



U.S. Department
of Transportation

**Federal Highway
Administration**

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HRW-WA

Roger Millar
Secretary of Transportation
Department of Transportation
Olympia, Washington

Attention: J. Kevin Workman, Administrator Real Estate Services Office
Michelle Newlean, Local Programs Right of Way Manager

Temporary Easement Guidance

Dear Mr. Millar:

There have been recent discussions concerning Temporary Easements (TEs) and ensuring property owners are compensated appropriately for these rights. This letter clarifies FHWA policy and provide guidance regarding the identification, valuation, and acquisition of TEs. This letter is consistent with previous guidance provided by the former WA Division ROW Program Manager.

FHWA is concerned that agencies are not identifying the adequate property rights needed to construct, operate, and maintain projects in accordance with 23 CFR 710.305(b). This can result in insufficient valuations, acquiring inadequate property rights, and property owners not being properly compensated. For example, based on recent file reviews on various WSDOT projects, FHWA observed that WSDOT is often reappraising properties and making multiple offers to property owners due to starting work without a complete identification of project needs when TEs are involved. This directly impacts the agency's ability to negotiate in good faith, is confusing for property owners, and may erode public confidence which is counter to 49 CFR 24.1(a).

The project team must adequately identify property needs, including the purpose and timeline for TEs. These details are communicated to the right of way team to ensure the correct rights are being valued, acquired, and proper compensation is paid to property owners. Once the needs are clear, the agency has an important role in developing an adequate Scope of Work and defining the appraisal problem in conformance with 49 CFR 24.103(a). The Scope of Work must identify the property rights to be valued including the explicit duration of the TE. These

details are assignment conditions to the valuer and are vital to completing the valuation. In accordance with 49 CFR 24.103(a)(2)(i) which requires an adequate description of the remaining property for a partial acquisition, the valuation must describe the relevant details of the TE, including the specific termination date and purpose.

The offer of just compensation to a property owner for a TE is tied to the fair market value determination *as of a specific date* for a specific duration and purpose. Just as with fee interests, a TE encumbers the property starting on the date of execution. However, in the case of a TE, the property rights purchased extend only until the conclusion on an explicit termination date. The entire timeframe between the execution of a TE and the termination date must be considered in the valuation. An ignored or uncompensated encumbrance is a violation of federal law. It is not appropriate to acquire a “90-day TE” with no specific termination date as this creates an undefined and uncompensated encumbrance.

The definition of “appraisal” in 49 CFR 24.2(a)(3) is “...a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value ***as of a specific date***, supported by the presentation and analysis of relevant market information.” The regulation in 49 CFR 24.102(g) is clear that if there is a significant delay between the date of the appraisal and the offer of just compensation, the appraisal shall be updated or a new appraisal obtained. If the latest appraisal information indicates that a change in the purchase offer is warranted, the Agency shall promptly establish just compensation and offer that amount to the property owner in writing. It is not appropriate to simply shift the date of the TE termination based on a duration (i.e.: 90 days); the TE must have an explicit, hard-stop termination date and may not be shifted based on the execution date.

After consultation with both WSDOT and FHWA HQ staff, the following guidelines will be considered as part of FHWA’s oversight responsibilities, specifically for the ROW Certification and file review process when acquiring TEs:

1. Applicable TE information, including a copy of the draft TE document, must be provided by the agency to the valuer with the Scope of Work for the valuation assignment. This will ensure the valuer understands the rights to be valued.
2. The TE is effective on the date the TE is mutually accepted and will extend until the explicit termination date as determined by project needs.
3. The TE document and the valuation must both state the specific date of termination. The valuation will include a copy of the draft TE document in the report.
4. The appraisal or waiver valuation Scope of Work and assignment must comply with the above-cited regulations, and any additional requirements cited in 49 CFR 24.103.
5. If there is a significant delay between the date of the valuation and the offer date, the valuation shall be updated or a new valuation made. If the terms of the TE change, a new valuation will be obtained and a new offer of just compensation made.
6. Encumbering a property for an extended period, such as two years, but compensating the property owner for a shorter duration (e.g., 90-day construction period), does not constitute just compensation and is inappropriate. A TE may have variables in its terms

(active & non-active times) if the TE is drafted properly and the entire duration of the TE and its impacts to the property's fair market value are considered by the valuer. *See additional TE examples.

7. If the dates of use of the TE are not known, acquisition of such TE will be deferred until those dates are determined and the valuation can reflect market value and state a specific date of termination.

We must emphasize, in closing, that the Uniform Act is specific about just compensation. It clearly states, in 42 USC Chapter 61 § 4651, that real property "...shall be appraised before the initiation of negotiations..." and that just compensation shall be not less than the agency's approved appraisal of the fair market value of the property. Therefore, if the relevant market conditions cannot be known by the appraiser due to the uncertainty of the project schedule, consideration should be given to delaying the offer to the property owner until the dates of the use of the TE are known and appraised at that time.

If you have any questions regarding this matter, please contact me at (360) 753-8655 or by email at Dianna.Mckeon@dot.gov.

Sincerely,

RALPH J. RIZZO
Division Administrator

**DIANNA LYNN
MCKEON** Digitally signed by
DIANNA LYNN MCKEON
Date: 2024.11.20
12:00:02 -08'00'

By: Dianna McKeon
Right-of-Way Program Manager

cc: FHWA Area Engineers
WSDOT ROW Program Managers

*Additional TE Examples:

#1

If a TE is executed on September 1st with an end date (as stated in the TE document) on November 30th this allows an approximately 90-day duration. The property is uniformly encumbered during that time frame and is valued as such. However, if a “90-day TE” is not scheduled to begin until some point after it has been executed between the parties, the possibility is created that an uncompensated encumbrance could exist from the TE’s date of execution until the scheduled “90-day TE” commencement. An uncompensated encumbrance is a violation of federal law. The time between the execution of the TE and the commencement of the “90-day TE” needs to be considered in the valuation process.

#2

A valuation completed on October 20, 2024, provides for a 90-day construction period within a two-year duration with a specific termination date of November 30, 2026, and compensation of \$1,000. The TE is mutually accepted by the property owner and agency on December 27, 2025. The TE will be effective on the date of mutual acceptance and will terminate on the specific date, November 30, 2026, regardless of when the property owner signs, the date does not get extended beyond the specific date of termination.