IRWA Presents

THE INDUSTRY ROUNDTABLE

Leveraging the value of the right of way professional

For years, the right of way component of infrastructure projects was often overlooked and left for the final hour. However, we at the IRWA know the true significance of this role. As we examined in our November/December 2017 cover story, "Securing a Seat at the Table," the overwhelming benefits of consulting right of way professionals in the initial planning phase of a project prove just how much attention should be given to the right of way team. And we're not the only ones who have recognized this. In recent years, we've seen a shift in the delivery of infrastructure projects—most notably the design-build method—and we've also witnessed the startling ways in which these alternative methods affect our industry.

We've gathered four experts in the field to give their insight into these recent changes, and to share their thoughts on how we can leverage this change as an opportunity to redefine the role of the right of way professional.

Chair of Nossaman's Eminent Domain and Valuation Practice Group, **Brad Kuhn** is a recognized leader in advising on all real property aspects of infrastructure and development projects. Brad has led some of the largest infrastructure projects in the nation and currently serves as IRWA's General Counsel, where he has also served as President of the Inland Empire Chapter.

Since 1986, **Brian Everett** has been involved in virtually every aspect of real estate consulting and right of way program management. For the past four years, he has served as the President and CEO of OPC LLC, one of the largest agency-focused, right of way consulting firms in the nation. His background in program and project management has helped pave the way for this pinnacle position in his career.

As the Executive Director of the Riverside County Transportation Commission (RCTC), **Anne Mayer** leads a staff of 49 with an annual budget of $881 million. Anne spearheaded the initiation of inland Southern California's first innovative finance and innovative project delivery efforts, which are coming to fruition on State Route 91 and Interstate 15.

Richard Huang is the Principal Project Manager for Parsons Corporation, and he is currently the Deputy Program Manager and Engineering Manager working on California's 405 freeway delivery. He has 22 years of extensive engineering experience with an emphasis on large, complex Alternative Delivery Programs across the U.S.

Q: How has the delivery of infrastructure projects changed over the last several years and how has that impacted the role of right of way professionals?

Brad: In the past, almost all infrastructure projects were developed and constructed through the traditional design-bid-build process. Right of way acquisition was not traditionally viewed as a critical path item, and it was much easier to secure possession of needed properties in an expedited manner. As a result, right of way acquisition activities were not given significant attention until very late in the process. Well, over the last several years, project delivery methods have changed. Project funding has routinely become contingent upon construction start-dates or project operations dates. Although these new delivery methods (such as design-build) have expedited the project timeline, it has wreaked havoc on the right of way acquisition process. By significantly narrowing the duration between project design and property delivery, right of way acquisition activities have become a critical path item with little to no leeway for delays without jeopardizing project funding. Exacerbating the problem, many states have made it more difficult and lengthy to acquire property rights or deliver possession.

Richard: And adding on to that, with the alternative delivery methods such as design-build or even P3s (where cost and schedule certainty prevails), right of way is often delivered just in time of the construction need, increasing the risk to successfully deliver the right of way needed for these capital improvement projects.

Brian: I definitely agree about the added pressure on the right of way acquisition process. Since construction is dependent upon right of way, the schedule is driven by successfully securing and clearing the required property. Failure to do so can result in construction delays and potentially to liquidated damages. Accordingly, OPC recognized the necessity and sensitivity to the schedule and started incorporating this element in a more detailed manner 10 years ago with the 91 CIP project. Today, the needs from our partner agencies is more "turn-key" control under a single roof resulting. For OPC, this resulted in certain vertical integration, such as title abstracting, plan review for right of way impacts, right of way engineering and appraisal working simultaneously under one right of way program manager in-house to help reduce timelines and assure successful delivery.

Anne: It certainly is challenging, but I would say the change to a design-build project delivery environment has given right of way professionals what they've always asked for throughout the years—early inclusion in the design process. As mentioned, design-build must include right of way in the early stages of a project to ensure proper timing and delivery provided in the project schedule. Just as the delivery of design and construction has offered greater flexibility, it has proved true for right of way delivery as well. For example, in a design-build project, right of way can be delivered in groups, allowing construction to proceed sooner in priority areas that are critical to a contractor, especially for long-duration project features, such as long bridge structures and retaining walls.

Richard: As popularity increases on these alternative delivery methods, the importance of the right of way professional increases with it, not only with agency support but as an advisor to the developer, joint-venture partners as well.

Brian: It's a far cry from the days when we were simply brought in after design was complete and we bought property and moved households and businesses. We now have an opportunity to assist in assessing critical path parcels and other project-related risks associated with the numerous right of way functions and schedule impacts.

Q: What value can right of way professionals bring to the table if they are involved early in the infrastructure project?

Richard: The value of involving right of way professionals early in infrastructure projects is the reduction of risks associated with delivery of the right of way. The right of way schedule can be further developed to provide better accuracy to the overall program schedule, and the right of way professional can also identify critical items early so mitigation measures can be developed.

Anne: In addition to that, early involvement ensures right of way professionals a place at the table and important status as part of the project delivery team. Knowing they have a handle on the right of way delivery and are able to provide status updates on their efforts gives those on the project team relief in knowing all of the moving parts in a highly complex project are working cohesively.

Brad: I'd say some of my most successful projects have involved the entire right of way group from the inception of a project. We have been able to come up with realistic budgets and schedules, minimize significant damages claims and reduce chances for project delays and change orders by fully vetting potential risks and focusing on the most critical property impacts. While there may be some additional up-front costs associated with this approach, the long-term savings are substantially outweighed since one small delay or change order could jeopardize a project schedule or budget to the point of preventing a project from being built.

Brian: I coined a phrase for a CLE presentation 10 years ago and it holds more value in today's design-build environment than it did back then. "Mitigate before you litigate." The value can be tremendous when the right of way program manager and the team are brought in early. Specifically, in the areas previously mentioned, such as identifying challenges to schedule, challenging ownership and title clearance issues.

Anne: And involving the right of way professional means utilizing them in all phases of the project. In the environmental and preliminary design stage, right of way professionals can identify specific property uses that might require additional time. They can also provide input on acquisition of mitigation land and inform the team about financial impacts of certain acquisitions, such as severance damages or loss of goodwill that need to be accounted for in the project budget. Getting involved during the design phase and staying involved during construction is key to seamless delivery.

Brian: They can even assist by being the public interface of a project. Early involvement allows for consistent public information and messaging. Nothing is more damaging or time consuming than inconsistency in information. While not necessarily a quantifiable aspect, success should include "staying out of the papers" and complete transparency and consistency. Having the entire team involved early can play a tremendous role in saving time, resources and money.

Q: What efforts can those in the right of way industry play outside of the traditional roles when working cohesively as a team?

Brad: Appraisers, attorneys, right of way consultants, relocation experts, public agencies and engineers can work as a team to identify potential risks and come up with the best potential solutions for the overall project.

Brian: I believe it is incumbent on right of way professionals to share the successes and challenges experienced through our project work. A strong, experienced team with a complete understanding of our project mission, roles and messaging will result in success. We in the industry must continue and update our methods through on-going educational updates and heavy involvement, such as that which is available with the IRWA. The team needs to have a full understanding of the changes in funding sources, impacts and auditing oversight agencies. When the right of way professionals bring this comprehensive understanding to the discussion, that message is shared consistently with the community impacted by our projects. We are the "human element" and the day to day face.

Richard: And by having a more complete understanding, the value of right of way professionals supporting infrastructure projects are ever increasing from their traditional roles. Right of way delivery strategies are evolving to meet the needs of the projects. More and more right of way professionals will venture into new roles outside the norm, especially with alternative delivery methods.

Brad: It all goes back to teamwork and the necessity to include the right of way professional in that team. Working independently, many issues can be missed or not thoroughly vetted. For example, we recently worked on a project where the engineer decided over 20 temporary construction easements (TCE) were necessary to construct a project and the agency was moving forward to acquire those rights. When the right of way acquisition group met with the engineers as a cohesive team, it was determined that the TCEs were not necessary, but they would result in $100,000 in construction cost savings. Those savings were vetted out compared to the acquisition costs, which would have likely been in the millions of dollars due to potential damages claims. The group decided that as a whole, the project was much better off avoiding the TCEs. That way, they would pay an additional $100,000 in construction costs, but save millions on the acquisitions. The entire right of way acquisition team was needed to help reach that determination and it was one that would have likely been missed in the past.

Anne: Additionally, right of way professionals play an important community relations role as well. A great deal of communication and information is exchanged during the various levels of the right of way process and productive relationships with property owners and businesses impacted by a project are crucial to a project's success. Right of way professionals are there to answer questions or provide property owners appropriate direction as it may relate to their individual parcel or a project concern. They also can relay critical issues from a property owner to the project team, which can be addressed by design engineers and community relations personnel. Relocations are often very stressful especially for those whose primary residence is impacted by a project. Right of way professionals must bring their softer skillsets to those transactions to minimize the stress and anxiety that comes with a move. The 91 Project required the relocation of 55 senior citizen residences in a mobile home park. The right of way team developed an implementation plan identifying key social services partners, best practices for outreach and goals for ensuring the transitions were conducted with compassion and empathy. While we succeeded in getting the process completed on time, our most important accomplishment was the respect we demonstrated in working with elderly and disabled residents and their families.

Richard: I would say the biggest opportunities for agencies to improve right of way delivery come from streamlining state and federal policies, identifying and remedying internal delivery deficiencies, offering incentives to entice owners to accept offers, using alternative delivery approaches to shift sensible right of way risks and of course, starting the right of way acquisition process as early as possible.

Brad: I agree—beginning early definitely increases your chance for success. A well-thought out acquisition plan, schedule and budget, as well as an early focus on mitigation options can substantially reduce project delays, cost overruns, change orders and contractor delay claims. Involving the right of way team early in the process and working cohesively with the engineering team, design team and the construction team can lead to a much smoother project delivery. Agencies like certainty, and there is a lot that can be done to improve that certainty by reducing risks.

Anne: The same goes for strategizing parcel acquisition early in the project development phase. Perform research on the properties required for a project and prepare a plan for the acquisitions. Always think about streamlining approval processes, information sharing and staying transparent, creating trust with stakeholders, agency management, property owners and the public. Internally agencies need to minimize the amount of paperwork or the need for physical files by embracing an electronic system to store project files available to all. A parcel file, for example, contains so much information about a specific parcel, but are oftentimes excessive and "super-sized." The agency is required to keep the files for quite some time (even after the project is complete), which can be cumbersome and lead to the storage of files away from the public agency office. Additionally, electronic filing systems provide an improved method of information retrieval by anyone on the project team.

Brian: I certainly agree with everyone that early involvement with the right of way team is the greatest of the opportunities for improvement. Too often we are brought in at the 11th hour and the irony is that it's not uncommon to hear "it's held up by right of way." That's typically an unfair assertion given that we may have been brought to the dance very late in the program. Some agencies remain resistant to fully accept the value that the right of way team can bring to the projects' success. Furthermore, recognizing right of way as "the human element" or wild card of project delivery will go a long way for agencies as the demand for more expeditious delivery of infrastructure increases.

Q: What are some of the biggest opportunities for agencies to improve right of way delivery?

Q: What are the biggest obstacles to ensuring right of way professionals participate in early project delivery and what recommendations do you have to overcome those obstacles?

Brad: Infrastructure is still a rapidly evolving industry, and delivery options are constantly changing and modernizing. Yet many public agencies are comfortable with what they know and may be reluctant to stray away from tried and true methods of project delivery, particularly on the right of way acquisition side.

Brian: Yes, they definitely can be reluctant. That's why we need to break down the barriers of existing norms in long-standing agencies unaccustomed to the rapid changes emerging in infrastructure demands. Time is of the essence and our industry is trapped in a "that's the way it's always been done" mentality. We have a responsibility to educate our agency partners with examples of successful alternatives.

Richard: As with typical hurdles when dealing with change, repeated education and persistence are necessary to capture buy-in from the industry. You have to show the value of initiating right of way professionals early in the program delivery. That small added services cost has the potential of saving millions in the long run.

Anne: I agree—it is absolutely necessary that agency management recognizes the critical role of right of way. After all, nothing gets delivered without acquisition of property rights and relocation of utilities to clear conflicts. But first, we collectively need to work with our state and federal partners to break down the project development process silos.

Brad: Ultimately, I think as more agencies involve right of way professionals early in the process and experience first-hand the benefits of such efforts, I believe it will provide a level of comfort for others to continue to pursue this opportunity. As the leading industry group, the IRWA is continuing to provide opportunities for learning, growth and improvement, so hopefully project owners will secure beneficial takeaways from the wealth of knowledge and experience at their fingertips.

Anne: We have to change the mindsets of project team members such as project managers and design engineers. Once you can influence that mindset and create a united, team approach, success is certainly within reach.

Brian: Speaking of team approaches, it was great honor to work with this dedicated team and I'd like to thank each member for coming together for this worthwhile article, for their great insight and for their continuing commitment and contributions toward "Enhancing Lives through Infrastructure." I'd also like to thank the IRWA for years of commitment to our industry and this platform to share our message. ✪