

**DEPARTMENT OF TRANSPORTATION**  
**DIVISION OF TRANSPORTATION SOLUTIONS**  
Statutory Authority: 17 Delaware Code, Section 533 (17 Del.C. §533)

**PROPOSED**

**PUBLIC NOTICE**

**2409 Procedures for Establishment of Fee Simple Ownership by the State of Delaware for Abandoned Right of Way Easements**

Pursuant to the authority provided by 17 Del.C. §533, the Delaware Department of Transportation (DelDOT), through its Division of Transportation Solutions, seeks to adopt regulations to establish procedures for determination that land encumbered by a permanent easement right-of-way has been abandoned and for recording the State's fee simple ownership of that land.

**Public Comment Period**

DelDOT will take written comments on the proposed creation of Section 2409 of Title 2, Delaware Administrative Code, from September 1, 2024 through October 1, 2024. The public may submit their comments to:

Chief of Right-of-Way or Public Relations  
in writing to their attention,  
Division of Transportation Solutions  
Right of Way Section  
Delaware Department of Transportation  
800 Bay Road  
Dover, DE 19901

**2409 Procedures for Establishment of Fee Simple Ownership by the State of Delaware for Abandoned Right of Way Easements**

**1.0 Purpose**

In accordance with 17 Del.C. §533, the purpose of this regulation is to set forth the procedures that the Delaware Department of Transportation (the "Department") will follow for establishing its determination that land encumbered by a permanent easement right-of-way has been abandoned and for recording its fee simple ownership of the land.

**2.0 Definitions**

The following words and terms, when used in this regulation, shall have the following meaning:

"Abandoned" means that the fee simple owner of real property has given up all claims, possession, and rights to the property.

"Adjacent land owner" means the owner of real property that abuts encumbered land.

"Department" means the Department of Transportation of the State of Delaware.

"Easement" means the right of a person or entity to use the land of another for a special purpose.

"Encumbered land" means the lands subject to easement rights held by the State for right-of-way purposes.

"Encumbered land owner" means the owner of real property subject to easement rights held by the State for right-of-way purposes.

"Owner" means the legal fee simple owner of real property as recorded upon the deed or any relevant documents passing ownership of the lands, duly recorded in the county where the lands are located.

"Owner's address" means the current mailing address of the owner.

"State" means the State of Delaware.

**3.0 Procedure for Providing Notice to Potential Interested Parties**

3.1 Prior to fee simple ownership of encumbered lands passing to the State, the Department shall provide written notice to potential interested parties, including adjacent land owners, that the State intends to declare the encumbered lands abandoned and to claim fee simple ownership of the encumbered lands. The written notice shall be made as follows:

- 3.1.1 By publishing a legal notice in any 1 or more newspapers of general circulation in the county where the encumbered lands are located. The notice shall be published in that county at least 3 times, not less frequently than once per week, for 3 successive weeks; and
- 3.1.2 By certified mail, return receipt requested, to the encumbered land owner and to all adjacent land owners. The written notice shall request that the encumbered land owner notify the Department, by certified mail, return receipt requested, within 60 days of the mailing of the notice, that the encumbered land owner has not abandoned the encumbered lands and asserts the encumbered land owner's claim of fee simple ownership. If the encumbered land owner's name, the encumbered land owner's address, or both are not ascertainable from the public records, then the Department shall provide the written notice to the last known available or reasonably ascertainable address of the last encumbered land owner of record. If the Department is unable to ascertain the owner's address, then the Department shall state that the encumbered land owner's name, the encumbered land owner's address, or both are not ascertainable from the public records within the affidavit identified in Section 4.0. In this event, the Department shall have met its requirement to provide notice through the published legal notice.
- 3.2 If the encumbered land owner of record, or the heirs or successors in interest of the encumbered land owner, shall fail to respond to the Department for a period of 60 days after the required notice has been mailed, then the Department may record, in the office of the Recorder of Deeds for the county where the encumbered lands are located, an affidavit containing information as set forth in Section 4.0.

#### **4.0 Affidavit to Record the State's Fee Simple Ownership**

- 4.1 An affidavit permitted under this section shall contain:
  - 4.1.1 A reference to:
    - 4.1.1.1 The record, volume and page, instrument number, or other recording data of the grant of permanent easement to the State of Delaware; or
    - 4.1.1.2 If there is no recorded information, the method of conveyance of the easement rights (e.g. acceptance of maintenance responsibility by the Department) shall suffice;
  - 4.1.2 The name of the original grantor of the permanent easement, as the name appears in the grant of the permanent easement, and a reference to the deed or other document by which the original grantor received rights to the lands;
  - 4.1.3 The original date of the grant of the permanent easement to the State for right of way purposes;
  - 4.1.4 A statement by the Department that:
    - 4.1.4.1 The Department has provided the required notice and, if applicable, that the name of the encumbered land owner, the encumbered land owner's address, or both are not ascertainable from the public records;
    - 4.1.4.2 The Department has not received from the encumbered land owner a notice that the fee simple owner has asserted a claim of ownership of the encumbered lands so as to deny abandonment of the encumbered lands;
    - 4.1.4.3 To the best of the Department's knowledge and belief, after conducting reasonable inquiry and investigation, no action has been filed by any purported encumbered land owner in any court of this State pertaining to determination of fee simple ownership of the lands.
    - 4.1.4.4 The Department requests the Recorder of Deeds in the county in which the encumbered lands are located to record the affidavit for the purpose of indicating abandonment of the underlying fee simple ownership of the encumbered lands, and passing fee simple ownership of the encumbered lands to the State of Delaware due to the abandonment;
    - 4.1.4.5 The authorized representative of the Department whose signature appears on the affidavit has personally reviewed all of the information and each of the facts contained in the affidavit and request; and
    - 4.1.4.6 The information contained in the affidavit and request is true and correct to the best of the Department's authorized representative's knowledge and to the best of the information as it is available to the Department.
- 4.2 The Department shall request that the Recorder of Deeds, or a duly appointed deputy, in the county in which the encumbered lands are located, cause the affidavit to be accepted for recording and to revise all available records to indicate a fee simple ownership of the encumbered lands by the State, upon the receipt of the affidavit and request by the Department.

#### **5.0 No Supplantation of any Remedy or Process Available**

This section does not supplant any other remedy or process available for transfer of fee simple interests of any encumbered lands within this State. Accordingly, if the Department is able to identify and locate the owner of any fee simple interest of encumbered lands subject to these provisions, then the Department shall pursue any acquisition of property rights through negotiation and, when necessary, condemnation. The Department is not liable to any person if the Department complied with this section and the encumbered land owner of record did not respond in a timely manner to proper notification.

#### **6.0 No Termination of Prior Rights**

Nothing herein shall be construed as terminating any prior rights related to the encumbered lands, including any easements granted for utility purposes, and the prior rights shall run with and encumber the encumbered lands unless and until those rights are properly terminated.

#### **7.0 Recorded Notice by Grantor of Easement**

Notwithstanding the foregoing, a grantor of an easement to the State of Delaware for right of way purposes may record written notice in the Office of the Recorder of Deeds, in and for the county where the encumbered lands exist, that the grantor does not intend to abandon the underlying fee simple rights in and to the lands. The recorded notice shall include current contact information for the grantor and, provided that the notice is recorded as described in this regulation, the notice shall provide a rebuttable presumption that the underlying fee simple rights have not been abandoned by the grantor and, therefore, shall not be subject to the provisions of 17 Del.C. §533.

**28 DE Reg. 217 (09/01/24) (Prop.)**