

## *Appendix B      Improvements Requiring New Rights-of-Way*

### **B.1 BACKGROUND**

Developers proposing real estate rezoning or subdivision 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. DelDOT'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 DelDOT's, DelDOT 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, or at best it is insufficient.

#### **B.1.1 MAJOR ISSUES**

The regulations herein address the following issues and barriers to development:

- Developer's inability to secure right-of-way for necessary improvements.
- DelDOT'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 consideration of development-related improvements.
- Lack of clarity and definition regarding DelDOT's role in assuring project quality.

## **B.1.2 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.

Section 507 directs DelDOT 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 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 DelDOT 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 Clean Air Act.

DelDOT'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, DelDOT is required to consult with area representatives of state and local government. DelDOT 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.

## **B.2 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. Two fundamental policies 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 build on the foundation laid by the *Strategies for State Policies and Spending*. They are intended to encourage 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, DelDOT is empowered to secure right-of-way for roadway improvements that are consistent with and support this key objective of *Livable Delaware*.

### **B.3 REGULATORY PROCEDURES**

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

Alternative One: DelDOT shall enter into an agreement with the entity seeking development approval whereby they assume direct responsibility for the planning, design, construction, and inspection of off-site improvements. The agreement must include terms giving DelDOT appropriate provisions for quality assurance and quality control. This is the preferred alternative.

Alternative Two: If DelDOT determines that the aforementioned agreement is not feasible and practical, DelDOT may assume responsibility for the scheduling, planning, design, construction, and inspection of the off-site improvements as a DelDOT project. The following include, but are not limited to, reasons that may cause DelDOT to assume responsibility 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 DelDOT'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.

#### **B.3.1 PROJECT ELIGIBILITY**

If a project is not in DelDOT's CTP and found to need right-of-way, it may be eligible for Alternative One. In order to be eligible, the improvements must be offsite (non-entrance and outside the limit of construction at the entrance) and must meet all of the following conditions:

- 1 The development project for which the improvements are required must
  - a. Be consistent with the local comprehensive plan;
  - b. Be consistent with *Strategies for State Policies and Spending*, including location in a Level 1, 2, or 3 State Strategy investment area;and
  - c. Be in conformance with the requirements of the Clean Air Act (CAA) regulations.
- 2 The need for the transportation improvement project must be documented and confirmed during the land use process prior to the developer receiving preliminary plan approval from the local land use agency.

The need and eligibility are confirmed through completion of the following checklist:

***Figure B-1 Transportation Improvement Checklist***

	Yes	No
Preliminary Plan Approval	<input type="checkbox"/>	<input type="checkbox"/>
Consistent with Comprehensive Plan	<input type="checkbox"/>	<input type="checkbox"/>
State Strategies Level 1, 2, or 3 Investment Area	<input type="checkbox"/>	<input type="checkbox"/>
In conformance with Clean Air Act Regulations	<input type="checkbox"/>	<input type="checkbox"/>

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 economically un-viable. Deferral or denial under these conditions shall be at DeIDOT's discretion.

### **B.3.2 PLAN PREPARATION**

Plan preparation for preliminary engineering and final design of transportation improvements (also known as "construction plans") shall be in accordance with Section 4.5 of the *Standards and Regulations for Subdivision Streets and State Highway Access Manual*.

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 and examination of plot plans. The *Standards and Regulations for Subdivision Streets and State Highway Access* contains the right-of-way plan checklist.

### **B.3.3 PUBLIC INPUT PROCESS**

Public input for land development is most critical during the exploratory sketch plan phase of the land use process at the local land use agency. During the design of transportation improvements, DeIDOT 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 project 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 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 this 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 is required. One 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 the meeting can vary, depending on the impacts of the proposed transportation improvements. All adjacent property owners shall be notified 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 as well as an estimate of how long and to what extent the public will be affected by the project.

#### **B.3.4 REVIEW PROCESS**

The developer's 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*, DeIDOT's *Standards and Regulations for Subdivision Streets and State Highway Access*, and the *Manual on Uniform Traffic Control Devices (Delaware MUTCD)*. Where conflicts exist, DeIDOT's *Road Design Manual* shall take precedence.

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

1. 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.
2. 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 construction and right-of-way plans. He or she shall also coordinate with the utility companies to determine existing utility locations and possible relocations.

Existing deeds and plot plans shall be acquired 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 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.

##### **B.3.4.1 INSPECTION**

Depending on the size and impact of the project on the abutting state-maintained roadway, the level of inspection will vary. Off-site improvement project inspection shall be in accordance with Section 6.6 of the *Standards and Regulations for Subdivision Streets and State Highway Access Manual*

### **B.3.5 REAL ESTATE PROCESS**

DelDOT's Real Estate right-of-way acquisition process can be used to secure roadway improvements triggered by development. Land acquisition shall be in accordance with DelDOT's most current *Real Estate Management Manual*. DelDOT engages the property owners and tenants in a process of notification, appraisal, and negotiations.

Based on the complexity, DelDOT's Real Estate Section will determine whether an appraisal is necessary or if a valuation waiver can be used. In instances where temporary access to a property is required, DelDOT shall determine the lease value of the property for the duration of the project.

#### Process Steps:

1. Notification: property owners and tenants will be notified in one or both of the following ways: they will be contacted by a DelDOT Real Estate representative or notified of public workshops.
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 (DelDOT). Property owners may, at their own cost, obtain their own appraisal.
3. Negotiations: a DelDOT 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 (DelDOT and the seller) sign a binding contract and settlement is held.
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 DelDOT'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.

### **B.3.6 DESIGN AND CONSTRUCTION ADMINISTRATION**

#### **B.3.6.1 Alternative One**

The developer shall hire a registered engineering firm possessing a Certificate of Authorization for all offsite improvement projects. If the developer designs the transportation improvements (Alternative One), the developer shall provide DelDOT with 100% of the right-of-way costs upon completion of the preliminary engineering and final determination of right-of-way. DelDOT will acquire the determined right-of way in accordance with the real estate process in section B.3.5 and DelDOT's *Real Estate Management Manual*.

The developer shall hire a qualified contractor as determined by DelDOT to implement the identified improvements.

The developer shall also enter into a construction inspection agreement with a firm currently under contract to provide such services with DelDOT.

#### **B.3.6.2 Alternative Two**

If DelDOT designs and constructs the transportation improvements (Alternative Two), the developer shall provide DelDOT with a certified check for the estimated total cost of preliminary engineering and final design costs as approved by DelDOT. The design fee shall be paid to DelDOT upon final determination of the required improvements and at the same time as final site plan and preliminary entrance plan is submitted for DelDOT's review and approval.

Prior to DelDOT acquiring right-of-way for the offsite improvements, the developer shall provide DelDOT with security in the amount of 100% of the estimated final construction and right-of-way acquisition costs as approved by DelDOT. DelDOT shall issue a Notice to Proceed (NTP) for the construction after the right-of-way acquisition is completed.

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.

These regulations address the identified need for transportation improvements triggered by new development in cases where such improvements would not otherwise be possible due to right-of-way constraints. In addition to providing a process for meeting a public transportation need, these regulations also establish under what conditions this process may be utilized in support of land use and transportation infrastructure coordination.