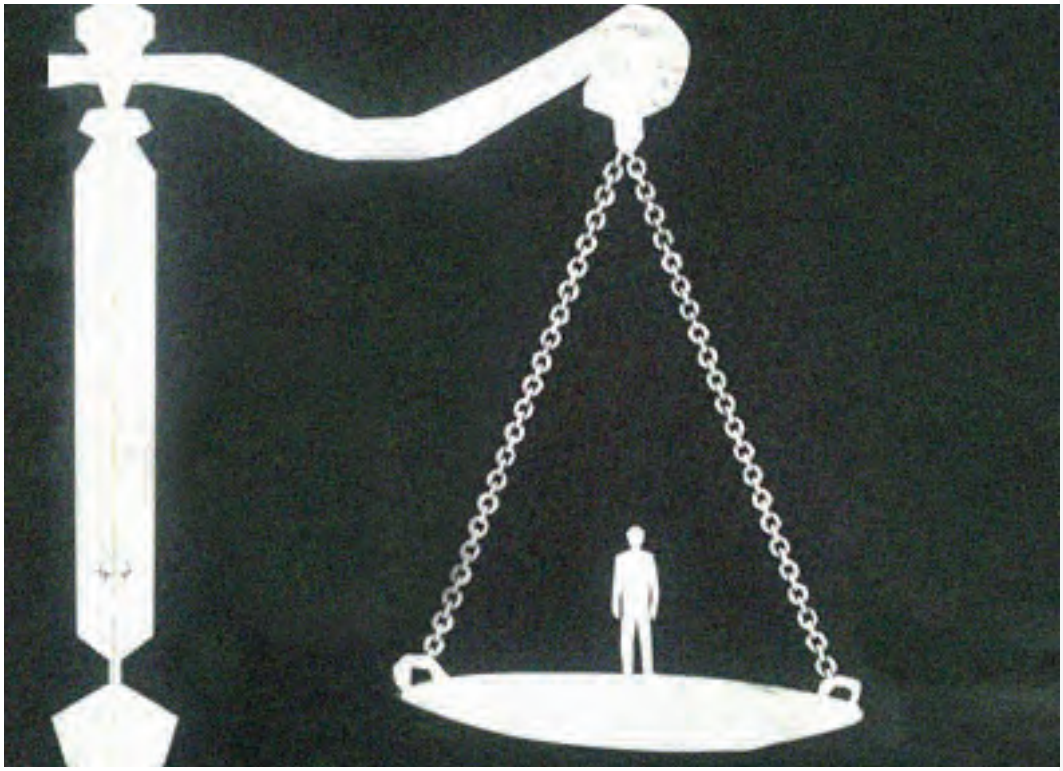

RELOCATION APPEALS

A winning formula for ensuring a fair and independent review process

BY WILLIAM VON KLUG

When it comes to determining relocation benefits, there are two simple rules. One is that displacees are entitled to the maximum benefits under the policies and regulations, and the other is that all persons are treated uniformly.

The Uniform Relocation and Real Properties Acquisition Policies Act (URA) regulations were written to give displacing agencies some latitude in the administration of relocation benefits and assistance. Agencies can write policies implementing those regulations, as long as those policies do not create lesser benefits or assistance.

While relocation agents are steadfast in their commitment to providing displacees with what they are entitled to, not everyone is always satisfied with the results. If there's a grievance or dispute that cannot be resolved between the displacee and the displacing agency, a relocation appeal may be the only way to move forward. However, depending on the outcome, the relocation appeals process may leave the displaced person feeling dissatisfied and distrustful about the fairness of the process. This dissatisfaction could expose the displacing agency to additional and avoidable administrative expenses, not to mention delays to the project.

The Concept of Fairness

In a typical relocation appeal, one of the first questions asked by the aggrieved person or their attorney is, "How can I have a fair appeal when you were chosen by the displacing agency and paid by that agency?" This is a very good question. Any appeal determination made by an individual that was chosen solely by the displacing agency is likely to be subject to criticism by the displaced person.

The foundation of all appeals can be found in the URA and its subsequent regulations, and this includes most state requirements. Those regulations are published and disseminated by the Federal Highway Administration (FHWA), the agency assigned by Congress to lead the promulgation of acquisition and relocation regulations.

The regulation pertaining to appeals is §24.10 of the FHWA regulations. However, within that section, there is no specific mention of the appeal format. As a result, displacing agencies may establish an appeal process in any format as long as it provides the following provisions:

- Ensures a prompt appeal process;
- Covers all of the appealable issues described in §24.10;
- Provides for the right of the displacee to be represented at the appeal;
- Provides for the right of the displacee to review other pertinent files;
- Requires that the appeal consider all pertinent material,
- Requires that a fair determination be made;
- Requires a written determination of the appeal findings;
- Requires that the person hearing the appeal cannot be someone who was involved in the action appealed; and
- Includes a right to judicial review, but only after the administrative process has been exhausted.

A hearing officer that is acceptable to both sides will ensure a fair and independent review process and help facilitate a win-win outcome.

Addressing the Concern

When the hearing officer is selected and paid by the displacing agency, the displacee's concern about getting a fair appeal is a valid one. An ideal way to meet the spirit and intent of the regulations would be to let the displaced person participate in the selection of the hearing officer. The displacing agency would still control the final selection and pay for the hearing officer, however the displacee would have a voice.

If the goal of a relocation hearing is to create a fair and independent review process, someone who is acceptable to both sides can go a long way in achieving the win-win decision needed to move a project forward. The responsibility of the hearing officer is simple—to independently review all the pertinent material and make an unbiased fair decision without regard to the impact that the decision has on the displacing agency, the displaced person, relationships with people on either side, on future or previous relocation claims and without concern the impact of the determination has on one's own self.

When selecting a professional to serve as the hearing officer, there are important credentials that will help ensure the selected candidate is best suited for the role. It is recommended that they have a minimum of 10 years of relocation knowledge and experience and fully understand that the policies of the displacing agency and the applicable state and/or federal regulations are all pertinent to any finding. They should be trained in, agree with and understand the concept of win-win negotiations. They need to have an understanding that benefits provided to other displaced individuals displaced by that agency have already created a precedent for the individual being displaced (the uniformity requirement of the URA).

There are also certain professionals who should not be selected for this role. One example would be mediators who are used to "splitting the baby" and do not consider the pertinent facts or consider the actual incurred costs. Attorneys are another group that, because they are trained to serve as advocates, aren't always capable of using the win-win style of negotiations that is required during an appeal. A current employee of the displacing agency or the agency funding the project is also not a good candidate, nor is someone who has shown a bias for either the displacee or the displacing agency. And of course, you would not want to hire a relocation consultant that made the original relocation determination or a competitor who bid on the project but wasn't selected.

Protecting the Reviewer

During my 44 years in the relocation profession, two of the toughest ethical issues I faced were during my role as a relocation hearing officer. On two separate occasions, I was reviewing relocation appeals with demands that exceeded $1 million. In both situations the displacees were parties that were either litigious individuals or represented by litigious attorneys. After reviewing all pertinent information, I could not concur that the demands were justified by policy or regulation. Given the nature of the appeal and the

uncomfortable situation this posed, I feared that the displacees might come after me with a spurious or retributionary litigation. Regardless, I was able to overcome this fear and make the right decision based on the facts. At the time, my agreement for services did not provide me with any protection. Fortunately, I was not sued.

To ensure that decisions are not influenced by concerns of personal litigation, this can be easily rectified by a contract provision. When contracting with hearing officer, here are the recommended provisions:

- An hourly fee based on a reasonable hourly rate for the person selected.
- A maximum "not to exceed fee" that allows for a review of all pertinent information.
- Protection from spurious litigation.
- No ex parte communication before or during the appeal process except as necessary to complete the appeal determination, and solely at or by the initiation of the hearing officer.
- A specific deadline to provide a hearing determination including requirements for both the displacee and the displacing agency to promptly provide required information.
- All requests for additional information be sent via email with a copy to both sides.
- Provision for a court reporter to provide a detailed and accurate hearing transcript.
- Agreement signed by both the displacee (or their representative) and the displacing agency indicating they have read the hearing officer's contract.

Financial Expectations

Recently, I was asked to hear an appeal and was advised that there was a budget for the appeal hearing officer. However, for a seasoned relocation professional, the amount was insufficient to hear even a simple appeal. This leads to a concern that a low fixed fee prohibits qualified persons from appropriately reviewing the facts and making a fair and independent determination. It also leads to the perception that the agency wants a subjective and predicable appeal determination rather than an independent hearing.

The administrative cost of an appeal that was done by an unqualified person or completed in an inappropriate manner casts a shadow on the appeal process and could cost the displacing agency thousands of dollars in unnecessary administrative expenses.

An appropriate appeal of a typical non-complex relocation, completed by a qualified individual, could be estimated to cost around $7,500 in administrative costs, including travel expenses.

"How can I have a fair appeal when you were chosen by the displacing agency...?"

This allows for a review of the displacing agency's policies and regulations, applicable state regulations and current regulations of the federal funding agency, as applicable. It also provides for a review of the individual relocation file and similar relocation files, attendance at a one-day appeal hearing, and adequate time to read the transcript, the applicable rules and write a determination.

Summary

Many state laws or regulations contain provisions that prohibit the displacement of an individual, family or business until the appeal process has been completed. Some agencies have adopted appeal procedures that offer the aggrieved person a multi-step appeal procedure. However, I would estimate that less than 25 percent of displacing agencies have an appeal policy established before someone files for an appeal.

Having served as a relocation appeals officer in over a dozen relocation cases, in all instances, I was selected by the displacing agency that also paid my fees. Some of the agencies I worked for were disappointed with my determination and subsequently advised me, or others, that they hired me with an expectation that my appeal determination would concur with their original determination. Apparently they expected me to, in essence, rubber stamp their original determination.

This past year, I have received an increased number of requests to serve as a hearing officer. If this is indicative of the future of relocation appeals, the displacing agencies will bear greater financial and project delay burdens as a result. It is surprising that there have not been more relocation appeals and judicial reviews of relocation, especially in states where state relocation regulations require resolution prior to displacement. Unless the appeal process is modified and made in accordance with the spirit and intent of the existing regulations, we may see an increase in relocation cases going to litigation. Not only will this impact the project schedule, but with large projects, this could represent hundreds of millions of dollars. ✪

William has worked in relocation since the URA's inception in 1970 and has overseen the relocation of over 10,000 displacees. He is also the course developer for IRWA's Course 502 on Business Relocation.