



CHAPTER FIVE
ACQUISITION

MAINE RIGHT OF WAY MANUAL

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CHAPTER FIVE

ACQUISITION

5-1 PROPERTY ACQUISITION — GENERAL

5-1.01 Purpose and Objectives of the Acquisition Function

The acquisition of property rights that are needed for right of way is an essential element in the highway project development process. It is therefore the Department's first acquisition policy to be respectful of owners and sensitive to their concerns and rights under the U.S. and Maine Constitutions, as well as other applicable laws.

MaineDOT's policy is to acquire the necessary property rights to the greatest extent possible by direct negotiations with the perfection of title done by blanket project condemnation. This requires personal contact with owners, providing **full** information about the project and its effect on their property, as well as an offer of just compensation based on supported valuation. Chapter 5 defines the policies and practices that promote this goal while simultaneously promoting effective and timely delivery of right of way for project construction. It is also intended to **promote public confidence** in MaineDOT and **protect property owner rights** as required by Federal and State laws and regulations. It is intended to be a flexible document to serve as a reference and guide for Negotiators and other Department personnel.

The process of acquiring real property includes appraisal, appraisal review, waiver valuations, establishing estimates of just compensation, negotiations, relocation assistance, administrative and legal settlements, and court settlements and condemnations. Grantees must ensure all acquisition and related relocation assistance activities are performed in accordance with 49 CFR part 24. If a grantee does not directly own the real property interests used for a title 23 project, the grantee must have an enforceable subgrant agreement or other agreement with the owner of the ROW that permits the grantee to enforce applicable Federal requirements affecting the real property interests, including real property management requirements.

5-1.02 Laws and Regulations

All citizens are guaranteed by the U.S. Constitution's Fifth and Fourteenth Amendments that they will not be deprived of property without due process of law, nor will property be taken for public use without payment of just compensation. The **Maine Constitution in Article 1 Section 21** states that "**Private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it.**" MaineDOT protects and implements these fundamental rights in performing property acquisition activities.

The United States and the State of Maine have extended Constitutional protections by enacting laws and regulations governing private property acquisition practices. The ***Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970*** Titles I and III (***Uniform Act***)

is the controlling Federal Statute that is codified by **Federal Regulations** in 23 **CFR** 710 and 49 **CFR** 24. **Maine Revised Statutes** annotated (**MRSA**) Title 23 establishes the authority and direction under Maine law for implementing these policies. Title 23 **MRSA** Part I Sections 154 and 155 specifically focus on the acquisition of property and related negotiations and compensation for the property. It is the Negotiator's responsibility to ensure that the provisions of these laws are fully and equitably applied to all property acquisitions and that all affected owners are treated fairly in the acquisition process.

5-1.03 Organization

Team members who are trained and qualified as right of way representatives are assigned as Negotiators to perform acquisition activities on the Teams. The assigned right of way personnel operate in a matrix environment under policy direction and overall supervision of the Chief Property Officer, but act as members of the self-directed Project Development Teams reporting to the Senior Property Officer in performing project-related responsibilities. The organizational structure places sufficient authority with the personnel who are responsible for project activities to ensure orderly and timely delivery of right of way needed for project construction, while fully protecting owner rights and providing services that are required in laws and regulations.

5-1.04 Work Flow

Right of way functions (e.g., acquisition, valuation, relocation, property management) are structured around 3 specific program areas relating to the highway system categories. These program areas are Highway, Bridge, and Multi-Modal. A Team Negotiator is assigned to perform the negotiation tasks from initial offer through condemnation and post-condemnation activities. Team Negotiators maintain a close relationship with the Senior Property Officer to ensure that any issues relative to acceptable completion of the right of way function are within the parameters of Federal and State laws and regulations.

5-1.05 Quality Assurance/Quality Control (QA/QC)

QA/QC are the basic program activities that MaineDOT personnel at all levels use to ensure that the right of way acquisition process is effectively being accomplished within the established goals and objectives of the Department. Also see Chapter 10.

Quality Assurance includes the policy guidance, program management tools and specific training necessary to ensure that responsible personnel are conducting right of way operations in an effective and efficient manner. The various activities used to test and evaluate program activities form the basic elements of the QA function.

Right of way personnel at all levels share a responsibility to strive to improve operational quality. This can be advanced by the following tasks:

1. Follow up phone calls with owners after acquisition process is complete,

2. Tracking and increasing rate of successful settlements,
3. Sharing personal best practices with other staff, and
4. Identifying personal training needs.

5-1.06 Conveyance Methods**5-1.06(a) Condemnation**

The primary means of property conveyance by MaineDOT is the condemnation process. This exercise of the State's eminent domain authority extinguishes all claims on the property and provides the State with clear title to that property. Condemnation is initiated after presentation of an offer of just compensation to the property owner. Negotiations based on fair market value continue for a period of 60 days after the date of taking at which time all unsettled parcels are referred to the State Claims Commission, as required under 23 *MRSA* Section 155. Negotiations continue through the construction phase of the project until the parcels are settled or scheduled for hearing with the State Claims Commission.

Condemnation is accomplished by filing a Notice of Layout and Taking with the appropriate County Registry of Deeds. This method is efficient and simple, with one filing in the County records rather than a number of individual deeds. With all rights extinguished, the issue focuses solely on the amount of compensation. This is either resolved through amicable agreement with the property owner based on continuing negotiations, or by decision of the State Claims Commission. The State Claims Commission is an independent impartial board composed of knowledgeable persons that provide an informal forum for hearing compensation claims arising from eminent domain cases. See Section 5-5 for a description of the role and the process of the State Claims Commission.

5-1.06(b) Deed

On projects with only one or a limited number of acquisitions, title to the property to be acquired may be obtained by securing a deed. These are generally instances where sufficient interest can be secured without using eminent domain procedures. This includes acquisitions where the amount of compensation is not disputed and an agreement can be negotiated.

In acquisition by deed, the Negotiator will contact the owner, present all pertinent information, make the offer, and secure an offer-assent form, which is then submitted to the Title Office for preparation of closing documents. If the agreement is for a greater amount than the appraisal, full justification for the additional amount must be included in the accompanying cover memorandum.

Closings are similar to private transactions. When all deeds and documents (e.g., partial mortgage releases, tax lien releases) necessary for transfer of title to the State are in order and a check has been prepared for the parties in ownership, arrangements are then made for completion of the transaction.

Whether acquisition is by filing condemnation or by deed, the rights and interests of affected property owners are protected. The property acquired is valued, the amount of just compensation is determined and an offer in writing is made to the owner. Importantly, negotiation efforts to reach amicable settlement continue after acquisition by condemnation.

5-1.06(c) Federal Land Transfers

When it is determined that a project will necessitate acquisition of rights from property owned by the United States of America, the provisions listed in 23 CFR 710.601 should be followed. As explained in paragraph (c) of this CFR, the department can file an application with the Federal Highway Administration or it can make application directly to the land owning agency if the agency has the authority to convey. If application is made to FHWA and they concur in the need for the transfer and the project is federally funded, the land owning agency will be notified by FHWA and a right of entry requested. The land owning agency will then have a four-month period in which to respond. After proper consents have been obtained, a deed is signed and recorded. Early coordination with FHWA is recommended.

Procedures are as follows:

The MaineDOT, through the Title Office, may file an application with the FHWA.

Applications shall include the following information:

- (1) The purpose for which the lands are to be used;
- (2) The estate or interest in the land required for the project;
- (3) The Federal-aid project number or other appropriate references;
- (4) The name of the Federal agency exercising jurisdiction over the land and identity of the installation or activity in possession of the land;
- (5) A map showing the survey of the lands to be acquired;
- (6) A legal description of the lands desired; and
- (7) A statement of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4332, *et seq.*) and any other applicable Federal environmental laws, including the National Historic Preservation Act (16 U.S.C. 470(f)), and 23 U.S.C. 138.

If the FHWA concurs in the need for the transfer, the Federal land management agency will be notified and a right-of-entry requested. For projects not on the Interstate System, the Federal land management agency shall have a period of 4 months in which to designate conditions necessary for the adequate protection and utilization of the reserve or to certify that the proposed appropriation is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved. The FHWA may extend the reply period at the timely request of the Federal land management agency for good cause.

The FHWA may participate in the payment of fair market value or the functional replacement of impacted facilities under 710.509 and the reimbursement of the ordinary and reasonable direct costs of the Federal land management agency for the transfer when reimbursement is required by the Federal land management agency's governing laws as a condition of the transfer.

Deeds for conveyance of real property interests owned by the United States shall be prepared by the eligible party and must be certified as being legally sufficient by an attorney licensed within the State where the real property is located. Such deeds shall contain the clauses required by FHWA and 49 CFR 21.7(a)(2). After the eligible party prepares the deed, it will submit the proposed deed with the certification to FHWA for review and execution.

Following execution by FHWA, the eligible party shall record the deed in the appropriate land record office and so advise FHWA and the affected Federal land management agency.

When the need for the interest acquired under this subpart no longer exists, the party that received the real property must restore the land to the condition which existed prior to the transfer, or to a condition that is acceptable to the Federal land management agency to which such property would revert, and must give notice to FHWA and to the affected Federal land management agency that such interest will immediately revert to the control of the Federal land management agency from which it was appropriated or to its assigns. Where authorized by Federal law, the Federal land management agency and such party may enter into a separate agreement to release the reversion clause and make alternative arrangements for the sale, restoration, or other disposition of the lands no longer needed.

Federal Land transfers are usually handled by the Title Office with information gathered from other units within the department. It should be noted as stated above that obtaining approvals from the federal level can take 4-6 months to accomplish. This should be factored into the right of way project schedule when this type of situation occurs.

5-1.07 Estates Acquired

Typically, MaineDOT purchases full fee title (the full bundle of rights) to property that is needed for the traveled way and other permanent highway features. However, in many instances, an easement conferring specific and limited control over the property is sufficient for the construction and maintenance of the highway project. MaineDOT may use any of its standard forms of easements to purchase only the rights needed for the highway facility. Following are the most frequent types of property interests that are used by the Department:

1. Fee Simple Absolute, or Fee. This estate represents the acquisition of all right title and interest in a property.
2. Easement for Highway Purposes. This estate represents acquisition of nearly the same rights as fee simple absolute, except that the abutting owner retains the underlying fee interest, or a right of reversion if the easement is extinguished.
3. Slope Easement. This easement is used to ensure and maintain the integrity of embankments that are adjacent to the highway project site.
4. Drainage Easement. This easement protects and maintains drainage facilities that were constructed to serve the site's drainage requirements.
5. Inlet and Outlet Ditch Easement. This easement is used to accommodate water flowages into and out of drainage areas.

6. Temporary Construction Right. This interest provides for the temporary use of property that is needed during the construction period (e.g., work areas, equipment maneuvering). The rights obtained expire on the Projex X49 “Construction Complete” milestone date.
7. Grading Rights. Rights that provide for matching the topography of abutting properties in with the new construction and are usually for the benefit of the parcel. These rights are not necessary for the completion of the project.
8. Wrought Portion or Prescriptive Easement. This interest is claimed after open and notorious use for over 20 years where no record of any ownership rights can be found. Wrought portion is typically claimed for traveled ways, shoulders, drainage side and back slopes and other supporting structures.

The purpose of maintaining a diverse range of easements is to custom match the property rights acquired to the specific needs of the project. The Department is authorized to acquire only land and rights in land that are needed for the highway facility, allowing the least intrusion on continued private use and ownership.

5-2 ACQUISITION FORMS AND REPORTS

5-2.01 Building the Acquisition File

The Acquisition File serves as a permanent record of all contacts with property owners. It includes, but is not limited to:

1. Completed parcel related forms,
2. Parcel related correspondence,
3. Summaries of discussions with the owner,
4. Pertinent information about the project or schedule,
5. Counteroffers,
6. Proposals for the retention of items,
7. Real/personal property determinations, and
8. Any other useful data obtained from the owner.

The file content is an informational data source to the negotiating agent and any person who is subsequently assigned to work on the case. It is also necessary to present a full record of the case to document claims, for audit purposes, and to support State Claims Commission proceedings.

Forms used as part of the record may be augmented, as necessary with approval of the Chief Property Officer, to meet specific circumstances or needs that may be unique to the particular property acquisition at hand.

Arrange the file in **chronological order** with the initial actions, applicable data, owner contacts, etc. and place them in the file in the sequence in which they occurred. Good file maintenance practices should be applied. Distinguish the original documents from duplicates. Also, cull unnecessary papers from the file before it is closed and placed in permanent storage.

5-2.02 Scanning Documents into the Department's Electronic Record Management System

It is important to note the right of way records relating to right of way appraisal and negotiations are confidential under Maine Law. Further, relocation assistance requirements mandate that some displacees provide copies of sensitive personal financial documents in order to qualify for relocation benefits. The confidentiality of these documents needs to be carefully considered and protected prior to scanning them into the Department's Electronic Record Management System.

5-2.03 Description and Special Instruction on Important Acquisition Forms and Reports

An important purpose of the acquisition forms that are included in the parcel file is to ensure that all information that the Department is legally required to provide to property owners is properly

presented. In addition to the forms, it is important to provide a checklist of items that should be discussed personally with the property owner. Certain forms are for internal administrative and reporting purposes. The right of way agent should realize that information on pre-designed forms cannot anticipate the wide variety of acquisition situations that will be encountered. If certain important information is not addressed in the forms, or if information items called for in the forms does not seem relevant, consult with the Senior or Chief Property Officer.

On all forms, mark the lines that are not applicable to the parcel or situation "N/A."

The following discusses the forms (or processes) that are most frequently used in the acquisition process:

1. Offer Letter (Forms AQ-1 and AQ-2). The Offer Letter includes information describing the taking and the property rights to be acquired. It also includes entries for a breakdown of the total value to the elements necessary for the owner to make an informed decision. A total taking of land requires only that the highest and best use and fair market value be stated. A partial taking, however, requires additional information to be provided, including highest and best use after the taking, fair market value of the part taken, severance damage to the remainder (if any), special benefits when applicable, and a statement of net damage allocating values to each of those items. These forms are consistent with the requirements of **23 MRSA 154**.
2. Owner's Offer – Assent (Form AQ-15). In completing and signing this form, the owner agrees that the State acquires the land, including buildings as identified in the right of way map, through eminent domain. It also states the amount of compensation and the projected date of the vacation and removal of the buildings or other improvements, where applicable. This form does not transfer ownership of any land or rights in land to MaineDOT. Its intent is to release the property owner's right to appeal the damage award.
3. Initiation of Negotiations Statement (Form AQ-20). Federal Regulations require owners be given a reasonable time to consider the offer and respond with any information they may have prior to the filing of the condemnation notice. Reasonable time has been determined to be a **minimum** of 28 days. The Negotiator will complete an Initiation of Negotiations Statement specifying the date of completion of initiation of negotiations with all owners on a project. The completion date on the statement is the beginning date of the owner's opportunity to consider the offer and respond. In cases where whole parcels are acquired, the appraisal problem is complex or the acquisition is contentious, additional time should be allowed for the owner to respond. See Section 5-3.02(f) and 49 CFR 24.102(f) Basic Negotiation (Appendix)
4. Negotiator's Contact Information. This is the complete and cumulative record of negotiations contacts with the owner or a representative. Each time there is a contact with the property owner, the Negotiator should make an entry in RMS specifying what was discussed, any forms or other information presented to the owner, and conclusions reached during the contact. It is important to document the record to ensure that future contacts address any outstanding issues or questions in

- an effort to reach an amicable settlement for the acquired property. Negotiator should also document internal MaineDOT discussions in the contact forms. Complete narrative reports of each contact are necessary to adequately document the parcel file for future reference.
5. Waiver Offer Settlement Agreement (Form AQ-8). This Agreement Form accompanies the Department's Waiver Valuation Procedure for non-complex acquisitions less than \$15,000. It is important that the owner understand the process and, in particular, that the valuation does not arise from an appraisal of the property. The Negotiator should carefully explain the estimate of just compensation to the owner. For parcel offers greater than \$10,000 the negotiator must be a separate person from who did the valuation. See Chapter 3 for policy on the Waiver Valuation Procedure.
 6. Administrative Settlement Agreement (Form AQ-7). The Settlement Agreement, to be signed by the owner, releases MaineDOT from all claims, demands or causes of action as a result of the project construction. It includes the amount paid at condemnation and any additional amounts included as part of the settlement. The Negotiator should document in the file all actions and conclusions reached in discussions with the owner to support the Agreement.
 7. After Condemnation Settlement Agreement (Form AQ-9). After date of condemnation and receipt of the compensation check, the owner will be asked to sign the version of the form indicating that either (1) the amount of the check received in payment for rights taken by condemnation is acceptable or (2) the amount is not acceptable and the Department is requested to refer the matter to the State Claims Commission.
 8. Negotiator's Statement (Form AQ-6). This statement is completed and signed by the Negotiator after execution of a Settlement Agreement. The Negotiator certifies that he or she has no direct or indirect interest in the property, the agreement was obtained without coercion or threat, the agreement is inclusive of all considerations agreed to by the owner, and it is understood that the rights were secured in connection with a Federal-aid highway project, if applicable.
 9. Right of Way Certificate (Form AD-3). The certification is assurance that all requirements of law regarding the purchase of right of way and relocation that are prerequisite to construction have been completed. Detailed information is provided including the number of owners, parcels, replacement housing payments to owners and tenants, and moving costs for all residential, farm or business properties. This form is necessary for the project construction authorization. This form is an essential part of the Project Record. See Chapter One, Section 2.02(b) for a complete discussion of the Right of Way Certificate.
 10. Negotiator's Certificate (Form AQ-5). After receiving the project assignment the Negotiator will sign and date a certification stating that the Negotiator has no present

or future financial interest in any of the properties assigned for negotiation on the project nor are any of the property owners related in any way.

11. Status Report. Thirty days after condemnation the assigned agent will prepare a status report outlining the settlement status of each parcel to include any special agreements or other requests that have been made by the owner to the Department. Copies of this report will be sent to the project file, Negotiator file, the Senior Property Officer and the Project Resident.
12. Status Report to Legal. Sixty days after condemnation the Negotiator will complete a status report for transmittal to the MaineDOT Legal Division outlining the status of all unsettled parcels on the project. Included in the report should be any special agreements or requests proposed by the Department.
13. Work Permit or Rights of Entry (Form AQ-4). Temporary rights are generally needed to ensure proper grading between the construction project and adjacent properties. It would include rights for excavating, placement of fill, loaming, seeding and other incidental work. The usual method for obtaining the necessary rights is by agreement with the owner through a work permit. The owner's signature on the work permit does transfer the temporary right to the MaineDOT. The use of work permits on Emergency Relief (ER) projects will be coordinated with FHWA.
14. Administrative Settlement Justification (Form AQ-3). When an administrative settlement is reached, the Negotiator will complete the justification explaining the reasons for settlement and certifying that it is in the public interest.

5-3 DIRECT NEGOTIATIONS

5-3.01 Preparation for Negotiations

5-3.01(a) Assignment

Based on staff availability, type of project and complexity of acquisitions, the Senior Property Officer assigns Right of Way Negotiators to the Project Teams to ensure the timely delivery of right of way for project construction. Each agent or Negotiator is responsible for performing the acquisition elements of the individual parcels assigned in conformity to the procedures set forth in this *Manual*.

Prior to starting negotiation activities, the Senior Property Officer will confirm “NEPA Complete” and that authorization for negotiation and acquisition has been obtained. In the Projex database, authorization for negotiation will be represented by a date in the Right of Way Negotiation/Acquisition field, found in the Status/Authorization section under the Description heading. If date information is missing, then the Senior Property Officer should notify both the Project Manager and the Property Office to resolve the authorization issues prior to initiating negotiations.

Upon assignment, the Negotiator should initially make a thorough review of the parcels to be acquired, noting the complexity and special circumstances that are involved. The Negotiator should estimate the lead-time necessary to complete the acquisition process for each of the parcels. At this time, the sequencing and priority of parcel acquisition should be decided to ensure that early action is taken for those acquisitions that may require an extended negotiation process or where there are relocations involved. A sequential order can then be established for the initial contact with each of the property owners, allowing as much time as practical to finalize the acquisition and secure the necessary rights by the scheduled project construction date.

5-3.01(b) Acquisition File Documents

Many of the acquisition file documents are now included in the MaineDOT Realty Management System Database (RMS). These documents are designed to self-populate based on data that was previously entered into the system. It is important that the Negotiator use these documents and keep subsequent files, contact summaries, etc. in RMS up to date. It is the responsibility of the Senior Property Officer to ensure work completed by a consultant negotiator is properly entered in the system.

The **Negotiator will reconfirm** that the **second phase right of way authorizations** are approved and then assemble and ensure that the following documents are present in the Acquisition file:

1. Parcel plan showing the acquisition as it relates to the whole property;
2. Project right of way plan and profile sheets;
3. Aerial Photography, if available.
4. Appraisal Report or Waiver Valuation Worksheet;

5. Review Appraiser's determination of value, if appropriate;
6. Statement of just compensation;
7. Agreement forms;
8. Waiver Valuation Offer Settlement Agreement, if applicable;
9. Owner Contact Report Forms;
10. The Negotiator's Certificate; and
11. Memorandums relating to the individual parcel and copies of previous correspondence that was sent to or received from the owner.

The Negotiator is responsible for insuring that the parcel file is complete and that all of the previously noted correspondence, agreements and other documents are present. In addition, the Negotiator will review the content of all documents to ensure that there are no errors, omissions or contradictory statements. This review is a basic QA action that is an essential step in the process.

5-3.01(c) Preparation for Initial Owner Meeting

The greatest influence on whether a successful settlement is reached is the Negotiator's extent and quality of preparation. A prepared, knowledgeable Negotiator projects a sense of confidence, encourages trust of the owner, and reflects that the Department has thoroughly and fairly considered all the effects of the project on the property.

Initially, the Negotiator should become completely familiar with the project and determine why the project is needed, what the anticipated benefits to the community will be and, most importantly, a thorough understanding of the impact on each of the affected property owners. The Negotiator will learn from experience that certain questions can be anticipated and should be addressed before contact with the owner. The Negotiator should consult with other members of the Project Team to clarify elements as they affect specific properties (e.g., slopes, driveways, drainage, tree removals or replacements, project landscaping).

The Negotiator should be able to explain the valuation process, and in particular, the appraisal process, if it is the basis for the value determination. The owner should be convinced by the Negotiator's presentation that the value of the property rights acquired are fairly determined and are based on properly analyzed market information. If there are damages to the remainder in the after condition, they should be known by the Negotiator. If a partial acquisition is not assigned damages to the remainder, the Negotiator should be able to explain why the property does not suffer economically in the after condition. If necessary, the Negotiator should consult with the Review Appraiser or the Appraiser to explain aspects of the value that the owner may be expected to ask about. The Negotiator should be able to explain the value to the owner, as well as the process by which it was established.

The Negotiator should view the property to be acquired before meeting with the owner. Selectively, and depending on circumstance, the primary comparable sales relied on by the Appraiser in determining the property value should be viewed. This will further support the

Negotiator's knowledge and confidence in the fairness of value and provide a basis for an informed discussion with the owner.

Finally, prior to scheduling the initial contact with the owner, the Negotiator should become familiar with the facts of the present ownership (e.g., who are the fee owners, what are the ownership interests, what are the names of all parties of interest and the proper pronunciation of those names).

5-3.02 Initial Negotiations

5-3.02(a) The Negotiations Environment

The initial offer meeting is the most important contact the Negotiator will have with the owner. It is essential, therefore, that the tone of the first meeting be one that conveys a thoroughly professional demeanor, with the Negotiator displaying an understanding of the project, the property to be acquired, the effect of that acquisition on any remaining property, and the valuation process.

The Negotiator should focus on establishing a positive business relationship with the owner (or representative of the owner). The meeting should be arranged at a time and place that are convenient to the owner and supportive of serious business interchange. The Negotiator should not hesitate to suggest that distractions be minimized (e.g., suggesting that the sound on a television be muted).

A property owner who is elderly, or who has a disability, should be accommodated in any way that is reasonable. For example, an older owner may welcome a suggestion that a relative or trusted friend be present at the initial offer meeting. However, the Negotiator should avoid meeting the owner with a group of people who do not have any interest in the property.

If an owner exclusively speaks a language other than English, and the Negotiator cannot communicate in that language, arrange for interpretation services.

The order and pace of the first meeting are entirely within the professional judgment of the Negotiator. There can be a plan developed for the meeting, but the Negotiator should remain flexible and respond to the needs or concerns of the owner. During early discussion, there may be a sense that the Negotiator's planned order of discussion is causing some tension or discomfort to the property owner. For example, an owner may be so anxious to know the dollar amount of the offer that he or she finds it difficult to concentrate on the preliminary information about the project and its effect on the property. At that point, it may be wise to make the offer, allow time for the owner to contemplate the amount, and then proceed in presenting the information that is important to the owner's understanding of the acquisition and the offered amount.

5-3.02(b) Coercive Actions Prohibited

The Negotiator will not take any coercive actions to compel a property owner to agree to the offer for property to be acquired. This includes deferring timing of negotiations or

condemnation, or advancing condemnation. The Negotiator will not provoke or sustain heated arguments, or attempting to intimidate an owner. An example of intimidation would be to state “All your neighbors have settled, why are you being unreasonable?” If the level of tension at a meeting rises to the point that further discussion would not be effective, the Negotiator should end the meeting as gracefully as possible, while attempting to preserve the opportunity to resume discussion at another time.

5-3.02(c) Discussion of Project, Acquisition and Process

The Negotiator should use the plan of meeting that was previously developed, but allow enough flexibility to react to any questions or concerns of the owner as the meeting proceeds. The nature and scope of the project should be explained using terms that are easily understandable to the typical layperson. The use of project and parcel plans along with other visual aids can enhance the owner’s understanding of the project. The Negotiator may refer to a nearby location that has a condition similar to how the subject property will appear after the project. This might be a similar driveway treatment or degree of slope in the front yard.

The owner's familiarity with the project may be limited or quite extensive, depending on the extent of early involvement during the environmental or public hearing process. In either case, a review of the nature and scope of the project, including the benefits to the community and impacts on the remaining property as a result of the acquisition, may be beneficial at this time. On the other hand, these basic elements may be read as simplistic and time-wasting “window dressing” to an owner. The Negotiator must read the reactions and temperament of the owner and adjust accordingly.

If the Negotiator at any time during a meeting encounters an excessively hostile atmosphere or feels menaced or threatened, immediately terminate the negotiations. The Negotiator’s personal judgment will be the guide to determining whether a meeting should be ended. The events should be immediately reported to the Senior Property Officer, who will determine what further action will be taken.

An explanation of the project activities, such as the time that MaineDOT will require possession and information on the construction schedule including anticipated completion date, can help alleviate pre-existing concerns.

The Negotiator should explain that MaineDOT generally acquires the property through the exercise of eminent domain, which provides the State with clear title to the property. This does not restrict the owner’s right to contest just compensation. The process for resolving a compensation issue should be explained. The Negotiator should describe the role of the State Claims Commission as a fair, impartial and informal means for owner views on compensation to be heard.

5-3.02(d) Project Presentation Outline

The Negotiator should also explain construction details and their effect on the owner’s property. The presentation should provide a full parcel specific explanation of the acquisition, to include:

- Project Purpose and Need.
 - Project termini
 - Typical section
 - Schedule
 - Public process
- Specific Property Impacts
 - Typical Section in front of property
 - Horizontal and Vertical centerline changes
 - Super elevations
 - Takes
 - Fee Simple, including a definition of the term,
 - Easements, including a definition of the terms,
 - Rights, including a definition of the term.
 - Drainage
 - Personal Property including a definition of the term
 - Site improvements within the Taking, trees, shrubs, pavement, lawn etc.
 - Drive grades before and after

The transfer of property rights by deed should be discussed to the extent it is applicable to the acquisition situation.

The owner should be further advised of the protections provided by Federal and State law and regulations, including that payment of determined compensation will be made to the owner before MaineDOT requires possession, and the right to challenge compensation before the State Claims Commission and to the State Courts. If the acquisition causes displacement from a home or business location, there are benefits, rights and protections that apply. See Chapter 6 for relocation requirements.

5-3.02(e) Notification of Potential Buyers

The Negotiator will advise the owner of responsibility under **23 MRSA 153-B4**. This provides that if an owner decides to sell the property after the owner is notified that the Department intends to purchase or acquire the property by eminent domain, the owner must inform the potential buyer of the Department's intent.

5-3.02(f) Presentation of Offer

Presentation of the offer, in writing, represents the ***Initiation of Negotiations***. Initiation of Negotiations is a regulatory phrase and represents an important milestone in the acquisition process. This milestone serves as the beginning of the minimum 28 day offer consideration period and also serves as the date certain displacees become eligible for relocation benefits. Care should be taken on every parcel and item to document the date, time and place that the written offer was delivered and to whom it was delivered.

Item that should be discussed during the presentation of the offer are as follows:

- Offer and basis for offer

- Amount and general description of the valuation process
- Proposed Condemnation Date
- Payees included on the check, (Note only the owner is included on checks \$1000.00 or less).
- Cash check without violating rights to negotiate or appeal
- Relocation Benefits (If Applicable).
- Recourse
 - Negotiate
 - State Claims Commission
 - Superior Court
- Follow-up
 - Agent/Negotiator address. Phone and e-mail addresses
 - Commitment to follow up. It is the Negotiator's responsibility to follow up on mail negotiations and negotiate in good faith, not the owner's responsibility to follow up. Request for phone number or e-mail if one is not available.

After the project is described, the effects on property are addressed, and other relevant information is provided to the owner, the Negotiator should present the amount of the compensation offer. The written Offer Letter (Form AQ-1 or AQ-2) provides a description of the acquisition and a breakdown of value that separately states the value of the whole, each part acquired and damages to the remainder. There may be more than one taking from the property, and there may be different property rights acquired, reflecting easements that are needed. The basis of the values should be explained to the owner. A property owner may possess more than one larger parcel on a project. The owner should be presented a separate offer letter for each larger parcel acquisition. The Negotiator should inform the owner that the check may include as payees any individual or entity who has a recorded interest in the property (i.e. mortgage, tax lien). Additionally, the owner should understand that they can cash the check without indicating acceptance or affecting their rights of appeal.

Owner reactions to the offer will vary widely. Some may express a willingness to settle for the offered amount without hesitation. Others may object to the acquisition and the offer and possibly not state a reason for their dissatisfaction. A negative reaction would not necessarily be an unalterable one. The owner may need time to consider the offer, or may wish to consult with family or advisors privately. It is important for the Negotiator to keep the lines of communication open and actively listen to the owner and not presume to know his or her concerns or what questions he or she may have. Some questions that are presented may not be immediately answerable, and it is proper to defer an answer until the question can be thoroughly researched.

5-3.02(g) Reasonable Time to Consider Offer

Federal regulations (49 CFR Part 24.102 (f)) require that the owner shall be given reasonable opportunity to consider the offer and present materials which the owner believes are relevant to that value of the property, and to suggest modifications to the purchase price. Any objections from the owner shall be seriously and carefully received, documented and considered. The owner may present information pertaining to value or ownership that was not previously known which might affect the value. If the appraisal omitted certain features (e.g., special landscaping, outbuildings) or if the remainder will suffer an element of damage that is not reported in the appraisal, MaineDOT will appropriately revise the offer amount. To ensure that the owner is

provided **reasonable time to respond**, the Department will not file a condemnation until **at least** 28 days have elapsed from the date the owner receives the State's written offer. It should be noted that cases will exist where four weeks **does not represent an adequate time frame**. In these cases, additional time should be allotted in the project schedule to ensure owners have adequate time to respond. The Negotiator is expected to make every effort to follow-up with unsettled owners prior to the condemnation to ensure the owner has every opportunity to consider and respond to the offer of just compensation. In cases where negotiations are initiated by mail, the owner will be given a **minimum** of 28 days from the receipt date evidenced by the postal return receipt "green card".

5-3.02(h) Objections and Counteroffers

The owner may express objections during the course of discussion of the acquisition and the offer of just compensation. The owner may view the whole situation as a complete disturbance of an otherwise orderly and settled lifestyle. These feelings should be acknowledged in a non-defensive manner without rebuttal. Further discussion may reduce tension, or may heighten it. The Negotiator must decide whether it is productive to continue the meeting. If not, the Negotiator should close the meeting while attempting to preserve a businesslike relationship that may be resumed more productively in future contacts.

The owner may present a counteroffer to the Department's offer of just compensation. Once a counteroffer is made, the Negotiator should ask the owner to explain the basis for the counteroffer and proceed to explore the owner's reasoning for the increased amount. The Negotiator should use their best judgment in approving or disapproving counteroffers within the range of their authority. This information should be noted and reported to the Senior Property Officer with a recommendation. The counteroffer may be based on relevant value factors that were not previously considered, in which case a revision in the just compensation offer will be made. Also, if an administrative settlement is warranted, these factors may contribute to the support of a settlement.

5-3.02(i) Owner Requests and Proposals

The owner may present additional proposals for consideration by the Department. For example, requests for changes in construction or design features that could be made to moderate the impacts of the project on the property. Other minor elements may include requests to harvest existing crops, the retention of shrubbery and household appliances not considered personal property. Additional costs incurred by the Department in construction concessions to the owner can be used as incentives for reaching settlements. Transmit these requests to the Senior Property Officer and/or Project Manager for consideration.

5-3.02(j) Initiation of Negotiations Statement.

When the Negotiator has contacted all impacted owners on a project and all offers have been presented, the Negotiator will complete an Initiation of Negotiations Statement (Form AQ-20), certifying that all offers have been received.

5-3.03 Follow-up Contacts**5-3.03(a) Scheduling**

After the initial contact with each owner on the project, the Negotiator will assess the status of unsettled parcels to determine the extent of follow-up action considered necessary. Circumstances of each case will guide the Negotiator in making decisions on the number of contacts both prior to and subsequent to the date of actual condemnation.

At least 3 weeks prior to condemnation, the Negotiator will ensure that RMS has been updated pertaining to settlement status of each parcel and any special agreements or requests that have been proposed to the Department. This information will be made available to the review appraiser, the Project Resident and the Senior Property Officer. This information will serve as a guide for the Negotiator to follow up with the Project Resident after the project construction has begun to discuss specific items relating to abutting property owners' special settlement specifications or other appropriate items that may have been agreed to. This information is also relied upon as a flag to update the appraisals on all unsettled parcels.

A standard number of contacts are not specified, and scheduling follow-up discussions will be based on the professional judgment of the Negotiator. At least one follow-up contact should be made with each unsettled owner prior to condemnation. The primary objective is to reach an amicable settlement with the owner and discussions should continue to achieve that objective.

Schedule subsequent contacts with unsettled parcel owners to the extent that it will be productive in reaching a settlement. Opportune times for contact include, but are not limited to, the time between initial contact and the date of condemnation, termination of the 60-day referral period, completion of project construction and just prior to scheduling for State Claims Commission hearing.

Sixty days after condemnation, the Negotiator will write a status report to the MaineDOT Legal Division concerning the status of all unsettled parcels on the project and any special agreements or requests that have been proposed to the Department.

5-3.03(b) State's Offer Accepted

If MaineDOT's offer is accepted, the owner will be requested to execute the appropriate settlement agreement. This affirms acceptance of a proposed settlement amount and releases the State of Maine from any further claim or causes of action arising from the acquisition of real property. The Negotiator will advise the owner of the date of possession by MaineDOT, which will be in compliance with notices required according to the status of the occupancy and whether there will be displacement from a home or business. Also, an owner is not required to surrender possession of the property until the State pays the agreed purchase price.

5-3.03(c) Terminating Negotiations

A reasonable and sufficient number of meetings or phone contacts should be made as determined by the Negotiator. At some point, it may be apparent that there are irresolvable differences that prevent an amicable settlement of compensation. This decision should be made early in the negotiation process based on clear statement by the owner that no further contact or discussion is desired. Other circumstances that call for immediate termination of further contact include:

1. The Negotiator being menaced,
2. the Owner being represented by legal counsel and negotiations being transferred to Legal Division,
3. The owner becoming incapacitated, and
4. The owner's whereabouts are unknown.

Referral to the State Claims Commission is appropriate at this time; however, negotiations may be resumed at the owner's initiative.

5-4 NEGOTIATIONS BY MAIL

5-4.01 Circumstances for Use

It is the Department's policy to make personal contact with property owners to deliver the acquisition offer whenever practical. However, circumstances may prevent personal contact or may cause unreasonable delay in delivering the offer. Following are conditions in which an offer may be delivered by mail:

1. The owner resides out of State.
2. The owner refuses personal contact.
3. The whereabouts of the owner cannot be determined.
4. The owner is represented by an attorney who requests offer delivery by mail.
5. Following up on initial offers where appropriate.

If the owner is a minor, is incarcerated, or has been adjudicated not competent, the file should be referred to the State Claims Commission for an appointment of a guardian ad litem to protect the owner's interests and rights. All further correspondence will be with the guardian.

Other situations may also warrant delivery of the offer by mail as decided by the Property Office Director or the Senior Property Officer.

5-4.02 Procedure

The acquisition documents are sent with an explanatory cover letter to the owner's address by certified mail with return receipt requested. The contact packets should include, at a minimum, a section of the right of way plan relating the project to the property, a plan or sketch of the property, the Offer Letter (Form AQ-1 or AQ-2), Offer Assent Forms (Form AQ-15), a stamped return envelope, and the MaineDOT right of way brochure "A Land Owner's Guide to the Property Acquisition Process." The cover letter should provide a full parcel specific explanation of the acquisition, to include:

- Project Purpose and Need.
 - Project termini
 - Typical section
 - Schedule
 - Public process
- Specific Property Impacts
 - Typical Section in front of property
 - Horizontal and Vertical centerline changes
 - Super elevations
 - Takes
 - Fee
 - Easements
 - Rights
 - Personal property (if any)
 - Site improvements within the Taking Trees, shrubs, pavement, lawn etc.

- Drive grades before and after
- Offer and basis for offer
 - Amount and general description of the process
 - Proposed Condemnation Date
 - Payees on check
 - Cash check without violating rights to negotiate or appeal
- Recourse
 - Negotiate
 - State Claims Commission
 - Superior Court
- Follow-up
 - Agent/Negotiator address. Phone and e-mail addresses
 - Promise to follow up. It is the Negotiator's responsibility to follow up on mail negotiations and negotiate in good faith, not the owner's responsibility to follow up. Request for phone number, seasonal address or e-mail.

If the owner's address is not known, or if the initial mailing is returned undelivered, the Negotiator will consult with the Senior Property Officer to determine the correct constructive delivery of the offer by posting the property or by publishing an advertisement.

The negotiation by mail procedure is only effective if it is clear and convenient to the owner to respond. It is required that the Negotiator makes a follow-up phone call within 2 weeks of delivery of the offer package. This will confirm that the owner understands the offer and other information (e.g., the owner's rights, options, and the effect of the acquisition on remaining property). If there is any doubt about the owner's understanding, or if the owner so requests, arrange for a personal visit unless it is not physically or economically practical.

5-5 STATE CLAIMS COMMISSION

5-5.01 Role and Composition of the Commission

The State Claims Commission established under 23 **MRSA** Sections 151 and 152, is an independent, impartial board composed of persons who are knowledgeable in the determination of fair market value for condemnation. The Commission is composed of 5 members appointed by the Governor, 2 of whom must be qualified appraisers and 2 of whom are attorneys. One of the attorney members is designated to be Chair by the Governor. The 5th member of the Commission is a member of the board of county commissioners of the county in which the property is located, and is appointed for each hearing or series of hearings.

5-5.02 Referrals to the Commission

Pursuant to 23 **MRSA** Section 155, the Department shall file a petition with the Commission requesting a hearing and award of just compensation for any property owners who have not negotiated an agreement with the Department regarding just compensation after 60 days from the date of taking. The State Claims Commission operates under 23 **MRSA** Section 156, wherein the chairman of the board, after receiving the Department's petition, assigns a date for a hearing. The chair then assigns no more than 3 members of the board to hear the case, one of which is an appraiser and one attorney. Notice of the time and place of the hearing is mailed by registered or certified mail to all parties of interest at least 14 days before the hearing date.

Before making an award, the State Claims Commission views the property involved. The interested parties are notified of the viewing and can be present if they so desire.

The Department is represented at the hearing and may present evidence related to title, engineering, and appraisal opinion as to the fair market value of the property. Property owners may either represent themselves or employ counsel. In making an award, the Commission is not limited by the range of testimony presented, but may reach a decision based on the viewing, testimony and its own judgment.

As soon as practical after the hearing has concluded, the Commission will make an award in writing, specifying the following:

1. The owners and encumbrances;
2. The nature of the interest taken;
3. The commission's decision on elements of damage;
4. Gross damage;
5. Net amount of award;
6. Interest on the award;
7. Award of just compensation; and
8. Withholding for any advance payment for relocation replacement housing

5-5.03 Cooperation with State Claims Commission

The Department is responsible for referring unsettled parcels to the Commission 60 days after the date of condemnation. At the time of referral, all parcel file information will be reviewed to ensure that it is complete and accurate. In referring such parcels, the Department will provide the Commission with the names and addresses of the owner(s) of record and the holders of any mortgages, tax liens or other encumbrances; a copy of the notice of condemnation; the statement of the Department, and a plan of the property involved as served upon the owner(s) of record for the Commission's information. Appropriate personnel must be available at the time of the hearing to provide evidence relative to title, engineering, appraisal or other necessary information for the property involved.

5-5.04 State Claims Commission Awards

At the completion of a hearing, the Commission sends an attested copy of the award to the Department and the property owner(s). The Department or any of the aggrieved parties have 30 days to file an appeal with the Superior Court. If no appeal is made within 30 days, it the Department's responsibility to then pay the awarded amount, if any, to the parties within 60 days of the issuance of that award by the Commission.

Parcel files will contain copies of Claims Commission awards and comments from those involved in the case relative to the decision relating to appealing the award.

5-6 ACQUISITION REVIEW COMMITTEE

Parcels on which compensation remains unsettled 60 days after condemnation will be administratively reviewed before referral to the State Claims Commission. Additionally, parcels whose owners have presented counter-offers significantly above traditional guidelines will be reviewed on an as needed basis. Each parcel is reviewed to assure that all relevant materials are in the file and that it is ready for presentation before the State Claims Commission. The review will also determine whether there is a basis for an increased offer amount, which will be a final offer of settlement to the owner. The Administrative Settlement process recognizes that there are reasonable differences in judgment as to value of real property, and appraisals are an expert opinion value, but do not represent fixed and unalterable judgments. The Committee will determine if an administrative settlement is reasonable, prudent and in the public interest. If so, the Committee will provide a written justification in support of the settlement. The written justification will state all relevant facts and circumstances considered by the Committee in arriving at a final offer, including trial risks. Appraisers and review appraisers will not be pressured to adjust their estimate of value to justify such settlements, as this would invalidate the appraisal process.

5-6.01 The Acquisition Review Committee Composition and Responsibilities

The Acquisition Review Committee is a committee emanating out of the Property Office, chaired by the Chief Property Officer, that consists of the Senior Property Officers from the Highway, Bridge, and Multimodal Programs as appropriate, along with the Property Office Director, and a Principal Real Estate Attorney from the Legal Services Office. Meetings will be chaired by the Chief Property Officer. The Committee will meet as often as workload requires. Meeting minutes will be kept that record the date, time and place of meeting and names of resource persons present, and the decisions reached.

The Acquisition Review Committee is a government decision panel discussing matters relating to the appraisal and negotiation for real estate purchases and meetings are not open to public attendance. The Committee may call on any persons to provide factual information or expert opinion. Positions that may be called by the Committee include: Program Manager, Project Manager, Mapper, Appraiser, Review Appraiser, Negotiator, Relocation Specialist, Chief Surveyor, Senior Property Officer or Real Estate Attorney.

5-6.02 Committee Procedures

The Committee Chair will prepare an agenda and send a notice of meeting via e-mail to Committee members. The cases are considered individually in committee session. Parcels that are presented for administrative settlement are reviewed and recommended for increased offer based on the facts of each parcel acquisition.

The Committee has broad latitude in deciding the basis for an increased offer, and is not restricted to valuation issues. Considerations may include risk of the State to a high court award, cost to the State in advancing cases through the State Claims Commission and courts,

equity with settlements made with other property owners, substantial market changes between the time of valuation and condemnation.

Each Committee member will come prepared to discuss knowledge of the parcel and bring relevant material (e.g., files and plans) to aid in the discussion. Staff, who are familiar with the case, including the Appraiser and the Negotiator, may be asked their views and recommendations in person or by submission of a memorandum.

The Committee will reach decisions by consensus. Per the provisions of Administrative Policy Memorandum No. 10, the Director, Bureau of Project Development, will approve settlement amounts greater than \$150,000. An increased offer amount will be a final MaineDOT offer prior to referral to the State Claims Commission.

A copy of the justification for any settlement shall be placed in the project files. The records of the Committee are subject to confidentiality provisions of 23 **MRSA** 63. Records are open to public inspection after 9 months following the completion date of the project, or for claims appealed to the Superior Court, records will be open for public inspection following award of the Court.

5-7 ADVANCE AND EARLY ACQUISITION

5-7.01 Advance Acquisition Defined

Advance acquisition is the purchase of property needed for an identified highway project in advance of the completion of the environmental review process. Advance acquisition is used under limited circumstances to alleviate a hardship to the owners (hardship acquisition), or to preclude imminent development of the property (protective purchase).

5-7.02 Advance Acquisition – Criteria for Use and Approval Authority

The following criteria are applicable to both hardship and protective purchase advance acquisition:

1. Advance acquisition may only be used for one or a limited number of parcels on a project.
2. The project must be included in the current approved State Transportation Improvement Plan.
3. The preliminary alignment for the project must be established. Preliminary alignment is defined as the date in Projex's "Actual Date" field for the X11 milestone, "Preliminary Alignment Complete".
4. The proposed advanced acquisition of the property must be strictly for highway purposes and needs.
5. If the proposed advanced acquisition is of a business or commercial operation, such operation must cease its business functions/operations prior to acquisition by the Department subject only to the following exceptions:
 - a. The owner of a business or commercial operation who has purchased property for a new location and has entered into binding contracts for the construction of a new facility with a firm completion date may negotiate with the Department to remain on the acquired property under an Occupancy Agreement with terms acceptable to the Department for a specified period of time pending completion of the new facility; and,
 - b. The owner of a business or commercial operation who has entered into a binding purchase and sale agreement for a new business location conditioned upon the early acquisition of his existing business by the Department may negotiate with the Department to remain on the acquired property under an Occupancy Agreement with terms acceptable to the Department for a predetermined period of time necessary for the owner to close the purchase of the new business location and move inventory, equipment and other business property from the acquired property to the new location.

6. The proposed advanced acquisition must be submitted by the Project Team to the Chief Property Officer for approval.
7. The Department has complied with applicable public involvement requirements under 1 **MRSA** 406 and 23 **CFR** 450 and 771.111.
8. A determination has been completed for any property that is subject to the provisions of 23 **USC** 138, known as Section 4(f) (property – parks and recreational areas).
9. Procedures of the Advisory Council on Historic Preservation are completed for properties subject to the rules of the Maine Historic Preservation Commission and Title 54 USC Chapter 3001 (historic preservation).

The Director, Bureau of Project Development has approval authority for advance acquisitions. Advance acquisition proposals shall be submitted to Federal Highway Administration for approval.

The Senior Property Officers of each program will maintain records for all advance acquisition proposals in the project and parcel files. Additionally, the acquired property should be maintained under normal property management procedures and, if time permits, a reasonable rental should be obtained on a short or long-term basis depending on the time available between acquisition and the date of construction.

5-7.03 Hardship Acquisition Procedure

Advance acquisition may be authorized when the owner of a property has a reasonable basis for claiming a hardship arising from a pending highway acquisition. When the State concurs with an owner's request for a hardship acquisition, the State is not required to accelerate condemnation if an agreement cannot be reached with the property owner. If an agreement can't be reached then the State may defer acquisition of the property to the time it would normally occur in the schedule. The owner should be informed of this possibility when the request for hardship acquisition is accepted.

The Department may consider the following conditions as hardship circumstances:

1. Health/Safety Risks. Continued occupancy of a residence poses health or safety risks to the occupants. For instance, a family member may be incapacitated and unable to use a bathroom on the second floor or a house may contain environmental risks such as lead base paint when there are children in the household.
2. Financial Hardship. The owner will suffer a financial loss due to an inability to sell the property when there is a valid need. For instance, a property owner may wish to take a job in another State and is unable to sell the house at a fair price because of market knowledge of pending highway acquisition.

In addition to the health, safety or financial hardship, the owner must also document an inability to sell the property for fair market value within a typical period of time. Some factors to consider include whether:

1. The property owner openly marketed the property through a realtor, a listing service or through other means.
2. The owner or realtor conducted a market analysis to determine a listing price disregarding any increase or decrease in value caused by the project.
3. The property has been on the market for an amount of time typical in the area and available for inspection by prospective buyers.
4. The property owner documents an inability to find a broker willing to list the property due to the impending project.

The Department will carefully consider all requests for hardship acquisition on their merits. A right of way agent who becomes aware of a situation that could fall within the hardship acquisition criteria is encouraged to bring the matter to the attention of the Senior Property Officer and the Property Office, for full review. It is appropriate for Property Office staff to assist an owner in preparing a written request for hardship acquisition.

When the State determines that a hardship exists and elects to proceed, the offer of just compensation must be based on an appraisal of the fair market value, and negotiations must proceed in good faith with sufficient information provided to the property owner for making an informed decision.

5-7.04 Protective Purchase Procedure

The Department may acquire a limited number of parcels in advance of general project acquisition if development of the property is imminent and would limit future transportation choices or increase project cost. The protective purchase authority may be used proactively, within overall criteria, to purchase key property that is known to be attractive for speculative commercial purchase. In this way, protective purchase may protect a proposed corridor from being excluded from consideration because of rising costs that may have been initiated by the project itself.

Potential protective purchase properties may be identified by Property Office personnel or other staff involved in early project development or by local planning or development authorities. The potential for development must be clearly demonstrated and the development must be imminent.

The Department will ensure that the acquisition of property under either the protective buying or the hardship acquisition criteria would not influence the environmental assessment of a project including the decision relative to the need to construct the project or the selection of a specific location.

5-7.05 MAP-21 Section 1302 Advance Acquisition

Effective October 1, 2012, federal reimbursement for early acquisition activities was established whereas prior to enactment, federal dollars could only participate in a soft match during construction as a “delayed reimbursement” for early acquisition.

MaineDOT will use the following process in order to utilize the opportunities provided under MAP-21:

- 1) MaineDOT will certify to the following concerning the property in question
 - a. The State has authority to acquire the real property interest under State law; and
 - b. The acquisition of the real property interest-
 1. An individual Categorical Exclusion has been prepared;
 2. will not limit the choice of reasonable alternatives for the project or otherwise influence the decision of the FHWA on any approval required for the project;
 3. does not prevent the lead agency from making an impartial decision as to whether to accept an alternative that is being considered in the environmental review process;
 4. The current project is included in the current STIP as a standalone acquisition project;
 5. complies with other applicable Federal laws (including regulations);
 6. will be acquired through negotiation, without the threat of condemnation Section 3 below outlines MaineDOT’s strategy in using condemnation as a closing tool only using Federal Funding under MAP-21;
 7. will not result in a reduction or elimination of benefits or assistance to a displaced person required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.) and title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) and;
 8. Does not involve any property subject to Section 4(f) or Section 106 protection.

- 2) MaineDOT will provide the property owners with a revised Notice to Owner of Interest to Acquire prior to using this MAP-21 acquisition process. The notice will include a full explanation of the property owner’s rights under Federal and state laws, as well as termination of negotiations in the event of no agreement as to the amount of just compensation or administrative settlement. MaineDOT will also state the maximum number of days it will negotiate before terminating negotiations. MaineDOT will use its condemnation authority as a closing tool only. No demolition will occur until NEPA for the project has been completed.

- 3) One of the following two outcomes will occur after the Notice to Owner of Interest to Acquire is provided to the property owners:
 - a. MaineDOT provides a written offer and negotiates a settlement including full consideration of any materials or information provided by the owners. If agreement with the property owner is reached, MaineDOT will use its condemnation authority as a closing tool only.

b. If MaineDOT and the owners do not settle or cannot agree on just compensation or an administrative settlement, MaineDOT will terminate negotiations in writing. The termination notice will inform the owner that MaineDOT may return and move forward with the standard acquisition process using condemnation. MaineDOT will reserve the right to move forward either using State funds OR using Federal funds once NEPA is complete for the project.

4) Eligibility for relocation assistance begins on the date of the initiation of negotiations to acquire the property. MaineDOT will establish eligibility by delivering a Comparable Replacement Housing Notice for owner-occupants or a Rental Assistance Payment Estimate for tenants. The occupants will also be given an Initial Relocation Notice Letter which provides an overview of the relocation process and protections. It is understood that any formal rule-making adopted by FHWA will supersede this policy.

5-7.06 Early Acquisition Defined

Early Acquisition is the acquisition of real property at any time the State has the legal authority to do so, based on program or project considerations. The State may undertake early acquisition for corridor preservation, access management, or other purposes.

MaineDOT may acquire property with State funding before authorization by FHWA for right of way acquisition. The cost of this property may be credited to the non-Federal share of the federally funded project at the time of the project agreement, provided the acquisition complies with the following conditions:

1. The original project agreement covering the project was signed on or after June 9, 1998.
2. Property is acquired in compliance with Maine statutes.
3. The early acquisition must be associated with a project that is included in the Capitol Work Plan.
4. The property proposed for early acquisition must be impacted by all reasonable potential alignments.
5. The proposed early acquisition of a property must be strictly for highway purposes and needs and incorporated into a Federal-Aid Project.
6. If the proposed early acquisition is of a business or commercial operation, such operation must cease its business functions/operations prior to acquisition by the Department subject only to the following exceptions:
 - a. The owner of a business or commercial operation who has purchased property for a new location and has entered into binding contracts for the construction of a new facility with a firm completion date may negotiate with the Department to remain on the acquired property under an Occupancy Agreement with terms acceptable to the Department for a specified period of time pending completion of the new facility; and,
 - b. The owner of a business or commercial operation who has entered into a binding purchase and sale agreement for a new business location conditioned upon the

early acquisition of their existing business by the Department may negotiate with the Department to remain on the acquired property under an Occupancy Agreement with terms acceptable to the Department for a predetermined period of time necessary for the owner to close the purchase of the new business location and move inventory, equipment and other business property from the acquired property to the new location.

7. The early acquisition must be submitted by the Project Team to the ARC committee, which includes at least members of the legal staff, the Project Manager, ROW Relocation and Property Management.
8. The property is not from a public park, recreation area, wildlife and waterfowl refuge or a historic site of national, State or local significance (known as “4(f)” property).
9. Acquisition and related relocation is in compliance with the ***Uniform Relocation and Real Property Acquisition Policies Act of 1970*** (as amended) and 49 CFR Part 24.
10. Acquisition is in compliance with the requirements of Title VI of the ***Civil Rights Act*** of 1964.
11. The FHWA concurs with MaineDOT determination that the acquisition did not influence the environmental assessment for the project, including the need to construct the project or the project design or location.

The amount of the credit will be the cost of the early-acquired property unless Maine determines there has been a significant lapse of time, or increases in real estate values between the date of acquisition and the date of credit. If either of these conditions applies the amount of the credit may be the current fair market value at the time of the credit as supported by a real estate appraisal. The total credit to a project will not exceed Maine’s pro rata share of total project cost.

The Federal rules applicable to early acquisition are at 23 ***CFR*** 710.501.

5-8 FUNCTIONAL REPLACEMENT OF PUBLIC-OWNED FACILITIES

5-8.01 Purpose

The Functional Replacement Program is designed to provide relief to public agencies when a highway project requires the acquisition of an essential public facility. This policy recognizes that the proper measure of compensation for essential facilities is their replacement cost rather than depreciated current fair market value. Payment of depreciated value for a public facility imposes the cost of replacement on the local or other owning agency, whereas the need to replace arises from the State- and Federal-funded highway project. The Functional Replacement Program refines the concept of just compensation so as not to burden the agency suffering the loss of facility or the citizens who fund that agency. Authority for functional replacement is in 23 **CFR** 710.509.

The property must be in public ownership and use, and the replacement must remain in public ownership and continue the public use of the facility being acquired. The facility may be Federal, State or locally owned. Facilities of volunteer fire departments are eligible if the real property is in public ownership. Some common types of facilities replaced include fire stations, schools and municipal buildings. State DOT maintenance facilities have been the most common type of replacement due to their location adjacent to the highway.

Functional replacement is an option for the owning agency. The acquiring agency informs the owning agency of its right to an estimate of just compensation based on the appraisal of fair market value and of the option to choose either just compensation or functional replacement. The agency may elect to be compensated on the basis of appraised fair market value.

It is important for the Department to identify practical functional replacement situations early in the project life to ensure adequate time for initiating and completing the various required approvals and completing the construction of the replacement facility in sufficient time to meet the project construction date. The agency involved should be contacted by the Negotiator or other assigned acquisition agent to determine whether the facility will remain in existing use and whether agency management wishes to consider employing the functional replacement process.

The Senior Property Officer in each program will be the lead for administering functional replacement. Other Offices will have consultation and review responsibilities as determined for specific projects.

5-8.02 Procedures

5-8.02(a) Initial Meeting and Request

At the time that a publicly owned facility is identified as being in the acquisition area of a proposed highway alignment, MaineDOT will meet with representatives of the owning agency to secure information and explore options. This meeting will:

1. Confirmation. Confirm that the facility is publicly owned. If the facility is leased, even on long-term approximating its economic life, it does not constitute ownership.
2. Applicability. Explore the need of the owning agency for continuance of use. If the facility is no longer serving an essential public purpose, it is not appropriate to replace it. Compensation will be on the basis of current fair market value. This would apply, for example, if an older fire station to be acquired overlapped the service area of an existing newer and larger fire station.
3. Purpose. Determine if the facility serves a unique and essential public purpose. Most public facilities are special purpose and uniquely serve the use for which they were constructed. However, if the facility can be replaced by purchasing an existing building on the open market, or if the use can be discontinued without harm to the public interest, functional replacement is not appropriate.
4. Compensation. Determine the intentions of the owning agency. The option of payment of monetary just compensation should be explored. Officials of the owning agency may prefer the flexibility of a monetary payment, based on an appraisal, rather than replacement in kind.
5. Agreement. If functional replacement is appropriate and desired, MaineDOT and the owning agency will agree on the form and content of an agreement that will define the replacement and the responsibilities of the parties.

The owning agency must make a formal request that the facility be replaced as an alternative to a payment of monetary value (fair market value). This will include a presentation that the facility serves an essential public purpose that must be continued in the public interest. If functional replacement is approved by the Department, MaineDOT will review the request and must concur in the finding of essential public purpose.

The Department will make a formal determination that functional replacement is in the public interest. The determination will be forwarded for concurrence to FHWA if Federal participation in the cost of the functional replacement is anticipated (23 **CFR** 710.509b (5)).

5-8.02(b) Betterments and Increases in Capacity

The issues of betterments and increases in capacity should be fully explored with the owning agency. A replacement facility will not be an exact copy of what is acquired. It will be a structure that serves the same function (e.g., school, jail), but it will be constructed to current standards of construction and design. The replacement desired by the owning agency may serve a larger population or service area. Or, features may be included in design that improves quality, level of service or range of services. For instance, an acquired fire station may be replaced with a much larger building with community rooms for public functions, or the replacement function may be combined in a larger building that also includes a town hall.

MaineDOT will not influence the type and extent of replacement except to limit reimbursement to that necessary to provide replacement utility that is equivalent to the facility that is acquired by MaineDOT.

MaineDOT will reimburse for betterments or increases in capacity that meet legal and regulatory standards for the type of facility being replaced. This is within the “equivalent utility” criteria. Significant features in a new building should be confirmed as standards by means as reference to buildings of a similar function that were recently constructed by other jurisdictions in the area. Other references would be standards that have been promulgated by national standard-setting organizations or provisions in State law or agency regulations providing minimum standards for the use and occupancy of public facilities.

MaineDOT and the owning agency will reach an agreement on responsibility for the costs of betterments and increases in capacity before committing to functional replacement.

5-8.02(c) Agreement Between the Parties

The agreed functional replacement terms, conditions, responsibilities and cost sharing will be set forth in an agreement between MaineDOT and the owning agency. The agreement will serve as the contract between the parties and will be reviewed by FHWA prior to execution. All elements of the acquisition of the facility by MaineDOT and the replacement will be addressed in the agreement. The agreement will provide that the owning agency will keep auditable records of all costs.

5-8.02(d) Replacement Site

The owning agency will be reimbursed for the actual and reasonable cost of a suitable replacement site. For state funded projects, if a pre-owned site is used by the agency, MaineDOT will pay the fair market value of the site acquired for the highway. Acquiring agencies need to be diligent in insuring that the owning agency does not receive a double payment by receiving compensation for both the displacement and replacement site.

5-8.02(e) Review and Oversight

MaineDOT will authorize the owning agency to incur costs and begin work. The contracting process of the owning agency may be used unless otherwise provided in the agreement. For Federal projects, all Federal contracting requirements must be met.

MaineDOT will perform review and oversight on the replacement project, including the following elements:

1. Site selection and purchase,
2. Replacement facility plans and specifications,
3. Contract documents,
4. Progress inspections during construction, and

5. Final inspection at completion.

Each functional replacement situation is unique. The Director, Project Development Bureau, will assign responsibility for review and oversight of each functional replacement project in accord with the knowledge, skills and special resources required by the type of facility being replaced. Other MaineDOT offices may be asked for advice and assistance in planning, coordinating and reviewing a project as circumstances warrant.

The Department will formally approve the completion of the project before making final payment to the owning agency.

5-9 SUPPLEMENTAL ACQUISITION ACTIVITIES

5-9.01 Coordination with Legal Services Office

The right of way function maintains an open line of communication on all levels with the Legal Services Office. Consultation is generally informal. This enables appropriate and timely right of way actions involving legal issues. When a formal opinion is needed, a request will be made in writing to the Chief Counsel through the Chief Property Officer.

The Senior Property Officers work with the Legal Services Office on the following activities:

1. Title certifications,
2. State Claims Commission activities,
3. Superior Court Appeals on compensation,
4. Closings - acquisition by deed,
5. Legal advice on acquisition compensability questions, and
6. Legal settlements after Superior Court filing.

5-9.02 Tenant-Owned Improvements

Any improvements that are considered to be real property if they were owned by the landowner are also to be considered real property if they are owned by the tenant. MaineDOT will acquire the same interest in these improvements as if they were owned by the landowner.

The Property Owner Report will indicate whether a tenant is in occupancy on the property to be acquired. Any structures or improvements that are real property and that are owned by the tenant must be identified. A separate offer may be made by MaineDOT to acquire tenant-owned improvements provided the owner of the land disclaims interest in those property items.

A review of the property lease may, but not always, clarify property ownership issues.

It is accepted practice for commercial tenants to lease space that is essentially vacant or partially vacant and to build out or add to the interior to suit their particular needs. In these instances, unless otherwise precluded by the lease agreement, the tenant is entitled to payment for these improvements because the Department is required to acquire an equal interest in all buildings, structures or other improvements (23 *MRSA* Section 154-E).

On residential property, a tenant may own outbuildings (e.g., storage sheds) or above- or below-ground swimming pools. The Negotiator will inquire from the landowner as to the status of these items and make a separate offer to the tenant if the owner signs a statement disclaiming interest.

The basis for the amount of the offer for tenant-owned improvement is the higher of the contributory value of the items to the whole property or the value for removal, also known as

salvage value. The payment for an improvement may not result in the duplication of any compensation that was otherwise authorized by law.

Before payment can be made to a tenant for any improvements, its owner must assign, transfer and release to the Department all of their rights, title and interest in the property improvement. The Negotiator will draft a short release document and present it to the owner to sign. When the Negotiator is unable to obtain a release from the owner of the improvement, this fact should be noted in the parcel acquisition record. The parcel will be referred to the State Claims Commission for proper distribution of the parcel valuation. Both the owner and the tenant would have the right to challenge any decision by the Commission by filing a claim with the Superior Court for further adjudication.

5-9.03 Uneconomic Remnants

An uneconomic remnant is a remaining part of a property in which the owner would be left with an interest that the Department has determined has little or no utility or value to the owner. MaineDOT will offer to acquire any remainder property that is determined to be an uneconomic remnant as required under 23 *MRSA* Section 154-C.

When the Negotiator becomes aware of a potential uneconomic remnant that was not previously identified, it should be brought to the attention of the Senior Property Officer for a final decision.

At the time of negotiation, the owner may express concern that a remainder property is of no use or is a burden for reason of taxes and maintenance. This should be brought to the attention of the Senior Property Officer for consideration and decision as to whether it meets the definition of uneconomic remnant that is stated above. However, the Department is not obligated to purchase an uneconomic remnant if that remnant is contaminated with hazardous or other wastes.

It is clearly evident that if the entire property is being acquired, valuation will be based on the total property value. The owner is entitled, however, to the value of the part taken and damages to the remainder and must be informed of those amounts if he or she so chooses.

5-9.04 Developer Project Acquisitions

Plans for private development (e.g., shopping centers, strip malls) may require changes in existing traffic patterns on the highways that are adjacent to the developed area. Design plans that include existing right of way limits are submitted to the Department by the developer. After review of these plans, the need for an additional right of way as a result of the developer's project are identified and transmitted to the developer for further action. A right of way plan prepared by the developer's engineering firm will be submitted for approval. It is MaineDOT's responsibility to assure appropriate process in acquiring and recording these rights and submitting that documentation to the appropriate Project Manager.

Upon approval of final plans by MaineDOT, the developer shall acquire or obtain any additional right-of-way or easement rights so required before commencing construction. Title to such right-of-way or easement rights so acquired shall be conveyed to "State of Maine, its successors and assigns forever, acting by and through its Department of Transportation". Easement language should follow MaineDOT format, and easement types should follow MaineDOT practice. Standard easement language for easements typically required for highway projects is available from MaineDOT upon request.

Prior to acquisition of rights, draft deeds and easement documents must be submitted to MaineDOT for approval. Unless previously approved by the Legal Services Office, conveyances of permanent rights to the State of Maine must be by warranty deed. When rights are acquired and conveyed, original paperwork shall be forwarded to MaineDOT Traffic Section, along with final mylar plans showing the new R/W limits. MaineDOT Traffic Section will be responsible for filing paperwork and plans with the Property Office.

The Developer shall not file deeds conveying permanent property rights to the State of Maine at the County Registry of Deeds. The Legal Services Office will file approved deeds at the Registry. The Developer should submit a completed Maine Revenue Services Real Estate Transfer Tax Declaration form with each deed. On each transfer tax form, the box in Section 6(c) should be checked and the following language inserted in that section: *"Seller and Buyer are exempt pursuant to 36 MRSA 4641-C(1). This is a conveyance for transportation purposes."*

The developer shall also supply to the Department a final stamped recordable right of way plan that the Department will also record.

5-9.05 Donations

The Department can accept donations of property that would otherwise be acquired for a project. Prior to acceptance of any donation, the Department must inform the owner of the right to receive just compensation for the property, based on an appraisal by a qualified appraiser unless the property comes within the purview of the Waiver Valuation Procedure. All donations of property prior to approval of the NEPA document must meet the environmental requirements of **NEPA** and 23 **USC** 323(d). It should be noted that it is **not** the Department's policy to solicit donations. Typically, the offer to donate should come from the owner rather than the acquiring agency. The accepting agency should ensure the owner understands the right to receive just compensation before the donation is accepted by having the owner acknowledge that right in writing.

The owner will sign an agreement that states the owner's awareness of the right to have the property appraised and to receive just compensation. Also, the owner will be advised of the date by which the property is to be vacated. The completed agreement should be submitted to the Senior Property Officer for review and approval. Where appropriate, advice will be requested from the Legal Division.

On Federal-aid projects, a credit to the State's matching share can be made based on the fair market value of the donated property. This value cannot include any increases or decreases in value caused by the project. The fair market value should be based on an estimate that is prepared by a qualified staff appraiser commensurate with the complexity of the underlying property acquisition.

Credit for any donations that are made in exchange for construction features or services will be limited to the estimated fair market value less the cost of those features or services.

5-9.06 State and Local Contributions

Real property owned by the State of Maine or by a municipality that is incorporated within the right of way of a federally funded project may be used as a credit toward the non-Federal matching share of the project. This provision does not apply to property that was initially acquired with any kind of Federal financial assistance, or to lands already in use for transportation purposes.

The amount of the credit will be the fair market value as discussed in Section 5-9.05.

The prerequisite conditions in Section 5-7.04 apply to the credit to the extent they were applicable at the time the real property was initially acquired by the State or the municipality. A certification as to compliance with these requirements will be made by the donating agency. Relocation benefits will apply to persons displaced from pre-owned property unless the property was rented specifically on the basis of short-term occupancy pending need for project purposes.

5-9.07 Property Pin Replacement

Maine Law, 14 MRSA Section 7554-A requires MaineDOT to establish policies and procedures for replacing landmark property boundary markers that are obliterated by any public improvement. The law requires maintenance of records that describe the landmark and its location in sufficient detail to reestablish the point of former location. The law gives the Department the flexibility of re-establishing the point, or making payment to the owner for the cost of re-establishment.

MaineDOT survey crews and staff responsible for the development of existing conditions plans should review title and boundary surveys to determine the existence of boundary markers. The locations should then be confirmed in the field, plotted on right of way maps and maintained in appropriate databases.

Negotiators should confirm the existence and location of the boundary markers with property owners at initiation of negotiations, make note of the confirmation and discussion in the Negotiator's Log, and report any conflicts to the Property Office.

MaineDOT will re-establish the point of former location of any disturbed boundary marker as shown on a right of way map or in MaineDOT records at no cost to the owner, upon the owner's request.

Under certain conditions, the MaineDOT may reimburse a property owner for reasonable survey costs to set a marker on the new right of way line. These conditions are:

- The property owner has provided a copy of a mathematically retraceable boundary survey completed by a Licensed Professional Land Surveyor on or after October 3, 1973, which shows the location of the disturbed boundary markers
- **and**
- The location of the disturbed boundary markers is shown on the MaineDOT right of way maps and property owner surveys,
- **and**
- The subject property is impacted by a taking in fee simple absolute that changes the point of intersection with the new right of way line and sideline boundaries
- **or**
- The subject property is bisected by a project being built on new location. In this case, new boundaries are being created by the bi-section of the parcel, so there are no existing pins to disturb. Reimbursement is intended to set pins on the new boundaries.

MaineDOT is not responsible for resolving boundary disputes between abutting owners. In the event of a boundary dispute, MaineDOT reserves the right to re-establish the boundary marker at the point of former location.

Requests for re-establishing or setting boundary markers should be made to the Chief Surveyor through the Project Negotiator via email. The Chief Surveyor will consider all appropriate information presented in deciding the eligibility for reimbursement and the amount of the reimbursement. The decision of the Chief Surveyor is final.

5-9.08 Acquiring from Special Entities

Special entities include utilities, railroads, Indian nations and political jurisdictions. MaineDOT has repeated or continual contact with these entities and it is important that they be dealt with consistently. In addition, the relationship of special entities with MaineDOT is controlled by State and Federal laws and regulations. MaineDOT is involved with special entities at the earliest planning phase, and frequently agreements are reached in the public interest that involves restoration of facilities or construction features that mitigate damage. Monetary payment based on appraised value may not be the sole determinant of just compensation.

Right of Way Project Team members will be guided by the Chief Property Officer and Director of the Property Office in acquisition activities involving special entities.

5-9.09 Dedications

Dedications are acquisitions of real property for transportation projects that arise from the actions of local planning and zoning authorities. A large private development proposal may secure local zoning approval subject to “dedication” of a part of the tract for highway use. The

dedicated part may enable improvements identified in MaineDOT's Capitol Work Plan, or resolve transportation needs created by the development proposal.

Dedications arise from local zoning and are not initiated by MaineDOT. The Department is interested in assuring that it has unencumbered title to land it accepts for highway use. Therefore the private owner making the dedication will be advised that MaineDOT may condemn over the transfer to assure clear unencumbered title to the property. Dedications should not be made with the sole intent to use as right of way for a federal-aid project.

