Memorandum

U.S. Department of Transportation
Federal Highway Administration

Subject: Right-of-Way Activities during Planning and Project Development

Date: March 16, 1984

From: Associate Administrator for Right-of-Way and Environment
Washington, D.C.

Reply to Attn of: HRE-1

To: Mr. W. S. Mendenhall, Jr.
HRA-06 Regional Federal Highway Administrator
Fort Worth, Texas

Earlier this month, Mr. Barnhart received an inquiry from Texas Highway Commissioner Robert Lanier concerning right-of-way costs and possible delays caused by Federal environmental requirements during highway planning and development. It is also our understanding that he is concerned about paying inflated real estate costs for highway rights-of-way due to land speculation which tends to drive real estate prices up once the State starts planning and developing a new project. Mr. Lanier has asked for legislation to permit right-of-way reservation for future highways before complying with environmental requirements. The following is our analysis of the situation which leads us to conclude that legislative change is not necessary to accomplish what Mr. Lanier desires.

Advanced Planning Stage

It is our understanding that most cities and surrounding counties around the country that are the size of Dallas, San Antonio, and Houston voluntarily use official mapping or general zoning authority to control development and to preserve a corridor for future highway use. These activities are identified through the continuing, cooperative, and comprehensive (3C) urban transportation planning process required by Section 134 of 23 U.S.C. Early preservation of transportation corridors by local officials does not constitute a Federal action; therefore, no environmental documents are needed at this stage.

However, local governments may not always be successful in postponing development indefinitely if a landowner files suit and/or forces the city or county to acquire the land or to lift the controls. Any acquisition by the locals must meet the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 in order to maintain eligibility for Federal-aid preliminary engineering and construction funds.

The local government may accept donations of land if the owner is fully informed of his or her right to receive just compensation for the acquisition of the property. This provision permits the State to acquire property without payment for the real estate.

Environmental and Project Development Stage

Any project development activities after the advanced, early planning stage must meet the requirements of the National Environmental Policy Act (NEPA) and other Federal statutes and regulations. In order not to predetermine or prejudice the Federal decisionmaking process on highway alternative locations, the FHWA cannot authorize the State Highway Department to acquire land prior to the approval of NEPA documents except for hardship acquisition or protective buying. This restriction would also apply to acquisitions by local officials undertaken pursuant to State direction. Furthermore, acquisitions by local officials to preserve transportation corridors during the advanced planning stage may not preclude the objective consideration of all reasonable location alternatives by State and Federal officials in the environmental document. Similarly, corridor preservation does not foreclose various design alternatives or modifications. Consequently, locals should be aware of the risks taken when they provide significant investment of resources for acquisition and related design. Conceivably, the preserved corridor could not be the selected alternative.

Normal Highway Right-of-Way Acquisition Stage

The Commissioner's primary concern appears to be about the State avoiding the payment of unduly inflated real estate costs for highway rights-of-way due to land speculation. Federal law or regulation does not require the payment of current real estate value. Federal law and regulations allow the State considerable flexibility to avoid cost increases due to land speculation related to the highway project, although State law may be more restrictive.

Federal law and regulation provide for the following options:

1. Nothing prevents a person whose real property is being acquired from making a gift or partial or full donation of such property as long as that person has been fully informed of his or her right to receive just compensation for the acquisition of the property.

2. Administrative settlement permits settlements in amounts different than the established just compensation when good reason exists to do so. It is expected that such settlements will be made by State administrative personnel based on administrative rationale.

   During the discussion, owners could be made aware of the extensive advantages which flow from the proposed project, perhaps encouraging them to accept a more reasonable value for the property.

   Admittedly these settlements, as a matter of practice, are typically made in amounts higher than the established just compensation. However, administrative settlements are equally applicable to settlements made below the established just compensation.

3. Any decrease or increase in the fair market value of real property caused by the public improvement prior to the date of valuation can be disregarded in determining the compensation for the property.

   This provision is intended to permit States to disregard speculative increases in value caused by the knowledge or imminence of a proposed project. The State would have to pay no more for the rights-of-way than prices paid for real estate purchased outside the influence of the project. The date of the project would be the controlling factor to determine project influence. This could be as early as when the project becomes public knowledge and affects the land values within proximity to the project. Appraisal techniques to properly assess such increases in value are readily available.

4. For the longer term, the State may want to consider going to a "pure" before and after valuation approach in establishing just compensation. A real estate appraisal is made of the property in its before condition disregarding any influence of the proposed project. The second step involves an after appraisal of the same property giving consideration to the project influence on the property. The difference between the two is just compensation. The Federal Government uses this methodology as do several States. It should be noted that this method can result in a zero award.

   Many States, including Texas, use a "modified" before and after valuation method. They always pay for the land taken regardless of project influence and can only offset special benefits against damages,while the "pure" before and after method allows recognition of both special and general benefits.

   The State and our Division Office Right-of-Way staffs should be aware of this information. However, we would be willing to assist the State in discussing this issue further.

Please bring this explanation of existing rules to Mr. Lanier's attention and let me know if his concerns are adequately addressed.

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