



Right of Way Acquisition in the Garden State

By Lester Finch

The fifth amendment to the United States Constitution (1792) prescribes that no person can be deprived of property without “due process of law,” and that private property cannot be taken for public use without the payment of “just compensation.” The fourteenth amendment (1868), extended the due process provision to state actions, without the compensation requirement and at the turn of the century, in the Burlington Railway case, the Supreme Court held that states were required to pay compensation for property taken. The simple phrases “due process” and “just compensation” have generated voluminous case law in the various states and each state constitution has placed its own spin on their meaning and evolving case law has added to the disparity in treatment among the several states.

In the early 1960s, in one of his classic dissents, Associate Justice John Marshall Harlan of the United States Supreme Court concluded that “Due process has not been reduced to any formula; its content cannot be determined by reference to any Code. It is the balance which our Nation has struck between the liberty and demands of an organized society.”

New Jersey’s Eminent Domain Statute (N.J.S.A. 20-3-1 et seq.) was revised in 1971 to provide that “no

action to condemn shall be instituted unless the condemnor is unable to acquire such title or possession through *bona fide negotiations* with the prospective condemnee ... ” Negotiations must include a written offer setting forth the property and Interest to be acquired, the compensation to be paid and a *reasonable disclosure* of the manner in which the compensation has been calculated. Until 1985, we provided the owner with a written offer of the just compensation and a listing of the comparable sales upon which we relied in establishing value. The property owner was not entitled to view our appraisal report until subsequent to the filing of the Complaint in the condemnation action.

State Highway Access Management Act (N.J.A.C. 16:47 et seq)

In 1992, the New Jersey Legislature enacted the *State Highway Access Management Act*, which controls access to adjoining properties from State highways. Any revocation or modification of access requires a written notice to the property owner, accompanied by a plan showing our proposed access revision and our determination that the remaining access is either reasonable or unreasonable. Right-of-way input is a critical element

of the planning process and at the time that the project is sent to a District Office to initiate acquisition, each case involving a revocation or modification of access is accompanied by an instruction as to how the property is to be appraised. In New Jersey, modification or revocation of access is construed to be an exercise of our police, rather than eminent domain power.

The owner has the right to request a modification to our access proposal and may appeal the determination to an Administrative Law Judge. Until the access issues have been resolved, our appraisal process may not be started. Case law has held that, although the remaining access may have been

Department conduct a phase 1 screening of each property to disclose potential contamination. The Court inquired as to how an owner could make an informed decision as to the sufficiency of the offer, without first being informed as to the extent of, as well as the estimated cost of remediating, any contamination on the property. If contamination is suspected, or actually present, a remediation cost report must be prepared and provided to the owner concurrently with the tender of the just compensation.

If the construction schedule permits, the owner is permitted to remediate the property. In those instances where our construction timetable requires prompt action, the remediation is accomplished



deemed “reasonable,” if the change in the access from the highway to the remaining property necessitates an alteration to the interior traffic circulation on the property, the change in access may be compensable as part of the eminent domain process, even though the access modification was accomplished under our police power.

Environmental Contamination

New Jersey’s **Industrial Site Remediation Act** requires an assessment of contamination and remediation of contaminated properties prior to change of title. Case law, beginning with a ruling in 1994, requires that the

as part of the construction contract. The owner is responsible only for those costs that she/he would have incurred had the owner performed the remediation and any additional costs resulting from the expedited remediation are borne by the Department.

Our statute governing environmental contamination now permits the owner of a remainder to agree to a deed restriction limiting the use of the property to its existing use and only requiring a level of remediation consistent with the use. Previously, all properties were required to be remediated to residential standards. This change in policy by our Department of Environmental



Protection has generated significant cost savings to the owner. At such future time that the property was to be developed to another use, the property would be remediated to the standards applicable to the proposed use.

Real Property Appraisal Process

In 1985, in the case **Commissioner of Transportation v. Hancock**, the Appellate Division of our Superior Court affirmed the trial court finding that the owner must be provided with copy of our “**approved appraisal**,” during pre-litigation negotiations. In 1991, in **Commissioner of Transportation v. Testa**, the Appellate division held that we were required to provide the owner with copies of all appraisals of the subject property that were relied upon in establishing the just compensation, including any non real estate reports. This requirement has not increased the time required to purchase right of way; has resulted in a significant reduction in the number of cases proceeding to condemnation and has dramatically enhanced our credibility with the property owners.

The disclosure of the appraisal reports has also had the collateral benefit of improving the quality of the reports. To date, we have not been required to provide the property owner with our appraisal review, but feel that it is only a function of time, specifically in those cases involving more than one appraisal report, where the reviewer establishes value based upon one of the reports. There is a case currently pending in our Appellate Court system, where the owner is alleging lack of bona fide negotiations, due to the fact that we did not include the owner in the development of our proposed cure to mitigate damages resulting from a partial acquisition.

A Federal Highway Administration waiver permits the NJDOT to perform administrative determinations of value on parcels whose value is estimated at \$10,000.00 or less. If an agreement cannot be reached, an appraisal report must be prepared and a new offer made

based upon the report. Predicated upon the complexity of the appraisal assignment, a limited appraisal may be prepared in lieu of a complete report. Non-real estate reports may be required to assess the viability of a cure to remaining property in mitigation of damages. All appraisal reports receive a technical and field review prior to establishment of the just compensation.

Bona Fide Negotiations

Personal negotiations are attempted with all property owners and mail negotiations are conducted with absentee owners. The owner receives an initial written notice informing the owner of our intention to acquire the property and of her/his right to accompany the appraiser during the appraiser’s inspection of the property. The

**All appraisal reports
receive a technical and
field review prior to
establishment of the
just compensation.**

letter also provides the owner with our assessment as to whether or not the property requires remediation and the owner’s responsibilities regarding the remediation.

At the negotiations contact, the owner is provided with a copy of all real property appraisals and non-real estate reports that were relied upon in the determination of the just compensation. The written offer of the just compensation accompanies our written conclusions as to the environmental status of the property and, as appropriate, the owner is provided with the estimated cost to remediate any contamination.

The owner is provided with a plan depicting the proposed taking and construction plans and cross sections are provided upon request. Negotiations for partial takings cannot be concluded until the construction details have

What is it?

It's an Internet mailing list dedicated to right-of-way topics. Anything posted to the list is sent to your e-mail address. It's a free, virtual discussion group created to facilitate the exchange of ideas, news, etc., and it's open to anyone interested in the right-of-way profession.

How do I join?

You must have an Internet e-mail account.

If so, simply send e-mail to:
listserv@listserv.right-of-way.com
Then, type **add right-of-way** in the body of the message, and send.

How do I participate?

After you have subscribed,
just send e-mail to:
right-of-way@listserv.right-of-way.com

Who can I contact if I have additional questions?

Contact John Taylor at
jtaylor@netcom.com
or (213) 2445067 for more information.
Get more involved in your professional right-of-way community by joining and participating in this electronic forum.

New Employment Service

IRWA has a new free service for right-of-way employers and for those seeking employment. The **Job Bank**, which includes job postings of prospective employers and resumes of job seekers, has had very positive response during its trial period. Anyone can access and update information on the Job Bank through the IRWA web page at HYPERLINK <http://www.irwa.com>.

As of December 31, 1997, the voice recorded Job Hotline will be discontinued. For questions about these employment services, contact Tamara at International Headquarters, (310) 538-0233, ext. 131.

been provided to an owner who has requested them. We are required to consider an owner's request for modifications to our proposed design and the owner must be permitted sufficient time to secure an appraisal report if she/he so desires. Negotiations continue until an agreement is reached or it becomes apparent that a negotiated settlement is unlikely. In the latter instance, the eminent domain process is explained to the owner and a notice of our intention to condemn, is sent to the owner. This notice summarizes the negotiations and provides our basis for proceeding with the condemnation process.

We actively utilize administrative settlements to secure agreements with property owners above the fair market value as indicated by the appraisal report. Staff acquisition agents are authorized to settle administratively up to 10 percent above the fair market value and the district office managers are permitted to reach agreement up to 50 percent above the appraised valuation. Written justification is required in support of the recommended settlement. Recommended settlements in excess of 50 percent above the appraised valuation must have the approval of The Manager of Right of Way. Administrative settlements have proven to be cost effective, since we are saved the expense of appraisal updates, counsel fees to prepare for and conduct the commission hearing and the salaries of the commissioners. The typical costs incurred in conducting a commission hearing vary from \$4,000 to 6,000. The owner is likewise spared the additional appraisal and counsel fees.

Eminent Domain

The eminent domain process is initiated by the preparation of a Complaint, which sets forth the extent and justification for the proposed taking. A Deputy Attorney General signs the Complaint and the appraisal is updated, changing the effective date of the value estimate to the date of Complaint. The owner is presented

with the updated appraisal along with a written offer of the estimated just compensation.

At a "show cause" hearing, the owner is permitted to introduce evidence as to why we should not be permitted to condemn. If bona fide negotiations have been conducted, the Judge appoints three commissioners (not employed by the Department) to establish the just compensation and at that point in time, title to the property vests in the Department. Within six months of the appointment of commissioners, we must deposit the just compensation with our Superior Court. The three Commissioners schedule a hearing at which time both the owner and the Department present evidence as to the valuation of the property. Subsequent to the hearing, the Commissioners render a monetary award, which may be appealed by either party. If appealed, the jury is the final arbiter as to the just compensation due the owner.

Epilogue

Evolving case law and changing statutory requirements auger for an increasingly expanded definition of bona fide negotiations to which we will continue to react. To date, there is a strong case to be made that the increased protections provided to the property owner are not an unreasonable burden to be borne by this Department in light of the fact that the power to take private property for public use is one of the most intrusive rights granted to the various Governmental jurisdictions within our Country. ■

Lester Finch has more than 30 years experience in all aspects of the right-of-way acquisition process. Employed by the New Jersey Department of Transportation, he currently holds the position of Manager, Technical Support in the Department's Right of Way Bureau. Mr. Finch has a masteris degree from Rider University. He is a New Jersey State Certified General Real Estate Appraiser and a licensed tax assessor.