

**2300 Division of Planning and Policy**

**2308 Development Related Improvements Requiring New Rights-of-way**

**BACKGROUND**

Developers proposing rezoning, subdivision or land development applications in Delaware municipalities and counties are required to improve the local transportation system that serves the property if their proposed development triggers the need for the improvement. Many developers are able to make the necessary improvements, while others are hindered by their inability to secure the necessary road right-of-way. Often, prior development along the roadway has already absorbed the capacity created when the road was first built and the surrounding landowners may not feel that there is any benefit in selling the needed right-of-way to enable the next round of development. Prior to these regulations, state law did not authorize acquisition of rights-of way necessary for development-related improvements.

Fundamentally these road improvements are for the public good, as the general public will receive the travel benefits. The need for improvements is most often triggered by new development in combination with pre-existing traffic growth patterns in the area. DeIDOT's plan for making roadway improvements is outlined in its Capital Transportation Program (CTP). The needed roadway improvement may be on a different schedule or it may not be in the CTP at all. A further concern is implementing roadway improvements without sufficient public involvement. When the project is DeIDOT's, DeIDOT utilizes a formal public participation process. However, when a private sector developer carries out the improvements, a similar public participation process may not be followed, may be insufficient.

**MAJOR ISSUES**

The regulations herein address the following issues and barriers to implementing transportation improvements; the need for which is triggered by development:

Developer's inability to secure right-of-way for necessary improvements which are required when counties and municipalities approve rezoning of property or new subdivisions or land developments.

DeIDOT's Capital Transportation Program

(CTP) schedule being different than the developer's schedule or not including the needed improvement.

Lack of a public participation process during the planning and design of development-related improvements.

Lack of clarity and definition regarding DeIDOT's role in assuring project quality.

**1.0 Purpose**

The Delaware State Senate passed SB 284 on June 8, 2004 and the Delaware House of Representatives passed it on July 1, 2004. SB 284 was signed into law on July 22, 2004 and it is codified at 17 **Del.C.** Section 507. The essence of this legislation was to address the need for transportation improvements that are required to be made by developers when new development has been approved by local government.

Section 507 directs DeIDOT to establish rules and regulations to determine where and under what conditions it will:

- Use its real estate process to acquire the necessary right-of-way for public purpose improvements;
- Enforce the maintenance of safe operating conditions for the public during construction;
- Involve the public and inform them of the reason for and scope of improvements; and
- Assure compliance with applicable environmental and legal requirements.

Developers whose proposals trigger the need for improvements, or necessitate an acceleration of the timing of previously recognized DeIDOT projects, shall contribute funds towards the necessary right-

of-way acquisitions. Improvements are limited to those that do not negatively impact the State's ability to meet the conformity requirements of the Federal Clean Air Act and its several amendments.

DeIDOT's use of this authority is limited to areas where the State's own land use policies support the type and scale of the proposed development. As part of the approval process for transportation improvements built pursuant to this authority, DeIDOT is required to consult with area representatives of state and local government. DeIDOT retains the discretionary authority to use the provisions of Section 507 and its implementing regulations, or to decide not to make use of this authority in a given instance.

## **2.0 Relationship to Strategies for State Policies and Spending**

Delawareans are concerned about the threat of sprawl, traffic congestion, loss of farmland and open space, diminished air and water quality, and a shortage of affordable housing.

*Strategies for State Policies and Spending* was adopted by Governor Ruth Ann Minner and published by the Office of State Planning Coordination to coordinate land use decision-making with the provision of infrastructure and services in a manner that makes the best use of Delaware's natural and fiscal resources. There are two fundamental policies that guide the State Strategies:

State spending should promote quality, efficiency, and compact growth; and

State policies should foster order and resource protection, not degradation.

*Strategies for State Policies and Spending* includes a map that serves as a graphic representation of the areas favored for growth. The map depicts four investment levels, of which the first three are appropriate locations for the application of these regulations: Level 1, Level 2, and Level 3. Level 3, however, is intended for longer term phased growth or land preservation. For a full description of the investment levels as well as the map, please visit: [www.state.de.us/planning/strategies](http://www.state.de.us/planning/strategies). The strategies of the State's Livable Delaware initiative complement the Strategies for State Policies and Spending. They are intended to support growth in areas that the State has agreed are most appropriate for and capable of accommodating this growth in an efficient and cost-effective manner, with a focus on existing communities and growth areas. Through these regulations, detailed herein, DeIDOT is empowered to secure right-of-way for roadway improvements that are consistent with and support this key objective of Livable Delaware.

## **3.0 Regulatory Procedures**

The construction of the necessary transportation improvements may occur in one of the following two ways:

Alternative One: DeIDOT shall enter into an agreement with the entity seeking development approval whereby the developing entity takes the project lead and assumes direct responsibility and all costs for the planning, design, right-of-way acquisition, construction, and inspection of improvements. The agreement must include terms giving DeIDOT appropriate provisions for quality assurance and quality control. This is the preferred alternative.

Alternative Two: If DeIDOT determines that the aforementioned agreement is not feasible and practical, DeIDOT may take the project lead and assume responsibility for the scheduling, planning, design, right-of-way acquisition, construction, and inspection of the off-site improvements as a DeIDOT project. The following include, but are not limited to, conditions that may cause DeIDOT to take the lead, but not the cost, for the project:

The project is particularly complex. The project will still be wholly funded by the entity seeking development approval.

The project is already in the DeIDOT's CTP, planning and design are complete, but right-of-way has not been acquired. The developer shall contribute funds towards the necessary right-of-way acquisition and be responsible for any additional costs incurred as a result of the portion of the project being modified.

The development and related improvements are part of a Transportation Investment District or similar master planned area. The developer will pay their fair share of the cost based on trip

generation. The specific responsibilities of these several parties will be described in a Memorandum of Agreement.

**3.1 Project Eligibility**

If a project or improvement is not in DeIDOT's CTP, or in the CTP but not yet under design and found to need right-of-way, it may be considered for eligibility if the following conditions are met:

The development project for which the improvements are required is

- Consistent with the local comprehensive plan;
- Consistent with Strategies for State Policies and Spending, including location in a Level 1, 2, or 3 State Strategy investment area; and
- In conformance with the requirements of the Clean Air Act (CAA) regulations.

The need for the transportation improvement project must be documented and confirmed during the land use process as part of the preliminary plan approval from the local land use agency.

The transportation improvement is located adjacent to the public right-of-way. Improvements include but are not limited to, intersection upgrades, roadway widening, and improvements required at the entrance to the proposed development.

When the project has been found to be eligible, DeIDOT may still choose to defer or deny advancement of the project. Project deferral may be considered in cases where a project is located in an active transportation study area, or in an area where a study is about to be initiated, where the results could have a significant impact on or eliminate the need for the subject project.

Project denial may be considered in cases where the project would cause abutting property to lose access or be reduced in value to the extent that it would be rendered unusable, economically. Deferral or denial under these conditions shall be at DeIDOT's discretion.

**3.2 Plan Preparation**

After the project is accepted by DeIDOT, plan preparation for preliminary engineering and final design of transportation improvements (also known as "construction plans") shall be in accordance with DeIDOT plan development standards.

Right-of-Way (ROW) plans shall be in accordance with *DeIDOT's Right-of-Way Manual*. Additionally, right-of-way shall be verified through deed research, examination of plot plans and DeIDOT highway, bridge and subdivision archives.

**3.3 Public Input Process**

Public input for land development is most critical during the exploratory sketch plan phase of the land use process and should be part of the local land use agency's process. During the design of transportation improvements, DeIDOT and the developer will solicit public input in a formal setting and provide information such as the implementation process, maintenance and protection of traffic (MOT), and potential impacts (e.g. travel time charts showing different alternative routes and projections showing how long the public will be inconvenienced).

DeIDOT's Public Involvement Policy O-03 illustrates the range and levels at which the public has an opportunity to participate in the planning process. This policy states that public involvement processes shall be proactive and provide complete information, timely public notice, full public access to key decisions, and opportunities for early and continuing involvement. DeIDOT shall consult with state and local governmental representatives once the concept plan is submitted. DeIDOT, with the participation of the relevant developer, is committed to educating the public about transportation issues, services and projects, as well as soliciting information, reaching consensus, and providing a way for the general public to express their needs, ideas, concerns, and perspectives relating to the transportation system.

Public input under the road improvement process shall be in accordance with DeIDOT's Public Involvement Policy O-03.

Regardless of whether a developer or DeIDOT takes the lead in making the transportation improvement, a minimum of one public meeting shall be held after preliminary plan review. The need for other meetings, for example showing implementation and maintenance of traffic, will be determined

by DeIDOT and included in the agreement between DeIDOT and the entity seeking development approval. The scope of these additional meetings can vary, depending on the impacts of the proposed transportation improvements. All adjacent property owners shall be notified by regular mail in writing 14 days prior to the public meeting, and offered an opportunity to comment. A notice shall be placed in a local newspaper of general circulation advertising the public meeting date and location for the proposed improvement, its scope, an indication of the expected project duration and the opportunity to discuss to what extent the public will be affected by the project.

#### 3.4 Review Process

The developer's engineer, who must be a Delaware-registered professional engineer, shall prepare and submit to DeIDOT for review and approval all construction plans, right-of-way plans, specifications, and estimates for the project. The design of roadway improvements shall be in accordance with the latest standards published by the American Association of State Highway and Transportation Officials (AASHTO), *DeIDOT's Road Design Manual*, and the *Manual on Uniform Traffic Control Devices (MUTCD)*.

The plan submissions will be required to undergo separate reviews for construction and right-of-way plans:

The construction plan submission will consist of a preliminary, semi-final, and final (or contract) plan submission. The submittals shall include design plans, specifications and cost estimates for construction of the project.

The right-of-way plan submissions shall include a semi-final and final plan submission.

The developer's engineer shall establish review dates with concurrence from DeIDOT for all construction and right-of-way plans. These plans shall be reviewed by DeIDOT's Chief Engineer. The developer's engineer shall coordinate with the utility companies to determine existing utility locations and possible relocations.

Existing deeds and recorded plot plans shall be acquired and applicable DeIDOT highway, bridge and subdivision plans shall be obtained to establish and verify the existing right-of-way. The engineer shall attest to the right-of-way shown on the plans.

The engineer will work through DeIDOT's Development Coordination Section and the Pavement Management Section for pavement evaluation and design verification. This may include the need for pavement cores and subgrade soils analysis.

The engineer will work with DeIDOT's Design Services for hazardous material and/or contaminated site delineation. The developer shall be responsible for any site remediation required. The engineer shall prepare, apply for, and obtain all necessary permits and environmental or historic documentation required by federal, state, and local authorities. Copies of the permits and supporting documentation shall be provided to DeIDOT prior to a Notice to Proceed being issued for construction of the project.

##### 3.4.1 Inspection

DeIDOT will determine the level of inspection required for each project. Inspection will be provided by DeIDOT Public Works staff, DeIDOT construction staff, or an inspection consultant currently under contract with DeIDOT for inspection services.

#### 3.5 Real Estate Process

DeIDOT's Real Estate right-of-way acquisition process can be used to secure roadway improvements triggered by development, only after the developer has exhausted all efforts to obtain the needed private property through voluntary good faith negotiations. The developer shall consult with the Real Estate Section, develop an acquisition plan and implement that plan with DeIDOT oversight. Land acquisition shall be in accordance with DeIDOT's most current Real Estate Management Manual. DeIDOT engages the property owners and tenants in a process of notification, appraisal, and negotiations. DeIDOT's Real Estate Section, or a qualified entity, with prior approval by DeIDOT, shall procure the necessary rights-of-way.

Based on the complexity, DeIDOT's Real Estate Section will determine whether an appraisal is necessary or if a valuation waiver method can be used. In instances where temporary access to a

property is required, DeIDOT shall determine the lease value of the property for the duration of the project.

Process Steps:

- 3.5.1 Notification: property owners and tenants will be notified in one or both of the following ways: they will be contacted by a DeIDOT Real Estate representative or notified of public workshops. This notification will occur at least six months in advance of any eminent domain action, should good faith negotiations fail to result in a signed contract.
  - 3.5.2 Valuation: property owners will receive fair market value for any land and/or buildings they are required to sell. A qualified, licensed independent appraiser may complete the appraisal, which is approved by an independent authority (DeIDOT). If the offer of just compensation is estimated to be less than \$10,000, DeIDOT may authorize the use of one of two (2) appraisal waiver valuation methods and the offer to purchase may be made in the form of an Administrative Offer Summary (AOS). If the offer of just compensation is estimated to be more than \$10,000, but less than \$25,000, DeIDOT may authorize the use of one of two (2) appraisal waiver valuation methods and the offer to purchase may be made in the form of an Administrative Offer Summary (AOS) with the consent of the owner. Property owners may, at their own cost, obtain their own appraisal.
  - 3.5.3 Negotiations: a DeIDOT Real Estate representative will contact the property owner with a plan showing the amount of land needed and written confirmation of the amount of compensation being offered. The property owner will be given 60 calendar days to consider the offer. If the offer is accepted, both parties (DeIDOT and the seller) sign a binding contract and settlement is held.
  - 3.5.4 Acquisition: A deed of conveyance is signed over when the check is delivered at settlement. If the fair market value offer is not accepted, state law recognizes the right of the property owner to refuse the purchase offer and to have the value of the property established through the courts utilizing DeIDOT's power of eminent domain (the right of the government to acquire private property for public use). That approach will only be used as an action of last resort. If DeIDOT uses its power of eminent domain to obtain required right-of-way, DeIDOT and DeIDOT's legal counsel will assume responsibility for pursuing the legal action and the developer will deposit an amount equal to the property owner's estimate of valuation, plus estimated attorney's fees with DeIDOT.
- 3.6 Design and Construction Administration
- 3.6.1 Alternative One

The developer shall hire a Delaware-registered professional engineering firm possessing a Certificate of Authorization for all offsite improvement projects. If the developer designs the transportation improvements, the cost of which the developer has responsibility, (Alternative One), the developer shall provide DeIDOT with 100% of the right-of-way costs upon completion of the preliminary engineering and final determination of right-of-way. DeIDOT or a qualified entity, with prior approval by DeIDOT, will acquire the determined right-of way in accordance with the real estate process in section B.3.5 and DeIDOT's Real Estate Management Manual.

The developer shall hire a qualified contractor as determined by DeIDOT to implement the identified improvements. The contractor shall be one that is listed on the DeIDOT Registry of Contractors.

The developer shall also enter into a construction inspection agreement with a firm currently under contract to DeIDOT or a firm currently on the Registry of Contractors to provide such services with DeIDOT.
  - 3.6.2 Alternative Two

If DeIDOT designs and constructs the transportation improvements (Alternative Two), prior to initiation of design services the developer shall provide DeIDOT with a certified check for the estimated total cost of preliminary engineering and final design costs as approved by DeIDOT. Upon final determination of the required improvements and at the same time as final site plan and preliminary entrance plan is submitted for DeIDOT's review and approval, the developer and DeIDOT will reconcile any differences between the estimated design costs and actual costs.

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Prior to DeIDOT acquiring right-of-way for the offsite improvements, the developer shall provide DeIDOT with security in the amount of 100% of the estimated final construction and right-of-way acquisition costs as approved by DeIDOT.

The following forms of security shall be acceptable:

- Surety Bond issued by a bonding company licensed in Delaware.
- Commercial letter of credit issued by a lending institution licensed in Delaware.
- Certified check with escrow agreement.

DeIDOT shall issue a Notice to Proceed (NTP) for the construction after the right-of-way acquisition is completed. Upon final determination of the required right-of-way acquisition and construction costs, the developer and DeIDOT will reconcile any differences between the estimated right-of-way acquisition and construction costs and the actual costs.

At no time will DeIDOT have responsibility for the cost of scheduling, planning, public participation, design, right-of-way acquisition, construction or inspection related to improvements except as provided for in the section 4.0 of these regulations.]

**4.0 Finance**

Except in those instances where DeIDOT has entered into an agreement to fund certain portions or phases of a transportation project or projects, DeIDOT will not provide financing for any portion or phase of a transportation project or projects covered by these regulations. Except in the instances cited above, the developer shall pay directly for all costs and expenses associated with said project. The developer may avail his or herself of the several types of financial vehicles commonly used for such purposes including bonds, letters of credit and escrow accounts.

**10 DE Reg. 892 (11/01/06)**