

A critical component of any federal aid public transportation project are the land rights needed to facilitate the construction operation and maintenance of the project in accordance with **Federal Highway Administration 23 CFR 1.23(a) – “Interest to be acquired – The State* shall acquire rights-of-way of such nature and extent as are adequate for the construction*, operation*, and maintenance* of a project”**. These land rights ensure that the transportation facility along with any associated appurtenances have a legal right to exist on a parcel of land and therefore cannot be displaced by a competing land use before a return on the investment has been realized.

*See Definitions

The transportation facility itself primarily consists of public roads, sidewalks, and multi-use trails. Permanent supporting appurtenances of the transportation facility typically include items such as culverts, storm sewers, embankments, ditches, ditch backslopes, curb ramps, bridges, guardrail, street lighting, signs, traffic signals, landscaping, sight distance, joint use drives, or any other items that if altered or removed could jeopardize the continued operation and maintenance of the facility as intended.

Because the transportation facility is a public use feature it must reside on public right of way or land that is dedicated for the specific projects use. Land that was previously purchased, platted, or otherwise dedicated for public right of way, and is under the project sponsors jurisdiction, is generally available for the public transportation project. Similarly permanent easement rights that are owned or are otherwise made available to the sponsoring agency may be used for the purpose for which they were acquired for. Rights for any additional areas that are required for the project will need to be acquired from the owning party through the standard design-appraisal-acquisition process or other acceptable means.

At times the transportation facility will require the use of property that is currently owned by the local public agency project sponsor. This land is available for project use if a purpose consistent with the project needs was either identified as part of the purchase, or was later identified through a declaration or dedication. Land that was simply purchased in the sponsoring agencies name, or for a purpose that is not consistent with the transportation project’s needs, cannot readily be used for the project as is. Examples of this situation typically occur when the local public agency simply purchased the property in their name for some possible future use, or it was acquired for a non-transportation use such as a park, school, library, city office, courthouse, pool, retirement home, fire station sports complex, maintenance yard, cemetery, etc. In these situations the project sponsor already has the ownership in the land and only the purpose and/or use that is consistent with the requirements of the project has to be established and of record. This can be done by platting, dedicating, or otherwise legally establishing the area as public ROW in accordance with local procedures. Sometimes another option is to formally declare that the land can be used for the transportation project through the execution of a “Declaration as to Use” resolution by the sponsoring agency.

This “Declaration as to Use” is processed by the sponsoring agency in accordance with their “resolution” procedures. Once approved a copy must be placed on file at the register of deeds office so that it is available for discovery. It must be filed before a right of way certificate can be issued for the project.

A Declaration as to Use does not transfer ownership of the property. It still remains in the ownership of the Local Public Agency. Also the use of the term “State” in the Federal CFR does not imply that the state needs to own the land. This was a generic term used when the CFR was written as State DOT’s were the primary agency regulated under the CFR. See “definitions”.

Example “Declaration as to Use” templates and language are available from the Nebraska Department of Transportation. These examples may be modified to reflect any language or formatting specific to the requirements of the LPA. Content language is listed below. Draft Declaration language should be reviewed and approved by Nebraska Department of Transportation officials prior to the LPA passing the resolution to be sure it meets the project needs. Once filed at the Register of Deeds office a copy of the recorded document should be forwarded to the Department of Transportation ROW Division for their records and so that the State ROW certificate can be issued.

Information to be contained in a Declaration as to Use Resolution

- The owner of the land.
- The location of land (section-township-range, lot block subdivision, or legal description)
- Who currently administers the land (Parks Department, Public School, etc.) if applicable.
- What the land is currently being occupied by or used for (name of park, school, trail, open ground, drainage ditch, etc.)
- What the project sponsor wishes to construct (sidewalk, road, trail, etc. [include “and associated appurtenances”]).
- Project name, project number, and project control number that the transportation facility that it is being built under (include both the State’s and the LPA’s as applicable).
- A reference to Federal Highway Administration 23 CFR 1.23(a)
- An attached exhibit (plan sheet, or other type of drawing) showing what is to be built. If the declaration is for a specific project feature that can be readily identified in the field such as a sidewalk or bicycle pedestrian trail an attached exhibit showing the location of the feature is usually sufficient. A legal description and/or plat geographically identifying the location of the land to be occupied by the transportation facility may be required to specifically identify the area in certain circumstances.
- Duration the declaration is in affect (either in perpetuity or a minimum of 25 years from completion of its construction).

- If the LPA specified a use in their deed when they acquired the property include a statement that identifies the purpose for which it was acquired for and if this purpose is congruent with its current use.

Sample Templates available from NDOT:

Template 1 Declaration as to use Resolution Section Township Range (S-T-R) Perpetuity

Template 2 Declaration as to use Resolution Section Township Range (S-T-R) 25 year

Template 3 Declaration as to use Resolution Lot -Block Perpetuity

Template 4 Declaration as to use Resolution Lot -Block 25 year

Template 5 Declaration as to use Resolution Section Township Range (S-T-R) Congruent Perpetuity

Template 6 Declaration as to use Resolution Section Township Range (S-T-R) Congruent 25 year

Template 7 Declaration as to use Resolution Lot -Block Congruent Perpetuity

Template 8 Declaration as to use Resolution Lot -Block Congruent 25 year

Definitions

State The term “State” in this regulation is accepted to mean the local public agency who has the jurisdictional authority for the construction, operation, and maintenance of the facility either by being the project sponsor, by operation of law, classification of the transportation facility, or through agreements or other documents legally establishing this responsibility.

Construct Construct is the process of physically building the project according to plan. The land rights acquired for these activities should be of sufficient size to reasonably facilitate the area needed for personnel and required equipment to stage, remove, and construct all items identified in the construction plans without trespassing on private property. The right of way areas for this project need also includes the room required to temporarily alter or accommodate surrounding features such as traffic, drainage, and accesses that facilitate the construction activities. Items to consider when determining the amount of right of way needed for this purpose include adequate room for equipment and personnel to operate beyond the physical footprint of the feature being constructed, grading requirements, access to the site, construction staging, temporary roads, feasible excavation for subterranean items, removal or adjustments of obstructions, clearing tracts, temporary

construction items, storage of building materials, component assembly, etc. Areas acquired in fee are available for these construction activities as well as any permanent easements whose purpose is consistent with the proposed use. Any additional areas would only be needed during the construction phase and therefore can be acquired as temporary easements.

Operate This is the process of ensuring that the transportation facility that is under the control, jurisdiction, and responsibility of the public agency continually functions as intended. The permanent land rights for this need permit the safe and efficient operation of the facility, and subsequent use by the public, without being encumbered by competing land use rights. This includes the physical areas occupied by any feature made available for the public's use such as driving surfaces, public sidewalks, multi-use trails, ADA ramps, stairs, etc. It also includes areas that function or contain features that are in support of these objects such as fill or cut slopes, bridges, curbs, drainage structures, traffic signals, street lighting, clear zones, signs, permanent erosion control, sight distances, ditches, project drainage, retaining walls, joint use drives, etc. Because of the permanent nature of these features they must reside on land acquired either in fee or as a permanent easement whose purpose is consistent with its intended use.

Maintain Maintenance is the process of periodically inspecting, repairing, replacing, or restoring individual features of the facility to ensure the overall facility is functioning as intended or to prolong its service life. The permanent land rights should therefore provide the room necessary for personnel and equipment to access and perform expected and routine maintenance activities such as pavement repairs, restoring erosion control features, cleanout of ditches, restoring sideslopes and backslopes damaged by erosion, cleanout of culverts, ensure structures are sound, fix sidewalks, etc. Because these activities are ongoing the lands rights justified by them must be either acquired either in fee or as a permanent easement whose purpose is consistent with its intended use.