

Learning Objectives

- Explain the establishment of Just Compensation
- Describe the negotiation process and best practices
- Define Early Acquisition, Protective Buying, Hardship Acquisition and Pre-Award Authority
- Discuss preservation of Railroad Right-of-Way
- Review practices not accepted on FTA projects



Key Message: Explain and discuss the fundamental precepts of acquiring private property for public use.

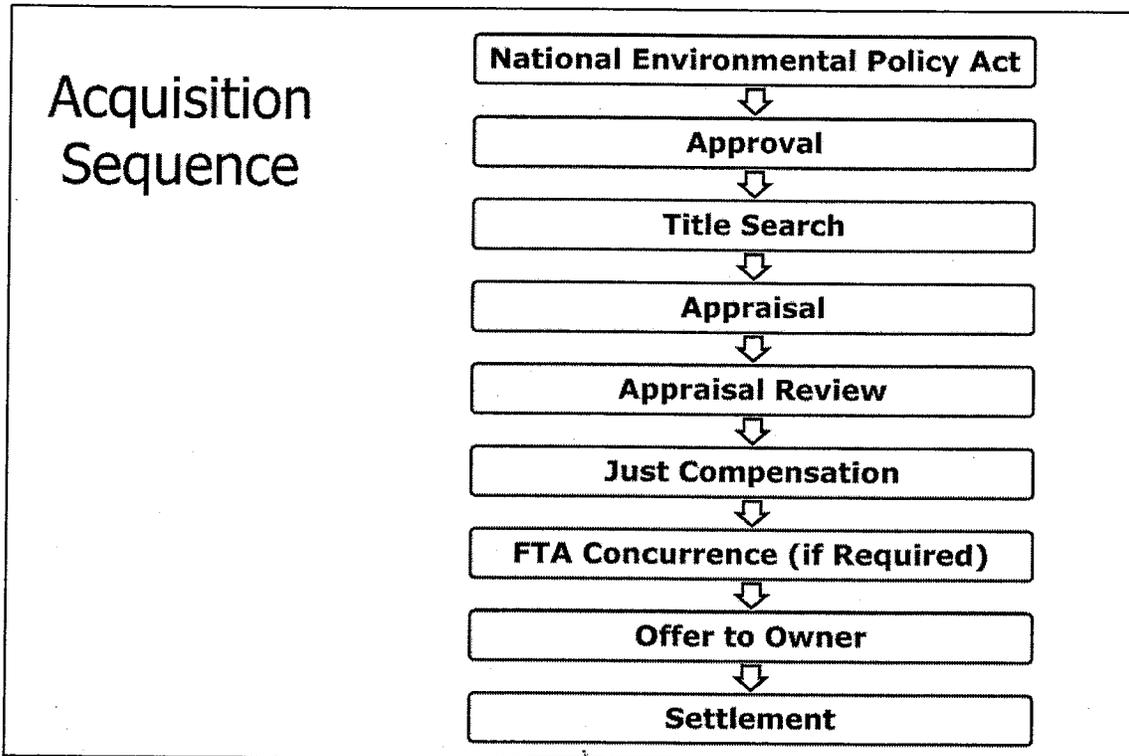
Notes:

The Regulatory references for the Objectives in this module are found in 49 CFR 24.102(d)(e)(f)(g)(h)(i)(j) and (k).

The references are found in Appendix A of the Participant Workbook– Federal Regulations 49 CFR 24.102 starts on page 617, half way down the right hand column; titled “Basic acquisition policies.”

The last objective, “Practices not Accepted on FTA Projects” consists of a list of practices some of which have clearly defined restrictions under Federal law and regulations, and others are practices used mainly as short cuts that are often used on non-federal projects. However, without the proper supervision, FTA has found that many of these practices are finding their way into federally funded projects.

We will discuss the fundamental precepts of acquiring private property for public purposes. The 5th Amendment of the Constitution requires that private property may not be taken for public purposes without payment of Just Compensation and the Constitution also requires the acquiring agency to follow due process when they acquire privately owned property.



Key Message: To ensure eligibility for Federal funding, the grantee should follow the typical Acquisition Sequence when acquiring real property for a project.

Notes:

If a grantee is using Federal funds to acquire real property or provide relocation assistance necessary to secure property for a project, the grantee must comply with the requirements in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act or URA), as amended. The Uniform Act is implemented by regulation (49 CFR Part 24).

FTA must review and concur in appraisals and review appraisals for acquisitions over \$500,000 or in-kind contributions of any value before Federal funds are expended, or the value is used as local match. The requirements and processes for conducting appraisals, review appraisals, providing relocation assistance, and requesting FTA's concurrence follows the above sequence.

Certain real estate activities can occur prior to the completion of NEPA. These include title work, relocation planning and appraisals; however, negotiations is specifically prohibited until the conclusion of the NEPA process. Since both appraisals and title work are time sensitive, any early real estate work may have to be repeated if the NEPA approval process is delayed. Therefore grantees should use caution when performing such early work.

Establishing Just Compensation

- The Agency **shall** establish an amount that it believes to be Just Compensation
- The amount **shall** not be less than the approved appraisal
- The agency **shall** make a written offer to acquire the property



Key Message: Appendix A, 49 CFR Part 24, Section 24.102(d), page 618 (left column), "Establishment and offer of Just Compensation" sets the procedure for handling Just Compensation.

Notes:

Module 3 discusses Just Compensation, what it is, how the amount is determined, and the procedure in which it is presented. The required steps for establishing Just Compensation state:

1. The Agency **shall** establish an amount that it believes to be Just Compensation.
2. The amount **shall** not be less than the approved appraisal.
3. The agency **shall** make a written offer to acquire the property.

This is the only authorized, approved due process if Federal funds are to participate.

Is it ever acceptable to negotiate an amount with the property owner before an appraisal is made? Discuss.

Negotiation Process

- Offer shall be in the form of a summary statement
- Negotiate in person whenever possible
- Listen to other's perspective
- Look for win-win option



Key Message: There is an acceptable process that must be adhered to.

Notes:

The negotiation process is found in 49 CFR 24.102(e)(f)(g)(h)(j)(k)

(e) A Summary Statement tells the owner everything that is being acquired and applies a value to those items.
The summary statement:

- Identifies the property to be taken
- Identifies the buildings, if any
- Identifies the damages (partial takes)

(f) Basic Procedures:

- Shall make a personal contact with owner
- Owner shall be given opportunity to consider the offer
- Agency shall consider owners response

(g) Reasons for updating the offer of Just Compensation

- Outdated, FTA requires updating the appraisal after 6 months
- Depends on real estate activity
- Other justifiable reasons such as plan changes

(h) Coercive Action – cannot threaten condemnation to force a decision

(j) Payment before possession – the acquiring agency cannot force surrender of land before payment is made.

(k) Uneconomic Remnants - See diagram on Learning Activity 5



Best Practices

- Build a rapport
- Be accurate and clear
- Listen
- Probably better to settle than litigate



Key Message: Some good and proven business practices

Notes:

- Build a Rapport – Gain the trust of the property owner
- Be Accurate in what you convey – do not make promises you cannot keep.
- Listen – This could be your most valuable asset, especially if there is a lot of sentimental value attached to the project. You may be the only person the property owners have seriously talked to since the project started.
- Better to settle than litigate – This will be discussed in detail in the session on Administrative Settlements.

Learning Activity 5a Model Offer Letter and Summary Statement

[LETTERHEAD OF ACQUIRING AGENCY]
[DATE]

[NAME]
[ADDRESS]
[CITY], [STATE] [ZIP]

Project ID _____
Parcel ID _____

[SALUTATION]

The Metro Transit Agency has proposed (describe project). This transportation improvement necessitates the acquisition of property, including property that public records indicate you own.

Our approved offer is \$ _____ for the needed real property. This offer is allocated as follows:

Loss of land, including any improvements and fixtures being acquired is: \$ _____
Damage to remaining property is: \$ _____

The above amounts represent payment for clear title to the needed property.

As an alternate offer, in addition to the land necessary for the project, we will also acquire the property we have identified as an uneconomic remainder for the sum of \$ _____.

This value is based on a professional appraisal made by a qualified appraiser to determine the fair market value of your property plus damages to the remainder, if any. The appraised value was reviewed by our reviewing appraisers to assure that you will receive just compensation for your property. Our determination of just compensation: (1) is based on the fair market value of the property; (2) is not less than the approved, appraised value of the property; and (3) disregards any decrease or increase in fair market value prior to the date of valuation caused by the project for which the property is being acquired.

Metro Transit Agency (will or will not) pro-rate real estate taxes based on available information on the date of settlement and deed transfer. If the agency does not prorate at settlement, we will reimburse you separately for your prepaid taxes on the portion of the property transferred to Metro Transit.

Following is a list of structures, equipment and fixtures that have been considered as a part of the real estate and are part of the property to be acquired. You may negotiate to retain any of the items owned by you but not needed by Metro Transit Agency. Items marked with a "T" are believed to be owned by other parties; therefore, their value is not

included in the above approved offer.

[NOTE: include either or both of these clauses only when applicable].

[If applicable, list structures, building equipment and fixtures]

The following items are considered to be personal property and are not included in the acquisition:

[Use clause only where required]

[Include additional information appropriate or required by State law]

We are also enclosing a brochure explaining your rights and our acquisition procedures. If you have any questions concerning the construction or acquisition details or the right of-way plans furnished you, please contact me at [PHONE NUMBER].

Sincerely,

Encl.

****Omit if no damages***

***** Omit if no uneconomic remainder***

******Include if not hand delivered***

Note: Omit "if any" when not applicable



Early Acquisition/Pre-Award Authority

- Can we acquire real estate prior to environmental clearance?
- What is Pre-Award Authority?



Key Message: There are two distinct situations that allow early acquisition

Notes:

Acquiring real estate before or during the NEPA process is very restrictive; however, common sense tells us there are going to be times when some form of early, pre-environmental clearance, is necessary.

Be careful to not confuse early acquisition and pre-award authority. There are different requirements that govern each situation.

FTA acknowledges only one situation where real estate may be purchased before some kind of NEPA action (Railroad right-of-way under SAFETY-LU)

Early Acquisition

Criteria for early acquisition consideration

- Must qualify for a Categorical Exclusion
- Specific to a parcel
- Action will not limit evaluation of alternatives
- No development until NEPA completed



Key Message: There are strict rules that apply to early acquisition.

Notes:

Early Acquisition has a strict set of criteria that must be met before any acquisition can occur.

The land to be purchased must qualify for a Categorical Exclusion (CE).

The Categorical Exclusion is for the parcel in question and not for the entire corridor.

The request will qualify for a Categorical Exclusion only where the acquisition will not limit the evaluation of alternatives.

No project development may proceed on such early acquired land until the NEPA process is completed.

Exceptions

The three (3) exceptions to the prohibition on acquiring property prior to NEPA "completion for the project"

- Hardship Acquisition
- Protective Acquisition
- Preservation of Railroad Right-of-Way

"Categorical Exclusions; once granted, represent satisfaction of the NEPA requirements for the parcels"



Key Message: The three exceptions that allow early acquisition

Notes:

There are three exceptions to the rule on acquiring real estate before the NEPA process is complete. The first two (hardship acquisition and protective buying) require the early acquisition conditions in the previous slide. They require a Categorical Exclusion prior to advancing.

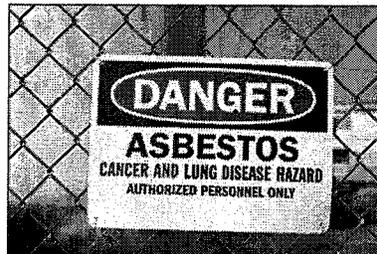
Early acquisitions must be approved through the FTA Region.

The courts have supported acquiring Right-of-Way (R/W) prior to NEPA completion; HOWEVER, a Category Exclusion must be completed for the first two – Hardship Acquisition and Protective Acquisition.

Hardship Acquisition

FTA may concur in a request for early acquisition, when:

- An owner has attempted to sell but cannot; or
- Based on owner's health, safety, or financial reasons



Key Message: Hardship is justified based on a property owner's inability to sell, health, safety or financial reasons.

Notes:

The transit agency may concur in a request for a hardship acquisition where the owner is trying to sell but because potential buyers are aware of the transit project they are unwilling to pay the fair market value. The owner can also justify the need to sell on the basis of health, safety or financial reasons, that remaining on the project will result in undue hardship. Examples:

Health: Possible fall-out from contamination stirred up by project; physical condition deteriorated due to stress over the project.

Safety: Maybe the neighborhood has deteriorated due to vacant buildings as a result of the project or the structure of the house has deteriorated due to the project

Financial: The most common request usually applies to businesses. Why? Location is everything to a business; if a good replacement site comes on the market it is very important to a business to occupy that site.

The property owner must initiate the action not the transit agency – Hardship Acquisition is considered an owner requested action and the agency will not condemn the parcel if a settlement cannot be reached.

Protective Buying

- Imminent threat of development by owner
- Development would impede transit use and alignments



Key Message: Under a protective buy the transit agency initiates the action.

Notes:

There are two conditions that must be considered in justifying a protective buy.

- (1) Where land needed for the project is under imminent threat of being developed by the current owner. The owner must have demonstrated steps to develop the property, such as applying for a building permit or zoning exception, and
- (2) The transit agency demonstrates that development of the property would limit future alignments.

This action is initiated by the transit agency. Therefore, if there is no agreement on the price, the agency may proceed to condemnation.

Preservation of Railroad Right-of-Way

New under SAFETEA LU: paragraph 5324(c)

- Acquisition of railroad right-of-way (ROW) before NEPA is permitted
- Acquired ROW may not be developed until NEPA is completed
- Must be a linear track and visually identifiable as railroad ROW



Key Message: Congress under SAFETEA LU authorized a special early acquisition for railroad right-of-way.

Notes:

5324(c) – Railroad Corridor Preservation

- (1) In General – the Secretary may assist an applicant to acquire railroad (RR) right of way (ROW) before the completion of the environmental reviews for any project that may use the ROW if the acquisition is otherwise permitted under Federal Law.

The Secretary may establish restrictions on such an acquisition as the Secretary determines to be necessary and appropriate.

- (2) Environmental Reviews – Railroad ROW acquired under this subsection may not be developed in anticipation of the project until all required environmental reviews for the project have been completed.

Railroad ROW is usually land in a linear configuration and visually identifiable as railroad ROW.

Visually identifiable as railroad ROW may be determined by the presence of:

- Tracks
- RR ties
- Ballast
- Berms

For additional guidance on railroad acquisition go to the FTA website, <http://www.fta.dot.gov>, “Final Guidance on Railroad Acquisition.”



Pre-Award Authority

- FTA extends automatic Pre-Award Authority for acquisition of real property for New Start projects upon completion of the NEPA process for that project
- The Acquisition must be in accordance with the Uniform Act and implementing regulations



Key Message: Grantee may start their normal acquisition process upon completion of the NEPA process.

Notes:

FTA extends automatic Pre-Award Authority for the acquisition of real property upon issuance of a Record of Decision (ROD), finding of no Significant Impact (FONSI), or a Categorical Exclusion (Categorical Exclusion).

The Pre-Award Authority does not constitute a commitment of any Federal funding for the project.

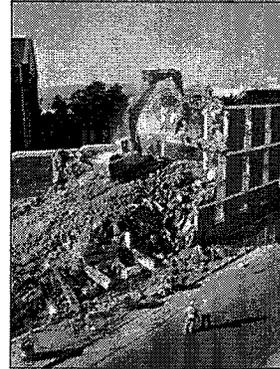
Only when a project has entered into Final Design can FTA commit federal matching funds.

Pre-Award Authority laws, regulation, and guidance can be found in the following:

- Law
 - Public Law 91-646, Uniform Relocation Assistance and Real Property Acquisition Polices Act of 1970, as amended (URA)
- Regulation
 - 49 CFR Part 24
- FTA Circulars
 - 5200 – Full Funding Grant Agreements
 - 5010.1D– Grant Management Guidelines (Chapter IV Section 2)
- Master Agreement
 - Sections: 19, 21, and 22
- FTA Circulars 5200 and 5010.1D and the Master Agreement discuss real estate and the pre-award authority.

Limits on Pre-Award Authority

- To acquire real property in accordance with the Uniform Act
- To provide relocation assistance in accordance with the Uniform Act
- Demolition



There are limits to what can be accomplished under Pre-Award Authority

Notes:

The authority is strictly limited to costs incurred to acquire the ROW and related property.

If applicable, relocation assistance must be provided in accordance with the Uniform Relocation Assistance Act (URA).

Demolition is a recent addition to the allowable costs under Pre-Award Authority.



Pre-award Authority Does Not Cover:

- Site preparation
- Other activities not necessary to comply with the Uniform Act
- Federal participation for demolition before Final Design



Key Message: The use of land acquired under Pre-Award Authority has some restrictions.

Notes:

If the building that is acquired under Pre-Award Authority is empty and poses a fire-safety hazard or other hazard to the community, the grantee can request the Federal share reimbursement before Final Design. Otherwise the grantee will not receive federal participation until the project has been accepted for Final Design.

Demolition will be at the grantees expense.

FTA Experience

- Poor grantee documentation of negotiations process
- Negotiated agreements prior to the appraisal



Key Notes: There are several activities that are not in accordance with the Uniform Relocation Act or FTA Circular 5010.1D.

Notes:

FTA office and field reviews have identified several non-compliant practices.

Inadequate recordkeeping of acquisition and displacement activities are non-compliant with 49 CFR 24.9. The Regulations state that “*the Agency shall maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance....*”.

Negotiations with property owners before the establishing of Just Compensation will result in the loss of Federal funds.