

Local Agency-Funded Acquisition in Advance of Project NEPA Decision and the Use of Eminent Domain (July 2015)

Good news! HQ Local Programs Right of Way (ROW) recently met with FHWA regarding the use of eminent domain by local agencies in early/advance acquisitions and determined this to be a WSDOT policy issue and not a regulatory issue. Based on that outcome, WSDOT Local Programs is in the process of changing our policy for local agencies.

Here is the proposed language that will be added to LAG 25.4.43 – Procedures for Local Agency-Funded Acquisition in Advance of Project NEPA Decision (With Match) & Procedures for Local Agency-Funded Acquisition in Advance of Project NEPA Decision (Without Match):

The use of eminent domain on a locally-funded acquisition in advance of a project NEPA approval is a risk decision for the local agency. To use eminent domain, an agency must be able to prove public use and necessity, which may be difficult when the environmental alternatives have not been evaluated or selected. If the ECS with Appendix F is approved by FHWA/WSDOT for the current ROW alignment that was acquired in advance of NEPA approval, then the risk to the agency is low. In this case, these parcels can be incorporated into a federally funded roadway project and the project will be certified for construction. However, the risk comes in when Appendix F is not approved by FHWA/WSDOT for the current acquired ROW alignment in advance of NEPA approval. In this case the agency will not be able to incorporate the parcels into the federal aid project. The agency must use caution in evaluating risks associated with the use of eminent domain in locally funded property acquisitions as it could prevent the agency from incorporating the property into a future federal aid project.

Until the proposed revision is approved and published in the LAG manual, local agencies need to request a deviation of procedures for the non-use of eminent domain requirement stated in LAG 24.4.43. So, the agency will need to send the deviation request for each project to their LAC and the LAC will forward it to the Local Programs ROW Manager for approval.