U.S. DOT argued that a § 4(f) analysis was not required, because there is no constructive use of parkland when "the construction of a new road and a new park are jointly planned on a single parcel of land." 496

In reversing the district court's decision, the Ninth Circuit stated that its "review of section 4(f)’s legislative history … uncovered evidence that Congress did contemplate joint development of parks and roads when it considered section 4(f)." 497 When a proposed road is found to constructively use an existing park, the proposed road's effect upon the existing park is made against the background of prior judgments about the type of park that the community and state wanted and the proximity of roads to that park. The construction of a road that would adversely and significantly affect the park would abruptly change the community consensus about the appropriate use of the land. Congress intended section 4(f) to apply in such a situation. Where a park and road are jointly planned on land which previously had neither park nor road, however, no consensus is being upset. It is difficult to see, therefore, how the road would significantly and adversely affect the park. 498 The court held that there is no constructive use of parkland under § 4(f) when a road and park are planned jointly. 499

2. Federal Planning Funds

In Village of Los Ranchos de Albuquerque v. Barnhart, 500 the Tenth Circuit held that § 4(f) does not apply to a project that receives only federal planning funds. 501 The court affirmed a New Mexico federal district court's decision on a proposal to construct two bridges across the Rio Grande River. The project required substantial right-of-way acquisitions within the Village of Los Ranchos de Albuquerque.

One of the issues on appeal was whether the proposed bridge construction required compliance with § 4(f). 502 The district court held that § 4(f) only applies to federal projects. 503 Although the federal government provided the majority of the funding for the EIS, § 4(f) did not apply to a bridge funded by the state of New Mexico. 504 There was no evidence that the federal government possessed the power to control the project. Neither New Mexico's eligibility for federal assistance, nor FHWA's assistance in and approval of the EIS, was sufficient to bring the bridge project within the purview of § 4(f). 505 Section 4(f) "bars the use of federal funds to finance construction of highways through parks, without all possible planning to minimize harm to the park." 506 The court affirmed the district court's grant of a summary judgment to the government defendants. 507

3. Temporary Use

In Steward Park and Reserve Coalition Inc. v. Slater, 508 the New York State Department of Transportation (New York State DOT) moved a planned four-lane highway to avoid using parklands. 509 By moving the proposed highway, no use of parklands would occur, and, if any use did occur, it was a temporary use. 510

The court held that a study was not necessary because a temporary use is not a use under § 4(f). 511

To conclude this section of the digest, the most common situations when § 4(f) applies are when it is necessary to incorporate land from property protected by § 4(f) into a transportation project; when it is necessary to occupy such property temporarily; or when there is a constructive use of § 4(f) property because of a transportation project's close proximity to the property.

A majority of the transportation departments responding to the survey reported that the U.S. DOT and/or FHWA had concluded that there was no prudent and feasible alternative to the use of § 4(f) land for one or more of their department's

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490 See id. at 399 (citing 23 C.F.R. § 774.11(i)).
491 Id. at 402.
492 948 F.2d 568, 573 (9th Cir. 1991).
493 Id. at 573.
494 Id. at 570.
495 Id. at 571.
496 Id.
497 Id. at 573.
498 Id. at 574.
499 Id. at 575.
500 Id.
502 Id. at 1479–80.
503 Id. at 1484.
504 Id. at 1481–82, 1484–85.
505 Id. at 1481–82.
506 Id. at 1485 (citation omitted) (emphasis in original).
507 Id. at 1478.
509 Id. at 255.
510 Id. at 257.
511 Id.
proposed programs or projects. Likewise, the same transportation departments reported that the U.S. DOT and/or FHWA had concluded that one or more of their proposed programs or projects had included all possible planning to minimize harm to the § 4(f) property at issue. Some transportation departments reported that they had been delegated the authority to determine whether a § 4(f) analysis was required for a department’s proposed program or project based on whether it would have a de minimis impact on the § 4(f) property at issue.

Finally, takings or constructive uses of property protected by § 4(f) of the Department of Transportation Act of 1996 illustrate two of the condemnation hierarchies discussed in Section II: the relative importance or necessity of a taking of public-use property for a proposed use compared to the property’s current use and the recognized importance of highway or other transportation projects that may necessitate a taking of public-use property.

J. Acquisition of Environmental Mitigation Land as an Eligible Cost Under the Federal-Aid Program

Federal regulations authorize “[t]he acquisition and maintenance of land for wetlands mitigation, wetlands banking, natural habitat, or other appropriate environmental mitigation [as] an eligible cost under the Federal-aid program.” FHWA participation in wetland and other mitigation is governed by 23 C.F.R. pt. 777.1

XII. EFFECT OF THE LAND AND WATER CONSERVATION FUND ACT ON ACQUISITIONS OF LAND FOR HIGHWAY PROJECTS

A. Introduction

The LWCF established federal funding to assist state and federal agencies to meet their need for outdoor recreation areas. The Act is an example of the third and fourth condemnation hierarchies discussed in Section III of the digest—the importance of a public-use property’s current use when compared to the proposed use of the property and the importance of highway and other transportation projects that require a taking of public-use property.

The LWCFA established the Land and Water Conservation Fund in the U.S. Treasury.1 Section 200305 provides that the Secretary of the Interior may provide financial assistance to states for outdoor recreation for planning, the acquisition of land, water, or interests in land or water, and for development.

Virtually all of the transportation departments responding to the survey reported that the LWCFA has not precluded their department’s ability to take or acquire public-use property owned by a park or recreation area subject to the LWCFA for a highway project. Nevertheless, the departments provided information on how the LWCFA has affected their department’s ability to acquire or take property protected by the Act. For example, the Arkansas DOT reported that the department has been affected “somewhat,” because the “LWCF generally adds time to the project development and land acquisition process.” The Texas DOT stated that “[i]n designing highway projects, if land protected under Section 6(f) of the LWCF is identified in the area, [the department seeks] to avoid impacting the 6(f) property[] and … only propose[s] conversion of the 6(f) property if necessary to meet the project’s purpose and need.” However, the department advised that “[c]onversion of 6(f) property for highway purposes is very rare.”

B. Requirements of the Land and Water Conservation Fund Act Applicable to Transportation Projects

The LWCFA requires a comprehensive statewide outdoor recreation plan prior to the Secretary’s consideration of finan-
cial assistance for acquisition or development projects. Except as allowed by the Act, conversions of LWCFA-funded recreation areas for “other than public outdoor recreation use” are prohibited. The Secretary may approve a conversion only when

the Secretary finds it to be in accordance with the then-existing comprehensive statewide outdoor recreation plan and only on such conditions as the Secretary considers necessary to ensure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

Section 6(f)(3) of the LWCFA is the cornerstone of the federal efforts to ensure that compliance with the LWCFA is maintained regarding public outdoor recreation use. When an area has received LWCFA funding, the area is to be “maintained in public recreation . . . use unless [the] NPS approves substitution of property of reasonably equivalent usefulness and location and of at least equal fair market value.”

The regulations’ requirements for an approval by the NPS of a request for a conversion, include prerequisites, inter alia, that:

1. All practical alternatives to the proposed conversion have been evaluated.
2. The fair market value of the property to be converted has been established and the property proposed for substitution is of at least equal fair market value as established by an approved appraisal (prepared in accordance with uniform Federal appraisal standards) excluding the value of structures or facilities that will not serve a recreation purpose.
3. The property proposed for replacement is of reasonably equivalent usefulness and location as that being converted. Equivalent usefulness and location will be determined based on the following criteria:…
   1. Property to be converted must be evaluated in order to determine what recreation needs are being fulfilled by the facilities which exist and the types of outdoor recreation resources and opportunities available. …

However, replacement property does not have to be “directly adjacent to or close by the converted site.”

Subsection 59.3(b)(6) of the regulations requires the satisfactory accomplishment of all necessary coordination with other federal agencies, including compliance with § 4(f) of the Department of Transportation Act of 1966.

The Texas DOT has published a handbook that states that § 6(f) of the LWCFA “prohibits certain types of decisions even if all the appropriate compliance activities are conducted correctly and all required documentation is prepared correctly.” If a Section 6(f) property must be used to meet the purpose and need of a project and there is no feasible and prudent alternative, the NPS can approve a conversion of the use of a Section 6(f) property and replacement property of equal fair market value and usefulness, although approval is rarely granted.

Several cases illustrate the Handbook’s foregoing analysis. For example, Brooklyn Heights Ass’n v. National Park Service, decided by a federal district court in New York, establishes the importance of having accurate documentation for a LWCFA grant. The plaintiffs brought an action pursuant to the LWCFA, as well as other federal and New York statutes, to enjoin a change to property that was assisted by an LWCFA grant awarded to the New York State Office of Parks, Recreation, and Historic Preservation (OPRHP). The district court stated that, under § 6(f) (3), “once a property is assisted by an LWCFA grant, it shall be preserved in perpetuity for public outdoor recreational use—or replaced by a substitute property of equal value, usefulness, and location.”

Of importance to the Brooklyn Heights Association case was that one of the required documents submitted for the application was a hand-signed and dated copy of the § 6(f) boundary map that was supposed to delineate clearly the area to be included under the conversion provisions of § 6(f)(3). Although a somewhat factually complicated case, the issue concerned the § 6(f)(3) map’s inclusion at the time of the grant of certain property in the Empire Fulton Ferry State Park (EFFSP) for which the OPRHP successfully applied for LWCFA assistance in 2001. The approved map included a “Tobacco Warehouse” and other property. The question was whether the NPS could agree to a request to revise the map over 5 years after the closing of the grant. The theory was that the map could be changed because of a mistake at the time of the creation of the map and subsequent grant.

The court found that the § 6(f)(3) boundary map submitted by OPRHP and accepted by NPS contains not the slightest hint of mistake. There is no suggestion of a cartographical error or any kind of inadvertent ministerial or clerical oversight. The purposeful inclusion and acceptance of the structures within the 6(f)(3) boundary is further confirmed by a wealth of details from the record.

The court held that “there is no provision in § 6(f)(3), nor in 36 C.F.R. pt. 59, that allows for the ‘technical correction’ procedure self-originated and employed by NPS here, even given, as the Court must, a deferential treatment of NPS’s interpretations of those provisions.” Moreover, “any change to the 6(f)(3) boundary after the close of an LWCFA grant—regardless whether that change is referred to as a ‘revision’ or ‘correction’—triggers the conversion process and requires the full consideration of

520 520 Id. 200305(d)(1)(2018).
521 Id. § 200305(f)(3).
522 Id.
523 36 C.F.R. § 59.3(a) (2018).
524 Id. § 59.3(b)(1)–(3)(i).
525 Id. § 59.3(b)(3)(ii).
526 Id. § 59.3(6).
alternatives and, if needed, the substitution of a replacement property.534

The court granted the plaintiff’s motion for an injunction. The court set aside the December 12, 2008, and the February 14, 2011, NPS decisions on the revision and/or correction of the § 6(f)(3) boundary map for grant number 36-01225 for the EFFSP and restored the § 6(f)(3) boundary map for grant number 36-01225 for the EFFSP to the version originally submitted on October 17, 2001.535

A case decided by the Supreme Court of Mississippi, *Pat Harrison Waterway District v. County of Lamar*,536 arose out of the decision of Lamar County to withdraw from the Pat Harrison Waterway District (District). The District established four water parks under contracts with the U.S. Department of the Interior that provided LWCFA funding. Under the contracts, the federal government could require specific enforcement of the contracts for a breach of the agreements.537 The District also established three water parks with funding provided by the U.S. Department of Agriculture’s Soil Conservation Service and the National Watershed Protection and Flood Prevention Act Program.538

In September 2011, Lamar County notified the District that it was withdrawing from the District. Mississippi Code § 51-15-118, the “withdrawal statute,” provided that a withdrawing county would be “responsible for paying its portion of any district bonds, contractual obligations, and any other indebtedness and liabilities of the district that are outstanding on the date of such county’s withdrawal from the district.”539 However, there was an issue whether the District’s contracts with the federal government, contracts that required perpetual park operations and maintenance, remained in force as continuing contractual obligations under § 51-15-118.540

The court held that the referenced contractual obligations, which may or may not arise in the future, were contingent, not outstanding, obligations.541 Under the contracts, “the duty to share in future maintenance and operational costs rests on those counties that remain within the District when the costs are incurred.”542 Thus, Lamar County could exercise its right to withdraw and was not responsible for paying the “perpetual costs” under the contracts.543 The court approved, however, a chancellor’s finding that Lamar County owned $337,088 pursuant to the state’s withdrawal statute.

In *Sierra Club v. Davies*,544 the Eighth Circuit held that geological testing at a park that a LWCFA grant benefited did not result in a conversion within the meaning of the Act. The court addressed whether preliminary testing in a state park to determine whether commercial diamond mining was feasible constituted a conversion under the LWCFA.545 A federal district court in Arkansas permanently enjoined the testing on the basis that it was a nonrecreational use of the park. The Eighth Circuit reversed, finding that the testing was a distinct issue and separate from the one of whether commercial mining would constitute a conversion under the LWCFA.546 The grant at issue occurred after 1976 when Arkansas received a federal matching grant from the NPS for $723,808, which was part of an acquisition and development project at the Crater of Diamonds State Park.547

After the NPS’s acting regional director approved the “Phase I testing,” the plaintiffs/appellees filed suit.548 The court stated that, although the LWCFA does not define the term conversion, the NPS has determined that conversions generally occur in four situations.549 The only possible type of conversion under the LWCFA that applied was one that occurs when a nonrecreational use is made of an area subject to an LWCFA grant. The court held that the proposed drilling did not alter the park’s purpose or recreational character.550 In fact, the court found that there were many instances when the agency had “construed temporary, nondestructive activities as being other than conversions.”551 For example, “[t]he agency specifically exempts from the definition of conversion underground utility easements which do not have a significant impact on the recreational utility of the park.”552 The agency’s policy has been “that the construction by a nonowner of a waterline, pipeline, underground utility or ‘similar construction’ which does not impair the present or future recreational use of the property might not constitute a conversion if the surface area is restored to its ‘preconstruction condition’ and there is no relinquishment of control over the property.”553 The sale of subsurface rights or the nondestructive extraction of oil and gas from LWCFA-assisted land also does not constitute a conversion under the Act.554

In *Friends of Ironbridge Park v. Babbitt*,555 the Fourth Circuit affirmed a district court’s ruling upholding a decision by the NPS that its approval was not required for the construction of a public golf course and related facilities in a park that was

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534 Id. at 442 (citation omitted) (emphasis in original).
535 Id. at 444.
536 185 So. 3d 935 (Miss. 2015).
537 Id. at 937.
538 Id. at 938.
539 Id. at 939–40 (footnote omitted).
540 Id. at 945.
541 Id. at 946–47.
542 Id. at 947.
543 Id. at 950.
544 955 F.2d 1188 (8th Cir. 1992).
545 Id. at 1189.
546 Id.
547 Id. at 1190.
548 Id.
549 Id. at 1193 (identifying the four situations as: (1) property interests are conveyed for nonprofit outdoor recreation uses; (2) nonrecreation uses (public or private) are made of the project area, or a portion thereof; (3) noneligible indoor recreation facilities are developed within the project area without (NPS) approval; and (4) public outdoor recreation use of property acquired or developed with LWCFA assistance is terminated) (citing LWCFA Grants Manual, Chapter 675.9.3(A)).
550 Id. at 1193, 1195.
551 Id. at 1193.
552 Id. (citations omitted).
553 Id. at 1193–94 (footnote omitted).
554 Id.
developed in part with funds awarded under § 6 of the LWCF. The appeals court held that "the NPS did not act arbitrarily and capriciously in determining that the construction of the golf facility would not constitute a change in use of the area from passive to active such that [36 C.F.R.] § 59.3(d) would require NPS approval of the change."556

To conclude, the LWCF authorized federal funding to assist state and federal agencies to meet their need for outdoor recreation areas. The LWCF is another example of the third and fourth condemnation hierarchies discussed in Section III of the digest—the importance of a public-use property's current use compared to the proposed use of the property and the importance of highway and other transportation projects that may require a taking of public-use property. Nevertheless, virtually all of the transportation departments responding to the survey reported that the LWCF has not precluded their department's ability to acquire public-use property owned by a park or recreation area subject to the LWCF for a highway project.

XIII. STATE TRANSPORTATION DEPARTMENTS' ACQUISITION OF LANDS OR AN INTEREST IN LANDS FROM THE UNITED STATES

A. Introduction

As explained in Section III in the analysis of the first condemnation hierarchy, which is based on the identity and authority of the condemnor, a state or an agency or department thereof has no power to take federal land within the state's territorial limits, regardless of the federal property's existing use.

However, a majority of the DOTs responding to the survey stated that there have been occasions when their department has requested the U.S. DOT and/or the FHWA to assist their department to acquire public-use property from the United States and/or a federal agency or department for one or more of their department's highway projects.557 For example, the Arkansas DOT "routinely acquires property by easement or transfers for roads from the Department of the Interior through the FHWA."558 The Missouri DOT's response stated that "[f]rom time to time we have difficulty acquiring [land] from federal agencies, but the problem is … delay rather than an … opposition to the project."559 The New Hampshire DOT currently is "working on a land swap with [the U.S. Fish and Wildlife Service] with which FHWA is assisting."560

B. 23 U.S.C. § 317

Several provisions of the United States Code apply when a state transportation department wants to acquire land owned by the United States for the department's use.

Under 23 U.S.C. § 317(a), when the Secretary of Transportation determines that any land owned by the United States is reasonably necessary for the right-of-way of any highway, or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands, the Secretary shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands which it is desired to appropriate.

Section 317(b) provides that the Secretary responsible for the administration of the land has 4 months to certify to the Secretary of Transportation that the proposed appropriation of the land or material "is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved…"561 If the responsible Secretary has not agreed to the appropriation and transfer under conditions that the Secretary "deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State transportation department, or its nominee, for such purposes and subject to the conditions so specified."562

C. 23 U.S.C. § 107

As for the Interstate highway system, 23 U.S.C. § 107 applies to the acquisition of rights-of-way. Under § 107(a), a state may request the Secretary of Transportation to acquire lands or interests in lands required by a state for right-of-way or other purposes in connection with the construction, reconstruction, or improvement of any section of the Interstate system.

The foregoing authority applies also to "lands and interests in lands received as grants of land from the United States and owned or held by railroads or other corporations."563

Section 107(c) authorizes the Secretary to convey land or an interest in land by deed that was acquired in any state under §

556 Id. at *7.
559 See Summary of Transportation Departments' Responses to the Survey, response of Missouri DOT to question number 13, infra (App. C) pp. C-16 to -17.

562 Id.
563 Id. § 107(a)(1)–(2).
564 Id. § 107(a)(2).
107 to the state transportation department or a political subdivision of the state on terms and conditions as the Secretary and the state transportation department or political subdivision may agree.565

Section 107(d) applies when a state is constructing a project and “rights-of-way, including control of access, on the Interstate System are required over lands or interests in lands owned by the United States...”566 The Secretary may make arrangements with the agency having jurisdiction over the property to provide the state “adequate rights-of-way and control of access thereto from adjoining lands...”567 Section 107(d) directs that any agency must cooperate with the Secretary.568

D. Applicable Federal Regulations

The federal regulations provide in 23 C.F.R. § 710.601(a) that “[w]hen the FHWA determines that a strong Federal transportation interest exists, these provisions may also be applied to highway projects that are eligible for Federal funding under Chapters 1 and 2 of title 23, of the United States Code...”568

Section 710.601(b) of the regulations states that “[u]nder certain conditions, real property interests owned by the United States may be transferred to a non-Federal owner for use for highway purposes.”570

Section 710.601(e), which applies to projects not on the Interstate System, states, in part, that

the Federal land management agency shall have a period of 4 months in which to designate conditions necessary for the adequate protection and utilization of the reserve or to certify that the proposed appropriation is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved.571

E. FHWA Assistance When State Transportation Departments Need to Acquire Land from a Federal Agency

State transportation departments may need FHWA's assistance when the departments want to acquire land from a federal agency. FHWA regulations provide that a state transportation department that wants to acquire property for a federally funded highway project may file an application with the FHWA or with the federal agency that owns the land.572

An application must include the purpose for which the lands are to be used; the estate or interest in the land required; the federal project number or other appropriate references; the name of the federal agency exercising jurisdiction over the land, as well as the identity of the installation or activity in possession of the land; a map showing the survey of the lands to be acquired; a legal description of the lands desired; and a statement of compliance with NEPA, and any other applicable federal environmental laws, including the National Historic Preservation Act.573

In conclusion, a state, or an agency or department thereof, has no power to take federal land within the state's territorial limits, regardless of the federal property's existing use. As discussed in this section of the digest, several provisions of the United States Code allow a state transportation department to acquire land owned by the United States for the department's use. Moreover, FHWA regulations provide that a state transportation department wanting to acquire property for a federally funded highway project may file an application with the FHWA or with the federal agency that owns the land.

XIV. COMPENSATION OF OWNERS FOR TAKINGS OF PUBLIC-USE PROPERTY

A. Whether a State Transportation Department as Condemnor Is Required to Pay Compensation to a Public Owner for a Taking of Public-Use Property

There is authority for the proposition that when a condemnor takes public-use property, such as a park or fire station, the condemnor must pay just compensation.574 A majority of the transportation departments responding to the survey stated that when their department takes public-use property by eminent domain owned by the state, or a state agency or department thereof, or of a political subdivision, their department is required by law (or by judicial precedent) to pay compensation for the property that is taken.575 In Arkansas, “[i]t has been the practice of the Arkansas State Highway Commission to pay any state agency or public entity department for its property[,] however, generally, the Commission does not pay compensation for public property that is a dedicated right of way.”576 Similarly, the Texas DOT stated that it “is not required by law or judicial precedent to pay compensation for utilizing city street or county road right of way for highway purposes. Public use property other than municipal and county right of way is compensated for.”577

565 Id. § 107(c).
566 Id. § 107(d).
567 Id.
568 Id.
569 23 C.F.R. § 710.601(a).
570 Id. § 710.601(b).
571 Id. § 710.601(e).
572 Id. § 710.601(c); see also 23 U.S.C. § 317(d).
574 See, e.g., Uniform Eminent Domain Code § 1004, Comment (1st para.) (stating that § 1004 defines the meaning of fair market value in terms that correspond with widely approved judicial and statutory definitions and that the Code rejects the “value-to-the-taker” and “loss-to-the-owner” approaches to compensation and adopts the majority market value test as the best measure of value), https://www.uniformlaws.org/ HigherLogic/System/DownloadDocumentFile.aspx?DocumentFileKey=3ea598b9-d4e5-ca78-de9e-62eb02ee77d8&forceDialog=0 (last accessed May 6, 2019).
Assuming a taking of public-use property is compensable under state law, it appears that the condemnor must pay just compensation for the property.\(^{578}\) In *State ex rel. State Highway Commission v. Board of County Commissioners*,\(^{579}\) the issue was whether the state had to pay compensation to Dona Ana County for property the Commission took for highway purposes. The court noted that article II, section 20 of the New Mexico Constitution states that “private property shall not be taken or damaged for public use without just compensation.”\(^{580}\) However, according to the Supreme Court of New Mexico, because the property in question was public property used for governmental purposes, the county could not “claim it is guaranteed compensation under [that] constitutional provision.”\(^{581}\) Moreover, “absent statutory authority, property of one public body being used for public purposes cannot be condemned by another public body.”\(^{582}\) However, the court held that the legislature had eliminated any doubt that when public property used for a governmental function is taken for highway construction, section 55-10-5 of the New Mexico Statutes Annotated requires the payment of compensation.\(^{583}\)

The court explained the rationale for requiring the state to pay compensation to the county:

Whereas[,] property owned and used by political subdivisions of the state for governmental purposes is technically state property, under our system of government each subdivision is made responsible for providing the facilities required by the particular subdivision through taxes or bond issues payable by the property owners of the subdivision. If the state can take a strip from the court house lot or the hospital lot, it can also take the court house building and the hospital building. Many such buildings are financed by the county through the issuance of general obligation bonds repayable with the taxes levied against property in the county. If the state took the buildings and did not compensate the county, replacement would have to be made through new bond issues or by other means which might be available to the subdivision. The burden would be intolerable or, possibly, even prohibited by debt limitations pertinent to the subdivision.\(^{584}\)

Thus, the court held that because highways are state projects paid for by the public of the state at large, including in many instances contribution by the federal government, it is only just and proper that the legislature in its wisdom should provide for compensation when public property is taken for highway purposes as they have clearly done in Chap. 234, N.M.S.L.1959, and since this is an alternative procedure, must also have been intended by § 55-10-5, N.M.S.A.1953.\(^{585}\)

### B. Meaning of the Term Special-Use or Special-Purpose Property

Typically, when the courts speak of compensation for property taken that is devoted already to a public use or purpose, they use the term special-use or special-purpose property. The meaning of the terms public-use property and special-use or special-purpose property overlap, first, because the terms apply to some, if not all, of the same properties (e.g., schools or parks), and, second, because of the difficulty determining the value of such properties when they are taken in whole or in part by eminent domain. For the purpose of this section of the digest, the terms public-use property and special-use or special-purpose property are considered to be interchangeable. The reason is that, although schools, parks, utilities, and railroads have been held to be special-use or special-purpose properties, they are public-use properties as well.\(^{586}\) Whether referred to as public-use or as special-use or special-purpose property, the property “serves a useful purpose to its owner, [but] if the owner desire[s] to dispose of it he or she would be unable to sell it at anything like its real value.”\(^{587}\) In *State by Commissioner of Transportation v. Carroll*,\(^{588}\) the Supreme Court of New Jersey stated that, although “there is very little authority to support the compensability of 'special use properties,'”\(^{589}\) compensation is due when property being taken “is put to a special use....”\(^{590}\)

### C. Judicial Discretion Regarding the Method of Valuation of Public-Use Property

As noted previously, when determining compensation for a taking of a public-use property (or special-use or special-purpose property), there is some flexibility regarding how such property should be valued.\(^{591}\) However, “[h]istorically, what constitutes just compensation has been an elusive question, one that [cannot be reduced to inexorable rules].”\(^{592}\) The Missouri DOT’s response to the survey stated that the department uses all three methods of fair market valuation (comparable sales, replacement cost, and income methods) because the department does not “have a special valuation method for publicly owned property.”\(^{593}\)

For the fair market value approach to function as a means of establishing a valuation for public-use or special-use or special-

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579 72 N.M. 86, 380 P.2d 830 (N.M. 1963).
580 Id. at 88, 380 P.2d at 832.
581 Id. (emphasis supplied).
582 Id.
583 Id. at 93, 380 P.2d at 835.
584 Id. (citation omitted).
585 Id.
586 Nichols, *infra* note 2, § 12C.01[1], at 12C-10 (rel. 126-6/2017).
587 Id. at 12C-2.
589 Id. at 325, 587 A.2d at 268.
590 Id. at 326, 587 A.2d at 269.
purpose property, it may be necessary to "relax the conventional rules of evidence."\footnote{Note 2, \$ 12C.01[2], at 12C-14 (rel. 126-6/2017).} As one court has stated:

Special use property is property that "has no definite and ascertainable market value because [it] is not regularly bought and sold on the open market." ... [For example,] public schools generally are considered special use property. ... In takings cases involving special use property, a trial court has the discretion to depart from traditional valuation methods to properly compensate the party whose property has been taken.

According to Nichols, the determination of "market value always assumes a hypothetical situation anyway so that, in reason, it may be applied to any property. In dealing with special purpose properties, the hypothetical is to assume what the owner of similar special purpose property would pay for the subject property."\footnote{Id. at 12C-13 (rel. 126-6/2017) (footnotes omitted).} Another approach that Nichols suggests is that, rather than applying a market value approach,\footnote{Id. at 12C-20-22 (rel. 126-6/2017).} the condemnor or court use a "value to the owner" approach.\footnote{State ex rel. Comm'r, Dept of Transp. v. Ill. Cent. Gulf R.R. Co., No. 02A01-9110-CV-00228, 1992 Tenn. App. LEXIS 692, at *12 n.6 (Jan. 17, 1992).} However, only one case was located for the digest in which a court applied a value to the owner method to determine the value of public-use or special-use or special-purpose property taken by eminent domain.\footnote{See Nichols, supra note 2, \$ 12C.01[2], at 12C-35 (rel. 126-6/2017).}

Although the courts may have some flexibility on the appropriate method of valuation to use under the circumstances, Nichols still analyzes the traditional methods of valuation (the comparable sales approach, the cost approach, and the income approach) as being applicable to takings of public-use or special-use or special-purpose property taken by eminent domain.\footnote{W. Va. Dept of Transp., Div. of Highways v. W. Pocahontas Props., 236 W. Va. 50, 68, 777 S.E.2d 619, 637 (2015) (footnotes omitted).}

D. Valuation Based on the Comparable Sales Approach

The transportation departments responding to the survey reported that, with some exceptions, the fair market approach based on comparable sales is the method they use most often to determine the valuation of public-use property. When appraising real property based on comparable sales, in addition to other responsibilities, an appraiser

"should personally verify sales with either the buyer or seller. ... Verification of a sale with the broker or attorney and the buyer or seller will usually produce the greatest amount of useful, reliable information." Appraisers must thoroughly research the prices, real property rights conveyed, financing terms, motivations of buyers and sellers ... and dates (i.e., the market conditions) of the property transactions."\footnote{See Summary of Transportation Departments' Responses to the Survey, response of Arkansas DOT to question number 19, infra (App. C) pp. C-24 to -25.}

The Arkansas DOT uses "[f]air market value based on comparable sales. A cost to cure the damages from the acquisition may be used as an aid to determine the after value of the property and compensation."\footnote{See id.} However, for temporary construction easements, "the temporary rental value is calculated based upon a 2-year rental rate based on the fair market value."\footnote{See Summary of Transportation Departments' Responses to the Survey, response of Kentucky DOT to question number 19, infra (App. C) p. C-25; Utah DOT, in response to question number 19, also stated that the method of valuation that it uses is based on comparable sales, infra (App. C) p. C-25 n.916.} The Kentucky DOT’s approach is "fair market value based on comparable sales as determined by court-appointed appraisers."\footnote{See Summary of Transportation Departments' Responses to the Survey, response of New Hampshire DOT to question number 19, infra (App. C) p. C-25.} The New Hampshire DOT’s response to the survey identified the fair market value method based on comparable sales as its only method of valuation of public-use property.\footnote{See Summary of Transportation Departments' Responses to the Survey, response of Texas DOT to question number 19, infra (App. C) p. C-25 to -26.}

In Pennsylvania, \[i\]n most instances, if the property is of a type for which comparable sales exist, the measure of “adequate compensation” (the Texas Constitution’s equivalent of just compensation) is the fair market value of the property taken plus the diminution in value, if any, of the remaining property after (as a result of) the taking and considering the likely use to which the acquired parcels are to be put. This measure was applied to a Texas Dept. of Public Safety commercial driver’s license driver testing facility, which consisted of land and pavement.\footnote{Id. at *5 (citations omitted).}

However, in Capital Properties, Inc. v. State Department of Transportation,\footnote{596} the Supreme Court of Rhode Island held that a trial court in its discretion may depart from the comparable sales method when the property being taken “is unique or special purpose or special use property.”\footnote{See id.} The state condemned three lots owned by the plaintiff located in an area called the Capital Center Project. Disagreeing with the state’s determination of the land’s fair market value, plaintiff petitioned for an assessment of damages by a jury.

The court stated that
a landowner whose property is taken by the State in condemnation proceedings is entitled to just compensation for the taken property. Just compensation translates itself into the fair market value of the property at the time of taking. Where, as in this case, there is only a partial taking from each of the plaintiff’s three parcels or lots, it is entitled not only to the fair market value of the land taken, but also, any special or peculiar damages which result to the remaining land. 610

The court found that the property that was taken was unique, constituting a special use, and that special-purpose lots were restricted by the Capital Center Project Commission’s plans and regulations. 611 Although the comparable sales method was not appropriate, 612 the court accepted one expert’s method of valuation as the most persuasive because of his “understanding of the unique and special nature of the property,” 613 even though the expert also relied on comparable sales. Interestingly, it was the state’s expert that “met and carried” the plaintiff’s burden of proof. 614

Of course, lawful land-use, zoning, and other restrictions that may apply to a property are relevant when determining the fair market value of property at the time of a taking. 615 When only part of an owner’s land is taken, the owner “is entitled to be compensated not only for the value of the land taken but also for any diminution in the value of the remaining land which may be attributed to the taking” 616 an issue that also may arise when using the replacement cost method of valuation. 617 In the law of eminent domain, there is a distinction … between damages to a remainder area when part of a tract is physically appropriated[,] and damages to a tract no part of which is physically appropriated. In the former case it matters not that the injury is suffered in common with the general public. Under the sole test is whether the damage complained of is directly attributable to the taking. 618

When an agency takes part of a public-use property for an unrelated purpose, the condemnor should pay just compensation for damage to the remainder that will put the owner in as good a position as if there had not been a partial taking. 619

In Utah DOT v. Coalit, Inc., 620 discussed in Section XI.G of the digest, the Utah Court of Appeals explained that in a partial taking case the general rule is that “any enhancement or decrease in value attributable to the purpose for which the property is being condemned shall be excluded in determining the fair market value of the property.” 621 Nevertheless, in Coalit, Inc., the general rule did not apply. Coalit’s property was not within the original scope of the project but was merely adjacent property; thus, an enhancement in value of the remainder attributable to the project was appropriate. 622 Coalit argued successfully that the Utah DOT could not assert repeatedly that Coalit’s parcel was unrelated to the Legacy Parkway Project (as a means of having a “bargaining chip” with the U.S. Corps of Engineers for the purpose of mitigation credit on future projects), and, thereafter, when compensation was at issue, assert that the property was related to the Parkway project. 623

E. Valuation Based on the Replacement Cost Approach

For some public-use property, which is not purchased and sold regularly, establishing market value may be difficult. When, because of its unusual character, property has no market value in the ordinary accepted sense of the term, resort may be had in condemnation actions to other means to determine compensation due the owner for his loss. School houses, churches, court houses and the like are special purpose properties not ordinarily banded about in the market place, and something other than market value must be employed in ascertaining their worth in condemnation actions. 624

In such instances, “[o]ne approach to valuation is the replacement cost approach, which ‘generally consists of the calculation of a depreciated replacement cost for improvements on the land, plus the value of the land, as evidence of market value.’” 625

In its response to the survey, the Texas DOT reported that in some instances

for which comparable sales did not exist, the measure of adequate compensation was the undepreciated replacement or substitution cost method. The doctrine calls for the measurement of compensation for the acquisition of public facilities to be, generally, the reasonably necessary cost to replace the remaining land and facilities to the same or a reasonably equal utility as existed prior to the taking. 626

Property used as a school is one example of property dedicated to a public use that is described also herein as a special-use

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610 Id. at *2 (citations omitted).
611 Id. at *16–17.
612 Id. at *17.
613 Id. at *37.
614 Id. at *38.
615 Id. at *4.
617 See Section IX.E of the digest.
619 Id. at 318, 282 A.2d at 78. See also W. Bay Christian Sch. Ass’n, No. WM-05-0428, 2007 R.I. Super LEXIS at *6 (Feb. 7, 2007).
621 Id. at 611 (citation omitted) (emphasis supplied).
622 Id. (citation omitted).
623 Id. at 613.
626 See Summary of Transportation Departments’ Responses to the Survey, response of Texas DOT to question number 19, infra (App. C) pp. C-24 to -25. The Texas DOT cautioned, however, that the Texas Supreme Court, in what is at this time the seminal case in Texas on the substitute facilities doctrine, has pointed out [that] the viability of the substitute facilities doctrine has been called into question, and the United States Supreme Court has ruled [that] it does not have to be applied to all public takings but only to those particular cases where the facts show the property to be acquired has no fair market value. Religious of the Sacred Heart of Texas v. City of Houston, 836 S.W.2d 606 (Tex. 1992); see also United States v. 50 Acres of Land, 469 U.S. 24, 105 S. Ct. 451, 83 L. Ed. 2d 376 (1984).
or special-purpose property. In *W. Bay Christian Sch. Ass’n v. R.I. Dep’t of Transp.*, supra, the Rhode Island DOT took 4.2 acres of school property by eminent domain that belonged to the West Bay Christian School Association as part of a highway construction project. A Rhode Island court noted that the first consideration in a partial taking case is the value of the land taken;\(^\text{627}\) the second element of compensation is the “diminished value of the remaining parcel after the taking.”\(^\text{629}\) The court held that for a partial taking of a special-use property “replacement cost or substitution cost is appropriate” in determining compensation.\(^\text{630}\) The court, noting that the “substitution principle has been called the ‘substitute facilities doctrine,’”\(^\text{631}\) stated that replacement or substitution cost “focuses not on the decreased market value of property[,] but on the cost of ‘equivalent facilities or necessary measures to restore the utility of the property.’”\(^\text{632}\)

West Bay, although arguing that the highest and best use of the remaining parcel was as a single family residence,\(^\text{633}\) failed to provide expert testimony on the impact of the taking if the school continued to operate.\(^\text{634}\) Although the court found that the highest and best use of the remaining parcel after the taking was for a school,\(^\text{635}\) neither the plaintiff nor the defendant presented any evidence on the diminished value of the remaining parcel if used as a school.\(^\text{636}\) It was the plaintiff’s burden, not the state’s, to prove and quantify “any diminished value to the remaining school parcel,” but the plaintiff “produced no evidence to quantify a loss in value to the parcel if it were to remain as a school.”\(^\text{637}\)

In *State by State Highway Commissioner v. Board of Education*,\(^\text{638}\) the Board of Education of Elizabeth New Jersey (Board) sought review of an award of $3,700 as compensation for the New Jersey State Highway Commission’s condemnation of a 2,034 square foot tract of land owned by the Board where an elementary school was located.\(^\text{639}\) The state argued that there were 158,966 square feet and all the improvements after the taking for which the highest and best use of the property was its present use as a public school and playground.\(^\text{640}\) The Board argued that there had been a taking of the remaining property, because the construction on the condemned land and the abutting roadways interfered with the remaining property’s use as a school.\(^\text{641}\) Although the court held that the state had not taken the remaining property, the school was a special-purpose property for which an award of just compensation could not be determined by fair market value based on comparable sales.\(^\text{642}\)

One question was “how much of an increase in sound can be tolerated in the classroom before steps must be taken to alter the structure of the school in such a manner that the noise level is abated on the inside?”\(^\text{643}\) The court stated, first, that “[a] landowner has a right to be free from unreasonable interference caused by noise even though the noise vector may come from some direction other than perpendicular.”\(^\text{644}\) Second, “pollution of the air by gases and smoke is considered ‘matter,’ just as solids or liquids. If they are emitted into the air and allowed to pass over remaining land so as to deprive the owner of the beneficial use of the same, it may be an element of damage if it is the result of a taking.”\(^\text{645}\)

The court held that the Board was entitled to an award of compensatory damages to the remaining property after the taking\(^\text{646}\) “based on the necessity and cost of putting the remaining property in shape to meet the changed conditions caused by the highway.… The damages assessed should be based on replacement, renovation, construction or alteration costs of the facility.”\(^\text{647}\) Because the partial taking impaired the beneficial use of the property, the condemnee was entitled to its expenses to remedy the impairment.\(^\text{648}\) The Board was entitled to compensatory damages in the amount of $160,419.96 for the cost of installing soundproofing and air-conditioning in the school to remedy the air and sound pollution that the new highway caused.\(^\text{649}\)

**F. Valuation Based on the Income Approach**

Although no cases were located for the digest involving the use of the income method to determine the value of public-use property taken by eminent domain, this section analyzes the income method and the difficulties that may arise even when applying the method to income-producing commercial properties.

The Supreme Court of Wisconsin held in *National Auto Truckstops, Inc. v. Department of Transportation*,\(^\text{650}\) a partial taking case, that the income approach ordinarily may not be used when evidence of comparable sales is available.\(^\text{651}\) The court held that the trial court properly exercised its discretion to exclude

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\(^\text{628}\) Id. at *6.

\(^\text{629}\) Id. at *13.

\(^\text{630}\) Id. at *26 n.12 (citation omitted).

\(^\text{631}\) Id.

\(^\text{632}\) Id. at *12 n.6 (citations omitted).

\(^\text{633}\) Id. at *18.

\(^\text{634}\) Id. at *23.

\(^\text{635}\) Id. at *26.

\(^\text{636}\) Id.

\(^\text{637}\) Id. at *28.


\(^\text{639}\) Id. at 309–10, 282 A.2d at 74.

\(^\text{640}\) Id. at 310, 282 A.2d at 74.

\(^\text{641}\) Id. at 311, 282 A.2d at 74.

\(^\text{642}\) Id. at 319, 282 A.2d at 78.

\(^\text{643}\) Id. at 313, 282 A.2d at 76.

\(^\text{644}\) Id. at 314, 282 A.2d at 76 (citations omitted).

\(^\text{645}\) Id. (citations omitted).

\(^\text{646}\) Id. at 321, 282 A.2d at 80.

\(^\text{647}\) Id. at 323–24, 282 A.2d at 81 (citations omitted).

\(^\text{648}\) Id. at 324, 282 A.2d at 82.

\(^\text{649}\) Id. at 324–25, 282 A.2d at 81–82.

\(^\text{650}\) 263 Wis. 2d 649, 665 N.W.2d 198 (Wis. 2003).

\(^\text{651}\) Id. at 653, 665 N.W.2d at 200.
evidence of income offered by National Auto. However, as held in another case, in the absence of comparable sales data, the income approach may be used when "the condemned real estate itself generates future income which can be capitalized to give some fair indication of what an investor would pay for the privilege of receiving that income over some foreseeable period of time." Nevertheless, it has been held that "evidence of net income is ordinarily inadmissible for purposes of establishing property values in condemnation cases involving commercial enterprises because income is dependent upon too many variables to serve as a reliable guide in determining fair market value." When an appraiser uses the income capitalization approach, the appraiser "must take care to consider only the income that the property itself will produce—not income produced from the business enterprise conducted on the property (i.e., the business of mining)." The income capitalization approach is complex and employs specialized terminology but is "intend[ed] to simulate investor behavior." The approach blends current cash flows and estimates of future income and expenses, so as to develop a "reliable estimate of income expectancy" that a buyer and seller would rely upon in a sale of the real estate. At its heart, the income capitalization approach revolves around the appraiser's calculation of the "net operating income" from the real estate, which is roughly the income remaining after deduction of certain operating expenses (but not all expenses).

The general rule, except in some states, is that a condemnee may not claim for lost profits allegedly caused by a taking. Thus, an appraisal of value based on the income approach may not be based on the capitalization of the condemnee's alleged lost business profits. Only the loss of rental income derived solely from the real property, which "is distinct from profits of a business located on the property," may be compensable when real property is taken by eminent domain.

As the Supreme Court of North Carolina has held, when income evidence is used to value property, "care must be taken to distinguish between income from the property and income from the business conducted on the property." Note that in takings of commercial property, an appraisal may be based on comparable rental values, even if the condemnee did not receive rent from the property. Although a trier of fact may consider a condemnation's adverse effects, the effects are not separate, recoverable items of damage and "are relevant only as circumstances tending to show a diminution in the over-all fair market value of the property."

In Western Pocahontas Properties, the Supreme Court of Appeals of West Virginia held that just compensation may not be based on lost profits by a business on land taken by condemnation. The Division of Highways (DOH) took approximately 30 of 187 acres of property belonging to Western Pocahontas Properties, L.P. (Pocahontas) that contained "mineable coal" beneath the surface. Pocahontas had leased the entire 187 acres to Beacon Resources, Inc. (Beacon). The lease permitted Beacon to mine the coal in exchange for royalty payments to Pocahontas. Beacon argued that the trial court erred when it refused to instruct the jury that it could not consider profits that Beacon would have been earned by mining the coal.

Because the case involved a lease of coal reserves, Beacon argued that "the only proper measure of value is in the ability of those reserves to produce income." Beacon claimed that it did "not seek lost profits as consequential damages' but rather 'seek[s] the value of [the] coal which is measured by the dollar amount for which they could sell it.'" The DOH, however, emphasized that "Beacon's witnesses repeatedly discussed Beacon's business profits as the sole basis for valuations of just compensation for its real property interests."

The court held that "evidence showing 'past annual profits derived from a business conducted on the [condemned] property … offered as an index to the market value of the property'] is ordinarily inadmissible[,]’ … [P]rofits are 'too remote and speculative to be the subject of jury consideration.'" One reason for the rule is that [n]o reasonable buyer would set a fair market value for real estate solely upon the pure profit of a business located upon the real estate. However, if the real estate is being purchased as an investment, the earning power of the land may be a critical element that affects the buyer's and seller's calculation of the market value. When the tract of real estate itself generates income—such as through the rental of the land, rental of buildings upon the land, or the extraction of crops, timber or minerals—that income may be considered in a condemnation action through an appraiser's use of the "income capitalization approach" to valuing real estate.

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652 The court remedied the case on the issue only of whether the property owner’s access after the taking was reasonable; if not, National Auto could be entitled to just compensation for the deprivation or restriction of its right of access. Id. at 669, 665 N.W.2d at 208.


656 W. Pocahontas Props., 236 W. Va. at 70, 777 S.E.2d at 639 (footnote omitted).

657 Id. at 69, 777 S.E.2d at 638 (footnotes omitted).

658 Id. at 72 n.86, 777 S.E.2d at 642 n.86.


660 Id. at 3–4, 637 S.E.2d at 888.

661 Id. at 7, 637 S.E.2d at 890.

662 Id. (citation omitted).

663 Id. at 13, 637 S.E.2d at 894.

664 Id. at 14, 637 S.E.2d at 895 (citations omitted).


666 Id. at 63, 777 S.E.2d at 632 (footnote omitted).

667 Id. (footnote omitted).

668 Id.

669 Id. at 64, 777 S.E.2d at 633 (footnotes omitted).

670 Id. at 65, 777 S.E.2d at 634.
Accordingly, the income approach to valuation is based not on the income or profit of a business on the property but from the real estate itself, "whether from the quality of crops grown there, the rents from buildings, or the minerals that can be extracted from beneath the land."670

When income is derived from the real estate itself, [a]n appraiser may, in part, rely upon the future income stream from the real estate to calculate a fair market value through use of the "income capitalization approach." This appraisal approach ... allows future income generated by the real estate to be mathematically "capitalized" in ways that reflect future risks, inflation, and other factors to calculate a fair market value that would be accepted by a reasonable buyer and reasonable seller.671

Thus, “value is indicated by a property’s earning power, based on the capitalization of income.”672 In a case involving mineral deposits,

the fair market value of the condemned real estate as a whole may not be calculated by separately valuing the mineral interests and then adding these values to that of the surface... “[T]he measure of compensation in such proceedings is the market value of the land to be condemned as a whole, with due consideration of all the components that make for its value.”673

An “owner may show that the fair market value of the lot has decreased, in part, because the... condemnation action reduced the future income stream that would be generated by the real estate.”674 A jury must “be instructed that the evidence of separate values is only a factor to be considered in determining the total market value of the land[].”675 The court held that the trial court erred when it failed to inform “the jury to disregard Beacon’s profits when addressing just compensation.”676

G. Valuation of Utility Property

It may not be possible to determine the value of utility property taken by eminent domain by using comparable sales data. Utilities are likely to be valued based on a going concern value and the value of the utility’s franchise using the income approach or, alternatively, as discussed below, the cost approach.677

In City of Bend v. Juniper Utility Co.,678 the dispute centered on whether to use the income or the cost approach to value a utility that was never intended by the private owners of a development to be an independent source of profit.679 The Oregon Court of Appeals stated that the “three commonly utilized methodologies” to appraise the value of utility plants ... are:

“(1) the market approach, which looks at comparable sales data; (2) the income approach, which looks at the income-generating potential of the property; and (3) the cost approach, a valuation typically based on replacement or reproduction cost of the plant minus any depreciation.”680 The court held that there was no fixed principle of eminent domain law under Oregon Constitution article I, section 18 that precluded the use of the cost approach to determine the fair market value of an unprofitable regulated water utility.

The city argued that the income approach should be used “because the plant had virtually no potential to generate income and, for that reason, no buyer would pay anything for it.”681 Under the city’s approach, the plant had a fair market value of zero.682 The utility defendants “argued that the plant’s regulated income potential—admittedly nothing—failed to capture the fair market value of the utility. The better approach, in their view, was the cost approach”683 with which the trial court agreed.

The trial court “concluded that the starting point for determining fair market value of the plant was ‘original cost new less depreciation’” that “take[s] into account the age and condition of the plant and the regulatory environment (including the fact that even an unregulated buyer would not pay more for the plant than the original cost of the plant less depreciation).”684

In Oregon, the “courts have specifically recognized—if not endorsed—the cost approach as an appropriate valuation methodology in condemnation cases involving special use property for which comparable sales data is unavailable.”685 The Court of Appeals held that the cost of reproduction, or substitute facility doctrine, may be the appropriate measure of fair market value when the condemned property performs “a legally necessary function.”686 Although the valuation of public utilities is “extraordinarily difficult,”687 the court held that “[t]he cost approach to value is based upon the principle of substitution, that is, it assumes that property is worth its cost or the cost of a satisfactory substitute with equal utility.”688

The appeals court affirmed the trial court’s use of the cost approach, because

670 Id.
671 Id. at 65–66, 777 S.E.2d at 634–35 (footnote omitted).
672 Id. at 66, 777 S.E.2d at 635 (footnote omitted).
673 Id. at 67, 777 S.E.2d at 636 (footnotes omitted).
674 Id. at 72, 777 S.E.2d at 641 (footnote omitted).
675 Id. at 67–68, 777 S.E.2d at 636–37 (footnotes omitted).
676 Id. at 77, 777 S.E.2d at 646 (footnote omitted).
with a public utility company, no one valuation method can be used because of the unique makeup. The tangible plant has to be valued using the reconstruction cost approach, but this approach alone does not suffice because it fails to consider the value of the rights associated with the franchise. These rights are valued by using the income approach and added to the plant value to arrive at just compensation.
679 Id. at 13, 252 P.3d at 344.
680 Id. at 15–16, 252 P.3d at 345 (citation omitted).
681 Id. at 12, 252 P.3d at 343.
682 Id. at 16, 252 P.3d at 345.
683 Id.
684 Id. at 17, 252 P.3d at 345–46.
685 Id. at 24, 252 P.3d at 349 (citation omitted).
686 Id. at 32, 252 P.3d at 354 (citation omitted).
687 Id. at 28, 252 P.3d at 352.
688 Id. at 23, 252 P.3d at 349 (citation omitted) (emphasis omitted) (footnote omitted).
the city’s income approach has significant limitations when applied to a regulated utility; most notably, it fails to account for the Juniper system’s value to nonregulated buyers and does not compensate the utility for CIAC—contributions by J. L. Ward Company and others in aid of the construction and expansion of the utility.495

In addition, “the city’s approach did not allow for the utility’s income-producing potential to non-regulated buyers.”696

[The city’s approach effectively equates the utility’s value for rate-making purposes with its fair market value for purposes of just compensation. As the trial court correctly observed, courts have rejected that approach given the differences between ratemaking and condemnation proceedings.691

An issue that may be present in takings of utility property is whether a utility’s contributions in aid of construction (CIAC) are recoverable. In Washington Suburban Sanitary Commission v. Utilities, Inc.,692 the Washington Suburban Sanitary Commission (WSSC) sought to condemn water and sewerage systems (the Systems) owned and operated by the appellee/appellant, Utilities, Inc. of Maryland (UIM), a public service utility. The jury valued the Systems at $9.7 million. In accordance with the applicable statute, the court deducted $3.2 million representing CIAC.693

UIM was a subsidiary of a nationwide holding company, Utilities Inc. (UI), that operated more than 350 utility systems in 15 states.694 UIM argued that the statute requiring the deduction of CIAC resulted in an unconstitutional taking without just compensation. WSSC argued that the trial court erred in admitting evidence relating to the value of the Systems based on the capitalization of the regulated cash flow at rates of return that were appropriate to an unregulated, governmental owner; that UIM had “no reasonable, investment-backed expectation to payment”695 for CIAC; and that, as a matter of state law, UIM had “only a bare legal and non-beneficial title in the CIAC.”696

The Maryland Court of Appeals reviewed the elements that must be considered in a case involving the condemnation of a public utility.

“When the plant of a public service corporation is taken by eminent domain, the corporation is not limited to the value of its physical property, or to the cost of reproducing the same, but it is entitled to be paid for the value of its property and franchises taken together as a going concern and as parts of one working system. In reaching that value there are a number of tests, no one of which is conclusive, but each of which sheds some light upon the subject of the investigation.697

The elements ordinarily considered in ascertaining the value of the utility are the current value of the tangible property of the company, the earnings, both present and future, of the company, the ‘going value’ of the plant, and the amount of money required to put the plant in good condition.”698

The court, in analyzing the income approach to a utility’s value, stated that, “[a]lthough the income approach to value undertakes to value the entire enterprise, including the land, a valuation based upon the regulated income which is derived from a rate base that does not include appreciation excludes a significant aspect of the fair market value of the Systems.”699

Thus, the court held that the requirement in Md. Code Ann., article 29, section 3-107(a) that CIAC be deducted from the fair market value of the Systems, valued as going concerns, cannot escape the constitutional prohibition against taking without just compensation on the ground that UIM had no reasonable investment-backed expectation in the Systems. It is value, not expectation of value, that applies in eminent domain and other actual takings.700

The court observed that “[i]n the few cases that have considered CIAC in an eminent domain context have held, or strongly indicated, that CIAC must be fairly compensated.”701

H. Valuation of Railroad Property

The courts have accepted the cost approach to determine the value of railroad property in condemnation cases. (Note that, as discussed in Section IX.C.1, federal law may preempt a taking of railroad property by a state transportation department.) In People ex rel. Department of Transportation v. Southern Pacific Transportation Co.,702 a California appellate court had to determine whether the railroad company was entitled to compensation for a right-of-way condemned by Caltrans. The railroad used the property as a double-track railroad line but could use the property as a transportation corridor in which the railroad company could have constructed a “runaround track.”703

The court held that the “the cost of reproduction of the facilities [was] an acceptable approach to a determination of compensation” when “market value or other acceptable standards of valuation [cannot] rationally be applied or … would not put the owner ‘in as good a position … as if his property had not been taken.”704

In Commonwealth v. R.J. Corman Railroad Co./Memphis Line,705 the R.J. Corman Railroad Company (Corman) owned and operated the “Memphis Line,” a shortline rail carrier.706 The Kentucky Department of Highways instituted condemnation

690 Id. at 27, 252 P.3d at 351.
691 Id. at 28, 252 P.3d at 352.
692 Id. (citation omitted). The court did rule that an award of severance damages for a “stranded” pipe, as well as in connection with a golf course, was not proper. Id. at 30, 252 P.3d at 353.
694 Id. at 7, 775 A.2d at 1181. See Md. Code Ann. art. 29, § 3-107.
695 365 Md. at 8, 775 A.2d at 1181.
696 Id. at 24, 775 A.2d at 1191 (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (“sustaining the constitutionality of an ordinance preserving historic buildings, which was in effect when the condemnee purchased an historic building, which prevented the condemnee from increasing the height of the building… ’ Id.).
697 Id. at 27–28, 775 A.2d at 1193 (quoting 4A J.L. Sackman, Nichols (3d ed. rev. 2000) (some citations omitted).
698 Id. at 29, 775 A.2d at 1194.
699 Id.
700 Id. at 31, 775 A.2d at 1195.
702 Id. at 320, 148 Cal. Rptr. at 538.
703 Id. at 325, 148 Cal. Rptr. at 540–41 (citation omitted) (some internal quotation marks omitted).
704 116 S.W.3d 488 (Ky. 2003).
705 Id. at 491.
proceedings for six grade-level highway-crossing easements across the Memphis Line right-of-way and also condemned a small parcel in fee for one replacement crossing.

The trial court entered a summary judgment for the Department on the basis, as a matter of law, that Corman suffered no compensable loss because of the installation of the crossings over Corman’s railroad track and that Corman was entitled to a maximum recovery of only nominal damages.706

The Supreme Court of Kentucky held that Corman’s expert erroneously considered two factors as impinging upon the fair market value of the Memphis Line right-of-way following the crossing condemnations: 1) the anticipated expenses for the maintenance and operation of each crossing; and 2) the estimated litigation and clean-up costs for accidents predicted to occur at the crossings over the next twenty years. From these projections, [the expert] Mr. Capito calculated a reduction in value of the railroad at each crossing.707

The court held that Corman’s expert’s estimates of accident litigation and cleanup costs were “highly speculative and incapable of reasonable ascertainment, making them irrelevant to the valuation process.”708 Thus, Corman could not “expect compensation for the maintenance and operational expenses of the condemned crossings.”709

Corman attempted to argue that the “use of the capitalization of net income approach … to estimate the fair market value of the right-of-way insulates the railroad from a charge of ‘price-tagging,’” because the income method “predicts market value ‘by analyzing a property’s capacity to produce income and convert[as] this potential into an indication of fair market value.’”710 The Kentucky Supreme Court agreed only that in some circumstances the income method can provide a reliable indication of the fair market value of condemned property.711 Most jurisdictions, however, limit use of the income method to situations where “profits are derived from the intrinsic nature of the real estate itself, as distinguished from the profits derived from a business operated on the land.”712

Although the state’s expert “found no change in the fair market value of the right-of-way as a result of the crossing condemnations,”713 the court remanded the case to the trial court for a determination of nominal damages.714

I. Valuation of Pipelines

Under some circumstances, utility and pipeline companies may recover the cost of relocating their facilities.715 In Common-

wealth v. Means & Russell Iron Co.,715 involving the condemnation of a pipeline easement by Kentucky, the state challenged the portion of the award for the relocation costs of the pipeline. Although only 652 feet of the water pipeline were within the condemned area, because of the destruction of the usability of the condemned portion, together with the widening of the road, it was necessary to relocate approximately 3,000 feet so that the water system would function.716 The court affirmed the judgment for relocation costs. It was “difficult to conceive [of] a better method of compensating appellee for the minimum damages sustained through the condemnation of its easement than that adopted by the Court in instructing the jury peremptorily to award the undisputed cost of the actual re-location.”717

J. Federal Participation in Functional Replacement of Publicly Owned Real Property

Federal law authorizes functional replacement of property, including public-use property, acquired or taken by eminent domain in lieu of compensation. (Section XVI.C of the digest discusses state statutes that authorize state transportation departments to offer functional replacement of property.) Federal regulations state that [w]hen publicly owned real property, including land and/or facilities, is to be acquired for a project receiving grant funds under title 23, in lieu of paying the fair market value for the real property, the acquiring agency may provide compensation by functionally replacing the publicly owned real property with another facility that will provide equivalent utility.718

Before making functional replacement, the following conditions must be met:

(1) Functional replacement is permitted under State law and the acquiring agency elects to provide it;
(2) The property in question is in public ownership and use;
(3) The replacement facility will be in public ownership and will continue the public use function of the acquired facility;
(4) The acquiring agency has informed, in writing, the public entity owning the property of its right to an estimate of just compensation based on an appraisal of fair market value and of the option to choose either just compensation or functional replacement;
(5) The FHWA concurs in the acquiring agency determination that functional replacement is in the public interest, and
(6) The real property is not owned by a utility or railroad.719

Federal participation must be limited to the actual costs incurred in replacing the acquired land or facility. The costs must be “for facilities that do not represent increases in capacity or betterments, except for those necessary to replace utilities, to meet legal, regulatory, or similar requirements, or to meet reasonable prevailing standards” and be “for land to provide a site for the replacement facility.”720

706 Id.
707 Id. at 492.
708 Id. at 493.
709 Id. at 495.
710 Id. (citation omitted). The term “price-tagging allows damages for ‘discrete harms’ and ‘can easily result in excessive awards…’” Id. (citation omitted).
711 Id. at 496 (citations omitted).
712 Id. at 496.
713 Id. at 498.
714 See Section IX.B.3 of the digest.
715 299 Ky. 465, 185 S.W.2d 960 (1945).
716 Id. at 468, 185 S.W.2d at 961.
717 Id.
719 Id. § 710.509(b)(1)–(6).
720 Id. § 710.509(d)(1)–(2).
K. Appraisals of Public-Use Property Taken by Eminent Domain

A standard guide to appraisals of property is the 2018–2019 Uniform Standards of Professional Appraisal Practice (USPAP), published by the Appraisal Standards Board, of the Appraisal Foundation, which is authorized by Congress to provide uniform standards and standards of professional appraisal practice. Both federal and state court opinions cite to the USPAP.

The USPAP provides guidance and information on valuation approaches—the sales comparison approach, the cost approach, and the income approach. The USPAP does not provide guidance on the valuation specifically of public-use property as distinct from other property or on the valuation, for example, specifically of temporary construction or other easements as distinct from other interests in real property. However, the cases discussed in this section of the digest provide guidance that is specific to the foregoing issues, such as capitalizing the income produced by a property to determine the value of the property in the absence of comparable sales data or using rental income to determine the value of a temporary easement.

To conclude this section of the digest on appraisals and valuation of and compensation for public-use property taken by eminent domain, a majority of the transportation departments responding to the survey reported that, when they take public-use property by eminent domain owned by the state or by a unit of local government, they must pay compensation for the property.

Transportation departments responding to the survey also reported that, with some exceptions, the fair market value approach based on comparable sales is the method that they use most often to determine the valuation of public-use property. However, for some public-use property, which is not purchased and sold regularly, establishing market value may be difficult. In such instances, the second method to determine the value of public-use property is the replacement cost or substitution cost approach. The third method of valuation is the income approach, but the courts have held that the income approach ordinarily may not be used when evidence of comparable sales is available. In the absence of comparable sales data, the income approach may be used when the condemned real estate itself generates future income, which can be capitalized to give a fair indication of what an investor would pay for the privilege of receiving that income over a foreseeable period of time.

Utilities are likely to be valued based on a going concern value and the value of the utility’s franchise using the income approach or, alternatively, the cost approach. As for railroad property, the courts have accepted the cost approach to determine the value of railroad property in condemnation cases.

Finally, the USPAP, cited by both federal and state courts, contains standards and standard rules for appraisals, as well as uniform standards of professional appraisal practice. However, as one DOT advised, the same basic appraisal policies and procedures apply to public-use property that apply to other types of real property.

XV. CASE STUDIES OF TAKINGS OF PUBLIC-USE PROPERTY

A. Introduction

Several transportation departments provided information on one or more of their department’s takings of public-use property that the departments regard as having been particularly difficult for legal or other reasons. However, the departments responding to the survey stated that they did not have an example of a taking of a public-use property that would be a useful case study for the digest. The research, however, identified several takings of public-use property that are instructive.

B. Pretextual Taking of Public-Use Property to Limit or Destroy a Prior Public Use

In at least one case a condemnee alleged that a taking of its public-use property was pretextual. In Township of Readington v. Solberg Aviation Co., supra, Solberg Aviation Co. (Solberg) alleged, inter alia, that the taking by the Township of Readington (Readington) of Solberg’s property was a “pretextual … attempt to limit the use of airport property.” In reversing a summary judgment for Readington, a New Jersey appellate court held that several New Jersey state statutes “preempt[ed] certain aspects of local land use,” thereby “constraining a municipality’s exercise of its condemnation authority…”

The appellate court described Readington’s efforts for many years to prevent the expansion of the airport. Ultimately, in 2006, Readington enacted an ordinance authorizing the use of eminent domain to take a fee simple title to the defendants’ property outside the 102-acre “airport facilities area” and to take the “development rights to the airport facilities area.” Solberg argued that the trial court wrongly held that the Township had “land use authority over the airport,” because, pursuant to several state statutes, “the vast bulk of authority to regulate airports resides with the State…” Solberg claimed that Readington used eminent domain “to subvert the purposes” of the Air Safety and Zoning Act (ASZA) and exercise control of the airport property.

The appellate court agreed that “the FAA has exclusive control of flight routes and schedules,” but stated that other decisions affecting airport location and operation are largely left to the discretion of local governments. Readington’s taking of...
the “development rights to the airport or fee simple ownership of property within the safety zone would provide the Township with greater control over airport operations than it would have through normal application of the zoning law.” Solberg argued that Readington’s alleged purpose of using eminent domain to preserve open space was pretextual, because Readington’s “true purpose [was] to exert unlawful, de facto zoning control over airport operations.” The court found that there was “voluminous evidence of the Township’s opposition to airport expansion” from the 1960s until the passage of Readington’s condemnation ordinance.

The appeals court also found “that the objective factors surrounding the adoption of the condemnation ordinance impugn[ed] its validity.”

There is no support for finding that the condemnation of development rights will achieve airport preservation and preservation of community character. … The condemnation, as proposed, will not result in the Township acquiring ownership rights to the airport. Given that the airport is only marginally profitable and the future viability of privately-owned airports is problematic, the fact that the facility will remain under the ownership of the Solbergs casts doubt on its post-condemnation survival. … The Township’s ownership of development rights will limit the airport’s ability to improve the facilities.

Furthermore, Readington’s taking of the airport’s development rights would not preserve open space: “The airport facilities area is not open space. It is occupied by runways, taxiways, parking lots, airplane hangars, fuel tanks, and operations buildings.” The court found that the Township’s effort “to condemn development rights to the airport was tainted by the Township’s desire to control airport operations”: that “the true purpose of the condemnation was to secure a greater measure of land use authority over the airport than the Township currently enjoy[ed]”; and that “[t]hese … improper purposes … subvert[ed] the Commissioner’s ultimate authority over aeronautical facilities.”

Relevant precedents, the court stated, supported Solberg’s argument that the Township abused its exercise of the power of eminent domain; there was “formidable evidence that the condemnation was initiated to thwart airport expansion”; and “the Township’s unilateral efforts to restrict those activities can amount to bad faith.” On the other hand, it was not improper to take airport property outside the airport facilities area and the airport safety zone that were unaffected by airport operations. Readington retained full zoning authority over that part of the property.

The court held that “[t]he doctrine of prior use ‘denies [the] exercise of the power of condemnation where the proposed use will destroy an existing public use or prevent a proposed public use unless the authority to do so has been expressly given by the Legislature or must necessarily be implied.’” The court stated that the foregoing rule “is applicable to municipal condemnations of utilities or the land of another municipality” but that the rule “has no place where the condemnor is, in essence, the sovereign, either federal or state.”

The court reversed and remanded for a trial on whether any of the seven parcels named in Readington’s “condemnation action fall outside of the airport facilities area and safety zone”; if so, the trial court had to “assess each parcel consistent with [the court’s] opinion.”

On remand, after a nonjury trial conducted between May 2014 and January 2015, the trial judge ruled that Readington “had pursued the condemnation and the taking of defendants’ property rights in bad faith,” dismissed the Township’s condemnation action, and awarded the defendants attorney’s fees and litigation costs. After the township appealed, on March 1, 2019, a New Jersey appellate court affirmed the trial court’s decision and detailed findings of Readington’s bad faith. The appeals court stated that the “[d]efendants met their burden of proof in showing that the Township’s asserted reason for the taking, i.e., open-space preservation, was pretextual, and that the condemnation was actually motivated to stifle aviation-related activities on the property.”

C. Whether a Property Owner Lacking the Power of Condemnation May Assert the Public-Use Doctrine

In Norfolk Southern Railway Co. v. Intermodal Properties LLC, the question was whether a property owner, Intermodal Properties LLC (Intermodal), could defeat a railroad’s exercise of eminent domain by showing that the present owner’s proposed use of its property would better serve the public interest than the railroad’s proposed use. Because Intermodal did not have condemnation authority, and because its proposed use of the property sought by the railroad was neither a prior nor a public use, the Supreme Court of New Jersey held that Intermodal could not invoke the public-use doctrine.
Norfolk Southern owned and operated Croxton Yard, a large intermodal freight facility in Secaucus, New Jersey. In 2004, Norfolk Southern decided to expand the yard by acquiring three adjacent properties, including one owned by Intermodal. After Intermodal rejected Norfolk Southern’s offers, the railroad initiated condemnation by filing a petition with the New Jersey DOT, which referred the case to an administrative law judge (ALJ). Intermodal argued that its proposed use of the property as a parking facility for the Secaucus Junction passenger rail station was more compatible with the public interest. However, the ALJ ruled that Intermodal could not invoke the prior public use doctrine. Neither was Intermodal’s property that Norfolk Southern sought in the condemnation proceeding being used for a public purpose, nor was the property even zoned for a parking facility.

A New Jersey appellate court affirmed the ALJ’s decision. The first issue concerned N.J. Stat. Ann. § 48-3-17.7, which requires that a railroad’s taking by eminent domain not be “incompatible with the public interest.” The issue on appeal was not one of compatibility. The issue was whether a property owner could defeat eminent domain by demonstrating that the current owner’s proposed use of its own property would better serve the public interest than the condemnor’s proposed use. The court stated that

the prior public use doctrine … operates to "deny[y] exercise of the power of condemnation where the proposed use will destroy an existing public use or prevent a proposed public use unless the authority to do so has been expressly given by the Legislature or must necessarily be implied” … The application of the doctrine, therefore, is both specific and narrow. It does not automatically apply merely because property is already being used for a public purpose.

The court held that a property owner who lacks the power to condemn may not assert the prior public use doctrine to defeat condemnation of its property. “[I]f the prior public use doctrine does not apply, no comparative evaluation of two public uses, one existing and one proposed, need be undertaken in order to determine which should prevail as the paramount use.”

A property owner must have a property with a preexisting public use “coupled with the power of eminent domain…” Thus, Intermodal could not rely on the prior public use doctrine to challenge Norfolk Southern’s condemnation of its property.

D. Whether the Public-Use Doctrine Applies to Private Condemnations

In some situations, state law sanctions the use of private condemnations. CAW Equities, L.L.C. v. City of Greenwood Village involved a private condemnation of property for water use. In Colorado, “[t]he importance of water distribution … is expressed in the state constitution, which permits private property to be taken, without the consent of the owner, for ‘reservoirs, drains, flumes, or ditches on or across the lands of others.’

Section 7 of article XVI of the Colorado Constitution states that

[all persons and corporations shall have the right-of-way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.”

Although the constitution recognizes a private right of eminent domain, the legislature may impose “just limitations, which do not prevent the exercise of the right.”

CAW Equities (CAW) sought to use private condemnation to take a public equestrian and pedestrian trail (public trail) that bisected two of CAW’s adjacent properties. CAW wanted the property so that it could construct a ditch from a canal to the southern end of its properties. CAW appealed a state district court’s judgment that denied CAW’s use of private condemnation of the public trail belonging to the city of Greenwood Village. At issue was the prior public use doctrine and "whether a person claiming a right to condemn property for a ditch must show that the ditch is ‘necessary’ under the constitution.”

Notwithstanding CAW’s argument that section 7 was "self-executing and that a private condemnor need not comply with the eminent domain statutes or show necessity before exercising his or her condemnation right,” the district court held that CAW lacked the authority to condemn the trail. On appeal, CAW argued, inter alia, that the district court erred when it applied statutory limitations to CAW’s constitutional right to private condemnation for the purpose of water use. The appeals court held that the prior public use doctrine applies to private condemnation proceedings under section 7, thereby precluding a private condemnation that would entirely eliminate an existing public use on the condemned property.

The court stated that the prior public use rule may be defeated “expressly, by necessary implication, or by public exigency.” However,

section 7 does not constitute ‘express authority’ to condemn property in public use. … The [district] court properly applied this doctrine in finding that CAW failed to (1) allege express authority for its right to condemn all of the public trail; (2) prove that the right to condemn property already in public use was a necessary implication of its private condemnation right; and (3) prove that some public exigency existed to justify the necessity of condemning the public trail.

The term “expressly” means that “[t]he right to take property already dedicated to a public use for another public use exists in some cases, but such right must be by specific grant

746 Id. at 147, 71 A.3d at 833 (citation omitted).
747 Id. at 162, 71 A.3d at 842.
748 Id. at 163, 71 A.3d at 842 (citations omitted).
749 Id. (citation omitted).
750 Id. at 163, 71 A.3d at 843.
752 Id. at 1202 (quoting Colo. Const. art II, § 14).
753 Id. (citation omitted).
754 Id. (citation omitted).
755 Id. at 1203.
756 Id. at 1201.
757 Id. at 1203.
758 Id. at 1204.
759 Id. at 1203.
of authority.” 760 Under section 7, the term “right-of-way across public, private, and corporate lands’ … is not an express provision to condemn entire tracts of land currently in public use.” 761 “[T]he prior public use doctrine requires express legislative or constitutional authority for a condemnor to entirely extinguish an existing public use, as distinct from the general grant of the power to condemn.” 762 The court stated that, if there were no prior public use doctrine, “property could be condemned back and forth indefinitely.” 763

The “public exigency” exception also did not apply to permit the taking, because CAW provided no evidence of a public exigency that justified condemning the public trail. CAW not only failed to show that a ditch over the entire tract was necessary, but also conceded that a ditch on another tract of land, although not preferable, was possible. 764 The appeals court affirmed the district court’s judgment that CAW lacked the legal authority to condemn the public trail.

In summary, there are several reported takings of public-use property that are instructive as case studies. First, one case holds that a condemnor’s attempt by eminent domain to take public-use property belonging to an airport was merely a pretext to prevent the airport’s expansion. Second, in another case it was held that, because a company itself did not have condemnation authority, the company could not invoke the public-use doctrine to prevent a taking by a railroad. Third, it was held in one case that a property owner may prevent a private condemnation of its property under state law when the private condemnation would entirely eliminate an existing public use of the owner’s property.

XVI. STATE TRANSPORTATION DEPARTMENTS’ RIGHT-OF-WAY MANUALS APPLICABLE TO ACQUISITIONS OR TAKINGS OF PUBLIC-USE PROPERTY

A. Introduction

As discussed in this section, most if not all state transportation departments have a right-of-way manual that sets forth policies, procedures, and guidance for the department’s acquisition of right-of-way. 765 For instance, insofar as public-use property is concerned, the Caltrans Right of Way Manual, which prescribes “uniform procedures and guidance” for Caltrans’s right-of-way functions, 766 explains the different methods that Caltrans may use to obtain public land depending on which agency controls the desired property. 767 Similarly, other states have a detailed right-of-way manuals describing how the transportation department may acquire public land.

The following subsections of the digest discuss some of the manuals’ provisions relating to several of the topics covered in the preceding sections of the digest: transfers of real property to the state transportation department by the federal, state, and local governments; functional replacement of property in lieu of compensation; relocation of utilities; and the acquisition or use of railroad right-of-way, as well as the meaning of the terms special entities and special-interest lands that apply to the same types of property as the terms public-use and special-use or special-purpose property.

B. Acquisition of Real Property from the Federal, State, and Local Governments

1. Federal Property

The state right-of-way manuals deal specifically with the acquisition of federal land for a highway project. The Alaska Department of Transportation and Public Facilities (Alaska DOT & PF) manual notes that FHWA is authorized to appropriate and transfer certain public lands owned by the United States, managed by the U.S. Department of Agriculture Forest Service (USDA Forest Service) and the Bureau of Land Management (BLM) in the U.S. Department of the Interior, to the Alaska DOT & PF as provided by 23 U.S.C. §§ 107(d) and 317 for right-of-way, sources of materials for construction or maintenance, maintenance and stockpile sites, and roadside and landscape development. 768

The Caltrans Right of Way Manual states that the California State Lands Commission exercises jurisdiction of and management control over certain public lands that the state receives from the federal government, 769 which includes sovereign land and school land. 770

In Colorado, most of the property rights that the Colorado DOT acquires for construction on federal property is obtained from the USFS and the BLM. 771 The Colorado DOT Right of Way Manual explains that any application for an appropriation of right-of-way on state highways within the federal-aid system that “traverse lands” under the jurisdiction of the USDA Forest Service and BLM are made pursuant to 23 U.S.C. § 317

760 Id. at 1204 (citation omitted).
761 Id. (citation omitted).
762 Id. at 1205 (emphasis supplied).
763 Id. (citation omitted).
764 Id. at 1206.
765 See Appendix F, Links to State Departments of Transportation Right-of-Way Manuals.
and for the Interstate system pursuant to 23 U.S.C. § 107(d).

The Colorado DOT Right of Way Manual notes that the U.S. DOT and the USDA Forest Service and BLM have entered into a memorandum of understanding. The Colorado DOT also acquires land from other federal agencies, including the Bureau of Reclamation, National Park Service, and Bureau of Indian Affairs.

The Maine Department of Transportation (Maine DOT) Right of Way Manual advises that when the Maine DOT requires property from the federal government for a project, the Maine DOT follows the provisions in the federal regulations in 23 C.F.R. § 710.601. The manual observes that the department may submit an application to the FHWA or that it may submit an application directly to the land-owning agency, assuming the latter agency has the authority to convey the subject property.

The Minnesota DOT Right of Way Manual similarly points out that 23 U.S.C. §§ 107(d) and 317 authorize a transfer of lands or interest in lands owned by the United States to the Minnesota DOT. Consistent with the discussion in Sections III and VIII.A of the digest, the Minnesota DOT states that “[u]nder no circumstances does the State have the right to acquire any Federal lands by eminent domain proceedings.

2. State Property

Section V.A of this digest analyzes the issue of whether a state through its transportation department may take land from another state agency. Many of the right-of-way manuals reviewed for the digest address this very issue. In California, the State Lands Commission may grant easements and right-of-way to Caltrans for highways pursuant to § 6210.3 of the Public Resources Code. Caltrans also may reserve state sovereign land or state school lands for highway purposes by preparing a map that includes the proposed right-of-way and obtaining approval of the map by the Commission. When Caltrans seeks land controlled by the Department of Parks and Recreation, Caltrans may receive “permits of easements” to place public roads on park property. Real property owned by an agency in California also may be transferred to another state agency if the transfer receives the written approval of the director of general services. The director may authorize the agency receiving the property to compensate the transferring agency.

The Colorado DOT Right of Way Manual sets forth the procedures for acquiring rights to property owned by the federal government and state agencies. The manual states that “[c]onceptually these different agencies should be treated as private landowners”; thus, when the Colorado DOT estimates that the value of the property exceeds $5,000, “the owner has the right to hire an appraiser at CDOT expense.” The Colorado DOT only acquires property to which state agencies are allowed to hold title, i.e., the State Board of Land Commissioners, the Division of Wildlife, and the Division of Parks and Outdoor Recreation. As for acquisitions from other state agencies, the Colorado DOT handles them on a case by case basis.

When the Illinois DOT seeks to acquire state-owned property, “a jurisdictional transfer instrument is prepared for execution by the appropriate agency heads and approval of the Governor.” The instrument must be accompanied by a statement that it is “satisfactory to the local office of the agency in question.” When replacement property is required, the DOT and the other agency must enter into an agreement, pursuant to Illinois Compiled Statute 605, § 5/4-509, before the acquisition of the replacement property and its transfer to the other agency.

The Florida DOT Right of Way Procedures Manual, regarding the acquisition of right-of-way from state agencies, states that “[t]he Board of Trustees of the Internal Improvement Trust Fund administers and controls all Florida State Lands with the exception of certain lands held and controlled by the Florida Department of Agriculture.”

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772 Id.
773 Id.
777 Id.
778 Id. ch. 6, supra note 767, § 6.14.02.00.
779 Id. § 6.14.02.01, at 6.14-1 (citing Cal. St. & Hwy Code § 101.5).
In Minnesota, state law authorizes the transfer of the control of state-owned lands between various departments of state government for public purposes. The state department having such lands under its control and supervision may transfer such lands to another state department, upon such terms as may be mutually agreed upon by the heads of the interested state agencies.\textsuperscript{796}

The manual addresses also the matter of compensation, stating that “[u]pon approval of the construction plans by the departments of state government and [an] agreement as to right of way and other related matters, [a] determination is made by both state departments as to whether any money consideration is to be considered in the transfer.”\textsuperscript{792}

The Washington State DOT Right of Way Manual provides that “[c]ertain public lands (such as school trust lands, escheat lands, forest board lands, tide and shore lands, and bed and shore lands) are managed by the Department of Natural Resources (DNR).”\textsuperscript{793} As for other public lands, “[n]egotiations are conducted between the HQ Special Acquisition Section and a representative of the particular agency. Normal acquisition procedures are followed in that WSDOT offers to pay market value as reported on the Determination of Value…”\textsuperscript{794}

3. Local Government Property

Section V of the digest addresses the issue of whether state transportation departments under their state’s law may take property belonging to a municipality, county, or a local public agency.

To some extent, state right-of-way manuals address the same issue. Of interest is that in Florida

\begin{quote}
\textit{[p]ublicly owned property shall be acquired \textit{without monetary payment} when the intended use is consistent with the use for which it was dedicated or acquired. If title will not be transferred to the Department, a written permission to use the right of way from the local governmental entity holding title to said right of way must be received by the Department.}\textsuperscript{795}
\end{quote}

When “federal funding will be involved in any phase of the project, whether for design, right of way, or construction, all property to be conveyed to the Department must have been acquired by the local governmental entity according to federal regulations.”\textsuperscript{796}

As for procedures, the Florida DOT is required to obtain a deed from any local governmental entity holding title to real property dedicated or acquired for public use as right of way on all roads designated in the State Highway System. In lieu of executing a deed, a local governmental entity may elect to issue a recorded right of way map to the state[,] covering such lands.\textsuperscript{797}

In Minnesota, when acquiring land from local government agencies, “in addition to a proper deed, a certified copy of a resolution of the governing body and a certified copy of the minutes of the meeting must be obtained.”\textsuperscript{798}

C. Functional Replacement in Lieu of Compensation


\begin{quote}
\textit{[w]hen publicly owned real property, including land and/or facilities, is to be acquired for a highway project, in lieu of paying the \textit{fair market value for the real property}, the Department may provide compensation by functionally replacing the publicly owned real property with another facility which will provide equivalent utility. Examples are libraries, fire and police stations, city and town halls, and public schools.}\textsuperscript{799}
\end{quote}

As detailed in the Alabama DOT manual, [f]ederal-aid participation in the costs of functional replacement is limited to costs that are actually incurred in the replacement of the acquired land and/or facility and are:

\begin{enumerate}
  \item a. Costs for facilities which do not represent increases in capacity or betterments, except for those necessary to replace utilities, to meet legal, regulatory, or similar requirements, or to meet reasonable prevailing standards; and
  \item b. Costs for land to provide a site for the replacement facility.\textsuperscript{800}
\end{enumerate}

However, federal-aid funds may be used for the cost of functional replacement only when:

\begin{enumerate}
  \item a. Functional replacement is permitted under State law (it currently is) and the Department elects to provide it.
  \item b. The property to be acquired is in public ownership and use.
  \item c. The replacement facility will be in public ownership and will continue the public use function of the acquired facility.
  \item d. The Department has informed the agency owning the property of its right to an estimate of just compensation based on an appraisal of fair market value and of the option to choose either just compensation or functional replacement.
  \item e. The FHWA concurs in the Department’s determination that functional replacement is in the public interest.
  \item f. The real property is not owned by a utility or railroad.\textsuperscript{801}
\end{enumerate}

\textsuperscript{795} Minnesota DOT Right of Way Manual, supra note 776, § 806.1.1 (citing Minn. Stat. § 15.16).

\textsuperscript{796} Id. § 806.1.2.

\textsuperscript{797} Washington State Department of Transportation Right of Way Manual § 6-7.3(B) (Mar. 2018) (citing Wash. Rev. Code § 47.12.026 for all DNR-controlled uplands, other than rights of way over and across the beds of navigable waters and/or harbor areas, and Wash. Rev. Code § 47.12.026 for rights-of-way over aquatic lands across beds of navigable waters and/or harbor areas), http://www.wsdot.wa.gov/Publications/Manuals/M26-01.htm (last accessed May 6, 2019).

\textsuperscript{798} Id.

\textsuperscript{799} Florida DOT Right of Way Procedures Manual, supra note 774, § 7.10.1.1 (citing Florida Constitution art. X, § 6) (emphasis supplied).

\textsuperscript{800} Id. § 7.10.1.3.

\textsuperscript{801} Id. § 7.10.1.1. (citing Fla. Stat. § 337.29).

\textsuperscript{776} MnDOT Right of Way Manual, supra note 776, § 807.1.


The Alaska DOT & PF Right-of-Way Manual defines functional replacement as “an alternative acquisition available on federal-aid highway projects. It means to replace publicly-owned real property (land, facilities, or both) acquired as a result of a federal aid transportation project with land, facilities, or both, that provide equivalent utility.”

The Caltrans Right of Way Manual states that “[w]hen publicly owned real property, including land and/or facilities, is to be acquired for a highway project, in lieu of paying fair market value for the real property, the State may provide compensation by functionally replacing the publicly owned real property with another facility which will provide equivalent utility. This can be done when it is permitted under State law, in the best interest of the State and the State has informed the agency owning the property of its rights to an estimate of just compensation, based on an appraisal of fair market value and of the option to choose either just compensation or functional replacement.”

The manual further advises that “[t]he functional replacement concept permits Federal participation in costs of acquiring an adequate substitute site if one is required and the construction costs of the replacement improvements which duplicate the function of the acquired improvement. This concept requires that the facility must be needed by the public, must be actually replaced and the costs to presently replace the facility or cure damage to it be actually incurred by the public agency. The functional replacement concept may also be applied to State-funded projects.”

When the Department determines that functional replacement of real property in public ownership may be necessary and in the public interest, and the FHWA approves such determination before the acquisition, Federal funds may participate in the payment to the public agency for:

A. The functional replacement costs of the improvements required to be replaced exclusive of any but nominal betterments; and

B. The market value of the land acquired when the public agency has land upon which to relocate the facilities; or

C. The reasonable cost of acquiring a substitute site where lands owned by the public agency are not available for use in relocating the facility.

The agency whose land is being acquired will have the option to choose either just compensation for the acquired property or a functional replacement. Functional replacements require FHWA approval and are made pursuant to 23 C.F.R. § 710.509.

In Florida, “[w]hen lands, buildings, or other improvements are needed for transportation purposes, but are held by a governmental entity and utilized for public purposes other than transportation, the Department may compensate the entity for such properties by providing functionally equivalent replacement facilities. The providing of replacement facilities may only be undertaken with the agreement of the governmental entity affected.”

Some of the conditions that must be met are:

(A) The property to be replaced must be publicly owned;

(B) The use of functional replacement must be in the public’s interest…. There must be a clear showing that the public function to be replaced is essential to the affected community;

(C) On projects pursuing federal participation in right of way, FHWA must agree that functional replacement is in the public’s interest and must concur with the Department’s assessment of its use….

Furthermore, “[o]n projects with federal participation in right of way, an agreement shall be entered into by the Department and the owning agency setting forth the rights, obligations and duties of each party with regard to the facility being acquired, the acquisition of the replacement site, and the construction of the replacement facility, prior to the Department’s and FHWA’s concurrence with the award for actual construction.”

The Kentucky Transportation Cabinet’s Right of Way Guidance Manual authorizes a functional replacement program. The manual states that the program “provides an alternative method of acquiring and compensating for publicly owned property that provides an essential public service,” such as schools, police stations, and fire stations. However, the program excludes utilities, railroads, land subject to the provisions of 23 U.S.C. § 138, and properties subject to 16 U.S.C. § 470(f) [transferred to 54 U.S.C. § 100101]. In Kentucky, “[u]pon approval of the request, contact shall be made with the owning agency to determine whether there is an interest in functional replacement. The owning agency shall be advised that it has the option of accepting the amount of just compensation established by the appraisal process or accepting functional replacement.”

In Maine, functional replacement is meant to provide relief to public agencies when a highway project requires the acquisition of an essential public facility. This policy recognizes that the proper measure of compensation for essential facilities is their replacement cost rather than depreciated current fair market value. Payment of depreciated value for a public facility imposes the cost of replacement on the local or other owning agency, whereas the need to replace arises from the State- and Federal-funded highway project. The Functional Replacement Program refines the concept of just compensation so as not to burden the agency suffering the loss of facility or the citizens who fund that agency. Authority for functional replacement is in 23 C.F.R. 710.509.

An eligible facility for functional replacement in Maine may be federal, state, or locally owned; however, an agency "may

803 Caltrans Right of Way Manual, Acquisition, ch. 8, supra note 781, § 8.30.01.00 (emphasis supplied).
804 Id. (emphasis supplied).
805 Id. (emphasis supplied).
806 Id.
807 Id. § 8.30.02.00.
808 Florida DOT Right of Way Procedures Manual, supra note 774, § 7.10.4.1 (emphasis supplied).
809 Id. § 7-10-9-1.
810 Id. § 7.10.4.13, at 7-10-12.
812 Id.
813 Id.
814 Maine DOT Right of Way Manual, supra note 775, § 5-08.01(emphasis supplied).
elect to be compensated on the basis of appraised fair market value.\(^{815}\)

The Maine DOT Right of Way Manual explains that a replacement facility will not be an exact copy of what is acquired. It will be a structure that serves the same function (e.g., school, jail), but it will be constructed to current standards of construction and design. The replacement desired by the owning agency may serve a larger population or service area. Or, features may be included in design that improves quality, level of service or range of services. For instance, an acquired fire station may be replaced with a much larger building with community rooms for public functions, or the replacement function may be combined in a larger building that also includes a town hall.\(^{816}\)

The Maine DOT reimburses “for betterments or increases in capacity that meet legal and regulatory standards for the type of facility being replaced.”\(^{817}\)

D. Relocation of Utilities

The Commonwealth of Kentucky Transportation Cabinet Utilities & Rails Guidance Manual states that

[the Cabinet] the Cabinet utilities relocation process allows public utility companies undertaking facilities relocation for the benefit of the Cabinet to use their own planning, design, construction, and accounting practices to the extent practicable. State or federal law or policy may require the use of alternative procedures in order for a utility company to qualify for reimbursement.\(^{818}\)

The aforesaid manual observes that “[m]ost utility relocation and accommodation issues involve consideration of the following federal questions: the accommodation of utility facilities on highway right of way . . . and the use of federal-aid highway funds for the relocation of utility facilities.”\(^{819}\) The manual further observes that federal laws, 23 U.S.C. §§ 109(1) and 123, deal, respectively, with accommodation of utilities on or in the right-of-way of federal-aid highways and reimbursement of utilities for relocation of facilities because of the construction of a project on any federal-aid highway.\(^{820}\)

E. Acquisition of Railroad Right-of-Way

Note that federal law in 23 U.S.C. § 130 addresses federal payment for construction costs to eliminate hazardous railroad-highway crossings or for relocation of a railway.\(^{821}\)

The Minnesota DOT Right of Way Manual, in addressing the acquisition of railroad right-of-way, states that the [acquisition of highway right of way over operating railway right of way (and associated plant improvements) requires in depth consideration of the impacts of the planned road construction and real estate acquisition on the continuous operation of the railroad.\(^{822}\)

It is MnDOT policy that highway right of way acquired across operating railway right of way must be obtained as an easement interest only. Right of way being acquired from non-operating, railway property is obtained in fee simple unless the owner can justify a lesser interest.\(^{823}\)

F. Miscellaneous

1. Negotiations

Several of the right-of-way manuals reviewed for the digest negotiate for the acquisition of property. When the Colorado DOT needs to acquire land from a federal or state agency, its Right of Way Manual defines the term initiation of negotiations to mean “the delivery of the initial written offer of just compensation by the Agency to the owner or the owner’s representative to purchase the real property for the project.”\(^{824}\)

2. Definitions of the Terms Special Entities and Special-Interest Lands

The Maine DOT Right of Way Manual defines the term special entities to include utilities, railroads, Indian nations, and political subdivisions.\(^{825}\)

The North Dakota DOT Right of Way Manual states that “[s]pecial interest lands, such as those owned by the federal government, various departments of the State, municipalities, etc., require special handling.”\(^{826}\) For example, “[s]tate school lands by grant or acquisition are managed by a State Land Commissioner. Applications to purchase state school land shall be submitted on a special State Land Department form.”\(^{827}\)

In sum, most if not all state transportation departments have a right-of-way manual that sets forth, policies, procedures, and grade crossings to eliminate hazards posed by blocked grade crossings due to idling trains, may be paid from sums apportioned in accordance with section 104 of this title [23 U.S.C.S. § 104]. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 [23 U.S.C. § 120] and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title [23 U.S.C.S. § 104]. \(^{828}\)


Id.

Colorado DOT Right of Way Manual, supra note 771, § 11.1.2(1).

Maine DOT Right of Way Manual, supra note 775, § 5-8.02(b).


Id. § 6.2, at VI-1.
guidance for the department’s acquisition of right-of-way. Some of the issues the manuals address are the acquisition of real property from the federal, state, and local governments; functional replacement in lieu of compensation; relocation of utilities; and acquisition of railroad right-of-way.

XVII. BEST PRACTICES STATE TRANSPORTATION DEPARTMENTS USE WHEN ACQUIRING OR TAKING PUBLIC-USE PROPERTY

Transportation departments were asked, based on their department’s experience, to describe what they regard as their best practices when seeking to acquire or take public-use property when the property belongs to the state, or an agency or department thereof, or to a municipality, county, or local public agency. According to one department, “[b]est practices are dependent upon the purpose, need, and necessity of the applicable parcel of real property.”

Several transportation departments emphasized the importance of negotiations. For example, the Kentucky DOT and the Texas DOT attempt to negotiate an acquisition before resorting to eminent domain. The Texas DOT stated that “[s]uccessful negotiations require a high degree of flexibility and, frequently, the payment of a value premium.” As for the success of negotiations, the departments responding to the survey reported that the percentage of acquisitions of public-use property resolved by negotiations rather than by eminent domain range from 90% to 99%. Transportation departments also emphasized the importance of communicating with property owners. The New Hampshire DOT keeps “the political subdivision involved in the planning process.” The Missouri DOT “communicate[s] early, often and with as much detail as possible.” When applicable, PennDOT uses a Memorandum of Understanding or Interagency Agreement as mitigation when replacement land can be provided. The South Dakota DOT relies on “[c]ommunication and collaboration early in the project design phases along with regular communication as design elements are adjusted to accommodate negotiated common ground for construction needs and adjacent owner interests.” The Utah DOT also emphasized “[g]ood communication along with relocation where possible.”

As for public-use property owned by a utility, railroad, or pipeline, the departments responding to the survey had similar recommendations, such as negotiating prior to an acquisition, communicating early and often with as much detail as possible, keeping other interested stakeholders involved in the planning process, and providing substitute right-of-way or paying just compensation.

Transportation departments also identified forms that their departments use to negotiate the acquisition of public-use property. For example, the Arkansas DOT “utilizes its standard documents for acquisition of public-use properties unless the other party requests the use of their own documents.” The New Hampshire DOT presents an appraisal and an offer to the governing body (e.g., select board, school board), which has a minimum of 45 days to consider the offer before the department institutes condemnation proceedings.

In summary, according to the transportation departments responding to the survey, best practices include communicating in as much detail as possible with the government or other entity (e.g., utility or railroad) owning the property, involving the owner in the project planning, adjusting design elements and

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828 See Summary of Transportation Departments’ Responses to the Survey, response of West Virginia DOT to question number 22(a), infra (App. C) p. C-29.
829 See Summary of Transportation Departments’ Responses to the Survey, response of Kentucky DOT to questions number 21(b) and 22(a), infra (App. C) pp. C-28 & -29.
831 See Summary of Transportation Departments’ Responses to the Survey, response of Arkansas DOT (90%), Kentucky DOT (99%), Missouri DOT (99%), New Hampshire DOT (95%), South Dakota DOT (99%), Texas DOT (90%), and West Virginia DOT (95%) to question number 21(a), infra (App. C) p. C-27 n.921.
833 See Summary of Transportation Departments’ Responses to the Survey, response of Missouri DOT to question number 22(b), infra (App. C) p. C-29.
834 See Summary of Transportation Departments’ Responses to the Survey, response of PennDOT to question number 22(a), infra (App. C) p. C-29.
836 See Summary of Transportation Departments’ Responses to the Survey, response of Utah DOT to question number 22(a), infra (App. C) p. C-29.
837 See Summary of Transportation Departments’ Responses to the Survey, response of Kentucky DOT to question number 22(b), infra (App. C) p. C-29.
838 See Summary of Transportation Departments’ Responses to the Survey, response of Missouri DOT to question number 22(b), infra (App. C) p. C-29.
840 See Summary of Transportation Departments’ Responses to the Survey, response of PennDOT to question number 22(b), infra (App. C) p. C-29.
841 See Summary of Transportation Departments’ Responses to the Survey, response of Arkansas DOT (90%), Kentucky DOT (99%), Missouri DOT (99%), New Hampshire DOT (95%), South Dakota DOT (99%), Texas DOT (90%), and West Virginia DOT (95%) to question number 21(a), infra (App. C) p. C-27 to -28.
making accommodations, and paying compensation or offering replacement property.

XVIII. SUMMARY AND CONCLUSIONS

The digest analyzes situations in which a state transportation department or other condemnor may be unable to take property because of the public-use doctrine. However, it appears that in most states, notwithstanding the public-use doctrine, state transportation departments have sufficient constitutional and statutory authority to take public-use property for their highway and other transportation projects. There are some kinds of public-use property, such as parks, recreational areas, wildlife refuges, or historic sites, for which a transportation department may have to comply with statutory conditions and requirements or may have to obtain specific statutory authority or legislative approval before using eminent domain to take the property.

The digest discusses condemnation hierarchies that apply to takings of property, including public-use property, for transportation projects. The hierarchies are based on (1) the identity and authority of the condemnor (e.g., the state) vis-à-vis other condemners (e.g., municipalities and counties); (2) the identity of the owner of the public-use property (e.g., federal, state, or local government or a public agency) sought by eminent domain; (3) the relative importance of a proposed use in comparison to the public-use property's present use (e.g., for parks, parkland, recreational areas, wildlife refuges, or historic sites); and (4) the inherent importance of a highway or other transportation project when compared to existing public uses of property, including property protected by federal or state law from categorical takings or constructive uses.

Consistent with the first condemnation hierarchy, the federal government may take property owned by a state or a municipality, county, or local public agency, including public-use property. However, a state has no power to take federal property within the state's territorial limits, regardless of the property's federal use. Before a state transportation department may acquire federal land, the federal government must consent to the acquisition. A majority of the DOTs responding to the survey stated that there have been occasions when their department has requested the U.S. DOT and/or the FHWA to assist their department to acquire public-use property from the United States and/or a federal agency or department for one or more of their department's projects.

A state is the sovereign, and its authority, subject to any restrictions imposed by law, is superior to that of municipalities, counties, and local public agencies. As one state supreme court has said, the state, in its capacity as the sovereign, has many inherent powers that municipalities do not possess and has few of the municipalities' limitations.

The second condemnation hierarchy is based on the identity of the owner of public-use property that a state or a municipality, county, or local public agency seeks to take by eminent domain. Unless otherwise proscribed by state law, a state transportation department may take public-use property owned by a municipality, county, or local public agency. Also, subject to any state law to the contrary, a county or municipality may take property owned by another municipality, county, or local public agency.

The third condemnation hierarchy is based on the importance of a property's existing public use compared to the proposed use of the property. Section 4(f) of the Department of Transportation Act of 1996, which protects parks, parkland, recreational areas, wildlife refuges, and historic sites from categorical takings or constructive uses, illustrates the third condemnation hierarchy. Likewise, the Land and Water Conservation Fund Act of 1965, which provides federal funding for outdoor recreation areas, as well as state laws that protect parks, parkland, or nature or forest preserves from takings by eminent domain, exemplifies the third condemnation hierarchy.

The fourth condemnation hierarchy is predicated on the recognized importance of a proposed highway or other transportation project that necessitates a taking of property, including public-use property. State statutes typically grant transportation departments wide discretion to take property needed for a highway or other transportation project, even when the property that is required for a project is already dedicated to a public use.

There appears to be no constitutional barrier in the states to a transportation department's taking of public-use property by eminent domain. In fact, most state constitutional provisions reviewed for the digest apply to takings by the government of private property rather than of publicly owned or public-use property. Various proscriptions do exist in some states, either by statute or at common law, that limit or preclude takings of public-use property. For example, California statutes permit the taking of property already dedicated to a public use when the proposed taking would not unreasonably interfere with or impair the existing use; when the proposed use is compatible with the existing public use; or when the proposed taking is a more necessary public use, such as for a highway, than the existing use. Nevertheless, nearly all of the transportation departments responding to the survey reported that there have been no occasions when their department has been unable, because of state constitutional and/or statutory authority, or the lack thereof, to use eminent domain to take public-use property for a transportation project.

The majority rule appears to be that when a state transportation department takes public-use property belonging to another government or government agency, either state or local, the condemnor must pay just compensation. A majority of the transportation departments responding to the survey reported that when their department uses eminent domain to take public-use property owned by the state, or an agency or department thereof, or of a municipality, county, or local public agency, their department is required by law (or by judicial precedent) to pay compensation for the property.

The methods used to determine the fair market value of property, including public-use property, are the comparable sales approach, the replacement cost or substitute facilities approach, and the income approach. Because public-use property is not regularly bought and sold on the open market, a public-
use property may not have an ascertainable fair market value based on comparable sales data. However, the transportation departments responding to the survey reported that, with some exceptions, the fair market value approach based on comparable sales is the method that they use most often to determine the value of public-use property.

The second method of determining the value of public-use property is the replacement or substitution cost approach. The replacement cost method of valuation focuses not on the decreased market value of property but on the cost of equivalent facilities and/or measures necessary to restore the property's utility.

The third method of valuation is the income approach. The income approach may be used when the real property itself generates income that may be capitalized to arrive at an indication of what a purchaser would pay to receive a stream of income over a foreseeable period of time. Except in some states, the rule is that a condemnee may not claim for lost business profits allegedly caused by a taking. When an appraiser uses the income capitalization approach, the appraiser must take care to consider only the income that the property itself will produce, not income produced from a business enterprise conducted on the property.

As for utility property, it may be difficult to determine the value of the property by using comparable sales data. A utility is likely to be valued based on its going concern value and the value of its franchise using the income approach or, alternatively, the cost approach. With respect to railroad property, the courts have accepted the cost approach in condemnation cases to determine the value of railroad property.

Several takings of public-use property are instructive as case studies. First, in at least one case a condemnee successfully established that a condemnor's taking of its public-use property (i.e., airport property) was a pretext to prevent the airport's expansion. Second, in another case, a court held that because a company, the condemnee, did not itself have condemnation authority, the company could not invoke the prior public use doctrine to prevent a taking of its property. That is, to assert the public-use doctrine, a property owner must have a property with a preexisting public use coupled with the owner's power of eminent domain. Third, although in some states the law permits private condemnations for specific purposes, it has been held that a property owner may preclude a private condemnation that would eliminate entirely an existing public use of the owner's property.

Most if not all state transportation departments have a right-of-way manual that sets forth policies, procedures, and guidance for the department's acquisition of right-of-way. For instance, insofar as public-use property is concerned, Caltrans Right of Way Manual, which prescribes uniform procedures and guidance for Caltrans's right-of-way functions, explains the different methods that Caltrans may use to obtain public-use property depending on the level of government or the agency that owns or controls the desired property.

Finally, transportation departments identified what they perceive to be their best practices when acquiring public-use property. The departments emphasized the importance of having continuous communications with the owner of the public-use property, providing detailed information to the owner, and negotiating with the owner for the purchase of the property.
APPENDIX D

STATE CONSTITUTIONAL PROVISIONS APPLICABLE TO TAKINGS OF PROPERTY, INCLUDING PUBLIC-USE PROPERTY

Alabama


That the exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as individuals; but private property shall not be taken or applied for public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner; provided, however, that the general assembly may, by law, secure to persons or corporations the right of way over the lands of other corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner. And provided, that the right of eminent domain shall not be so construed as to allow taxation, or forced subscription, for the benefit of railroads, or any other kind of corporations other than municipal, or for the benefit of any individual or association.

Alaska

Alaska Const. art. I, § 18.

Private property shall not be taken or damaged for public use without just compensation.

Arizona


Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the state treasury for the owner on such terms and conditions as the Legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefore be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question[,] and determined as such without regard to any legislative assertion that the use is public.


The legislature shall provide by proper laws for the sale of all state lands or the lease of such lands, and shall further provide by said laws for the protection of the actual bona fide residents and lessees of said lands, whereby such residents and lessees of said lands shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease to other parties the former lessee shall be paid by the succeeding lessee the value of such improvements and rights and actual bona fide residents and lessees shall have preference to a renewal of their leases at a reassessed rental to be fixed as provided by law.

Arkansas


The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.


The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public—use the same as the property of individuals.

California


(a) Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

(b) The State and local governments are prohibited from acquiring by eminent domain an owner occupied residence for the purpose of conveying it to a private person.

(c) Subdivision (b) of this section does not apply when State or local government exercises the power of eminent domain for the purpose of protecting public health and safety; preventing serious, repeated criminal activity; responding to an emergency; or remedying environmental contamination that poses a threat to public health and safety.

(d) Subdivision (b) of this section does not apply when State or local government exercises the power of eminent domain for
the purpose of acquiring private property for a public work or improvement.

(c) For the purpose of this section:
1. “Conveyance” means a transfer of real property whether by sale, lease, gift, franchise, or otherwise.
2. “Local government” means any city, including a charter city, county, city and county, school district, special district, authority, regional entity, redevelopment agency, or any other political subdivision within the State.
3. “Owner-occupied residence” means real property that is improved with a single-family residence such as a detached home, condominium, or townhouse and that is the owner or owners’ principal place of residence for at least one year prior to the State or local government's initial written offer to purchase the property. Owner-occupied residence also includes a residential dwelling unit attached to or detached from such a single-family residence which provides complete independent living facilities for one or more persons.
4. “Person” means any individual or association, or any business entity, including, but not limited to, a partnership, corporation, or limited liability company.
5. “Public work or improvement” means facilities or infrastructure for the delivery of public services such as education, police, fire protection, parks, recreation, emergency medical, public health, libraries, flood protection, streets or highways, public transit, railroad, airports and seaports; utility, common carrier or other similar projects such as energy-related, communication-related, water-related and wastewater-related facilities or infrastructure; projects identified by a State or local government for recovery from natural disasters; and private uses incidental to, or necessary for, the public work or improvement.
6. “State” means the State of California and any of its agencies or departments.

The right of eminent domain is hereby declared to exist in the State to all frontages on the navigable waters of this State.

Colorado

Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.

Colo. Const. art. II, § 15.
Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Connecticut

Conn. Const. art. I, § 11.
The property of no person shall be taken for public use, without just compensation therefor.

Delaware

No person shall for any indictable offense be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; and no person shall be for the same of offense twice put in jeopardy of life or limb; nor shall any person's property be taken or applied to public use without the consent of his or her representatives, and without compensation being made.

Florida

(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.
(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.
(c) Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.

Georgia

(a) Except as otherwise provided in this Paragraph, private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.
(b) When private property is taken or damaged by the state or the counties or municipalities of the state for public road or street purposes, or for public transportation purposes, or for any other public purposes as determined by the General Assembly, just and adequate compensation therefor need not be
paid until the same has been finally fixed and determined as provided by law; but such just and adequate compensation shall then be paid in preference to all other obligations except bonded indebtedness.

(c) The General Assembly may by law require the condemnor to make prepayment against adequate compensation as a condition precedent to the exercise of the right of eminent domain and provide for the disbursement of the same to the end that the rights and equities of the property owner, lien holders, and the state and its subdivisions may be protected.

(d) The General Assembly may provide by law for the payment by the condemnor of reasonable expenses, including attorney's fees, incurred by the condemnee in determining just and adequate compensation.

(e) Notwithstanding any other provision of the Constitution, the General Assembly may provide by law for relocation assistance and payments to persons displaced through the exercise of the power of eminent domain or because of public projects or programs; and the powers of taxation may be exercised, and public funds expended in furtherance thereof.

**Ga. Const. art. IX, § II, para. V**

The governing authority of each county and of each municipality may exercise the power of eminent domain for any public purpose subject to any limitations on the exercise of such power as may be provided by general law. Notwithstanding the provisions of any local amendment to the Constitution continued in effect pursuant to Article XI, Section I, Paragraph IV or any existing general law, each exercise of eminent domain by a non-elected housing or development authority shall be first approved by the elected governing authority of the county or municipality within which the property is located.

**Hawaii**

**Haw. Const. art. I, § 20.**

Private property shall not be taken or damaged for public use without just compensation.

**Haw. Const. art. X, § 5.**

The University of Hawaii is hereby established as the state university and constituted a body corporate. It shall have title to all the real and personal property now or hereafter set aside or conveyed to it, which shall be held in public trust for its purposes, to be administered and disposed of as provided by law.

**Idaho**

**Idaho Const. art. I, § 14.**

The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

**Idaho Const. art. IX, § 8.**

It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted; provided, that no state lands shall be sold for less than the appraised price. No law shall ever be passed by the legislature granting any privileges to persons who may have settled upon any such public lands, subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly. The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants; provided, that not to exceed one hundred sections of state lands shall be sold in any one year, and to be sold in subdivisions of not to exceed three hundred and twenty acres of land to any one individual, company or corporation. The legislature shall have power to authorize the state board of land commissioners to exchange granted or acquired lands of the state on an equal value basis for other lands under agreement with the United States, local units of government, corporations, companies, individuals, or combinations thereof.

**Idaho Const. art. XI, § 8.**

The right of eminent domain shall never be abridged, nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the police powers of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state.
Illinois

Ill. Const. art. I, § 15.
Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

Indiana

Ind. Const. art. 1, § 21.
No person’s particular services shall be demanded, without just compensation. No person’s property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.

Iowa

Iowa Const. art. I, § 18.
Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.

The general assembly, however, may pass laws permitting the owners of lands to construct drains, ditches, and levees for agricultural, sanitary or mining purposes across the lands of others, and provide for the organization of drainage districts, vest the proper authorities with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches, and levees heretofore constructed under the laws of the state, by special assessments upon the property benefited thereby. The general assembly may provide by law for the condemnation of such real estate as shall be necessary for the construction and maintenance of such drains, ditches and levees, and prescribe the method of making such condemnation.

Kansas

No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation.

Kentucky

Ky. Const. § 195.
The Commonwealth, in the exercise of the right of eminent domain, shall have and retain the same powers to take the property and franchises of incorporated companies for public use which it has and retains to take the property of individuals, and the exercise of the police powers of this Commonwealth shall never be abridged nor so construed as to permit corporations to conduct their business in such manner as to infringe upon the equal rights of individuals.

Ky. Const. § 211.
No railroad corporation organized under the laws of any other State, or of the United States, and doing business, or proposing to do business, in this State, shall be entitled to the benefit of the right of eminent domain or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this Commonwealth.

Ky. Const. § 242.
Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual made by Commissioners or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law.

Maine

Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it.

Maryland

Md. Const. art. III, § 40.
The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.

Md. Const. art. III, § 40A.
The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation, but where such property is situated in Baltimore City and is desired by this State or by the Mayor and City Council of Baltimore, the General Assembly may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof by the State or by the Mayor and City Council of Baltimore, or into court, such amount as the State or the Mayor and City Council of Baltimore, as the case may be, shall estimate to be the fair value of said property, provided such
legislation also requires the payment of any further sum that may subsequently be awarded by a jury; and further provided that the authority and procedure for the immediate taking of property as it applies to the Mayor and City Council of Baltimore on June 1, 1961, shall remain in force and effect to and including June 1, 1963, and where such property is situated in Baltimore County and is desired by Baltimore County, Maryland, the County Council of Baltimore County, Maryland, may provide for the appointment of an appraiser or appraisers by a Court of Record to value such property and that upon payment of the amount of such evaluation, to the party entitled to compensation, or into Court, and securing the payment of any further sum that may be awarded by a jury, such property may be taken; and where such property is situated in Montgomery County and in the judgment of and upon a finding by the County Council of said County that there is immediate need therefor for right of way for County roads or streets, the County Council may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof, or into court, such amount as a licensed real estate broker or a licensed and certified real estate appraiser appointed by the County Council shall estimate to be the fair market value of such property, provided that the Council shall secure the payment of any further sum that may subsequently be awarded by a jury. In the various municipal corporations within Cecil County, where in the judgment of and upon a finding by the governing body of said municipal corporation that there is immediate need therefor for right of way for municipal roads, streets and extension of municipal water and sewage facilities, the governing body may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof, or into court, such amount as a licensed real estate broker appointed by the particular governing body shall estimate to be a fair market value of such property, provided that the municipal corporation shall secure the payment of any further sum that subsequently may be awarded by a jury. This Section 40A shall not apply in Montgomery County or any of the various municipal corporations within Cecil County, if the property actually to be taken includes a building or buildings.

Md. Const. art. III, § 40B.

The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation, except that where such property, located in Prince George's County in this State, is in the judgment of the Washington Suburban Sanitary Commission needed for water supply, sewerage and drainage systems to be extended or constructed by the said Commission, the General Assembly may provide that such property, except any building or buildings may be taken immediately upon payment therefor by the condemning authority to the owner or owners thereof or into the Court to the use of the person or persons entitled thereto, such amount as the condemning authority shall estimate to be the fair value of such property, provided such legislation requires that the condemning authority's estimate be not less than the appraised value of the property being taken as evaluated by at least one qualified appraiser, whose qualifications have been accepted by a Court of Record of this State, and also requires the payment of any further sum that may subsequently be awarded by a jury, and provided such legislation limits the condemning authority's utilization of the acquisition procedures specified in this section to occasions where it has acquired or is acquiring by purchase or other procedures one-half or more of the several takings of lands or interests in land necessary for any given water supply, sewerage or drainage extension or construction project.


The General Assembly of Maryland, by public local law, may authorize and empower the Mayor and City Council of Baltimore:

(a) To acquire, within the boundary lines of Baltimore City, land and property of every kind, and any right, interest, franchise, easement or privilege therein, by purchase, lease, gift, condemnation or any other legal means, for development or redevelopment, including, but not limited to, the comprehensive renovation or rehabilitation thereof; and

(b) To sell, lease, convey, transfer or otherwise dispose of any of said land or property, regardless of whether or not it has been developed, redeveloped, altered or improved and irrespective of the manner or means in or by which it may have been acquired, to any private, public or quasi public corporation, partnership, association, person or other legal entity.

No land or property taken by the Mayor and City Council of Baltimore for any of the aforementioned purposes or in connection with the exercise of any of the powers which may be granted to the Mayor and City Council of Baltimore pursuant to this Article by exercising the power of eminent domain, shall be taken without just compensation, as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation.

All land or property needed, or taken by the exercise of the power of eminent domain, by the Mayor and City Council of
Baltimore for any of the aforementioned purposes or in connection with the exercise of any of the powers which may be granted to the Mayor and City Council of Baltimore pursuant to this Article is hereby declared to be needed or taken for a public use.


The General Assembly of Maryland, by public local law, may authorize the Mayor and City Council of Baltimore:

(a) Within the City of Baltimore to acquire land and property of every kind, and any right, interest, franchise, easement or privilege therein, by purchase, lease, gift, condemnation or any other legal means, for storing, parking and servicing self-propelled vehicles, provided, that no petroleum products shall be sold or offered for sale at any entrance to or exit from, any land so acquired or at any entrance to, or exit from, any structure erected thereon, when any entrance to, or exit from, any such land or structure faces on a street or highway which is more than 25 feet wide from curb to curb; and

(b) To sell, lease, convey, transfer or otherwise dispose of any of said land or property, regardless of whether or not it has been developed, redeveloped, altered, or improved and irrespective of the manner or means in or by which it may have been acquired, to any private, public or quasi public corporation, partnership, association, person or other legal entity.

No land or property taken by the Mayor and City Council of Baltimore for any of the aforementioned purposes or in connection with the exercise of any of the powers which may be granted to the Mayor and City Council of Baltimore pursuant to this Article by exercising the power of eminent domain, shall be taken without just compensation, as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation.

All land or property needed, or taken by the exercise of the power of eminent domain, by the Mayor and City Council of Baltimore for any of the aforementioned purposes or in connection with the exercise of any of the powers which may be granted to the Mayor and City Council of Baltimore pursuant to this Article is hereby declared to be needed or taken for a public use.

Md. Const. art. XI-D, § 1.

The General Assembly of Maryland, by public local law, may authorize the Mayor and City Council of Baltimore:

(a) To acquire land and property of every kind, and any right, interest, franchise, easement or privilege therein, in adjoining or in the vicinity of the Patapsco River or its tributaries, by purchase, lease, gift, condemnation or any other legal means, for or in connection with extending, developing or improving the harbor or port of Baltimore and its facilities and the highways and approaches thereto; and providing, further, that the Mayor and City Council of Baltimore shall not acquire any such land or property, or any such right, interest, franchise, easement or privilege therein, for any of said purposes, in any of the counties of this State without the prior consent and approval by resolution duly passed after a public hearing, by the governing body of the county in which such land or property, or such right, interest, franchise, easement or privilege therein, is situate; and provided, further, that Anne Arundel County shall retain jurisdiction and power to tax any land so acquired by the Mayor and City Council of Baltimore under the provisions of this Act.

(b) To sell, lease, convey, transfer or otherwise dispose of any of said land or property, regardless of whether or not it is undeveloped or has been developed, redeveloped, altered, or improved and irrespective of the manner or means in or by which it may have been acquired, to any private, public or quasi public corporation, partnership, association, person or other legal entity.

No land or property taken by the Mayor and City Council of Baltimore for any of the aforementioned purposes or in connection with the exercise of any of the powers which may be granted to the Mayor and City Council of Baltimore pursuant to this Article by exercising the power of eminent domain, shall be taken without just compensation, as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation.

All land or property needed, or taken by the exercise of the power of eminent domain, by the Mayor and City Council of Baltimore for any of the aforementioned purposes or in connection with the exercise of any of the powers which may be granted to the Mayor and City Council of Baltimore pursuant to this Article is hereby declared to be needed or taken for a public use.

Massachusetts

Mass. Const. pt. first, art. X

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street; provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.
Mass. Const. amend. art. LI

The preservation and maintenance of ancient landmarks and other property of historical or antiquarian interest is a public use, and the commonwealth and the cities and towns therein may, upon payment of just compensation, take such property or any interest therein under such regulations as the general court may prescribe.

Michigan


The assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes.


Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual’s principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property’s fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.

“Public use” does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.

In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.

Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph.

Resolved further, That the foregoing amendment shall be submitted to the people of the state at the next general election in the manner provided by law.


The legislature shall have general supervisory jurisdiction over all state-owned lands useful for forest preserves, game areas and recreational purposes; shall require annual reports as to such lands from all departments having supervision or control there-
purposes, and shall exercise the right of eminent domain as provided by law for the highway commission.

**Montana**

*Mont. Const. art. XI, § 4.*

The exercise of the power and right of eminent domain shall never be construed or abridged to prevent the taking by law of the property and franchises of corporations and subjecting them to public use. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when the rights of any corporation are affected by any exercise of said power of eminent domain.

**Mississippi**

*Miss. Const. art. 3, § 17.*

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

**Montana**

*Mont. Const. art. II, § 29.*

Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

*Mont. Const. art. X, § 11.*

(1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.

(2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

(3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the manner and for at least the price prescribed without the consent of the United States.

(4) All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.

**North Dakota**

*N.D. Const. art. I, § 16.*

Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, unless the owner chooses to accept annual payments as may be provided for by law. No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, unless the owner chooses annual payments as may be provided by law, irrespective of any benefit from any improvement proposed by such corporation. Compensation shall be ascertained by a jury, unless a jury be waived. When the state or any of its departments, agencies or political subdivisions seeks to acquire right of way, it may take possession upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right of way is located. The clerk shall immediately notify the owner of such deposit. The owner may thereupon appeal to the court in the manner provided by law, and may have a jury trial, unless a jury be waived, to determine the damages, which damages the owner may choose to accept in annual payments as may be provided for by law. Annual payments shall not be subject to escalator clauses but may be supplemented by interest earned.

For purposes of this section, a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.

*N.D. Const. art. XII, § 5.*

The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies and subjecting them to public use; the same as the property of individuals; and the exercise of the police power of this state shall never be abridged, or so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals or the general well-being of the state.

**Nebraska**


The property of no person shall be taken or damaged for public use without just compensation therefor.

*Neb. Const. art. X, § 6.*

The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking by the legislature, of the property and franchises of incorporated com-
panies already organized, or hereafter to be organized, and sub-
jecting them to the public necessity the same as of individuals.

**New Hampshire**

_N.H. Const. pt. first, art. 12._

Every member of the community has a right to be protected
by it, in the enjoyment of his life, liberty, and property; he is
therefore bound to contribute his share in the expense of such
protection, and to yield his personal service when necessary. But
no part of a man's property shall be taken from him, or applied
to public uses, without his own consent, or that of the represen-
tative body of the people. Nor are the inhabitants of this state
controllable by any other laws than those to which they, or their
representative body, have given their consent.

_N.H. Const. pt. first, art. 12-a._

No part of a person's property shall be taken by eminent domain
and transferred, directly or indirectly, to another person if the
taking is for the purpose of private development or other private
use of the property.

**New Jersey**

_N.J. Const. art. I, para. 20._

Private property shall not be taken for public use without just
compensation. Individuals or private corporations shall not be
authorized to take private property for public use without just
compensation first made to the owners.

**New Mexico**

_N.M. Const. art. II, § 20._

Private property shall not be taken or damaged for public use
without just compensation.

_N.M. Const. art. XI, § 18._

The right of eminent domain shall never be so abridged or con-
strued as to prevent the legislature from taking the property and
franchises of incorporated companies and subjecting them to
the public use, the same as the property of individuals.

**New York**

_N.Y Const. art. I, § 7._

(a) Private property shall not be taken for public use without
just compensation.

(b) [Repealed]

(c) Private roads may be opened in the manner to be prescribed
by law; but in every case the necessity of the road and the amount
of all damage to be sustained by the opening thereof shall be first
determined by a jury of freeholders, and such amount, together
with the expenses of the proceedings, shall be paid by the person
to be benefited.

(d) The use of property for the drainage of swamp or agricul-
tural lands is declared to be a public use, and general laws may
be passed permitting the owners or occupants of swamp or
agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions, on making just compensation, and such compensation together with the cost of such drainage may be assessed, wholly or partly, against any property benefited thereby; but no special laws shall be enacted for such purposes.

**N.Y. Const. art. XVIII, § 8.**

Any agency of the state or any city, town, village, or public corporation, which is empowered by law to take private property by eminent domain for any of the public purposes specified in section one of this article, may be empowered by the legislature to take property necessary for any such purpose but in excess of that required for public use after such purpose shall have been accomplished; and to improve and utilize such excess, wholly or partly for any other public purpose, or to lease or sell such excess with restrictions to preserve and protect such improvement or improvements.

**N.Y. Const. art. XVIII, § 9.**

Subject to any limitation imposed by the legislature, the state, or any city, town, village or public corporation, may acquire by purchase, gift, eminent domain or otherwise, such property as it may deem ultimately necessary or proper to effectuate the purposes of this article, or any of them, although temporarily not required for such purposes.

**Ohio**

**Ohio Const. art. XIII, § 5.**

No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

**Ohio Const. art. XVIII, § 4.**

Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

**Ohio Const. art. VIII, § 4.**

Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner.

**Oklahoma**

**Okla. Const. art. II, § 23.**

No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law.

**Okla. Const. art. II, § 24.**

Private property shall not be taken or damaged for public use without just compensation. Just compensation shall mean the value of the property taken, and in addition, any injury to any part of the property not taken. Any special and direct benefits to the part of the property not taken may be offset only against any injury to the property not taken. Such compensation shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. Provided however, in no case shall the owner be required to make any payments should the benefits be judged to exceed damages. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.

**Oregon**

**Or. Const. art. I, § 18.**

Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.
Rhode Island

No person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured in such manner as may be prescribed by law.

Pennsylvania

Pa. Const. art. 1, § 10
Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

Municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements and compensation shall be paid or secured before the taking, injury or destruction.

South Carolina

(A) Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.
(B) For the limited purpose of the remedy of blight, the General Assembly may provide by law that private property constituting a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use, or any combination of these factors may be condemned by eminent domain without the consent of the owner and put to a public use or private use if just compensation is first made for the property.

Except as otherwise provided in this section, the General Assembly may vest the power of assessing and collecting taxes in all of the political subdivisions of the State, including counties, municipalities, special purpose districts, public service districts, and school districts. Property tax levies shall be uniform in respect to persons and property within the jurisdiction of the body imposing such taxes; provided, that on properties located in an area receiving special benefits from the taxes collected, special levies may be permitted by general law applicable to the same type of political subdivision throughout the State, and the General Assembly shall specify the precise condition under which such special levies shall be assessed. For the tax year beginning 2007, each parcel of real property in this State shall have a maximum value for ad valorem taxes that does not exceed its fair market value. The General Assembly is authorized, by general law, to define “fair market value” and to define when property has been improved or when losses have occurred to change the value of the real property.

The General Assembly shall establish, through the enactment of general law, and not through the enactment of local legislation pertaining to a single county or other political subdivision, the method of assessment of real property within the State that shall apply to each political subdivision within the State. Each political subdivision shall value real property by a method in which the value of each parcel of real property, adjusted for improvements and losses, does not increase more than fifteen percent...
every five years unless, as defined by the General Assembly, an assessable transfer of interest occurs.

Notwithstanding any other provision of law, for the purposes of calculating the limit on bonded indebtedness of political subdivisions and school districts, pursuant to Sections 14 and 15 of Article X, respectively of the Constitution of this State, the assessed values of all taxable property within a political subdivision or school district shall not be lower than the assessed values of tax year 2006.

Whenever there is a merger of governments authorized under Section 12 of Article VIII, tax districts may be created, based upon the services rendered in each district, but tax levies must be uniform in respect to persons and property within each such district.

S.C. Const. art. XIV, § 2.

The title to all lands and other property which have heretofore accrued to this State by grant, gift, purchase, forfeiture, escheats or otherwise shall vest in the State of South Carolina, the same as though no change had taken place.

South Dakota

S.D. Const. art. VI, § 13.

Private property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedure established by the Legislature and according to § 6 of this article. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.

S.D. Const. art. XVII, § 18.

Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The Legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases.

Tennessee


That no man’s particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.

Texas

Tex. Const. art. III, § 52j.

A governmental entity may sell real property acquired through eminent domain to the person who owned the real property interest immediately before the governmental entity acquired the property interest, or to the person’s heirs, successors, or assigns, at the price the entity paid at the time of acquisition if:

(1) the public use for which the property was acquired through eminent domain is canceled;
(2) no actual progress is made toward the public use during a prescribed period of time; or
(3) the property is unnecessary for the public use.

Utah

Utah Const. art. I, § 22.

Private property shall not be taken or damaged for public use without just compensation.

Virginia


That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms “lost profits” and “lost access” are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is.
Vermont

Vt. Const. ch. l, art. 2.
That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person’s property is taken for the use of the public, the owner ought to receive an equivalent in money.

Washington

Wash. Const. art. l, § 16.
Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public. Provided, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

Private property shall not be taken or sold for the payment of the corporate debt of any public or municipal corporation, except in the manner provided by law for the levy and collection of taxes.

Wash. Const. art. XII, § 10.
The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals.

Wisconsin

The property of no person shall be taken for public use without just compensation therefor.

Wis. Const. art. XI, § 2.
No municipal corporation shall take private property for public use, against the consent of the owner, without the necessity thereof being first established in the manner prescribed by the legislature.

Wis. Const. art. XI, § 3a.
The state or any of its counties, cities, towns or villages may acquire by gift, dedication, purchase, or condemnation lands for establishing, laying out, widening, extending, and maintaining memorial grounds, streets, highways, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air, and usefulness of such public works. If the governing body of a county, city, town or village elects to accept a gift or dedication of land made on condition that the land be devoted to a special purpose and the condition subsequently becomes impossible or impracticable, such governing body may by resolution or ordinance enacted by a two-thirds vote of its members elect either to grant the land back to the donor or dedicated or his heirs or accept from the donor or dedicator or his heirs a grant relieving the county, city, town or village of the condition; however, if the donor or dedicator or his heirs are unknown or cannot be found, such resolution or ordinance may provide for the commencement of proceedings in the manner and in the courts as the legislature shall designate for the purpose of relieving the county, city, town or village from the condition of the gift or dedication.

West Virginia

Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the legislature, of the property and franchises of incorporated companies already organized, and subjecting them to the public use, the same as of individuals.
**Wyoming**

*Wyo. Const. art. 1, § 32.*
Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation.

*Wyo. Const. art. 1, § 33.*
Private property shall not be taken or damaged for public or private use without just compensation.

*Wyo. Const. art. 10, § 9.*
The right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals.

*Wyo. Const. art. 10, § 14.*
Exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking by the legislature of property and franchises of incorporated companies and subjecting them to public use the same as property of individuals.
APPENDIX E

STATE STATUTES APPLICABLE TO TAKINGS OF PROPERTY, INCLUDING PUBLIC-USE PROPERTY

Note
The following terms are highlighted for the reader's convenience: cemetery, common carrier, compensation, condemnation, cost approach, damage, damaged, damages, depreciation, eminent domain, exchange, fair market value, historic, income, municipality, park, pipeline, public use, utility, railroad, school, replacement, special use, state-owned, substitute, valuation.

Alabama

For the purpose of this chapter, the highway authorities of the state, acting alone or through the counties, cities and towns, may acquire private or public property and property rights for controlled access facilities and service roads, including rights of access, air, view and light, by gift, devise, purchase or condemnation in the same manner as such authorities are now, or hereafter may be, authorized by law to acquire such property or property rights in connection with highways and streets within their respective jurisdiction. In connection with the acquisition of property or property rights for any controlled access facility, or portion thereof or service road in connection therewith, the state, county, city or town highway authority is hereby authorized, in its discretion, to acquire an entire lot, block or tract of land, even though such entire lot, block or tract of land is not immediately needed for the right-of-way proper; provided, that the authority is not granted to acquire property not immediately needed for the right-of-way proper unless the owner of such property shall consent thereto.

Alaska

For the purpose of assessing compensation and damages, the right to them accrues at the date of issuance of the summons, and its actual value at that date is the measure of compensation of the property to be actually taken, and the basis of damages to property not actually taken but injuriously affected in the cases where the damages are allowed. If an order is made letting the plaintiff into possession, as provided in AS 09.55.380, the compensation and damages awarded shall draw lawful interest from the date of the order. Improvements put upon the property after the date of the service of summons may not be included in the assessment of compensation or damages.

Alaska Stat. § 19.05.080 (2018):
The department on behalf of the state and as part of the cost of constructing or maintaining a highway may purchase in the open market, acquire, take over, or condemn under the right and power of eminent domain land in fee simple or easements that it considers necessary for present public use, either temporary or permanent, or that it considers necessary and reasonable for the public use. By the same means, the department may obtain material, including clay, gravel, sand, or rock, or the land necessary to obtain material, including access to it. The department may acquire the land or materials notwithstanding the fact that title to it is vested in the state or a department, agency, commission, or institution of the state. Acquisition of materials by purchase in the open market under this section is governed by AS 36.30 (State Procurement Code).

Alaska Stat. § 19.05.110 (2018):
When property that is devoted to or held for another public use for which the power of eminent domain may be exercised is taken for high purposes, the department [of transportation] may, with the consent of the person or agency in charge of other public use, condemn real property to be exchanged with such person or agency for the real property so taken. The section does not limit the authorization of the department [of transportation] to acquire, other than by condemnation, property for that purpose in any other manner.

Alaska Stat. § 19.05.120 (2018):
When the commissioner formally declares that it is the best public interest of the state to do so, the department [of transportation] may acquire by purchase or otherwise privately or publicly owned land or an interest in it for the purpose of exchanging it for privately or publicly owned land which the department is authorized by law to acquire.

Arizona

A. This state may exercise the right of eminent domain for transportation purposes, and the court in which the action is pending shall give the action precedence over other civil actions.
B. If property that is devoted to or held for some public use other than existing street, highway or airport uses for which the power of eminent domain might be exercised is to be taken for such transportation purposes and if the person or agency in charge of the public use consents, the director may purchase or exercise the right of eminent domain to acquire real property or an interest in the property to be exchanged with the person or agency for the real property that is to be taken for transportation purposes.
C. This article does not limit the authorization to the department to acquire, other than by exchange, property for these purposes or to acquire directly by condemnation, purchase or otherwise, without such exchange, property held for some other public use by any lawful means provided in section 28-7092.
Arkansas

(a) In any proceeding instituted by and in the name of the State of Arkansas, involving the acquisition of any real property or any interest therein or any easements for public highway purposes, the petitioner may file a declaration of taking at any time before judgment signed by the Director of State Highways and Transportation, or with the condemnation petition, declaring that the real property or any interest therein or any easement is thereby taken for the use of the State of Arkansas.
(b) The declaration of taking shall contain or have annexed thereto the following:
(1) A statement of the authority under which the property or any interest therein or any easement is taken;
(2) A statement of the public use for which such property or any interest therein or any easement is taken;
(3) A description of the property taken or any interest therein or an easement, sufficient for the identification thereof;
(4) A plat showing the property taken or any interest therein or any easement; and
(5) A statement of the amount of money estimated by the acquiring agency to be just compensation for the property taken, or any interest therein or any easement.

(a) The State Highway Commission is authorized to acquire real or personal property, or any interest therein, deemed to be necessary or desirable for state highway purposes, by gift, devise, purchase, exchange, condemnation, or otherwise.
(b) These lands or real property may be acquired in fee simple or in any lesser estate.

California

“Property appropriated to public use” means property either already in use for a public purpose or set aside for a specific public purpose with the intention of using it for such purpose within a reasonable time.

Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future. Where property is sought to be acquired pursuant to this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.

Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated. Where property is sought to be acquired pursuant to this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.

(a) When property described in Section 1240.680 is sought to be acquired for city or county road, street, or highway purposes, and such property was dedicated or devoted to regional park, recreational, or open-space purposes prior to the initiation of road, street, or highway route location studies, an action for declaratory relief may be brought in the superior court by the regional park district which operates the park, recreational, or open-space area to determine the question of which public use is the best and most necessary public use for such property.
(b) The action for declaratory relief shall be filed and served within 120 days after the city or county, as the case may be, has published in a newspaper of general circulation pursuant to Section 6061 of the Government Code, and delivered to the regional park district, a written notice that a proposed route or site or an adopted route includes such property.
(c) With respect to property dedicated or devoted to regional park, recreational, or open–space purposes which is sought to be acquired for city or county road, street, or highway purposes:
(1) If an action for declaratory relief is not filed and served within the 120–day period established by subdivision (b), the right to bring such action is waived and the provisions of Section 1240.680 do not apply.
(2) When a declaratory relief action may not be brought pursuant to this section, the provisions of Section 1240.680 do not apply.

(a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.
(b) The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.
(a) In the name of the people of the State of California, the department may acquire by eminent domain any property necessary for state highway purposes.
(b) For any property that the department is acquiring by, or under threat of, eminent domain, the department shall, in a timely manner, provide a copy of all appraisals it performed or obtained for the property to the property owner. If any appraisals that are performed or paid for by the department are first provided to the property owner, the appraiser shall provide a copy of those appraisals to the department.

Subject to Sections 1240.670, 1240.680, and 1240.690 of the Code of Civil Procedure, the real property which the department may acquire by eminent domain, or otherwise, includes any property dedicated to park purposes, however it may have been dedicated, when the commission has determined by resolution that such property is necessary for state highway purposes.

The department may acquire, either in fee or in any lesser estate or interest, any real property which it considers necessary for state highway purposes. Real property for such purposes includes, but is not limited to, real property considered necessary for any of the following purposes:
(a) For rights-of-way, including those necessary for state highways within cities.
(b) For the purposes of exchanging the same for other real property to be used for rights-of-way.
(c) For rock quarries, gravel pits, or sand or earth borrow pits.
(d) For offices, shops, or storage yards.
(e) For parks adjoining or near any state highway.
(f) For the culture and support of trees which benefit any state highway by aiding in the maintenance and preservation of the roadbed, or which aid in the maintenance of the attractiveness of the scenic beauties of such highway.
(g) For drainage in connection with any state highway.
(h) For the maintenance of an unobstructed view of any portion of a state highway so as to promote the safety of the traveling public.
(i) For the construction and maintenance of stock trails.
(j) For the construction and maintenance of nonmotorized transportation facilities, as defined in Section 156.

Colorado
Boards of county commissioners, acting for their respective counties, are authorized to acquire by donation, by purchase, or by eminent domain proceedings in the name of such boards any private or public property necessary for the improvement or construction of state highways. Said boards have authority to contract with the department of transportation to pay for all or any part of such property so acquired.

For all of the purposes of this part 2 and, with respect to state highways, for all the purposes of part 1 of article 3 of this title, state highways or county highways may be designated, established, and constructed in, into, or through cities and counties, cities, or towns when such highways form necessary or convenient connecting links for carrying state highways or county highways into or through such cities and counties, cities, or towns, and for such purposes the department of transportation and the boards of county commissioners of the several counties may condemn or otherwise acquire rights-of-way and access rights.

Boards of county commissioners, acting for their respective counties, are authorized to acquire by donation, by purchase, or by eminent domain proceedings in the name of such boards any private or public property necessary for the improvement or construction of state highways. Said boards have authority to contract with the department of transportation to pay for all or any part of such property so acquired.

Connecticut
(a) Real property defined. For the purpose of this section, “real property” means land and buildings and any estate, interest or right in land.
(b) Condemnation of land for state highway or highway maintenance storage area or garage. The commissioner may take any land the commissioner finds necessary for the layout, alteration, extension, widening, change of grade or other improvement of any state highway or for a highway maintenance storage area or garage and the owner of such land shall be paid by the state for all damages, and the state shall receive from such owner the amount or value of all benefits resulting from such taking, layout, alteration, extension, widening, change of grade or other improvement. The use of any site acquired for highway maintenance storage area or garage purposes by condemnation shall conform to any zoning ordinance or development plan in effect for the area in which such site is located, provided the commissioner may be granted any variance or special exception as may be made pursuant to the zoning ordinances and regulations of

1 The state and county, or either of them, can take and condemn private and public properties, located within a municipality, for highway purposes without the consent or agreement of the municipality wherein such properties are located. Town of Greenwood Vill. v. District Court, 138 Colo. 283, 332 P.2d 210 (1958).
the town in which any such site is to be acquired. The assessment of such damages and of such benefits shall be made by the commissioner and filed by the commissioner with the clerk of the superior court for the judicial district in which the land affected is located. The commissioner shall give notice of such assessment to each person having an interest of record therein, or such person's designated agent for service of process, by mailing to such person a copy of the same, postage prepaid, and, at any time after such assessment has been made by the commissioner, the physical construction of such layout, alteration, extension, widening, maintenance storage area or garage, change of grade or other improvement may be made. If notice cannot be given to any person entitled thereto because such person's whereabouts or existence is unknown, notice may be given by publishing a notice at least twice in a newspaper published in the judicial district and having a daily or weekly circulation in the town in which the property affected is located. Any such published notice shall state that it is a notice to the last owner of record or such owner's surviving spouse, heirs, administrators, assigns, representatives or creditors if he or she is deceased, and shall contain a brief description of the property taken. Notice shall also be given by mailing to such person at his or her last-known address, by registered or certified mail, a copy of such notice. If, after a search of the land and probate records, the address of any interested party cannot be found, an affidavit stating such facts and reciting the steps taken to establish the address of any such person shall be filed with the clerk of the court and accepted in lieu of service of such notice by mailing the same to the last-known address of such person. Upon filing an assessment with the clerk of the court, the commissioner shall forthwith sign and file for record with the town clerk of the town in which such real property is located a certificate setting forth the fact of such taking, a description of the real property so taken and the names and residences of the owners from whom it was taken. Upon the filing of such certificate, title to such real property in fee simple shall vest in the state of Connecticut, except that, if it is so specified in such certificate, a lesser estate, interest or right shall vest in the state. The commissioner shall permit the last owner of record of such real property upon which an owner-occupied residence or owner-operated business is situated to remain in such residence or operate such business, rent free, for a period of ninety days after the filing of such certificate.

(c) Purchase. The commissioner may purchase any land and take a deed thereof in the name of the state when such land is needed in connection with the layout, construction, repair, reconstruction or maintenance of any state highway or bridge, and any land or buildings or both, necessary, in the commissioner's opinion, for the efficient accomplishment of the foregoing purpose, and may further, when the commissioner determines that it is in the best interests of the state, purchase, lease or otherwise arrange for the acquisition or exchange of land or buildings or both for such purpose. The commissioner, with the advice and consent of the Attorney General, may settle and compromise any claim by any person, firm or corporation claiming to be aggrieved by such layout, construction, reconstruction, repair or maintenance by the payment of money, the transfer of other land acquired for or in connection with highway purposes, or otherwise. The commissioner shall permit the last owner of record of such real property upon which an owner-occupied residence or owner-operated business is situated to remain in such residence or operate such business, rent free, for a period of ninety days from the filing of such deed.

(d) Purchase and condemnation for military purposes. The commissioner may purchase or take in the name of the state any land, buildings, interest in land, easements or other rights he finds necessary for the layout, construction, maintenance or use of roads or bridges authorized by section 13a-5, under the provisions of this title relating to the purchase and taking of land for state highways. Any person aggrieved by any such action of the commissioner shall have the same rights of appeal as provided in this title in relation to the taking of land by the commissioner for highway purposes.

(e) Condemnation for highway drainage or preservation of historical monument. The commissioner may take any land (1) which is necessary for the construction of any ditch, drain, gutter or other structure which is required for the purpose of draining any state highway; or (2) which is required for the purpose of preserving any historical monument or memorial, the removal of which is made necessary by the construction or reconstruction of a state highway. The commissioner may assess benefits and damages caused by any such construction and for the taking of any such land under the provisions of subsection (b) of this section and sections 13a-74, 13a-76, 13a-77 and 13a-78 and any person aggrieved by the assessment of any such benefits or damages shall be entitled to the relief provided for in said sections.

(f) Purchase or condemnation of rights of access and egress. The commissioner may take or purchase rights of access to and egress from land abutting any highway or land taken or purchased as right-of-way therefor, or any other highway for the purpose of protecting the functional characteristics of any state highway or state highway appurtenances or safety of the traveling public to and from any state highway or state highway appurtenances when in his judgment such limitation of access is necessary to permit the convenient, safe and expeditious flow of traffic. Such taking or purchase shall be in the same manner and with like powers as authorized and exercised by said commissioner in taking or purchasing real property for state highway purposes.

(g) State-owned property. When the Commissioner of Transportation finds it necessary that real property, the title to which is in the state of Connecticut and which is under the custody and control of any state department, commission or institution, be taken for the purpose of drainage, construction, alteration, reconstruction, improvement, relocation, widening and change of grade of any highway to be constructed under his supervision, he shall petition the Secretary of the Office of Policy and Management that custody of such real property be transferred to him as Commissioner of Transportation. Such petition shall
set forth the necessity for such transfer and control. The Secretary of the Office of Policy and Management shall present such petition to the department, commission or institution having custody and control of such real property, and, upon the recommendation of, and subject to such consideration as may be required by, such department, commission or institution and with the approval of the Secretary of the Office of Policy and Management, such department, commission or institution shall transfer the custody and control of such real property to the Commissioner of Transportation for the purposes required.

(h) Review and approval of State Properties Review Board. Exception. All sales or exchanges of surplus property by the Department of Transportation and matters dealing with the initial acquisition of any existing mass transit system or the purchase or sale of real properties acquired in connection with any state highway system or mass transit system shall be subject to review and approval of the State Properties Review Board except that those acquisitions and administrative settlements relating to such properties which involve sums not in excess of five thousand dollars shall be reported to the board by the Commissioner of Transportation but shall not be subject to such review and approval. The Secretary of the Office of Policy and Management shall be informed for inventory purposes of any transfer effectuated in connection with this section. The State Properties Review Board shall not grant such approval if the Department of Transportation has failed to comply with any applicable statutes in connection with the proposed action.


(a) Real property defined. For the purpose of this section, “real property” means land and buildings and any estate, interest or right in land.

(b) Condemnation of land for state highway or highway maintenance storage area or garage. The commissioner may take any land the commissioner finds necessary for the layout, alteration, extension, widening, change of grade or other improvement of any state highway or for a highway maintenance storage area or garage and the owner of such land shall be paid by the state for all damages, and the state shall receive from such owner the amount or value of all benefits resulting from such taking, layout, alteration, extension, widening, change of grade or other improvement. The use of any site acquired for highway maintenance storage area or garage purposes by condemnation shall conform to any zoning ordinance or development plan in effect for the area in which such site is located, provided the commissioner may be granted any variance or special exception as may be made pursuant to the zoning ordinances and regulations of the town in which any such site is to be acquired. The assessment of such damages and of such benefits shall be made by the commissioner and filed by the commissioner with the clerk of the superior court for the judicial district in which the land affected is located. The commissioner shall give notice of such assessment to each person having an interest of record therein, or such person’s designated agent for service of process, by mailing to such person a copy of the same, postage prepaid, and, at any time after such assessment has been made by the commissioner, the physical construction of such layout, alteration, extension, widening, maintenance storage area or garage, change of grade or other improvement may be made. If notice cannot be given to any person entitled thereto because such person’s whereabouts or existence is unknown, notice may be given by publishing a notice at least twice in a newspaper published in the judicial district and having a daily or weekly circulation in the town in which the property affected is located. Any such published notice shall state that it is a notice to the last owner of record or such owner’s surviving spouse, heirs, administrators, assigns, representatives or creditors if he or she is deceased, and shall contain a brief description of the property taken. Notice shall also be given by mailing to such person at his or her last-known address, by registered or certified mail, a copy of such notice. If, after a search of the land and probate records, the address of any interested party cannot be found, an affidavit stating such facts and reciting the steps taken to establish the address of any such person shall be filed with the clerk of the court and accepted in lieu of service of such notice by mailing the same to the last-known address of such person. Upon filing an assessment with the clerk of the court, the commissioner shall forthwith sign and file for record with the town clerk of the town in which such real property is located a certificate setting forth the fact of such taking, a description of the real property so taken and the names and residences of the owners from whom it was taken. Upon the filing of such certificate, title to such real property in fee simple shall vest in the state of Connecticut, except that, if it is so specified in such certificate, a lesser estate, interest or right shall vest in the state. The commissioner shall permit the last owner of record of such real property upon which an owner-occupied residence or owner-operated business is situated to remain in such residence or operate such business, rent free, for a period of ninety days after the filing of such certificate.

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(d) Purchase and condemnation for military purposes. The commissioner may purchase or take in the name of the state any land, buildings, interest in land, easements or other rights he finds necessary for the layout, construction, maintenance or use of roads or bridges authorized by 000066 13a-5, under the provisions of this title relating to the purchase and taking of land for state highways. Any person aggrieved by any such action of the commissioner shall have the same rights of appeal as provided in this title in relation to the taking of land by the commissioner for highway purposes.

(e) Condemnation for highway drainage or preservation of historical monument. The commissioner may take any land (1) which is necessary for the construction of any ditch, drain, gutter or other structure which is required for the purpose of draining any state highway; or (2) which is required for the purpose of preserving any historical monument or memorial, the removal of which is made necessary by the construction or reconstruction of a state highway. The commissioner may assess benefits and damages caused by any such construction and for the taking of any such land under the provisions of subsection (b) of this section and sections 13a-74, 13a-76, 13a-77 and 13a-78 and any person aggrieved by the assessment of any such benefits or damages shall be entitled to the relief provided for in said sections.

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(g) State-owned property. When the Commissioner of Transportation finds it necessary that real property, the title to which is in the state of Connecticut and which is under the custody and control of any state department, commission or institution, be taken for the purpose of drainage, construction, alteration, reconstruction, improvement, relocation, widening and change of grade of any highway to be constructed under his supervision, he shall petition the Secretary of the Office of Policy and Management that custody of such real property be transferred to him as Commissioner of Transportation. Such petition shall set forth the necessity for such transfer and control. The Secretary of the Office of Policy and Management shall present such petition to the department, commission or institution having custody and control of such real property, and, upon the recommendation of, and subject to such consideration as may be required by, such department, commission or institution and with the approval of the Secretary of the Office of Policy and Management, such department, commission or institution shall transfer the custody and control of such real property to the Commissioner of Transportation for the purposes required.

(h) Review and approval of State Properties Review Board. Exception. All sales or exchanges of surplus property by the Department of Transportation and matters dealing with the initial acquisition of any existing mass transit system or the purchase or sale of real properties acquired in connection with any state highway system or mass transit system shall be subject to review and approval of the State Properties Review Board except that those acquisitions and administrative settlements relating to such properties which involve sums not in excess of five thousand dollars shall be reported to the board by the Commissioner of Transportation but shall not be subject to such review and approval. The Secretary of the Office of Policy and Management shall be informed for inventory purposes of any transfer effectuated in connection with this section. The State Properties Review Board shall not grant such approval if the Department of Transportation has failed to comply with any applicable statutes in connection with the proposed action.

**Delaware**


(a) The Department shall acquire full information concerning the roads of this State, the nature and improvement thereof, the needs thereof and the character and amount of traffic thereon and such other details as may be necessary or desirable for the Department to have in the performance of its duty of determining upon and laying out, without regard to any personal advantage or disadvantage or bias toward any person or persons, community or political party or organization, consistent and congruous route or routes of state highways with a view to establishing such a consistent, congruous, comprehensive and permanent system of state highways along the route or routes of travel as will accommodate the greatest needs of the people of this State.

(b) The Department shall:

(1) Determine upon, lay out, construct or reconstruct state highways so as to make roads which, with reasonable maintenance, shall be permanent;

(2) Maintain all state highways under its jurisdiction;

(3) Maintain a system of accounting adequate to give in detail the expenditures of the Department and the costs of its works;

(4) Keep full and accurate minutes of all meetings and records of all proceedings of the Department, which minutes and records shall be public records;

(5) Reimburse the owner thereof for the expense (as hereinafter defined) of the relocation of public utility facilities necessitated by any project where the State is to be reimbursed by at least 90% of the cost of such project from federal funds or by the federal government or any agency thereof, such expense to be the amount paid by such owner properly attributable to such relocation after deducting therefrom any increase in the value...
of the new facilities and any salvage value derived from the old facilities;

(6) Install on state land the tile necessary, in the opinion of the Department, to provide adequate entrances and exits to and from the property of adjoining landowners provided:
   a. The tile is supplied by the adjoining landowners;
   b. The tile conforms to the specifications established from time to time by the Department; and
   c. The property is a single residential lot occupied or to be occupied by the land owners and intended for residential use only; or
   d. The property is agricultural use land. “Agricultural use land” shall mean land devoted to the production for sale of plants and animals useful to humans, including but not limited to: Forages and sod crops; grains and feed crops; dairy animals and dairy products; poultry and poultry products; livestock, including beef cattle, sheep, swine, horses, ponies, mules or goats, including the breeding and grazing of any or all of such animals; bees and apiary products; fur animals; trees and forest products; or when devoted to and meeting the requirements and qualifications for payments or other compensation pursuant to soil conservation program under an agreement with an agency of the federal government.

Nothing contained in this subsection shall relieve the Department from the responsibility for replacing tile originally installed by the Department or any governmental agency and subsequently damaged by operations of the Department;

(7) Maintain the Van Buren Street Bridge over the Brandywine Creek;

(8) Provide relocation assistance to persons displaced as a result of the acquisition for highway purposes of real property upon which they live or conduct a business or farm operation in accordance with Chapter 91 of Title 29.

(c) To these ends the Department may:

(1) Determine upon and lay out a system of state highways;

(2) Take over and convert into state highways any public road by whatever name such road or part thereof, or under whatever authority or control such road or part thereof, may have theretofore existed;

(3) Lay out, open, widen, straighten, grade, extend, construct, reconstruct and maintain any state highway or proposed state highway for the purpose of the improvement of state highways;

(4) Acquire by condemnation or otherwise any land, easement, franchise, material or property, which, in the judgment of the Department, shall be necessary therefor, provided that the Department shall not reconstruct a highway unless there will result a net saving or reconstruction, further provided that § 145 of this title shall not be deemed to be inconsistent with the provisions hereof;

(5) Have access to and make copies of maps, surveys, data or information which any state agency may possess concerning any road in the State;

(6) Employ and discharge professional or technical experts, surveyors, agents, assistants, clerks, employees and laborers, skilled and unskilled, and also such advisers and consultants as may be required to accomplish the purposes of the chapter and the other responsibilities of the Department. In the event that the size of the capital improvement program requires overtime to administer in a timely manner, or in the event that: (i) The federal government makes available additional funding for transportation projects which are part of the Department's capital improvement program; and (ii) use of these funds in a particular federal fiscal year is required to access these funds; and (iii) overtime is required to administer the program within that federal fiscal year to assure the use of these funds, then for these purposes the Department may pay overtime moneys to those employed pursuant to this subsection, any relevant Delaware law, rule or regulation to the contrary notwithstanding;

(7) Secure offices and quarters for the Department and furnish the same;

(8) Exclusively grant franchises and licenses to public service corporations or to corporations furnishing gasoline or petroleum products to the air field installation operated by the federal government in Kent County, to use the state highways, in whole or in part, for a term not exceeding 50 years; provided, however, that any franchise or license granted to any such corporation furnishing gasoline or petroleum products to said air field installation shall restrict the use of said state highways to the transmission of gasoline or petroleum products to said air field installation. Any franchise or license owned by any public service corporation on April 2, 1917, shall not be affected by this chapter;

(9) Make and enter into any and all contracts, agreements or stipulations for the execution of the purposes of this chapter;

(10) Purchase all machinery, tools, supplies, material and instrumentalities whatsoever which may be necessary for the full performance of its duties;

(11) Call upon the Attorney General for the Attorney General's opinion or advice touching its duties or powers;

(12) Accept lands by easement or lease in the name of the State in areas where it is deemed necessary to establish dumping areas for the use of the public, supervise and control all areas so accepted and provide suitable passageways to the dumping areas and further, police the areas in order to prevent the spread of pests and disease and make such other regulations and rules as shall be deemed necessary for the purpose of carrying out the intent and purpose of this paragraph;

(13) Enter upon the lands or waters of any person for the purpose of surveys, repairs, reconstruction and operation of publicly financed improvements but subject at all times to responsibility for all and any damages which shall be done to the property of any such person or persons. Water levels to be maintained back of publicly financed sluices, water control structures, dams and similar structures shall be at a level that will not cause damage to adjoining property, such as seepage of water into base-
ments and wells, and that no lands shall be flooded without the owners’ full consent; and

(14) Place vending machines and/or other items that will enable drivers to be more rested and refreshed in safety roadside rest areas, unless prohibited by federal laws, rules or regulations. Any profits derived from such items shall be credited to the Department of Transportation Safety Roadside Rest Area Fund.

a. There is hereby created within the State Treasury a special fund to be designated as the Department of Transportation Safety Roadside Rest Area Fund which shall be used in the operation and maintenance of the roadside rest areas under the jurisdiction of the Department.

b. Any profits realized by the Department from items available at existing roadside rest areas that are for the purpose of enabling drivers to be more rested and refreshed shall be deposited in the State Treasury to the credit of said Department of Transportation Safety Roadside Rest Area Fund. Such profits shall be used by the Department for the operation and maintenance of the safety roadside rest area facilities within its jurisdiction.

d. The Department may also do whatever is incidental and germane to the scope of the duties and powers conferred on it by law.

(e) The general powers and duties conferred upon the Department by this section shall be exercised by it by the establishment and supervision of any and all policies pursuant to which such powers and duties shall be carried out.

(f) Whenever the Department of Transportation widens, constructs or reconstructs any major arterial, minor arterial, collector road or proposed road in an urbanized area of this State, the Department shall incorporate within such plans, layout, widening, construction or reconstruction the construction of sidewalks, provided there is a need for sidewalks or that it can be reasonably anticipated that the need for sidewalks will exist. The Department shall have the responsibility for determining whether such need for sidewalks does or will exist for all or any part of any such project and, before arriving at a decision as to the need of such sidewalk construction, shall consult with the county department of planning, the State Planning Office, the State Planning Department and the local school district in which the proposed new road construction or road widening construction is to take place. The cost of such sidewalk construction shall be included in the total cost of the new road construction or road widening project. This subsection shall apply only to projects funded pursuant to acts authorizing the Department to borrow money and issue bonds and notes for capital improvements, enacted after January 1, 1973.

(g) The Department shall have exclusive original supervision and regulation of all public carriers and also over their property, property rights, equipment, facilities, franchises, rates, fares, tariffs, regulations, practices, measurements and services.

(h) The Department may work in conjunction with any political subdivision of the State and with any private organization to plan and construct such bicycle and pedestrian transportation facilities as may be appropriate. In carrying out this portion of its overall program, the Department may take into consideration in scheduling its projects those in which the affected local community is willing to contribute a matching share (whether in cash, rights of way, or other in-kind services) in order to accomplish the project.


(a)

(1) The Department, in the name of the State, may only acquire private or public property and property rights needed to provide public thoroughfares such as pathways, sidewalks, bus shelters, parking areas in support of public transit, maintenance yards and similar public transportation related facilities, including rights to access, air, view and light by gift, devise, purchase or in the exercise of the power of eminent domain, acquire the same by condemnation by proceeding in the manner prescribed in Chapter 61 of Title 10, be authorized by law to acquire such property or property rights for the purposes set forth in this section and within its jurisdiction. Property rights so acquired shall be in fee simple absolute or such lesser interest as the Department may deem appropriate. Except as provided in paragraph (a)(2) of this section, no acquisition of real property or property rights shall be made without Department approved final right-of-way plans depicting the proposed acquisitions and that approval coming only after the project has been developed and plans prepared in accordance with all applicable governing laws, rules and regulations pertaining to the development of transportation projects.

(2) The acquisition of real property by the Department in advance of final right-of-way plan approval, shall be reviewed by a committee consisting of the Secretary of the Department of Natural Resources and Environmental Control, the Secretary of the Department of Transportation, the Secretary of the Department of Agriculture, the Director of the Division of Small Business, the Governor’s Chief of Staff, a member of the Senate designated by the President Pro Tempore of the Senate, a member of the House of Representatives designated by the Speaker of the House of Representatives, a member of the public designated by the President Pro Tempore of the Senate and a member of the public designated by the Speaker of the House of Representatives to determine the consistency of such action with the State’s overall goals for land use planning. If it determines that the acquisition will be inconsistent with State planning goals, the committee may disapprove the acquisition.

(3) The Department shall provide to the Governor and General Assembly, on or before December 31 of each year, a report identifying all properties acquired in the preceding 12 month period in connection with acquisitions made pursuant to paragraph (a)(2) of this section.

(4) For the purposes of acquiring real property for pathways that go through dedicated open space in a recorded residen-
tial subdivision, where the proposed pathway is not adjacent to the existing right of way, the Department is not authorized to exercise its eminent domain power to acquire land for such pathway, unless a majority of the residents of the recorded residential subdivision vote to approve within 90 days of notice of its intent to exercise its eminent domain power by the Department. There will be 1 ballot per residence and the ballot may be cast by paper ballot, by proxy, by signing a petition, or electronically from a confirmed valid email address for a resident.

(b) When any property heretofore or hereafter acquired by the Department by gift, devise, purchase or condemnation is no longer needed for transportation purposes the Department shall attempt to dispose of the property as follows:

(1) If at the time of the Department’s determination to dispose of the property, the property is subject to a revenue producing lease agreement which has been in force for a period of at least 5 years, the Department shall, in writing, notify the tenant that the property is no longer needed for transportation purposes. Such notice shall inform the tenant of the Department’s desire to sell the property, and include a copy of the Department’s approved appraisal and a purchase agreement containing the terms and conditions for sale to the tenant. The sale price shall not be less than the approved appraised value. If the tenant elects to purchase the property, the tenant shall execute and return the purchase agreement to the Department within 30 days of such notice. Such notice is not required if the tenant has, in writing, waived any desire to purchase the property, or if the property is subject to multiple leases. Failure of the tenant to respond to the notice within 30 days shall constitute a waiver of the tenant’s rights hereunder.

(2) If the provisions of paragraph (b)(1) of this section do not apply, or were forfeited through lack of response, or were waived by the tenant, or the tenant fails to comply with the terms and conditions of the purchase agreement, the Department shall, in writing, notify the owner from whom the property was acquired, if the property had been acquired within the immediately preceding 5 years, that the property is no longer needed for transportation purposes. In the event that the previous owner is deceased, the Department may proceed with the provisions for sale identified in paragraph (b)(3) of this section. Such notice shall inform the prior owner of the Department’s desire to sell the property at the approved appraised value, and shall include a copy of the Department’s approved appraisal and a purchase agreement containing the terms and conditions for the sale to the prior owner. The sale price shall not be less than the approved appraised value. If the prior owner elects to purchase the property, he/she shall execute and return the purchase agreement to the Department within 30 days of such notice. Such notice is not required if the prior owner has, in writing, waived his/her right to repurchase the property. Failure of the prior owner to respond to the notice within 30 days shall constitute a waiver of their rights hereunder.

(3) If the provisions of paragraphs (b)(1) and (2) of this section have been satisfied without sale, the Department shall determine if the property has independent utility and in such cases shall offer the property for sale to the general public at a public auction sale. The Department shall notify the public of the sale by posting a “Notice of Sale” on the property at least 2 weeks before the sale and by publishing a “Notice of Sale” for at least 1 day a week for 2 consecutive weeks in a newspaper having general circulation in the county where the property is located. The “Notice of Sale” shall describe the property to be sold, state the date, time, location of the sale, terms and conditions, and amount of the minimum acceptable bid. The public sale may be conducted by Department personnel or the Department may retain an outside contractor to handle the sale. At the conclusion of the sale, the Department’s representative shall announce the name of the highest bidder and the amount of the bid. The Department’s representative shall record the results of the sale including the name and amount of the next highest bid. The Department shall have the authority to accept or reject the highest bid as long as such bid is equal to or greater than 85 percent of the approved appraised value. The Department shall offer the property for sale at a price not less than 85 percent of the approved appraised value and shall reject any bid of a lesser amount. The Department may reject any bid for due cause. If the sale is confirmed and the highest bidder defaults, the Department may proceed to the next highest acceptable bidder. In the event that the Department does not receive an acceptable bid, the public sale shall be deemed concluded. The Department may proceed to dispose of the property through absolute auction for whatever price can be obtained, subject, however, to unanimous written approval of the selling price from the Controller General and the Director of the Office of Management and Budget.

(4) For the purposes of acquiring real property for pathways that go through dedicated open space in a recorded residential subdivision, where the proposed pathway is not adjacent to the existing right of way, the Department is not authorized to exercise its eminent domain power to acquire land for such pathway, unless a majority of the residents of the recorded residential subdivision vote to approve within 90 days of notice of its intent to exercise its eminent domain power by the Department. There will be 1 ballot per residence and the ballot may be cast by paper ballot, by proxy, by signing a petition, or electronically from a confirmed valid email address for a resident.

(5) Notwithstanding any other provisions of this section, the Department may convey property by direct sale or trade to an owner of other property which is being acquired for transportation purposes. Such sale shall not abridge the provisions of paragraphs (b)(1) and (2) of this section. The Department shall receive in return a price and/or compensatory property valued at not less than the approved appraised value.

(6) Notwithstanding any other provisions of this section, the Department may convey property by direct sale to a public utility company when such property is needed for public utility purposes, provided the Department receives in return a price not less than the approved appraised value.
a. Notwithstanding any other provisions of this section, the Department may convey property to other governmental entities for public purposes, on terms acceptable to the Department and other agency.

b. Notwithstanding any other provisions of this section or Chapter 9 of Title 3, the Department may convey property to the Delaware Agricultural Lands Preservation Foundation on terms acceptable to the Department and the Foundation.

c. Notwithstanding any other provisions of this section or Chapter 75 of Title 7, the Department may convey property to the Delaware Open Space Council on terms acceptable to the Department and the Council.

(8) As used in this subsection, “approved appraised value” shall mean:

a. When the estimated value of the property is not more than $10,000, an appraisal performed by a qualified Department employee or qualified independent appraiser, reviewed and approved by a qualified Department review appraiser; or

b. When the estimated value of the property exceeds $10,000, an appraisal performed by a qualified independent appraiser, reviewed and approved by a qualified Department review appraiser.

(9) Property rights disposed of pursuant to this section may be in fee simple absolute or such lesser interest as the Department may deem appropriate.

(10) “Notice,” as required in paragraphs (b)(1) and (2) of this section, shall be sent by certified mail, return receipt requested, addressed to the tenant or previous owner at the last known postal address obtained after diligent inquiry. If after diligent inquiry a postal address cannot be found, the Department shall publish a notice for at least 1 day a week for 2 consecutive weeks in a newspaper having general circulation in the county in which the property is located. Such published notice shall set forth the name or names of the tenant or previous owner to whom it is directed, that the Department desires to sell the property, a brief description of the property to be sold and the date by which the Department must receive a response. The return receipt of the notice, whether signed, refused or unclaimed, or a copy of the published newspaper notice shall be held and considered to be prima facie evidence of the service of the notice.

(11) The Department shall provide to the Governor and the General Assembly on or before March 31 of each year, a report identifying by size and location all properties being held for projects, properties deemed surplus or excess properties, dates of acquisition, purchase price, previous owner, date the property was determined to be excess and/or surplus, dates and nature of actions undertaken to dispose of such surplus/excess properties and approximate fair market value of each. If properties are deemed nonmarketable they shall be identified as such. The report shall further identify all properties disposed of during the previous year by size and location, date of disposition, appraised value if appraised, amount received from disposition and name of the purchaser, purchasers or owners, including, but not limited to, equitable owners.

The Delaware River and Bay Authority shall not exercise its power of eminent domain to condemn any property, devoted to a public use, of the State, or any municipality, county, local government, agency, public authority or commission thereof, or any 1 or more of them, for any purpose other than a crossing without having first secured legislative authorization and approval of each specific condemnation of property by act of the General Assembly.

Florida

The department shall have the following general powers and duties:

(1) To assume the responsibility for coordinating the planning of a safe, viable, and balanced state transportation system serving all regions of the state, and to assure the compatibility of all components, including multimodal facilities.

(2) To adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of law conferring duties upon it.

(3) To adopt an official seal.

(4) To maintain its headquarters in Tallahassee and its district offices and necessary field offices at such places within the state as it may designate, and to purchase, build, or lease suitable buildings for such uses.

(5) To purchase, lease, or otherwise acquire property and materials, including the purchase of promotional items as part of public information and education campaigns for the promotion of scenic highways, traffic and train safety awareness, alternatives to single-occupant vehicle travel, and commercial motor vehicle safety; to purchase, lease, or otherwise acquire equipment and supplies; and to sell, exchange, or otherwise dispose of any property that is no longer needed by the department.

(6) To acquire, by the exercise of the power of eminent domain as provided by law, all property or property rights, whether public or private, which it may determine are necessary to the performance of its duties and the execution of its powers.

(7) To enter into contracts and agreements.

(8) To sue and be sued as provided by law.

(9) To employ and train staff, and to contract with qualified consultants. For the purposes of chapters 471 and 472, the department shall be considered a firm.

(10) 

(a) To develop and adopt uniform minimum standards and criteria for the design, construction, maintenance, and operation of public roads pursuant to the provisions of s. 336.045.

(b) The department shall periodically review its construction, design, and maintenance standards to ensure that such stan-
dards are cost-effective and consistent with applicable federal regulations and state law.

(c) The department is authorized to adopt rules relating to approval of aggregate and other material sources.

(11) To establish a numbering system for public roads and to functionally classify such roads.

(12) To coordinate the planning of the development of public transportation facilities within the state and the provision of related transportation services as authorized by law.

(13) To plan proposed transportation facilities as part of the State Highway System, and to construct, maintain, and operate such facilities.

(14) To establish, control, and prohibit points of ingress to, and egress from, the State Highway System, the turnpike, and other transportation facilities under the department’s jurisdiction as necessary to ensure the safe, efficient, and effective maintenance and operation of such facilities.

(15) To regulate and prescribe conditions for the transfer of stormwater to the state right-of-way as a result of manmade changes to adjacent properties.

(a) Such regulation shall be through a permitting process designed to ensure the safety and integrity of the Department of Transportation facilities and to prevent an unreasonable burden on lower properties.

(b) The department is specifically authorized to adopt rules which set forth the purpose; necessary definitions; permit exceptions; permit and assurance requirements; permit application procedures; permit forms; general conditions for a drainage permit; provisions for suspension or revocation of a permit; and provisions for department recovery of fines, penalties, and costs incurred due to permittee actions. In order to avoid duplication and overlap with other units of government, the department shall accept a surface water management permit issued by a water management district, the Department of Environmental Protection, a surface water management permit issued by a delegated local government, or a permit issued pursuant to an approved Stormwater Management Plan or Master Drainage Plan; provided issuance is based on requirements equal to or more stringent than those of the department. The department may enter into a permit-delegation agreement with a governmental entity if issuance of a permit is based on requirements that the department finds will ensure the safety and integrity of facilities of the Department of Transportation.

(16)

(a) To plan, acquire, lease, construct, maintain, and operate toll facilities; to authorize the issuance and refunding of bonds; and to fix and collect tolls or other charges for travel on any such facilities.

(b) Notwithstanding any other provision of law, the department may not enter into a lease-purchase agreement with an expressway authority, regional transportation authority, or other entity. This paragraph does not invalidate a lease-purchase agreement authorized under chapter 348 or chapter 2000-411, Laws of Florida, existing as of July 1, 2013, and does not limit the department’s authority under s. 334.30.

(17) To designate limited access facilities on the State Highway System and turnpike projects; to plan, construct, maintain, and operate service roads in connection with such facilities; and to regulate, reconstruct, or realign any existing public road as a service road.

(18) To establish and maintain bicycle and pedestrian ways.

(19) To encourage and promote the development of multimodal transportation alternatives.

(20) To conduct research studies, and to collect data necessary for the improvement of the state transportation system.

(21) To conduct research and demonstration projects relative to innovative transportation technologies.

(22) To cooperate with and assist local governments in the development of a statewide transportation system and in the development of the individual components of the system.

(23) To cooperate with the transportation department or duly authorized commission or authority of any state in the development and construction of transportation facilities physically connecting facilities of this state with those facilities of any adjoining state.

(24) To identify, obtain, and administer all federal funds available to the department for all transportation purposes.

(25) To do all things necessary to obtain the full benefits of the national Highway Safety Act of 1966, and in so doing, to cooperate with federal and state agencies, public and private agencies, interested organizations, and individuals to effectuate the purposes of that act, and any and all amendments thereto. The Governor shall have the ultimate state responsibility for dealing with the Federal Government in respect to programs and activities initiated pursuant to the national Highway Safety Act of 1966, and any amendments thereto.

(26) To provide for the enhancement of environmental benefits, including air and water quality; to prevent roadside erosion; to conserve the natural roadside growth and scenery; and to provide for the implementation and maintenance of roadside conservation, enhancement, and stabilization programs. At least 1.5 percent of the amount contracted for construction projects shall be allocated by the department on a statewide basis for the purchase of plant materials. Department districts may not expend funds for landscaping in connection with any project that is limited to resurfacing existing lanes unless the expenditure has been approved by the department’s secretary or the secretary’s designee. To the greatest extent practical, at least 50 percent of the funds allocated under this subsection shall be allocated for large plant materials and the remaining funds for other plant materials. Except as prohibited by applicable federal law or regulation, all plant materials shall be purchased from Florida commercial nursery stock in this state on a uniform competitive bid basis. The department shall develop grades and standards for landscaping materials purchased through this process. To accomplish these activities, the department may contract with
nonprofit organizations having the primary purpose of developing youth employment opportunities.

(27) To conduct studies and provide coordination to assess the needs associated with landside ingress and egress to port facilities, and to coordinate with local governmental entities to ensure that port facility access routes are properly integrated with other transportation facilities.

(28) To require persons to affirm the truth of statements made in any application for a license, permit, or certification issued by the department or in any contract documents submitted to the department.

(29) To advance funds for projects in the department's adopted work program to governmental entities prior to commencement of the project or project phase when the advance has been authorized by the department's comptroller and is made pursuant to a written agreement between the department and a governmental entity.

(30) To take any other action necessary to carry out the powers and duties expressly granted in this code.

(31) To provide oversight of traveler information systems that may include the provision of interactive voice response telephone systems accessible via the 511 number as assigned by the Federal Communications Commission for traveler information services. The department shall ensure that uniform standards and criteria for the collection and dissemination of traveler information are applied using interactive voice response systems.

(32) To enter into agreement with Space Florida to coordinate and cooperate in the development of spaceport infrastructure and related transportation facilities contained in the Strategic Intermodal System Plan and, where appropriate, encourage the cooperation and integration of airports and spaceports in order to meet transportation-related needs.

(33) To develop, in coordination with its partners and stakeholders, a Freight Mobility and Trade Plan to assist in making freight mobility investments that contribute to the economic growth of the state. Such plan should enhance the integration and connectivity of the transportation system across and between transportation modes throughout the state. The department shall deliver the Freight Mobility and Trade Plan to the Governor, the President of the Senate, and the Speaker of the House of Representatives by July 1, 2013.

(a) The Freight Mobility and Trade Plan shall include, but need not be limited to, proposed policies and investments that promote the following:

1. Increasing the flow of domestic and international trade through the state's seaports and airports, including specific policies and investments that will recapture cargo currently shipped through seaports and airports located outside the state.

2. Increasing the development of intermodal logistic centers in the state, including specific strategies, policies, and investments that capitalize on the empty backhaul trucking and rail market in the state.

3. Increasing the development of manufacturing industries in the state, including specific policies and investments in transportation facilities that will promote the successful development and expansion of manufacturing facilities.

4. Increasing the implementation of compressed natural gas (CNG), liquefied natural gas (LNG), and propane energy policies that reduce transportation costs for businesses and residents located in the state.

(b) Freight issues and needs shall also be given emphasis in all appropriate transportation plans, including the Florida Transportation Plan and the Strategic Intermodal System Plan.

(34) To assume the responsibilities of the United States Department of Transportation with respect to highway projects within the state under the National Environmental Policy Act of 1969, 42 U.S.C. ss. 4321 et seq., and with respect to related responsibilities for environmental review, consultation, or other action required under any federal environmental law pertaining to review or approval of a highway project within the state. The department may assume responsibilities under 23 U.S.C. s. 327 and enter into one or more agreements, including memoranda of understanding, with the United States Secretary of Transportation related to the federal surface transportation project delivery program for the delivery of highway projects, as provided by 23 U.S.C. s. 327. The department may adopt rules to implement this subsection and may adopt relevant federal environmental standards as the standards for this state for a program described in this subsection. Sovereign immunity from civil suit in federal court is waived consistent with 23 U.S.C. s. 327 and limited to the compliance, discharge, or enforcement of a responsibility assumed by the department under this subsection.


(1)

(a) The department may purchase, lease, exchange, or otherwise acquire any land, property interests, buildings, or other improvements, including personal property within such buildings or on such lands, necessary to secure or use transportation rights-of-way for existing, proposed, or anticipated transportation facilities on the State Highway System, on the State Park Road System, in a rail corridor, or in a transportation corridor designated by the department. Such property shall be held in the name of the state.

(b) The department may accept donations of any land, buildings, or other improvements, including personal property within such buildings or on such lands with or without such conditions, reservations, or reverter provisions as are acceptable to the department. Such donations may be used as transportation rights-of-way or to secure or use transportation rights-of-way for existing, proposed, or anticipated transportation facilities on the State Highway System, on the State Park Road System, or in a transportation corridor designated by the department.

(c) If lands, buildings, or other improvements are needed for transportation purposes, but are held by a federal, state, or local governmental entity and used for public purposes other than
transportation, the department may compensate the entity for such properties by providing functionally equivalent replacement facilities. The provision of replacement facilities under this subsection may only be undertaken with the agreement of the governmental entity affected.

(d) The department may contract pursuant to s. 287.055 for auction services used in the conveyance of real or personal property or the conveyance of leasehold interests under subsections (4) and (5). The contract may allow for the contractor to retain a portion of the proceeds as compensation for the contractor’s services.

(2) A complete inventory shall be made of all real or personal property immediately upon possession or acquisition. Such inventory must include a statement of the location or site of each piece of realty, structure, or severable item. Copies of each inventory shall be filed in the district office in which the property is located. Such inventory shall be carried forward to show the final disposition of each item of property, both real and personal.

(3) The inventory of real property that was acquired by the state after December 31, 1988, that has been owned by the state for 10 or more years, and that is not within a transportation corridor or within the right-of-way of a transportation facility shall be evaluated to determine the necessity for retaining the property. If the property is not needed for the construction, operation, and maintenance of a transportation facility or is not located within a transportation corridor, the department may dispose of the property pursuant to subsection (4).

(4) The department may convey, in the name of the state, any land, building, or other property, real or personal, which was acquired under subsection (1) and which the department has determined is not needed for the construction, operation, and maintenance of a transportation facility. When such a determination has been made, property may be disposed of through negotiations, sealed competitive bids, auctions, or any other means the department deems to be in its best interest, with due advertisement for property valued by the department at greater than $10,000. A sale may not occur at a price less than the department's current estimate of value, except as provided in paragraphs (a)-(d). The department may afford a right of first refusal to the local government or other political subdivision in the jurisdiction in which the parcel is situated, except in a conveyance transacted under paragraph (a), paragraph (c), or paragraph (e).

(a) If the property has been donated to the state for transportation purposes and a transportation facility has not been constructed for at least 5 years, plans have not been prepared for the construction of such facility, and the property is not located in a transportation corridor, the governmental entity may authorize reconveyance of the donated property for no consideration to the original donor or the donor’s heirs, successors, assigns, or representatives.

(b) If the property is to be used for a public purpose, the property may be conveyed without consideration to a governmental entity.

(c) If the property was originally acquired specifically to provide replacement housing for persons displaced by transportation projects, the department may negotiate for the sale of such property as replacement housing. As compensation, the state shall receive at least its investment in such property or the department’s current estimate of value, whichever is lower. It is expressly intended that this benefit be extended only to persons actually displaced by the project. Dispositions to any other person must be for at least the department’s current estimate of value.

(d) If the department determines that the property requires significant costs to be incurred or that continued ownership of the property exposes the department to significant liability risks, the department may use the projected maintenance costs over the next 10 years to offset the property’s value in establishing a value for disposal of the property, even if that value is zero.

(e) If, at the discretion of the department, a sale to a person other than an abutting property owner would be inequitable, the property may be sold to the abutting owner for the department’s current estimate of value.

(5) The department may convey a leasehold interest for commercial or other purposes, in the name of the state, to any land, building, or other property, real or personal, which was acquired under subsection (1). However, a lease may not be entered into at a price less than the department’s current estimate of value. The department’s estimate of value shall be prepared in accordance with department procedures, guidelines, and rules for valuation of real property, the cost of which shall be paid by the party seeking the lease of the property.

(a) A lease may be accomplished through negotiations, sealed competitive bids, auction, or any other means the department deems to be in its best interest. The department may allow an outdoor advertising sign to remain on the property acquired or be relocated on department property. This subsection shall not cause a sign to be considered a nonconforming sign pursuant to chapter 479.

(b) If, at the discretion of the department, a lease to a person other than an abutting property owner or tenant with a leasehold interest in the abutting property would be inequitable, the property may be leased to the abutting owner or tenant for at least the department’s current estimate of value.

(c) A lease signed pursuant to paragraph (a) may not be for more than 5 years; however, the department may renegotiate or extend such a lease for an additional 5 years as the department deems appropriate.

(d) Each lease shall provide that, unless otherwise directed by the lessor, any improvements made to the property during the lease shall be removed at the lessee’s expense.

(e) If property is to be used for a public purpose, the property may be leased without consideration to a governmental entity. A lease for a public purpose is exempt from the term limits in paragraph (c).
(f) Paragraphs (c) and (e) do not apply to leases entered into pursuant to s. 260.0161(3), except as provided in such a lease.

(g) A lease executed under this subsection may not be used by the lessee to establish the standing required under s. 73.071(3)

(b) if the business had not been established for the specified number of years on the date title passed to the department.

(h) The department may enter into a long-term lease without compensation with a public port listed in s. 403.021(9)(b) for rail corridors used for the operation of a short-line railroad to the port.

(6) This chapter does not prevent the joint use of right-of-way for alternative modes of transportation if the joint use does not impair the integrity and safety of the transportation facility.

(7) The department shall prepare the estimate of value provided under subsection (4) in accordance with department procedures, guidelines, and rules for valuation of real property. If the value of the property is greater than $50,000, as determined by the department estimate, the sale must be at a negotiated price of at least the estimate of value as determined by an appraisal prepared in accordance with department procedures, guidelines, and rules for valuation of real property, the cost of which shall be paid by the party seeking the purchase of the property. If the estimated value is $50,000 or less, the department may use a department staff appraiser or obtain an independent appraisal.

(8) As used in this section, the term "due advertisement" means an advertisement in a newspaper of general circulation in the area of the improvements of at least 14 calendar days before the date of the receipt of bids or the date on which a public auction is to be held.

(9) The department, with the approval of the Chief Financial Officer, may disburse state funds for real estate closings in a manner consistent with good business practices and in a manner minimizing costs and risks to the state.

(10) The department may purchase title insurance if it determines that such insurance is necessary to protect the public’s investment in property being acquired for transportation purposes. The department shall adopt procedures to be followed in making the determination to purchase title insurance for a particular parcel or group of parcels which, at a minimum, shall specify criteria that the parcels must meet.

(11) This section does not modify the requirements of s. 73.013.

**Fla. Stat. § 337.27 (2018):**

(1) The power of eminent domain is vested in the department to condemn all necessary lands and property, including rights of access, air, view, and light, whether public or private, for the purpose of securing and utilizing transportation rights-of-way, including, but not limited to, any lands reasonably necessary for securing applicable permits, areas necessary for management of access, borrow pits, drainage ditches, water retention areas, rest areas, replacement access for landowners whose access is impaired due to the construction of a facility, and replacement rights-of-way for relocated railroad and utility facilities; for existing, proposed, or anticipated transportation facilities on the State Highway System or State Park Road System; or in a transportation corridor designated by the department; or for the purposes of screening, relocation, removal, or disposal of junkyards and scrap metal processing facilities. The department shall have the power to condemn any material and property necessary for such purposes. The secretary of the Department of Transportation may delegate the authority to execute eminent domain resolutions to the department’s chief administrative officer of the district in which the property is located, or to the chief administrative officer of the Office of Florida Turnpike if the property is to be acquired for a turnpike system project.

(2) Title to any land acquired in the name of the department vests in the state.

(3) The department is authorized to pay the judgment or compensation, including deposits required, awarded in any such proceedings out of any funds available to the department for the maintenance or construction of any transportation facility on the State Highway System, on the State Park Road System, or in a transportation corridor designated by the department.

(4) When the department acquires property for a transportation facility or in a transportation corridor through the exercise of eminent domain authority, by purchase or donation, it is not subject to any liability imposed by chapter 376 or chapter 403 for preexisting soil or groundwater contamination due solely to its ownership. This section does not affect the rights or liabilities of any past or future owners of the acquired property nor does it affect the liability of any governmental entity for the results of its actions which create or exacerbate a pollution source. The department and the Department of Environmental Protection may enter into interagency agreements for the performance, funding, and reimbursement of the investigative and remedial acts necessary for property acquired by the department.

**Georgia**


(a) The right of eminent domain is the right of this state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of this state on account of public exigency and for the public good. Thus, in time of war or insurrection the proper authorities may possess and hold any part of the territory of this state for the common safety. Notwithstanding any other provisions of law, except as provided in Code Section 22-1-15, neither this state nor any political subdivision thereof nor any other condemning authority shall use eminent domain unless it is for public use. Public use is a matter of law to be determined by the court and the condemnor bears the burden of proof.

(b) Except as provided in Code Section 22-1-15, no condemnation shall be converted to any use other than a public use for 20 years from the initial condemnation.

(c) (1) Except as provided in Code Section 22-1-15, if property acquired through the power of eminent domain from an owner
fails to be put to a public use within five years, the former property owner may apply to the condemnor or its successor or assign for reconveyance or quitclaim of the property to the former property owner or for additional compensation for such property. For purposes of this subsection, property shall be considered to have been put to a public use at the point in time when substantial good faith effort has been expended on a project to put the property to public use, notwithstanding the fact that the project may not have been completed. The application shall be in writing, and the condemnor or its successor or assign shall act on the application within 60 days by:

(A) Executing a reconveyance or quitclaim of the property upon receipt of compensation not to exceed the amount of the compensation paid by the condemnor at the time of acquisition; or
(B) Paying additional compensation to the former owner of the property, such compensation to be calculated by subtracting the price paid by the condemnor for the property at the time of acquisition from the fair market value of the property at the time the application is filed.

(2) If the condemnor fails to take either action within 60 days, the former property owner may, within the next 90 days following, initiate an action in the superior court in the county in which the property is located to reacquire the property or receive additional compensation.

(3) The condemnor shall provide notice to each former owner of the property prior to acquisition if the condemnor fails to put such property to a public use within five years. The condemnee shall have one year from the date notice is received to bring an application under this subsection.

(d) When property is acquired from more than one owner for the same public use and reconveyance or additional compensation to a single owner is impracticable, any party to the original condemnation or each person with a legal claim in such condemnation may file an action in the superior court in the county in which the property is located for an equitable resolution.

(c) Property or interests shall not be acquired for "future public road purposes," as that term is used in this Code section, unless:

(1) Construction will be commenced on the property to be acquired within a period of not less than two years nor more than ten years following the end of the fiscal year in which the secretary of transportation of the United States approves an advance of all the necessary funds to the department for the acquisition of rights of way for such construction under authority of Title 23, Section 108, United States Code, as amended; and

(2) The intended acquisition is part of a specific plan of highway development, and the acquisition will assist in accomplishing one or more of the following:

(A) A substantial monetary savings;
(B) The enhancement of the integration of highways with public or private urban redevelopment; or
(C) The forestalling of the physical or functional obsolescence of highways.

(d) In the process of acquiring property or interests for any public road purpose, an entire lot, block, or tract of land may be acquired if by so doing the interest of the public will be best served.


(a) This Code section shall be applicable to incorporated municipalities of the State of Georgia having a population of more than 300,000 according to the United States decennial census of 1960 or any future such census.

(b) All such municipalities shall have authority to sell, exchange, or otherwise dispose of any real or personal property comprising parks, playgrounds, golf courses, swimming pools, or other like property used primarily for recreational purposes, provided that nothing in this Code section shall have the effect of authorizing alienation where such would be in derogation of rights, duties, and obligations imposed by prior deed, contract, or like document of similar import or where such alienation would cause divesting of title to a park, playground, golf course, swimming pool, or other like property that had been dedicated to public use and not subsequently abandoned.

(c)

(1) All such municipalities shall have authority to lease out and grant easements over property used primarily for recreational purposes to others consistent with general park and recreational purposes for a period not exceeding 50 years and for a valuable consideration. Any such recreational property which was formerly used for annual regional fair purposes but is no longer so used may be leased by any such municipality to one or more private entities for terms of not more than 50 years each for development and use as motion picture and television production,
processing, and related facilities together with all such support and service facilities as are necessary or convenient to such use.

(2) All such municipalities shall have authority to enter into contracts and renewals and extensions of contracts for the cooperative operation, maintenance, cooperative management, and funding of property which in no way limits the governance or the policy role of said municipalities which property is used primarily for recreational purposes consistent with general park and recreational purposes, for periods not exceeding ten years and for a valuable consideration.

**Hawaii**


In fixing the compensation or damages to be paid for the condemnation of any property, the value of the property sought to be condemned with all improvements thereon shall be assessed, and if any of the improvements are separately owned, the value thereof shall be separately assessed. If the property sought to be condemned constitutes only a portion of a larger tract, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff shall also be assessed, and also how much the portion not sought to be condemned will be specifically benefited, if at all, by the construction of the improvement proposed by the plaintiff. If the benefit shall be equal to the amount of compensation assessed for the property taken, and for damages by reason of its severance from another portion of the same tract, then the owner shall be allowed no compensation, but if the benefits shall be less than the amount so assessed as damages or compensation, then the former shall be deducted from the latter and the remainder shall be the amount awarded as compensation or damages. In case of the exercise of the power of eminent domain by the city and county of Honolulu in furtherance of any governmental power under section 46-74.2 and the improvement ordinance of the city, the amount of damages or compensation assessed, or awarded, or agreed upon in any compromise approved by motion of the city council shall in no case be construed as limiting or affecting the power of the city council to distribute any portion of the cost upon any property found to be benefited thereby proportioned as provided by law in the exercise of their judgment whether under an improvement district or frontage improvement created before or after the acquisition of any such land. If condemnation is for the purpose of widening or realigning any existing highway or other public road, the owner of the property condemned shall be entitled to full compensation for the property actually taken and special benefits shall be considered only insofar as the value of the benefits shall not exceed the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvements in the manner proposed by the plaintiff. That is, if the special benefits shall be equal to the severance damages, then the owner of the parcel shall be allowed no compensation except the value of the portion taken, but if the special benefits shall be less than the severance damages, then the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value of the land taken.

**Illinois**

_735 Ill. Comp. Stat. 30/10-5-5 (2018):_

(a) Private property shall not be taken or damaged for public use without just compensation and, in all cases in which compensation is not made by the condemning authority, compensation shall be ascertained by a jury, as provided in this Act. When compensation is so made by the condemning authority, any party, upon application, may have a trial by jury to ascertain the just compensation to be paid. A demand on the part of the condemning authority for a trial by jury shall be filed with the complaint for condemnation of the condemning authority. When the condemning authority is plaintiff, a defendant desirous of a trial by jury must file a demand for a trial by jury on or before the return date of the summons served on him or her or on or before the date fixed in the publication in case of defendants served by publication. If no party in the condemnation action demands a trial by jury, as provided for by this Section, then the trial shall be before the court without a jury.

(b) The right to just compensation, as provided in this Act, applies to the owner or owners of any lawfully erected off-premises outdoor advertising sign that is compelled to be altered or removed under this Act or any other statute, or under any ordinance or regulation of any municipality or other unit of local government, and also applies to the owner or owners of the property on which that sign is erected. The right to just compensation, as provided in this Act, applies to property subject to a conservation right under the Real Property Conservation Rights Act [765 Ill. Comp. Stat. 120/1 et seq.]. The amount of compensation for the taking of the property shall not be diminished or reduced by virtue of the existence of the conservation right. The holder of the conservation right shall be entitled to just compensation for the value of the conservation right.

_735 Ill. Comp. Stat. 30/20-5-5 (2018):_

(a) This Section applies only to proceedings under this Article that are authorized in this Article and in Article 25 of this Act [735 Ill. Comp. Stat. 30/25].

(b) In a proceeding subject to this Section, the plaintiff, at any time after the complaint has been filed and before judgment is entered in the proceeding, may file a written motion requesting that, immediately or at some specified later date, the plaintiff either: (i) be vested with the fee simple title (or such lesser estate, interest, or easement, as may be required) to the real property, or a specified portion of that property, which is the subject of the proceeding, and be authorized to take possession of and use the property; or (ii) only be authorized to take possession of and to use the property, if possession and use, without the
vesting of title, are sufficient to permit the plaintiff to proceed with the project until the final ascertainment of compensation. No land or interests in land now or hereafter owned, leased, controlled, or operated and used by, or necessary for the actual operation of, any common carrier engaged in interstate commerce, or any other public utility subject to the jurisdiction of the Illinois Commerce Commission, shall be taken or appropriated under this Section by the State of Illinois, the Illinois Toll Highway Authority, the sanitary district, the St. Louis Metropolitan Area Airport Authority, or the Board of Trustees of the University of Illinois without first securing the approval of the Illinois Commerce Commission.

Except as otherwise provided in this Article, the motion for taking shall state: (1) an accurate description of the property to which the motion relates and the estate or interest sought to be acquired in that property; (2) the formally adopted schedule or plan of operation for the execution of the plaintiff’s project; (3) the situation of the property to which the motion relates, with respect to the schedule or plan; (4) the necessity for taking the property in the manner requested in the motion; and (5) if the property (except property described in Section 3 of the Sports Stadium Act [65 Ill. Comp. Stat. 100/3], or property described as Site B in Section 2 of the Metropolitan Pier and Exposition Authority Act [70 Ill. Comp. Stat. 210/2]) to be taken is owned, leased, controlled, or operated and used by, or necessary for the actual operation of, any interstate common carrier or other public utility subject to the jurisdiction of the Illinois Commerce Commission, a statement to the effect that the approval of the proposed taking has been secured from the Commission, and attaching to the motion a certified copy of the order of the Illinois Commerce Commission granting approval. If the schedule or plan of operation is not set forth fully in the motion, a copy of the schedule or plan shall be attached to the motion.

735 Ill. Comp. Stat. 30/20-5-10 (2018):

(a) The court shall fix a date, not less than 5 days after the filing of a motion under Section 20-5-5 [735 Ill. Comp. Stat. 30/20-5-5], for the hearing on that motion and shall require due notice to be given to each party to the proceeding whose interests would be affected by the taking requested, except that any party who has been or is being served by publication and who has not entered his or her appearance in the proceeding need not be given notice unless the court so requires, in its discretion and in the interests of justice.

(b) At the hearing, if the court has not previously, in the same proceeding, determined that the plaintiff has authority to exercise the right of eminent domain, that the property sought to be taken is subject to the exercise of that right, and that the right of eminent domain is not being improperly exercised in the particular proceeding, then the court shall first hear and determine those matters. The court's order on those matters is appealable and an appeal may be taken from that order by either party within 30 days after the entry of the order, but not thereafter, unless the court, on good cause shown, extends the time for taking the appeal. However, no appeal shall stay the further proceedings prescribed in this Act unless the appeal is taken by the plaintiff or unless an order staying further proceedings is entered either by the trial court or by the court to which the appeal is taken.

(c) If the foregoing matters are determined in favor of the plaintiff and further proceedings are not stayed, or if further proceedings are stayed and the appeal results in a determination in favor of the plaintiff, the court then shall hear the issues raised by the plaintiff’s motion for taking. If the court finds that reasonable necessity exists for taking the property in the manner requested in the motion, then the court shall hear such evidence as it may consider necessary and proper for a preliminary finding of just compensation. In its discretion, the court may appoint 3 competent and disinterested appraisers as agents of the court to evaluate the property to which the motion relates and to report their conclusions to the court; and their fees shall be paid by the plaintiff. The court shall then make a preliminary finding of the amount constituting just compensation.

(d) The court’s preliminary finding of just compensation and any deposit made or security provided pursuant to that finding shall not be evidence in the further proceedings to ascertain finally the just compensation to be paid and shall not be disclosed in any manner to a jury impaneled in the proceedings. If appraisers have been appointed, as authorized under this Article, their report shall not be evidence in those further proceedings, but the appraisers may be called as witnesses by the parties to the proceedings.

735 Ill. Comp. Stat. 30/10-5-60 (2018):

Except as to property designated as possessing a special use, the fair cash market value of property in a proceeding in eminent domain shall be the amount of money that a purchaser, willing, but not obligated, to buy the property, would pay to an owner willing, but not obliged, to sell in a voluntary sale.

For the acquisition or damaging of property under the O’Hare Modernization Act, the amount shall be determined as of the date of filing the complaint to condemn. For the acquisition of other property, the amount shall be determined and ascertained as of the date of filing the complaint to condemn, except that:

(i) in the case of property not being acquired under Article 20 (quick-take) [735 Ill. Comp. Stat. 30/20-5-5 et seq.], if the trial commences more than 2 years after the date of filing the complaint to condemn, the court may, in the interest of justice and equity, declare a valuation date no sooner than the date of filing the complaint to condemn and no later than the date of commencement of the trial; and

(ii) in the case of property that is being acquired under Article 20 (quick-take) [735 Ill. Comp. Stat. 30/20-5-5 et seq.], if the trial commences more than 2 years after the date of filing the complaint to condemn, the court may, in the interest of justice and equity, declare a valuation date no sooner than the date of filing the complaint to condemn and no later than the date on which the condemning authority took title to the property.
In the condemnation of property for a public improvement, there shall be excluded from the fair cash market value of the property any appreciation in value proximately caused by the improvement and any depreciation in value proximately caused by the improvement. However, such appreciation or depreciation shall not be excluded when property is condemned for a separate project conceived independently of and subsequent to the original project.

**Indiana**

*Ind. Code Ann. § 8-23-8-3 (2018):*

(a) The department or a highway authority may acquire private or public property and property rights for limited access facilities and service roads, including rights of access, air, view, and light, by gift, devise, purchase, or condemnation for the laying out, widening, or improvement of highways and streets within their respective jurisdictions.

(b) In the acquisition of property or property rights for a limited access facility or a service road connected with a facility, the state, county, or municipality may acquire an entire lot, block, or tract of land, if the interests of the public will be best served, even though the entire lot, block, or tract is not immediately needed for the right-of-way.

(c) Court proceedings necessary to acquire property or property rights under this section take precedence over all other causes not involving the public interest in all courts.

**Iowa**

*Iowa Code § 306A.5 (2018):*

1. For the purposes of this chapter, cities and highway authorities having jurisdiction and control over the highways of the state, as provided by chapter 306, may acquire private or public property rights for controlled-access facilities and service roads, including rights of access, air, view, and light, by gift, devise, purchase, or condemnation in the same manner as such units are authorized by law to acquire such property or property rights in connection with highways and streets within their respective jurisdictions. All property rights acquired under this chapter shall be in fee simple. In connection with the acquisition of property or property rights for a controlled-access facility or portion of, or service road in connection with a controlled-access facility, the cities and highway authorities, in their discretion, may acquire an entire lot, block, or tract of land, if by so doing the interests of the public will be best served, even though the entire lot, block, or tract is not immediately needed for the right-of-way proper.

2. Access rights to any highway shall not be acquired by any authority having jurisdiction and control over the highways of this state by adverse possession or prescriptive right. Action taken by any such authority shall not form the basis for any claim of adverse possession or prescriptive right to any access rights by any such authority.

**Kansas**


(a) Necessity. Private property shall not be taken or damaged for public use without just compensation.

(b) Taking entire tract. If the entire tract of land or interest in such land is taken, the measure of compensation is the fair market value of the property or interest at the time of the taking.

(c) Partial taking. If only a part of a tract of land or interest is taken, the compensation and measure of damages is the difference between the fair market value of the entire property or interest immediately before the taking, and the value of that portion of the tract or interest remaining immediately after the taking.

(d) Factors to be considered. In ascertaining the amount of compensation and damages, the following nonexclusive list of factors shall be considered if such factors are shown to exist. Such factors are not to be considered as separate items of damages, but are to be considered only as they affect the total compensation and damage under the provisions of subsections (b) and (c) of this section. Such factors are:

1. The most advantageous use to which the property is reasonably adaptable.

2. Access to the property remaining.

3. Appearance of the property remaining, if appearance is an element of value in connection with any use for which the property is reasonably adaptable.

4. Productivity, convenience, use to be made of the property taken, or use of the property remaining.

5. View, ventilation and light, to the extent that they are beneficial attributes to the use of which the remaining property is devoted or to which it is reasonably adaptable.

6. Severance or division of a tract, whether the severance is initial or is in aggravation of a previous severance; changes of grade and loss or impairment of access by means of underpass or overpass incidental to changing the character or design of an existing improvement being considered as in aggravation of a previous severance, if in connection with the taking of additional land and needed to make the change in the improvement.

7. Loss of trees and shrubbery to the extent that they affect the value of the land taken, and to the extent that their loss impairs the value of the land remaining.

8. Cost of new fences or loss of fences and the cost of replacing them with fences of like quality, to the extent that such loss affects the value of the property remaining.


10. Damage to property abutting on a right-of-way due to change of grade where accompanied by a taking of land.

11. Proximity of new improvement to improvements remaining on condemnor’s land.

12. Loss of or damage to growing crops.
(13) That the property could be or had been adapted to a use which was profitably carried on.

(14) Cost of new drains or loss of drains and the cost of replacing them with drains of like quality, to the extent that such loss affects the value of the property remaining.

(15) Cost of new private roads or passageways or loss of private roads or passageways and the cost of replacing them with private roads or passageways of like quality, to the extent that such loss affects the value of the property remaining.

c) Fair market value. "Fair market value" means the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion. The fair market value shall be determined by use of the comparable sales, cost or capitalization of income appraisal methods or any combination of such methods.

Kentucky


(1) The Commonwealth of Kentucky, Department of Highways, when it has, by official order, designated the route, location, or relation of a highway, limited access highway, bridge, roadside park, borrow-pit, quarry, garage, or other property or structure deemed necessary for the construction, reconstruction, or maintenance of an adequate system of highways, may, if unable to contract or agree with the owner or owners thereof, condemn the lands or material, or the use and occupancy of the lands designated as necessary. All property acquired by the Commonwealth of Kentucky, Department of Highways, shall be in fee simple whenever so specified in the petition filed in the action. The official order of the Department of Highways shall be conclusive of the public use of the condemned property and the condemnor’s decision as to the necessity for taking the property will not be disturbed in the absence of fraud, bad faith, or abuse of discretion.

(2) Any property purchased or otherwise acquired by the Department of Highways for the purpose of construction or reconstruction of a road, street, or highway shall be cleared and maintained by the Department of Highways from the time of acquisition until such property is no longer owned by the department.

(3) The proceedings for condemnation shall be as provided in the Eminent Domain Act of Kentucky.


(1) The department is hereby authorized and empowered to acquire by purchase, whenever it shall deem such purchase expedient, solely from funds provided under the authority of KRS 177.390 to 177.570, such lands, structures, property, rights, rights-of-way, franchises, easements and other interests in lands, including lands lying under water and riparian rights, which are located within the Commonwealth, as it may deem necessary or convenient for the construction and operation of any project, upon such terms and at such prices as may be considered by it to be reasonable and can be agreed upon between it and the owner thereof, and to take title thereto in the name of the Commonwealth for the use and benefit of the department.

(2) Whenever a reasonable price cannot be agreed upon, or whenever the owner is legally incapacitated or is absent, unknown or unable to convey valid title, the department is hereby authorized and empowered to acquire by condemnation or by the exercise of the power of eminent domain any lands, property, rights, rights-of-way, franchises, easements and other property, including public lands, parks, playgrounds, reservations, highways or parkways, or parts thereof or rights therein, of any person, copartnership, association, railroad, public service, public utility or other corporation, or municipality or political subdivision, deemed necessary or convenient for the construction or the efficient operation of any project or necessary in the restoration of public or private property damaged or destroyed. Any such proceedings shall be conducted, and the compensation to be paid shall be ascertained and paid, in the manner provided by the Constitution and laws of the Commonwealth then applicable which relate to condemnation or to the exercise of the power of eminent domain by the department. Title to any property acquired by the department shall be taken in the name of the Commonwealth for the use and benefit of the department. In any condemnation proceedings the court having jurisdiction of the suit, action or proceeding may make such orders as may be just to the department and to the owners of the property to be condemned and may require an undertaking or other security to secure such owners against any loss or damage by reason of the failure of the department to accept any pay for the property, but neither such undertaking or security nor any act or obligation of the department shall impose any liability upon the Commonwealth except as may be paid from the funds provided under the authority of KRS 177.390 to 177.570.

(3) If the owner, lessee or occupier of any property to be condemned shall refuse to remove his personal property therefrom or give up possession thereof, the department may proceed to obtain possession in any manner now or hereafter provided by law.

(4) With respect to any railroad property or right-of-way upon which railroad tracks are located, any powers of condemnation or of eminent domain may be exercised to acquire only an easement interest therein which shall be located either sufficiently far above or sufficiently far below the grade of any railroad track or tracks upon such railroad property so that neither the proposed project nor any part thereof, including any bridges, abutments, columns, supporting structures and appurtenances, nor any traffic upon it, shall interfere in any manner with the use, operation or maintenance of the trains, tracks, works or appurtenances or other property of the railroad nor endanger the movement of the trains or traffic upon the tracks of the railroad. Prior to the institution of condemnation proceedings for such easement over or under such railroad property or right-of-way, plans and specifications of the proposed project...
showing compliance with the above-mentioned above or below grade requirements and showing sufficient and safe plans and specifications of such overhead or underground structure and appurtenances shall be submitted to the railroad for examination and approval. If the railroad fails or refuses within thirty (30) days to approve the plans and specifications so submitted, the matter shall be submitted to the Public Service Commission of Kentucky whose decision, arrived at after due consideration in accordance with its usual procedure, shall be final as to the sufficiency and safety of such plans and specifications and as to such elevations or distances above or below the tracks. Said overhead or underground structure and appurtenances shall be constructed only in accordance with such plans and specifications and in accordance with such elevations or distances above or below the tracks so approved by the railroad or the Public Service Commission as the case may be. A copy of the plans and specifications approved by the railroad or the Public Service Commission shall be filed as an exhibit with the petition for condemnation.


(1) In all actions for the condemnation of lands under the provisions of KRS 416.550 to 416.670, except temporary easements, there shall be awarded to the landowners as compensation such a sum as will fairly represent the difference between the fair market value of the entire tract, all or a portion of which is sought to be condemned, immediately before the taking and the fair market value of the remainder thereof immediately after the taking, including in the remainder all rights which the landowner may retain in the lands sought to be condemned where less than the fee simple interest therein is taken, together with the fair rental value of any temporary easements sought to be condemned.

(2) Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the immence of condemnation or the construction of the project shall be disregarded in determining fair market value. The taking date for valuation purposes shall be either the date the condemnor takes the land, or the date of the trial of the issue of just compensation, whichever occurs first.

Louisiana


In addition to having all of the powers granted it by virtue of its being a nonprofit corporation created pursuant to the Louisiana Nonprofit Corporation Law, each authority may exercise all additional powers necessary, appurtenant, convenient, or incidental to the carrying out of its purposes, including but not limited to the following rights and powers:

(1) To adopt and amend bylaws, regulations, and procedures for the governance of its affairs and the conduct of its business and to designate an official journal which shall be a newspaper of general circulation within the geographical boundary of the authority.

(2) To adopt, use, and alter at will an official seal.

(3) To construct, reconstruct, maintain, improve, install, extend, develop, equip, repair, operate, own, and lease projects within the geographic boundaries of the authority in the manner to be determined by the authority, including in segments, phases, or stages, and all rights-of-way and to pay all project costs in connection therewith.

(4) To sue and be sued in its own name, plead, and be impleaded; however, any and all actions at law or in equity1 against the authority shall be brought in the parish where the cause of action arises, and if land is involved, including condemnation proceedings, suit shall be brought in the parish where the land is situated.

(5) (a) To fix, revise, and adjust, from time to time, tolls, fees, and charges in connection with each project sufficient to pay all maintenance, operation, debt service and reserve or replacement costs, and other necessary or usual charges, and to regulate speed limits on the tollways consistent with state speed limits. In all cases, however, the amount of the toll charged to commercial vehicles shall be multiples of the two-axle rate such that an increase equal to approximately one-half the two-axle rate is realized for each axle over two.

(b) No toll shall be charged or collected from vehicles which will only travel over a portion of a tollway which was in existence as a non-toll route prior to construction of the tollway project and which was not substantially reconstructed by the tollway project.

(6) To contract with any person, partnership, association, or corporation desiring the use of any part of a project, including the right-of-way adjoining the paved portion, for placing thereon telephone, fiber optic, telegraph, electric light, or power lines, gas stations, garages, and restaurants, or for any other purpose, and to fix the terms, conditions, rents, and rates of charges for such use. Any utilities which are placed within the right-of-way shall be locatable by the one-call system and the utilities shall place locator strips on any buried objects. The contract or lease shall require the removal at the expense of the lessee of any utilities or other obstructions placed within the right-of-way at the request of such private utility owner when expansion of the toll facility requires such removal. Installation and removal of utility facilities shall be consistent with rules and regulations promulgated by the federal government and the Louisiana Department of Transportation and Development.

(7) To acquire, hold, and dispose of real and personal property in the exercise of its powers and the performance of its duties under this Chapter in accordance with existing state law.

(8) To acquire in the name of the authority by purchase, gift, transfer, foreclosure, lease, or otherwise, including rights or easements, or by the exercise of the power of eminent domain in the manner hereinafter provided, such public or private
lands, including public parks, playgrounds or reservations, or parts thereof or rights therein, rights-of-way, property rights, easements, and interests, as it may deem necessary for carrying out the provisions of this Chapter. Eminent domain shall be used for the sole purpose of constructing tollways and for the other public purposes set forth in this Chapter, and not for the exercise of, or accommodation for, private development interests, including but not limited to service stations, food marts, restaurants, truck stops, or other private enterprises.

(9) To hold, sell, assign, lease, or otherwise dispose of any real or personal property or any interest therein; to release or relinquish any right, title, claim, lien, interest, easement, or demand however acquired, including any equity or right of redemption in property foreclosed by it; to take assignments of leases and rentals; to proceed with foreclosure actions; or to take any other actions necessary or incidental to the performance of its corporate purposes.

(10) To designate the location, and establish, limit, and control points of ingress and egress for each project as may be necessary or desirable in the judgment of the authority to ensure the proper operation and maintenance of such project, and to prohibit entrance to such project from any point or points not so designated. Creation of new points of ingress and egress or substantial reconstruction or redesign of the same shall be made only after public hearing. Where the state highway system is affected, the concurrence of the department shall be obtained for any such matters set forth in this Paragraph.

(11) In all cases where parish, municipal, or other public roads are affected or severed, the authority is hereby empowered and required to move and replace the same with equal or better facilities, and all expenses and resulting damages, if any, shall be paid by the authority.

(12) To enter, or authorize its agents to enter, upon any lands, waters, and premises within the geographic boundaries of the authority for the purpose of making surveys, soundings, drillings, and examinations as it may deem necessary or appropriate for the purposes of this Chapter, and such entry shall not be deemed a trespass or unlawful. The authority shall make reimbursement for any actual damages resulting to such lands, waters, and premises as a result of such activities.

(13) To procure liability, casualty, and other insurance in such amount or amounts appropriate to the size of the project, as determined by the board, insuring the authority against all losses, risk, and liability arising out of the construction, operation, maintenance, and ownership of any project.

(14) To apply for, receive, and accept subventions, grants, loans, advances, and contributions from any source of money, property, labor, or other things of value, to be held, used, and applied for its corporate purposes.

(15) To open accounts at financial institutions as necessary for the conduct of its business and to invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement in such investments as may be provided in any financing document relating to the use of such funds, or, if not so provided, as the board may determine, subject to compliance with state laws relative to investments by political subdivisions.

(16) To borrow money and issue bonds for any corporate purpose, including the development, construction, or financing of any project which the authority is authorized to acquire or construct, including all costs in connection with and incidental to such acquisition or construction and the financing thereof.

(17) To enter into contracts and agreements and execute all instruments necessary or convenient therefor for accomplishing the purposes of this Chapter. Such contracts and agreements may include, without limiting the foregoing, construction agreements, purchase or acquisition agreements, loan or lease agreements, partnership agreements, including limited partnership agreements, joint venture, participation agreements, or loan agreements with leasing corporations or other financial institutions or intermediaries.

(18) To enter into agreements with a public or private entity, to permit the entity, independently or jointly with the authority, to construct, maintain, repair, and/or operate projects, and to authorize the investment of public and private money to finance such projects, subject to compliance with state law relative to use of public funds.

(19) To employ consultant engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and such other employees and agents as may be necessary for the accomplishment of its corporate purposes, and to fix their compensation.

(20) To exercise the power of eminent domain in accordance with general law or, at the option of the authority, Part XVII of Chapter 1 of this Title, and the provisions relating to acquisition of property prior to judgment found therein, provided that any property so acquired by an authority which is not used for an authorized public purpose of the authority within three years of such acquisition shall be reconveyed by the authority to the prior owners thereof at current market value. Upon refusal or failure to accept reconveyance of such property by the prior owner, the authority may use or dispose of such property as provided for in this Chapter.

(21) To do all acts and things necessary or convenient for the powers granted to it by law.

**Maine**


If the department determines that public exigency requires the taking of property or any interest in property, or is unable to purchase a property or any interest in a property, or the necessary ways and access to a property at what it considers a reasonable valuation, or if the title in a property is defective, it shall file in the registry of deeds for the county or registry district where the land is located a notice of condemnation which must contain a description of the project specifying the property and the interest taken and the name or names of the owner or owners of record so far as they can be reasonably determined. The depart-
ment may prescribe procedures for the reasonable determination of the owner or owners of record. The department may join in the notice one or more separate properties whether in the same or different ownership and whether or not taken for the same use.

The department shall serve a check in the amount of the determined net condemnation damage and offering price and a copy of the notice of condemnation on the owner or owners of record. In case there is multiple ownership, the check may be served on any one of the owners. With that copy the department must serve on each individual owner of record a copy of that part of the plan as relates to the particular parcel or parcels of land taken from that owner and a statement by the department with respect to the particular parcel or parcels of land taken from that owner which must:

1. Date of proposed possession. State the proposed date of taking possession;

2. Compensation involving severance damage. Where the department appraisals disclose severance damages, state the amount of compensation itemized in accordance with the department’s determination of the following elements of damage:

A. The highest and best use of the property at the date of taking;
B. The highest and best use of the property remaining after the taking;
C. The fair market value of the property before the taking;
D. The fair market value of the property after the taking;
E. The gross damage, showing separately:
   (1) The fair market value of the real property taken; and
   (2) Severance damages including the impairment or destruction of facilities and structures;

F. Special benefits, accruing to the remaining property by reason of the public improvement for which part of the property is taken, to be set off against severance damages;

G. The net damage showing separately:
   (1) The fair market value of the real property taken;
   (2) The amount of severance damages in excess of special benefits; and
   (3) The offering price;

H. If the offer is not acceptable and the State cannot negotiate an agreement on the amount of just compensation within 60 days from the date of taking, the owner may apply to the department within said 60 days and have the matter referred to the State Claims Commission for assessment of the damage. Acceptance and cashing this check will not jeopardize negotiation and will not be construed as acceptance of the offer; and

I. Enclosed Check No.: Amount: $
listing the parcel or item numbers to be condemned, the name of the apparent owner or owners of record of the property interests, the estimated areas to be condemned and the nature of the interests to be condemned; and a location at which the complete notice of layout and taking may be examined.

If such owner is a person under the age of 18 years, or an incompetent person, the commission shall cause such notice and check to be served upon the legal guardian of such person or incompetent. If there is no such guardian, then the department shall apply to the judge of probate for the county wherein the property is situated, briefly stating the facts and requesting the appointment of a guardian. The reasonable fee of such guardian as approved by the court must be paid by the department.

In case there is a mortgage, tax lien of record or other encumbrance covering any of said land, a copy of the notice of condemnation must be sent forthwith by registered or certified mail to the holder of record of said mortgage, tax lien or other encumbrance addressed to the holder’s office or place of abode if known, otherwise to the office, abode or address as set forth in said record.

The recording of the notice of condemnation is the date of taking and vests title to the property therein described in the State in fee simple or such lesser state as is specified in the notice of condemnation. Within one year after the completion of the project for which the land is taken, the department shall file a plan for recording in the registry of deeds for the county or registry district where the land is located.

If a condemnation proceeding is instituted and then abandoned, the owner of any right, title or interest in any real property included in said proceeding must be reimbursed by the department for reasonable attorney, appraisal and engineering fees, actually incurred because of the condemnation proceedings.

Maryland

(a) Purposes of acquisition.—
(1) Any land may be acquired under this subtitle for any State highway construction purpose.
(2) Any land along or near any State highway may be acquired under this subtitle:
(i) To protect the highway or any scenery along or near it;
(ii) For landscaping the highway;
(iii) To provide parking and service areas along the highway; or
(iv) For any similar purpose.
(b) Limitation on manner of acquisition.—Land may not be acquired under this section by condemnation unless the Administration determines that the land is needed for immediate or proposed construction of a State highway or a related parking or service area. However, land may be acquired for a related parking or service area only if it is adjacent to a controlled access highway.

(c) Prohibited uses.—
(1) A motel, restaurant, or gasoline or automobile service station may not be operated or permitted by the Administration or by any other agency or political subdivision of this State on any highway or related parking or service area the land for which was acquired under this subtitle.
(2) This subsection does not apply to any toll highway.
(d) Interest that may be acquired.—The interests in land that may be acquired under this section include easements restricting or subjecting to administrative regulation the right of the owner or other persons to:
(1) Erect buildings or other structures;
(2) Construct a private drive or road;
(3) Remove or destroy shrubbery or trees;
(4) Place trash or unsightly or offensive material on the land; or
(5) Display signs, billboards, or advertisements on the land.
(e) Instrument of conveyance.—If any land is acquired under this section, the instrument conveying the land shall set forth clearly the specific restrictions or other interests acquired. These restrictions shall run with the land to which they apply and bind all subsequent holders, except as the instrument otherwise expressly provides.

(a) Effective date of authority if continuing powers of condemnation.—In this section, the phrase “the effective date of legislative authority for the acquisition of the property” means, with respect to a condemnor vested with continuing power of condemnation, the date of specific administrative determination to acquire the property.
(b) Fair market value.—The fair market value of property in a condemnation proceeding is the price as of the valuation date for the highest and best use of the property which a vendor, willing but not obligated to sell, would accept for the property, and which a purchaser, willing but not obligated to buy, would pay, excluding any increment in value proximately caused by the public project for which the property condemned is needed. In addition, fair market value includes any amount by which the price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of the property and the date of actual taking if the trier of facts finds that the diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff or its officials concerning the public project, and was beyond the reasonable control of the property owner.
(c) Assessed value.—The defendant property owner may elect to present as evidence in a condemnation proceeding, the assessed value of the property, as determined by the Department of Assessments and Taxation, if the assessed value is greater than the appraised value placed on the property by the condemning authority.
(d) Acquisition of exempt property by eminent domain.—If property is ever acquired by the exercise of the power of eminent domain, the fair market value of the property is not affected by the property having been qualified for a tax credit under § 9-208 of the Tax - Property Article. However, if the grantee of an easement purchased the easement for monetary consideration other than, or in addition to, the tax credit under § 9-208 of the Tax - Property Article, then the condemnation award shall be reduced by an amount equal to the additional consideration.

Massachusetts


(a) The department may take by eminent domain in accordance with the provisions of chapter 79 or any alternative method now or hereafter provided by general law, any public land and any fee simple absolute or lesser interest in private property or part thereof or rights therein as it may deem necessary for carrying out the provisions of this chapter.

(b) Whenever a parcel of private property so taken is used in whole or in part for residential purposes, the owner of such parcel may, within 30 days of the date of the department’s notice to vacate such parcel, appeal to the department for a postponement of the date set for such vacating, whereupon the department shall grant to the owner a postponement of 3 months from the date of such appeal; provided, however, that the appeal for such postponement shall be in the form of a written request to the department sent by registered mail, return receipt requested; and provided, further, that section 40 of said chapter 79 shall govern the rights of the department and of any person whose property shall be so taken.

(c) The department shall have power, in the process of constructing, reconstructing, repairing, rehabilitating, improving, policing, using or administering all or any part of the state highway system to take by eminent domain pursuant to chapter 79, such land abutting the state highway system as it may deem necessary or desirable for the purposes of removing or relocating all or any part of the facilities of any public utility, including rail lines, and may thereafter lease the same or convey an easement or any other interest therein to such utility company upon such terms as it, in its sole discretion, may determine. Notwithstanding any general or special law to the contrary, the relocation of the facilities of any public utility, including rail lines, in accordance with this section shall be valid upon the filing of the plans thereof with the department of telecommunications and energy, if applicable.

Michigan


Whenever, in the discretion of the state highway commissioner, it is necessary to acquire the property or rights of way, or any part of or interest in said property or rights of way, owned by a railroad, railway or public utility having the right of eminent domain, in order to establish, construct, widen, straighten, alter, relocate or otherwise improve a trunk line highway, the state highway commissioner shall be authorized to enter into negotiations with such railroad, railway or public utility for the purchase of said property, rights of way, or any part thereof or interest therein, and to enter into an agreement with any such railroad, railway or public utility to exchange other designated property or interests in property for such property, rights of way, or any part thereof or interests therein, whenever such other designated property or interests in property shall be acquired by him; and whenever any such agreement has been entered into, the said state highway commissioner shall be authorized and he is hereby empowered to acquire such other property or interests in property by purchase or condemnation, and when acquired to execute the necessary conveyances and releases thereof to such railroad, railway or public utility for its use, and to take in exchange therefor the railroad, railway or public utility property, rights of way or any part thereof or interests therein for public highway purposes in accordance with such agreement.


Boards of county road commissioners, with the approval of the board of supervisors, and the state highway commissioner are hereby authorized and empowered to secure from the owners thereof:

(a) Property for the right of way for any highway to be laid out, altered, or widened, or for changing the line thereof;

(b) Gravel, rock, sand, dirt and any and all other materials that may be needed for the proper construction, improvement or maintenance of a highway;

(c) Property deemed by the board or commissioner to be necessary to give to persons using a highway a clear view of approach persons and vehicles, cars, trains and other instruments of travel, at any intersection of a highway with another highway or with a railroad track;

(d) Property deemed by the board or commissioner to be necessary to change the channel of any water course, natural or artificial, in order to maintain a proper alignment of any highway without crossing such water course and the riparian rights of any person, firm or corporation in or pertaining to any such water course;

(e) The fee or any lesser estate in land abutting on any highway right of way and deemed by the board or commissioner to be necessary for the storage of road machinery, equipment or materials;

(f) Property deemed by the board or commissioner to be necessary for the location, development and construction of off-street parking places for vehicles, to facilitate the flow of traffic on sections of the highways forming by-passes around and connections into and through municipalities and metropolitan areas, upon which sections parking is permanently prohibited;

(g) Property deemed by the board or commissioner to be necessary for the construction, adjacent to the highways, of flight
strips for the landing and take off of aircraft in order to insure greater safety for traffic. For the purpose of uniformity the size, location, layout, lighting and markings of such flight strips shall be in conformity with rules and regulations to be prescribed by the commissioner;

(ii) The state highway commissioner and boards of county road commissioners are authorized and empowered to take property and property rights under the provisions of this act within the limits of any incorporated city or village in this state: Provided, however, That before any proceedings are taken under this act involving the taking of any property or property rights in any city or village for the changing, altering, opening or widening of any street or highway, said street or highway shall be taken over as county road or designated as a state trunk line or federal aid highway, as the case may be, and the consent of the village or city council by resolution so to take over or designate said street or highway as a county road or state trunk line or federal aid highway shall be first obtained.

The provisions of this chapter shall be deemed to extend to and include the right to acquire and take property and property rights held, reserved, owned, used or occupied by any cemetery association or municipality, or by any person, firm, society, association or corporation for cemetery or municipal purposes; to acquire and take property desired by the board or commissioner to exchange for other property which in his or their opinion it is necessary to acquire for highway purposes, whenever he or they have agreed in writing with the owner or owners of such property for such exchange; and to acquire and take the fee to the whole of a particular lot or parcel of land whenever in the opinion of the board or commissioner it is advisable to provide for the proper construction, improvement or maintenance of highways.

Mississippi

The land commissioner with the approval of the Governor is hereby authorized to sell, lease, or donate to the State Highway Commission or to any county or counties or the Natchez Trace Commission, for right of way purposes or for road material used or useful in the construction or maintenance of state, federal, and county highways, any of the public lands of the state, regardless of the quantity of said lands.

Missouri

1. The state highways and transportation commission shall have power to purchase, lease, or condemn, lands in the name of the state of Missouri for the following purposes when necessary for the proper and economical construction and maintenance of state highways:

1) Acquiring the right-of-way for the location, construction, reconstruction, widening, improvement or maintenance of any state highway or any part thereof;

2) Acquiring bridges or sites therefor and ferries, including the rights and franchises for the maintenance and operation thereof, over navigable streams, at such places as the state highways and transportation commission shall have authority to construct, acquire or contribute to the cost of construction of any bridge;

3) Acquiring the right-of-way for the location, construction, reconstruction, widening, improvement or maintenance of any highway ordered built by the bureau of public roads of the Department of Agriculture of the United States government;

4) Obtaining road building or road maintenance materials or plants for the manufacture or production of such materials and acquiring the right-of-way thereto; also acquiring the right-of-way to such plants as are privately owned when necessary for the proper and economical construction of the state highway system;

5) Changing gradients in any state highway;

6) Establishing detours in connection with the location, construction, reconstruction, widening, improvement or maintenance of any state highway or any part thereof;

7) Changing the channels of any stream and providing for drainage ditches when necessary for the proper construction or maintenance of any state highway;

8) Eliminating grade crossings;

9) Acquiring water supply and water power sites and necessary lands for use in connection therewith, including rights-of-way to any such sites;

10) Acquiring sites for garages and division offices and for storing materials, machinery and supplies;

11) Acquiring lands for sight distances along any state highway or any portion thereof whenever necessary, and also acquiring lands within wyes formed by junctions of state highways, or junctions of state highways and other public highways;

12) Acquiring lands or interests therein for the purpose of depositing thereon excess excavated or other materials produced in the construction, reconstruction, widening, improvement or maintenance of any state highway;
(13) Acquiring lands for any other purpose necessary for the proper and economical construction of the state highway system for which the commission may have authority granted by law. If condemnation becomes necessary, the commission shall have the power to proceed to condemn such lands in the name of the state of Missouri, in accordance with the provisions of chapter 523, insofar as the same is applicable to the said state highways and transportation commission, and the court or jury shall take into consideration the benefits to be derived by the owner, as well as the damage sustained thereby. The state highways and transportation commission also shall have the same authority to enter upon private lands to survey and determine the most advantageous route of any state highway as granted, under section 388.210, to railroad corporations.

2. In any case in which the commission exercises eminent domain involving a taking of real estate, the court, commissioners, and jury shall consider the restriction of or loss of access to any adjacent highway as an element in assessing the damages. As used in this subsection, “restriction of or loss of access” includes, but is not limited to, the prohibition of making right or left turns into or out of the real estate involved, provided that such access was present before the proposed improvement or taking.

Montana

Notwithstanding any other provision of law, the department of transportation may acquire by purchase or other lawful manner lands or other real property, excluding oil, gas, and mineral rights, that it considers reasonably necessary for present or future highway purposes. The department may acquire a fee simple or lesser estate or interest. The provisions of 70-30-104(2) do not apply to the acquisition of a fee simple interest under this section.

(1) Before property can be taken, the condemnor shall show by a preponderance of the evidence that the public interest requires the taking based on the following findings:
(a) the use to which the property is to be applied is a public use pursuant to 70-30-102;
(b) the taking is necessary to the public use;
(c) if already being used for a public use, that the public use for which the property is proposed to be used is a more necessary public use;
(d) an effort to obtain the property interest sought to be taken was made by submission of a final written offer prior to initiating condemnation proceedings and the final written offer was rejected.

(2) Subsection (1)(d) does not prohibit the condemnor from making further offers in an effort to obtain the property interest sought to be taken, but offers made after the final written offer is submitted pursuant to subsection (1)(d) may not be used to determine whether the condemnee prevails pursuant to 70-30-305. The condemnor shall disclose to a property owner that further offers made in accordance with this subsection (2) are not considered the final written offer.

Nebraska

In connection with the acquisition of lands, property or interests therein for state highway purposes, the department may, in its discretion, acquire, by any lawful means except through the exercise of eminent domain, an entire lot, block, or tract of land or property if, by so doing, the interests of the public will be best served, even though said entire lot, block, or tract is not immediately needed for state highway purposes. Without limiting the same hereby, this may be done where uneconomic remnants of land would be left the original owner or where severance or consequential damages to a remainder make the acquisition of the entire parcel more economical to the state; Provided, that when any such property or land is left without access to a road, and the cost of acquisition of such landlocked property or land through the exercise of eminent domain would be more economical to the state than the cost of providing a means of reasonable ingress to or egress from the property or land, the state may, in its discretion, acquire such landlocked property or land thereof by eminent domain.

Nevada

1. In all cases of highways constructed, reconstructed or improved under the provisions of this chapter which are located or relocated over privately owned property the Department may acquire, in the name of the State, either in fee or in any lesser estate or interest, any real property or interest therein and any personal property which it considers necessary.

2. The property which may be acquired for those purposes includes, but is not limited to, real property, interests therein, improvements located thereon and personal property for any of the following purposes:
(a) For rights-of-way for both present and future needs for highways of all types, including highways constructed within towns and cities.
(b) For exchanging the property or interests therein for other property or interests therein required for highway purposes to avoid the payment of excessive compensation or damages.
(c) For sites on which to relocate structures which are within the right-of-way of a projected highway.
(d) For sites for storage, communications and maintenance and for administrative, recreational and historical purposes and necessary appurtenances in connection with those sites.
(e) For extraction of material, including rock quarries, gravel pits, sand or earth borrow pits, or other roadway material; also to obtain water from any source for any purpose which may be necessary for the construction and maintenance of the highways and their appurtenances.

(f) For the culture and support of trees and other flora which will benefit the highways in any way, including the increasing of the scenic beauty of the highways.

(g) For drainage in connection with any highway.

(h) For the maintenance of an unobstructed view of any portion of a highway so as to promote the safety of the traveling public.

(i) For the placement of directional signs and other signs, construction of fences, curbs, barriers, and obstructions as may be necessary for the safety and convenience of the traveling public.

(j) For constructing and maintaining highway cut and fill slopes.

(k) For public parks, playgrounds, recreational grounds and sites adjoining highway or freeway rights-of-way; acquisition of sites to replace housing; and acquisition and rehabilitation, relocation and construction of housing to replace other housing acquired. New Jersey – nothing found.

**New Hampshire**


If the commissioner is unable to acquire the rail properties of any railroad, or any part thereof, by purchase or otherwise, he or she may proceed to condemn all or any such portion of such property. In all such condemnation proceedings, the legislative determination herein made that the acquisition is for a public use and is reasonably necessary shall be prima facie evidence thereof. The procedure for any necessary condemnation proceedings shall be as set forth in RSA 498-A.

**New York**

*N.Y. Em. Dom. Proc. Law § 512 (2018):*

The court, after hearing the testimony and weighing the evidence, shall determine the compensation due the condemnees for damages as the result of the acquisition. The court's decision shall be in compliance with section four thousand two hundred thirteen of the civil practice law and rules.

*N.Y. Gen. Mun. Law § 3 (2018):*

Where property of a municipal corporation, school district or district corporation is taken in the exercise of the power of eminent domain for a purpose substantially different from that for which it is held by such municipal corporation, school district or district corporation, just compensation to the municipal corporation, school district or district corporation shall be made in the same manner, to the same extent and subject to the same limitations as though it were private property.

**North Carolina**


The said Department of Transportation is vested with the following powers:

1. Telephone, telegraph, distributed antenna systems (DAS), broadband communications, electric and other lines, as well as gas, water, sewerage, oil and other pipelines, to be operated by public utilities as defined in G.S. 62-3(23) and which are regulated under Chapter 62 of the General Statutes, or by municipalities, counties, any entity created by one or more political subdivisions for the purpose of supplying any such utility services, electric membership corporations, telephone membership corporations, or any combination thereof; and

2. Nonutility owned or operated communications or data transmission infrastructure.

The Department retains full power to widen, relocate, change or alter the grade or location thereof, or alter the location or configuration of such lines or systems above or below ground. No agreement for use of Department right-of-way under this sub-subdivision shall abrogate the Department's ownership and control of the right-of-way. The Department is authorized to adopt policies and rules necessary to implement the provisions of this sub-subdivision.

d. To change or relocate any existing roads that the Department of Transportation may now own or may acquire.

e. To acquire by gift, purchase, or otherwise, any road or highway, or tract of land or other property whatsoever that may be necessary for a State transportation system and adjacent utility rights-of-way.

f. Provided, all changes or alterations authorized by this subdivision shall be subject to the provisions of G.S. 136-54 to 136-63, to the extent that said sections are applicable.

g. Provided, that nothing in this Chapter shall be construed to authorize or permit the Department of Transportation to allow or pay anything to any county, township, city or town, or to any board of commissioners or governing body thereof, for any existing road or part of any road heretofore constructed by any
such county, township, city or town, unless a contract has already been entered into with the Department of Transportation.

(3) To provide for such road materials as may be necessary to carry on the work of the Department of Transportation, either by gift, purchase, or condemnation: Provided, that when any person, firm or corporation owning a deposit of sand, gravel or other material, necessary, for the construction of the system of State highways provided herein, has entered into a contract to furnish the Department of Transportation any of such material, at a price to be fixed by said Department of Transportation, thereafter the Department of Transportation shall have the right to condemn the necessary right-of-way under the provisions of Article 9 of Chapter 136, to connect said deposit with any part of the system of State highways or public carrier, provided that easements to material deposits, condemned under this Article shall not become a public road and the condemned easement shall be returned to the owner as soon as the deposits are exhausted or abandoned by the Department of Transportation.

(4) To enforce by mandamus or other proper legal remedies all legal rights or causes of action of the Department of Transportation with other public bodies, corporations, or persons.

(5) To make rules, regulations and ordinances for the use of, and to police traffic on, the State highways, and to prevent their abuse by individuals, corporations and public corporations, by trucks, tractors, trailers or other heavy or destructive vehicles or machinery, or by any other means whatsoever, and to provide ample means for the enforcement of same; and the violation of any of the rules, regulations or ordinances so prescribed by the Department of Transportation shall constitute a Class 1 misdemeanor: Provided, no rules, regulations or ordinances shall be made that will conflict with any statute now in force or any ordinance of incorporated cities or towns, except as provided in G.S. 136-27.4.

(6) To establish a traffic census to secure information about the relative use, cost, value, importance, and necessity of roads forming a part of the State highway system, which information shall be a part of the public records of the State, and upon which information the Department of Transportation shall, after due deliberation and in accordance with these established facts, proceed to order the construction of the particular highway or highways.

(7) To assume full and exclusive responsibility for the maintenance of all roads other than streets in towns and cities, forming a part of the State highway system from date of acquiring said roads. The Department of Transportation shall have authority to maintain all streets constructed by the Department of Transportation in towns of less than 3,000 population by the last census, and such other streets as may be constructed in towns and cities at the expense of the Department of Transportation, whenever in the opinion of the Department of Transportation it is necessary and proper so to do.

(8) To give suitable names to State highways and change the names as determined by the Board of Transportation of any highways that shall become a part of the State system of highways.

(9) To employ appropriate means for properly selecting, planting and protecting trees, shrubs, vines, grasses or legumes in the highway right-of-way in the promotion of erosion control, landscaping and general protection of said highways; to acquire by gift or otherwise land for and to construct, operate and maintain roadside parks, picnic areas, picnic tables, scenic overlooks and other appropriate turnouts for the safety and convenience of highway users; and to cooperate with municipal or county authorities, federal agencies, civic bodies and individuals in the furtherance of those objectives. None of the roadside parks, picnic areas, picnic tables, scenic overlooks or other turnouts, or any part of the highway right-of-way shall be used for commercial purposes except for any of the following:

a. Materials displayed in welcome centers in accordance with G.S. 136-89.56.

b. Vending machines permitted by the Department of Transportation and placed by the Division of Services for the Blind, Department of Health and Human Services, as the State licensing agency designated pursuant to Section 2(a)(5) of the Randolph-Sheppard Act (20 USC 107a(a)(5)). The Department of Transportation shall regulate the placing of the vending machines in highway rest areas and shall regulate the articles to be dispensed.

c. Activities permitted by a local government pursuant to an ordinance meeting the requirements of G.S. 136-27.4.

Every other use or attempted use of any of these areas for commercial purposes shall constitute a Class 1 misdemeanor, and each day's use shall constitute a separate offense.

(10) To make proper and reasonable rules, regulations and ordinances for the placing or erection of telephone, telegraph, electric and other lines, above or below ground, wireless facilities, signboards, fences, gas, water, sewerage, oil, or other pipelines, and other similar obstructions that may, in the opinion of the Department of Transportation, contribute to the hazard upon any of the said highways or in any way interfere with the same, and to make reasonable rules and regulations for the proper control thereof. And whenever the order of the said Department of Transportation shall require the removal of, or changes in, the location of telephone, telegraph, electric or other lines, wireless facilities, signboards, fences, gas, water, sewerage, oil, or other pipelines, or other similar obstructions, the owners thereof shall at their own expense, except as provided in G.S. 136-19.5(c), move or change the same to conform to the order of said Department of Transportation. Any violation of such rules and regulations or noncompliance with such orders shall constitute a Class 1 misdemeanor. For purposes of this subdivision, "wireless facilities" shall have the definition set forth in G.S. 160A-400.51.

(11) To regulate, abandon and close to use, grade crossings on any road designated as part of the State highway system, and whenever a public highway has been designated as part of the...
State highway system and the Department of Transportation, in order to avoid a grade crossing or crossings with a railroad or railroads, continues or constructs the said road on one side of the railroad or railroads, the Department of Transportation shall have power to abandon and close to use such grade crossings; and whenever an underpass or overhead bridge is substituted for a grade crossing, the Department of Transportation shall have power to close to use and abandon such grade crossing and any other crossing adjacent thereto.

(12) The Department of Transportation shall have such powers as are necessary to comply fully with the provisions of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991), as amended, and all other federal aid acts and programs the Department is authorized to administer. The said Department of Transportation is hereby authorized to enter into all contracts and agreements with the United States government relating to survey, construction, improvement and maintenance of roads, urban area traffic operations studies and improvement projects on the streets on the State highway system and on the municipal system in urban areas, under the provisions of the present or future congressional enactments, to submit such scheme or program of construction or improvement and maintenance as may be required by the Secretary of Transportation or otherwise provided by federal acts, and to do all other things necessary to carry out fully the cooperation contemplated and provided for by present or future aid acts of Congress for the construction or improvement and maintenance of federal aid of State highways. The good faith and credit of the State are further hereby pledged to make available funds necessary to meet the requirements of the acts of Congress, present or future, appropriating money to construct and improve rural post roads and apportioned to this State during each of the years for which federal funds are now or may hereafter be apportioned by the said act or acts, to maintain the roads constructed or improved with the aid of funds so appropriated and to make adequate provisions for carrying out such construction and maintenance. The good faith and credit of the State are further pledged to maintain such roads now built with federal aid and hereafter to be built and to make adequate provisions for carrying out such maintenance. Upon request of the Department of Transportation and in order to enable it to meet the requirements of acts of Congress with respect to federal aid funds apportioned to the State of North Carolina, the State Treasurer is hereby authorized, with the approval of the Governor and Council of State, to issue short term notes from time to time, and in anticipation of State highway revenue, and to be payable out of State highway revenue for such sums as may be necessary to enable the Department of Transportation to meet the requirements of said federal aid appropriations, but in no event shall the outstanding notes under the provisions of this section amount to more than two million dollars ($2,000,000).

(12a) The Department of Transportation shall have such powers as are necessary to establish, administer, and receive federal funds for a transportation infrastructure banking program as authorized by the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, as amended, and the National Highway System Designation Act of 1995, Pub. L. 104-59, as amended. The Department of Transportation is authorized to apply for, receive, administer, and comply with all conditions and requirements related to federal financial assistance necessary to fund the infrastructure banking program. The infrastructure banking program established by the Department of Transportation may utilize federal and available State funds for the purpose of providing loans or other financial assistance to governmental units, including toll authorities, to finance the costs of transportation projects authorized by the above federal aid acts. Such loans or other financial assistance shall be subject to repayment and conditioned upon the establishment of such security and the payment of such fees and interest rates as the Department of Transportation deems necessary. The Department of Transportation is authorized to apply a municipality’s share of funds allocated under G.S. 136-41.1 or G.S. 136-44.20 as necessary to ensure repayment of funds advanced under the infrastructure banking program. The Department of Transportation shall establish jointly, with the State Treasurer, a separate infrastructure banking account with necessary fiscal controls and accounting procedures. Funds credited to this account shall not revert, and interest and other investment income shall accrue to the account and may be used to provide loans and other financial assistance as provided under this subdivision. The Department of Transportation may establish such rules and policies as are necessary to establish and administer the infrastructure banking program. The infrastructure banking program authorized under this subdivision shall not modify the formula for the distribution of funds established by G.S. 136-189.11. Governmental units may apply for loans and execute debt instruments payable to the State in order to obtain loans or other financial assistance provided for in this subdivision. The Department of Transportation shall require that applicants shall pledge as security for such obligations revenues derived from operation of the benefited facilities or systems, other sources of revenue, or their faith and credit, or any combination thereof. The faith and credit of such governmental units shall not be pledged or be deemed to have been pledged unless the requirements of Article 4, Chapter 159 of the General Statutes have been met. The State Treasurer, with the assistance of the Local Government Commission, shall develop and adopt appropriate debt instruments for use under this subdivision. The Local Government Commission shall develop and adopt appropriate procedures for the delivery of debt instruments to the State without any public bidding therefor. The Local Government Commission shall review and approve proposed loans to applicants pursuant to this subdivision under the provisions of Articles 4 and 5, Chapter 159 of the General Statutes, as if the issuance of bonds was proposed, so far as those provisions are applicable. Loans authorized by this subdivision shall be outstanding debt for the purpose of Article 10, Chapter 159 of the General Statutes.

(12b) To issue “GARVEE” bonds (Grant Anticipation Revenue Vehicles) or other eligible debt-financing instruments to finance federal-aid highway projects using federal funds to pay a por-
tion of principal, interest, and related bond issuance costs, as authorized by 23 U.S.C. § 122, as amended (the National Highway System Designation Act of 1995, Pub. L. 104-59). These bonds shall be issued by the State Treasurer on behalf of the Department and shall be issued pursuant to an order adopted by the Council of State under G.S. 159-88. The State Treasurer shall develop and adopt appropriate debt instruments, consistent with the terms of the State and Local Government Revenue Bond Act, Article 5 of Chapter 159 of the General Statutes, for use under this subdivision. Prior to issuance of any “GARVEE” or other eligible debt instrument using federal funds to pay a portion of principal, interest, and related bond issuance costs, the State Treasurer shall determine (i) that the total outstanding principal of such debt does not exceed the total amount of federal transportation funds authorized to the State in the prior federal fiscal year; or (ii) that the maximum annual principal and interest of such debt does not exceed fifteen percent (15%) of the expected average annual federal revenue shown for the period in the most recently adopted Transportation Improvement Program. Notes issued under the provisions of this subdivision may not be deemed to constitute a debt or liability of the State or of any political subdivision thereof, or a pledge of the full faith and credit of the State or of any political subdivision thereof, but shall be payable solely from the funds and revenues pledged therefor. All the notes shall contain on their face a statement to the effect that the State of North Carolina shall not be obligated to pay the principal or the interest on the notes, except from the federal transportation fund revenues as shall be provided by the documents governing the revenue note issuance, and that neither the faith and credit nor the taxing power of the State of North Carolina or of any of its political subdivisions is pledged to the payment of the principal or interest on the notes. The issuance of notes under this Part shall not directly or indirectly or contingently obligate the State or any of its political subdivisions to levy or to pledge any form of taxation whatever or to make any appropriation for their payment.

(13) The Department of Transportation may construct and maintain all walkways and driveways within the Mansion Square in the City of Raleigh and the Western Residence of the Governor in the City of Asheville including the approaches connecting with the city streets, and any funds expended therefor shall be a charge against general maintenance.

(14) The Department of Transportation shall have authority to provide roads for the connection of airports in the State with the public highway system, and to mark the highways and erect signals along the same for the guidance and protection of aircraft.

(15) The Department of Transportation shall have authority to provide facilities for the use of waterborne traffic and recreational uses by establishing connections between the highway system and the navigable and nonnavigable waters of the State by means of connecting roads and piers. Such facilities for recreational purposes shall be funded from funds available for safety or enhancement purposes.

(16) The Department of Transportation, pursuant to a resolution of the Board of Transportation, shall have authority, under the power of eminent domain and under the same procedure as provided for the acquisition of rights-of-way, to acquire title in fee simple to parcels of land for the purpose of exchanging the same for other real property to be used for the establishment of rights-of-way or for the widening of existing rights-of-way or the clearing of obstructions that, in the opinion of the Department of Transportation, constitute dangerous hazards at intersections. Real property may be acquired for such purposes only when the owner of the property needed by the Department of Transportation has agreed in writing to accept the property so acquired in exchange for that to be used by the Department of Transportation, and when, in the opinion of the Department of Transportation, an economy in the expenditure of public funds and the improvement and convenience and safety of the highway can be effected thereby.

(17) The Department of Transportation is hereby authorized and required to maintain and keep in repair, sufficient to accommodate the public school buses, roads leading from the state-maintained public roads to all public schools and public school buildings to which children are transported on public school buses to and from their homes. Said Department of Transportation is further authorized to construct, pave, and maintain school bus driveways and sufficient parking facilities for the school buses at those schools. The Department of Transportation is further authorized to construct, pave, and maintain all other driveways and entrances to the public schools leading from public roads not required in the preceding portion of this subdivision.

(18) To cooperate with appropriate agencies of the United States in acquiring rights-of-way for and in the construction and maintenance of flight strips or emergency landing fields for aircraft adjacent to State highways.

(19) To prohibit the erection of any informational, regulatory, or warning signs within the right-of-way of any highway project built within the corporate limits of any municipality in the State where the funds for such construction are derived in whole or in part from federal appropriations expended by the Department of Transportation, unless such signs have first been approved by the Department of Transportation.

(20) The Department of Transportation is hereby authorized to maintain and keep in repair a suitable way of ingress and egress to all public or church cemeteries or burial grounds in the State notwithstanding the fact that said road is not a part of the state-maintained system of roads. For the purpose of this subdivision a public or church cemetery or burial ground shall be defined as a cemetery or burial ground in which there are buried or permitted to be buried deceased persons of the community in which said cemetery or burial ground is located, but shall not mean a privately owned cemetery operated for profit or family burial plots.

(21) The Department of Transportation is hereby authorized and directed to remove all dead animals from the traveled por-
tion and rights-of-way of all primary and secondary roads and to dispose of such animals by burial or otherwise. In cases where there is evidence of ownership upon the body of any dead dog, the Department of Transportation shall take reasonable steps to notify the owner thereof by mail or other means.

(22) No airport or aircraft landing area shall be constructed or altered where such construction or alteration when undertaken or completed may reasonably affect motor vehicle operation and safety on adjoining public roads except in accordance with a written permit from the Department of Transportation or its duly authorized officers. The Department of Transportation is authorized and empowered to regulate airport and aircraft landing area construction and alteration in order to preserve safe clearances between highways and airways and the Department of Transportation is authorized and empowered to make rules, regulations, and ordinances for the preservation of safe clearances between highways and airways. The Department of Transportation shall be responsible for determining safe clearances and shall fix standards for said determination which shall not exceed the standards adopted for similar purposes by the United States Bureau of Public Roads under the Federal Aid Highway Act of 1958. Any person, firm, corporation or airport authority constructing or altering an airport or aircraft landing area without obtaining a written permit as herein provided, or not in compliance with the terms of such permit, or violating the provisions of the rules, regulations or ordinances promulgated under the authority of this section shall be guilty of a Class 1 misdemeanor; provided, that this subdivision shall not apply to publicly owned and operated airports and aircraft landing areas receiving federal funds and subject to regulation by the Federal Aviation Authority.

(23) When in the opinion of the Department of Transportation an economy in the expenditure of public funds can be effected thereby, the Department of Transportation shall have authority to enter into agreements with adjoining states regarding the planning, location, engineering, right-of-way acquisition and construction of roads and bridges connecting the North Carolina State highway system with public roads in adjoining states, and the Department of Transportation shall have authority to do planning, surveying, locating, engineering, right-of-way acquisition and construction on short segments of roads and bridges in adjoining states with the cost of said work to be reimbursed by the adjoining state, and may also enter into agreements with adjoining states providing for the performance of and reimbursement to the adjoining state of the cost of such work done within the State of North Carolina by the adjoining state: Provided, that the Department of Transportation shall retain the right to approve any contract for work to be done in this State by an adjoining state for which the adjoining state is to be reimbursed.

(24) The Department of Transportation is further authorized to pave driveways leading from state-maintained roads to rural fire district firehouses which are approved by the North Carolina Fire Insurance Rating Bureau and to facilities of rescue squads furnishing ambulance services which are approved by the North Carolina State Association of Rescue Squads, Inc.

(25) The Department of Transportation is hereby authorized and directed to design, construct, repair, and maintain paved streets and roads upon the campus of each of the State's institutions of higher education, at state-owned hospitals for the treatment of tuberculosis, state-owned orthopedic hospitals, juvenile correction centers, mental health hospitals and retarded centers, schools for the deaf, and schools for the blind, when such construction, maintenance, or repairs have been authorized by the General Assembly in the appropriations bills enacted by the General Assembly. Cost for such construction, maintenance, and repairs shall be borne by the Highway Fund. Upon the General Assembly authorizing the construction, repair, or maintenance of a paved road or drive upon any of the above-mentioned institutions, the Department of Transportation shall give such project priority to insure that it shall be accomplished as soon as feasible, at the minimum cost to the State, and in any event during the biennium for which the authorization shall have been given by the General Assembly.

(26) The Department of Transportation, at the request of a representative from a board of county commissioners, is hereby authorized to acquire by condemnation new or additional right-of-way to construct, pave or otherwise improve a designated State-maintained secondary road upon presentation by said board to the Department of Transportation of a duly verified copy of the minutes of its meeting showing approval of such request by a majority of its members and by the further presentation of a petition requesting such improvement executed by the abutting owners whose frontage on said secondary road shall equal or exceed seventy-five percent (75%) of the linear frontage along the secondary road sought to be improved. This subdivision shall not be construed to limit the authority of the Department of Transportation to exercise the power of eminent domain.

(27) The Department of Transportation is authorized to establish policies and promulgate rules providing for voluntary local government, property owner or highway user participation in the costs of maintenance or improvement of roads which would not otherwise be necessary or would not otherwise be performed by the Department of Transportation and which will result in a benefit to the property owner or highway user. By way of illustration and not as a limitation, such costs include those incurred in connection with drainage improvements or maintenance, driveway connections, dust control on unpaved roads, surfacing or paving of roads and the acquisition of rights-of-way. Local government, property owner and highway user participation can be in the form of materials, money, or land (for right-of-way) as deemed appropriate by the Department of Transportation. The authority of this section shall not be used to authorize, construct or maintain toll roads or bridges.

(28) The Department of Transportation may obtain land, either by gift, lease or purchase which shall be used for the construction and maintenance of ridesharing parking lots. The Depart-
ment may design, construct, repair, and maintain ridesharing parking facilities.

(29) The Department of Transportation may establish policies and adopt rules about the size, location, direction of traffic flow, and the construction of driveway connections into any street or highway which is a part of the State Highway System. The Department of Transportation may require the construction and public dedication of acceleration and deceleration lanes, and traffic storage lanes and medians by others for the driveway connections into any United States route, or North Carolina route, and on any secondary road route with an average daily traffic volume of 4,000 vehicles per day or more.

(29a) To coordinate with all public and private entities planning schools to provide written recommendations and evaluations of driveway access and traffic operational and safety impacts on the State highway system resulting from the development of the proposed sites. All public and private entities shall, upon acquiring land for a new school or prior to beginning construction of a new school, relocating a school, or expanding an existing school, request from the Department a written evaluation and written recommendations to ensure that all proposed access points comply with the criteria in the current North Carolina Department of Transportation “Policy on Street and Driveway Access”. The Department shall provide the written evaluation and recommendations within a reasonable time, which shall not exceed 60 days. This subdivision applies to improvements that are not located on the school property. The Department shall have the power to grant final approval of any project design under this subdivision. To facilitate completion of the evaluation and recommendations within the required 60 days, in lieu of the evaluation by the Department, schools may engage an independent traffic engineer prequalified by the Department. The resulting evaluation and recommendations from the independent traffic engineer shall also fulfill any similar requirements imposed by a unit of local government. This subdivision shall not be construed to require the public or private entities planning schools to meet the recommendations made by the Department or the independent traffic engineer, except those highway improvements that are required for safe ingress and egress to the State highway system, pursuant to subdivision (29) of this section, and that are physically connected to a driveway on the school property. The total cost of any improvements to the State highway system provided by a school pursuant to this subdivision, including those improvements pursuant to subdivision (29) of this section, shall be reimbursed by the Department. Any agreement between a school and the Department to make improvements to the State highway system shall not include a requirement for acquisition of right-of-way by the school, unless the school is owned by an entity that has eminent domain power. Nothing in this subdivision shall preclude the Department from entering into an agreement with the school whereby the school installs the agreed upon improvements and the Department provides full reimbursement for the associated costs incurred by the school, including design fees and any costs of right-of-way or easements. The term “school,” as used in this subdivision, means any facility engaged in the educational instruction of children in any grade or combination of grades from kindergarten through the twelfth grade at which attendance satisfies the compulsory attendance law and includes charter schools authorized under G.S. 115C-218.5. The term “improvements,” as used in this subdivision, refers to all facilities within the right-of-way required to be installed to satisfy the road cross-section requirements depicted upon the approved plans. These facilities shall include roadway construction, including pavement installation and medians; ditches and shoulders; storm drainage pipes, culverts, and related appurtenances; and, where required, curb and gutter; signals, including pedestrian safety signals; street lights; sidewalks; and design fees. Improvements shall not include any costs for public utilities.

(29b) The Department of Transportation shall consider exceptions to the sight distance requirement for driveway locations in instances where the curves of the road are close and frequent. Exceptions shall be granted in instances where sufficient sight distance can be provided or established through other means such as advisory speed signs, convex mirrors, and advanced warning signs. When appropriate, the Department shall consider lowering the speed limit on the relevant portion of the road. The Department may require a driveway permit applicant to cover the cost of installing the appropriate signage around the driveway, including speed limit reduction and driveway warning signs, and may also require the applicant to install and maintain convex or other mirrors to increase the safety around the driveway location.

This subdivision applies only to sections of roadway where the minimum sight distance as defined in the published “Policy on Street and Driveway Access to North Carolina Highways” is not available for a proposed driveway.

(30) Consistent with G.S. 130A-309.14(a1), the Department of Transportation shall review and revise its bid procedures and specifications set forth in Chapter 136 of the General Statutes to encourage the purchase or use of reusable, refillable, repairable, more durable, and less toxic supplies and products. The Department of Transportation shall require the purchase or use of such supplies and products in the construction and maintenance of highways and bridges to the extent that the use is practicable and cost-effective. The Department shall prepare an annual report on October 1 of each year to the Environmental Review Commission as required under G.S. 130A-309.14(a1).

(31) The Department of Transportation is authorized to designate portions of highways as scenic highways, and combinations of portions of highways as scenic byways, for portions of those highways that possess unusual, exceptional, or distinctive scenic, recreational, historical, educational, scientific, geological, natural, wildlife, cultural or ethnic features. The Department shall remove, upon application, from any existing or future scenic highway or scenic byway designation, highway sections that:

a. Have no scenic value,

b. Have been designated or would be so designated solely to preserve system continuity, and
c. Are adjacent to property on which is located one or more permanent structures devoted to a commercial or industrial activity and on which a commercial or industrial activity is actually conducted, in an unzoned area or an area zoned commercial or industrial pursuant to a State or local zoning ordinance or regulation, except for commercial activity related to tourism or recreation.

The Department shall adopt rules and regulations setting forth the criteria and procedures for the designation of scenic highways and scenic byways under this subsection.

Those portions of highways designated as scenic by the Department prior to July 1, 1993, are considered to be designated as scenic highways and scenic byways under this subsection but the Department shall remove from this designation portions of those highway sections that meet the criteria set forth in this subsection, if requested.

(32) The Department of Transportation may perform dredging services, on a cost reimbursement basis, for a unit of local government if the unit cannot obtain the services from a private company at a reasonable cost. A unit of local government is considered to be unable to obtain dredging services at a reasonable cost if it solicits bids for the dredging services in accordance with Article 8 of Chapter 143 of the General Statutes and does not receive a bid, considered by the Department of Transportation Engineering Staff, to be reasonable.

(33) The Department of Transportation is empowered and directed, from time to time, to carefully examine into and inspect the condition of each railroad, its equipment and facilities, in regard to the safety and convenience of the public and the railroad employees. If the Department finds any equipment or facilities to be unsafe, it shall at once notify the railroad company and require the company to repair the equipment or facilities.

(34) The Department of Transportation may conduct, in a manner consistent with federal law, a program of accident prevention and public safety covering all railroads and may investigate the cause of any railroad accident. In order to facilitate this program, any railroad involved in an accident that must be reported to the Federal Railroad Administration shall also notify the Department of Transportation of the occurrence of the accident.

(35) To establish rural planning organizations, as provided in Article 17 of this Chapter.

(36) The Department shall have the following powers related to fixed guideway public transportation system safety:


b. The Department shall examine and inspect the condition of each rail fixed guideway public transportation system and its equipment and facilities for the purpose of ensuring the safety and convenience of the public and the rail fixed guideway public transportation system’s employees. If the Department finds any equipment or facilities to be unsafe, it shall at once notify the rail fixed guideway public transportation system and require the rail fixed guideway public transportation system to repair the equipment or facilities.

c. The Department may conduct, in a manner consistent with federal law, a program of accident prevention and public safety covering all rail fixed guideway public transportation systems and may investigate the cause of any rail fixed guideway public transportation system accident. In order to facilitate this program, any rail fixed guideway public transportation system involved in an accident meeting the reporting thresholds defined by the Department shall report the accident to the Department.

d. The Department shall review, approve, oversee, and enforce each rail fixed guideway public transportation system’s implementation of the public transportation system safety plan required pursuant to 49 U.S.C. § 5329(d).

e. The Department shall audit, at least once triennially, each rail fixed guideway public transportation system’s compliance with the public transportation agency safety plan required pursuant to 49 U.S.C. § 5329(d).

f. The Department shall provide, at least once annually, a status report on the safety of the rail fixed guideway public transportation systems overseen by the Department to the Federal Transit Administration, the Governor, and the Board of Directors, or equivalent entity, of any rail fixed guideway public transportation system the Department oversees.

g. The Department shall not receive funding for the activities authorized by sub-subdivisions a. through f. of this subdivision from any rail fixed guideway public transportation systems subject to the Department’s authority pursuant to the provisions of sub-subdivisions a. through f. of this subdivision.

(37) To permit use of and encroachment upon the right-of-way of a State highway or road for the purpose of construction and maintenance of a bridge owned by a private or public entity, if the bridge shall not unreasonably interfere with or obstruct the public use of the right-of-way. Any agreement for an encroachment authorized by this subdivision shall be approved by the Board of Transportation, upon a finding that the encroachment is necessary and appropriate, in the sole discretion of the Board. Locations, plans, and specifications for any pedestrian or vehicular bridge authorized by the Board for construction pursuant to this subdivision shall be approved by the Department of Transportation. For any bridge subject to this subdivision, the Department shall retain the right to reject any plans, specifications, or materials used or proposed to be used, inspect and approve all materials to be used, inspect the construction, maintenance, or repair, and require the replacement, reconstruction, repair, or demolition of any partially or wholly completed bridge that, in the sole discretion of the Department, is unsafe or substandard in design or construction. An encroachment agreement authorized by this subdivision may include a
requirement to purchase and maintain liability insurance in an amount determined by the Department of Transportation. The Department shall ensure that any bridge constructed pursuant to this subdivision is regularly inspected for safety. The owner shall have the bridge inspected every two years by a qualified private engineering firm based on National Bridge Inspection Standards and shall provide the Department copies of the Bridge Inspection Reports where they shall be kept on file. Any bridge authorized and constructed pursuant to this subdivision shall be subject to all other rules and conditions of the Department of Transportation for encroachments.

(38) To enter into agreements with municipalities, counties, governmental entities, or nonprofit corporations to receive funds for the purposes of advancing right-of-way acquisition or the construction schedule of a project identified in the Transportation Improvement Program. If these funds are subject to repayment by the Department, prior to receipt of funds, reimbursement of all funds received by the Department shall be shown in the existing Transportation Improvement Program and shall be reimbursed within the period of the existing Transportation Improvement Program.

(39) To enter into partnership agreements with private entities, and authorized political subdivisions to finance, by tolls, contracts, and other financing methods authorized by law, the cost of acquiring, constructing, equipping, maintaining, and operating transportation infrastructure in this State, and to plan, design, develop, acquire, construct, equip, maintain, and operate transportation infrastructure in this State. An agreement entered into under this subdivision requires the concurrence of the Board of Transportation. The Department shall report to the Chairs of the Joint Legislative Transportation Oversight Committee, the Chairs of the House of Representatives Appropriations Subcommittee on Transportation, and the Chairs of the Senate Appropriations Committee on the Department of Transportation, at the same time it notifies the Board of Transportation of any proposed agreement under this subdivision. No contract for transportation infrastructure subject to such an agreement that commits the Department to make non-rental payments for undisputed capital costs of a completed transportation infrastructure to be made later than 18 months after final acceptance by the Department of such transportation infrastructure shall be executed without approval of the Local Government Commission. Any contracts for construction of highways, roads, streets, and bridges which are awarded pursuant to an agreement entered into under this section shall comply with the competitive bidding requirements of Article 2 of this Chapter.

(39a) a. The Department of Transportation or Turnpike Authority, as applicable, may enter into up to three agreements with a private entity as provided under subdivision (39) of this section for which the provisions of this section apply.

b. A private entity or its contractors must provide performance and payment security in the form and in the amount determined by the Department of Transportation. The form of the performance and payment security may consist of bonds, letters of credit, parent guaranties, or other instruments acceptable to the Department of Transportation.

c. Notwithstanding the provisions of G.S. 143B-426.40A, an agreement entered into under this subdivision may allow the private entity to assign, transfer, sell, hypothecate, and otherwise convey some or all of its right, title, and interest in and to such agreement, and any rights and remedies thereunder, to a lender, bondholder, or any other party. However, in no event shall any such assignment create additional debt or debt-like obligations of the State of North Carolina, the Department, or any other agency, authority, commission, or similar subdivision of the State to any lender, bondholder, entity purchasing a participation in the right to receive the payment, trustee, trust, or any other party providing financing or funding of projects described in this section. The foregoing shall not preclude the Department from making any payments due and owing pursuant to an agreement entered into under this section.

d. Article 6H of Chapter 136 of the General Statutes shall apply to the Department of Transportation and to projects undertaken by the Department of Transportation under subdivision (39) of this section. The Department may assign its authority under that Article to fix, revise, charge, retain, enforce, and collect tolls and fees to the private entity.

e. Any contract under this subdivision or under Article 6H of this Chapter for the development, construction, maintenance, or operation of a project shall provide for revenue sharing, if applicable, between the private party and the Department, and revenues derived from such project may be used as set forth in G.S. 136-89.188(a), notwithstanding the provisions of G.S. 136-89.188(d). Excess toll revenues from a Turnpike project shall be used for the funding or financing of transportation projects within the corridor where the Turnpike Project is located. For purposes of this subdivision, the term "excess toll revenues" means those toll revenues derived from a Turnpike Project that are not otherwise used or allocated to the Authority or a private entity pursuant to this subdivision, notwithstanding the provisions of G.S. 136-89.188(d). For purposes of this subdivision, the term "corridor" means (i) the right-of-way limits of the Turnpike Project and any facilities related to the Turnpike Project or any facility or improvement necessary for the use, design, construction, operation, maintenance, repair, rehabilitation, reconstruction, or financing of a Turnpike Project; (ii) the right-of-way limits of any subsequent improvements, additions, or extension to the Turnpike Project and facilities related to the Turnpike projects, including any improvements necessary for the use, design, construction, operation, maintenance, repair, rehabilitation, reconstruction, or financing of those subsequent improvements, additions, or extensions to the Turnpike Project; and (iii) roads used for ingress or egress to the toll facility or roads that intersect with the toll facility, whether by ramps or separated grade facility, and located within one mile in any direction.
f. Agreements entered into under this subdivision shall comply with the following additional provisions:

1. The Department shall solicit proposals for agreements.

2. Agreement shall be limited to no more than 50 years from the date of the beginning of operations on the toll facility.

3. Notwithstanding the provisions of G.S. 136-89.183(a)(5), all initial tolls or fees to be charged by a private entity shall be reviewed by the Turnpike Authority Board. Prior to setting toll rates, either a set rate or a minimum and maximum rate set by the private entity, the private entity shall hold a public hearing on the toll rates, including an explanation of the toll setting methodology, in accordance with guidelines for the hearing developed by the Department. After tolls go into effect, the private entity shall report to the Turnpike Authority Board 30 days prior to any increase in toll rates or change in the toll setting methodology by the private entity from the previous toll rates or toll setting methodology last reported to the Turnpike Authority Board.

4. Financial advisors and attorneys retained by the Department on contract to work on projects pursuant to this subsection shall be subject to State law governing conflicts of interest.

5. 60 days prior to the signing of a concession agreement subject to this subdivision, the Department shall report to the Joint Legislative Transportation Oversight Committee on the following for the presumptive concessionaire:

I. Project description.

II. Number of years that tolls will be in place.

III. Name and location of firms and parent companies, if applicable, including firm responsibility and stake, and assessment of audited financial statements.

IV. Analysis of firm selection criteria.

V. Name of any firm or individual under contract to provide counsel or financial analysis to the Department or Authority. The Department shall disclose payments to these contractors related to completing the agreement under this subdivision.

VI. Demonstrated ability of the project team to deliver the project, by evidence of the project team’s prior experience in delivering a project on schedule and budget, and disclosure of any unfavorable outcomes on prior projects.

VII. Detailed description of method of finance, including sources of funds, State contribution amounts, including schedule of availability payments and terms of debt payments.

VIII. Information on assignment of risk shared or assigned to State and private partner.

IX. Information on the feasibility of finance as obtained in traffic and revenue studies.

6. The Turnpike Authority annual report under G.S. 136-89.193 shall include reporting on all revenue collections associated with projects subject to this subdivision under the Turnpike Authority.

7. The Department shall develop standards for entering into comprehensive agreements with private entities under the authority of this subdivision and report those standards to the Joint Legislative Transportation Oversight Committee on or before October 1, 2013.

(40) To expand public access to coastal waters in its road project planning and construction programs. The Department shall work with the Wildlife Resources Commission, other State agencies, and other government entities to address public access to coastal waters along the roadways, bridges, and other transportation infrastructure owned or maintained by the Department. The Department shall adhere to all applicable design standards and guidelines in implementation of this enhanced access.

(41) The Department shall, prior to the beginning of construction, determine whether all sidewalks and other facilities primarily intended for the use of pedestrians and bicycles that are to be constructed within the right-of-way of a public street or highway that is a part of the State highway system or an urban highway system must be constructed of permeable pavement. “Permeable pavement” means paving material that absorbs water or allows water to infiltrate through the paving material. Permeable pavement materials include porous concrete, permeable interlocking concrete pavers, concrete grid pavers, porous asphalt, and any other material with similar characteristics. Compacted gravel shall not be considered permeable pavement.

(42) The Department shall develop and utilize a process for selection of transportation projects that is based on professional standards in order to most efficiently use limited resources to benefit all citizens of the State. The strategic prioritization process should be a systematic, data-driven process that includes a combination of quantitative data, qualitative input, and multi-modal characteristics, and should include local input. The Department shall develop a process for standardizing or approving local methodology used in Metropolitan Planning Organization and Rural Transportation Planning Organization prioritization.

(43) For the purposes of financing an agreement under subdivision (39a) of this section, the Department of Transportation may act as a conduit issuer for private activity bonds to the extent the bonds do not constitute a debt obligation of the State. The issuance of private activity bonds under this subdivision and any related actions shall be governed by The State and Local Government Revenue Bond Act, Article 5 of Chapter 159 of the General Statutes, with G.S. 159-88 satisfied by adherence to the requirements of subdivision (39a) of this section.

(44) The Department is authorized to contract for sponsorship arrangements for Department operations and may solicit contracts for such arrangements pursuant to Article 2 of this Chapter. All amounts collected and all savings realized as a result of these sponsorship arrangements shall be used by the Department toward funding of maintenance activities.

(44a) Where the Department owns or leases the passenger rail facility, owns or leases the rail equipment, or holds leasehold or license rights for the purpose of operating passenger stations,
the Department may operate or contract for the following receipt-generating activities and use the proceeds to fund passenger rail operations:

a. Where the Department owns the passenger rail facility or owns or leases the rail equipment, operation of concessions on State-funded passenger trains and at passenger rail facilities to provide to passengers food, drink, and other refreshments, personal comfort items, Internet access, and souvenirs publicizing the passenger rail system.

b. Where the Department holds leasehold or license rights for the purpose of operating passenger stations, operation of concessions at rail passenger facilities to provide food, drink, and other refreshments, personal comfort items, Internet access, and souvenirs publicizing the passenger rail system, in accordance with the terms of the leasehold or license.

c. Advertising on or within the Department’s passenger rail equipment or facility, including display advertising and advertising delivered to passengers through the use of video monitors, public address systems installed in passenger areas, and other electronic media.

d. The sale of naming rights to Department-owned passenger rail equipment or facilities.

(45) The Department shall not transfer ownership of a State-owned concrete arch bridge to any public, private, or nonprofit entity as part of any bridge relocation or reuse program project unless the entity assumes all liability associated with the bridge and posts a bond or other financial assurance acceptable to the Department to cover the present value of future maintenance costs, as well as any right-of-way or other additional costs if the bridge transfer would require the Department to change the planned route of any replacement structure.

North Dakota


The jury, or court, or referee, if a jury is waived, must hear such legal testimony as may be offered by any of the parties to the proceedings and thereupon must ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty and of each and every separate estate or interest therein. If it consists of different parcels, the value of each parcel and each estate and interest therein shall be separately assessed.

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

3. If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.

4. If the property is taken or damaged by the state or a public corporation, separately, how much the portion not sought to be condemned and each estate or interest therein will be benefited, if at all, by the construction of the improvement proposed by the plaintiff, and if the benefit shall be equal to the damages assessed under subsections 2 and 3, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but if the benefit shall be less than the damages so assessed the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value of the portion taken.

5. As far as practicable, compensation must be assessed separately for property actually taken and for damages to that which is not taken.

Ohio


(A) All appropriations of real property shall be made pursuant to sections 163.01 to 163.22 of the Revised Code, except as otherwise provided in this section, as otherwise provided to abate a health nuisance or because of a public exigency as provided in division (B) of section 307.08, 6101.181, 6115.221, 6117.39, or 6119.11 or division (D) of section 504.19 of the Revised Code, or as otherwise provided to abate a health nuisance or because of a public exigency as provided in a municipal charter or ordinance.

(B) The director of transportation may appropriate real property pursuant to sections 163.01 to 163.22 of the Revised Code or as otherwise provided by law.

(C) Notwithstanding any authority to appropriate real property other than under sections 163.01 to 163.22 of the Revised Code, any proceeding to appropriate real property is subject to division (B) of section 163.21 of the Revised Code.

(D) Any instrument by which an agency acquires real property pursuant to this section shall include all of the following:

1. The name of the agency that has the use and benefit of the real property in the manner required by section 5301.012 of the Revised Code;

2. A statement of the purpose of the appropriation as provided with the appropriation petition;

3. A statement that the prior owner possesses a right of repurchase pursuant to section 163.211 of the Revised Code if the agency decides not to use the property for the purpose stated in the appropriation petition and the owner provides timely notice of a desire to repurchase. Nothing in this section affects the authority of the director of transportation to convey unneeded property pursuant to division (F) of section 5501.34 of the Revised Code.

(E) Nothing in this chapter precludes any person from voluntarily conveying a property to an agency that is considering appropriating the property or that offers to purchase the property under threat of appropriation. Any such voluntary conveyance of a property to an agency is deemed for all purposes to be a sale under the threat of appropriation for a public use. This divi-
sion applies to a voluntary conveyance to an agency regardless of whether the property is a blighted property or is located in a blighted area, or the property subsequently could be found for any reason not to qualify for appropriation by the agency.

**Ohio Rev. Code Ann. § 5593.21 (2018):**
Any municipal corporation or other political subdivision, and all public agencies and commissions of the state notwithstanding any contrary law may lease, lend, grant, or convey to a bridge commission, at its request, upon such terms as the proper authorities of such municipal corporations, other political subdivisions, or public agencies and commissions of the state determines (determine) reasonable and fair, and without the necessity for an advertisement, order of court, or other action or formality, other than the regular and formal action of the authorities concerned, any real property which is necessary or convenient to the effectuation of the authorized purposes of the commission, including public roads and other real property already devoted to public use.

On or before the first day of February in each year the commission shall make an annual report of its activities for the preceding calendar year to the governor and the general assembly. Each such report shall set forth a complete operating and financial statement covering the commission's operations during the year.

The commission shall submit a copy of its proposed annual budget for each calendar year to the general assembly, the office of budget and management, and the legislative budget office of the legislative service commission at the same time such budget is submitted to the trustees of the commission's bond holders.

The commission shall cause an audit of its books and accounts to be made at least once each year by certified public accountants and cost thereof may be treated as a part of the cost of construction or of operations of any bridges then in operation or in course of construction, such cost to be apportioned among said bridges in the discretion of the commission, but not in contravention of any existing trust agreement to which the commission is a party.

**Oregon**

(1) If real property upon which utility facilities are located is necessary for city street, public road or state highway location, relocation, construction, reconstruction, betterment or maintenance, and any portion of the real property is likewise required by the utility for the proper operation of its business, but the utility is willing to convey the real property to the state for city street, public road or state highway purposes in exchange for other real property within a reasonable distance, the state, through the Department of Transportation, may acquire by purchase, agreement or by the exercise of the power of eminent domain, other real property, except that of another utility, within a reasonable distance. After having acquired such real property, the state, through the department, may convey it to the utility in exchange for the real property required from the utility for city street, public road or state highway purposes. The difference in the value of the respective real properties shall be considered by the department in making the exchange.

(2) ORS 366.332 and this section do not vest in any utility any right, title or interest in any city street, public road, state highway or other public property.

**Pennsylvania**

(a) Just compensation.—Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected by the condemnation and the fair market value of the property interest remaining immediately after the condemnation and as affected by the condemnation.

(b) Urban development or redevelopment condemnation.—In the case of the condemnation of property in connection with any urban development or redevelopment project, which property is damaged by subsidence due to failure of surface support resulting from the existence of mine tunnels or passageways under the property or by reason of fires occurring in mine tunnels or passageways or of burning coal refuse banks, the damage resulting from the subsidence or underground fires or burning coal refuse banks shall be excluded in determining the fair market value of the condemnee's entire property interest immediately before the condemnation.

(c) Value of property damaged by natural disaster.

(1) In the case of the condemnation of property in connection with any program or project which property is damaged by any natural disaster, the damage resulting from the natural disaster shall be excluded in determining fair market value of the condemnee's entire property interest immediately before the condemnation.

(2) This subsection applies only where the damage resulting from the natural disaster has occurred within five years prior to the initiation of negotiations for or notice of intent to acquire or order to vacate the property and during the ownership of the property by the condemnee. The damage to be excluded shall include only actual physical damage to the property for which the condemnee has not received any compensation or reimbursement.

(a) Title to any property condemned by the Commission shall be taken in the name of the Commission. Prior to physical entry upon the land, the Commission shall be under no obligation to accept and pay for any property condemned or any costs incidental to any condemnation proceedings: Provided, however, That in any condemnation proceedings, the court having jurisdiction of the suit, action or proceeding may make such orders as may be just to the Commission and to the owners of the prop-
erty to be condemned, and may require an undertaking or other security to secure such owners against any loss or damage by reason of the failure of the Commission to enter upon, accept and pay for the property, but neither such undertaking or security nor any act or obligation of the Commission shall impose any liability upon the Commonwealth except such as may be paid from the funds provided under the authority of this act.

The Commission, in its discretion, may vacate any portion or all of the land condemned either prior to or after physical entry upon the land or any part thereof and prior to final determination of damages. In such cases, the Commission shall be under no obligation to accept and pay for any property condemned and subsequently vacated: Provided, however, That in any such case, the court having jurisdiction of the suit, action or proceeding may make such orders as may be just to the Commission and to the owners of the property, and may require an undertaking or other security to secure such owners against any and all loss or damages occasioned to the owner from the time of the original condemnation to the time of the modification thereof, but neither such undertaking or security nor any act or obligation of the Commission shall impose any liability upon the Commonwealth except such as may be paid from the funds provided under the authority of this act.

(b) In addition to the foregoing powers, the Commission and its authorized agents and employees may enter upon any lands, waters and premises in the State for the purpose of making surveys, soundings, drillings and examinations, as it may deem necessary or convenient for the purpose of this act, and such entry shall not be deemed a trespass, nor shall an entry for such purposes be deemed an entry under any condemnation proceedings which may be then pending: Provided, however, That the Commission shall make reimbursement for any actual damages resulting to such lands, waters and premises as a result of such activities.

(c) All counties, cities, boroughs, townships and other political subdivisions and municipalities, and all public agencies and commissions of the Commonwealth of Pennsylvania, notwithstanding any contrary provision of law, are hereby authorized and empowered to lease, lend, grant or convey to the Commission upon its request, upon such terms and conditions as the proper authorities of such counties, cities, boroughs, townships, other political subdivisions and municipalities, or public agencies and commissions of the Commonwealth of Pennsylvania may deem reasonable and fair, and without the necessity for any advertisement, order of court or other action or formality, other than the regular and formal action of the authorities concerned, any real property which may be necessary or convenient to the effectuation of the authorized purposes of the Commission, including public roads and other real property already devoted to public use.

Rhode Island

R.I. Gen. Laws § 24-12-6 (2018):

All towns, cities, and other political subdivisions and all public agencies and commissions of the state, notwithstanding any contrary provision of law, are hereby authorized and empowered to lease, lend, grant, or convey to the authority at its request, upon such terms and conditions as the proper authorities of the towns, cities, other political subdivisions or public agencies and commissions may deem reasonable and fair and without the necessity for any advertisement, order of court, or other action or formality, other than the regular and formal action of the authorities concerned, any real property which may be necessary or convenient to the effectuation of the authorized purposes of the authority, including public roads and other real property already devoted to public use, and subject to the above provisions, the state hereby consents to the use of all lands owned by it, including lands lying under water, which are deemed by the authority to be necessary for the construction or operation of any project.

R.I. Gen. Laws § 24-12-17 (2018):

In any proceedings for the assessment of compensation and damages for land or interest therein taken or to be taken by eminent domain by the authority the following provisions shall be applicable:

(1) At any time during the pendency of an action or proceeding, the authority or an owner may apply to the court for an order directing an owner or the authority, as the case may be, to show cause why further proceedings should not be expedited, and the court may upon the application make an order requiring that the hearings proceed and that any other steps be taken with all possible expedition.

(2) If any of the land, or interest therein, is devoted to a public use, it may nevertheless be acquired, and the taking shall be effective provided that no land or interest therein, belonging to a public utility corporation may be acquired without the approval of the administrator of public utilities or other officer or tribunal having regulatory power over the corporation. Any land, or interest therein, already acquired by the authority may nevertheless be included within the taking for the purpose of acquiring any outstanding interests in the land.


(a) Whenever, in connection with the laying out, widening, relocating, improving, constructing, or altering of a highway by the department of transportation, land, an easement, or other interest therein owned by a public utility or railroad company, is acquired by the director of transportation under the provisions of this chapter, thereby necessitating the relocation of the facilities of the company, the director of transportation, subject to the provisions of this chapter, may acquire by purchase or may take by condemnation such land or easements therein as may be necessary for the relocation or replacement of the pub-
lic utility or railroad facilities and convey the land or easements to the public utility or railroad company. The conveyance shall be in lieu of any damages for the value of the land, easements, or other interests therein of the company so taken by the director of transportation, not including, however, any damages for the cost of the relocation for which the state may be liable.

(b) For the purposes of this section, the term “public utility” shall embrace the definition therefor contained within § 39-1-2 and, in addition, shall include any public water works or water service owned or furnished by any municipal or quasi-municipal corporation or authority.

South Carolina


No lands, rights-of-way, easements, or any interests in real or personal property which have been, or may be acquired for schools, churches, graveyards, municipal corporations, or subdivisions of them, or for the construction or use of any highway, railroad, railway, canal, telegraph, power line, telephone, or other public service use are exempt from condemnation. In any condemnation actions affecting properties of railroad, canal, telephone, telegraph, electric power, and other public service companies, where the companies have placed their structures across navigable streams, or canals and waterways built or to be built for purposes of navigation and hydroelectric purposes, the question of compensation and special damages, including the costs of removing, rebuilding, or relocating structures of any kind belonging to the companies on the properties, must be determined in accordance with principles of law now prevailing. No public electric utility property may be condemned unless it is located within the proposed area of any reservoir, or is needed in connection therewith for flowage purposes, or essential for the construction of any dam or reservoir or tail race or navigation channel.


The department, for the purpose of acquiring property as authorized by Sections 57-5-320, may condemn lands, rights-of-way, and easements of railroad, railway, telegraph, or other public service corporations, provided that the condemnation does not impair the ability of the railroad, railway, telegraph, or other public service corporations to operate.


The department may acquire an easement or fee simple title to real property by gift, purchase, condemnation or otherwise as may be necessary, in the judgment of the department, for the construction, maintenance, improvement or safe operation of highways in this State or any section of a state highway or for the purpose of acquiring sand, rock, clay, and other material necessary for the construction of highways, including:

(a) land for drainage ditches and canals that may be needed in order to correct existing land drainage facilities impaired or interfered with by the department in connection with its road improvement work; and

(b) property, either within or without incorporated towns, to be used for borrow pits from which to secure embankment and surfacing materials.

Other property required, as determined by the department, for the construction, maintenance and safe operation of state highways may be acquired by condemnation in the manner described in this article. Provided, however, after condemnation, trial and rendition of verdict by jury there shall be no abandonment by the department without the payment of expenses incurred by the landowner including a reasonable fee to the attorney or attorneys representing the landowner, which fee and expenses shall be set and approved by the trial judge.

South Dakota


The Department of Transportation may, pursuant to state law, incur costs for the functional replacement of real property in public ownership. For the purpose of this section, functional replacement is defined as the replacement of real property, either lands or facilities, or both, acquired as a result of a highway or highway related project with lands or facilities, or both, which will provide equivalent utility.

Application of this law requires that:

(1) The property to be functionally replaced is in public ownership and its replacement is in the public interest;

(2) The owning agency desiring the functional replacement submits a formal request to the Department of Transportation to take such action;

(3) The current fair market value of the land or facility, or both, to be acquired for highway purposes is determined by appraisal; and

(4) Replacement sites and construction are in compliance with existing codes, laws and zoning regulations for the area in which the facility will be relocated.

S.D. Codified Laws § 57-5-380 (2018):

The department, for the purpose of acquiring property as authorized by Section 57-5-320, may condemn lands, rights-of-way, and easements of railroad, railway, telegraph, or other public service corporations, provided that the condemnation does not impair the ability of the railroad, railway, telegraph, or other public service corporation to operate.

Tennessee


(a)

(1) In estimating the damages, the jury shall give the value of the land or rights taken without deduction, but incidental ben-
efits which may result to the owner by reason of the proposed improvement may be taken into consideration in estimating the incidental damages. Whenever any person, agency, or other entity acquires interest in any parcel of real property and such acquisition requires the removal of furniture, household belongings, fixtures, equipment, machinery, or stock in trade of any person in rightful possession, regardless of whether such person has a legal interest in such property, the reasonable expense of the removal shall be considered in assessing incidental damages. The reasonable expense of the removal of such chattels shall be construed as including the cost of any necessary disconnection, dismantling, or disassembling, the loading, and drayage to another location not more than fifty (50) miles distant, and the reassembling, reconnecting, and installing on such new location.

(2) When title to an entire tax parcel is condemned in fee, the total amount of damages for the condemnation of the parcel shall be not less than the last valuation used by the assessor of property just prior to the date of taking, less any decrease in value for any changes in the parcel occurring since the valuation was made, such as the removal or destruction of a building, flooding, waste, or removal of trees. The valuation may be introduced and admitted into evidence at the trial. In addition to condemnation proceedings under this chapter, this subdivision (a)(2) shall apply to condemnation proceedings under chapter 17 of this title or any other law.

(b) Notwithstanding any other law, if any person, agency, or other entity acquires any interest in real property pursuant to the execution of the power of eminent domain, the person shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which the person requires to be removed from such real property or which the person determines will be adversely affected by the use to which such real property will be put.

(c)

(1) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (b), such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired, notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property to remove such building, structure, or improvement at the expiration of his term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor.

(2) Payment under this subsection (c) shall not result in duplication of any payments otherwise authorized by law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment, the tenant shall assign, transfer, and release to the acquiring party all the tenant’s right, title, and interest in and to such improvements. Nothing in this subsection (c) shall be construed to deprive the tenant of any rights to reject payment under this subsection (c) and to obtain payment for such property interests in accordance with applicable law, other than this subsection (c).

(d) Any person, agency or other entity acquiring real property pursuant to the exercise of eminent domain shall as soon as practicable after the date of payment of the purchase price or the date of deposit into court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is earlier, reimburse the owner, to the extent that such acquiring party deems fair and reasonable for expenses the owner necessarily incurred for:

(1) Recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the acquiring party;

(2) Penalty costs for repayment of any preexisting recorded mortgage entered into in good faith encumbering such real property; and

(3) The pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the acquiring party, or the effective date of possession by the acquiring party, whichever is earlier.


(a) The department is authorized to condemn the fee to, or an easement in, lands that may be necessary, suitable, or desirable for the construction, reconstruction, development, enlargement, maintenance, repair, drainage, or protection of any street, road, highway, freeway, or parkway, by the officials charged by law with the maintenance or construction of the street, road, highway, freeway, or parkway, including the power to acquire easements in lands adjacent to the lands for related slopes and drainage and any other similar purposes.

(b) This section applies to all transportation purposes, as well as for highway purposes.

Texas


(a) The authorization under this subchapter to purchase or exercise the power of eminent domain is not affected by the location of the real property, the location of the real property right, or the location of the material. This subsection applies without regard to whether the location is in or outside a municipality.

(b) Under this subchapter, the commission may purchase or condemn real property, property rights, and materials that belong to the public, whether under the jurisdiction of the state, a state agency, a county, a municipality, including a home rule municipality, or an entity or subdivision of a county or municipality.
(a) The governing body of a political subdivision or public agency that owns or is in charge of public real property may consent to the use of the property for highway purposes.
(b) The governing body of a political subdivision or public agency may, without advertisement, convey the title to or rights or easements in real property that the department needs for highway purposes.
(c) Notwithstanding any law to the contrary, at the request of the department, a political subdivision or a state agency may lease, lend, grant, or convey to the department real property, including a highway or real property currently devoted to public use, that may be necessary or appropriate to accomplish the department’s purposes. The political subdivision or state agency may lease, lend, grant, or convey the property:
1) on terms the subdivision or agency determines reasonable and fair; and
2) without advertisement, court order, or other action or formality other than the regular and formal action of the subdivision or agency concerned.

(a) The commission may use real property owned by the state, including submerged real property, that the commission could acquire under this subchapter for highway purposes.
(b) This section does not deprive the School Land Board of authority to execute a lease authorized by law for the development of oil, gas, or another mineral on state-owned real property adjoining a state highway or in a tidewater limit and for that purpose a lease executed by the School Land Board may provide for directional drilling from real property adjoining a state highway or from a tidewater area.

Utah

(1) The department may acquire any real property or interests in real property necessary for temporary, present, or reasonable future state transportation purposes by gift, agreement, exchange, purchase, condemnation, or otherwise.
(2)
(a) Title to real property acquired by the department or the counties, cities, and towns by gift, agreement, exchange, purchase, condemnation, or otherwise for highway rights-of-way or other transportation purposes may be in fee simple or any lesser estate or interest.
(ii) Title to real property acquired by the department for a public transit project shall be transferred to the public transit district responsible for the project.
(iii) A public transit district shall cover all costs associated with any condemnation on its behalf.
(b) If the highway is a county road, city street under joint title as provided in Subsection 72-3-104(3), or right-of-way described in Title 72, Chapter 5, Part 3, Rights-Of-Way Across Federal Lands Act, title to all interests in real property less than fee simple held under this section is held jointly by the state and the county, city, or town holding the interest.
(3) A transfer of land bounded by a highway on a right-of-way for which the public has only an easement passes the title of the person whose estate is transferred to the middle of the highway.

(1) If property devoted to or held for some other public use for which the power of eminent domain might be exercised is to be taken for state transportation purposes, the department may, with the consent of the person or agency in charge of the other public use, condemn real property to be exchanged with the person or agency for the real property to be taken for state transportation purposes.
(2) This section does not limit the department’s authorization to acquire, other than by condemnation, property for exchange purposes.

Utah Code Ann. § 78B-6-511 (2018):
(1) The court, jury, or referee shall hear any legal evidence offered by any of the parties to the proceedings, and determine and assess:
(a)
(i) the value of the property sought to be condemned and all improvements pertaining to the realty;
(ii) the value of each and every separate estate or interest in the property; and
(iii) if it consists of different parcels, the value of each parcel and of each estate or interest in each shall be separately assessed;
(b) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff;
(c) if the property, though no part of it is taken, will be damaged by the construction of the proposed improvement, and the amount of the damages;
(d) separately, how much the portion not sought to be condemned, and each estate or interest in it, will be benefitted, if at all, by the construction of the improvement proposed by the plaintiff, provided that if the benefit is equal to the damages assessed under Subsection (1)(b), the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit is less than the damages assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value of the portion taken;
(e) if the property sought to be condemned consists of water rights or part of a water delivery system or both, and the tak-
ing will cause present or future damage to or impairment of the water delivery system not being taken, including impairment of the system's carrying capacity, an amount to compensate for the damage or impairment; and
(f) if land on which crops are growing at the time of service of summons is sought to be condemned, the value that those crops would have had after being harvested, taking into account the expenses that would have been incurred cultivating and harvesting the crops.

(2) In determining the market value of the property before the taking and the market value of the property after the taking to assess damages in partial takings cases as described in Subsection (1)(b), the court, jury, or referee:

(a) may consider everything a willing buyer and a willing seller would consider in determining the market value of the property after the taking; and
(b) may not consider the assessed value on the property tax assessment for the property unless the court determines that the assessed value on the property tax assessment constitutes an admission by a party opponent.

Vermont


(a) Authority.—The Agency, when in its judgment the interest of the State requires, may take any property necessary to lay out, relocate, alter, construct, reconstruct, maintain, repair, widen, grade, or improve any State highway, including affected portions of town highways. In furtherance of these purposes, the Agency may enter upon lands to conduct necessary examinations and surveys; however, the Agency shall do this work with minimum damage to the land and disturbance to the owners and shall be subject to liability for actual damages. All property taken permanently shall be taken in fee simple whenever practicable. For all State highway projects involving property acquisitions, the Agency shall follow the provisions of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act (“Act”) and its implementing regulations, as may be amended.

(b) The Agency, in the construction and maintenance of limited access highway facilities, may also take any land or rights of the landowner in land under 9 V.S.A. chapter 93, subchapter 2, relating to advertising on limited access highways.

(c) Public hearing; notice of hearing.
(1) A public hearing shall be held for the purpose of receiving suggestions and recommendations from the public prior to the Agency’s initiating proceedings under this chapter for the acquisition of any property. The hearing shall be conducted by the Agency.

(2) The Agency shall prepare an official notice stating the purpose for which the property is desired and generally describing the highway project.

(3) Not less than 30 days prior to the hearing, the Agency shall:

(A) cause the official notice to be printed in a newspaper having general circulation in the area affected;
(B) mail a copy of the notice to the legislative bodies of the municipalities affected; and
(C) mail a copy of the notice to all known owners whose property may be taken as a result of the proposed improvement.

(4) At the hearing, the Agency shall set forth the reasons for the selection of the route intended and shall hear and consider all objections, suggestions for changes, and recommendations made by any person interested. Following the hearing, the Agency may proceed to lay out the highway and survey and acquire the land to be taken or affected in accordance with this chapter.

(d) The Agency shall not take land or any right in land that is owned by a town or union school district and being used for school purposes until the voters of the district have voted on the issue of taking at a meeting called for that purpose. A special meeting of the town or union school district shall be called promptly upon receiving notice of a public hearing unless the annual meeting is to be held within 30 days after receiving the notice of public hearing. Due consideration shall be given by the court to the result of the vote, in addition to the other factors referred to in section 501 of this title, in determining necessity.

(e) In the interests of orderly and effective future planning, the Agency may acquire land and rights in land to be used for highway purposes within the reasonably foreseeable future, including future construction of four-lane highways on routes presently designed for construction of two lanes, and the construction of interchanges, bridges, and all other improvements to existing highways or highways presently scheduled for construction. In the case of the laying out of highways on a new location, “reasonably foreseeable future” means projects on which construction is to be commenced in a period not exceeding 15 years from the date of acquisition. In the event the Agency determines that the land is no longer necessary for use as a highway, it shall immediately sell the property at public sale to private persons, giving consideration to the adjoining landowners.

Virginia


A. The Commissioner of Highways is vested with the power to acquire by purchase, gift, or power of eminent domain such lands, structures, rights-of-way, franchises, easements, and other interest in lands, including lands under water and riparian rights, of any person, association, partnership, corporation, or municipality or political subdivision, deemed necessary for the construction, reconstruction, alteration, maintenance, and repair of the public highways of the Commonwealth and for these purposes and all other purposes incidental thereto may condemn property in fee simple and rights-of-way of such width and on such routes and grades and locations as the Commissioner of Highways may deem requisite and suitable, including locations for permanent, temporary, continuous, periodical, or
future use and rights or easements incidental thereto and lands, quarries, and locations, with rights of ingress and egress, containing gravel, clay, sand, stone, rock, timber, and any other road materials deemed useful or necessary in carrying out the purposes of this subsection.

B. The Commissioner of Highways is authorized to exercise the power provided under subsection A within municipalities on projects that are constructed with state or federal participation if requested by the municipality concerned. Whenever the Commissioner of Highways has acquired property pursuant to a request of the municipality, except that rights-of-way or easements acquired for the relocation of a railroad, public utility company, or public service corporation or company, another political subdivision, or a cable television company in connection with such projects shall be conveyed to that entity in accordance with § 33.2-1014. The authority for such conveyance shall apply to acquisitions made by the Commissioner of Highways pursuant to previous requests as well as any subsequent request.

C. Any offer by the Commissioner of Highways to a property owner with respect to payment of compensation for the prospective taking of property and damage to property not taken incident to the purposes of this section shall separately state (i) the property to be taken and the amount of compensation offered therefor and (ii) the nature of the prospective damage or damages and the amount of compensation offered for each such prospective damage. The amount of the offer shall not be less than the amount of the approved appraisal of the fair market value of such property in accordance with the provisions of § 25.1-417, or the current assessed value of such property for real estate tax purposes, unless the property has physically changed in a material and substantial way since the current assessment date such that the real estate tax assessment no longer represents a fair valuation of the property, when the entire parcel for which the assessment is made is to be acquired, whichever is greater. Any such appraisal used by the Commissioner of Highways as the basis for an offer shall be prepared by a real estate appraiser licensed in accordance with Chapter 20.1 (§ 54.1-2009 et seq.) of Title 54.1.

D. The Commissioner of Highways shall also provide to a property owner a copy of any report of status of title prepared in connection with such acquisition if prepared pursuant to subsection D of § 25.1-204.

E. In negotiating with a property owner with respect to payment for prospective damage to property not taken incident to the purposes of this section, the Commissioner of Highways shall ensure that such property owner or his authorized representative is properly informed as to the type and amount of foreseeable damage or enhancement. Adequate briefing includes (i) the giving of plats and profiles of the project, showing cuts and fills, together with elevations and grades and (ii) explanation, in lay terms, of all proposed changes in profile, elevation, and grade of the highway and entrances, including the elevations of proposed pavement and shoulders, both center and edges, with relation to the present pavement and approximate grade of entrances to the property.

F. Any option or deed executed by the property owner shall contain a statement that the plans as they affect his property have been fully explained. However, the requirements of this section with respect to information and briefing and the acknowledgment thereof in options and deeds shall in no way be construed to affect the validity of any conveyance, to create any right to compensation, or to limit the authority of the Commissioner of Highways to reasonably control the use of public highways so as to promote the public health, safety, and welfare.

G. Nothing in this section shall make evidence of tax assessments admissible as proof of value in an eminent domain proceeding.

The Commission is hereby authorized and empowered to acquire by purchase, whenever it deems such purchase expedient, solely from funds provided under the authority of this chapter, such lands, structures, rights-of-way, property, rights, franchises, easements, and other interests in lands, including lands lying under water and riparian rights, that are located within the Commonwealth as it may deem necessary or convenient for the construction and operation of the project, upon such terms at such prices may be considered by it to be reasonable and can be agreed upon between it and the owner thereof, and to take title thereto in the name of the District. All localities and political subdivisions and all public agencies and commissions of the Commonwealth, notwithstanding any contrary provision of law, are hereby authorized and empowered to lease, lend, grant, or convey to the District at the Commission's request upon such terms and conditions as the proper authorities of such localities, political subdivisions, agencies, or commissions of the Commonwealth may deem reasonable and fair and without the necessity for any advertisement, order of court, or other action or formality, other than the regular and formal action of the authorities concerned, any real property that may be necessary or convenient to the effectuation of the authorized purposes of the Commission, including public highways and other real property already devoted to public use. Whenever a reasonable price cannot be agreed upon, or whenever the owner is legally incapacitated or is absent, unknown, or unable to convey valid title, the Commission is hereby authorized and empowered to acquire by condemnation or by the exercise of the power of eminent domain any lands, property, rights, rights-of-way, franchises, easements, and other property, including public lands, parks, playgrounds, reservations, highways, or parkways, or parts thereof or rights therein, of any person, partnership, association, railroad, public service, public utility or other corporation, municipality, or political subdivision deemed necessary or convenient for the construction or the efficient operation of the project or necessary in the restoration of public or private property damaged or destroyed. Such proceedings shall be in accordance with and subject to the
provisions of any and all laws applicable to condemnation of property in the name of the Commissioner of Highways under the laws of the Commonwealth. Title to any property acquired by the Commission shall be taken in the name of the District. In any condemnation proceedings, the court having jurisdiction of the suit, action, or proceeding may make such orders as may be just to the Commission and to the owners of the property to be condemned and may require an undertaking or other security to secure such owners against any loss or damage by reason of the failure of the Commission to accept and pay for the property, but neither such undertaking or security nor any act or obligation of the Commission shall impose any liability upon the District except as may be paid from the funds provided under the authority of this chapter.

If the owner, lessee, or occupier of any property to be condemned refuses to remove his personal property therefrom or give up possession thereof, the Commission may proceed to obtain possession in any manner provided by law.

With respect to any railroad property or right-of-way upon which railroad tracks are located, any powers of condemnation or of eminent domain may be exercised to acquire only an easement interest therein, which is located either sufficiently far above or sufficiently far below the grade of any railroad track upon such railroad property so that neither the proposed project nor any part thereof, including any bridges, abutments, columns, supporting structures, and appurtenances, nor any traffic upon it interferes in any manner with the use, operation, or maintenance of the trains, tracks, works, or appurtenances or other property of the railroad nor endanger the movement of the trains or traffic upon the tracks of the railroad. Prior to the institution of condemnation proceedings for such easement over or under such railroad property or right-of-way, plans and specifications of the proposed project showing compliance with the above-mentioned above or below grade requirements and showing sufficient and safe plans and specifications of such overhead or underground structure and appurtenances shall be submitted to the railroad for examination and approval. If the railroad fails or refuses within 30 days to approve the plans and specifications so submitted, the matter shall be submitted to the State Corporation Commission, as to the sufficiency and safety of such plans and specifications and as to such elevations or distances above or below the tracks. Said overhead or underground structure and appurtenances shall be constructed only in accordance with such plans and specifications and in accordance with such elevations or distances above or below the tracks so approved by the railroad or the State Corporation Commission. A copy of the plans and specifications approved by the railroad or the State Corporation Commission shall be filed as an exhibit with the petition for condemnation. The cost of any such overhead or underground projects and appurtenances and any expense and cost incurred in changing, adjusting, relocating, or removing the lines and grades of such railroad in connection with the project shall be paid by the Commission as a part of the cost of the project.

Washington

*Wash. Rev. Code § 47.12.023 (2018):*

(1) Except as provided in RCW 47.12.026 and 47.12.029, whenever it is necessary to secure any lands or interests in lands for any highway purpose mentioned in RCW 47.12.010, or for the construction of any toll facility or ferry terminal or docking facility, the title to which is in the state of Washington and under the jurisdiction of the department of natural resources, the department of transportation may acquire jurisdiction over the lands or interests in lands, or acquire rights to remove materials from the lands in the manner set forth in this section.

(2) At any time after the final adoption of a right-of-way plan or other plan requiring the acquisition of lands or interests in lands for any purpose as authorized in subsection (1) of this section, the department of transportation may file with the department of natural resources a notice setting forth its intent to acquire jurisdiction of the lands or interests in lands under the jurisdiction of the department of natural resources required for right-of-way or other highway purposes related to the construction or improvement of such state highway, toll facility, or ferry terminal or docking facility.

(3) The department of transportation at the time of filing its notice of intent as provided in subsection (2) of this section shall file therewith a written statement showing the total amount of just *compensation* to be paid for the property in the event of settlement. The offer shall be based upon the department of transportation approved appraisal of the *fair market value* of the property to be acquired. In no event may the offer of settlement be referred to or used during any arbitration proceeding or trial conducted for the purpose of determining the amount of just *compensation*.

(4) Just *compensation* and/or *fair market value* for the purposes of this section shall be determined in accordance with applicable federal and state constitutional, statutory, and case law relating to the *condemnation* of private and public property for public purposes.

(5) If the department of natural resources does not accept the offer of the department of transportation, the department of transportation may nonetheless pay to the department of natural resources the amount of its offer and obtain immediate possession and use of the property pending the determination of just *compensation* in the manner hereinafter provided.

(6) If the amount of just *compensation* is not agreed to, either the department of natural resources or the department of transportation may request in writing the appointment of an arbitrator for the purpose of determining the amount of *compensation* to be paid by the department of transportation for the acquisition of jurisdiction over the lands or interests in lands or rights therein. In that event the department of natural resources and the department of transportation may jointly agree on an arbitrator to determine the *compensation*, and his or her determination shall be final and conclusive upon both departments. The costs of the arbitrator shall be borne equally by the
parties. If the department of natural resources and the department of transportation are unable to agree on the selection of an arbitrator within thirty days after a request therefor is made, either the department of transportation or the department of natural resources may file a petition with the superior court for Thurston county for the purpose of determining the amount of just compensation to be paid. The matter shall be tried by the court pursuant to the procedures set forth in RCW 8.04.080.

(7) Whenever the department of transportation has acquired immediate possession and use of property by payment of the amount of its offer to the department of natural resources, and the arbitration award or judgment of the court for the acquisition exceeds the payment for immediate possession and use, the department of transportation shall forthwith pay the amount of such excess to the department of natural resources with interest thereon from the date it obtained immediate possession. If the arbitration or court award is less than the amount previously paid by the department of transportation for immediate possession and use, the department of natural resources shall forthwith pay the amount of the difference to the department of transportation.

(8) Upon the payment of just compensation, as agreed to by the department of transportation and the department of natural resources, or as determined by arbitration or by judgment of the court, and other costs or fees as provided by statute, the department of natural resources shall cause to be executed and delivered to the department of transportation an instrument transferring jurisdiction over the lands or interests in lands, or rights to remove material from the lands, to the department of transportation.

(9) Except as provided in RCW 47.12.026, whenever the department of transportation ceases to use any lands or interests in lands acquired in the manner set forth in this section for the purposes mentioned herein, the department of natural resources may reacquire jurisdiction over the lands or interests in land by paying the fair market value thereof to the department of transportation. If the two departments are unable to agree on the fair market value of the lands or interests in lands, the market value shall be determined and the interests therein shall be transferred in accordance with the provisions and procedures set forth in subsections (4) through (8) of this section.


(1) Except as provided in RCW 47.12.026 and 47.12.029, whenever it is necessary to secure any lands or interests in lands for any highway purpose mentioned in RCW 47.12.010, or for the construction of any toll facility or ferry terminal or docking facility, the title to which is in the state of Washington and under the jurisdiction of the department of natural resources, the department of transportation may acquire jurisdiction over the lands or interests in lands, or acquire rights to remove materials from the lands in the manner set forth in this section.

(2) At any time after the final adoption of a right-of-way plan or other plan requiring the acquisition of lands or interests in lands for any purpose as authorized in subsection (1) of this section, the department of transportation may file with the department of natural resources a notice setting forth its intent to acquire jurisdiction of the lands or interests in lands under the jurisdiction of the department of natural resources required for right-of-way or other highway purposes related to the construction or improvement of such state highway, toll facility, or ferry terminal or docking facility.

(3) The department of transportation at the time of filing its notice of intent as provided in subsection (2) of this section shall file therewith a written statement showing the total amount of just compensation to be paid for the property in the event of settlement. The offer shall be based upon the department of transportation approved appraisal of the fair market value of the property to be acquired. In no event may the offer of settlement be referred to or used during any arbitration proceeding or trial conducted for the purpose of determining the amount of just compensation.

(4) Just compensation and/or fair market value for the purposes of this section shall be determined in accordance with applicable federal and state constitutional, statutory, and case law relating to the condemnation of private and public property for public purposes.

(5) If the department of natural resources does not accept the offer of the department of transportation, the department of transportation may nonetheless pay to the department of natural resources the amount of its offer and obtain immediate possession and use of the property pending the determination of just compensation in the manner hereinafter provided.

(6) If the amount of just compensation is not agreed to, either the department of natural resources or the department of transportation may request in writing the appointment of an arbitrator for the purpose of determining the amount of compensation to be paid by the department of transportation for the acquisition of jurisdiction over the lands or interests in lands or rights therein. In that event the department of natural resources and the department of transportation may jointly agree on an arbitrator to determine the compensation, and his or her determination shall be final and conclusive upon both departments. The costs of the arbitrator shall be borne equally by the parties. If the department of natural resources and the department of transportation are unable to agree on the selection of an arbitrator within thirty days after a request therefor is made, either the department of transportation or the department of natural resources may file a petition with the superior court for Thurston county for the purpose of determining the amount of just compensation to be paid. The matter shall be tried by the court pursuant to the procedures set forth in RCW 8.04.080.

(7) Whenever the department of transportation has acquired immediate possession and use of property by payment of the amount of its offer to the department of natural resources, and the arbitration award or judgment of the court for the acquisition exceeds the payment for immediate possession and use, the department of transportation shall forthwith pay the amount
of such excess to the department of natural resources with interest thereon from the date it obtained immediate possession. If the arbitration or court award is less than the amount previously paid by the department of transportation for immediate possession and use, the department of natural resources shall forthwith pay the amount of the difference to the department of transportation.

(8) Upon the payment of just compensation, as agreed to by the department of transportation and the department of natural resources, or as determined by arbitration or by judgment of the court, and other costs or fees as provided by statute, the department of natural resources shall cause to be executed and delivered to the department of transportation an instrument transferring jurisdiction over the lands or interests in lands, or rights to remove material from the lands, to the department of transportation.

(9) Except as provided in RCW 47.12.026, whenever the department of transportation ceases to use any lands or interests in lands acquired in the manner set forth in this section for the purposes mentioned herein, the department of natural resources may reacquire jurisdiction over the lands or interests in land by paying the fair market value thereof to the department of transportation. If the two departments are unable to agree on the fair market value of the lands or interests in lands, the market value shall be determined and the interests therein shall be transferred in accordance with the provisions and procedures set forth in subsections (4) through (8) of this section.

West Virginia


n addition to all other duties, powers and responsibilities given and assigned to the commissioner in this chapter, the commissioner may:

(1) Exercise general supervision over the state road program and the construction, reconstruction, repair and maintenance of state roads and highways: Provided, That the commissioner shall implement reasonable design techniques intended to minimize damage that may result from recurring floods within the purpose and need of the state road system;

(2) Determine the various methods of road construction best adapted to the various sections and areas of the state and establish standards for the construction and maintenance of roads and highways in the various sections and areas of the state;

(3) Conduct investigations and experiments, hold hearings and public meetings and attend and participate in meetings and conferences within and without the state for purposes of acquiring information, making findings and determining courses of action and procedure relative to advancement and improvement of the state road and highway system;

(4) Enter private lands to make inspections and surveys for road and highway purposes;

(5) Acquire, in name of the department, by lease, grant, right of eminent domain or other lawful means all lands and interests and rights in lands necessary and required for roads, rights-of-way, cuts, fills, drains, storage for equipment and materials and road construction and maintenance in general;

(6) Procure photostatic copies of any or all public records on file at the State Capitol of Virginia which may be considered necessary or proper in ascertaining the location and legal status of public road rights-of-way located or established in what is now the State of West Virginia, which when certified by the commissioner, may be admitted in evidence, in lieu of the original, in any of the courts of this state;

(7) Plan for and hold annually a school of good roads, of not less than three or more than six days’ duration, for instruction of his or her employees, which is held in conjunction with West Virginia University and may be held at the university or at any other suitable place in the state;

(8) Negotiate and enter in reciprocal contracts and agreements with proper authorities of other states and of the United States relating to and regulating the use of roads and highways with reference to weights and types of vehicles, registration of vehicles and licensing of operators, military and emergency movements of personnel and supplies and all other matters of interstate or national interest;

(9) Classify and reclassify, locate and relocate, expressway, trunkline, feeder and state local service roads and designate by number the routes within the state road system;

(10) Create, extend or establish, upon petition of any interested party or parties or on the commissioner’s own initiative, any new road or highway found necessary and proper;

(11) Exercise jurisdiction, control, supervision and authority over local roads, outside the state road system, to the extent determined by him or her to be expedient and practicable;

(12) Discontinue, vacate and close any road or highway, or any part of any road or highway, the continuance and maintenance of which are found unnecessary or improper, upon petition and hearing or upon investigation initiated by the commissioner;

(13) Close any state road while under construction or repair and provide a temporary road during the time of the construction or repair;

(14) Adjust damages occasioned by construction, reconstruction or repair of any state road or the establishment of any temporary road;

(15) Establish and maintain a uniform system of road signs and markers;

(16) Fix standard widths for road rights-of-way, bridges and approaches to bridges and fix and determine grades and elevations therefor;

(17) Test and standardize materials used in road construction and maintenance, either by governmental testing and standardization activities or through contract by private agencies;
(18) Allocate the cost of retaining walls and drainage projects, for the protection of a state road or its right-of-way, to the cost of construction, reconstruction, improvement or maintenance;
(19) Acquire, establish, construct, maintain and operate, in the name of the department, roadside recreational areas along and adjacent to state roads and highways;
(20) Exercise general supervision over the construction and maintenance of airports and landing fields under the jurisdiction of the West Virginia State Aeronautics Commission, of which the commissioner is a member, and make a study and general plan of a statewide system of airports and landing fields;
(21) Provide traffic engineering services to municipalities of the state upon request of the governing body of any municipality and upon terms that are agreeably arranged;
(22) Institute complaints before the Public Service Commission or any other appropriate governmental agency relating to freight rates, car service and movement of road materials and equipment;
(23) Invoke any appropriate legal or equitable remedies, subject to section seven of this article, to enforce his or her orders, to compel compliance with requirements of law and to protect and preserve the state road and highway system or any part of the system;
(24) Make and promulgate rules for the government and conduct of personnel, for the orderly and efficient administration and supervision of the state road program and for the effective and expeditious performance and discharge of the duties and responsibilities placed upon him or her by law;
(25) Delegate powers and duties to his or her appointees and employees who shall act by and under his or her direction and be responsible to him or her for their acts;
(26) Designate and define any construction and maintenance districts within the state road system that is found expedient and practicable;
(27) Contract for the construction, improvement and maintenance of the roads;
(28) Comply with provisions of present and future federal aid statutes and regulations, including execution of contracts or agreements with and cooperation in programs of the United States government and any proper department, bureau or agency of the United States government relating to plans, surveys, construction, reconstruction, improvement and maintenance of state roads and highways;
(29) Prepare budget estimates and requests;
(30) Establish a system of accounting covering and including all fiscal and financial matters of the department;
(31) Establish and advance a right-of-way Acquisition Revolving Fund, a Materials Revolving Fund and an Equipment Revolving Fund;
(32) Enter into contracts and agreements with and cooperate in programs of counties, municipalities and other governmental agencies and subdivisions of the state relating to plans, surveys, construction, reconstruction, improvement, maintenance and supervision of highways, roads, streets and other travel ways when and to the extent determined by the department to be expedient and practical;
(33) Report, as provided by law, to the Governor and the Legislature;
(34) Purchase materials, supplies and equipment required for the state road program and system;
(35) Dispose of all obsolete and unusable and surplus supplies and materials which cannot be used advantageously and beneficially by the department in the state road program by transfer of the supplies and materials to other governmental agencies and institutions by exchange, trade or sale of the supplies and materials;
(36) Investigate road conditions, official conduct of department personnel and fiscal and financial affairs of the department and hold hearings and make findings thereon or on any other matters within the jurisdiction of the department;
(37) Establish road policies and administrative practices;
(38) Fix and revise from time to time tolls for transit over highway projects constructed by the Division of Highways after May 1, 1999, that have been authorized by the provisions of §17-17A-5b of this chapter;
(39) Take actions necessary to alleviate any conditions as the Governor may declare to constitute an emergency, whether or not the emergency condition affects areas normally under the jurisdiction of the Division of Highways; and
(40) Provide family restrooms at all rest areas along interstate highways in this state, all to be constructed in accordance with federal law.

Wisconsin

Wis. Stat. § 32.02 (2018):

The following departments, municipalities, boards, commissions, public officers, and business entities may acquire by condemnation any real estate and personal property appurtenant thereto or interest therein which they have power to acquire and hold or transfer to the state, for the purposes specified, in case such property cannot be acquired by gift or purchase at an agreed price:

(1) Any county, town, village, city, including villages and cities incorporated under general or special acts, school district, the department of health services, the department of corrections, the board of regents of the University of Wisconsin System, the building commission, a commission created by contract under s. 66.0301, with the approval of the municipality in which condemnation is proposed, a commission created by contract under s. 66.0303 that is acting under s. 66.0304, if the condemnation occurs within the boundaries of a member of the commission, or any public board or commission, for any lawful purpose, but in the case of city and village boards or commissions approval of that action is required to be granted by the governing body.
A mosquito control commission, created under s. 59.70 (12), and a local professional football stadium district board, created under subch. IV of ch. 229, may not acquire property by condemnation.

(2) The governor and adjutant general for land adjacent to the Wisconsin state military reservation at Camp Douglas for the use of the Wisconsin national guard.

(3) Any railroad corporation, any grantee of a permit to construct a dam to develop hydroelectric energy for sale to the public, any Wisconsin plank road corporation, any drainage corporation, any interstate bridge corporation, or any corporation formed under chapter 288, laws of 1899, for any public purpose authorized by its articles of incorporation.

(4) Any Wisconsin telegraph or telecommunications corporation for the construction and location of its lines.

(5) (a) “Foreign transmission provider” means a foreign corporation that satisfies each of the following:

1. The foreign corporation is an independent system operator, as defined in s. 196.485 (1) (d), or an independent transmission owner, as defined in s. 196.485 (1) (dm), that is approved by the applicable federal agency, as defined in s. 196.485 (1) (c).

2. The foreign corporation controls transmission facilities, as defined in s. 196.485 (1) (h), in this and another state.

(b) Any Wisconsin corporation engaged in the business of transmitting or furnishing heat, power or electric light for the public or any foreign transmission provider for the construction and location of its lines or for ponds or reservoirs or any dam, dam site, flowage rights or undeveloped water power.

(6) Any Wisconsin corporation furnishing gas, electric light or power to the public, for additions or extensions to its plant and for the purpose of conducting tests or studies to determine the suitability of a site for the placement of a facility.

(7) Any Wisconsin corporation formed for the improvement of any stream and driving logs therein, for the purpose of the improvement of such stream, or for ponds or reservoir purposes.

(8) Any Wisconsin corporation organized to furnish water or light to any city, village or town or the inhabitants thereof, for the construction and maintenance of its plant.

(9) Any Wisconsin corporation transmitting gas, oil or related products in pipelines for sale to the public directly or for sale to one or more other corporations furnishing such gas, oil or related products to the public.

(10) Any rural electric cooperative association organized under ch. 185 which operates a rural electrification project to:

(a) Generate, distribute or furnish at cost electric energy at retail to 500 or more members of said association in accordance with standard rules for extension of its service and facilities as provided in the bylaws of said association and whose bylaws also provide for the acceptance into membership of all applicants therefor who may reside within the territory in which such association undertakes to furnish its service, without discrimination as to such applicants; or

(b) Generate, transmit and furnish electric energy at wholesale to 3 or more rural electric cooperative associations furnishing electric energy under the conditions set forth in par. (a), for the construction and location of its lines, substation or generating plants, ponds or reservoirs, any dam, dam site, flowage rights or undeveloped water power, or for additions or extension of its plant and for the purpose of conducting tests or studies to determine the suitability of a site for the placement of a facility.

(11) Any housing authority created under ss. 66.1201 to 66.1211; redevelopment authority created under s. 66.1333; community development authority created under s. 66.1335; local cultural arts district created under subch. V of ch. 229, subject to s. 229.844 (4) (c); or local exposition district created under subch. II of ch. 229.

(11m) The Wisconsin Aerospace Authority created under subch. II of ch. 114.

(12) Any person operating a plant which creates waste material which, if released without treatment would cause stream pollution, for the location of treatment facilities. This subsection does not apply to a person with a permit under ch. 293 or subch. III of ch. 295.

(13) Any business entity authorized to do business in Wisconsin that shall transmit oil or related products including all hydrocarbons which are in a liquid form at the temperature and pressure under which they are transported in pipelines in Wisconsin, and shall maintain terminal or product delivery facilities in Wisconsin, and shall be engaged in interstate or international commerce, subject to the approval of the public service commission upon a finding by it that the proposed real estate interests sought to be acquired are in the public interest.

(15) The department of transportation for the acquisition of abandoned rail and utility property under s. 85.09.

(16) The department of natural resources with the approval of the appropriate standing committees of each house of the legislature as determined by the presiding officer thereof and as authorized by law, for acquisition of lands.


In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed:

(1) The compensation so determined and the status of the property under condemnation for the purpose of determining whether severance damages exist shall be as of the date of evaluation as fixed by s. 32.05 (7) (c) or 32.06 (7).

(1m)

(a) As a basis for determining value, a commission in condemnation or a court shall consider the price and other terms and circumstances of any good faith sale or contract to sell and purchase comparable property. A sale or contract is comparable within the meaning of this paragraph if it was made within a
reasonable time before or after the date of evaluation and the property is sufficiently similar in the relevant market, with respect to situation, usability, improvements, and other characteristics, to warrant a reasonable belief that it is comparable to the property being valued.

(b) As a basis for determining value, a commission in condemnation or a court shall consider, if provided by the condemnor or condemnee, an appraisal based on the income approach and an appraisal based on the cost approach.

(2) In determining just compensation the property sought to be condemned shall be considered on the basis of its most advantageous use but only such use as actually affects the present market value.

(2m) In determining just compensation for property sought to be condemned in connection with the construction of facilities, as defined under s. 196.491 (1) (e), any increase in the market value of such property occurring after the date of evaluation but before the date upon which the lis pendens is filed under s. 32.06 (7) shall be considered and allowed to the extent it is caused by factors other than the planned facility.

(3) Special benefits accruing to the property and affecting its market value because of the planned public improvement shall be considered and used to offset the value of property taken or damages under sub. (6), but in no event shall such benefits be allowed in excess of damages described under sub. (6).

(4) If a depreciation in value of property results from an exercise of the police power, even though in conjunction with the taking by eminent domain, no compensation may be paid for such depreciation except as expressly allowed in subs. (5) (b) and (6) and s. 32.19.

(5)

(a) In the case of a total taking the condemnor shall pay the fair market value of the property taken and shall be liable for the items in s. 32.19 if shown to exist.

(b) Any increase or decrease in the fair market value of real property prior to the date of evaluation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, may not be taken into account in determining the just compensation for the property.

(6) In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

(a) Loss of land including improvements and fixtures actually taken.

(b) Deprivation or restriction of existing right of access to highway from abutting land, provided that nothing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict such access without compensation under any duly authorized exercise of the police power.

(c) Loss of air rights.

(d) Loss of a legal nonconforming use.

(e) Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land. In determining severance damages under this paragraph, the condemnor may consider damages which may arise during construction of the public improvement, including damages from noise, dirt, temporary interference with vehicular or pedestrian access to the property and limitations on use of the property. The condemnor may also consider costs of extra travel made necessary by the public improvement based on the increased distance after construction of the public improvement necessary to reach any point on the property from any other point on the property.

(f) Damages to property abutting on a highway right-of-way due to change of grade where accompanied by a taking of land.

(g) Cost of fencing reasonably necessary to separate land taken from remainder of condemnee's land, less the amount allowed for fencing taken under par. (a), but no such damage shall be allowed where the public improvement includes fencing of right-of-way without cost to abutting lands.

(6g) In the case of the taking of an easement, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the items of loss or damage to the property enumerated in sub. (6) (a) to (g) where shown to exist.

(6r)

(a) In the case of a taking of an easement in lands zoned or used for agricultural purposes, for the purpose of constructing or operating a high-voltage transmission line, as defined in s. 196.491 (1) (f), or any petroleum or fuel pipeline, the offer under s. 32.05 (2a) or 32.06 (2a), the jurisdictional offer under s. 32.05 (3) or 32.06 (3), the award of damages under s. 32.05 (7), the award of the condemnation commissioners under s. 32.05 (9) or 32.06 (8) or the assessment under s. 32.57 (5), and the jury verdict as approved by the court under s. 32.05 (10) or (11) or 32.06 (10) or the judgment under s. 32.61 (3) shall specify, in addition to a lump sum representing just compensation under sub. (6) for outright acquisition of the easement, an amount
payable annually on the date therein set forth to the condemnee, which amount represents just compensation under sub. (6) for the taking of the easement for one year.

(b) The condemnee shall choose between the lump sum and the annual payment method of compensation at such time as the condemnee accepts the offer, award or verdict, or the proceedings relative to the issue of compensation are otherwise terminated. Selection of the lump sum method of payment shall irrevocably bind the condemnee and successors in interest.

(c) Except as provided under subd. 2., if the condemnee selects the annual payment method of compensation, the fact of such selection and the amount of the annual payment shall be stated in the conveyance or an appendix thereto which shall be recorded with the register of deeds. The first annual payment shall be in addition to payment of any items payable under s. 32.19. Succeeding annual payments shall be determined by multiplying the amount of the first annual payment by the quotient of the state assessment under s. 70.575 for the year in question divided by the state assessment for the year in which the first annual payment for that easement was made, if the quotient exceeds one. A condemnee who selects the annual payment method of compensation, or any successor in interest, may at any time, by agreement with the condemnor or otherwise, waive in writing his or her right, or the right of his or her successors in interest, to receive such payments. Any successor in interest shall be deemed to have waived such right until the date on which written notice of his or her right to receive annual payments is received by the condemnor or its successor in interest.

2. If lands which are zoned or used for agricultural purposes and which are condemned and compensated by the annual payment method of compensation under this paragraph are no longer zoned or used for agricultural purposes, the right to receive the annual payment method of compensation for a high-voltage transmission line easement shall cease and the condemnor or its successor in interest shall pay to the condemnee or any successor in interest who has given notice as required under subd. 1. a single payment equal to the difference between the lump sum representing just compensation under sub. (6) and the total of annual payments previously received by the condemnee and any successor in interest.

(7) In addition to the amount of compensation paid pursuant to sub. (6), the owner shall be paid for the items provided for in s. 32.19, if shown to exist, and in the manner described in s. 32.20.

(8) A commission in condemnation or a court may in their respective discretion require that both condemnor and owner submit to the commission or court at a specified time in advance of the commission hearing or court trial, a statement covering the respective contentions of the parties on the following points:

(a) Highest and best use of the property.

(b) Applicable zoning.

(c) Designation of claimed comparable lands, sale of which will be used in appraisal opinion evidence.

(d) Severance damage, if any.

(e) Maps and pictures to be used.

(f) Costs of reproduction less depreciation and rate of depreciation used.

(g) Statements of capitalization of income where used as a factor in valuation, with supporting data.

(h) Separate opinion as to fair market value, including before and after value where applicable by not to exceed 3 appraisers.

(i) A recitation of all damages claimed by owner.

(j) Qualifications and experience of witnesses offered as experts.

(9) A condemnation commission or a court may make regulations for the exchange of the statements referred to in sub. (8) by the parties, but only where both owner and condemnor furnish same, and for the holding of prehearing or pretrial conference between parties for the purpose of simplifying the issues at the commission hearing or court trial.

Wyoming


For the purposes of this act [§§ 24-6-101 through 24-6-110], the highway authorities of the state, county, city, town, or village may acquire private or public property and property rights for access facilities and service roads, including rights of access, air, view, and light, by gift, devise, purchase or condemnation in the same manner as such units are now or hereafter may be authorized by law to acquire such property or property rights in connection with highways and streets within their respective jurisdictions. All property rights acquired under the provisions of this act shall be in fee simple where conditions permit, otherwise by appropriate easement.
APPENDIX F

LINKS TO STATE DEPARTMENTS OF TRANSPORTATION RIGHT-OF-WAY MANUALS

Alabama Department of Transportation

Alaska Department of Transportation and Public Facilities

Arizona Department of Transportation

Arkansas Department of Transportation

California Department of Transportation (Caltrans)

Colorado Department of Transportation

District of Columbia Department of Transportation

Florida Department of Transportation

Georgia Department of Transportation

Hawaii Department of Transportation

Idaho Transportation Department

Illinois Department of Transportation

Indiana Department of Transportation

1 All right-of-way manuals last accessed May 6, 2019.
Iowa Department of Transportation

Kansas Department of Transportation

Kentucky Transportation Cabinet

Louisiana Department of Transportation & Development

Maine Department of Transportation

Minnesota Department of Transportation

Mississippi Department of Transportation

Montana Department of Transportation

Nebraska Department of Transportation

New Hampshire Department of Transportation

New Jersey Department of Transportation

New Mexico Department of Transportation

North Carolina Department of Transportation Division of Highways
North Dakota Department of Transportation

Ohio Department of Transportation

Oregon Department of Transportation

Pennsylvania Department of Transportation

South Carolina Department of Transportation, Right of Way Department

Texas Department of Transportation

Virginia Department of Transportation

Washington State Department of Transportation

West Virginia Department of Transportation Division of Highways

Wyoming Department of Transportation
APPENDIX G

DOCUMENTS PROVIDED IN RESPONSE TO THE SURVEY OF STATE TRANSPORTATION DEPARTMENTS

Publication 378, Chapter 3 – Acquisitions, Section R. – Acquisitions from Railroads

Publication 378, Appendix C – Legal Issues and Guidance, Section B. – Acquisitions from Other Government Entities

Publication 10X (DM-1X), 2015 Edition – Change #1, Appendix AG – Stafford Act and Other Flood Hazard Mitigation Assistance Grant Property Processes

Example: Memorandum of Understanding for Joint Jurisdiction of Land

Item Number

Item No. 1

Item No. 2

Item No. 3

Item No. 4

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1 All documents provided by the Pennsylvania Department of Transportation.
Publication 378

Chapter 3 - Acquisitions

Section R. - Acquisitions from Railroads
However, the amount of the bonus value payable to the tenant should be stated in the section titled, "The areas required are as follows:"

5. Declarations of Taking. Declarations of taking will still be necessary if an amicable acquisition cannot be achieved, even though off-premise OADs themselves are treated as personalty. The declaration will be required to take the leasehold or other property interest of the OAD owner. The off-premise OAD owner should be designated on the declaration of taking as "tenant" if that is their property interest, just like any other leasehold owner whose interest is being taken. The OAD owner may also own the land in fee or have an easement.

6. Extent of Taking. A condemnor is given discretion to determine the amount of land required for public projects. However, that discretion can be reviewed through the filing of preliminary objections to a taking to determine whether fraud, bad faith, or an abuse of discretion exits. In this regard, a condemnor may not appropriate a greater amount of property than is reasonably required for the contemplated public purpose.

The Department must be careful not to take more land than necessary in all projects. In fact, special care must be taken in this regard when off-premise OADs are being displaced. Off-premise OAD owners have not hesitated to file preliminary objections challenging takings as excessive. The Department must have a legitimate engineering reason for the location of right-of-way lines in all cases, especially those displacing off-premise OADs. In no event should there even be an appearance that a right-of-way line was located for the purpose of eliminating an off-premise OAD.

7. Removal of Off-Premise OADs by the Department. Before removing an off-premise OAD, the Department must first acquire the OAD owner's interest in the land, whether in fee, easement or leasehold. This can be done by amicable settlement or through condemnation. Amicable settlements for leaseholds should be documented with Form RW-364 whether or not a payment is being made. If the tenant's interest is not amicably acquired, the leasehold or other interest must be condemned even where the landlord's interest is amicably acquired and/or no payment is due for the leasehold.

After acquiring the land and conducting diligent negotiations with the off-premise OAD owner, if it appears that an amicable settlement may not be reached to acquire the OAD, then Form RW-5910AD should be sent to the claimant. This form can be sent after a deed is signed or after the declaration of taking is filed. It is not necessary to wait for the period for preliminary objections to expire. Form RW-5910AD informs the claimant that if they do not select a payment option or move their OAD by a specified date, the Department will assume that the device is abandoned in place and that they have chosen the personal property loss payment option. If the claimant fails to respond by the specified date, then we are deeming the OAD to be abandoned in place. If the claimant responds to the Form RW-5910AD letter, but is indecisive, the District should send a second letter stating that we are assuming that they are abandoning the OAD in place and choosing the personal property loss option.

This procedure applies to off-premise OADs owned by both tenants and landowners.

Before authorizing a contractor to remove an off-premise OAD, the owner must have been given an Offer Letter Form RW-3560AD, a Form RW-5900AD, and a Form RW-5910AD, including a reasonable amount of time to select the option to either move or abandon the device.

8. Retention Credit Not Applicable to Off-Premise OADs. Because off-premise OADs are considered to be personal property, Form RW-621 is not applicable. That is, the off-premise OAD owner cannot elect to remove the sign in return for a retention credit. Off-premise OAD owners must select the moving cost payment option if they want to keep their signs. Moving costs are to be reimbursed only after verifying that the OAD has been moved. If the OAD owner does not wish to remove the sign, then the Department will take possession of the device and may pay the personal property loss payment.

R. Acquisitions from Railroads.

1. In General. Railroads are given special status under Pennsylvania law:

   a. The Public Utility Commission (PUC) has jurisdiction over all public highway-railroad crossings and must approve projects that involve them. The PUC also has the authority to appropriate railroad
property necessary for these projects.

b. Other types of railroad acquisitions are subject to consent from the railroad company. Refer to 3.03.R.3. below.

In view of these factors and the nature of railroads as another mode of transportation, cooperation with railroads in the right-of-way acquisition process is especially important.

A process flow chart has been created to illustrate the options regarding railroad acquisitions. The flow chart is located at P:\pendent shared\C-O ROW File Sharing\Railroad Acquisitions and is available via the ROW Office Homepage.

2. Highway-railroad Crossings. A highway-railroad crossing is a special type of intersection involving joint use of right-of-way for both railroad and highway operations. A highway-railroad crossing is the intersection of a highway right-of-way with a railroad's right-of-way upon which railroad tracks lie and is subject to the jurisdiction of the PUC. The highway can be at, above or below the grade of the railroad tracks.

Railroad property for projects which include highvay-railroad crossings may be acquired amicably or when the PUC appropriates the property. Under either scenario, a metes and bounds description of the property to be acquired/appropriated must be prepared. The metes and bounds description must refer to a railroad marker. See Publication 14M, Plans Presentation (Dual Unit), Design Manual Part 3, Chapter 3; Publication 371, Grade Crossing Manual, Chapter 2 discussing PUC acquisitions at highway-railroad crossings.

PUC appropriated acquisitions are affected by entry of an order of the PUC appropriating the required right-of-way. The appropriation order has the same effect as, and is essentially equivalent to, a declaration of taking. It refers to the right-of-way acquisition plan, but includes metes and bounds descriptions of all areas appropriated. The order must be filed in the appropriate recorder of deeds office and indexed for title notice purposes. See Publication 371, Grade Crossing Manual, Chapter 2 discussing PUC acquisitions at highway-railroad crossings.

The PUC can exercise jurisdiction over private property within a crossing project; however, Department procedure is to request that the PUC only take jurisdiction over acquisitions from the railroad.

Acquisitions from private property owners (i.e., those not under PUC jurisdiction) are to be addressed under standard acquisition procedures.

a. Submission of Request to Appropriate to the PUC. Note: This process can take up to 90 days from the time the information is submitted to the PUC. The PUC appropriation of railroad property needs to be accomplished as early in the project development as possible to avoid delaying the letting. In order to not delay an order from the PUC, the District must have concurrence of the railroad regarding the plan and metes and bounds descriptions prior to submission to the PUC. The prior concurrence of the railroad will minimize the potential for an appeal from the PUC order appropriating the property.

The PUC can appropriate property with a final signed right-of-way plan that includes a detailed metes and bounds and recitations as required by the PUC. If not available, a right-of-way plan limited to the sheets which only include the railroad property and a detailed metes and bounds can be submitted to the PUC as long as the cover sheet is signed by the District Executive.

An electronic copy of the metes and bounds with recitations in Microsoft Word format should also be sent to the PUC Rail Safety Engineering Section for inclusion in the required order. This process can take up to 90 days from the time the information is submitted to the PUC.

The timing will dictate whether to acquire amicably or to pursue PUC appropriation. Considering the limited time to meet a project letting schedule, it is recommended that the District pursue PUC appropriation upon the initiation of negotiations. This may be accomplished through a concurrent effort; i.e., conduct an amicable settlement and PUC appropriation at the same time. Once the path for acquisition is determined, divert from either the amicable acquisition or the PUC appropriation process, as may be appropriate.

b. Amicable Acquisition. If acquired amicably from a railroad, a PUC appropriation (and referral for
payment of damages when needed) is not necessary. Regardless, close coordination between the Right-
of-Way Unit and the District Grade Crossing Unit is required. See Publication 371, Grade Crossing
Manual, Chapter 2. See also Publication 10, Design Manual Part 1, Transportation Program
Development and Project Delivery Process, Chapter 3. As with PUC appropriations, attention to
amicable acquisitions from railroads as early as possible will help to avoid delaying the letting.

Time-consuming and unsuccessful attempts at amicable acquisition, in lieu of concurrently pursuing
formal PUC appropriation, can result in project delay and place the District at a negotiating disadvantage.
Railroads frequently demand a quit claim deed, not a warranty deed, requiring modification to
PennDOT's pre-approved acquisition documents. Substantive changes to pre-approved documents, as
well as any unique agreements demanded by the railroad, are then subject to further form and legality
review by the Offices of General Counsel and Attorney General. See Chapter 1, Section 1.07 and RPDD
02-07-05 discussing the modification of forms and review and approval as to form and legality. These
additional approvals will extend the time period necessary for approval of the quit claim deed.

Since these standard documents generally refer only to a plan, the railroad will most likely demand a
metes and bounds description anyway for each required area. Finally, right-of-way clearance is
frequently only one part of the overall railroad coordination process. Railroads often seek to mix issues
related to the construction reimbursement agreement (and construction matters such as on-site flagging)
with the right-of-way acquisition process further complicating the transaction and leading to more delay.
It is for all these reasons that it is Department policy to pursue a concurrent approach.

In the event of an amicable acquisition where PUC proceedings have been initiated but a PUC order
appropriating the property has not been issued, the District R/W Administrator will forward a RW-348
(PUC Notification of Amicable Settlement) upon execution of all applicable settlement documents for the
right-of-way claim. This will terminate the need for the PUC appropriation.

c. Recordation of Order Excerpt, and payment/deposit of estimated just compensation. Normal right-
of-way clearance procedures apply where land is appropriated by PUC order. That is, mere entry of the
order by the PUC does not grant the Department a right to possess the land acquired. An excerpt of the
appropriation order must be recorded in the county recorder of deeds office (similar to the recording a
notice of condemnation) and payment must be made (directly or into court) to satisfy the Uniform Act
procedures in the absence of an authorization to enter or a statement in the PUC order that no payment is
due for the appropriation. See generally RPDD No. 7-9-93. The PUC order excerpt recordation process
is as follows:

(1) The PUC sends a certified excerpt of the order for recording, along with the entire order to the
Assistant Counsel in-Charge, Utilities, Real Property Division, who will forward it to the District
Right-of-Way Administrator with a copy to the District Grade Crossing Engineer/Administrator.

(2) The District Right-of-Way Unit will record the original certified (i.e., sealed) order excerpt
with the recorder of deeds office and provide proof of recording to the District Grade Crossing
Engineer/Administrator. The District should not record the certified order excerpt until the 30-day
appeal period has expired and the District is certain no appeal has been filed. Payment for the
recording must be processed by the District in a timely manner.

(3) The District Grade Crossing Engineer/Administrator then provides the Notification of
Recording to the PUC. See Pub 371, Chapter 2.04.

The PUC has jurisdiction to determine damages for land it has appropriated but seldom exercises that
power. If there is not an agreement regarding damages, the District must request that the Office of Chief
Counsel file a petition with the PUC requesting that it refer the determination of damages (referral) to the
appropriate court of common pleas (this is also known as a transfer of jurisdiction).

The acquisition of right-of-way from the railroad can be settled amicably at any time during the PUC
appropriation and/or PUC referral process. After PUC appropriation, an attempt should be made to settle
the claim using form RW-349 (this is similar to a post condemnation settlement upon the filing of a
declaration of taking). If the railroad is unwilling to settle for the appraised amount, they can accept
estimated just compensation by completing form RW-448RR.
When it is necessary to deposit estimated just compensation into court, the District must wait until the PUC enters the order granting the petition for the referral of damages prior to following the normal deposit procedures. See Section 3.09.B discussing this special procedure, and RPDD No. 5-7-89, also discussing the same. This process adds approximately 90 days to the deposit process.

Procedures used to document the deposit of estimated just compensation for a PUC Appropriation must not be confused with the declaration of taking entries made under normal acquisition procedures. Unlike the preliminary objection (PO) period, the railroad has two opportunities to object to the appropriation of its property.

1. If the railroad has objections to the request for the PUC to appropriate its property, it must object within 20 days in lieu of the PO period used for normal transactions.

2. After the PUC order appropriating the property is entered, the railroad has 30 days to appeal the PUC order appropriating the property.

After the order of referral has been forwarded to the District by the Office of Chief Counsel, the District may request that the estimated just compensation be deposited.

The Department may obtain possession after payment of an amicable settlement or when the EJC is filed with the court.

d. ROW Office Procedures for PUC Appropriations.

1. Claim Maintenance screen. Where a railroad claim is appropriated, the date the PUC Order is issued must be entered into the field entitled "PUC Order or MOU Date" in the ROW Office Claim Maintenance screen.

2. Declaration of Taking Maintenance screen. Since ROW Office does not have specific fields applicable to the unique circumstances of a PUC appropriation, special notations can be made instead of the available Declaration of Taking Claim Maintenance screen (even though no Declaration of Taking was filed). In order to incorporate the six-year statute of limitations, the Declaration of Taking Claim Maintenance screen data must be entered into ROW Office. Where this is the case, a Declaration of Taking record must be created in ROW Office with comments referring to the PUC appropriation. The establishment of this screen will enable the creation a Declaration of Taking Maintenance record to capture the appropriate estimated just compensation data.

In the reason for filing, enter "PUC Order transfer of jurisdiction". Other than entering the name of the Preparer, no other data will be entered on this screen; the Declaration of Taking Claim Maintenance screen will include sufficient information relative to the claim.

3. ROW Office Declaration of Taking Claim Maintenance Screen. This screen is broken down into three distinct sections to capture data. Due to the nature of a PUC appropriation, entering the Notice of Condensation 475 date into the ROW Office Declaration of Taking Claim Maintenance screen to establish the preliminary objection period is inappropriate. Only data called for under the Estimated Just Compensation section and Board of View sections will be completed for a railroad claim under PUC jurisdiction. Preliminary objection period information does not apply.

4. Claim Description Codes. To enable the assessment of the claim for clearance purposes, the following claim description codes shall be used:

RRA (Railroad Appropriated). Used to identify all Railroad appropriated claims in ROW Office

RRS (Railroad Settled). Used with the RRA Claim Description Code to identify Railroad appropriated claims that have settled.

5. ROW Claim Payments. FMV costs associated with claims identified with the RRA Claim Description code will be paid using internal order (cost function) 81102.
FMV costs associated with claims identified with the RRS Claim Description codes will be paid using internal orders (cost function) $11000.

3. Other Types of Railroad Acquisitions. Where the railroad-owned land is not at a public highway-railroad crossing, the PUC does not have jurisdiction. Normal acquisition procedures apply subject to the restrictions discussed herein. Examples of such situations would be the widening of a highway onto adjacent railroad right-of-way or the overtaking of an abandoned railroad spur.

There are two Pennsylvania statutes limiting the acquisition of railroad land in non-grade crossing situations. The Administrative Code provision authorizing the Department to acquire land for all transportation purposes specifically provides that real property belonging to a railroad cannot be acquired for purposes other than operating highway right-of-way unless there is clear and convincing evidence that the activity cannot be conducted economically at an alternate location. Examples of acquisitions covered by this statute are maintenance sites and construction facilities (such as a concrete batch-plant). Next, Section 412 of the State Highway Law addressing the acquisition of substitute right-of-way for utilities overtaken by a highway project provides that the right-of-way of a railroad company shall not be acquired or occupied without the consent of the company owning or operating, or in possession of, the railroad (the consent provision).

Note that there are no appellate cases interpreting the consent provision of Section 412. Similar language under the County Code has been interpreted as not being limited to operating railroad right-of-way. However, the County Code provision is not part of a statute addressing substitute right-of-way. Reading it in context, the provision only applies to the acquisition of substitute right-of-way for a utility other than the railroad itself (water, sewer, gas, electric, etc.).

Under these two statutes, the important factor is the reason for the Department’s acquisition. If the acquisition is for operating highway right-of-way, no limitation exists. If it is for some other non-operating highway right-of-way purpose, such as a maintenance site, there must be clear and convincing evidence that the activity for which the acquisition is being affected cannot economically be conducted at an alternate location. And if it is for a substitute right-of-way for another utility, the acquisition requires the consent of the railroad company.

Also, the Federal Commerce Commission Termination Act (49 U.S.C. §10501) regulates railroads engaged in interstate commerce. Railroads engaged in interstate commerce could raise a preemption defense under this Act to a state condemnation if the highway use would prevent or unreasonably interfere with rail operations or pose undue safety risks.

Given these legal restrictions, all efforts should be made to amicably acquire railroad right-of-way when the acquisition does not involve a grade crossing within the jurisdiction of the PUC. If an amicable agreement cannot be reached, and a declaration of taking must be filed, the Utilities and Right-Of-Way Section and the Office of Chief Counsel, Real Property Division, may be consulted to insure compliance with acquisition policy. Refer to Section 3.08.B.3.k. In no event should railroad right-of-way be designated as required for a substitute right-of-way for another public utility without the consent of the railroad. Obtaining this consent may be difficult and delay delivery of the project.

A quit claim deed can be accepted from a railroad. The Central Office Acquisitions Unit maintains examples of standard modified forms that can be used for this purpose. In view of the modifications, the deed is subject to approval of the Office of General Counsel and the Office of the Attorney General. See Chapter 1, Section 1.07 and RPD 02-07-05 discussing the modification of forms and review and approval as to form and legality. These additional approvals will extend the time period necessary for approval of the quit claim deed.

4. Conclusion. The following is a summary of railroad property acquisition scenarios discussed herein:

a. Grade Crossing: Accomplished by PUC appropriation unless an amicable acquisition is possible. Always pursue PUC appropriation concurrently with amicable negotiations.

b. Non-Grade Crossing (i.e. no PUC jurisdiction).
   
   (i) For Highway Purposes.
   
   * Operating Highway Right-of-Way: Apply normal acquisition/condemnation procedures.
- Non-operating Highway Operations: A certification that the transportation activity cannot be conducted economically at any other location is required. After certification, apply normal acquisition/condemnation procedures.

- Recognize that railroads engaged in interstate commerce have a federal preemption defense to a state condemnation, especially if the highway use would prevent or unreasonably interfere with rail operations or pose undue safety risks.

(2) As Substitute Right-of-Way for Utilities: Accomplished only with the consent of the railroad.

Where a declaration of taking is required, see Section 3.08.B.3.k discussing completion of the Form RW-400DTR.

Finally, note that a railroad is also a "utility" itself. Thus it is possible for a PennDOT project to impact an operating railroad in such a manner as to give rise to an obligation to provide substitute right-of-way to the railroad. In such a case the procedures for acquiring substitute right-of-way for utility apply. See Section 3.08.B.3.j.

S. Acquisitions from PennDOT Employees. The Adverse Interest Act precludes the Department from entering into a contract (sales agreement) with a PennDOT employee. There are two options when an acquisition is required from a PennDOT employee.

1. Condemn and pay estimated just compensation based on an application, which is not a contract. The employee can petition for viewers to obtain additional compensation or just allow the statutee of limitations to expire if they are satisfied with the compensation.

2. Condemn and enter into a post condemnation settlement agreement which is not contrary to the Adverse Interest Act because there is an adversarial relationship between the parties. Although an administrative settlement may be used to obtain a post condemnation settlement, great care should be exercised to avoid the appearance of a conflict of interest or special treatment. The file should thoroughly document any administrative settlement with a Department employee.

3. The above applies only for acquisitions by PennDOT from PennDOT employees or those performing as a contractor of any type on behalf of the Department. It does not apply to any other Commonwealth employee, nor does it apply if the acquiring agency is a local public agency.

3.04 ADMINISTRATIVE SETTLEMENTS

A. General Policy. It is the policy of the Department that every reasonable effort should be made to acquire real property expeditiously by negotiation. This includes the use of administrative settlements as long as they are reasonable, prudent, and in the public interest.

B. Authority to Approve Settlements. The District Right-of-Way Administrator possesses the authority to approve an administrative increase up to $50,000 over approved fair market value damages. The District Right-of-Way Administrator and the District Executive together may approve an administrative increase up to $100,000 over approved damages. On claims where the amount of the administrative increase is more than $100,000, the written concurrence of the Deputy Secretary for Highway Administration, in addition to the signatures of the District Right-of-Way Administrator and District Executive, is necessary (Refer to 3.04.D). Other than the District Right-of-Way Administrator, no right-of-way staff, whether employed by the Department or contracted to perform acquisition work on behalf of the Department, possesses administrative settlement authority of any amount. At the discretion of the District Right-of-Way Administrator, the District Chief Negotiator may be delegated the role of approving Administrative Settlements.

The Central Office Acquisition Unit will review administrative settlements made by the Districts. This review will be conducted as a part of their quality assurance function and will be after the fact. The Central Office Acquisition Unit Chief will be available to provide before the fact functional advice and guidance on proposed settlements as requested by the Districts.

If the Chief, Utilities and Right-of-Way Section, determines that a District has developed a pattern of approving
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Appendix C - Legal Issues and Guidance

Section B. - Acquisitions from Other Government Entities
When the Department knows that land being acquired is contaminated, an easement for highway purposes only should be acquired. This may help reduce the Department's liability. Condemning the land rather than acquiring it amicably in lieu of condemnation will also help reduce the Department's liability.

When the highway facility is located on land which is being or likely to be deep-mined, including removal of gas and oil by means of wells located off the right-of-way, the required right-of-way may be taken as an easement for highway purposes with approval of the Chief, Utilities and Right-of-Way Section. The depth of support necessary should be determined and shown on the plan. The depth of 300 feet may, but need not, be used.

When the highway facility is on structure and crosses over a railroad, the Pennsylvania Turnpike, or any other property in which substantial right-of-way saving can be affected, an aerial easement only should be acquired.

Acquisitions designated on prior highway plans as required for areas, e.g. required ditch area, were acquired as easements for the designated use. Likewise, land acquired as limit of slope was acquired as a slope easement.

5. Ultimate Right of Way. This is a designation sometimes seen on old Department plans that was to work in the nature of a setback. It designated areas that may be needed in the future for highway purposes. When land was so designated, the owner ostensibly could not erect buildings or other improvements within the area and if they did, they would not be paid for them when the Department did acquire the ultimate area as required right of way. However, the Pennsylvania Supreme Court has ruled that such an ultimate right of way line on a plan is meaningless — it is not a taking of any property right now and the landowner is free to build in the area and will be paid for any improvements in the area if the Department does acquire it. In short, ultimate right of ways shown on old Department plans should be ignored. If such a designation is on a local subdivision or other plan, then local ordinances must be consulted and interpreted to determine the effect of the designation.

B. Acquisitions from Other Government Entities.

1. General Overview. The document and procedures used to acquire land from other government entities varies according to the nature of the other entity. Although condemnation can be used against some other government entities under certain circumstances, this should be an alternative of last resort and not done without consultation with the Office of Chief Counsel, Real Property Division.

There is no prohibition to the payment of compensation for acquisitions from other government entities. In some circumstances it is not required or not done as a matter of practice. The better practice is to obtain the right-of-way without compensation.

If environmentally sensitive lands are involved, replacement lands are usually acquired for the other government entity. This could apply to all types of governments — Federal, State executive agencies, State non-executive entities or local. See Section C.01.C relating to the acquisition for environmental mitigation.

This topic is discussed in RPDD 01-12-96, entitled "Memorandums of Understanding, Interagency Agreements and Intergovernmental Agreements." Sample documents are attached to that directive. Please note, however, that Form RW-393 (9-81) (Agreement — Inter-Departmental) attached to the directive is no longer in print.

2. Federally-Owned Lands. The Department has limited options when acquiring land from a Federal agency for a highway project. In accordance with 23 CFR §710.601, the Department may file an application with the FHWA, or can make application directly to the land-owning agency if the land-owning agency has its own authority for granting interests in land. For example, the Department of Defense agencies such as the Army and the Navy have their own authority. Many Federal agencies, e.g. the National Park Service, the National Forest Service, etc., do not have their own authority; consequently, filing an application with the FHWA is the more common situation. The application must be submitted to the Chief of the Utilities and Right-of-Way Section for coordination with the FHWA.

The application must include specific information as set forth in the regulation. The deed of conveyance is prepared by the Department and submitted to FHWA for review and execution. Following execution, the deed is recorded by the Department and notice of the recording provided to FHWA and the concerned agency.

Just compensation is normally not paid for Federal acquisitions. Rather, replacement lands are acquired for the Federal agency. See Section C.01.L discussing acquisitions for others.
When property is needed by the Department which is under the control of the United States Army Corps of Engineers (ACOE), all property acquisition and temporary construction easements must be obtained from the ACOE. The ACOE is a review agency for purposes of obtaining clearances and permits along with property acquisition. The ACOE generally requires that an easement document be executed and acknowledged. A multiple step Corps of Engineer Acquisition Procedures checklist has been established. Contact the Administrative Unit, Utilities and Right of Way Section, for further guidance when one of these acquisitions is necessary.

3. Lands Under the Jurisdiction of Other Executive Agencies. Title to all lands of the Commonwealth resides in the Commonwealth. Jurisdiction over such lands, however, lies with the entity having control over it. That is why Department acquisitions are by the Commonwealth of Pennsylvania, Department of Transportation: title to the land lies in the Commonwealth; jurisdiction over the land in the Department.

A memorandum of understanding (MOU) is a cooperative agreement between executive agencies of the Commonwealth such as the Department of Transportation, the Department of Conservation and Natural Resources, the Department of Corrections, the Department of General Services, etc. MOUs can be used for a variety of interactions between executive agencies, including the transfer of jurisdiction over lands owned by the Commonwealth. MOUs do not create any contractual rights or obligations between the signatory agencies; it is a cooperative agreement indicating the intention of the parties and any dispute is subject to resolution by the Office of General Counsel. All MOUs are subject to review and approval as to legality and form.

The Office of Chief Counsel, Real Property Division, should be contacted when an MOU is required for the transfer of jurisdiction. There are certain standard clauses that must be included in all MOUs and there is a standard format. An MOU involving the transfer of land does not require an acknowledgement and is not recorded because title remains vested in the Commonwealth. There is simply a transfer of jurisdiction between Commonwealth entities taking place. MOUs regarding land transfers are executed on behalf of the Department by the Director of the Bureau of Project Delivery or a deputy secretary of transportation.

If an acknowledgement is desired for recording purposes or the other agency would like a quit claim deed filed to confirm the transfer of jurisdiction over the land, an interagency agreement must be used to document the transfer. An interagency agreement is a binding legal contract relating to independent agencies of the Commonwealth.

Some executive agencies will transfer lands to the Department at no cost, especially if the tract is small. In other situations, executive agencies have agreed to accept the Federal share of damages determined by the Department. There is no prohibition, however, to paying the full amount of damages as in any other acquisition.

There have been situations where the other executive agency requested that the Department condemn their land; for example, where the other agency is concerned it would need to file for local subdivision approval in the event an amicable transfer under an MOU was completed. If such a request to condemn another executive agency is made, the reason for the request must appear in the remarks section of the declaration of taking request (Form RW-400DTR).

4. Lands Under the Jurisdiction of Independent Agencies. An interagency agreement is the typical format used for the transfer of jurisdiction over land held by non-executive Commonwealth agencies. Such independent agencies include the Turnpike Commission, the Fish and Boat Commission and the Game Commission.

An interagency agreement is a binding legal contract subject to review and approval as to form and legality like all other contracts entered into by the Department. The Office of Chief Counsel, Real Property Division, should be contacted when an interagency agreement for the transfer of land is required. There are certain clauses that must be in the agreement and a certain format used.

If there is a desire that the document be recorded, that should be brought to the attention of the Office of Chief Counsel. In that case, an acknowledgment can be included. As an alternative, the agreement could provide that a quit claim deed confirming the transfer of jurisdiction be recorded after full execution and approval of the interagency agreement. The district would then need to request such a quit claim following execution and approval of the interagency agreement.
An MOU can also be used for transfers from a non-executive agency with their consent. Such consent is rarely granted. As far as processing is concerned, an MOU is only subject to one less step than an interagency agreement. MOUs need not be approved by the Office of Attorney General; interagency agreements must.

The Turnpike Commission has independent authority to deed its land to others. For this reason, acquisitions from the Turnpike can be accomplished by accepting a deed. The transaction can be documented through an interagency agreement that refers to a deed that is subsequently filed or a deed can be accepted without an interagency agreement. A deed should also be obtained from the Turnpike when it acquires State highway right-of-way on behalf of the Department. In this instance, a plan should also be generated that can be filed with the Department to document the right-of-way acquired.

Other independent agencies may also have authority to deed its land or interests in its land to others. For example, the Game Commission can grant rights of way in certain circumstances and prefers use of the deed of easement to document transfers of jurisdiction to the Department. If the other agency is willing to grant a deed, the Department can accomplish the transfer of jurisdiction by accepting a deed. The transaction can be documented through an interagency agreement that refers to a deed that is subsequently filed or a deed can be accepted without an interagency agreement.

The Department has entered into a State Game Land Banking Agreement to streamline transportation development projects impacting state game lands by allowing Districts to establish state game land banks. This agreement provides an expedited mitigation process where impacts under 5 acres can be debited from existing banks instead of being addressed on a project-by-project basis. A Cooperative Interagency Agreement between FHWA, the Game Commission and the Department establishes the mechanism for Interdepartmental Land Transfers and establishment of state game land banks. Special deed language is required in such transactions to indicate that compensation for the transfer will be provided from an appropriate state game land bank.

5. Lands Owned by County or Municipal Governments. Acquisitions from local governments that do not involve existing road right-of-way are normally treated like any other acquisition. That is, regular right-of-way acquisition documents are used and just compensation is paid on the basis of fair market value.

In rare circumstances, compensation based on fair market value is insufficient when acquiring land and improvements from a local government or other public entity. That is, compensation on a functional replacement basis may be appropriate where there is no ascertainable fair market value for the property in question and replacement of the facility is reasonably necessary to enable the local government to serve its constituents or customers as adequately as it would have had the condemnation not occurred. If the function is not being replaced, then no compensation is due where there is no ascertainable fair market value or the fair market value is zero.

The Department has recognized the possibility that payment would be required on a functional replacement basis when amicably acquiring a police station from a local government and fire stations from a local government and a volunteer fire company. That is, the functional replacement cost is considered as part of an administrative settlement in view of the fact the local government may be successful in forcing full payment for a replacement facility. Such administrative settlements may not include the costs of increases in capacity or betterments to a replacement facility, except those necessary to replace utilities and meet legal or other reasonable prevailing standards. A requirement that the replacement facility actually be constructed is also included in such settlements. An administrative settlement considering functional replacement costs must be approved by the Utilities and Right of Way Section.

Federal regulations allow the Department to provide compensation by functionally replacing a publicly owned property with another facility which will provide equivalent utility under certain circumstances set forth at 23 CFR §710.509. Among the requirements are that Pennsylvania law permits functional replacement and the Department elects to provide it; the property is in public ownership and use; the replacement facility will continue to be publicly owned and used; and the FHWA concurs that functional replacement is in the public interest. The Department has never implemented functional replacement under this provision and Department policy is not to do so in the future.

Where local road right-of-way is overtaken by Department required right of way, the Department does not pay compensation. Rather, the Department merely shows the area as legal right-of-way and it becomes part of the
State highway right-of-way. This is permitted because the right-of-way is either not replaced by the local municipality or its function is replaced by the Department when it constructs a re-routed local road or State highway segment as part of the project. This approach is also grounded in the concept that municipalities are part of the Commonwealth just like the Department.

6. Project 70 Lands. Special requirements apply to park and other public lands acquired under the Project 70 Land Acquisition and Borrowing Act of 1964, as amended. 72 Pa. C.S. §3946.1 et seq. Project 70 funds were used to acquire lands for recreational, historical and conservation purposes. No lands acquired with Project 70 funds can be disposed of or used for purposes other than recreational, historical and conservation purposes without the express approval of the General Assembly. 72 Pa. C.S. §3946.20.

In view of the language in the statute, a special act of the legislature is normally required to acquire Project 70 lands for highway purposes. However, counsel for the Department of Conservation and Natural Resources (DCNR) has decided that a land transfer from DCNR to the Department would be appropriate as to Project 70 lands where one purpose of the Department's highway project is to maintain or improve access to the State Park and to insure continued use of the State Park through which the highway is located; that is, the highway serves the park. Other state and local governments have not accepted this position. DCNR has also allowed transfers of State parklands to the Department without legislative approval when other land is being vacated to them as part of the project. This is based on the idea that the vacated land will be subject to the Project 70 restrictions, thereby providing no net loss of protected lands if the land converted to highway use is equivalent or smaller in size. The Game Commission has accepted this reasoning.

Special legislation authorizing the sale of Project 70 lands to the Department is usually made contingent upon the Department acquiring replacement lands that will be subject to the Project 70 restrictions. The normal plans presentation for park replacement lands can be used when acquiring the replacement Project 70 lands. The Department can include a specific reference to the Project 70 restrictions in a quit claim deed to the government entity for which the lands were acquired. The local government could also record a declaration of restrictive covenants to document the Project 70 restrictions.

Because of the possible need for special legislation, planning the acquisition of Project 70 lands should be considered early during the development of a project. Each district must determine which unit will be responsible for obtaining the special legislation.

C. Acquisition for Environmental Mitigation.

1. General Overview. The Department is often required to mitigate damages to environmental sensitive lands through the acquisition of other lands. This includes the acquisition of replacement local, state and federal park lands and game lands, as well as private lands that are wetlands or sensitive stream and terrestrial habitat areas for protected species. Sometimes construction must occur on these lands to create or enhance their environmental value; other times they are merely acquired to retain their natural condition.

The Department is authorized to acquire these lands under the Administrative Code as needed for transportation purposes and to mitigate impacts on other lands acquired. Because there is additional authority for acquisition of the land if it abuts the highway project, that is the preferred situation; however, abutment to the highway project is not absolutely required. See Section C.01.A.

When replacing public lands, title to the replacement land is acquired for the public entity. When mitigating impacts to private lands, title to the land is typically retained by the Department.

The need to acquire land for environmental mitigation must be included in the environmental document to allow acquisition for these purposes. Otherwise, the Department is subject to challenge by preliminary objections to a condemnation. The need for such acquisitions is often established by the United States Army Corps of Engineers in issuing a Section 404 permit under the Clean Water Act or by the PA Department of Environmental Protection in issuing a water encroachment permit, but may be required to satisfy other environmental requirements.

The Department’s policy on the acquisition of replacement lands and lands for environmental mitigation and the plan presentation in those regards will be more fully set forth in Publication 14M, Design Manual, Part 3, Plans Presentation, Chapter 3, Right-of-Way Plans, when it is revised. The plan notes defining these takings
will also be set forth in the Publication 14M, Design Manual Part 3, Plans Presentation, Chapter 3.

Guidance on acquisitions for wetland and stream mitigation is located in Publication 325, Wetland Resources Handbook, Appendix AA. This document includes the standard Declaration of Restrictive Covenants for Conservation to be used when fee title is acquired for a conservation area and the standard plan note to be used when acquiring a stream mitigation easement. It also includes specific guidance on plan requirements for these type of acquisitions and instructions for proper coordination.

Extensive coordination is necessary between the district environmental manager and plans unit in these types of takings due to their complexity.


2. Replacement Park and Game Lands. The Department’s ability to deed land to other public entities is restricted. For this reason, the best practice when the Department is required to replace lands acquired from a public entity (for example public parklands or Game Commission lands) is to acquire the land for the benefit of the public entity from which lands are being acquired. This allows the Department to possess the lands if necessary for construction purposes, but provide that title is being acquired for the benefit of the other public entity. The Department may, upon request, provide the public entity with a confirmatory quit claim deed reflecting that title to the land vested in the public entity upon acquisition as set forth in the plan authorizing the acquisition. See Section C.01.1 on requesting confirmatory deeds.

Replacement lands should normally be taken in fee simple. This provides the government entity for which the lands are being acquired full control over the area acquired and eliminates any responsibility of the property owner from whom it is acquired. It is also consistent with the nature of the title normally acquired for parks and game lands. If, however, the entity for which the lands are being acquired requests that only an easement be acquired, then an easement for parklands or an easement for game lands should be acquired. This may be appropriate, for example, if existing parklands of the government entity are held only in easement.

3. Wetland Mitigation. Lands taken for wetland mitigation should normally be acquired in fee simple. This simplifies the acquisition and provides the Department maximum control over the land. Landowners often also do not want to retain title to the land upon which wetlands are created or enhanced.

When the Department acquires fee title, a declaration of restrictions placing restrictive covenants on the land must be recorded following acquisition. These restrictions as approved by the Corps of Engineers will run with the land in perpetuity, allowing the Department, the Department of Environmental Resources, and the Corps to enforce the restrictions if necessary. The form of the declaration of restrictions has been negotiated with the Corps. See Publication 325, Wetland Resources Handbook, Appendix AA.

Time is of the essence in this submission because there is often a time limit in the permit relating to recording the restrictions.

The submission should include a draft declaration, a plan sheet for use as an exhibit, and a copy of any 404 permit conditions relating to the acquisition. Once the Real Property Division is satisfied with the declaration, a draft of the declaration will need to be submitted to the Corps for approval prior to execution. When the Corps’ approval of the declaration is received, the District Executive or Assistant District Executive should send the declaration to the Deputy Chief Counsel, Real Property Division for execution with a copy of the Corps’ approval attached. The declaration will be executed by the Deputy Secretary for Highway Administration. Following execution and approval as to form and legality, the declaration will be forwarded to the district for recording in the chain of title.

If deemed appropriate by the District Executive, a wetland mitigation easement can be acquired for a wetland mitigation site. The restrictions of the wetland mitigation easement have also been negotiated with the Corps of Engineers and should be defined on the plan as set forth in Publication 14M, Design Manual, Part 3, Plans Presentation. The easement also restricts use of the land in perpetuity and allows the Department and the Corps to enforce the restrictions if necessary. Acquisition of an easement only and the specific language of the easement will need to be approved by the Corps during the 404 permitting process. The review of the easement is the same as the process detailed above for declarations. A draft declaration of restrictions should
be provided to the Deputy Chief Counsel, Real Property Division for review.

4. Stream Mitigation. Land acquired for stream mitigation should normally be acquired in easement. This is because a fee simple acquisition would often bisect the remaining lands of the condemnee and increase damages.

The restrictions of the stream mitigation easements have been negotiated with the Corps of Engineers and should be defined on the plan as set forth in Publication 14M, Design Manual, Part 3, Plans Presentation. As with the wetland easement, the stream easement restricts use of the land in perpetuity and allows the Department, the Department of Environmental Resources and the Corps to enforce the restrictions if necessary. A draft of the easement language and plan should be provided to the Deputy Chief Counsel, Real Property Division for review. The submission should include a plan sheet with the easement language included and a copy of any 404 permit conditions relating to the acquisition. Once the Real Property Division is satisfied with the easement, acquisition of such an easement and the specific language of the easement will need to be approved by the Corps.

If deemed appropriate by the District Executive or required by the 404 permit, the Department may acquire a stream mitigation site in fee simple. As with a wetland mitigation site acquired in fee, a restrictive covenant in the form approved by the Corps of Engineers will need to be recorded following acquisition. The same procedures as set forth above for a wetland site acquired in fee simple should be followed.

5. Terrestrial Mitigation. Land acquired for terrestrial mitigation can be acquired in fee simple or easement, depending on the circumstances. Fee acquisition may bisect the remaining lands of the condemnee and increase damages, but may be appropriate if acquired on behalf of another state agency.

As with a wetland mitigation site acquired in fee, a restrictive covenant in the form approved by the Corps of Engineers will need to be recorded following acquisition if required by the 404 permit. The same procedures as set forth above for a wetland site acquired in fee simple should be followed.

The restrictions of the terrestrial mitigation easements should be defined on the plan as set forth in Publication 14M, Design Manual, Part 3, Plans Presentation. As with the wetland easement, the terrestrial easement restricts use of the land in perpetuity and allows enforcement if necessary. The same procedures as set forth above for a stream mitigation easement should be followed. Acquisition of such an easement and the specific language of the easement will need to be approved by the Corps if required by the 404 permit.

6. Conservation Easements. The Department has used the term conservation easement in the past to designate acquisitions for wetland, stream and terrestrial mitigation purposes. This term is correct under Pennsylvania law. See Memo to File, dated February 15, 2006, entitled "Takings for Environmental Mitigation." However, the Corps of Engineers is reluctant to use this designation because it views conservation easement as a term applicable when a non-profit conservancy-type organization holds the easement. For this reason, the Department is ceasing use of the term conservation easement, using instead wetland mitigation easement, stream mitigation easement, and terrestrial mitigation easement. Forms RW-317ACE (Agreement of Sale, Conservation Easement) and RW-317CE (Conservation Easement) should thus no longer be used.

D. Acquisitions from Railroads.

The content of this article is now located in Chapter 3, Section 3.03.R, which supersedes in its entirety the article previously set forth here.

E. Acquisition of Cemetery Land.

1. General Overview. The Act of April 5, 1849, P.L. 397, 9 P.S. §8 provides: "It shall not be lawful to open any street, lane, alley or public road through any burial ground or cemetery within this Commonwealth, any laws heretofore passed to the contrary notwithstanding: Provided, that this section shall not extend to the city or county of Philadelphia." This law applies to the Department and evidences a strong policy against any disturbance of cemeteries or burial grounds for road construction.

There are very few cases applying the cemetery law. The Office of Chief Counsel, Real Property Division should be consulted if there is any question on whether an acquisition falls within the prohibition of the law.
Publication 10X (DM-1X), 2015 Edition – Change #1, Appendix AG –
Stafford Act and Other Flood Hazard Mitigation Assistance Grant Property
Processes

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Appendix AG - Stafford Act and Other Flood Hazard Mitigation Assistance Grant Property Processes
APPENDIX AG

STAFFORD ACT AND OTHER FLOOD HAZARD MITIGATION
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Stafford Act and Other Flood Hazard Mitigation Assistance Grant Property Processes

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LIST OF ACRONYMS

BOPD
CE
CEES
CLOMR
FEMA
FHWA
FIRM
FMA
H&H
HDTS
HEC-RAS
HMA
HMGP
LOMR
LPN
NEPA
NFIA
NFIP
OCC
PDM
PEMA
PHMC
RAS
RFC
ROW
SHPO
SRL
TCE
TIP

Bureau of Project Delivery (PennDOT)
Categorical Exclusion
Categorical Exclusion Expert System
Conditional Letter of Map Revision
Federal Emergency Management Agency
Federal Highway Administration
Flood Insurance Rate Map
Flood Mitigation Assistance Grant
Hydrologic and Hydraulic
Highway Design and Technology Section (PennDOT)
Hydrologic Engineering Centers River Analysis System
Hazard Mitigation Assistance
Hazard Mitigation Grant Program
Letter of Map Revision
Linking Planning and NEPA
National Environmental Policy Act of 1969
National Flood Insurance Act of 1968
National Flood Insurance Program
Office of Chief Counsel (PennDOT)
Pre-Disaster Mitigation
Pennsylvania Emergency Management Agency
Pennsylvania Historical and Museum Commission
River Analysis System
Repetitive Flood Claims
Right-of-Way
Pennsylvania State Historic Preservation Office
Severe Repetitive Loss
Temporary Construction Easement
Transportation Improvement Plan

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APPENDIX AG

STAFFORD ACT AND OTHER FLOOD HAZARD MITIGATION
ASSISTANCE GRANT PROPERTY PROCESSES

This appendix describes procedures for utilizing property protected by the U.S. Federal Emergency Management Act (FEMA) Hazard Mitigation Grant Program (HMG). The HMG is authorized by Section 404 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) at 42 USC §5170c. FEMA regulations for implementing the HMG can be found at 44 CFR Part 206, Subpart N and 44 CFR Part 60. HMG is part of FEMA’s Hazard Mitigation Assistance (HMA) program. FHWA regulations implementing the Uniform Relocation Assistance and Real Property Acquisition Policies Act specifically require compliance with the Stafford Act. 49 CFR §24.8(n).

The Stafford Act was enacted by Congress in 1988 and provides the legal authority for the federal government to provide assistance to states and localities during declared major disasters and emergencies. The act also establishes the HMG, which provides grants to states and local governments to implement long-term hazard mitigation measures after a major disaster declaration. Hazard mitigation is defined as any sustained action taken to reduce or eliminate long-term risk to people and property from natural hazards and their effects. While there is a wide range of mitigation measure options, a frequently used measure includes removing buildings and purchasing property to restrict future development. This guidance specifically relates to the use of property for PennDOT projects that was acquired by others with an HMG grant using Stafford Act funding (Stafford Act property).

The HMG program in Pennsylvania is administered by FEMA through the Pennsylvania Emergency Management Agency (PEMA). Generally, parcels purchased with an HMG grant will be owned by the local municipality and will indicate the use of grant funding in the deed for the property. Occasionally, HMG property may be owned by an entity other than the local municipality, such as another state agency, a county, or a qualified conservation organization. In those situations, the current owner will need to perform the role of the municipality described in this policy.

After December 3, 1993, municipalities applying for HMG grants were required to enter into agreements with FEMA about the future use of the property to be acquired. Section 404(b) (2) (B) of the Stafford Act provides that these agreements must assure that:

i. Any property acquired, accepted or from which a structure will be removed pursuant to the project will be dedicated and maintained in perpetuity for a use that is compatible with open space, recreational, or wetlands management practices;

ii. No new structure will be erected on the property acquired, accepted, or from which a structure was removed under the acquisition or relocation program other than—
   I. a public facility that is open on all sides and functionally related to a designated open space or recreational use;
   II. a restroom; or
   III. a structure that the Administrator approves in writing before the commencement of the construction of the structure; and

iii. After receipt of the assistance, with respect to any property acquired, accepted, or from which a structure was removed under the acquisition or relocation program—
I. no subsequent application for additional disaster assistance for any purpose will be made by the recipient to any Federal entity; and

II. no assistance referred to in subclause (i) will be provided to the applicant by any Federal source.

Since May 4, 1994, FEMA has implemented these provisions of the Stafford Act by requiring that the terms quoted above be included as restrictive covenants in the deeds that convey the Stafford Act property to the municipality as stated per 44 CFR §206.434(e). Most PennDOT projects on Stafford Act property are consistent with these restrictions so long as they are public facilities that are open on all sides and are functionally related to a designated open space or recreational use. For example, PennDOT highway and bridge projects are public facilities and are usually designed to be open on all sides. They are also functionally related to the designated uses of the Stafford Act property because they provide access for the public and emergency personnel. Some PennDOT projects are acceptable uses of the property (i.e. trails) and while the coordination process described here-in would still be required in order to transfer land ownership, PennDOT may not need to prove the facility was part of the pre-existing federal-aid transportation system.

On December 3, 2007, FEMA adopted new regulations governing the acquisition of property for open space under its various grant programs. These regulations can be found at 44 CFR Part 80. New land use and oversight requirements found in Part 80 at 44 CFR §80.19. Part 80 generally disfavors use of Stafford Act property for paved roads, highway or bridge projects, but FEMA retains authority to approve any use of Stafford Act property that it determines compatible with the regulations, as stated in 44 CFR §80.19(a).

Part 80 also includes a specific exception that allows improvements to pre-existing federal-aid transportation systems where FEMA determines that competing federal interests are unavoidable and FEMA has analyzed the floodplain impacts for compliance with 44 CFR §60.3, as stated in 44 CFR §80.19(a) (1) (ii).

"Pre-existing federal aid transportation system" is an existing transportation system that could be eligible for a federal aid program. Whether or not the federal funds are utilized as part of the project is not relevant to the determination.

This guidance outlines the procedures that PennDOT will follow to obtain a determination from FEMA, through PEMA, that a PennDOT project using Stafford Act property is compatible with FEMA's Part 80 regulations. Following the guidance will result in a more streamlined process and allow project managers to anticipate a project schedule appropriate for the needs of the project. This guidance does not apply to FHWA-recognized emergency projects that qualify as an emergency repair under 23 USC 125; FHWA recognized emergency projects may proceed without a compatible use determination.

The primary steps of the Stafford Act compatible use determination process are:

1. Identify parcels funded by the Stafford Act.
2. Determine alternatives and conduct a detailed analysis including hydrologic and hydraulic studies of the identified alternatives.
3. Determine if the project must affect the parcel.

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4. Determine if the project is a "pre-existing federal-aid transportation system", as stated in 44 CFR 80.19 (1) (ii). This determination is made during scoping and documented during FHWA coordination.

5. Coordinate with the municipality and agencies and document coordination efforts.

Other HMA Grant Programs

The HMGIP is only one of three current Hazard Mitigation Assistance (HMA) programs administered by FEMA. Other HMA programs include the Pre-Disaster Mitigation Grant Program (PDM) authorized by Section 203 of the Stafford Act and the Flood Mitigation Assistance Program (FMA), which is authorized by Section 1366 of the National Flood Insurance Act of 1968 (NFIA) at 42 USC 4104c. The PDM is designed to offer funding for projects that reduce the overall risk to the population and structures for future hazard events. FMA funding is used to assist state and local governments in funding cost-effective actions that reduce or eliminate the risk of flood damage to buildings, manufactured homes, and other structures insured under the National Flood Insurance Program (NFIP).

In addition to the current HMA programs, other grant programs existed and resulted in the purchase of property for flood hazard mitigation. These programs include the Repetitive Flood Claims (RFC) grant program; and the Severe Repetitive Loss (SRL) grant program. Both the RFC and the SRL were authorized by the NFIA and offered grants only for disasters declared prior to June 1, 2009.

Property acquired under one of these other HMA programs may also be burdened with a deed restriction for open space and a determination from FEMA will be needed before the property can be used for a PennDOT project. The procedures outlined in this guidance for "Stafford Act" (HMGIP) properties should be followed for all other HMA identified properties.

AG.1 IDENTIFY STAFFORD ACT PROPERTIES

Identify and document Stafford Act properties within a project area during project planning; and again, during project scoping. Stafford Act properties are often documented on the project's Linking Planning and the National Environmental Policy Act (NEPA) (LPN) level 2 screening form and the information is then carried through and confirmed on the project's scoping document in the Categorical Exclusion Expert System (CEES). A map layer showing Stafford Act and other HMA properties is also available on the PennDOT One Map system, at https://www.dot7.state.pa.us/OneMap. The layer within PennDOT One Map may include both candidate Stafford Act properties, as well as funded Stafford Act properties. Confirmation of whether funding was actually used will be determined in the next section during the deed review. PennDOT One Map should be consulted periodically throughout the project design process to identify newly acquired properties with Stafford Act funding.
Impacts to Stafford Act properties may not be known until preliminary design; however, if properties are present in the project area, increase the estimated length of the project schedule when planning and programming the project on the transportation improvement program (TIP). Most of the additional time will be needed during preliminary engineering.

Note the presence of any Stafford Act properties within the project vicinity during secondary source review, prior to the scoping field view. Due to their overall complexity, projects with potential impacts to Stafford Act properties that otherwise qualify as categorical exclusion evaluations should be scoped as Level 2 CEs. Invite FHWA to the scoping field view, regardless of the project funding source. If it is known that there will be no use of the Stafford Act property, or if the use is known to be only temporary, a Level 2 CE is not required.

AG.2 ESTABLISH STAFFORD ACT PROPERTY BOUNDARIES DURING SCOPING

Once a Stafford Act property is identified, establish the Stafford Act property boundaries to determine if right-of-way (ROW) will be required from the property for construction of the project. Stafford Act property boundaries follow the parcel boundary and are defined in the property deed.

Look for language in the deeds that references FEMA, the Robert T. Stafford Disaster Relief and Emergency Assistance Act, the National Flood Insurance Act of 1968, the Hazard Mitigation Grant Program or one of the other HMA programs. Typically, deed review occurs in preliminary design; however, due to the length and complexity of this process, deed review of the Stafford Act (or other HMA funded parcels) should occur during scoping.

Discuss with FHWA during the scoping field view whether the project qualifies as a "pre-existing federal-aid transportation system", which is considered by FEMA an allowable use of Stafford Act properties. Regardless of the funding source used for a project, it may still be eligible for federal funding sources and could qualify as a federal-aid transportation system. Include FHWA's preliminary determination in the scoping document.

Allow time in the project schedule for a detailed alternatives analysis with hydrologic and hydraulic (H&H) modeling on several alternatives. The number of alternatives that would require H&H modeling will be determined based on project and site specifics. Anticipate a minimum of one year of agency coordination, prior to finalizing ROW.

AG.3 STAFFORD ACT PROPERTY IMPACTS

In order to address the needs of a project, ROW may need to be acquired from a Stafford Act property. The general policy of PennDOT is to acquire required ROW in fee simple, except where lesser interests are required for specific limited purposes (See PennDOT Publication 14M (DM-3), Section 3.1). When acquiring ROW from a Stafford Act property, PennDOT will acquire permanent ROW as an easement for highway purposes, except for lesser interests. Lesser interests, such as temporary construction easements,
slope easements, aerial easements, drainage easements, etc., will be acquired in conformity with
PennDOT Publication 14M and Publication 378.

**NOTE:** Consider practicable design alternatives to avoid permanent and
temporary impacts to Stafford Act funded parcels.

Refer to Figure AG.1 for an overview of the coordination process if a temporary construction easement
or permanent ROW is required from a Stafford Act property.

**Temporary Construction Easement Impacts**

Compatible use determinations are not necessary when the only acquisition from a Stafford Act property
is a temporary construction easement (TCE). If no permanent ROW is required, and a transportation
project requires only a TCE from a Stafford Act parcel, send a notification letter to FEMA, through
PEMA. The District project manager will coordinate with PennDOT Bureau of Project Delivery (BOPD),
Highway Design and Technology Section (HDTS) to develop the letter.

HDTS will send the notification letter to PEMA — Hazard Mitigation Division, Bureau of Recovery and
Mitigation, 1310 Elmerton Avenue, Harrisburg, PA 17110, a minimum of 30 days prior to contractor
"Notice to Proceed" and include the following:

- Brief project description, including allowable uses of the TCE (i.e. material storage, equipment
  storage; erosion and sediment pollution controls)
- Anticipated notice to proceed date to contractor and duration of the TCE use
- Figure showing location of the TCE
- Description of standard the TCE conditions per DM-3 and contractor restoration obligations per
  PennDOT Publication 408 (i.e. contractor on site responsible for security of TCE, no permanent
  alterations, etc.)

PEMA will forward the notification letter to FEMA and any other appropriate parties.

**Permanent ROW Impacts**

If project scoping indicates that permanent ROW impacts to a Stafford Act property seem likely, the
District project manager will coordinate with HDTS and the District environmental manager to perform a
detailed alternatives analysis during the NEPA process. HDTS will take the lead coordinating the
technical alternatives analysis process with PEMA.

**Alternatives Analysis**

The engineering alternatives analysis will determine: if there is a public benefit of the proposed use of the
Stafford Act property; if there is no practicable alternative to using the property; or, if undue hardship to
the community will result if non-restricted lands are used. In this guidance, a practicable alternative is an
alternative where construction is technically feasible, economically justified, and environmentally
acceptable.
If the alternatives analysis indicates that permanently impacting a Stafford Act property is the best option, then it will demonstrate that PennDOT has given proper consideration to other options and found them to be impracticable. The detailed alternatives analysis will include hydraulic modeling on alternatives, when the hydraulic modeling is the determining factor in the analysis. For example, if an alternative is dismissed due to roadway geometry, potential impacts to other sensitive resources, safety concerns, or lack of nearby sites that are not Stafford Act properties, then a hydraulic analysis is not needed for that alternative. If two or more alternatives have not been dismissed, their hydraulic impacts can be compared to the non-avoidance alternative’s hydraulic analysis.

The objective of the alternatives analysis is to determine if there is a practicable alternative to using the Stafford Act property. If there isn’t a practicable alternative, the analysis will clearly document why not. This process is strongly analogous to the analysis completed under Section 4(f).

Include the following components in the alternative analysis:

1. Purpose and Need
2. Project Description
3. Discuss whether the project can meet the purpose and need, but not be built on Stafford Act properties.
4. Description of each alternative, including the no-build alternative and the no-encroachment alternatives
   a. Major features and differences of each alternative
   b. Acreage of land acquisition, including temporary and permanent, compared to total property area for each alternative
   c. Hydraulic analysis of each alternative that meets the project purpose and need and has not been dismissed as an alternative for other reasons. The hydraulic analysis includes Effective, Existing, and Proposed Conditions models, in accordance with FEMA requirements
      i. H&H summary of results
      ii. Check-RAS (River Analysis System) program to verify compliance with current FEMA model standards (optional). Check-RAS can only be used if Hydrologic Engineering Centers River Analysis System (HEC-RAS) was the model utilized in H&H analysis.
      iii. Flood insurance rate maps (FIRM)
      iv. Discuss any letter of map revisions (LOMR) or conditional letter of map revisions (CLOMR) since the FIRM was published
      v. Discuss any known new encroachments or changes to encroachments that may not be shown on FIRM’s, LOMRs, or CLOMRs
      vi. Discuss freeboard requirements as required per locally adopted floodplain management ordinance
      vii. Discuss any changes in velocity (its effect on wildlife passage, beneficial floodplain value, stream morphology, scour, etc.)
      viii. Tabular comparison of all models and key parameters and differences
   d. Environmental impacts (NEPA considerations)
   e. Project cost estimate
f. Construction details (including demolition)
g. Is the alternative practicable (within reasonable natural, social, or economic constraints)?
h. Is there an undue hardship to the community if the alternative is chosen?

5. Prepare a tabular comparison of alternatives, including denoting major features and differences, general impacts, cost, ROW requirements, environmental impacts, hydraulic characteristics (if applicable), advantages, disadvantages, etc. An example tabular comparison is provided as Attachment A. Column headings should be project specific and compare the project needs and resources present.

6. If the preferred alternative would require permanent acquisition of Stafford Act property, include a discussion explaining why there is no alternative, other than the proposed project's preferred alternative, on which this construction is technically feasible, economically justified, and environmentally acceptable. Discuss the basis of selection of preferred alternative and why proposed action must be located in floodplain (If applicable).

If there is no practicable alternative to acquiring ROW from a Stafford Act funded property, the alternative selected must adhere to requirements set forth in 44 CFR 60.3, which establishes requirements based on the FEMA designated flood zone where the project is located. For projects within a detailed study area (i.e. Zone AE, A1-30) with an established floodway, H&H analysis must demonstrate that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood discharge. For projects within other designated zones or without an established floodway, please refer to 44 CFR 60.3 for requirements.

NOTE: Within a detailed study area, FEMA considers no increase as 0.00 feet. An increase above 0.00 feet is allowed, if a CLOMR application is submitted and approved. The CLOMR application process timeline would be in addition to the compatible use justification process. Following construction of the project, prepare a LOMR application, if there is a modeled increase of flood levels.

The alternative analysis will be conducted as part of the project's NEPA analysis. Environmental resources need to be identified for each of the alternatives. The NEPA document will assess the selected alternative project impacts and document Stafford Act property impacts. Ensure project compliance with Section 106 of the National Historic Preservation Act and PennDOT Publication No. 689 – The Transportation Development Process: Cultural Resources Handbook. Complete consultation with the Pennsylvania State Historic Preservation Office (SHPO), prior to submission of the Compatible Use Determination Request to PEMA.

FHWA Coordination

If the preferred alternative requires ROW acquisition on Stafford Act funded properties, the District project manager will coordinate with PennDOT HDTs. PennDOT HDTs will take the lead with the remainder of the process. PennDOT HDTs will describe the proposed transportation improvement project to FHWA and request FHWA correspondence that (1) acknowledges FHWA's review and analysis of the project.
alternatives study and H&H reports for technical sufficiency, and (2) confirms that the project is "part of a pre-existing federal-aid transportation system". Specifically, the FHWA Program Development Team environmental representative should provide a letter that documents the following (a template of items to be included in the letter is included as Attachment B):

1. FHWA's participation in the project alternatives study (as applicable),
2. FHWA's review of the H&H report for technical sufficiency (as appropriate) and whether or not FHWA believes that the project will have any calculable hydraulic impacts,
3. Whether or not FHWA recommends that FEMA determine the project be considered "part of a pre-existing federal-aid transportation system" based on FHWA's federal-aid funding eligibility determination (and if so what federal funds would be eligible to be spent on the project), and
4. FHWA concurrence with respect to the transportation need(s) for the project.

If FHWA determines that the project is not considered part of a pre-existing federal-aid transportation system, HDTs should additionally draft a letter to FEMA that explains why the overall project is compatible with the Part 80 Open Space requirements. Examples of items to consider in drafting this letter include whether the project benefits the Stafford Act property by providing necessary access, the overall impact of the project on the floodplain, and any mitigation that will be performed as part of the project.

**NFIP, Municipality, and/or County Coordination**

Next, coordinate with both the Commonwealth's NFIP coordinator and the municipality (property owner). PennDOT will supply FEMA with evidence that the proposed project supports federal, state, and local floodplain management requirements. This component must be supported with a written statement from the local floodplain administrator and the Commonwealth's NFIP Coordinator.

**NOTE:** In Pennsylvania, the state NFIP coordinator can be contacted at the Department of Community & Economic Development, Attn: NFIP Coordinator, 400 North Street, 4th Floor, Harrisburg, PA 17120-0225

PennDOT must coordinate with the Commonwealth's NFIP Coordinator to determine that the H&H analysis of the selected alternative meets the requirements of 44 CFR 60.3, the Pennsylvania Flood Plain Management Act of 1978, Act 166, and 25 PA Code Chapter 106. Coordination with the NFIP coordinator will include:

1. Cover letter describing the project and request a review of the H&H analysis (template included as Attachment C)
2. H&H analysis and report of selected alternative
3. Electronic version of HEC-RAS models, including Effective, Duplicate Effective (if applicable), Existing, and Proposed models.

The District project manager will coordinate with the municipality, which is the current owner of the Stafford Act funded parcel(s). Coordination with the municipality should include:
1. Cover letter describing the project and request to transfer a portion of Stafford Act property to a PennDOT highway easement with the underlying fee interest to remain with the affected municipality.

2. Parcel maps or site alignment maps that reflect the legal description as stated in the deed. Lot and subdivision numbers (if applicable) must be labeled and the exact limit of the proposed project must be highlighted.

The District project manager will assist the municipality in their review and preparation of their letter to PEMA, Hazard Mitigation Division, Bureau of Recovery and Mitigation. An example of a municipality letter to PEMA stating their support of a transportation improvement project that affects Stafford Act funded lands is provided as Attachment D.

Concurrently, if the municipality supports the project, an Agreement of Clarification should be provided for municipality signature. The District project manager will provide the municipality with an agreement of clarification for signature, using Form RW-321. Form RW-321 is provided as Attachment E and can be obtained from the District ROW Administrator. Contact the Office of Chief Counsel, Real Property Division, with any questions related to completing Form RW-321.

**PEMA Coordination**

Once FHWA, the state NFIP coordinator, and the affected municipality have responded favorably, early coordination with PEMA is recommended. A face-to-face meeting to introduce the project and circumstances will help to inform PEMA of the upcoming submittal, offer an opportunity for project discussion and answer questions, and identify project specific needs in the Compatible Use Determination Request process. Attendees at the meeting should be:

- PennDOT District project manager
- PennDOT District environmental manager
- PennDOT District ROW representative
- PennDOT BOPD-HDTS representative
- PennDOT BOPD-ROW representative
- FHWA Program Development Team environmental representative
- Municipality/county/property owner representative
- PEMA Hazard Mitigation Division, Bureau of Recovery and Mitigation
- PEMA Area Office (Eastern, Central, or Western)

Prepare minutes of the meeting to clearly document the project discussions that occurred.

**AG.4 FEMA COMPATIBLE USE DETERMINATION REQUEST**

Subsequent to the meeting with PEMA, any project specific requirements for the FEMA coordination should be clear and PennDOT can proceed in drafting the compatible use determination request package. The package will be submitted to PEMA, Hazard Mitigation Division, Bureau of Recovery and Mitigation, for their review and concurrence, prior to submitting to FEMA.

Minimum contents of the compatible use determination request:
1. Cover letter to PEMA that includes project description, project purpose and need, summary results of alternative analysis, and request for a compatible use determination. The letter states that PennDOT will only use the requested ROW for purposes compatible with open space, recreational, or wetland management practices and that no other structures or improvements shall be erected on the premises other than the stated transportation improvements included in the enclosed documents. A template example of a cover letter appropriate for PEMA submission is provided as Attachment F.

2. Alternative analysis including all items listed in section AE.3 of this guidance.

3. FHWA correspondence documenting their review of the project and confirmation that the project is part of a “pre-existing federal-aid transportation system”. If applicable, also include HDT correspondence to FEMA that explains why the overall project is compatible with the Part 80 Open Space requirements.

4. Municipality concurrence

5. Deed(s)

6. Parcel maps or preliminary right-of-way plans which reflect the legal descriptions as stated in the deed(s). The exact limit of the proposed project must be highlighted. Written confirmation from PennDOT must be included that demonstrate the subject property and maps are correctly related. FEMA has requested that a state agency certify that the property boundary stated in the deed matches what is provided on mapping. PennDOT should provide the confirmation.

7. Evidence that the proposed project supports federal, state, and local floodplain management requirements, supported with a written statement from the local floodplain administrator (to be included in PEMA’s cover letter submission to FEMA Headquarters through the FEMA Region III office) and the state NFIP Coordinator.

8. Brief description of the type of NEPA document being prepared, status of the project’s Cultural Resources Section 106 process, and type of state and federal permitting required for the project.

9. The Agreement of Clarification (Form RW-321), signed by the municipality (Director of PEMA signs agreement prior to FEMA submission)

10. PEMA concurrence (to be included in PEMA’s cover letter submission to FEMA)

11. Other items requested at the pre-submission PEMA meeting.

Separate from the FEMA compatible use determination request package, but submitted to PEMA concurrently, include a document that summarizes comments/requests from the pre-submission PEMA meeting and how they were addressed in the package.

Submit the document to PEMA and schedule a face-to-face meeting two weeks subsequent to submission to provide an opportunity for PEMA to discuss the project with PennDOT and request any clarifications needed. Continue to coordinate with PEMA to remain current on status of the review and continue to provide clarification, if needed. Once document is deemed complete by PEMA, PEMA will forward it to FEMA for their review, as appropriate. Continue regular communication with PEMA to obtain updates on the review progress.
Following PEMA's concurrence and submission to FEMA, the NEPA document for the project can be submitted for review and approval. Project impacts need to be adequately assessed (particularly floodplain impacts) in the document. The pending approval of the FEMA compatible use request must be acknowledged in the document.

**NOTE:** Even though NEPA approval may take place as indicated above, there is risk in proceeding with final design activities and acquisition of other ROW parcels if these activities are dependent on FEMA's approval of the use of the Stafford Act property. It would be prudent to limit final design and other activities to those that will be needed regardless of whether FEMA approves the use of the property or not. If FEMA does not approve the request, a re-evaluation of the NEPA document will be necessary.

### AG.5 FEMA COMPATIBLE USE APPROVAL

FEMA will approve and concur with the compatible use request by signing the agreement of clarification. It will need to be signed between the affected municipality, Director of PEMA, and FEMA in order to document FEMA's compatible use determination.

PEMA is responsible for the coordination and signing of the agreement of clarification. After signature, PEMA will provide the original executed agreement of clarification to HDTs. The District ROW Unit will record the agreement in the county where the parcel is located. The agreement of clarification will be indexed in the grantor and grantee indices in the name of the municipality. The recordation can be completed as part of the final ROW settlement agreement with the municipality. HDTs will then send a copy of the recorded agreement to PEMA and FEMA for their records, and provide FHWA with documentation of the compatible use determination made by FEMA. Recordation of the agreement of clarification allows PennDOT to acquire permanent ROW on Stafford Act properties.

### AG.6 LATE FINDING OF PROJECT IMPACTS ON STAFFORD ACT PROPERTY

Should a project impact a Stafford Act property, but not be identified until ROW acquisition or anytime within the design process, PennDOT must complete the TCE notification or compatible use request, as appropriate. A NEPA re-evaluation will be required, if environmental approval has been received. The project manager should contact HDTs as soon as possible to begin the process and determine that no other practicable alternative exists to using Stafford Act lands. Anticipate significant project schedule delays if this occurs late in the project development process.
Figure AG.1: Stafford Act Property Impacts Process Flow Chart

1. What is the anticipated type of impact to Stafford Act property?
   - Only temporary Conserve/No Conserve Required (Section AG 3)
   - Permanent ROW Required
   - Send notification letter and required attachments to FEMA a minimum of 30 days prior to commencing "Notice to Proceed"
   - FEMA forwards notification to FEMA

2. Proceed with detailed alternatives analysis (Section AG 3: Alternative Analysis)
   - Is there a practicable alternative to use of Stafford Act property that meets project needs?
     - Yes: Verify that alternative meets requirements of 44 CFR 60.3
     - No: Choose that alternate and proceed with NEPA and Preliminary Engineering/Final Design

3. Request FHWA correspondence (Section AG 3: FHWA Coordination)
   - Request state NFIP coordinator to verify project meets requirements of 44 CFR 80.3 (Section AG 3: NFIP, Municipality, and/or County Coordination)

4. Coordinate with municipality and/or county to prepare letter of support and sign Agreement of Clarification (Form FHW 501)
   - (Section AG 3: NFIP, Municipality, and/or County Coordination)

5. Hold meeting with FEMA and FHWA to discuss potential risks (Section AG 3: FEMA Coordination)

6. Prepare Compensable Use Determination Request package (Section AG 3)

7. Submit request package to FEMA. Included with the package is an Agreement of Clarification, already signed by the municipality or county. Schedule meeting with FEMA two weeks after submission (Section AG 3)

8. Observe FEMA concurrence of compensable use

9. FEMA submits request to FEMA Headquarters through FEMA Region III

10. FEMA approves compensable use request and signs Agreement of Clarification

11. Send copy of signed agreement to FEMA, FEMA, and FHWA

12. Proceed with ROW acquisition from flood hazard mitigation assistance grant property

*Procedures summarized in this figure for "Stafford Act" (HMGP) properties should also be followed for all other HMA identified properties.
### Attachment A, Table 1. Alternative Analysis Matrix

[Column and row headings should be adapted based on the specific project. Add additional columns as needed. Shade blocks red that lead to an alternative not being practicable. Shade the preferred alternative green.]

#### Project Name/Location

<table>
<thead>
<tr>
<th>Date</th>
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<tr>
<th>Alternatives</th>
<th>Bridge Construction Method</th>
<th>Project Purpose and Needs</th>
<th>Detour</th>
<th>Bridge Length</th>
<th>Length of Approach Construction</th>
<th>Anticipated Construction Time</th>
<th>Parcel Impacts</th>
<th>Stafford Act Funded Property Impacts</th>
<th>Area Impacted on Stafford Act Properties</th>
<th>Length of Stream Impacts</th>
<th>Change in Water Surface Elevation (WSE) from Existing</th>
<th>NEPA Impacts</th>
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<tr>
<td>No Build Alternative</td>
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<td>Alternative 1 - Bridge Rehabilitation</td>
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<td>Alternative 2 - On-Alignment Bridge Replacement - Bridge Type P1</td>
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<td>Alternative 3 - Off-Alignment Bridge Replacement - Bridge Type KD</td>
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<td>Alternative 4 - Off-Alignment Bridge Replacement 100 ft Downstream</td>
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<tr>
<td>Alternative 5 - Off-Alignment Bridge Replacement 100 ft Upstream</td>
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<tr>
<td>Alternative 6 - Off-Alignment Bridge Replacement outside of all Stafford Act Parcels</td>
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1 Include all feasible alternatives that meet the project needs to avoid the Stafford Act protected property - examples are included in table; add or delete alternatives as needed.
2 Half width vs full width.
3 Add project needs to the table as necessary; describe if the alternatives meet the project need.
4 Include length of detour, if detour route requires improvements, any detour route limitations.
5 Include number of residential or business displacements and other impacts such as those to a park or trail.
6 Include parcel numbers, parcel locations, and total number of parcels impacted.
7 Add NEPA impact columns that are relevant in selecting the alternative.
Attachment B: Template correspondence from FHWA to PEMA

Date

Mr. Tom Hughes
PEMA
Bureau of Recovery and Mitigation
1310 Elmerton Avenue
Harrisburg, PA 17110

Dear Mr. Hughes:

The proposed project involves the xxxx of the xxxx over xxxx creek/stream/river in Municipality, County. The roadway approach work will involve xxxx. The Federal Highway Administration (FHWA) has participated in the project alternatives analysis and also reviewed the hydrologic and hydraulic report for technical sufficiency. We have confirmed that the project has no calculable hydraulic impacts.

FHWA recommends that the Federal Emergency Management Agency (FEMA) determine the project to be "part of a pre-existing federal-aid transportation system" due to its eligibility for federal-aid funding and the importance of this bridge/roadway to transportation in xxxx County. The xxxx of the existing xxxx is eligible for FHWA xxxx (name the type of funding). This route is vitally important to transportation in xxxx County and FHWA has concurred with the need to xxxx (replace/rehab/etc.). If you have any questions, please contact xxxx.

Sincerely,

Division Administrator

Enclosures
Attachment C: Template correspondence from PennDOT to NFIP Coordinator

Date

Mr. Dan Fitzpatrick  
State Coordinator National Flood Insurance Program  
Department of Community and Economic Development  
400 North Street, 4th Floor  
Harrisburg, PA 17120

Dear Mr. Fitzpatrick:

The proposed project involves the xxxx of the xxxx over xxxxx creek/stream/river in Municipality, County. The roadway approach work will involve xxxx. The proposed project is located within the vicinity of a Hazard Mitigation Assistance grant property. The Pennsylvania Department of Transportation (PennDOT) requests your review of the hydrologic and hydraulic (H&H) report prepared for this project. Included for your review are the H&H analysis and report and an electronic version of the HEC-RAS models. Upon your review, please send notification of your agreement that the project meets the regulations of the National Flood Insurance Program, as contained in 44 CFR 60.3, and PA Act 166, The Pennsylvania Flood Plain Management Act of 1978.

Sincerely,

XXXXXXXX  
Highway Design and Technology Section  
PennDOT – Bureau of Project Delivery

Enclosures

AG-19
Attachment D: Example template letter of support from municipality

Date

Richard D. Flinn Jr., Director
PEMA
1310 Elmerton Avenue
Harrisburg, PA 17110

Dear Mr. Flinn:

xxxx Borough/Township has reviewed the plans for the replacement of the bridge on xxxx over xxxx Creek/Run/River. On Date, xxxx Borough/Township met and approved the request from the Pennsylvania Department of Transportation (PennDOT) to utilize portions of properties acquired through the Robert T. Stafford Relief and Emergency Assistance Act (or other hazard mitigation program). Project Description will be located in accordance with the attached plan and involves the following parcels:

<table>
<thead>
<tr>
<th>Parcel</th>
<th>Right of Way (easement)</th>
<th>Temporary Construction Easement (TCE)</th>
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<tr>
<td>202</td>
<td>144 SF</td>
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<td>203</td>
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<td>50 SF</td>
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<td>204</td>
<td>1000 SF</td>
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<tr>
<td>205</td>
<td>10000 SF</td>
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</tr>
<tr>
<td>Total</td>
<td>11,544 SF</td>
<td>1150 SF</td>
</tr>
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</table>

In accordance with the terms and provisions of the Robert T. Stafford Relief and Emergency Assistance Act (or other hazard mitigation program), the areas noted above will be conveyed as a highway easement with the underlying fee interest to remain with xxxx Borough/Township.

Sincerely,
attachment e: form rw-321 agreement of clarification

prepared by:

return to:

site location:

rw-321

<table>
<thead>
<tr>
<th>county</th>
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<tbody>
<tr>
<td>s.r. - section</td>
<td></td>
</tr>
<tr>
<td>municipality</td>
<td></td>
</tr>
<tr>
<td>parcel no(s)</td>
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</tr>
</tbody>
</table>

agreement of clarification
(Stafford Act)

this agreement of clarification, to land use restrictions and exceptions in accordance with federal and commonwealth requirements is made among owner(s) of property described below, heirs, executors, administrators, successors, and/or assigns, hereinafter, whether singular or plural, called the owner, and the commonwealth of pennsylvania, acting through the pennsylvania emergency management agency, hereinafter called the commonwealth, and the united states of america, acting through the federal emergency management agency, hereinafter called fema,

witnesseth

whereas owner is the fee owner of real property, hereinafter called property, assigned the above referenced parcel identification numbers and further identified in exhibit “a”; and

whereas, the robert t. stafford disaster relief and emergency assistance act (“the stafford act”), 42 usc §5121 et seq., identifies the use of disaster relief funds under § 5170c, the hazard mitigation grant program, hereinafter called hmgp, to provide the process for a community, the commonwealth, to apply for federal funds to be used to acquire interests in property, including the purchase of structures in the floodplain, to demolish and/or remove the buildings, and to convert and maintain the land use of such property as open space in perpetuity; and

whereas, owner acquired its interest in the property as the subgrantee, or the successor in interest of a subgrantee, of a grant to the commonwealth under the hmgp; and

whereas, the terms of the stafford act, its implementing regulations (44 cfr part 206, subpart n and 44 cfr part 80), the fema-commonwealth agreement, and the commonwealth-local agreement require that the subgrantee agree to terms that are intended to restrict the use of the land to open space in perpetuity in order to protect and preserve natural floodplain values, referenced in deed exceptions recorded as follows: ; and

whereas, 44 cfr § 80.19(a)(1) provides that allowable uses of property dedicated and maintained in perpetuity as open space for the conservation of natural floodplain functions may include parks for outdoor recreational activities; wetlands management; nature reserves; cultivation; grazing; camping (except where
Attachment E: Form RW-321 Agreement of Clarification

adequate warning time is not available to allow evacuation); unimproved, unpaved parking lots; buffer zones; and other uses FEMA determines compatible with 44 CFR Part 80; and

WHEREAS, 44 CFR § 80.19(b) provides that after acquiring the property interest, the subgrantee, including successors in interest, shall convey any interest in the property only if the FEMA Regional Administrator, through the COMMONWEALTH, gives prior written approval of the transfer; and

WHEREAS, the Commonwealth of Pennsylvania, acting through the Department of Transportation, hereinafter PENNDOT intends to construct a highway project to construct or improve the above mentioned State Route as further described in exhibit “B”, hereinafter called the PROJECT; and

WHEREAS, PENNDOT has determined that completion of the PROJECT will require PennDOT to obtain an easement for highway purposes across a portion of the PROPERTY; and

WHEREAS, based on sound engineering, applicable regulations and procedures, PENNDOT has given proper consideration to other options to meet the purposes and needs of the PROJECT and has found them to be impracticable; and

WHEREAS, the COMMONWEALTH, in consultation with FEMA, has determined that there reasonably is no land, other than the alignment for the PROJECT described in exhibit “B”, on which this construction is technically feasible, economically justified and environmentally acceptable; and

WHEREAS, based on information provided by PENNDOT, the Federal Highway Administration, hereinafter FHWA, has advised FEMA that the PROJECT is an improvement to a pre-existing Federal-aid transportation system or is otherwise necessary to serve competing Federal interests; and

WHEREAS, based on information provided by the COMMONWEALTH, FEMA has analyzed floodplain impacts associated with the PROJECT for compliance with 44 CFR § 60.3 or higher standards; and

WHEREAS, based on information provided by the COMMONWEALTH, FEMA has determined that the PROJECT will be constructed in a manner compatible with 44 CFR Part 80 and other applicable regulations related to floodplains;

NOW, THEREFORE, in consideration of the sum of the mutual covenants contained herein, the parties, intending to be legally bound, agree as follows:

1. The above recitals are incorporated into and made an integral part of this Agreement of Clarification.

2. The COMMONWEALTH and FEMA hereby approve acquisition of an easement for highway purposes on the PROPERTY through condemnation or agreement in lieu of condemnation by PENNDOT using its ordinary processes and procedures. The areal extent of this easement for highway purposes shall be no greater than the minimum necessary for the PROJECT.

3. OWNER shall remain the fee owner of the PROPERTY and shall retain a reversionary interest in the area of the easement for highway purposes. In the event that OWNER or its successors exercises this reversionary interest, the terms and conditions of the HMGP grant award and the associated property conveyance shall continue to restrict any future use of the PROPERTY by OWNER or its successors.

4. Nothing in this AGREEMENT OF CLARIFICATION shall be interpreted to eliminate, amend, change or in any way modify the recorded deed exceptions on the portions of the PROPERTY outside
Attachment E: Form RW-321 Agreement of Clarification

the easement for highway purposes. The PROPERTY shall otherwise remain subject to the terms and conditions of the HMGP grant award and the associated property conveyance.

5. Should any provision of this Agreement of Clarification or application thereof to any person or circumstance be found to be invalid or unenforceable, the rest and remainder of the provisions of this Agreement of Clarification and their application shall not be affected and shall remain valid and enforceable.

6. The restrictions and other requirements described in this Agreement of Clarification shall run with the land and be binding on the Owner’s successors, assigns and lessees or their authorized agents, employees or persons acting under their direction and control.

7. This Agreement of Clarification shall not be amended, modified or terminated except by a written instrument executed by and between the titleholder of the PROPERTY at the time of the proposed amendment, modification or termination, the COMMONWEALTH and FEMA, which written instrument shall be recorded with county register of deeds.
Attachment E: Form RW-321 Agreement of Clarification

IN WITNESS WHEREOF, the parties have executed this Agreement of Clarification:

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<th>OWNER</th>
<th>DATE</th>
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<td>name:</td>
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<tr>
<th>COMMONWEALTH OF PENNSYLVANIA</th>
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<tr>
<td>Pennsylvania Emergency Management Agency</td>
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<td>name:</td>
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<td>title:</td>
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| STATE OF PENNSYLVANIA | COUNTY OF | | STATE OF PENNSYLVANIA | COUNTY OF |
|----------------------|-----------|----------------------|-----------|
| On this day of , 20 , before me, , the undersigned officer, personally appeared , who acknowledged self to be the [title] of [name of entity], and that as such [title], being authorized to do so, executed the foregoing instrument for the purposes contained in it by signing on behalf of the entity as [Title]. | On this day of , 20 , before me, , the undersigned officer, personally appeared , who acknowledged self to be the [title] of the Pennsylvania Emergency Management Agency, and that as such [title], being authorized to do so, executed the foregoing instrument for the purposes contained in it by signing on behalf of the entity as [Title]. |
| In witness whereof, I hereto set my hand and official seal. [Signature] [Seal] | In witness whereof, I hereto set my hand and official seal. [Signature] [Seal] |

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<thead>
<tr>
<th>FEDERAL EMERGENCY MANAGEMENT AGENCY</th>
<th>DATE</th>
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<tr>
<td>name:</td>
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<td>title:</td>
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</table>
Attachment E: Form RW-321 Agreement of Clarification

STATE OF PENNSYLVANIA
COUNTY OF __________________________

On this _____ day of _____________, 20___, before me, ___________________________, the undersigned officer, personally appeared ___________________________, who acknowledged himself to be the ___________________________ [title] of the Federal Emergency Management Agency, and that as such ___________________________ [title], being authorized to do so, executed the foregoing instrument for the purposes contained in it by signing on behalf of the entity as ___________________________ [title].

In witness whereof, I hereto set my hand and official seal.

_____________________________ [Signature]

_____________________________ [Title]

[Seal]
Attachment F: Template correspondence from PennDOT to PEMA RE: package submittal

Date

Mr. Tom Hughes
PEMA
Bureau of Recovery and Mitigation
1310 Elmerton Avenue
Harrisburg, PA 17110

Dear Mr. Hughes,

SR xxxx over xxxxx creek/stream/river is in poor condition due to (list deficiencies and provide project description). The Pennsylvania Department of Transportation (PennDOT) has analyzed alternatives and determined replacement of the bridge on-alignment/off-alignment is the safest option for the travelling public, construction is technically feasible, economically justified, and environmentally acceptable.

Many alternatives were considered, but no practicable alternative exists to using restricted lands funded by the Robert T. Stafford Disaster Relief and Emergency Assistance Act/National Flood Insurance Act of 1968. PennDOT therefore requests the Pennsylvania Emergency Management Agency (PEMA) and the Federal Emergency Management Agency’s (FEMA) review of the attached Compatible Use Justification package to determine if required right of way (ROW) can be utilized for the pre-existing, federal aid transportation improvement project. PennDOT will only use the requested ROW for purposes compatible with open space, recreational, or wetland management practices, and no other structures or improvements shall be erected on the premises other than the stated transportation improvements included in the enclosed documents.

We will contact you soon to schedule a meeting to discuss this matter. In the meantime, if you have any questions, feel free to contact me at phone number or email.

Sincerely,

Name, title
Highway Design and Technology Section
PennDOT – Bureau of Project Delivery
Example: Memorandum of Understanding for Joint Jurisdiction of Land

Item No. 4
EXAMPLE: MOU
MEMORANDUM OF UNDERSTANDING FOR JOINT JURISDICTION OF LAND

THIS MEMORANDUM OF UNDERSTANDING ("Memorandum") is entered into by and between the Pennsylvania Department of Conservation and Natural Resources ("DCNR") and the Pennsylvania Department of Transportation ("PENNDOT").

WITNESSETH:

WHEREAS, DCNR is an Executive Agency of the Commonwealth, responsible for the administration, implementation, and enforcement of the conservation and natural resources programs, statutes, and regulations of the Commonwealth;

WHEREAS, PENNDOT is an Executive Agency of the Commonwealth responsible for the administration, implementation, and enforcement of the transportation, including highway, public transit, mass transit, and aviation statutes and regulations of the Commonwealth;

WHEREAS, DCNR maintains control and has under its jurisdiction certain lands of the Commonwealth situated in Ohiopyle State Park ("State Park"), Ohiopyle Borough, Fayette County ("Premises"), that it acquired from Western Pennsylvania Conservancy by deed dated May 2, 1963 and recorded in the Fayette County Recorder of Deeds Office in Deed Book 974, Page 399 and by deed dated May 13, 1969 and recorded in Fayette County Recorder of Deeds Office in Deed Book 1076, Page 965;

WHEREAS, while presently utilizing the Premises as a State Park, DCNR recognizes the public need for a PENNDOT project on State Route 381 that includes multimodal safety improvements to Ohiopyle State Park involving the realignment of Sugar Loaf Road with State Route 381, improvements to parking facilities, sidewalks, and park and bike lanes, and construction of a pedestrian underpass ("Project");

WHEREAS, DCNR further recognizes the benefits the Project will have on the State Park;

WHEREAS, PENNDOT needs a portion of the Premises to fulfill its statutory duties in conjunction with the Project;

WHEREAS, DCNR is willing to transfer to PENNDOT temporary jurisdiction and control of a temporary construction easement ("TCE") of 6.047 acres as well as joint jurisdiction and control of a drainage easement ("DE") of 0.22 acres and a required right-of-way ("ROW") of 1.459 acres; and

WHEREAS, Sections 501 and 502 of the Administrative Code of 1929 (71 P.S. §§ 181 and 182) require Commonwealth departments and agencies to coordinate their work and activities with other Commonwealth departments and agencies.
NOW, THEREFORE, the parties to this Memorandum set forth the following as the terms and conditions of their understanding:

1. **Transfer of Jurisdiction.** DCNR transfers to PENNDOT temporary jurisdiction and control of 6.047 acres of the Premises, depicted as a temporary construction easement in yellow on Exhibit A, attached to and made part of this Memorandum, as well as joint jurisdiction and control of 0.22 acres of the Premises, depicted as a drainage easement in blue on Exhibit A, and 1.459 acres of the Premises, depicted as a required right-of-way in green on Exhibit A, subject to all easements, servitudes and rights of others, including, but not confined to, streets, roadways, and rights of any telephone, telegraph, water, electric, gas or pipeline company(s) as well as under and subject to any state of tenancies vested in third persons, whether or not appearing of record, for any portion of the land or improvements erected thereon. Following construction of the Project, DCNR shall maintain the continuous and uninterrupted ability to enforce all applicable laws, rules and regulations regarding the use of the Premises as part of the State Park System.

2. **Scope of Temporary Construction Easement.** As to the TCE, DCNR grants to PENNDOT, its engineers, employees, contractors, and agents, the right to enter upon the TCE to do such work as necessary and required by PENNDOT for the Project, together with the right, liberty, and privileges of ingress, egress and regress over, in, and upon the TCE with its vehicles, machinery, tools, and mechanical devices for the purpose of construction operations required for the Project. PENNDOT and its contractors will restore the TCE to the satisfaction of the Park Manager upon completion of the Project. Full jurisdiction and control of the TCE will revert to DCNR upon completion of the Project.

3. **Joint Jurisdiction.** The parties will maintain joint administrative jurisdiction over the DE and ROW as follows:

   PENNDOT, or its assignee, will maintain jurisdiction over the DE and ROW for the purposes of discharging its statutory duties, including but not limited to, the right and power to maintain, inspect, and repair or replace the drainage facilities and roadway as part of the State Highway System, respectively.

   DCNR will maintain administrative jurisdiction over the DE and ROW for the purpose of discharging its statutory duties in relation to the State Park System, including but not limited to, the right to enforce all applicable laws, rules, and regulations regarding use of these areas as part of the State Park System.

4. **Replacement Parkland.** PENNDOT will acquire on behalf of DCNR 0.287 acres of property from the Ohiopyle Borough as replacement parkland and will construct the pedestrian underpass to benefit the patrons of the State Park by aiding recreational boaters and pedestrians crossing State Route 381 to access the water.
5. **Maintenance Obligations.** PENNDOT will be responsible for the maintenance of the drainage facilities in the DE and the roadway surface within the ROW. DCNR will be responsible for the maintenance of the sidewalks, parking and bike lane within the ROW and the remainder of the Premises, including, but not limited to, the pedestrian underpass, the parking lots, and the park entrance.

6. **Construction Agreement.** In executing its Construction Agreements for the Project, PENNDOT shall include a provision requiring its Contractors to “indemnify and save harmless the State, the Department (PENNDOT), and all of their officers and employees from all suits, actions, or claims of any character, name and description, brought for or on account of any injuries or damages received or sustained by any person, persons, or property during the performance of work by PENNDOT’S Contractor.” PENNDOT also shall ensure that its Contractors list the “State, the Department (PENNDOT), and all of their officers and employees” as additional insured on the Contractors’ insurance policies. The term “State” includes other agencies of the Commonwealth such as DCNR.

7. **Land and Water Conservation Fund.** DCNR has determined that the Project is within the Land and Water Conservation Fund Act (“LWCF”) 6(f) project area for the State Park but that the Project is a recreational enhancement for the State Park and visitors to the park. DCNR has also determined that the Project is not a conversion under LWCF. If the TCE exceeds 180 days, additional coordination with DCNR is required to determine whether a conversion resulted in a LWCF 6(f) conversion.

8. **No Contractual Rights.** This Memorandum is not intended to and does not create any contractual rights or obligations with respect to the signatory agencies or any other parties.

9. **Titles Not Controlling.** Titles of sections are for reference only and shall not be used to construe the language in this Memorandum.

10. **Choice of Law.** The laws of the Commonwealth of Pennsylvania shall be used to interpret this Memorandum.

11. **Amendments.** This Memorandum shall only be modified in writing with the same formality as the original Memorandum.

12. **Points of Contact.** The contact person for this Memorandum for PENNDOT shall be: Pennsylvania Department of Transportation, Right-of-Way Administrator, Engineering District 12-0, 825 N. Gallatin Avenue Extension, Uniontown, PA 15401 Telephone Number (724) 439-7146, FAX Number (724) (724)-425-3009. The contact person for this Memorandum for DCNR shall be Bureau of Parks, Operations and Maintenance Division, P.O. Box 8551, Harrisburg, PA 17105, Telephone Number (717) 787-6640, FAX Number (717) 787-8817. Either party may change its designated contact person by providing written notice to the other party.

13. **Dispute Resolution.** Any dispute arising under this Memorandum shall be submitted to the Office of General Counsel for final resolution.
MEMORANDUM OF UNDERSTANDING FOR
JOINT JURISDICTION OF LAND

IN WITNESS WHEREOF, the parties, through their authorized representatives, have signed this Memorandum below.

Commonwealth of Pennsylvania
Department of Conservation and Natural Resources

__________________________
Director, Bureau of State Parks

__________________________  
Commonwealth of Pennsylvania
Department of Transportation

__________________________
Brian Thompson, P.E.
Bureau of Project Delivery

APPROVED AS TO LEGALITY AND FORM:

__________________________  
Chief Counsel
Department of Conservation and Natural Resources

__________________________
For Chief Counsel
Department of Transportation

__________________________
Office of General Counsel

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ACKNOWLEDGMENTS

This study was performed under the overall guidance of the NCHRP Project Committee SP 20-6. The Committee is chaired by MICHAEL E. TARDIF, Friemund, Jackson and Tardif, LLC. Members are JAMES R. “JIM” BAILEY, Texas DOT; CARMEN D. Tucker Bakarich, Kansas DOT; RICHARD A. CHRISTOPHER, HDR Engineering; TONI H. CLITHERO, Vermont Agency of Transportation; JOANN GEORGALLIS, California Department of Transportation; MARCELLE SATTLIEWHITE JONES, Stantec Consulting Services, Inc.; RODNEY M. LOVE, Mississippi DOT; SID SCOTT, III, HKA-Global; FRANCINE T. STEELMAN, I-77 Mobility Partners, LLC.

MICHELLE S. ANDOTRA provided liaison with the Federal Highway Administration, ROBERT J. SHEA provided liaison with TRB's Technical Activities Division, and GWEN CHISHOLM SMITH represents the NCHRP staff.
These digests are issued in order to increase awareness of research results emanating from projects in the Cooperative Research Programs (CRP). Persons wanting to pursue the project subject matter in greater depth should contact the CRP Staff, Transportation Research Board of the National Academies of Sciences, Engineering, and Medicine, 500 Fifth Street, NW, Washington, DC 20001.