



U.S. Department  
of Transportation

**Federal Highway  
Administration**

# **CORRIDOR PRESERVATION**

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**Study of Legal and Institutional Barriers**

**Prepared for the Office of Real Estate Services**

**by:**

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# PART I: The Process



## **PART 1: THE CORRIDOR PRESERVATION PROCESS**

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### **INTRODUCTION**

This study addresses corridor preservation as a planning and implementation strategy for transportation programs. Its purpose is to identify barriers to corridor preservation and to propose measures for removing those barriers that can create an effective corridor preservation program.

In Part 1, the study discusses the corridor preservation process and the actors in that process. Part 2 discusses the four fundamental categories of corridor preservation techniques most commonly used: (1) local planning and development controls; (2) corridor mapping; (3) access management; and (4) land acquisition. Part 3 discusses barriers to corridor preservation. In Parts 4 through 7 the study addresses the most significant barriers to the use of each of the four categories of techniques and makes recommendations for overcoming these barriers.

In this study, a number of substantive and symbolic devices are used to assist the reader in understanding the analysis and conclusions in this study. First, where appropriate, *Problem Illustrations* and *Case Studies* have been included to explain points made in the text. These are boxed for easy identification. Second, in order to enable the reader to quickly locate the *Barrier Removal Measures* presented in this study, the symbol [■] has been placed in the margin. Finally, legal and institutional issues in the context of corridor preservation, are highlighted in the margins of the text. *Institutional issues* are highlighted with an arrow [←]. The symbol [↖] is used to signify a *legal issue*.

#### **1-1 DEFINING CORRIDOR PRESERVATION**

##### **1-1.1 WHAT CORRIDOR PRESERVATION IS**

A "corridor" is the path of a transportation facility that already exists or may be built in the future. There are a number of reasons for corridor preservation. The Report of the American Association of State Highway and Transportation Officials (AASHTO) Task Force on Corridor Preservation defines corridor preservation as:

a concept utilizing the coordinated application of various measures to obtain control of or otherwise protect the right-of-way for a planned transportation facility.<sup>1</sup>

As the AASHTO report explained, corridor preservation should be applied as early as possible in the identification of a transportation corridor to:

- ▶ Prevent inconsistent development;
- ▶ Minimize or avoid environmental, social, and economic impacts;
- ▶ Prevent the foreclosure of desirable location options;

## Defining Corridor Preservation

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- ▶ Allow for the orderly assessment of impacts;
- ▶ Permit orderly project development; and
- ▶ Reduce costs.<sup>2</sup>

Among the measures most commonly used in corridor preservation are *regulatory powers* to prevent and control development in transportation corridors and the *acquisition of key parcels of land* in these corridors when development of these parcels is threatened. Statutes in many states authorize the use of these two measures, and a number of states and local governments have made use of this statutory authority. We define a state or local "corridor preservation" program as one in which either or both of these measures is used on a continuing basis in an effort to preserve corridors for transportation facilities.

### (a) Benefits of Corridor Preservation

Corridor preservation can play a significant role in the transportation planning and project development process and in the avoidance of environmental damage. Corridor preservation seeks to control development that may occur within a proposed corridor so that needed improvements can be provided. Studies done as the basis for corridor preservation should also result in the selection of transportation corridors that not only minimize environmental harm but also provide opportunities for environmental enhancements. A new location not only may not serve transportation needs as well as the original corridor but also may be more damaging environmentally.

Corridor preservation can also provide major benefits to local governments in their planning and land use control programs, and to the development community by providing more predictability in the marketplace. By fixing the location of important transportation corridors that are a major determinant of new development, corridor preservation can allow developers to adjust their development strategies accordingly and thereby encourage more orderly and appropriate development in metropolitan and rural areas. In other words, uncertainties about the location of transportation facilities that otherwise would frustrate local planning and land use regulation are removed by corridor preservation. The designation of transportation corridors in a corridor preservation program provides certainty by indicating where major transportation improvements will be located. Developers and local governments can rely on these corridor designations when they plan and review new development projects.

Corridor preservation provides a basis for land acquisition and regulatory powers that maintains the integrity of transportation corridors. Corridor preservation provides the basis for protective "key parcel" acquisition when the integrity of a transportation corridor may be impacted by new development. Corridor preservation can also include regulatory powers that protect transportation corridors from intrusive development.

An effective corridor preservation program could have a negative impact on a local government's tax base because land reserved in a corridor will not be developed in the interim period before the proposed transportation improvement is constructed. On balance, however, the more orderly

and environmentally beneficial development that corridor preservation should produce will have positive impacts on the character and tax base of a community.

**(b) Effect of ISTEA**

An important distinction must be made between corridor preservation before and after the adoption of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Federal legislation did not formally recognize corridor preservation before ISTEA. The federal highway act authorized loans for the advance acquisition of land in right-of-way, but this program was limited. Some states and local governments had more ambitious corridor preservation programs that were implemented much earlier in the transportation project development process, but these programs were not mandated by the federal legislation.

ISTEA changed this situation by requiring the "consideration" of corridor preservation in mandatory state and regional long-range transportation plans. This change in federal requirements should encourage use of corridor preservation in state transportation and local government planning and land use regulation programs. The purpose of this study is to provide guidance to state and local governments in preparing and adopting effective programs that can make corridor preservation a reality.

← Institutionalization of corridor preservation

**1-1.2 Corridor Preservation Categories**

**(a) Proposed Corridors**

Transportation corridors can be designated at any point in the development cycle for a transportation project. To implement the mandate of ISTEA, states and regional agencies will at least have to "consider" corridor preservation in the preparation and adoption of long-range transportation plans.

Preservation also is useful to protect a preferred alignment selected and approved after completion of the full National Environmental Policy Act (NEPA) process and after other environmental requirements are satisfied. The use of corridor preservation at this later time, close to actual construction, has been the type of corridor preservation program historically used in the highway planning and construction process.

**(b) Existing Corridors**

Corridor preservation can also be applied to existing highways and other existing transportation facilities. Corridor preservation for existing transportation facilities, such as highways, can maintain and preserve capacity and retain options to enhance or increase existing capacity. This objective can be achieved through access management programs that improve traffic flow by

## **Timing Corridor Preservation Strategies**

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eliminating excessive and poorly designed access points to existing highways. Capacity protection can also be achieved through land use controls that limit and restrict development in areas adjacent to highways.

Corridor preservation can also be applied to the conversion of uses within existing public or private rights-of-way. In most cases these are public and private railroad rights-of-way that have been abandoned but that would be useful for other transportation facilities. **Appendix B** discusses the use of abandoned railroad rights-of-way in corridor preservation.

### **1-2 TIMING CORRIDOR PRESERVATION STRATEGIES FOR EXISTING AND PROPOSED CORRIDORS**

#### **1-2.1 Prior to Adoption of a State or Regional Long-Range Plan Under ISTEA**

ISTEA for the first time calls for a mandatory state long-range transportation plan and revises and strengthens the metropolitan transportation planning process. In the new planning process, systems planning is to be accomplished with public involvement and with environmental input at a much earlier stage than had existed under the preceding system.

Studies in preparation for the designation of transportation corridors will precede the formal adoption of a plan, and in some cases these early studies may indicate a need for corridor preservation before a plan is adopted. This especially may be the case with transportation corridors where there is presently little in the way of development but where development may occur before the plan can be adopted.

The techniques available to implement corridor preservation before a corridor is included in a plan may be limited, however. Early land acquisition may not be possible if there is no formal commitment to a corridor alignment through a plan designation. Some state corridor preservation statutes also require a corridor to be shown on a state or local comprehensive plan as a condition to using corridor preservation techniques, such as official maps. Other corridor preservation techniques, such as zoning, may still be useful, and there may also be opportunities for corridor preservation through voluntary cooperation with developers and landowners.

#### **1-2.2 Inclusion in Long-Range Transportation Plans**

##### **(a) The Long-Range Transportation Plan and Planning Process**

The basic goal of the planning process is to address overall social, economic, energy and environmental effects of transportation decisions.<sup>3</sup> The relationship between transportation facilities and planning and development is especially important to corridor preservation. ISTEA requires plans to address the effect of transportation policy decisions on land use and development. Plans must also demonstrate consistency with applicable land use and development plans.

Regional transportation agencies must consider 15 interrelated factors in the preparation of a long-range plan. ISTEA mandates state transportation planning for the first time. States must address 20 planning factors similar to those required for metropolitan planning organizations. State transportation planning requirements require states to assure coordination and consistency in transportation planning and programming among all governmental units responsible for transportation, land use planning, and environmental protection.

The Preamble to the metropolitan planning regulations states the intent of the planning process:

The intent of the ISTEA is to strengthen the planning process and make it a central mechanism for structuring effective investments to enhance overall metropolitan transportation system efficiency. To this end, the plan described in the proposed regulation would be dynamic, subject to more frequent revision and intended to serve as a "current" framework for transportation decisionmaking.<sup>4</sup>

**(b) "Consideration" of Corridor Preservation in the Plan and Planning Process**

Corridor preservation is one of the mandatory elements in both the state and regional long-range planning process. Statutory provisions mandating state and regional long-range transportation planning require both metropolitan planning organizations and states to "consider" in their planning process:

[p]reservation of rights-of-way for construction of future transportation projects, including identification of unused rights-of-way which may be needed for future transportation corridors and identification of those corridors for which action is most needed to prevent destruction or loss.<sup>5</sup>

Planning agencies must determine what they must do to comply with the requirement that they "consider" corridor preservation in the planning process. An initial step should be an analysis of corridor preservation as an option in the long-range plan. This analysis should include a review of the merits of corridor preservation for the state or region and an assessment of whether, and where, corridor preservation can be helpful.

Corridor preservation studies are a logical next step for those areas where corridor preservation can be effective. These studies should include an evaluation process in which criteria are adopted for the selection of transportation corridors and corridors are evaluated to determine whether they should be designated for preservation.

When corridor preservation studies are complete, the plan can map corridors that are selected for preservation. Corridor designation may or may not be precise. The planning regulations contemplate transportation corridor studies and note that these studies may not permit detailed designation of a transportation corridor:

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In circumstances where a corridor or subarea study is anticipated as a means for assessing potential transportation improvements but is not complete, the plan may indicate for such areas that the design concept and scope (modes and alignment) are not fully determined.<sup>6</sup>

The mapping detail that is adopted will depend on the type and location of a preserved corridor and on state legislation, which may designate the type of map needed. Corridor location and width are predetermined when corridor preservation is used for existing highways. Corridors can be wider and less precise in undeveloped areas where development pressure is not expected. More mapping precision is required in areas that are more developed and where development is expected soon. Schematic designation may not be sufficient under some corridor preservation legislation, which may require more definitive mapping in a comprehensive plan as the basis for using land acquisition and regulatory powers to implement a corridor preservation program.

Plans should contain two other elements to reinforce a corridor preservation program. One is an intergovernmental coordination element that indicates the intergovernmental strategies needed to carry out corridor preservation. Intergovernmental coordination is essential because a state transportation agency cannot carry out corridor preservation on its own. Local governments exercise the land use planning and development control powers that often are critical to the success of corridor preservation. State transportation agencies do not have these powers. If they are given permit authority over development in transportation corridors, the exercise of this authority must carefully be integrated with local government planning and land use regulation. Some state planning legislation requires the inclusion of intergovernmental coordination elements in state and local plans.

← *Intergovernmental  
Coordination*

Funding is another important component of an effective corridor preservation program, and plans should address the funding issue. Funding is needed if a corridor preservation element in a plan contemplates advance acquisition of right-of-way to protect a transportation corridor.

← *Agency funding  
for Acquisition*

Funding is needed even if corridor preservation in a plan relies on regulatory powers over land use. As this study demonstrates, back-up funding for land acquisition is essential if the use of regulatory powers in corridor preservation programs are to meet constitutional requirements. One of the most important of these is the requirement that government cannot "take" land with regulatory programs. A "taking" of land under a corridor preservation program would occur if regulatory restrictions used to implement that program are made too restrictive.

### (c) Environmental Reviews: NEPA and Clean Air Act Compliance

Federal legislation places a substantial number of significant environmental requirements on federally-funded transportation projects. Meeting these requirements is a major issue in corridor preservation programs.

NEPA has an important influence on transportation projects and corridor preservation for these projects. NEPA requires environmental review for all federally-funded transportation projects. Federal agencies that must make environmental determinations under other federal laws for trans-



portation projects often do so by relying on the environmental documents prepared under NEPA. The Clean Air Act is another important federal law that affects corridor preservation. It implements national policy for improving air quality and affects funding for transportation projects in areas that do not meet National Ambient Air Quality Standards.

### (1) NEPA

NEPA is potentially applicable to all federally-funded transportation projects. NEPA requires all federal agencies to prepare an environmental impact statement on major federal actions that can have a significant effect on the human environment. NEPA compliance has traditionally occurred at the project approval stage, before actual construction begins. Corridor preservation should not, in theory, require NEPA compliance. Corridor preservation may be a preliminary step in the transportation project development process and can occur well before a transportation project is finally approved.

In practice, however, NEPA compliance is an important component in corridor preservation. State transportation agencies may require compliance with NEPA in a corridor preservation program so they can be assured of federal funding when the project reserved in a transportation corridor is finally approved. Selective land acquisition is also common in corridor preservation, and is necessary as a back-up to land use regulations that are used to protect transportation corridors. Although many courts hold that the transfer of title in a land acquisition does not trigger NEPA,<sup>7</sup> compliance with NEPA is common when acquisition occurs.

With the passage of ISTEA, it is possible that a tiered NEPA process could be employed in corridor preservation. The first phase of this process, which would be carried out as part of state and regional transportation planning, would consider environmental impacts in enough detail to identify an environmentally preferable transportation corridor. The second phase would evaluate the environmental impacts of project construction activities in more detail and provide mitigation plans for impacts on environmental resources. A tiered NEPA analysis would be highly beneficial to corridor preservation because it would avoid the detailed environmental analysis that is so difficult to carry out at the corridor preservation stage.

This study discusses the issues created by NEPA in the corridor preservation process and makes suggestions for dealing more effectively with NEPA compliance. It should be kept in mind, however, that the field studies on which this study is based were carried out shortly after ISTEA was enacted and before the new planning processes required by ISTEA were implemented. Thus, the study primarily discusses how the NEPA environmental review process applied to highway projects prior to the adoption of ISTEA.

### (2) Clean Air Act's Conformity Requirement

The Clean Air Act (CAA) is implemented through the Environmental Protection Agency's (EPA) adoption of National Ambient Air Quality Standards. States adopt State Implementation Plans (SIP's) containing programs that will achieve the national air quality standards in regional areas.

## Timing Corridor Preservation Strategies

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One of these programs is a transportation control element that includes transportation management strategies that will assist in achieving air quality standards.

Despite these plans and programs, many regional areas do not meet the national air quality standards for smog, or ozone. Motor vehicle pollution is a major contributor to smog. Regional transportation plans adopted by regional transportation agencies are a major influence on motor vehicle pollution because they determine the location and character of highway and other transportation projects.

Because the effect of regional transportation plans on motor vehicle pollution is so important, the CAA requires regional transportation plans to conform to SIP's.<sup>8</sup> Regional transportation plans may include corridor preservation, so transportation corridors identified in regional transportation plans must conform with SIP's adopted under the CAA.

Congress amended the CAA in 1990 to strengthen this conformity requirement. EPA adopted conformity regulations to implement the 1990 CAA amendments and decided to limit the conformity requirement to metropolitan areas where the smog requirement was most serious. EPA's conformity regulations require that long-range regional transportation plans

will not (i) cause or contribute to any new violation of any standards in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.<sup>9</sup>

The conformity requirement will have an important effect on corridor preservation in metropolitan areas that do not meet national air quality standards for smog. EPA's regulations implement the conformity requirement through an air quality emissions budget that is part of the SIP. The purpose of this budget is to determine the increase in emissions of air pollution that can be allowed without violating national air quality standards.

The regional analysis that is part of the transportation plan "must estimate the emissions which would result from the transportation system if the transportation plan and TIP [Transportation Improvement Program] were implemented, and compare these emissions to the motor vehicle emissions budget identified in the SIP [State Implementation Plan]."<sup>10</sup> This requirement means that new transportation projects and corridors can be approved only if the emissions they generate fall within the limitations imposed by the emissions budget in the state implementation plan.

The conformity regulations require the sufficient identification of "each added or modified highway segment" so that the modeling can be carried out that is necessary to make an emissions estimate.<sup>11</sup> The degree of specificity required in the planning process must not preclude "the consideration of alternatives in the NEPA process,"<sup>12</sup> but the conformity regulations do not make transportation plans and Transportation Improvement Programs subject to NEPA review.<sup>13</sup>

This study was conducted before EPA adopted its CAA conformity regulations. There was no experience at that time to indicate how the amended conformity requirement might affect corridor preservation in metropolitan areas where the requirement that it be considered applies.

**1-2.3 Subsequent to Adoption of a Long-Range Transportation Plan**

Corridor preservation needs may arise after a long-range transportation plan is adopted. The transportation planning process enacted by ISTEA is ongoing and contemplates amendments to the long-range transportation plan when necessary. All requirements that apply to the designation of a transportation corridor in a long-range plan when it is adopted also apply to a plan amendment to include a transportation corridor after plan adoption. Programs developed for corridor preservation must provide for plan amendments when necessary.



# PART 2: Actors Involved

## **PART 2: ACTORS INVOLVED IN CORRIDOR PRESERVATION**

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### **2-1 ACTORS' MISSIONS DEFINED**

In order to understand the legal and institutional barriers to corridor preservation which arise in the implementation of the corridor preservation techniques discussed in this study, it is important to identify the key actors involved and the considerations which shape their actions in that context. These actors are:

#### **PUBLIC SECTOR ACTORS**

##### **Transportation Agencies**

- Federal Highway Administration (FHWA)
- State Departments of Transportation (DOTs)

##### **Resource Protection Agencies**

- United States Environmental Protection Agency (USEPA)
- United States Army Corps of Engineers (USCOE)
- United States Fish and Wildlife (USFW)
- State Environmental Protection Agencies
- Other Federal and State Agencies

##### **Local Legislative Bodies and Commissions**

- County (Board of Commissioners; Planning Commission)
- Municipality (City Council; Planning Commission/Village Board; Planning Commission)

#### **PRIVATE SECTOR ACTORS**

- Landowners/Developers
- Citizens (Citizen/Neighborhood Groups)
- National or Regional Public Interest Group/Associations

The "mission" of each actor in the context of corridor preservation is determined by a combination of factors including statutory mandates, rules and regulations and planning policies (for public sector bodies) and economic conditions.

##### **(a) Transportation Agencies**

The mission of State DOT's is to undertake facility planning and ultimately to construct a new highway facility or to increase the capacity of an existing facility. Corridor preservation techniques support that mission by protecting planned corridors from inconsistent development and from increases in the cost of land needed for new facilities and the expansion of existing ones.

As the principal governmental body responsible for promoting corridor preservation efforts at the state level, the FHWA's general mission in this area is to identify successful preservation efforts as well as problem programs, and to coordinate resources (funding; training) between the federal and state level to promote successful preservation efforts. The success of these efforts will be measurable in terms of lower right-of-way costs and the avoidance of environmentally sensitive areas.

**(b) Resource Protection Agencies**

The fundamental mission of the USEPA, USCOE, USFW, other federal agencies such as the National Historic Trust, and parallel state agencies, is preservation of natural and historic resources.

**(c) Local Legislative Bodies and Commissions**

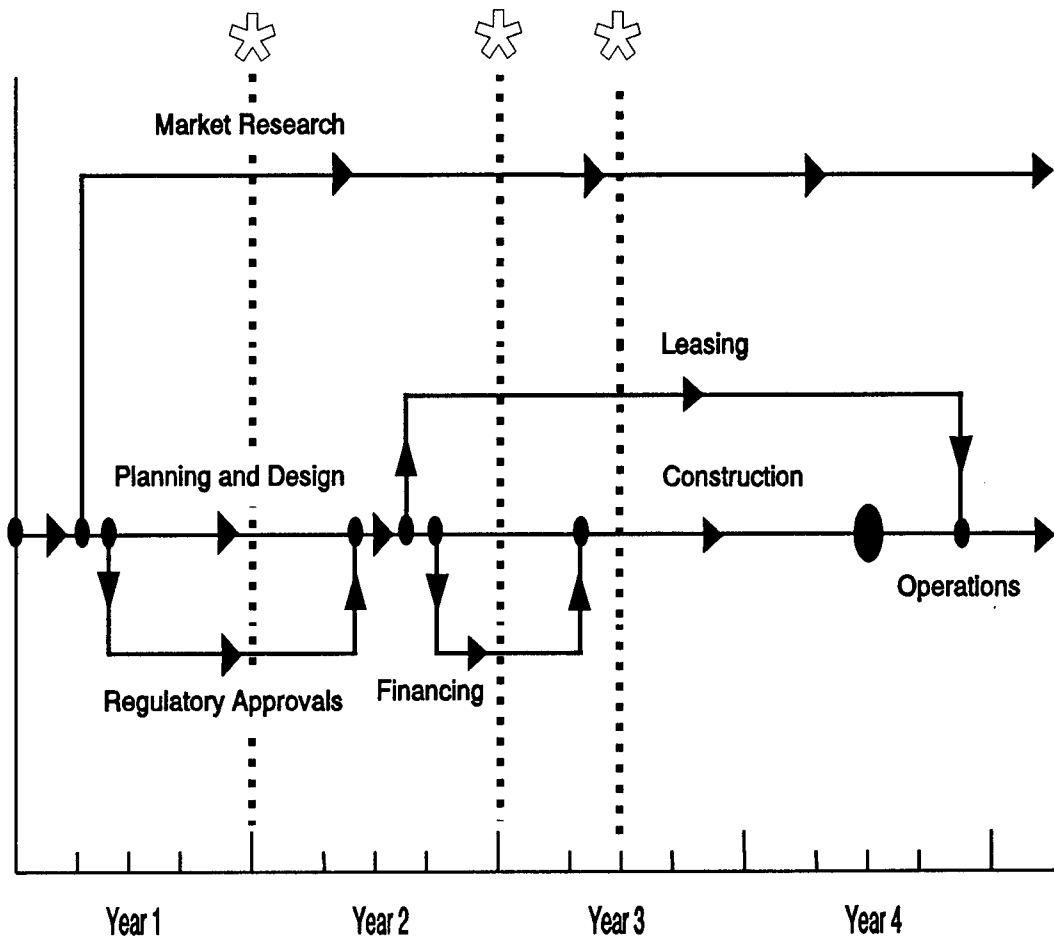
The mission of municipal and county governments, through their legislative bodies and planning commissions, is to utilize planning and development controls to accommodate development in transportation corridors without destroying the effectiveness of corridor preservation by coordinating public and private interests. However, this mission may be tempered by the need of local communities to promote economic development -- creating the potential for conflict with the mission of the transportation agency.

**(d) Landowners/Developers**

Stated in simple terms, a landowner/developer is in the business of land development to earn a return on investment. That motivation is derived from the basic right in this country to own and develop property. That motivation is consistent with the objectives of local governments to promote economic development and increase the tax base in their communities through development, particularly commercial and/or industrial development. In the context of corridor preservation, this fundamental objective of the landowner/developer must be understood and accepted as a given. If it is viewed by transportation agencies as a mission that is incompatible with the objective of corridor preservation, significant opportunities to work in concert with the landowner/developer to achieve agency objectives will be lost.

A critical point to understand with respect to the developer as an actor in the context of corridor preservation is that, to a significant degree, real estate development is a *process of negotiation*, a process of give and take. But there are built in timing constraints in that process which ultimately limit the developer's ability to be flexible in response to corridor preservation efforts. The following is a brief outline of the critical points in the development process. **(See Diagram of The Development Process on Following Page.)**

THE DEVELOPMENT PROCESS



\* = Potential Points of Critical Impact of Transportation Planning Decisions Upon Development Process

Source: Adapted from J. McMahan, Property Development (McGraw Hill, 1989)



### (1) Market Analysis

Before selecting a development site, whether for commercial, industrial or residential development, a developer usually conducts some degree of market analysis.

For residential development, the scope of analysis is geared toward a local market area. Demand factors examined include employment, disposable income, population, household characteristics, the political and economic growth climate, and the absorption rate. On the supply side, residential market analysis examines current residential construction activity and housing inventory by housing category, and current market conditions (prices, rents, building costs, etc). Typically the residential developer's analysis does not go beyond current roadway patterns as they relate to the proposed site. More often than not, highway projects that might affect the site are learned about through the newspapers. Because the residential developer is focused on a local market, the residential developer is less likely to discuss the project in advance with the local transportation agency in order to determine potential conflicts.

By contrast, the shopping center developer's market analysis usually does examine a potential site's accessibility in terms of present and future highway corridors, traffic counts, street capacities and travel times. Consequently, this type of developer is more likely to consult with the state DOT in advance of exercising any option to buy the site. Provided the developer receives agency information that can be relied upon through the projected construction stage, the developer can make adjustments that will serve both the developer's and the agency's objectives.

### (2) Planning/Design; Regulatory Approvals

The planning and design of a project, whether residential, commercial or industrial, must be coordinated by the developer with the planning and land use approval processes of the local jurisdiction. In addition to needing a particular zoning classification, the project may also need special approvals, such as a special approval under standards imposed by a transportation corridor overlay district. It may also be required to go through site plan review or planned development approval. In the process of obtaining approval, traffic impacts of the project may be evaluated and monetary exactions imposed by the local government to pay for the cost of improvements necessitated by the new development.

A critical variable in the regulatory approval process is the transportation planning process and the extent to which it is coordinated with the regulatory decisions made on a project. The more predictability (and coordination) there is between planning and regulation, the more likely it is that the developer can adjust to corridor preservation goals and timetables, by making early adjustments in site planning and financing. Interviews with developers indicate that it is the failure of planning coordination that frequently creates surprises that come too late for the developer to be able to adjust.

← Planning/  
Regulatory  
Coordination

**FAILURE TO COORDINATE  
TRANSPORTATION PLANNING  
WITH DEVELOPMENT REVIEW  
(Case Study)**

A developer of a regional shopping center mall received final approval under the state's DRI (Development of Regional Impact) process only to learn that the state DOT needed future right-of-way along an interstate highway that would require significant adjustments in the developer's site plan. This issue and its site planning consequences had never been incorporated in the DRI process even though the state DOT had participated in the DRI review. Having devoted three years to obtain commitments from major department stores and having obtained financing based upon the site plan relating to these major anchor tenants, the developer was placed in an impossible position.

**(3) Financing**

As the case study example above suggests, construction financing for any major office, commercial or shopping center project, particularly in the current economic climate, is preconditioned upon the developer tying up, in advance, not only the major tenants, but also, often a percentage of the smaller tenants, and lender approval of the site plan. Belated transportation planning decisions that impact that site plan and hence the likelihood of keeping major tenants, place the developer in an adversarial position with the transportation planning agency.

**(e) Citizen Groups**

Most frequently the mission of citizens and citizen groups who become involved in corridor preservation is similar to that of resource preservation agencies, namely, preservation. While preservation may be expressed in terms similar to those used by resource preservation agencies, more often it is expressed in terms of maintenance of "community character" or of a "quality of life" or "quality environment". Whatever the term used to describe citizens' mission, that mission can lead to conflict with the transportation planning agency and/or the developer, depending upon the citizens' evaluation of the proposed corridor alignment's/developer project's impact on the community's built environment, natural resources, traffic volumes (level of service) and accessibility within the corridor.

**(f) National or Regional Public Interest Group/Association**

The national or regional public interest group may mirror the interests and mission of local citizens. However, it may also have a mission to define issues in a larger policy context, which may lead to less flexibility in resolving corridor preservation issues.

2-2 PROPOSITIONS FOR UNDERSTANDING KEY ACTORS IN CORRIDOR PRESERVATION

The following propositions are derived from interviews with individuals in both the public and private sectors during the course of this study, and from the authors' experience in real estate development and land use and environmental regulation. They are designed to help adjust or refine models developed for corridor preservation. They are presented without any ranking or priority.

**PROPOSITION NO. 1**  
**(TRANSPORTATION AGENCIES)**

*State transportation agencies and municipal agencies need to take the initiative in setting up mechanisms to ensure the participation of landowners and developers in the corridor preservation process.*

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Corridor preservation legislation often does not include the necessary provisions for cooperation with landowners and developers. State and municipal agencies must make imaginative use of informal cooperation programs in order to ensure that the necessary cooperation occurs.



**PROPOSITION NO. 2**  
**(RESOURCE PROTECTION AGENCIES)**

*Federal and state natural resource agencies have their individual agency missions. These missions include responsibility for environmental programs whose goals may be inconsistent with corridor preservation.*

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Federal and state natural resource agencies are responsible for enforcing a wide spectrum of environmental laws. These include the National Environmental Policy Act (NEPA) and the § 404 permit program of the Clean Water Act. These laws have their own requirements, that may be inflexible and difficult to accommodate with corridor preservation. One example is the detailed environmental analysis requirements of NEPA.



**PROPOSITION NO. 3  
(RESOURCE PROTECTION AGENCIES)**

*Federal and state natural resource legislation may not allow resource protection agencies to coordinate with corridor preservation programs at a time early enough to be meaningful.*

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It is critical to take action to preserve transportation corridors very early in the transportation planning process. Natural resource legislation may not allow resource agencies to make decisions early enough in time to be coordinated with corridor preservation. For example, transportation project plans may not be definite enough at the corridor preservation stage to allow them to be reviewed under the Clean Water Act's § 404 permit program.



**PROPOSITION NO. 4  
(LOCAL LEGISLATIVE BODIES/COMMISSIONS)**

*The ability of local government legislative bodies and planning commissions to address or respond to transportation planning issues on a regional or extraterritorial basis is limited.*

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Because of limitations under state law and the political pressures placed on local land use decisionmaking, local governments may not be able to address transportation planning issues effectively outside their corporate jurisdictions.



**PROPOSITION NO. 5  
(DEVELOPERS)**

*With sufficient notice that an area has been designated for a transportation corridor plan, a developer will usually avoid the corridor area.*

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Because development involves significant financial risk, a developer looks for predictability in the planning and regulatory processes that can affect the development options of a site. Corridor transportation plans have long time horizons. The longer the projected timeline to reach the construction phase, the more generalized the plan is at the outset. A plan, particularly at the conceptual stage, introduces unpredictability in the development process that may not be worth the financial risk.



**PROPOSITION NO. 6  
(DEVELOPERS)**

*If a developer has already exercised an option to purchase or otherwise develop a site, and receives timely notice throughout a transportation corridor planning process, the developer is more likely to cooperate.*

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Developers do not like "surprises" in the development process. They are more likely to cooperate in corridor preservation if they have adequate notification of transportation corridor planning policies and decisions.



**PROPOSITION NO. 7  
(DEVELOPERS)**

*Developers of large developments are more likely to cooperate in corridor preservation programs. They have more opportunity, because of size and scale, to meet corridor preservation requirements and still achieve their development objectives.*

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Large-scale development provides more opportunity for accommodation to corridor preservation requirements through the transfer of project density and other mitigation techniques. Large-scale developers are also likely to be more familiar with corridor preservation planning and the location of transportation corridors.



**PROPOSITION NO. 8  
(DEVELOPERS)**

*The timeline of the development process is usually shorter than the transportation planning and implementation timeline.*

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Because the development process is shorter than that required for a corridor study and implementation program, there is an inherent tendency for points of tension or conflict to occur between the transportation agency and a developer who needs corridor access approval or a definitive decision on the location of a corridor alignment. This problem is compounded by the fact that a developer usually receives a financing commitment on the basis of a site plan approved by the lender. Changes to the site plan necessitated by later changes in access or alignment place that financing in jeopardy.



**PROPOSITION NO. 9  
(DEVELOPERS)**

*Developers prefer decisions based upon comprehensive infrastructure planning over incremental, case by case determinations.*

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Comprehensive infrastructure planning provides predictability in the development process and increases the likelihood that the infrastructure cost to support new development will be fairly proportioned.



**PROPOSITION NO. 10  
(CITIZEN/PUBLIC INTEREST GROUPS)**

*Because the agendas of citizen/neighborhood groups and public interest groups are frequently to preserve the existing built or natural environment, their agendas will frequently place them at odds with both the state transportation agency as well as developers.*

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In order to foster cooperation and compromise between state transportation agencies, local governments and citizen/public interest groups in preservation programs, legislation should require a process that encourages communication and cooperation between the state agency, landowners and developers and interested citizens and citizen groups. Absent state legislation, state and municipal agencies should make imaginative use of informal cooperation programs in order to ensure that the necessary cooperation occurs.







# PART 3: Fundamental Categories

## **PART 3: FUNDAMENTAL CATEGORIES OF CORRIDOR PRESERVATION MEASURES**

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A brief preliminary discussion of the different measures used for corridor preservation is helpful in understanding the later detailed discussion of these measures. In reviewing these measures keep in mind there is an important tradeoff between *police power measures*, that, if properly applied, do not require payment of compensation, and the *acquisition of land* for corridor preservation, which requires payment of compensation.

Police power measures are the regulatory controls, such as zoning and subdivision controls, that local governments adopt to regulate land development. Police power measures are the preferred corridor preservation technique. The environmental review requirements in federal legislation do not apply because police power measures do not require federal or any other funding from government.

One disadvantage of utilizing police power measures in corridor preservation is that, if applied too restrictively, they can raise significant taking of property problems. Recent land use regulation decisions by the U.S. Supreme Court have increased the potential for the taking issue to arise. It is too early to tell whether these recent decisions mean that the use of certain development controls will always be held to be a taking of property. The discussion of development controls in this study addresses the extent to which we believe taking issue problems can be avoided or remedied.

### **3-1 LOCAL LAND USE PLANNING AND DEVELOPMENT CONTROLS**

Because corridor preservation has important effects on land development, and because state transportation agencies do not exercise planning and development control powers, there is a tendency in corridor preservation programs to rely heavily on the exercise of these powers by local governments. State legislation, based on model acts published in the 1920s, has for decades authorized local governments to adopt comprehensive plans and to engage in zoning and the control of the land subdivision process. All of these powers are important in corridor preservation programs. Zoning controls land uses in transportation corridors. In the subdivision control process, local governments have required developers to dedicate to public ownership land they own that is located in transportation corridors.

Local governments also use other more recent and innovative development control techniques in corridor preservation. For example, local governments are often willing to transfer the density that could have been built on a developer's land within a corridor to the remaining part of the developer's land that is outside the corridor. Because the density allowed in a development is not decreased, this density transfer should resolve the taking issue that could otherwise arise. Density transfer, like other innovative measures used in corridor preservation, is not usually authorized by state zoning legislation. Other development controls, such as the exaction requirement noted above, may also require statutory authorization. Indeed, it is a major finding of this study that many of the applications of planning and development controls required in corridor preservation are not authorized by the typical state planning and development control act. Careful attention must be paid to providing the necessary authority for new and innovative controls if corridor preservation is to be effective.

### 3-2 CORRIDOR MAPPING LAWS

Corridor mapping laws are another local government development control technique for corridor preservation. These laws also date back to model legislation for development controls that was first proposed in the 1920s. These laws provided for what are known as "official maps" at the local government level. State legislatures later authorized state transportation agencies to adopt corridor maps for corridor preservation in state highway programs.

Corridor mapping is the one development control discussed in this study that is specifically intended for corridor preservation. Mapping programs are important in corridor preservation. They provide visual public notice of a transportation corridor and are the basis for establishing coordination between transportation agencies, land use regulators and the private development sector.

A weakness in corridor mapping laws is that the administrative techniques they authorize are not consistent with contemporary land use administration methods. Local official map laws impose a development restriction from the time they are adopted, subject only to an opportunity to request a variance when hardship can be demonstrated. This type of control is awkward and does not provide enough flexibility to deal with the many problems that can arise in transportation corridors, such as the need to provide for reasonable interim uses to avoid taking problems. Most state mapping laws use a more contemporary method of administration by requiring only that the adoption of an official map is a trigger for the submission of development applications to the state transportation agency. The agency then has a number of options in response, including the acquisition of property on which development is proposed.

← *Inconsistent  
Administrative  
Methods*



### 3-3 ACCESS MANAGEMENT

Access management is another program that states can use in corridor preservation. This program uses control over highway access to improve and enhance the capacity of existing highways and in this way prevent the need to construct additional highways. The programs first require a classification of highways by type according to access needs. Standards are then developed to provide access requirements for each highway category. These requirements are applied when developers request permission for development.

Access management can be an effective method of preserving highway capacity, but it also has several problems. One problem is that access standards are based on speed and safety requirements and so may not relate either to local land use plans or to plans for private development. There will be pressure to modify state access standards if local land use plans or private developer plans are not consistent with state requirements.

Access management programs also raise a taking issue. The right to reasonable access is a constitutional property right recognized in taking law, and an unreasonable restriction on access will be held to be a taking of property that requires compensation. Although compensation requirements for taking of access can limit access management problems, we do not believe that



## Categories of Corridor Preservation Measures

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the taking problems raised by access restriction are serious enough to warrant attention as a major barrier to access management.

Note, however, that state access standards are usually applied only to *new* development. A more serious taking of property issue relative to access restriction will arise if access standards are applied to *existing* development. However, state legislation that strengthens the use of access management techniques in corridor preservation has helped to avoid claims in court that a restriction on access is a taking of property.

### 3-4 LAND ACQUISITION

The advance acquisition of land in transportation corridors is one of the most established methods of corridor preservation. The federal government for some time has had a loan program for advance acquisition, and some states and local governments have also had land acquisition programs.

Land acquisition also faces serious problems, including the lack of adequate funding and the need to comply with environmental restrictions on land acquisition by government agencies. For these reasons, land acquisition is not emphasized as a corridor preservation measure in this study. Land acquisition can still be quite useful as a backup measure to development controls and corridor mapping programs as a means to avoid taking of property problems.

# PART 4: Barriers



## **PART 4: BARRIERS TO CORRIDOR PRESERVATION**

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### **4-1 DEFINING BARRIERS TO CORRIDOR PRESERVATION**

A barrier to corridor preservation is a legal or institutional obstacle to the implementation of any of the techniques necessary to make corridor preservation successful. This part of the study discusses each of the barriers to corridor preservation and the problems that each of these barriers creates. The matrices on the following pages summarize the legal and institutional barriers to corridor preservation and the relative strength of each barrier as an obstacle to corridor preservation programs. (See **Barrier Matrices on following pages**). Each matrix provides a framework for the discussion of the particular barrier in this study.

The chart on the following page illustrates how one state carried out corridor preservation prior to the adoption of the planning requirements in ISTEA that now make corridor preservation an element in long-range transportation plans. (See **Chart**)

In evaluating barriers to corridor preservation, it is essential to distinguish the corridor preservation programs discussed in this study from the routine protection of right-of-way through acquisition and regulation that regularly occurs in advance of project construction. This kind of corridor protection is illustrated by the right hand column of the chart on the following page. The corridor preservation programs discussed in this study must usually take place at a much earlier period in advance of acquisition.

TRANSPORTATION CORRIDOR PRESERVATION

STAGE	CORRIDOR IDENTIFICATION	ROUTE ADOPTION	PROJECT PROPOSED FOR STP	PROTECTIVE BUYING
TIME FROM PROJECT START	20 + YEARS	20 - 10 YEARS	10 - 7 YEARS	7 - 0 YEARS
Today's Actions:	<ul style="list-style-type: none"> <li>Local/Regional/State Contact Through ATSD<sup>1</sup></li> <li>Corridor Need Identified but Modal Options Open</li> <li>Conduct Corridor Environmental Review</li> <li>Include Corridor in RTP, Local General Plans and System Planning Documents</li> </ul>	<ul style="list-style-type: none"> <li>Monitor Preservation Activities</li> <li>Identify Modal Mix Through RTP/CMP<sup>2</sup> Procedures</li> <li>Start Route Adoption Study/Environmental Analysis</li> <li>Include Corridor/Route in RTP, Local General Plans and System Planning Documents</li> </ul>	<ul style="list-style-type: none"> <li>Projects Specified (Project Study Report Prepared)</li> <li>Include Projects in RTIP's, PSTIP,<sup>3</sup> other programs</li> <li>Prepare Project Environmental Document</li> </ul>	<ul style="list-style-type: none"> <li>Submit Environmental Document for Approval</li> <li>Obtain Federal Approval and Funding</li> </ul>
Preservation:	<ul style="list-style-type: none"> <li>Preserve Corridor by Local and Regional Action</li> </ul>	<ul style="list-style-type: none"> <li>Preserve Corridor by Local and Regional Action</li> </ul>	<ul style="list-style-type: none"> <li>Protect R/W by Local/Regional/State Action</li> </ul>	<ul style="list-style-type: none"> <li>Protect R/W by Protective Buying and R/W Acquisition</li> </ul>



1=ATSD Advance Transportation System Development 2=RTP Regional Transportation Plan, CMP Congestion Management Plan 3=RTIP/PSTIP Regional or Proposed Transportation Improvement Program  
 Source: California Department of Transportation (With Modifications)



4-2 INADEQUATE REGULATIONS

Inadequate regulatory powers are a barrier to corridor preservation programs. How this circumstance impacts the effectiveness of corridor preservation programs is discussed below.

BARRIERS	LEGAL			INSTITUTIONAL		
	Federal	State	Local	Federal	State	Local
INADEQUATE REGULATIONS	—	Lack of Enabling Authority ◆◆◆	Lack of Enabling Authority ◆◆	—	Intergovernmental Tensions ◆◆◆	Intergovernmental Tensions ◆◆◆
	—	Taking Clause ◆◆◆	Taking Clause ◆◆	—	Lack of Expertise ◆◆	Lack of Expertise ◆◆◆
	—	Environmental Requirements ◆	—	—	Perception of Regulatory Limitations ◆◆◆	Perception of Regulatory Limitations ◆◆
				—	Absence of Models ◆	Absence of Models ◆◆
				—	Inadequate Administrative Support ◆◆◆	Inadequate Administrative Support ◆

KEY

- ◆ = Low Significance
- ◆◆ = Moderate Significance
- ◆◆◆ = High Significance

4-2.1 Factors Affecting Regulatory Effectiveness

(a) Character of Land

Whether or not land preserved in a transportation corridor is developed or undeveloped is an important factor in the effectiveness of corridor preservation. A taking of property will occur when undeveloped land is preserved in a transportation corridor if all economically viable use of the land is prohibited. A taking of property issue will usually not arise if the land preserved in a transportation corridor is already developed, because pre-existing development will be allowed to continue and usually is an economically viable use of the land. Taking of property issues may still arise if corridor preservation affects the marketability of existing property or significantly limits its expansion or maintenance.

## **Barrier: Inadequate Regulations**

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### **(b) Existing Alignment**

Regulatory problems of corridor preservation are simplified on existing alignments. Because the highway or transportation facility is already in place, alternatives are diminished and the geographic extent of a preserved corridor need not be as great. These constraints should lessen environmental concerns about corridor preservation, especially the consideration of alternatives. The limited extent of a corridor widening may facilitate the ability of local governments to require private developers to participate in corridor preservation through dedication and reservation of right-of-way. These dedications and reservations may be justified by the impact that new development will have on transportation facilities.

### **(c) New Alignment**

Regulatory problems are more serious on new alignments. More land will have to be preserved, which increases the burden on the regulatory system because more land will be subject to taking of property limitations. Administrative support and funding will also have to be increased if the amount of land included in corridor preservation programs is increased.

Unlike public acquisition discussed in Part 7 of this study, the use of regulatory powers for corridor preservation such as corridor mapping or local planning and zoning, eliminates the need for substantial funding and avoids environmental reviews. However, it places the burden of corridor preservation on local governments and the private sector and can trigger problems under the taking clauses of federal and state constitutions.

#### **4-2.2 Legal Barriers to Adequate Regulations**

The federal government does not have land use regulation powers and so does not participate in regulatory programs for corridor preservation.

#### **LEGAL BARRIERS TO ADEQUATE REGULATIONS**

- ▶ Lack of State Enabling Authority
- ▶ The Taking Clause
- ▶ Environmental Restrictions

State transportation agencies and local governments require legal enabling authority in order to adopt and implement regulations for corridor preservation. At both governmental levels this authority should authorize the adoption and enforcement of state corridor maps or local official maps that can be used to preserve transportation corridors. Legislation at the state level should also authorize the use at the local level of planning and other land use controls, such as zoning, which are frequently used in corridor preservation.

**(a) Lack of State Enabling Authority**

Lack of enabling authority is moderately serious at the local level. Most local governments have been authorized to engage in planning and land use regulation, either by statute or under constitutional home rule. Local governments are not always authorized to adopt more sophisticated land use controls, such as density transfers, which can be useful in corridor preservation. Local governments in a substantial number of states are authorized to adopt local official maps. However, this legislation is not always adequate, partly because it raises a potential taking of property issue.

Lack of authority is more serious at the state level. State governments do not engage in traditional land use planning and control. Fewer states have statutes authorizing state corridor maps and this legislation is more likely to be inadequate because it has not been implemented for as long a time as local official maps.

**(b) The Taking Clause**

The "taking clause" (under the Fifth Amendment to the U.S. Constitution) is a substantial barrier to effective corridor preservation. The courts interpret this clause to require the payment of compensation when land use regulation excessively restricts property rights, which can occur in corridor preservation programs.

The taking clause is discussed more extensively later in this study as a barrier to corridor preservation. At this point it should be noted that the taking clause can be a serious limitation on corridor preservation because land use regulation must often severely restrict the use of land in highway corridors in order to make corridor preservation effective. The taking clause is a more serious problem at the state than at the local government level. Traditional land use control powers used by local governments in corridor preservation have a long history of judicial acceptance under the taking clause. Mapping laws raise more taking problems because corridor maps often totally restrict the use of land in highway corridors. Because mapping is the only regulatory technique available at the state level, the taking problem is more serious there.

A few states have revised their access management programs so they can use these programs as a technique for a corridor preservation. These states use access management controls to sustain the ability of existing highways to meet traffic capacity demands.

**(c) Environmental Requirements**

Environmental requirements are another limitation on the use of regulatory powers, but are not substantially serious because land regulation does not trigger the application of federal environmental law. A few states, such as California, have statutory counterparts of NEPA that apply to land use regulation. Environmental requirements can be a problem in these states. They are not rated as a serious problem in this study because only a few states have environmental requirements of this type.

### **4-2.3 Institutional Barriers to Adequate Regulations**

There are a number of institutional barriers to the use of regulatory powers. They can be summarized as follows:

**INSTITUTIONAL BARRIERS TO  
ADEQUATE REGULATIONS**

- ▶ Intergovernmental Tensions
- ▶ Lack of Expertise
- ▶ Perception of Regulatory Limitations
- ▶ Absence of Models
- ▶ Inadequate Administrative Support

**(a) Intergovernmental Tensions**

Intergovernmental tensions are serious at both state and local government levels. Effective corridor preservation programs require both state and local government implementation because corridor preservation affects local planning and land development. Many state corridor map laws explicitly provide for state-local cooperation and notice to the state agency by local governments of applications for development in transportation corridors. State and local intergovernmental cooperation has been difficult to achieve in some states, leading to intergovernmental tensions. Some local governments have planning programs that are inconsistent with state transportation planning, and it is difficult both legally and politically for state transportation agencies to compel local government compliance with state transportation planning policies.

**(b) Lack of Expertise**

Lack of expertise to administer corridor preservation programs is more of a problem at the local than the state level because local government staff may not have experience in transportation and corridor preservation programs, or they may not understand the objectives of corridor preservation. Additional training may be necessary.

**(c) Perception of Regulatory Limitations**

Staff and public perception of regulatory limitations is also critical. Problems under the taking clause are especially perceived as a major limitation on corridor preservation. The taking clause is seen as more serious at the state level because there is less experience with regulatory programs there and because taking of property issues at the state level can be more serious.

**(d) Lack of Models**

These sometimes negative perceptions are reinforced to some extent by the absence of statutory and administrative models under which corridor preservation programs can be conducted. Much of the standard legislation that is used as a model for corridor preservation that requires land use regulation is quite old, raises taking of property issues, and does not provide authority for some of the more innovative regulatory techniques.

**(e) Inadequate Administrative Support**

Lack of adequate administrative support is a final institutional barrier. It is serious at the state level, where there usually is no staff committed to corridor preservation programs. Corridor preservation is divided between planning and right-of-way offices or assigned to one or the other, with the result that the effectiveness of program implementation suffers. Administrative support is less serious at the local government level.

Corridor preservation is implemented by local governments under traditional land use programs, and may not require staff with special skills or commitment. Some jurisdictions with major corridor preservation programs have assigned them to special staff, which has significantly helped with program implementation.

**Barrier: Funding Limitations**

**4-3 FUNDING LIMITATIONS**

BARRIERS	LEGAL			INSTITUTIONAL		
	Federal	State	Local	Federal	State	Local
FUNDING LIMITATIONS	Lack of Adequate Authority ◆	Lack of Adequate Authority ◆◆	Lack of Adequate Authority ◆◆◆	Inadequate Funding ◆◆◆	Inadequate Funding ◆◆◆	Inadequate Funding ◆◆◆
	Spending Limits ◆	Spending Limits ◆◆	Spending Limits ◆◆◆	Uneven Funding ◆◆	Uneven Funding ◆◆◆	Uneven Funding ◆◆◆
	Environmental Requirements ◆◆◆	Environmental Requirements ◆	—	—	Voter Resistance ◆◆	Voter Resistance ◆◆◆
				—	Political Preference for Construction ◆◆	—

**KEY**

- ◆ = Low Significance
- ◆◆ = Moderate Significance
- ◆◆◆ = High Significance

**4-3.1 Legal Barriers to Funding**

Adequate funding is essential to all corridor preservation programs but especially for programs that rely on land acquisition. Funding not only must be adequate in amount but also must be provided at a consistently sufficient level so that state and local governments have a dependable source of funds to use for advance acquisition programs.

<p><b>LEGAL BARRIERS TO FUNDING</b></p> <ul style="list-style-type: none"> <li>▶ Lack of Adequate Authority</li> <li>▶ Spending Limits</li> <li>▶ Environmental Restrictions</li> </ul>
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**(a) Lack of Adequate Authority**

Lack of adequate authority to fund corridor preservation programs is most serious at the local level and less serious at the federal level, where federal legislation contains authority for loans

for early acquisition of highway corridors. Statutory authority for local governments does not usually include explicit authorization for funding for corridor preservation, although it can be implied.

**(b) Spending Limits**

Spending limits are another limitation on funding for corridor preservation. Constitutional and statutory limits on state and local government spending exist in almost all states. They are most serious at the local level, where voter approval is often required for new taxes that can support programs that require government expenditure. Spending limits are also contained in state constitutions, but are less serious at the state level because states have more opportunities to raise funds through taxation. There are also legal limits on expenditures at the federal level, including the amount of annual apportionments and "Q" funds for advance acquisition loans. Further, the realities of federal budgeting put practical limits on the amount of funding that can be made available for corridor preservation.

**(c) Environmental**

Environmental requirements affecting corridor preservation exist primarily at the federal level through legislation such as NEPA, which applies to all federally-assisted highways. Similar environmental legislation exists in a few states, such as New York, but most states do not have environmental legislation that applies to public works project. Environmental requirements at the local government level are not common.

**4-3.2 Institutional Barriers to Funding**

<p style="text-align: center;"><b>INSTITUTIONAL BARRIERS TO FUNDING</b></p> <ul style="list-style-type: none"><li>▶ Inadequate Funding</li><li>▶ Uneven Funding</li><li>▶ Voter Resistance</li><li>▶ Political Preference for Construction</li></ul>
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Institutional limitations to funding corridor preservation programs appear at all governmental levels and result in inadequate and uneven funding for corridor preservation, although federal funding is slightly more secure. Funding is inadequate because corridor preservation does not always have a sufficiently high priority, and because state transportation agencies may prefer construction to preservation. Construction of transportation facilities provides immediate relief for transportation congestion, provides jobs, stimulates new development and has political benefits

**Barrier: Inadequate Acquisition and Condemnation Powers**

that corridor preservation can seldom achieve. Indeed, corridor preservation can often be politically damaging. Voter resistance to adequate funding is also a major problem, especially at the local level, where voter opposition to public spending of all kinds has become a major obstacle in recent years.

**4-4 INADEQUATE LAND ACQUISITION AND CONDEMNATION POWERS**

BARRIERS	LEGAL			INSTITUTIONAL		
	Federal	State	Local	Federal	State	Local
INADEQUATE CONDEMNATION POWERS	—	Lack of Enabling Authority ♦	Lack of Enabling Authority ♦♦♦	Funding ♦♦♦	Funding ♦♦♦	Funding ♦♦♦
	—	Inadequate Authority ♦	Inadequate Authority ♦♦♦	Inter- govern- mental Tension ♦♦♦	Intergovern- mental Tension ♦♦	Intergovernme- ntal Tension ♦♦
	—	Necessity Rule ♦	Necessity Rule ♦	—	Political Pressure ♦	Political Pressure ♦
	Environ- mental Requirements ♦♦♦	Environ- mental Requirements ♦	—	—	Inadequate Administra- tive Support ♦♦♦	Inadequate Adminis- trative Support ♦

**KEY**

- ♦ = Low Significance
- ♦♦ = Moderate Significance
- ♦♦♦ = High Significance

**4-4.1 Factors Affecting These Powers**

A number of factors affect the use of acquisition and condemnation powers in corridor preservation programs. As previously noted with reference to the barrier of inadequate regulations, the character of the land affected by a transportation corridor and whether or not the corridor is a new or existing alignment are two critical factors. The cost of acquisition will be less if a corridor is undeveloped, but environmental limitations are usually more serious because there are usually alternatives to the proposed corridor alignment. The cost of acquisition may be greater if the corridor is a proposed widening of an existing facility, but environmental alternatives are fewer because the facility is already in place.



**4-4.2 Legal Barriers to Acquisition and Condemnation**

Corridor preservation programs that rely on the early acquisition of land in transportation corridors must have the authority to acquire land through voluntary conveyance and to condemn land through condemnation proceedings. This authority is also important in corridor preservation efforts that employ land use regulations. State and local governments may need to condemn land or acquire it voluntarily to avoid taking of property issues that may arise from the use of regulatory measures.

Some states authorize only the voluntary conveyance of land in corridor preservation programs. This is a barrier to corridor preservation because states may need to use the power to condemn land to acquire strategic parcels in transportation corridors when landowners are unwilling to convey voluntarily. Under the federal "Q" fund revolving account available to states, condemnation for advance acquisition is allowed and, in some cases, may be required.

**LEGAL BARRIERS TO ACQUISITION  
AND CONDEMNATION**

- ▶ Lack of State Enabling Authority
- ▶ Inadequate Authority
- ▶ The Necessity Rule
- ▶ Environmental Restrictions

**(a) Lack and Inadequacy of State Enabling Authority**

Lack of enabling authority and inadequacy of enabling authority for condemnation is especially a problem at the local level. Condemnation powers for corridor preservation are given almost entirely to state governments, so that local governments must rely on general condemnation authority that is given to them by statutes or constitutional home rule. Moreover, almost all advance acquisition for corridor preservation is done by state governments, so that the need for adequate legislation is not seen as a local government problem.

**(b) The Necessity Rule**

The necessity rule is another barrier to corridor preservation. This rule means that courts must find a "necessity" for a condemnation before they will approve it. Necessity is not usually a problem in most land acquisitions for transportation facilities, but it can become a problem when land is acquired for a facility that is not to be constructed for some time. The courts may then hold there is no necessity for the condemnation because the facility will not be needed in the immediate future. Although some courts have been unwilling to find a necessity for an advance

## **Barrier: Inadequate Acquisition and Condemnation Powers**

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acquisition for corridor preservation, this issue does not appear especially serious in most jurisdictions.

### **(c) Environmental Restrictions**

Transportation projects that are protected by corridor preservation must meet the requirements of federal environmental legislation, such as NEPA. Compliance with federal environmental restrictions is difficult at the time land is condemned or conveyed to preserve a transportation corridor because the approval and construction of the project for which the land will be used often is some years away. State and local governments will then be reluctant to condemn or take voluntary conveyance of land protected by corridor preservation because they cannot be assured that federal environmental requirements, which are essential to federal funding, will be met.

#### **4-4.3 Institutional Barriers to Acquisition and Condemnation**

#### **INSTITUTIONAL BARRIERS TO ACQUISITION AND CONDEMNATION**

- ▶ Funding
- ▶ Intergovernmental Tension
- ▶ Political Pressure
- ▶ Inadequate Administrative Support

Many of the institutional barriers have previously been noted. Funding is again a problem, as are intergovernmental tensions. These tensions in the use of condemnation powers are especially serious when they involve the federal government. State and local governments depend on federal funding for transportation facilities, and are unwilling to spend funds on advance condemnation for corridor preservation unless they are assured of eventual federal funding.

This reliance on federal funding creates a number of difficulties. One is that federal funding triggers environmental responsibilities, which are difficult to meet at an early corridor stage when precise alignments and right-of-way requirements are not known, and environmental impacts are uncertain. Another problem is that state governments may not have adequate funding for advance acquisition and may require advances from the federal right-of-way revolving fund available under 23 U.S.C. § 108, also known as "Q Funds." However, the revolving fund does not provide the adequate and consistently available funding that is required.

The inadequate administrative support that limits regulatory programs also limits the use of condemnation. Political pressure is another barrier to the use of condemnation powers, although it may not be serious. Political interests and lawmakers may favor construction programs, where results are immediately seen and which confer immediate political rewards. The use of

condemnation for corridor preservation when facilities may be some time off is not politically rewarding and may actually create political problems if there is public opposition to condemnation activities.

**4-5 ENVIRONMENTAL REQUIREMENTS**

BARRIERS	LEGAL			INSTITUTIONAL		
	Federal	State	Local	Federal	State	Local
ENVIRONMENTAL REQUIREMENTS	Environmental Assessment Requirements ◆◆◆	Environmental Assessment Requirements ◆	—	Intergovernmental Tensions ◆◆◆	Intergovernmental Tensions ◆	—
	Environmental Standards & Permitting ◆◆◆	Environmental Standards & Permitting ◆	—	Timing and Compliance Problems ◆◆◆	Timing and Compliance Problems ◆	—
	Environmental Prohibitions ◆◆◆	Environmental Prohibitions ◆	—	Processing Delays ◆◆◆	Processing Delays ◆	—
				Inflexible/Limiting Requirements ◆◆	Inflexible/Limiting Requirements ◆	—
				Citizen Opposition ◆◆◆	Citizen Opposition ◆◆	—

**KEY**

- ◆ = Low Significance
- ◆◆ = Moderate Significance
- ◆◆◆ = High Significance

**4-5.1 Factors Affecting Environmental Requirements**

Environmental requirements and regulations create barriers to the funding and use of regulatory powers in corridor preservation. These environmental barriers are, for the most part, *external* to corridor preservation programs. Environmental barriers are created primarily by federal legislation that includes transportation public works programs.

Important environmental requirements apply to the acquisition of land for highway and other transportation projects in corridor preservation programs. These requirements do not usually

## **Barrier: Environmental Requirements**

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apply to police power measures, such as mapping acts and land use control powers, that are also used as corridor preservation techniques. This is an important factor in deciding whether to use police power measures. Environmental requirements, when they apply, pose serious obstacles to the implementation of corridor preservation programs under the present structure of environmental laws.

### **4-5.2 Legal Barriers Created by Environmental Requirements**

#### **LEGAL BARRIERS CREATED BY ENVIRONMENTAL REQUIREMENTS**

- ▶ Environmental Assessment Requirements
- ▶ Environmental Standards and Permitting
- ▶ Environmental Prohibitions

The most important environmental restrictions are at the federal level. These environmental requirements take many forms. Some, such as NEPA, require a process in which the environmental impacts of federally-assisted projects, such as transportation projects, are considered. Other federal legislation, such as the dredge-and-fill permit requirement in the Clean Water Act (CWA), contain standards that are applied to federally-assisted projects.

The most important federal environmental requirements encountered in our research is NEPA.<sup>14</sup> NEPA applies whenever a state agency intends to use Federal-aid funds to construct a facility and uses or even contemplates land acquisition to implement a corridor preservation program through hardship or protective buying. Our research indicates that state agencies seek to obtain full NEPA clearance at the time they identify a highway corridor. The reason is that there may be a need to use acquisition powers at some later time. There is also a need to be assured of federal reimbursement for the expenditure of state funds in land acquisition.

The most important limitation imposed by the need for NEPA compliance is the difference in time frame NEPA compliance requires as compared with the timing requirements of corridor preservation when land acquisition is required. A full environmental impact statement under NEPA on the acquisition of land can take up to several years, but corridor preservation may require immediate action through acquisition.

FHWA and state agencies have attempted to avoid this problem in a number of ways, but none are completely successful. One method is the use of a Categorical Exclusion ("CE"). NEPA regulations authorize agencies to comply with NEPA by adopting a CE for an action if they conclude the action does not require an environmental assessment. Agencies have adopted CE's for the acquisition of land in transportation corridors when protective buying is needed. A CE can take substantially less time to prepare than a full-blown environmental impact statement because the environmental analysis required is not usually extensive.

The use of the CE in corridor preservation is still limited to individual land acquisitions. The Categorical Exclusion of an entire transportation corridor would be more effective but is not yet accepted as a way to comply with NEPA. A more appropriate method would be preparation of a tiered EIS for the corridor.

Thus tiering is another option. A state transportation agency could carry out a generalized environmental analysis for a transportation corridor. It could then prepare more detailed environmental impact statements for individual transportation projects when they are approved at a later date in the project development process.

Experience with phasing in California indicated that it may not be possible to limit consideration of environmental impacts at the corridor stage. Environmental impacts are difficult to divide neatly into different time periods. There is inevitable pressure toward full consideration of all the environmental impacts of a transportation project even at the early corridor stage of project development.

Some states, such as California and New York, have state environmental assessment legislation which is a counterpart of the federal law.<sup>15</sup> Florida is an example of a state that does not have an environmental assessment law but which, through regulation, has required environmental assessment for highway projects. In these states, compliance with the state "*little NEPAs*" is required in addition to compliance with the federal NEPA and can complicate corridor preservation efforts.

The use of state and local police power does not require a federal environmental impact statement unless federal funding is present. This is not likely at the planning and regulatory stage, and a federal court has held in a leading case that a federal impact statement is not needed on a regional transportation plan prepared under the federal highway act.<sup>16</sup> Most state environmental policy acts do not apply to local land use planning and land use control programs, but some do. California and New York are notable examples, and in these states corridor preservation programs that require planning and land use controls may require a state impact statement.

Our research uncovered similar compliance problems with other federal environmental laws, such as the dredge-and-fill program of the CWA. These statutes do not apply as pervasively to transportation projects because they apply only when a specific resource is affected, such as a wetlands or floodplain. The designation of transportation corridors also requires clearance under the National Historic Preservation Act if an historic resource is affected. Here again, the compliance difficulty is that the corridor stage is often too early a time at which to obtain approval from the environmental agency, such as the U.S. Army Corps of Engineers (USCOE), which is charged with administering the environmental law. FHWA has worked with the USCOE to achieve coordination in the application of NEPA to dredge-and-fill permits and to highway projects, and this program could be extended to include special attention to corridor preservation.<sup>17</sup>

Special problems of compliance arise from the requirement in the federal Clean Air Act (CAA) that transportation plans and projects conform with the air quality requirements of the State

## **Barrier: Environmental Requirements**

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Implementation Plans that implement CAA requirements. As Part 1 indicated,<sup>18</sup> USEPA regulations apply the conformity requirement to metropolitan regions that do not meet national air quality standards for smog. These regions are designated nonattainment areas under the CAA.

It will be difficult in many areas to bring transportation corridors into conformity with State Implementation Plans. The CAA puts regions that do not meet air quality standards for smog on a strict compliance schedule. New highways and the designation of corridors for these highways are allowed only if the air pollution emissions produced by motor vehicle travel on these highways will be within the regional "budget" for additional emissions. Because stringent air pollution reduction programs will be required in regions that are nonattainment, it will probably be difficult to budget for the additional air pollution that new highways and their corridors may produce in many regions that are not in compliance with the CAA.

### **4-5.3 Institutional Barriers Created By Environmental Restrictions**

Institutional barriers created by environmental restrictions again occur primarily at the federal level. These may be summarized as follows:

**INSTITUTIONAL BARRIERS CREATED  
BY ENVIRONMENTAL RESTRICTIONS**

- ▶ Intergovernmental Tensions
- ▶ Inflexible/Limiting Requirements
- ▶ Citizen Opposition

#### **(a) Intergovernmental Tensions**

Intergovernmental tensions are one example. Federal environmental requirements apply to state transportation programs, and compliance requires cooperation by both levels of government. As noted earlier, intergovernmental tension and timing and compliance problems occur in funding programs because states rely on the federal government to fund a substantial portion of their transportation programs. States are especially reluctant to engage in advance acquisition to preserve transportation corridors without complying with federal environmental requirements, especially the environmental assessment requirement included in NEPA. Yet compliance with NEPA is difficult because it may be too time-consuming to be undertaken at the corridor preservation stage.

#### **(b) Timing Problems**

NEPA is also an example of an environmental requirement that may impose substantial processing delays. Substantial delays create a barrier to corridor preservation because actions to preserve corridors, such as land acquisition, must usually be taken quickly.

**(c) Inflexible Requirements**

Another problem with environmental requirements is that they can be inflexible.<sup>19</sup> The dredge-and-fill ("§404") permit program in the CWA, which is administered by the USCOE and USEPA, is an example. USEPA regulations provide that an alternative to a project that requires a wetland location is presumptively preferable if the project is not dependent on a wetland location. Highway projects sometimes may require a wetland location. The §404 requirement is inflexible because it can require the relocation of a highway away from a wetland area even though the highway may create even more serious environmental problems in the area to which it is relocated. The balancing of environmental advantages and disadvantages among different program requirements is very difficult to achieve under existing federal legislation.

**(d) Citizen Opposition**

Environmental requirements are also the basis for citizen opposition to corridor preservation. Environmental laws, such as NEPA, created new opportunities for citizens and citizen groups to go to court to protest state and local public works projects, such as highway projects. Laws like NEPA also require citizen participation in the decision making process for highway projects and other public works. Increased citizen participation can improve decision making for transportation projects, but citizen opposition can also lead to delays in project implementation, which creates a barrier to corridor preservation when action must be taken quickly to preserve transportation corridors.

**4-6 PROPERTY RIGHTS**

Corridor preservation programs necessarily affect *property rights*. Land acquisition programs take property from property owners with payment of compensation. Land use regulations impose restrictions on property owners without payment of compensation. Each program raises a different type of property rights issue.

**Barrier: Property Rights**

BARRIERS	LEGAL			INSTITUTIONAL		
	Federal	State	Local	Federal	State	Local
PROPERTY RIGHTS	—	Taking Clause ◆◆◆	Taking Clause ◆◆◆	Property Rights Interest Group Advocacy ◆	Property Rights Interest Group Advocacy ◆◆	Property Rights Interest Group Advocacy ◆◆◆
	—	Necessity Rule ◆	Necessity Rule ◆	Expansive Judicial Interpretation of Property Rights ◆◆◆	Expansive Judicial Interpretation of Property Rights ◆◆	—
	—	Right of Access ◆◆	Right of Access ◆◆	—	—	—

**KEY**

- ◆ = Low Significance
- ◆◆ = Moderate Significance
- ◆◆◆ = High Significance

**4-6.1 Legal Barriers Created By Property Rights**

<p><b>LEGAL BARRIERS CREATED BY PROPERTY RIGHTS</b></p> <ul style="list-style-type: none"> <li>▶ The Taking Clause</li> <li>▶ The Necessity Rule</li> <li>▶ Right of Access</li> </ul>
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**(a) The Taking Clause**

The taking clause is a major legal limitation on the use of police power measures for corridor preservation. The extent to which the taking clause creates barriers to corridor preservation programs will depend on how it is applied by the courts. The taking clause is an open-ended constitutional limitation and has received widely varying interpretations at different times from the U.S. Supreme Court and from the state courts. An expansive judicial interpretation of the taking clause, and of other constitutional limitations such as the limitation on restriction of right



of access, will create major barriers to corridor preservation programs. A long period of time during which courts were more inclined to favor governmental interests over property interests in taking clause litigation may have ended with recent Supreme Court decisions on the taking issue.

Additional barriers to corridor preservation programs will be created if the Court continues its expansive interpretation of taking clause limitations. Recent decisions by the United States Supreme Court indicate that reserving land in transportation corridors through corridor mapping presents potentially serious taking problems. The Court held, in *Lucas v. South Carolina Coastal Council*,<sup>20</sup> that a land use regulation that deprives a landowner of all economically beneficial use of his property is a taking per se. In *Lucas* a coastal setback law prohibited the developer from erecting a single-family dwelling on a coastal plot, and there was no other use for his land. A similar situation could arise in corridor preservation if the regulations adopted to implement corridor preservation prohibit any use of land within the corridor to keep it in an undeveloped state, and no other economically beneficial use of the land is possible.

This situation need not always arise. Agricultural or other economically viable uses of land may be possible within a transportation corridor. State transportation agencies and local governments may also be able to allow low intensity uses in corridors and can mitigate the effect of a prohibition on development in a corridor by allowing a landowner to develop more intensively on land she owns which is outside the corridor.

Some state courts have considered taking clause problems in the use of corridor mapping for corridor preservation. A decision by the Florida Supreme Court held that the state corridor mapping law was unconstitutional, but a later decision upheld a municipal corridor mapping problem based on a comprehensive plan. Court decisions favorable to corridor mapping also exist in other states, such as Maryland.

Taking issues can also arise when local governments use planning and land use controls to severely restrict use of property as a means to implement a corridor preservation program. A local government may use zoning to restrict the development of property within a transportation corridor. Local governments may also require landowners to dedicate right-of-way for land within a transportation corridor. These and other land use controls can create taking problems.

It is possible to mitigate the impact of the taking clause through a combined program in which an agency can use acquisition and condemnation powers to back up police power regulation when a taking would otherwise occur. A number of states have corridor mapping statutes of this type, and an intermediate New Jersey appellate court has held its statute constitutional. Yet it is by no means clear that this kind of hybrid legislation would be approved in other states, or under the U.S. Supreme Court's taking decisions.

It is important to remember that property owners can sue under the federal constitution in state courts and rely on U.S. Supreme Court taking decisions to make their case. The Supreme

## **Barrier: Property Rights**

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Court's recent taking decisions in land use cases are more favorable to property owners than state court taking decisions in some states.

### **(b) The Necessity Rule**

The necessity rule, which has been discussed earlier, is a property rights limitation that can create a barrier to the use of land acquisition for corridor preservation. Courts must find a necessity for the acquisition of land that may not be used for a transportation facility until some time in the future. This legal limitation is not serious in most states.

### **(c) Right of Access**

Access management programs in corridor preservation programs present a somewhat different set of police-power taking issues. Reasonable access to land is a property right, so there is a possibility that controls on access in corridor preservation programs will affect the property right to access to such an extent that a taking occurs. The limitations on access rights that can be imposed without violating the taking clause are now generally clear, although there are variations among the states. Even so, court decisions on access rights are usually favorable enough to the state to support a successful access management program.

## **4-6.2 Institutional Barriers Created By Property Rights**

Property rights also create institutional barriers to corridor preservation that are created by the availability of the taking clause as a legal limitation on corridor preservation programs. These institutional barriers can be summarized as follows:

**INSTITUTIONAL BARRIERS CREATED  
BY PROPERTY RIGHTS**

- ▶ Property Rights Interest Group Advocacy
- ▶ Expansive Judicial and Legislative Interpretation of Property Rights

### **(a) Advocacy By Property Right Groups**

Property rights interest groups engage in considerable advocacy to limit the use of regulatory powers in corridor preservation and other land use programs, and to require the payment of compensation when regulatory powers are used.

Property rights advocacy has led to the bringing of court decisions to test the application of regulatory programs in corridor preservation. Advocacy also created political pressures that led

to the adoption of a Takings Executive Order by President Reagan and to the adoption of taking legislation limiting the use of regulatory powers in some states. Our research and other studies of corridor preservation indicate that opposition from property rights groups is often an important factor in a decision not to use regulatory powers in corridor preservation efforts.

The effectiveness of property rights advocacy varies inversely with the government level. It is usually most effective at the local government level, where decision makers are most accessible and where the regulation of property is, by far, the principal governmental concern. Property rights advocacy is less effective at the federal level, where Congress and federal decision makers must respond to a broad and varied constituency, and where protection of property rights is only one item on a crowded political agenda.

**(b) Legislative and Judicial Interpretation of Property Rights**

Interest group advocacy for property rights may produce more stringent judicial property rights protection and state and even federal legislation that applies the taking clause more rigorously to land use regulation. Changes in U.S. Supreme Court taking doctrine were noted earlier, and may lead state and federal courts to apply the taking clause more stringently to corridor preservation programs. Interest groups are pressuring both state legislatures and Congress to adopt legislation that codifies taking doctrine and makes it easier for courts to hold that a land use regulation is a taking.

**4-7 PROPOSITIONS FOR ASSESSING EFFECTIVENESS OF PROPOSALS FOR OVERCOMING BARRIERS TO CORRIDOR PRESERVATION**

The first step in the adoption of a barrier removal strategy is to propose a set of propositions as a screening tool that will help determine which barriers are important and which can effectively be removed. The propositions set out on the following pages can be used to help define "models" for corridor preservation programs and to improve the effectiveness of existing programs.

Some of these propositions describe existing institutional and legal characteristics that are common to all or most corridor preservation programs and create barriers to effective implementation. Other propositions state legal and institutional requirements for corridor preservation that are necessary in order to make corridor preservation effective.

**PROPOSITION NO. 1**

*Developing and implementing an effective program of corridor preservation requires complex adjustments in intergovernmental relationships in transportation programs.*

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Federal transportation programs are a federal-state partnership that requires cooperation in program administration between both levels of government. Cooperation is made more difficult in corridor preservation programs because most of the authority needed to implement a preservation program, such as the authority to regulate land use, is at the state and local, rather than the federal level. Moreover, within each state it is often local governments, rather than the state government, that carry out major corridor preservation responsibilities.



**PROPOSITION NO. 2**

*Developing and implementing an effective program of corridor preservation requires the adoption of sophisticated techniques of land use management.*

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Corridor preservation has important impacts on local land development policy, on local land development patterns, and on private property rights. When carried out through regulatory programs, corridor preservation also becomes an overlay on existing local land use regulations. Balancing all of these interests in the land management process will require sophisticated development control techniques and the sophisticated administration of development controls.



**PROPOSITION NO. 3**

*There is a tendency in corridor preservation programs for local governments to assume management responsibility by default.*

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All governmental levels participate in corridor preservation, but in the absence of a firm commitment to corridor preservation at federal and state government levels it is local governments that often assume the management of corridor preservation programs by default. They may need to and are often encouraged to assume major responsibilities in corridor preservation through the use of land use control measures, such as zoning and subdivision control.



**PROPOSITION NO. 4**

*In order to carry out an effective corridor preservation program, local governments must often extract exactions from private developers and must rely on their cooperation in the use of remedial land use controls.*

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Because public funding to preserve transportation corridors may not be adequate, local governments must often obtain land dedications and other contributions from private developers in order to make a corridor preservation program effective. The use of regulatory controls in corridor preservation creates potential "taking of property" problems. In order to avoid these problems, local governments may have to use regulatory techniques that transfer development from the area preserved for a corridor to other areas owned by developers affected by corridor preservation. These techniques require cooperation from the private development sector.



**PROPOSITION NO. 5**

*Environmental clearances must be structured so that they do not impede the effective use of corridor preservation measures.*

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Environmental clearance is essential in corridor preservation programs, most commonly when federal funds are used for land acquisition. Acquisition may be used on its own or may be a necessary backup to regulatory programs, such as official maps. States may seek environmental clearance even if state funds are used because they want to be assured of federal reimbursement. However, effective corridor preservation usually requires rapid governmental response that is not possible if lengthy environmental clearance must be obtained. Some implementation measures for corridor preservation, such as strategic land acquisition, should be considered environmentally neutral. When environmental clearance is required, it should occur at the stage when transportation corridors are mapped and limited to the environmental issues raised at that stage so that clearance procedures are not too protracted.



**PROPOSITION NO. 6**

*Effective corridor preservation must overcome the uncertainties that exist in the implementation of corridor preservation.*

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The participation of all three levels of government in corridor preservation, the tendency of local governments to accept program management by default, and problems in environmental clearance create uncertainties in corridor preservation. Legal risks caused by uncertainties stemming from recent Supreme Court land use taking cases also contribute. Corridor preservation programs must be designed to minimize these uncertainties.



**PROPOSITION NO. 7**

*The most effective corridor preservation programs require a sophisticated use of regulatory and acquisition powers, often in combination. However, the staff and understanding necessary to implement sophisticated corridor preservation programs may be lacking, especially at local government levels.*

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Legal constraints imposed by the limitations of the taking clause and problems in dealing with development pressures require considerable sophistication in the design of corridor preservation programs. Local governments may have to rely on involuntary land dedications by developers or on the transfer of development rights from transportation corridors. The necessary sophistication may be lacking at the local government level to implement these programs.



**PROPOSITION NO. 8**

*An effective corridor preservation program may require significant changes in existing federal legislative and regulatory authority.*

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Congress has recently reauthorized federal transportation programs in legislation that gave specific consideration to corridor preservation problems. This legislation may not be adequate, and additional revision may be necessary. Changes in program requirements and policy may also have to be considered.



**PROPOSITION NO. 9**

*Corridor preservation may have to be used selectively. A strategic "second best" program may be necessary that concedes preservation opportunities when preservation is too difficult to carry out.*

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There is a tendency in corridor preservation efforts to look for program solutions that will work all of the time. Unfortunately, the risks incurred in preservation efforts and the complexities of intergovernmental cooperation may make preservation efforts difficult if not impossible in many instances. "Second-best" solutions must be found that make the most of the strategic opportunities corridor preservation can present.





# PART 5: Land Use Controls



## **PART 5: LAND USE CONTROLS**

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### **5-1 THE ROLE OF LOCAL LAND USE PLANNING AND DEVELOPMENT CONTROLS IN CORRIDOR PRESERVATION**

Local governments play an important and often a primary role in corridor preservation. A major issue in corridor preservation is the use of planning and development controls to regulate and, if necessary, prohibit development in transportation corridors. The primary authority to adopt and carry out controls of this type is at the local government level, so states must often rely on local governments to implement their corridor preservation programs.

Local governments use a variety of planning and development controls to carry out corridor preservation. One of these controls, the local official map, is a development control technique that was designed solely for corridor preservation. This development control, and similar state corridor mapping laws, are discussed in the next section. This section discusses planning and land development controls, such as zoning and moratoria, which are used primarily to plan and control development within a community but which can also be used in corridor preservation programs.

### **5-2 LEGAL AND INSTITUTIONAL ISSUES**

#### **5-2.1 State and Local Roles**

State and local governments both play critical roles in the use of local planning and development controls in corridor preservation. Local governments adopt and administer these programs, but state government participation is critical in two ways. The state must provide authority for local planning and development control programs and the state courts must approve the constitutionality of local planning and development controls. 


The state can provide authority either through constitutional home rule provisions or through statutes. Home rule power may provide sufficient authority for planning and development control programs in some states, but statutory authority will be needed in most states. Statutory authority is now provided in almost all states for comprehensive planning and for the primary land use controls, such as zoning. Other more innovative development controls, such as a requirement that developers dedicate land for preservation in transportation corridors, will probably need statutory authority. This authority is not presently available in most states. In this discussion a distinction will be made between development controls that may require additional state statutory authority, and common development control techniques that are in use everywhere and for which statutory authority already is generally available.

State courts decide the constitutionality of planning and development controls in corridor preservation programs. Indeed, the state courts must apply federal as well as state constitutional law, as suit can be brought directly on the federal constitution in state courts. Recent Supreme Court decisions on the taking clause of the violation of the federal constitution as it applies to development controls have made several changes in applicable constitutional principles. These decisions are likely to provide guidelines to state courts on the taking issue for some time, and

should provide a common reference point for decisions on the constitutionality of development controls in corridor preservation programs.

Institutional issues are also important in the use of planning and development controls in corridor preservation programs. Institutional issues arise at the local government level because effective planning and development controls in corridor preservation programs require effective coordination with other local planning and development control efforts. Coordination with state government is also essential because the state transportation agency is responsible for the planning and construction of transportation facilities. Local planning and development control programs must incorporate state transportation planning and construction priorities.

### 5-2.2 Authority Issues

Police power programs raise two major legal issues. There must be adequate legal authority for the program, and the program should not raise taking of property issues. 

Constitutional home rule provisions are one source of power for corridor preservation programs. These provisions are broad enough in some states to include planning and development control powers required in corridor preservation programs. However, the lack of necessary home rule authority in some states, the restriction of home rule powers to a limited number of municipalities in others, and doubts about reliance upon home rule powers means that statutory authority is advisable for exercising planning and development control powers even in jurisdictions where home rule powers might be sufficient.

Specific statutory authority is especially required for some innovative development controls that can be useful in corridor preservation. The use of developer exactions, such as dedications of right-of-way, and density transfers, are two examples. Density transfers are useful in corridor preservation programs because they allow local governments to transfer to another part of a landowner's property the development that would have occurred on the part of the property that is reserved for a transportation corridor.

Although in some states local governments have been able to carry out developer exaction and density transfer programs without statutory authority, state legislation would provide a more secure legal base for these programs and could include provisions that would make them effective in corridor preservation. In some states the absence of statutory authority has meant that important police power measures, such as exactions, are not available. New York is an example. In that state, local governments rely on the environmental assessment required by their environmental impact statement law to impose exactions, such as impact fees, on developers for corridor preservation. These fees are then used to acquire land in designated corridor areas or to construct necessary transportation facilities.

**PROBLEM ILLUSTRATION**  
**Home Rule Authority**

**FACTS:** The Metro Regional Transportation Authority includes two states, the State of Madison and the State of Jefferson. The constitutional home rule provision in the State of Madison provides that all local governments in the state can exercise, without statutory authority, all powers over "local and municipal affairs." In the State of Jefferson the home rule constitutional provision provides that all local governments in the state can "exercise any legislative power or perform any function not denied by its charter or by the Constitution or general laws of the state."

Municipalities in both states wish to implement corridor preservation programs by adopting overlay zones for transportation corridors that include special zoning provisions, such as provisions for the review of all development proposals.

**QUESTION:** Does either or both of these constitutional home rule provisions authorize this zoning?

**ANALYSIS:** In the State of Madison, the court would probably hold that zoning is a governmental power that is shared between the state and its municipalities. This means that municipalities do not need legislation to adopt zoning ordinances, but also that the state can adopt statutes that indicate what zoning powers municipalities can exercise. A few state courts hold that zoning is a local power to be exercised by municipalities without state supervision. In the State of Jefferson, municipalities can exercise zoning powers without statutory authority, but the state legislature can also withdraw this power.

**BEST APPROACH:** The best approach is to have these states adopt legislation that authorizes overlay zones for transportation corridors that include special zoning provisions, such as provisions for the review of all development proposals.

**5-2.3 Constitutional Issues**

The taking clause of the federal and state constitutions is another important legal limitation on corridor preservation programs. Taking law remains a confusing body of doctrine. The U.S. Supreme Court has adopted a number of taking tests for land use regulations. If a land use regulation deprives land of all of its economically beneficial use, the regulation is a taking per se. If this situation does not occur, the Court applies a balancing test that considers the character of the governmental action, its economic impact and whether the regulation interferes with investment-backed expectations. The Court has also articulated a two-part taking test under which a taking is found to have occurred if a regulation does not advance a legitimate governmental interest or if it denies a property owner all economically viable use of his property.

Three recent decisions of the Supreme Court that are important to the use of planning and development controls in corridor preservation are discussed here. The first two cases discussed, the *Nollan* and *Dolan* cases, consider the use of developer exactions, such as a requirement that a developer dedicate land located in a transportation corridor to a state or local government for future use for a highway. The third case, the *Lucas* case, adopted a new rule to determine when a land use restriction is a taking of property. That case is important in corridor preservation because corridor mapping and other controls used in corridor preservation can have a very restrictive effect on land use.

### (a) The *Nollan* Case

The first case, *Nollan v. California Coastal Commission*,<sup>21</sup> was decided in 1987 and considered a condition imposed by the Commission that a property owner granted a permit for a house under the state's Coastal Act dedicate a public easement to allow the public to cross the beach in front of his property. The Supreme Court found a taking because it could not find a "nexus" or link between the easement requirement and the reason why it was imposed. The Commission gave a number of reasons, such as a finding that the house would contribute to a wall of residential structures that would prevent the public from viewing the coast, but the Court believed that none of these reasons justified the condition that an easement be granted.

*Nollan* had an important effect on corridor preservation programs because local governments often require developers to dedicate land in transportation corridors that is needed for new transportation facilities. The nexus test adopted in *Nollan* limits dedications to land necessary to meet traffic needs created by their development. It does not allow land dedications for highways when a development does not create the need for the dedication. An interstate highway is an example. The Supreme Court clarified the meaning of the *Nollan* case for exactions in its *Dolan* decision, decided seven years later.

### (b) The *Dolan* Case

In 1994, the U.S. Supreme Court decided another exaction case, *Dolan v. City of Tigard*.<sup>22</sup> In that case, the city adopted a comprehensive plan noting that flooding had occurred along a creek near plaintiffs' property. The plan suggested a number of improvements to the creek basin, and recommended that the floodplain be kept free of structures and preserved as greenways to minimize flood damage. A plan for the downtown area proposed a pedestrian/bicycle pathway intended to encourage alternatives to automobile transportation for short trips in the business district.

Plaintiffs planned to double the size of their store in the city's central business district, pave a 39-space parking lot, and build an additional structure on the property for a complementary business. To implement its plans and land development code, the city conditioned plaintiffs' building permit with a requirement that they dedicate roughly ten percent of their property to the city. The dedication included land within the floodplain for the improvement of a storm drainage system along the creek and a 15-foot adjacent strip for a pedestrian-bicycle pathway. To justify

the dedication the city found that the pathway would offset traffic demand and relieve congestion on nearby streets, and that the floodplain dedication mitigated the increase in stormwater runoff from plaintiffs' property.

The Court held a "nexus" existed, as required by the *Nollan* case, between a legitimate government purpose and the permit condition on plaintiffs' property. But the Court found a taking because "the degree of the exactions demanded by the city's permit conditions [did not] bear the required relationship to the projected impact of [plaintiffs'] proposed development." The Court reviewed the tests state courts adopted to decide this question and rejected all of them. It held the "reasonable relationship" test adopted by a majority of state courts was closest to "the federal constitutional norm," but rejected it because it is "confusingly similar" to the minimal level of scrutiny courts require under the equal protection clause.

Instead, the Court adopted a "rough proportionality" test to determine whether a taking has occurred under the federal constitution. The Court explained that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." In a footnote, the Court added that the city had made an "adjudicative decision" to condition plaintiffs' building permit, and that "in this situation" the burden of proof rests with the city. An adjudicative decision, also known as a quasi-judicial decision, requires the decision maker, as the basis for its decision, to determine the facts of a matter through a hearing, to make findings of fact, and to exercise discretion of a judicial nature in weighing the evidence and arriving at its decision.

The test the Court adopted for exactions in *Dolan* requires local governments to justify their exactions more carefully than the test adopted by a majority of state courts, and property owners can rely on the federal test by suing under the federal constitution in state courts. However, justifying an exaction in a transportation corridor should not be difficult if careful planning has preceded the designation of a transportation corridor, and if the exaction can be shown to be related to transportation needs.

An exaction in a corridor preservation program is likely to be an adjudication that shifts the burden of proof to the local government. *Dolan* shifted the burden of proof because the exaction was imposed through adjudication as a condition on the developer. An adjudication and a shift in the burden of proof should also occur when a dedication is imposed as a condition to other land use approvals, such as subdivision approvals.

(c) **The *Lucas* Case**

Another U.S. Supreme Court taking case that has an important effect on corridor preservation programs is the 1992 case of *Lucas v. South Carolina Coastal Council*.<sup>23</sup> The Court found a taking in *Lucas* when the state enacted a Beachfront Management Act that prevented Lucas from erecting a house on that part of a beach that was seaward of an historically-established erosion line. The Court held the prohibition was a taking per se because the prohibition denied Lucas

any economically beneficial use of his property. If the Court holds a land use regulation is a taking per se it means that no justification can be offered to defend the regulation. The regulation was a taking per se in *Lucas* because it denied him all viable economic use of his property.

A denial of all economically beneficial use also is likely to occur when police power measures are used in corridor preservation programs. Corridor mapping is a good example. Assume all of a landowner's property lies within a designated transportation corridor. Most state corridor mapping laws provide that no development can occur within a mapped corridor unless a permit for development is granted. If the state denies a permit, the landowner may well be deprived of all economically beneficial use of his land if there is no present use of the property that is economically viable. Of course, a taking may not occur if the land is being farmed or devoted to some other open use, such as ranching, as open uses can usually continue under a corridor mapping law. Nor may a taking occur if there already is a structure on the property, as corridor mapping laws allow existing uses to continue. The state, or a local government, may also allow a less intensive use on the property or may compensate the landowner for the restriction on his land by allowing him to develop more intensively on land he owns outside the transportation corridor.

There is no question that the taking clause is perceived as a significant barrier in the implementation of corridor preservation programs. State and local officials interviewed in our study expressed concerns about potential taking problems raised by the use of police power measures in corridor preservation.

Another type of taking problem can arise in corridor preservation programs if a court decides that a municipality has used its planning and development control powers with what is known as an "acquisitory intent." This problem arises if a municipality uses its zoning power to depress the value of land it intends to acquire later. For example, a municipality might zone a tract of land in a highway corridor for agricultural use even though the land is more properly suited to commercial use. A court could hold that this use of the zoning power was with acquisitory intent and therefore improper because the zoning restriction was adopted to depress the value of the property prior to its acquisition.

Acquisitory intent problems can also arise when a municipality prohibits or delays development on land it intends to acquire later for a public works project. For example, a municipality might refuse subdivision or other development approvals on land in a transportation corridor so that the land will remain undeveloped until it can be acquired for the highway project. A court could also find that the municipality in this instance used its development control authority with acquisitory intent.

Substantive due process problems also arise in corridor preservation programs. The due process clause of federal and state constitutions has a substantive requirement. That is, all governmental regulation, including development controls, must serve a legitimate governmental purpose. The U.S. Supreme Court included this requirement as part of its taking clause test, but courts also apply the legitimate purpose requirement independently as a substantive due process test. This issue arises, for example, in the use of downzoning in corridor preservation programs. If a



municipality downzones property in a transportation corridor to a less intensive use to prevent its development prior to its acquisition, a court could find a substantive due process violation because the zoning power has been used improperly.

### 5-2.4 Institutional Issues

The most important institutional factor in the use of local planning and development controls in corridor preservation programs is the effort that a local government makes in the planning and development control process. Whether a comprehensive plan is prepared is a major issue. A minority of states make comprehensive planning mandatory. In most states, however, comprehensive planning is still optional. In these states local governments may, but need not adopt, comprehensive plans. An effective local comprehensive planning process is essential as a method for providing a framework for local corridor preservation programs. Local comprehensive planning also is necessary in order to tie local corridor preservation efforts with state and regional transportation planning that includes corridor preservation.

Another important requirement in corridor preservation programs is the requirement that development controls be consistent with an adopted comprehensive plan. Again, only a minority of states require consistency. If consistency with the plan is not required, there is no legal authority that mandates the preservation of transportation corridors when development proposals are reviewed.

The scope, comprehensiveness and sophistication of local development controls is another important institutional issue. Zoning is the traditional method of local government development control. It is authorized by statute in all states for most local governments, and it has a secure constitutional base when it is used to regulate land use.

Zoning can be helpful in corridor preservation programs, but other more sophisticated development controls may also be necessary. Density transfers, sometimes known as the transfer of development rights (TDR's), are one example. A density transfer can be useful in a corridor preservation program because it can avoid constitutional taking problems. Density transfer allows a developer to transfer development from that part of his land which is included in a corridor to another part of his land that is outside the corridor. Yet density transfer is authorized only in a few states, and it requires a sophistication in administration that not all local governments may have. Indeed, it can be argued that the more successful a development control is in corridor preservation, the more sophistication and commitment it requires from a local government to make it effective.

Local government size is another important institutional consideration in corridor preservation programs. Small local governments may not have the resources to carry out a corridor preservation program effectively, but may have an important segment of a transportation corridor within their jurisdiction. When a transportation corridor is divided among a number of jurisdictions, the coordination of a corridor preservation program becomes quite difficult.



← *Scope &  
Sophistication  
of Controls*

← *Local  
Govt. Size*

## Comprehensive Planning

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Staffing is another problem. Small local governments may not be able to afford sufficient staff. Larger local governments may have the financial resources but may not be willing to make the necessary staff commitment.

Effective coordination with the state transportation agency is another important institutional issue. The most important institutional problem in the use of police power measures in corridor preservation programs is that the responsibility for planning and land use control powers lies primarily at the local government level. State governments do not exercise direct authority over land use, except in some states that have state wetlands permit and similar programs. Formal coordination of state transportation programs with local land use controls is not typical, although informal cooperation exists in some states.

← Powers  
at Local  
Level

The difficulty is that the state transportation agency is responsible for designating transportation corridors, but must rely on local governments to implement police power measures for corridor preservation. This division of authority necessarily leads to tensions between state and local governments and can seriously complicate the administration of a corridor preservation program. Corridor preservation can work in states, like New York, where there is close cooperation between the state and local governments, and local governments will not grant occupancy permits in transportation corridors without state approval.

### 5-3 COMPREHENSIVE PLANNING

#### 5-3.1 The Role of Comprehensive Planning in Corridor Preservation

Comprehensive planning is essential in corridor preservation programs. Federal legislation has required regional agencies in urban areas to adopt transportation plans for some time, but state transportation planning was optional. State planning is now mandatory under recent amendments in ISTEA to the federal highway legislation. ISTEA requires state and regional long-range transportation plans to "consider" corridor preservation in the planning process.

Local comprehensive planning also contains important links to transportation programs. State legislation for local planning always contains a transportation planning element, even when local planning is not mandated. The local plan's transportation element is critical in corridor preservation programs because the plan is the formal document for identifying transportation corridors that require preservation. Local development control powers used to preserve transportation corridors are based on the plan. A local government will rely on a planned transportation corridor, for example, to deny permission to develop land that lies within the corridor.

Much regional and local planning and planning legislation makes transportation planning an important component of the planning process. Washington State, for example, has adopted planning legislation that requires plans to articulate the relationship between land use assumptions

and transportation and to identify facility expansion necessary to meet predicted demand.<sup>24</sup> Corridor preservation will be an integral part of this planning process.

The local comprehensive plan also provides an important link to the use of development controls in corridor preservation. In some states, legislation requires all development controls and development permissions to be consistent with the adopted plan. Even when this requirement does not exist, the legality of a development control as a technique for corridor preservation is increased when the adoption of the control and its implementation is backed up by the designation of a corridor in the plan.

Finally, comprehensive plans provide the basis for linking state, regional and local corridor preservation efforts. Corridors designated in state plans, for example, should also appear in local plans so that the state corridor preservation can be carried out effectively at the local level. If the local comprehensive plan does not include transportation corridor designations in the state plan, there will not be a planning basis for carrying out corridor preservation at the local level that reflects state priorities.

Comprehensive planning plays a very important role in defending claims that zoning and other measures used to implement corridor preservation are a taking of property. Courts often rely on land use policies adopted in a comprehensive plan to reject claims that zoning and other regulations that implement a corridor preservation program are a taking of property.

### **5-3.2 Key Elements in Comprehensive Planning for Corridor Preservation**

The key elements outlined below are considered necessary for an effective comprehensive planning program in corridor preservation. The comprehensive plan is a statement of the goals and objectives for the future development of a community. It usually contains sections or "elements" on land use, community facilities, transportation and housing. The plan also contains a map that translates the goals and policies of the plan into land use designations indicating where different types of public and private development should locate. The planning policies and map together provide a basis for decisions on land use in the land use regulation process.

Most states have legislation authorizing comprehensive planning by county and municipal governments. Planning is optional in these states. The key elements make planning mandatory because planning by all local governments is essential to the success of a corridor preservation program. States that do not want mandatory planning should amend their existing planning legislation to authorize comprehensive transportation planning to implement a corridor preservation program consistent with state and regional transportation plans.

- (1) State legislation should authorize state and regional transportation plans that comply with ISTEA, and these plans should designate transportation corridors whenever possible.

- (2) State legislation should make comprehensive planning by local governments mandatory. It should require the preparation of a transportation planning element that is consistent with state and regional transportation plans, and should include the designation of transportation corridors as part of the local transportation planning process.
- (3) State legislation should require local plans to be consistent with state and regional transportation plans.
- (4) State legislation should make mandatory local planning and consistency requirements enforceable. One option is to provide for state agency review and approval of local plans. Judicial review is another option.

### 5-3.3 Significant Barriers for Removal

#### (a) Statutory Barriers

The implementation of ISTEA will require states to adopt new state legislation for state and regional transportation planning or to update existing state legislation to meet ISTEA requirements. Successful corridor preservation will also require the integration of local comprehensive plans with state and regional transportation plans and the preparation of transportation elements in local plans that include corridor preservation.

States provide statutory authority for local comprehensive planning in all states, but most states do not require integration with state and regional transportation plans or adequate attention to corridor preservation. Successful corridor preservation will also require statutes that make planning mandatory at the local government level because some local governments may not prepare a local plan if one is not required. Only a few states make local government planning mandatory.

State legislation for local comprehensive planning may also be deficient because it does not provide expressly for a corridor preservation element. A statutory corridor preservation element may not be essential because it can be implied from the typical statutory directive to prepare a transportation plan, but its inclusion would help provide statutory support for corridor preservation planning.

A final statutory problem is the provision of a statutory link between the state transportation plan and local plans. In the few states where local plans are reviewed by a state agency for compliance with state planning goals, compliance with the state transportation plan can be carried out in this process. In other states, it will be necessary to include a statutory requirement that local plans must include designated state transportation corridors. Enforcement of this requirement can be difficult.

**(b) Constitutional Barriers**

The most significant constitutional barrier is the possibility that the designation of a transportation corridor in a comprehensive plan will be held a taking of property. The comprehensive planning problem presented in Section 5-3.5 below indicates how this could occur, but also indicates that a court's holding that a taking has occurred is unlikely. Most courts hold that "mere planning" for public works is not a taking of property. The courts might reach a different result if a local government adopted restrictive zoning controls or prohibited the development of the land in order to implement a corridor designation in a plan.

**5-3.4 Detailed Measures for Removing Statutory Barriers**

Only the statutory barriers to comprehensive planning for corridor preservation are significant. The following proposals will remove these barriers:

**Mandatory State and Regional Transportation Planning.** *States should adopt or amend transportation planning state legislation to authorize state and regional transportation planning in compliance with ISTEA.* Corridor preservation is an essential part of state transportation planning. Options for transportation planning that will "consider" corridor preservation are detailed in Part 1 of this study. Corridor preservation will be most successful if state legislation authorizes state and regional transportation agencies to designate transportation corridors whenever possible.

**Mandatory Local Planning for Corridor Preservation and Consistency With State and Regional Transportation Plans.** *States should adopt state legislation mandating comprehensive planning by local governments and mandating consistency between the local plan and state and regional transportation plans. State legislation should also require local transportation plans to address corridor preservation and to designate corridors whenever possible.*

**Enforcing Local Planning Requirements.** It is essential to make mandatory local planning requirements enforceable. *One option is to authorize state review and approval of local comprehensive plans.* This review can be carried out by the state planning agency in states that require state review and approval of the entire local comprehensive plan. *State legislation can authorize the state transportation agency to review and approve regional transportation plans and the transportation element of local plans in states that do not have a comprehensive system for the review of local plans.*

Some states may not be prepared to adopt an integrated state-regional-local planning program with mandatory state agency review and approval. An effective corridor preservation program is possible in these states with less ambitious state planning legislation. As a minimum, *state legislation should mandate transportation planning at the local government level and should specify the elements of a corridor preservation planning program.* These requirements should be judicially enforceable.

In the absence of state review of local plans for compliance with state plans, some legal requirement is necessary that will mandate local inclusion of state-designated corridors in local plans. California is an example of a state that has this requirement. Enforcement of this requirement can be ensured through judicial or administrative remedies, but may be politically difficult to carry out.

### **PROBLEM ILLUSTRATION COMPREHENSIVE PLANNING**

**FACTS:** Granite County has a comprehensive planning program that includes a transportation element. As part of this element the county has designated a corridor for a new highway that cuts through the center of Zenith Developer's land. This corridor designation has substantially reduced the value of Zenith's land. It has also made this land difficult to sell.

**QUESTION:** If Zenith brings a court action claiming that the corridor designation in the comprehensive plan is a taking of its property, will it prevail?

**ANALYSIS:** The court would hold a taking has not occurred. Courts uniformly hold that "mere planning" for a public work is not a taking of property.

**CASE REFERENCE:** Selby Realty Co. v. City of San Buenaventura, 524 P.2d 111 (Cal. 1973)

### 5-3.5 A Case Study of Successful Planning for Corridor Preservation

#### PLANNING FOR CORRIDOR PRESERVATION (Case Study)

**FACTS:** The State of Jefferson has successfully completed its transportation planning process and has designated transportation corridors in its state transportation plan. The transportation plan is part of a state plan that includes other planning elements. The state has an integrated state-local planning process that requires planning by local governments and the consistency of local development controls with the state plan. A state agency reviews local comprehensive plans to determine if they comply with the state plan.

The state transportation agency has designated a corridor for a new highway in Granite County. The county plan initially showed this corridor, but the corridor was not as wide as the state plan required. When the Granite County plan was reviewed by the state planning agency, this defect was noted and the county was asked to bring its plan into compliance with the state plan. State approval of the county's plan was given when the county amended its plan to bring its corridor designation into compliance with the state plan.

**COMMENT:** Local comprehensive planning for corridor preservation will be less successful if some of these statutory elements are missing. For example, the county may decide not to do a plan if a plan is not required by statute. Even if a plan is required by statute, the county may not include the state's corridor designation if state review of the local plan is not provided. A requirement that local plans include transportation corridors designated in state plans may be difficult for the state to enforce.

## 5-4 ZONING

### 5-4.1 The Role of Zoning in Corridor Preservation

The local zoning ordinance is the primary control over land use. The function of the ordinance is to divide the community into land use districts that specify what land uses are allowed. There also is considerable power of discretionary review in zoning ordinances. Local governments are authorized to grant variances and exceptions to land use regulations contained in land use districts, and to authorize large-scale planned developments by approving their development plans under standards and criteria provided in the ordinance. Site plan review of developments for individual projects is another important discretionary review power.

Zoning interacts with corridor preservation in many ways. One important objective is to maintain a level of land use intensity that is compatible with the corridor designation. This usually means that the zoning ordinance designation should provide for maintaining land within a corridor in

an undeveloped state. This may not always be easy to do, since land may come into a corridor with an intensive zoning designation that is inconsistent with the objective of maintaining the corridor in an undeveloped state.

If land within a corridor is zoned at too high a density, a downzoning may be required to a less intensive use to protect the corridor. A downzoning may create taking of property problems if the downzoning is to a use that is not compatible with the surrounding area. Downzoning will also be suspect if it is applied only to properties within the protected corridor. A landowner may also claim a local government has downzoned its property within a transportation corridor to reduce the value of his land prior to its acquisition. This is known as *zoning with acquisitory intent*, and courts will usually hold it unconstitutional.<sup>25</sup>

It may be easier for a local government to refuse an upzoning to a more intensive use of property that is included within a transportation corridor. Much will depend on the nature of the existing and surrounding uses. If a landowner holds a vacant parcel in an area that is zoned and used for a more intensive use, it may be difficult to refuse to upzone the land if this is requested. It would also be difficult for a local government to argue that it is justified in refusing the rezoning because it wants to maintain the corridor in an open state until the highway is constructed.

Montgomery County, Maryland, has special provisions in its zoning ordinance for land included in transportation corridors. The land is to be classified to the least intense of adjacent zones, but the county may approve a more intensive zoning if it is recommended by a master or sector plan. Another option is to provide by zoning for *interim uses* in a transportation corridor that allow the landowner to make some use of her land but yet do not threaten the proposed transportation facility. An interim agricultural use is one possibility.

Planned unit development, site plan review and other discretionary review procedures also play a significant role in corridor preservation. Discretionary review under these procedures provides local governments an opportunity to work with developers to accommodate their development plans to corridor preservation needs. Many local governments typically work with developers in these discretionary reviews to modify proposed development and site plans so that development can occur in areas outside a preserved transportation corridor. These techniques are discussed later in this study.

### 5-4.2 Key Elements in Zoning for Corridor Preservation

The key elements in utilizing zoning for corridor preservation are:

- (1) State legislation should authorize zoning controls that are helpful in corridor preservation, such as overlay zones, planned unit development and site plan review. State legislation should also authorize interim uses by landowners in transportation corridors.
- (2) Local governments should adopt zoning controls for corridor preservation as part of a zoning program to implement a comprehensive plan.



- (3) State legislation should authorize local governments and developers to negotiate development agreements that will preserve transportation corridors yet allow economically viable development of land.

### 5-4.3 Significant Barriers for Removal

#### (a) Statutory Barriers

Statutory barriers to the use of zoning in corridor preservation are not likely to be significant. State legislation exists in most states that authorizes the use of zoning powers by local governments. Problems may arise with the use of special zoning for transportation corridors if an overlay district is used to accomplish this objective without proper enabling authority. An overlay district is a district that is superimposed on an existing zoning district to accomplish a specific zoning objective. In some states it may be necessary to provide specific authority for overlay zoning districts and for interim uses in transportation corridors that can be allowed until the facility is constructed, and for site plan review and other discretionary reviews that are useful in corridor preservation.

#### (b) Constitutional Barriers

As the zoning problems presented below indicate, the use of zoning in corridor preservation programs may create taking of property issues. Taking problems can arise in both an upzoning and a downzoning situation. Zoning may also create a constitutional problem if a court concludes a local government has used its zoning powers to depress the value of property prior to its acquisition. Zoning problems may differ significantly for corridors designated on new as compared with existing rights-of-way.

An *upzoning* denial occurs when a landowner decides to seek a zoning classification for a more intensive use on land subject to a corridor designation. When the corridor is in a rural or urbanizing area, the existing zoning on the property may be for an agricultural or low density residential use. The property owner may then seek an upzoning to a more intensive residential use, or to a commercial use. The local government will have to deny the upzoning on land in the transportation corridor if it is to preserve the corridor successfully until the transportation facility can be built.

A *downzoning* will occur if the existing zoning for land within a transportation corridor is too intensive for corridor preservation. The municipality may then downzone land within a corridor to a less intensive use. This situation may occur in a developed area. A transportation corridor may be zoned for intensive residential development, for example. In this situation, the local government will have to downzone land within the corridor to a non-developmental use, such as an agricultural use, in order to preserve the transportation corridor.

Notice that the amount of land owned by a developer that may be affected by an upzoning or downzoning will depend on the size of the tract owned by a developer and by the type of corridor

that is designated. A corridor for widening an existing highway, for example, is likely to affect only a limited amount of an owner's land if the parcel is substantial in size. In addition, because an existing highway is likely to be on the edge of a tract of land, a corridor for a highway widening is not likely to sever a land ownership and so will have a less dramatic effect on land value. A corridor for a new facility is likely to have a more dramatic effect on land value. The corridor is likely to be larger than a corridor for widening an existing highway, and may sever an owner's land. However, the impact on land value need not be negative. The proximity of the highway may increase, rather than decrease, the value the severed land.

Taking problems can be significant in either an upzoning refusal or downzoning situation because a landowner can argue that the refusal to upzone or the downzoning has taken all value from that part of his property that is within the transportation corridor. A refusal to permit any development or a downzoning may be essential in order to preserve the corridor from development. Although the case law is not yet clear on this point, a court could conclude that the Supreme Court's *Lucas* decision requires it to sever the property covered by the corridor designation from the rest of the landowner's property and then conclude that this severed property has been totally deprived of all value. This conclusion would require a court to hold that a *per se* taking has occurred.

### PROBLEM ILLUSTRATION

#### Upzoning

**FACTS:** Zenith Development Company owns a 100 acre tract of land in Granite County. All of its tract is zoned for agricultural use. The east 30 acres of its tract is in a transportation corridor designated on the Granite County comprehensive plan for a new major, but unlimited access, highway. The Zenith tract is located in a largely rural but developing area. Most of the area surrounding its tract is zoned for agricultural use.

Zenith would like to develop all of its tract for residential use. It learns about the transportation corridor designation and also learns that the state does not intend to acquire land for the highway for ten years. Zenith then applies for a rezoning of all of its tract for residential use. The county grants the rezoning for the 70 acres not located within the transportation corridor but denies the rezoning for the 30 acres located within the corridor.

**QUESTION:** If Zenith brings an action in state court claiming the refusal to rezone the 30 acres as requested is an unconstitutional taking of property, will it prevail?

**ANALYSIS:** The refusal to rezone is not a taking because Zenith may still use his land for agricultural uses and because this use is consistent with other zoned uses in the area. A court might find a taking if it believed the refusal to rezone was linked to the need to preserve the corridor.

**PROBLEM ILLUSTRATION**  
**Downzoning**

**FACTS:** Zenith Development Company owns a 100 acre tract of land in Granite County. All of its tract is zoned for residential use. The east 30 acres of its tract is in a transportation corridor designated on the Granite County comprehensive plan for a new major, but unlimited access, highway. The Zenith tract is located in a largely rural but developing area. Most of the area surrounding its tract is zoned for residential use. The state does not intend to acquire land for the highway for ten years.

Zenith would like to develop all of its tract for residential use. The county learns that Zenith's plans to develop its tract for residential use are imminent. The county then adopts an amendment to its zoning ordinance rezoning the east 30 acres of the Zenith tract for agricultural use only.

**QUESTION:** If Zenith then brings an action in state court claiming the downzoning of the 30 acres is an unconstitutional taking of property, will it prevail?

**ANALYSIS:** A court could hold that the downzoning is invalid. It is not likely to be a taking because Zenith can still use its land for agricultural use. However, courts do not usually approve downzoning that singles out an individual landowner for zoning treatment which is different from that given to its neighbors. The adoption of the downzoning to help preserve the transportation corridor also undercuts the validity of the downzoning.

**CASE REFERENCE:** Jafay v. Board of County Commissioners of Boulder County, 848 P.2d 892 (Colo. 1993)

A refusal to upzone or a downzoning can also create a potential taking issues if a court concludes that these actions were undertaken with acquisitory intent. The problem here is whether the court will find that zoning actions taken by a municipality are so linked with the preservation of a transportation corridor that the purpose of the zoning is to depress the value of the land prior to its acquisition. A court could also find that actions taken by a municipality were intended to prohibit the development of a property until it could be acquired for transportation purposes.

#### 5-4.4 Detailed Measures for Removing Barriers

**Statutory Authority for Zoning.** States should investigate the possibility of *separate statutory authorization for zoning controls that are necessary in corridor preservation programs*, such as overlay zones or the use of zones that limit development to interim uses that do not threaten a transportation corridor, such as agricultural uses. It is also essential to provide statutory authority for planned unit developments, site plan review and other discretionary zoning techniques that are useful in corridor preservation. ■

**PROBLEM ILLUSTRATION**  
**Acquisitory Intent Problem**

**FACTS:** Zenith owns a tract of land in the City of Metro which it had intended to develop as a commercial shopping center. The tract is adjacent to an existing highway. The State of Madison has designated the Zenith tract and other land adjacent to the highway as a widening corridor and has indicated it plans to acquire land for the corridor in ten years. When the city learned about the state corridor designation it adopted a three-month moratorium on any new development within the widening corridor. When the moratorium expired, Zenith applied to the city for site plan approval for its development. The city returned the application for additional information while it consulted with the state transportation agency about the state's plans for the highway widening. The city denied the application when Zenith resubmitted it.

**QUESTION:** Are the City's actions valid?

**ANALYSIS:** Many courts would invalidate these actions by the city as showing an acquisitory intent. A court could find that the city denied the site plan application when acting in concert with the state to preserve the widening corridor from development. The effect of the denial also is to depress the value of the property prior to its acquisition by the state.

**CASE REFERENCE:** People ex rel. Department of Transportation v. Diversified Properties Co. III, 17 Cal. Rptr.2d 676 (Cal. App. 1993)

**Minimizing The Taking of Property Problem.** The possibilities for the removal of constitutional barriers to corridor preservation are limited because the decision on how the taking clause applies to the use of zoning for corridor preservation is up to the courts. Municipalities can still *adopt measures in their zoning programs that will minimize the risk that a zoning restriction in a transportation corridor will be held unconstitutional.* ■

- (1) Examination of the downzoning and acquisitory intent problems indicates that courts will most likely invalidate zoning for corridor preservation if they believe a zoning restriction is selectively applied to a landowner to accomplish improper governmental purposes. Local governments can avoid this problem by adopting zoning controls for transportation corridors that are part of a comprehensive zoning program. Preferably, zoning controls for transportation corridors should implement the planning policies of the comprehensive plan.
- (2) Local governments can use discretionary zoning review procedures, such as planned unit development and site plan review, to allow development in transportation corridors in a manner that avoids taking issues. For

example, a local government can approve a density transfer as part of a site plan or planned unit development approval. Density transfers are discussed in Section 5-9. They allow development to be "clustered" in an area of a landowner's property that is outside the transportation corridor. The area within the transportation corridor can then be left open in order to preserve the corridor.

- (3) Local governments can avoid a potential taking of property problem by negotiating a development agreement with a developer. The development agreement allows the municipality and a landowner to agree in advance on a development plan for the property as the basis for a favorable zoning approval. Several states now authorize development agreements.

A development agreement can incorporate a development plan that avoids an over-restrictive impact on land value but preserves the transportation corridor. The presence of a transportation corridor can be taken into account in the agreement, and the developer's plans can be modified so that the corridor is preserved. One possibility is a density transfer that includes the "clustering" option discussed in paragraph (2) above.

5-4.5 A Case Study of Successful Zoning for Corridor Preservation

**CORRIDOR ZONING**  
(Case Study)

**FACTS:** Granite County has a comprehensive plan that includes a transportation element on which transportation corridors are indicated. The county also has sector plans for each area of the county on which transportation corridors are indicated in enough detail to administer a zoning program for corridor preservation.

The zoning ordinance provides that zoning in transportation corridors must be consistent with zoning on adjacent land, but authorizes the county council to rezone land within transportation corridors to less intensive uses. These uses can include interim uses, such as agricultural uses, that do not involve development in the transportation corridor. The council may not rezone individual tracts of land in transportation corridors to less intensive uses, but must reclassify all of the land within a designated corridor segment at one time. The zoning ordinance also states that it is county policy that rezoning to more intensive uses in the corridor zone is not to be allowed. There is adequate statutory authority for this zoning program.

**COMMENT:** This county has utilized an overlay zone for its corridor preservation zoning program, but an overlay zone is not absolutely necessary. The key strategy is that zoning for the transportation corridor is either consistent with adjacent zoning or is modified under a county policy that applies to all corridors as necessary and is not targeted to an individual landowner. Problems may still arise if a court concludes that the zoning adopted for a corridor or corridor segment was adopted with acquisitory intent. The likelihood of this finding is diminished because the zoning policy is a countywide policy intended to implement corridor planning in the comprehensive plan and not to forestall development for fiscal reasons in transportation corridors.

Statutory authority for the zoning program is provided in this example. A problem would be presented if authority is not provided. A taking issue is not likely to arise because an interim agricultural use is permitted. Agricultural zoning is constitutional if agricultural use is possible. A taking issue could arise if the zoned use is not possible on the land within the corridor.

## 5-5 MORATORIA

### 5-5.1 The Role of Moratoria in Corridor Preservation

Local governments can adopt zoning and land development moratoria as a control over land development. Moratoria are usually adopted to provide time to revise a land use plan or zoning ordinance, or to provide or upgrade public facilities such as sewer and water facilities. A leading case has also upheld the use of moratoria for growth control.<sup>26</sup>

Local governments can adopt moratoria during the preparation of a comprehensive plan that includes a transportation element designating transportation corridors. This type of moratorium is quite common. It can assist corridor preservation by prohibiting any development in a community until a transportation plan and its corridor preservation element are adopted.

A zoning or land development moratorium also is useful as a technique to maintain a transportation corridor in an undeveloped state. A community can adopt a moratorium after a transportation corridor is designated and prohibit any development in the corridor prior to the time construction is ready to begin on a transportation facility. The use of a moratorium may be unnecessary in a state that authorizes the use of a local official map for corridor preservation because the designation of a transportation corridor on an official map also imposes a moratorium on new development in a transportation corridor. Moratoria may still be useful in states where local governments do not have the authority to adopt official maps or if the local government believes a moratorium is more easily adopted and implemented. Moratoria are also more flexible than an official map because a moratorium does not require the adoption of a transportation corridor alignment.

State transportation agencies do not have the authority to adopt moratoria. Moratoria are adopted by local governments as part of their zoning and land use control programs, so the use of moratoria in corridor preservation will require close coordination between local zoning and land use programs and the planning and project development process in state transportation agencies.

### 5-5.2 Key Elements in the Use of Moratoria for Corridor Preservation

Although the majority of states do not specifically authorize the use of moratoria, most courts hold there is implied authority in state zoning legislation to adopt moratoria. However, it is advisable to have legislation specifically authorizing moratoria in corridor preservation programs to avoid the possibility a court might hold that implied authority to adopt moratoria for this purpose does not exist.

State legislation for the use of moratoria in corridor preservation should have two key elements:

- (1) State legislation should authorize the use of moratoria in corridor preservation during the preparation of transportation plans and after transportation corridors are designated in transportation plans.


## Moratoria

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- (2) State legislation should authorize and local governments should allow economically viable interim uses during the moratorium period. Local governments should adopt moratoria as part of a comprehensive land use program. Whenever possible, local governments should also adopt moratoria close to the time land acquisition is expected in a transportation corridor. These measures will help avoid taking of property problems in the use of moratoria in corridor preservation.


### 5-5.3 Significant Barriers for Removal

#### (a) Statutory Barriers

Although courts have implied the authority in many states to adopt moratoria, statutory authority to authorize the use of moratoria may be necessary. 

Courts are not likely to uphold the use of moratoria for periods as long as those that are necessary to preserve land from development in transportation corridors. Although there is no set rule on how long a moratorium may be maintained, corridor preservation may be necessary for up to 20 years prior to construction, and it is not likely that courts would approve a moratorium for this length of time. In some states, as in California, the time limit authorized by statute may be too short to make the moratorium effective in a corridor preservation program. The use of moratoria in corridor preservation may also present problems because it could be argued that maintenance of a transportation corridor in an undeveloped state is not a proper basis for a moratorium. Several states have also limited the use of land use moratoria, either by limiting the time they can be in effect or the reasons why they can be imposed. The statute may also authorize moratoria for limited purposes, such as deficiencies in public facilities, which may not include its use in corridor preservation.

#### (b) Constitutional Barriers

The use of a moratorium in corridor preservation also presents a taking of property issue. A property owner could argue that the moratorium prevents any economically beneficial use of his property for the duration of the moratorium, and that this is a per se taking of property under the U.S. Supreme Court's *Lucas* decision discussed in Section 5-2.3. One state court has held that the use of a moratorium in a corridor preservation program is not a taking,<sup>27</sup> but it is not clear that this holding is correct. Moratoria present even more serious problems since the Supreme Court's *Lucas* decision. A court could hold that a moratorium is a per se taking of land if the moratorium did not leave the property owner with an economically beneficial use of land during the moratorium period. 



### PROBLEM ILLUSTRATION

#### Moratorium

**FACTS:** In early 1991 the City of Metro began an access improvement study for an interstate highway. While the study was pending, Zenith Development Co. applied to the city for approval of a preliminary subdivision plat, site plan and special use permit to the city council for the development of a retail center adjacent to the interstate highway and in the area under study for access improvement. One month after submission of Zenith's applications, the city adopted a two-year moratorium on all development of land in the access study area. The moratorium prohibited consideration of subdivisions approvals, site plan reviews and special use permit approvals in the study area. The city council tabled consideration of Zenith's applications immediately after it adopted the moratorium.

**QUESTION:** Zenith brings an action in state court claiming the adoption of the moratorium and the tabling of its development applications are a taking of property. Will it prevail?

**ANALYSIS:** The court could hold that a per se temporary taking had occurred for the duration of the moratorium because the moratorium does not allow the landowner an economically beneficial use of his property during the moratorium period. A court could also hold a taking did not occur because it is erroneous to consider only the two-year segment of time during which the moratorium will be in effect in determining the application of the taking clause. The Supreme Court has held that taking law does not divide a property into "discrete segments" for purposes of determining whether a taking has occurred. A total taking of the property owners' full bundle of property rights has not occurred because only the use of the property during the two-year moratorium period has been restricted. The property owner will have the full use of his property after the moratorium has expired.

**CASE REFERENCE:** Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258 (Minn. App. 1993)

#### 5-5.4 Detailed Measures for Removing Barriers

**Statutory Authority for Moratoria.** The effective use of moratoria in corridor preservation programs requires specific statutory authority. *Statutory authority for moratoria is necessary, and a statute specifically authorizing moratoria in corridor preservation programs is needed.* The statute should provide the criteria for adopting moratoria in corridor preservation programs, such as the need to prevent development in the corridor until construction of the transportation facility can begin. The statute should also provide a length of time for a corridor preservation moratorium that is sufficient to accomplish corridor preservation objectives. ■

## Building Setbacks

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A moratorium statute should also specify interim uses that can be allowed in a transportation corridor during the moratorium. The statute should authorize municipalities to designate permissible interim uses and to grant special use permits for interim uses during the moratorium period. A moratorium statute may be helpful in corridor preservation programs even if a state has an official map act because a moratorium is a more flexible corridor preservation technique.

**Minimizing the Taking of Property Problem.** A strong possibility exists that the adoption of a moratorium for a corridor preservation program will be held a taking of property, especially if all economically beneficial use of the property is prohibited during the moratorium period. *Taking problems can be avoided through careful drafting and implementation of a moratorium statute. This statute should allow interim uses during the moratorium period.* Length of time is also a factor. Most of the moratoria the courts have upheld for other reasons, such as to give time to revise a zoning ordinance or comprehensive plan, have been for a reasonably short duration, such as two or three years. *A lengthier moratorium may be needed in corridor preservation.*

A possibility also exists that a court would hold a moratorium for a transportation corridor a taking of property because the municipality could be found to have had an acquisitory intent in adopting the moratorium. The problem exists even if the state is the acquiring agency, as the acquisitory intent problem presented earlier shows. A court could find that a municipality acted in concert with the state to prevent development or depress property values in advance of acquisition by the state.

States and municipalities can avoid these problems in the use of moratoria for corridor preservation if local governments adopt moratorium only when justified to control development as part of the local planning and development control process. A comprehensive development moratorium adopted for local planning and zoning purposes that also includes a corridor preservation element is more likely to be upheld against taking of property claims than a moratorium adopted specifically for corridor preservation.

Moratoria also are more likely to avoid a taking of property challenge if they are adopted close to the time that acquisition of land for a highway is contemplated. Local governments should consider adopting moratoria at earlier stages in the corridor preservation cycle only if they believe that the taking of property question can be avoided by permitting reasonable interim uses.

### 5-6 BUILDING SETBACKS

#### 5-6.1 The Role of Building Setbacks in Corridor Preservation

Building setbacks from streets and highways are another land use control that can be used in corridor preservation programs. Setbacks are an old land use control that even predates zoning, and setbacks may be required in separate setback ordinances as well as in the regulations adopted for zoning districts. Setbacks are required and upheld to prevent crowding land with development, to improve the visual aesthetics of development and to protect the public's health and safety by providing adequate passage for police, fire and medical vehicles. Building setbacks

are authorized under zoning legislation and there may also be separate statutory authority for setbacks.

Although building setbacks were not intended for use in corridor preservation programs, they can be used to reserve right-of-way for highway widening. A community will usually adopt a setback that is the width of the proposed widening and that is in addition to the setback that normally would be required under the zoning ordinance or setback control.

The use of a building setback in corridor preservation should be distinguished from land use dedications or other developer exactions for highway widening. A municipality may require a developer to dedicate or reserve a "setback" of land for a highway widening as a condition to subdivision or some other development approval. This kind of exaction is discussed later in this study. It is constitutional if the dedication for a highway widening is necessary to remedy congestion problems caused by the development.

### **5-6.2 Key Elements in the Use of Setbacks for Corridor Preservation**

In order to utilize setbacks for achieving corridor preservation, the following two elements are essential.

- (1) Statutory authority should be provided for the use of setbacks in corridor preservation.
- (2) State legislation should authorize a variance or exception from setback regulations to allow the economically viable use of land when a setback would deprive a landowner of all reasonable use.

### **5-6.3 Significant Constitutional Barriers for Removal**

#### **(a) Statutory Barriers**

There are statutory barriers to the use of setbacks for corridor preservation in most states because statutes do not usually authorize local governments to use setback controls for this purpose.

#### **(b) Constitutional Barriers**

A requirement that an additional setback be reserved for highway widening can present constitutional problems because it can be argued that reserving highway right-of-way is not a proper use of the zoning setback power, which is intended to implement safety and other land planning objectives. A highway widening setback can also present taking of property problems. The setback will usually prohibit any use of land within the setback area. A court could hold that this is a per se taking under the Supreme Court's *Lucas* decision. Courts prior to *Lucas* have invalidated the use of setbacks in corridor preservation as constituting a taking of property.<sup>28</sup>

### 5-6.4 Detailed Measures for Removing Barriers

**Statutory Authority for the Use of Setbacks in Corridor Preservation.** Statutory authority is required for the use of setbacks in corridor preservation. The statute should make it clear that setback requirements are to be based on an estimate of present and future highway needs, and that setbacks for highway widening are specifically authorized. ■

**Minimizing The Taking of Property Problem.** Because setbacks normally cover a narrow strip of land on the margin of existing lots and parcels of land, and because in many cases these existing parcels will be fully developed, it is not possible to minimize the taking of property problem by allowing low-intensive but reasonable uses. A setback will normally have to be kept undeveloped until acquired for highway purposes. A variance or exception process that allows a landowner to make a reasonable use of his land if he can show that the setback prohibits any reasonable use should help prevent successful claims that a setback is a taking of property. ■

## 5-7 LAND USE DEDICATIONS AND IMPACT FEES

### 5-7.1 The Role of Land Use Dedications and Impact Fees in Corridor Preservation Programs

The dedication of land for public purposes or the payment of fees to be used for land acquisition for public facility projects are known as developer exactions. They can be a useful land use measure in corridor preservation programs, and both dedications and fees are commonly used in corridor preservation in the jurisdictions we surveyed. Communities usually require land use dedications and fees when they approve the subdivision of land for development or when they give discretionary approval for a development, such as an exception to the zoning ordinance.

In land use dedication programs, the local government asks a developer to dedicate land within a highway corridor for future highway use without compensation. The effect of the dedication is to prevent development by removing the land from private ownership. In many jurisdictions, the developer deeds full title to the land to the municipality. Local governments in Delaware take a dedication of a negative easement in transportation corridors that legally prevents the owner of the land from developing the property.

Fees in lieu of dedication are a related land use technique that can be used in corridor preservation. Instead of asking for a dedication of land for a highway, a local government will ask a developer to pay a fee in lieu of dedication to be used for land acquisition for highway purposes. A developer's project may increase the need for highways, but he may not own land within a highway corridor that he can dedicate. By exacting a fee that can be used for highways wherever a need is created, a community has much more flexibility in the use of developer exactions to maintain land in highway corridors.

The importance of dedications and fees lies in the opportunities they present for negotiation with developers that can mitigate the impact of corridor preservation on a development project. For example, assume that either a new highway or a highway widening covers one-fourth of a

proposed residential development of 100 acres. Assume also that the zoning ordinance allows four dwelling units for each acre of a project. The zoning ordinance therefore would allow a total of 400 dwelling units. In this case, the municipality can authorize an internal density transfer of the 100 dwelling units that could have been built in the highway corridor in return for a dedication of the land that lies within the transportation corridor. The transferred dwelling units would be built in the project area that is outside the transportation corridor. This type of mitigation technique is frequently used in the corridor preservation programs we studied. Note that it also requires authority for density transfers, which are discussed in Section 5-9.

**5-7.2 Key Elements in the Use of Land Use Dedications and Impact Fees in Corridor Preservation**

The courts do not agree on whether there is implied authority in zoning or other enabling legislation to impose land use dedications and impact fees. Several states now have legislation specifically authorizing the use of dedications and impact fees, and it is advisable to adopt or amend state legislation to provide specifically for the use of dedications and impact fees in corridor preservation programs.

- (1) State legislation should authorize land use dedications and impact fees for corridor preservation. Dedications and impact fees should be authorized in the zoning as well as is in the subdivision control process.
- (2) State legislation should authorize land use dedications and impact fees for corridor preservation only if a local government has designated transportation corridors in a local comprehensive plan.
- (3) State legislation should specify a basis for requiring land use dedications and impact fees that meets constitutional taking of property requirements.
- (4) Local governments should have staff to do transportation facility need studies that will justify land use dedications and impact fees for corridor preservation.

**5-7.3 Significant Barriers for Removal**

**(a) Statutory Barriers**

The use of dedications and fees in corridor preservation programs requires statutory authority. Although some courts have implied the statutory authority to require dedications and in lieu fees, some courts have held dedications and fees unauthorized when no statutory power is conferred. State legislation should authorize dedications and fees as a condition to special uses and other development approvals as well as subdivision plat approvals. Otherwise, the use of dedications and fees in corridor preservation programs will be limited.

## Land Use Dedications and Impact Fees

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Several states have adopted statutes authorizing dedications and in-lieu fees, but even these statutes may not be adequate in corridor preservation programs. The statute may provide generalized criteria for the use of dedications and fees, but these may not easily be applicable in corridor preservation programs. State legislation should also provide specifically for the use of dedications and fees in a negotiating process in which density transfers and other techniques can be used to mitigate the impact of corridor preservation programs.

### (b) Constitutional Barriers

The use of dedication and in-lieu fees raises potential taking of property problems, especially since the U.S. Supreme Court's *Nollan* and *Dolan* decisions. These cases held there must be a "rough proportionality" between the purposes of a land use program and the dedication or fee if a taking is not to occur. In highway programs, this requirement means that a court will approve a dedication of land for a highway if the highway is required by the subdivision. It will not approve a dedication if the highway is not required by the subdivision.

In practical terms, this requirement means that a dedication for a street widening, or even for a new street or highway, will be approved if the development creates the need for the widening or new highway. A dedication will probably not be approved for a major new street or highway because the development does not create the need for the new street or highway. Some jurisdictions, such as Montgomery County, Maryland have recognized this distinction and have required only the reservation and not the dedication of land when dedication is required for a major transportation facility.

### (c) Institutional Barriers

Dedication programs also require sophisticated design and administration. Indeed, it can be argued that the limitations imposed by the taking clause compel local governments to utilize ever more sophisticated land use measures in order to implement a corridor preservation program without raising the taking issue. Some local governments, as our interviews showed, may not have the expertise or the willingness to undertake sophisticated dedication programs.

← Design and Administration

**PROBLEM ILLUSTRATION**

**Dedication**

**FACTS:** Palm Boulevard is an important north-south street in the City of Metro. The boulevard is generally laid out in a straight line, but has a slight "beer-belly" curve between Fourth and Fifth Avenues. Development on both sides of Palm Boulevard between these avenues consists of large Victorian homes, most of which have been converted either to multi-family or commercial use. Commercial zoning applies to both sides of the boulevard. For some time the city's master plan had shown the straightening of this beer-belly curve as a priority highway improvement on its comprehensive plan.

Zenith Development Co. owns a single-family residence on Palm Boulevard between Fourth and Fifth Avenues located right at the beer-belly curve. The residence has been used for multi-family residential purposes. Zenith plans to convert the residence into attractive offices. Their traffic studies show that the conversion will not generate more traffic than the present multi-family use.

Under the city ordinance, Zenith must submit a site plan to the city planning commission for commission approval. The commission approved Zenith's site plan for the conversion, but conditioned the approval on dedication of sufficient land by Zenith to straighten the beer-belly curve. This dedication will take one-fourth of Zenith's property but will not affect the conversion because the residence was built in line with existing dwellings on either side. The beer belly curve had served as a large front yard. State legislation does not authorize dedications for highway widening.

**QUESTION:** If Zenith brings suit in state court arguing that the dedication is not authorized by statute and that it is a taking of property, will it prevail?

**ANALYSIS:** Several state courts have held that statutory authority is needed for a dedication of this type. The court would also probably hold that the dedication is a taking of property. The widening of Palm Boulevard is required by the city's comprehensive plan to improve the city's street system. Zenith is in no way responsible for the curve, which has existed for some time, and its traffic studies show that the conversion will not increase traffic congestion. There is no "nexus" between Zenith's conversion and the widening dedication so the dedication is a taking of property.

**CASE REFERENCE:** Rohn v. City of Visalia, 263 Cal. Rptr. 319 (Cal. App. 1989)

### 5-7.4 Detailed Measures for Removing Barriers

**Statutory Authority for Dedications and Fees.** Many states have adopted legislation authorizing the use of dedications and in-lieu fees in local development control programs. *States should adopt or modify existing legislation to expressly authorize the use of dedications and reservations in corridor preservation programs and should provide standards for the use of these measures.* This legislation should be drafted to authorize the use of dedications and in-lieu fees as a condition to special uses and other development approvals as well as subdivision plat approvals. Otherwise, many land development projects will not be subject to the dedication and fee requirement. ■

The need for separate statutory authority for corridor preservation programs arises out of the different use of dedications and fees in these programs. In most instances, dedications of widening strips for highways are intended for immediate construction as soon as the development is completed. Indeed, under some ordinances developers are required to construct the highway widening as well as dedicate land for it.

Different problems arise when dedications and fees are used for corridor preservation. Developers are asked to develop land or pay fees to hold corridors that will be constructed at some time in the future, when need arises. In the usual case a developer will contribute some but not all of the traffic congestion that requires a street or highway widening. Because dedications and fees are constitutionally justified by the nexus test, the statute must be drafted to require a determination of how much congestion can be expected to be created by the development that is subject to a dedication or fee so that the developer's proportionate contribution can be determined.

*It will also be helpful if statutory authority for dedications and fees is linked to density transfers and other techniques for mitigating the impact of corridor preservation on a development project.* The statute should provide specifically for the use of dedications concurrently with density transfers in order to avoid taking of property problems.

*The successful implementation of a dedication and fee program for corridor preservation will also require an extensive planning program.* The studies necessary to justify dedications and fees should be carried out as part of a planning program so that courts will be convinced that dedications and fees are based on community needs and are not directed solely at an individual developer without justification. *State legislation should authorize local governments to require land use dedications and impact fees only if the local government comprehensive plan has designated transportation corridors.*

**Minimizing the Taking of Property Problem.** The Supreme Court's holding in the *Dolan* case means that local governments will be held to a higher standard when justifying exactions in corridor preservation programs. Even before *Dolan*, as the dedication problem presented in Section 5-7.3 shows, some state courts struck down dedications for highway purposes that did not meet the nexus test. Although the impact of the *Dolan* case on exactions is not yet clear, it ■



is essential to avoid fact situations of the kind presented in Section 5-7.3. Local governments must justify dedications and impact fees with strong empirical support that show they meet the requirements of the taking clause.

*A well-drafted statute can support dedications and fees in corridor preservation programs if the statute is carefully drawn to require application of the nexus test and if the statutory criteria are followed.* Courts will especially be persuaded that a dedication and fee are constitutional because the municipality is required to use the same statutory criteria for all dedications and fees within its jurisdiction. Developers will not be able to show that a dedication or fee was directed solely at them because the same statutory criteria will have been used throughout the community. Statutory authorization of mitigation measures, such as density transfers, will also help avoid taking problems.

**Supporting Studies and Staffing.** Dedications and fees for corridor preservation will require complex planning and traffic studies to determine the appropriate nexus on which a dedication or fee can be based. State legislation can simplify administrative problems by providing clear standards that can be applied in corridor preservation programs at the local government level.



Even so, the successful implementation of a dedication and fee program will require additional staff and administrative sophistication that some local governments, especially smaller local governments, cannot afford. In a typical case, for example, the imposition of a corridor preservation dedication and mitigating density transfers will require detailed studies of traffic needs that justify the dedication and the submission and review of detailed design plans as the basis for a density transfer mitigation. The statute will have established criteria for the dedication and for the density transfer, but these criteria must be applied to individual development applications as they are presented for approval.

← *Need for additional staff and administrative competence*

Another problem is that small municipalities may not have a large number of developments that are subject to corridor preservation dedication requirements. In this situation, the municipality may not be able to justify the staff needed to process dedications and density transfers, and will not be able to acquire the experience necessary to administer a dedication and density transfer program successfully.

There are no easy answers to these problems. The incorporation of state corridor designations may help simplify local administration of dedications and fees, especially as states complete their mandated transportation planning programs. Regional transportation planning agencies can help by making transportation studies available. The costs and difficulties of administration still remain at the local government level.

**5-7.5 A Case Study of a Successful Dedication Program for Corridor Preservation**

**DEDICATION PROGRAM  
(Case Study)**

The State of Jefferson has adopted a land use dedication and in-lieu fee statute for corridor preservation. The statute has the following elements:

1. Local comprehensive plans are mandatory and must incorporate in their transportation elements the corridor designations made in a state or regional transportation plan.
2. Transportation studies by the state transportation agency and a regional transportation agency, if there is one, are to be accepted in court as prima facie evidence of the need for a transportation corridor designated in a state or regional transportation plan.
3. Land dedications and in-lieu fees are authorized for transportation corridors designated in a state or regional transportation plan. Local governments may rely on state or regional transportation studies to determine the proportionate contribution a developer must make by way of a dedication or fee to the preservation of a transportation corridor.
4. A local government must show that state or regional and local transportation studies support a nexus between the dedication or fee required for corridor preservation and the dedication and fee required from the developer.
5. Local governments are authorized to provide density transfers on development projects that will mitigate the impact of a dedication or fee for corridor preservation on a developer.

Zenith Development Co. owns 100 acres of land in Granite County on which it plans a shopping center development. The county's comprehensive plan shows a transportation corridor for a new state highway that is designated on the state transportation plan. The corridor takes one-third of Zenith's land in a strip of land on the edge of Zenith's land but also severs five acres of land from the rest of the Zenith property. Studies in support of the state transportation plan show that the corridor will be needed to meet transportation needs that will arise in the next 20 years. Studies by Zenith show that its development will contribute one-third of that need.

Through negotiation, the county and developer arrive at the following agreement: They agree that dedication of five acres of the developer's land represents its pro rata contribution to the need for the transportation corridor. To meet this need, the developer agrees to dedicate to the county the five-acre parcel that is severed from his land. As the county also wishes to preserve the transportation corridor that crosses the developer's land, the county and the developer work out a density transfer arrangement that transfers to the remainder of the developer's property the development density that would have been built in the highway corridor. The development requires site plan approval, and the density transfer is approved as part of the site plan approval process.

In the preceding case study, the state has adopted a dedication and in-lieu fee statute that meets the needs of the corridor preservation program. Note that the statute provides for coordination between state and regional transportation planning programs and the local comprehensive plan and that local governments must demonstrate a nexus that supports a dedication or fee. Local governments may rely on state and regional transportation studies to show that a nexus exists, but note that local studies are still necessary to determine the contribution developers must make to the preservation of a transportation corridor. Density transfer is authorized as a mitigation measure. The statute also applies specifically to corridor preservation.

Deletion of any of these statutory elements will weaken a corridor preservation program. In particular, reliance on a dedication or fee statute not specifically designed for corridor preservation means that many elements needed in a corridor preservation program will be omitted.

The problem presented is simplified enough so that the corridor preservation requirement can be met. Dedication of the five-acre remnant meets the developer's dedication requirement. The county also is able to authorize a density transfer that will offset the dedication of land within the highway corridor and thus avoid a taking problem. Other corridor configurations may not be as easy to mitigate. Mitigation is especially difficult if a transportation corridor severs a developer's property down the middle and leaves remnants on either side that are not possible to develop. Transportation planners may be able to design around this problem.

## **5-8 LAND USE RESERVATIONS**

### **5-8.1 The Role of Land Use Reservation in Corridor Preservation**

Requiring the reservation of land in corridor preservation programs is a land use technique that is similar to dedication. Development may not occur on reserved land for a specified number of years, and the local government is required to compensate the landowner when the land is finally taken for a transportation facility. Montgomery and Prince George's counties in the suburban Washington, D.C. area in Maryland, where we conducted interviews, are outstanding national examples of a reservation program in corridor preservation. The two counties are served jointly by a Maryland-National Capital Park and Planning Commission.

This program is authorized by state law<sup>29</sup> and is tied to the subdivision control process. These counties are authorized to condition subdivision approval on a developer's making a reservation of land for a transportation corridor shown on a comprehensive plan. Ordinances in both counties implement this statutory authority. Reservations are based on the county plan and area plans within the counties that are in turn carried forward in detailed plans as the basis for reservations that show lot lines and ownerships. A reservation is limited to three years, and property taxes are abated during this three-year period. Property tax abatement facilitates developer acceptance of the reservation requirement. The Montgomery County ordinance denies any use of the property unless authorized by the county. The ordinance prohibits any building or structure on reserved land during the reservation period.

## Land Use Reservations

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These counties also have a requirement that development can be allowed only if a developer can show that public facilities are adequate. This requirement has sometimes been used to protect highway corridors when transportation facilities are not adequate for a development that has been proposed.

The reservation program in these counties has been somewhat successful, but it has required sophisticated and expensive administration. Some of the problems may have been created by the Maryland law under which reservations are required. The statutory limitation of the use of reservations to subdivision control has sometimes proved troublesome, and attempts have been made to tie reservations to development permits. The reservation period is only three years, which is not sufficient for a corridor preservation program that may require a twenty-year lead time. The statute does not authorize extensions of a reservation, which must be voluntary and cannot be coerced by a denial of a building permit or some other county action.

The tax abatement provision is also problematic. One problem is that developers will apply for a reservation to obtain the tax abatement, knowing the reservation will expire before the transportation facility for which the land is reserved can be built. The county has lost taxes in the interim and must still acquire and pay for the land.

Attempts have been made to deal with these problems in a number of ways, such as negotiating longer reservation periods with developers and by refusing applications for reservation and tax exemption if the county believes the application is premature. These attempts at improving the reservation program have not been entirely successful, and both counties consider themselves somewhat at the mercy of developers in their corridor preservation programs. Changes in the state legislation may be required to make this program effective.

### 5-8.2 Key Elements in the Use of Land Use Reservations in Corridor Preservation

State legislation authorizing the use of land use reservations in corridor preservation is necessary. It is highly unlikely a court would find the necessary implied statutory authority for land use reservations. The key elements in the use of land use reservations in corridor preservation are:

- (1) State legislation should authorize local governments to adopt a land use reservation program for corridor preservation.
- (2) State legislation should authorize the use of land use reservations for corridor preservation in the zoning and the subdivision control process. Local governments should have the option to decide when land use reservations are necessary and should have the authority to determine time limits for reservations.
- (3) State legislation should authorize and local governments to allow economically viable interim uses and density transfers on land reserved for transportation corridors. These measures will help avoid the taking of property issue in the use of land reservations for corridor preservation.

- (4) Local governments need to provide adequate staffing for land reservation programs.

### 5-8.3 Significant Barriers for Removal

#### (a) Statutory Barriers

This analysis of the Maryland program indicates that statutory authority is needed for land use reservations and that statutory authority must be adequate. As the discussion above indicated, some of the details of the state legislation authorizing land use reservations in Maryland have impeded the implementation of a successful program. If the reservation is to be coupled with a property tax abatement, it is clear that the timing and length of time of the reservation are critical. The Maryland experience also indicates that linking the reservation to development approvals other than subdivision approvals is essential because otherwise some development will escape the reservation requirement. The statute should also give the local government some discretion in deciding whether to accept a reservation so that it can control the timing of reservation requests.

#### (b) Constitutional Barriers

The reservation program clearly presents constitutional problems similar to those presented by dedications. Land is reserved for up to three years under the Maryland programs and any building or structure on the land is prohibited during the reservation period. Although the Maryland cases have held that reservations in transportation corridors are not a taking of property,<sup>30</sup> they have also held that a taking occurred when the land use reservation was too restrictive.<sup>31</sup>

#### (c) Institutional Barriers

This discussion of the Maryland reservation programs also indicates the institutional problems that can arise in programs of this type. Some of these problems are the result of the program mandated by the Maryland law, which confers favorable tax abatements on developers but does not give the counties the option to refuse reservations, and provides for a short reservation term without renewal. The counties cannot mandate a reservation, which is voluntary and attached only to the subdivision review process. The result is that the law places the counties and developers in a confrontational posture. Developers hold the upper hand, and can apply for a building permit, or file and then withdraw a building permit application, with the clear threat that the developer will proceed with building unless a reservation is granted or the land acquired. The counties have an advance acquisition program, but the funds available are not enough to preserve all land from development when development pressures threaten.

## Land Use Reservations

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Another institutional problem is that political resistance to change may make it difficult to improve the Maryland state legislation. Authority to require a reservation for a longer period of time would be quite helpful, for example, but it is not clear that the legislature would be willing to grant this authority.

← *Political Resistance*

Staffing is another institutional problem. The administration of a program as complex as a reservation program requires the fiscal resources for the training and maintenance of additional staff.

### 5-8.4 Detailed Measures for Removing Barriers

**Statutory Authority for Land Use Reservation.** This discussion of the Maryland program indicates that statutory authority is needed to make a land use reservation program effective. *The major element is authority that places initiative under the program with the local government, which would be able to require reservations anywhere in the development control process without having to respond to a development proposal.* Local governments should have the authority to approve or disapprove a request for a reservation, or to require the reservation of land when they believe it is necessary. Local governments should also have the authority to require land reservations in the zoning process, when applications for the approval of a development project are submitted, as well as in the subdivision control process. Other issues that should be considered in a reservation statute are the provision of reasonable time limits, authorization for reasonable interim uses, and authority in the local government to negotiate time extensions when necessary. ■

**Minimizing The Taking of Property Problem.** The taking problems presented by reservations for transportation corridor are similar to those presented by moratoria. *Provisions for reasonable interim uses and density transfer can help avoid taking problems,* but the risk is still present a court would find a total deprivation of all use that is a taking of property or a taking based on acquisitory intent. ■

**Adequate Staffing.** The discussion of the Maryland reservation program indicates that the *implementation of a successful reservation program will require informed and possibly expensive administration. Because reservations are required in the development process, staff must be available at all steps in that process to review and request reservation proposals.* Detailed planning and mapping of transportation corridors is also required. Negotiation with developers can be time-consuming and difficult. Municipalities planning to adopt a reservation program must be willing to make the necessary staff and time commitments to make the program successful. ■

*It is recommended that state transportation agencies make financial assistance for administration available to local governments that need it.* Financial assistance for corridor preservation is presently available in some states.

**5-9 DENSITY TRANSFERS**

**5-9.1 The Role of Density Transfers in a Corridor Preservation Program**

Density transfers are another, equally sophisticated, land use measure used in corridor preservation. Density transfer is effective when only part of a developer's land is included within a transportation corridor and the developer plans to develop the remainder. The local government can then trade off a dedication or reservation of the land within the corridor against an increase in density on the land not within the corridor so that the developer is left with the same intensity of development even after the dedication. The result is that the developer does not lose any development density as a result of the corridor preservation, and so a taking problem does not occur. Our interviews found several jurisdictions where density transfers were successfully used in corridor preservation.

Density transfers are a form of development review also known as planned unit or clustered development. Density transfers are a limited form of planned unit development review because density in a development is not increased and uses remain the same. The only effect of the review is to transfer development from one part of a tract to another. Often this is done in return for the provision of open space or other amenity features, which offset the increased concentration of density that occurs on that part of the tract to which the density is transferred. In corridor preservation, the density transfer offsets the loss of land for the corridor that occurs through dedication or reservation.

Density transfers do not occur automatically. They require a rearrangement of the densities that can be provided on a tract of land and a concentration of the density allowed for an entire tract on that part of the tract not affected by the transportation corridor. The municipality must adopt an ordinance in which criteria for transfers are provided to be applied in a review process in which applications for density transfer are considered and approved.

**5-9.2 Key Elements in the Use of Density Transfers in a Corridor Preservation Program**

Although a few courts have found implied statutory authority to require density transfers in land use programs, it is advisable to have legislation specifically authorizing this land use control technique. The key elements in the use of density transfers in corridor preservation are:

- (1) State legislation should authorize the use of density transfers in corridor preservation.
- (2) State legislation authorizing density transfers should specify criteria for their approval. Legislation should allow density transfers when land use dedications and impact fees are required for a development in a transportation corridor.

## Density Transfers

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- (3) Local governments should administer density transfer programs fairly. They should not arbitrarily reduce zoning densities on land within a transportation corridor in order to force landowners into a density transfer program.
- (4) Local governments should provide adequate staffing for density transfer programs.

### 5-9.3 Significant Barriers for Removal

#### (a) Statutory Barriers

The use of density transfers in corridor preservation presents a potential statutory authority problem. The Standard Zoning Act that is the basis for zoning legislation in all states does not authorize the review process that density transfer requires. Although courts have held that the necessary review powers can be implied from the zoning act,<sup>32</sup> it is advisable to include authority for density transfers in the zoning act. This is especially so since the use of density transfers for corridor preservation presents problems not presented by the usual density transfer proposal. Density transfers increase density in one part of a development because the density allowed in the entire development is concentrated there. This concentration is offset by the provision of open space or other amenities in the usual density transfer, but this amenity offset does not occur when a density transfer is used in corridor preservation.

#### (b) Constitutional Barriers

There usually should not be any serious constitutional problems with density transfers because density is merely rearranged on a tract of land. Constitutional problems can arise, however, if the municipality manipulates the zoning process to make density transfers attractive. For example, a developer asked to accept a density transfer can argue that the higher density offered on the remainder of his land to offset a dedication or reservation for a transportation corridor is spurious because the local government earlier downzoned his land in order to make the density transfer attractive. This argument can be hard to counter, although a Maryland case has rejected it.<sup>33</sup>

#### (c) Institutional Barriers

Density transfers will require sophisticated and probably expensive administration. An equivalency rule must be adopted, for example, that can determine how much area should be allowed for streets when density is concentrated on only part of a tract. This rule is not easy to develop because higher densities require proportionately less area for streets per dwelling unit than lower densities. A density transfer ordinance also requires staff to review project proposals.

← Administrative  
Cost



A density transfer can be objectionable for other reasons. In Prince George's County, Maryland, where density transfers have been used, neighbors adjoining the area to which density has been transferred have objected because the development allowed after the transfer is more intense than it would have been even though the density is not changed. The area included in the land dedicated for the corridor together with the land remaining in the developer's ownership, for example, might all have originally been zoned for single family use. After the dedication and the density transfer, neighbors may find all of the residential development concentrated on the remaining land in a more intensive configuration, such as townhouses. Overall density has not been changed, but it has been concentrated in one place and neighbors may find this objectionable.

#### 5-9.4 Detailed Measures for Removing Barriers

**Statutory Authority for Density Transfer.** It is advisable to provide statutory authority for the use of density transfers in corridor preservation programs. Most model legislation that authorizes density transfers is designed primarily for more ambitious planned unit developments, but there is some legislation that authorizes density transfers only within developments.<sup>34</sup> *The legislation should specifically authorize local governments to adopt an ordinance providing for density transfer and for a process in which applications for density transfers can be considered and approved.*

*The statute should provide for the use of density transfers when part of a development is to be dedicated or reserved for corridor preservation, and dedications and reservations for corridor preservation should specifically be authorized. The statute should also include criteria under which dedications and reservations can be required without violating the taking clause. It is also important to specify that the approval of a density transfer cannot result in an increase in density, and to specify the type of development that can occur on that part of the tract on which density is concentrated.*

**Fair administration.** Local governments should set densities at appropriate levels. They should not downzone densities for projects in transportation corridors to make density transfer more attractive to developers. *Density transfers should not decrease the density in a development project from what it would have been if none of the land had been restricted by a transportation corridor.* In other words, the increase in density on the land that is available for development should offset the loss of density on the land that is within the transportation corridor and cannot be developed.

**Adequate Staffing.** Like other complex development control techniques used in corridor preservation, density transfer will require the staff and time commitment necessary for administration. *Problems of public acceptance of density transfers that change expected development patterns will require careful public relations and work with community and neighborhood groups.* Overcoming opposition by neighbors to density transfers that require more intensive development may not always be possible.

## **Other Discretionary Land Use Controls**

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### **5-10 SUBDIVISION CONTROLS, PLANNED UNIT DEVELOPMENT AND OTHER DISCRETIONARY LAND USE CONTROLS**

#### **5-10.1 The Role of Subdivision Controls, Planned Unit Development and Other Discretionary Land Use Controls in Corridor Preservation**

Many of the development controls that are useful in corridor preservation are available in subdivision control regulation or applied when a local government must give a discretionary approval for a new development. Local governments rely on the full array of development controls over the land development process to ensure the effectiveness of a corridor preservation program.

A number of these controls have been described in this study. Subdivision controls regulate the subdivision of land for development and require adequate subdivision design and the provision of necessary facilities within the subdivision. Exactions such as dedications and in-lieu fees can be required when a subdivision is approved, and can include exactions for the preservation of land in transportation corridors. Land can also be reserved for corridor preservation when a subdivision is approved.

The zoning ordinance determines the uses allowed in zoning districts shown on a zoning map. Discretionary land use approvals can include exceptions to the uses allowed in zoning districts, site plan reviews of individual projects, and the approval of large-scale developments, utilizing the mechanisms of planned unit development or density transfers. Authority for these discretionary approvals is usually included in the zoning ordinance. These controls often allow a use not allowed by the zoning ordinance.

An effective corridor preservation program should include the coordinated use of subdivision and discretionary land use controls for the preservation of transportation corridors. Because the state transportation agency's role in corridor preservation is so critical, project review through subdivision control and other discretionary approval procedures becomes an important check point for coordinating local and state development controls in transportation corridors.

#### **5-10.2 Key Elements in the Use of Subdivision Controls, Planned Unit Development and Other Discretionary Land Use Controls in Corridor Preservation**

Although most courts have held there is implied statutory authority for the use of discretionary land use controls, it would be helpful to have legislation specifically authorizing these controls and their use in corridor preservation. The key elements in the use of subdivision controls, planned unit developments and other discretionary land use controls in corridor preservation are:

- (1) State legislation should authorize local governments to use discretionary land use controls in corridor preservation programs. Discretionary land use controls include conditional uses and exceptions, planned unit developments, site plan review, density transfer and subdivision controls.

- (2) If a landowner is denied the approval required by a discretionary land use control, the zoning ordinance that applies to land within a transportation corridor should allow landowners an economically viable use of their land.
- (3) Local government ordinances should provide adequate criteria for discretionary land use controls and adequate staffing for their administration.

### 5-10.3 Significant Barriers for Removal

One of the major problems with using local land use controls in corridor preservation is that the legal framework for the use of discretionary approvals in local land use controls is in need of reform. The purpose of many of these approvals is not always clear, and they can also overlap. Adoption and implementation of an effective corridor preservation program may require an overhaul of the local land use control system.

#### (a) Statutory Barriers

Statutory authority for many of these development control techniques, such as planned unit development and land use reservations, is lacking in many jurisdictions. Although local governments make use of these techniques even in the absence of statutory authority, the adoption of state legislation that will authorize necessary local development control programs for corridor preservation programs is an important priority.

#### (b) Constitutional Barriers

Discretionary approval techniques are used in land use regulation to authorize uses that are more intensive than those allowed by the zoning ordinance. A denial of a discretionary approval, for this reason, will not usually raise a taking of property problem because the landowner is still entitled to the use authorized by the zoning ordinance, and this use often will be an economically viable use of the land.

Constitutional taking of property problems can arise in the use of discretionary approvals if a land use dedication or impact fee is required as a condition to a discretionary approval. Taking of property issues raised by dedications and impact fees were discussed earlier in Section 5-7.

#### (c) Institutional Barriers

Adequate staffing also is necessary to administer planned unit development and other discretionary approvals because the review process requires analysis of site plan, design and other development problems. Problems also arise in the use of discretionary approvals if the ordinance does not clearly specify the criteria to be applied to discretionary approvals and the basis for any dedications or fees that may be required for corridor preservation.

← Need for  
Adequate  
Staffing

### 5-10.4 Detailed Measures for Barrier Removal

**Statutory Authority for Discretionary Approvals.** Statutory authority exists under the zoning enabling act for the more traditional discretionary approvals, such as conditional uses and exceptions. *Additional statutory authority is advisable for some of the newer discretionary controls, such as planned unit developments. It is important to authorize the use of these controls in corridor preservation to remove any doubt that they can be applied for this purpose.* ■

*Corridor preservation may also require a modification of existing techniques that are used in the development control process. Density transfers are an example. They have typically been used to authorize a reallocation of density in return for open space and other amenities rather than the preservation of transportation corridors. Statutory revision must take the requirements of corridor preservation into account.*

The second point is that *substantial revision of the planning and development control system may be necessary if the existing system of planning and development control is too uncoordinated and fragmented to implement a successful corridor preservation program. Individual communities may be able to fashion a successful development control program from existing techniques, as the case study indicates, but the organization of fragmented controls may not be sufficient in many areas.*

**Minimizing The Taking of Property Problem.** There should not usually be a taking of property problem if a landowner in a transportation corridor is denied a discretionary land use approval required by a land use ordinance. A landowner is always entitled to the land use allowed by the zoning ordinance classification that applies to his land. *There should not be a taking problem if the zoning ordinance classification allows an economically viable use of the landowner's property.* ■

**Adequate Criteria for Discretionary Approvals and Adequate Staffing.** *Ordinances authorizing discretionary approvals should make them available for corridor preservation and should contain criteria to guide their application in corridor preservation programs. For example, the ordinance should state that subdivision approval may be denied for land that is located in a transportation corridor. The ordinance should also authorize dedications, impact fees, density transfers and other techniques that can implement a corridor preservation program and help avoid taking of property problems.* ■

**5-10.5 A Case Study of a Successful Local Planning and Development Control Program for Corridor Preservation**

**LOCAL PLANNING AND DEVELOPMENT  
CONTROL PROGRAM FOR CORRIDOR  
(Case Study)**

Granite County has organized an integrated system of planning and development control measures to protect transportation corridors. The county has designated transportation corridors in the transportation element of its comprehensive plan. Corridors on which preservation is an immediate priority are also mapped on detail maps that show lot lines and property ownership.

The county has a hierarchy of development controls that provide a series of defenses in corridor preservation. The county's first line of defense is in its undeveloped area, where new development projects normally require approval as a planned unit development. The second line of defense is the subdivision control process. The third line of defense are the discretionary approvals required in the zoning process. In each of these approval procedures, the county requires the dedication or reservation of land for transportation corridors. Dedication is required if the dedication requirement is supported by the nexus requirement. Otherwise, reservation is required. State legislation and local ordinances give the county the necessary flexibility in administering these programs. This flexibility includes the authority to require extensions of time for reservations.

State legislation and county ordinances authorize the use of mitigation procedures when dedications and reservations are required for transportation corridors. These procedures include a density transfer process, which is part of the planned unit development procedure.

Public hearings on mapped corridors and cooperation with community groups and neighborhood organizations help assure public understanding of the corridor preservation program. A public neighborhood hearing is required, for example, on an application for a density transfer, which can lead to an intensification of development in neighborhood areas.



# PART 6: Mapping Laws

## **PART 6: MAPPING LAWS**

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### **6-1 THE ROLE OF MAPPING LAWS IN CORRIDOR PRESERVATION**

States have adopted laws called corridor mapping laws that are used only in corridor preservation programs. These laws provide the statutory authority to adopt corridor maps to implement corridor preservation.<sup>35</sup> Statutory authorization is required for the adoption of corridor maps. Corridor maps can be adopted at either the local government level or the state level, and some states authorize the use of corridor maps at both governmental levels.

Corridor maps are usually known as "official maps" at the local level. State legislation for official maps has been available since the early days of planning legislation, but the local official map is still not a commonly used corridor preservation technique. An official map of a transportation corridor is adopted by the municipality, but it may or may not be part of the comprehensive plan. After the official map is adopted, no development may occur in the mapped corridor unless a variance is granted by the local government. The state legislation should provide that compensation is payable when the land is acquired for a transportation project. There may be a time limit on the length of time an official map can be in effect.

A number of states also authorize state corridor maps for transportation corridors. A typical state mapping law will require public hearings and comments on planned corridors, the preparation and recording of official maps of the corridor, and local referral to the state transportation agency of any application to develop land within a mapped corridor. The state transportation agency must then find either that the development proposal has an impact on the preservation of the corridor or that it does not have an impact. If the proposed development is found to have an impact on the corridor, the state transportation agency must negotiate with the developer either for the purchase of its land or for modification in development plans that will protect the corridor.

Some corridor mapping legislation allows for mapping sufficiently in advance of construction to be effective during the long lead time that corridor preservation may require. In other states, as in California, legislation may authorize adoption of a "precise plan" of a highway corridor and may then prohibit development within the alignment set by the precise plan.<sup>36</sup> Discussions with California officials indicated that this authority is seldom used, and then only when the time to construct the highway is close at hand.

Our interviews indicated that corridor mapping is not widely used in corridor preservation. In localities that do use it, the administrative system contemplated by the enabling state legislation usually is not adopted. Instead, localities often enforce official maps through the development controls that were discussed in Part 5. Voluntary cooperation from developers also occurs. Developers may voluntarily hold back from development in transportation corridors in return for agricultural zoning, tax abatements and permission for interim uses.

In California, Florida, North Carolina and other states, we found examples of the coordination between local governments and state agencies that corridor mapping contemplates. In some states, the effectiveness of the program depended on the willingness of state agencies to purchase land in transportation corridors on which development was threatened.



**6-1.1 Key Elements in the Use of Corridor Preservation Mapping Laws in Corridor Preservation**

Legislation authorizing the use of corridor mapping in corridor preservation is essential. The key elements in the use of corridor preservation mapping laws in corridor preservation are:

- (1) State legislation should authorize corridor preservation mapping. The legislation should authorize an administrative review process in which the state transportation agency or a local government reviews applications for development in transportation corridors.
- (2) State legislation should allow development to occur on land within a transportation corridor if the state transportation agency decides not to acquire it. Legislation should also authorize hardship and protective buying in transportation corridors. These measures will help avoid taking of property problems in corridor preservation.
- (3) State legislation should require the coordination of corridor preservation efforts by the state transportation agency and local governments. Legislation should also require the integration of state and regional transportation plans and local comprehensive plan.
- (4) State legislation should require the coordination of corridor preservation mapping with the administration of other land use controls by local governments.

**6-2 STATE CONSIDERATIONS**

**6-2.1 Legal**

**(a) Statutory**

The provision of adequate enabling authority is a primary concern at the state level. The state must adopt legislation for corridor mapping programs for the state transportation agency and must also adopt legislation for local official maps. States should also consider legislation that authorizes funding sources for local government acquisition of corridors protected by local official maps. ↖

**(b) Constitutional**

The taking of property problem is serious in the use of corridor maps for corridor preservation if the law does not allow any use of land in the transportation corridor. This limitation on land use may be a total taking of a landowner's property that does not allow him any economically ↖

beneficial use of his land. In this event, the U.S. Supreme Court's *Lucas* case would apply and the reservation of land in the highway corridor would be held a per se taking of property.

Taking problems arose even before the Supreme Court decided the *Lucas* case. Although the record on corridor map laws was uneven, some state courts had held them to be a taking of property.<sup>37</sup> A corridor mapping law can also violate substantive due process if a court concludes it does not serve a proper constitutional purpose. The Florida Supreme Court held in a recent decision that its state corridor mapping law violated substantive due process.<sup>38</sup> However, an important later decision by the Florida Supreme Court held that an unrecorded county thoroughfare map adopted as part of the mandatory county plan was not a taking on its face, even though the effect of the map was to prohibit all development in the corridor that would impede future highway construction<sup>39</sup>. The county noted that the thoroughfare map was a long-range planning tool tied to its comprehensive plan and did not designate the exact routes of future highways. The county also contended the map provided enough flexibility so that it could not be determined whether a taking had occurred until a developer submitted an application for development. At that time the county would be able to work with the developer to mitigate the effect of the map through density transfers and development clustering to avoid the highway right-of-way. The county also contended that the map would have the effect of increasing the value of properties within the corridor.

The Florida Supreme Court pointed out that comprehensive planning and corridor preservation measures are required by Florida statutes and state regulations, and that "[o]ne of the purposes of the thoroughfare map is to place property owners on notice as to the necessity and location of future roads." The court also noted that "[t]here are many public benefits to be achieved through comprehensive planning of future road development."

The court gave two principal reasons for holding that the thoroughfare map was not a taking on its face. Owners adjacent to transportation corridors would probably benefit from the planned construction of roads, and the thoroughfare map limited development only to the extent necessary to ensure that future land use was compatible with the planned highway. The thoroughfare map did not finally designate highway locations within the transportation corridor, and the county as a permitting authority "has the flexibility to ameliorate some of the hardships of a person owning land within the corridor."

The court recognized, however, that the thoroughfare map could be a taking as applied to a particular property, and that the taking issue should be determined as individual owners made application for development within the transportation corridor.

This case is the most important case ever decided at the state court level upholding the constitutionality of corridor mapping under the taking clause. The court relied in its decision on the elements of a corridor preservation and mapping program recommended by this study. Especially important to the court's favorable holding were the county's use of corridor mapping to implement a comprehensive plan and the availability of flexible land use measures to mitigate the effect of the corridor map on the landowner's property. Notice also that the court did not hold that a time limit is necessary in corridor mapping programs. Careful planning and flexible

administration of the corridor mapping program should avoid claims that a corridor map is an as-applied taking of property.

As with moratoria and land use reservations, taking problems under official maps laws can be mitigated by allowing reasonable interim uses and by providing for acquisition of land in mapped corridors to back up the corridor map. A law that authorized the acquisition of land in mapped corridors was held not to be a taking by an intermediate New Jersey appellate court.<sup>40</sup>

### **6-2.2 Institutional**

Coordination problems arise in state corridor mapping programs. Some of these statutes require close coordination between the state agency and local governments. Within a mapped corridor, landowners must file an application for a development permit with the local government that has jurisdiction. The local government then notifies the state agency, which has a limited time to purchase the property. If the state agency does not purchase the property, the local government may allow development to occur.

← *Coordination Problem*

## **6-3 LOCAL CONSIDERATIONS**

### **6-3.1 Legal**

State legislation usually requires local governments to adopt a local ordinance to implement a local official map law. The taking of property problem is similar to that under state mapping laws, although it may be more serious at the local level because local official map laws are often more rigid than the state laws and do not specifically authorize the use of land acquisition to back up official map corridor designations. Some localities have adopted land acquisition programs to give constitutional support to their official maps.



### **6-3.2 Institutional**

As authorized by state legislation, local official map laws are intended to be administered separately from local development controls. Our interviews showed that often this was not the case, as local governments integrated the local development controls with the protection of transportation corridors designated on local official maps. Integration is preferable because coordination between the exercise of local development controls and the protection of corridors under state corridor maps is essential.

## **6-4 SIGNIFICANT BARRIERS AND DETAILED MEASURES FOR REMOVAL**

### **6-4.1 Inadequate Regulations**

Some corridor mapping legislation is not effective in corridor preservation programs. The statute may not authorize a flexible method of administering development restrictions within

transportation corridors. The statute may not authorize a sufficient period of time for the map to be in effect or may authorize a corridor map that can only be used close to construction.

**Barrier Removal Measure.** Legislation for local official maps authorizes the adoption of a corridor map in which development is immediately and inflexibly restricted unless a variance is granted. This method of implementation reflects administrative practices in vogue early in the century when model legislation for local official maps was drafted, but is cumbersome to carry out and can create a taking issue because the development restriction is absolute from the time the map is adopted. ■

*The administrative method for state corridor map laws is preferable. The map should not be immediately effective as a prohibition on development but should merely be the basis for a requirement that all development proposals be referred for review. The state agency will have the review power under state corridor map laws. Local development control agencies should have review powers under local official map laws. Adequate coordination with other local development controls powers should be authorized at the local level.*

Legislation should recognize the importance of corridor mapping early in the highway planning process by providing an adequate period of time during which a corridor map will be in effect. Landowner hardship and taking problems can be avoided by authorizing protective and hardship buying well in advance of actual construction of a highway.<sup>41</sup>

### 6-4.2 Property Rights

There are potential taking of property issues in the use of corridor maps at both state and local government levels.

**Barrier Removal Measure.** The courts have the final responsibility to determine when a taking of property has occurred. *States and local governments can educate courts on the necessity of recognizing the constitutionality of corridor mapping laws. Courts should be more willing to hold that a corridor map is not a taking if it is based on comprehensive planning, if it has adequate provision for hardship and protective buying, if it allows development to occur if land is not acquired, and if there is a firm commitment from the state to carry out the transportation project for which a corridor is designated.* ■

As noted earlier, official maps that by law have the immediate effect of prohibiting development on property within a mapped corridor are most likely to attract a successful taking challenge. Taking challenges are less likely to succeed if the corridor map is not an immediate restriction on development but is simply the basis for agency review of development proposals as they are presented. The availability of flexible measures to mitigate the impact of a corridor map on the development of property should then be able to mitigate any restriction imposed by the map that might attract a taking challenge.

*Back-up powers of acquisition are essential.* Courts are less likely to find that a taking has occurred if acquisition is available. Acquisition powers also help when a corridor map creates severed remnants of land that cannot be developed and that need to be acquired to make the corridor mapping program effective. Acquisition programs require authorization by state statute and adequate funding. These problems are discussed in the section on acquisition later in this study.

#### 6-4.3 Lack of *Intergovernmental* Coordination

There are major *intergovernmental* coordination problems in the use of corridor maps.

**Barrier Removal Measure.** *Corridor mapping legislation should provide for a coordinated state and local administration of the corridor mapping program.* Because local governments have the primary responsibility for land use planning and development programs, they should have the responsibility to initially consider applications for development within designated corridors. *Local government notification of the state transportation agency should also be required, and the state should have the final decision on whether land proposed for development should be acquired or allowed to develop.* ■

#### 6-4.4 Lack of Coordination in Planning

Coordination of state and regional transportation plans with local comprehensive plans may be difficult. The legal measures for requiring local comprehensive plans to include transportation corridors designated in state and regional transportation plans may not be available.

**Barrier Removal Measure.** *As a minimum, state legislation should require local comprehensive plans to include transportation corridors designated in state or regional transportation plans. The state transportation agency should have the legal authority to enforce this requirement.* A comprehensive and integrated state planning system in which local plans are part of an integrated state planning framework and approved by a state planning agency would substantially improve state and local coordination of corridor preservation programs.<sup>42</sup> ■

#### 6-4.5 Lack of *Intragovernmental* Coordination

There are significant *intragovernmental* problems in the implementation of corridor maps.

**Barrier Removal Measure.** This problem arises principally at the local government level. Official maps were originally conceived as operating independently of the normal range of local development control powers. It is now apparent that the *administration of local official maps is best implemented through coordination with other local development controls.* The case study on discretionary approvals in Section 5-10.5 illustrates a community that uses a wide range of local development controls to implement its corridor maps. ■



# PART 7: Access Management

## **PART 7: ACCESS MANAGEMENT**

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### **7-1 THE ROLE OF ACCESS MANAGEMENT IN CORRIDOR PRESERVATION**

States, for decades, have had legislation that regulates driveway permits and curb cuts, and transportation departments affect access in highway design through median placement and median openings. Access management is a more recent regulatory program that builds on these traditional programs to provide a more explicit control over access to highways. A significant number of states have access management programs, although only in a few states is access management used to maintain highway capacity. Colorado pioneered the access management concept, and Florida and New Jersey have adopted programs based on the Colorado concept. Our research included interviews with Colorado and Florida officials on their access management programs.<sup>43</sup>

Access management has a number of purposes, and it need not be related to corridor preservation. Florida's program, for example, is not used to preserve highway corridors. One purpose of access management programs is to preserve the functional integrity of the highway and improve highway safety by avoiding the level of conflict at access points. Corridor preservation plays a role in access management if the program is also used to preserve and enhance highway capacity on existing alignments. Improving and maintaining traffic flow on existing alignments can avoid the need for constructing new highways, with the environmental, funding and other problems they can create. The result is that an existing highway corridor is preserved at a level that will maintain needed traffic flows.

Access management on new highway alignments will also have an effect on corridor preservation. If access is properly limited when a new highway is built, the highway will maintain its capacity to move traffic longer and will be better preserved as an existing transportation facility.

An access management program intended to maintain and improve highway capacity would regulate access points so that traffic flow is kept at acceptable levels or improved. The state would first classify state highways according to their access needs. Access controls would be least strict, for example, on local roads and would not allow access at all except by interchanges on limited access highways. Each highway category would include standards indicating how often access could be allowed on the highways included in the category. For example, access to at-grade highways might be allowed every mile. The program would also include spacing controls on traffic signals, controls on their operation and controls over median openings.

The access management program is managed through a permit system. A major limitation is that the program is reactive. Access requirements are imposed on landowners as they apply for access permits. How strictly the state defines the permit requirement determines how effective the access management program will be. Colorado, for example, requires an access permit only when there is a significant change in use.

Because highway alignments, topography and land ownership vary widely, some flexibility is needed in access management programs. One option is to adopt access management requirements as regulations and then provide for administrative variances. Another option is to avoid the variance problem by drafting access management requirements as guidelines subject to interpre-



tation on a case-by-base basis. Each option has disadvantages, but the need for flexibility in the program cannot be avoided if public acceptance is to be achieved.

Cooperation with local governments is essential. Access management controls can have a major effect on local land use planning and development, especially for commercial uses. A requirement that access management requirements be incorporated in local land use plans is one option but may be difficult to enforce. Coordination with local subdivision controls and zoning also is essential. Unless review and approval by the state agency is required, a local government can give a subdivision or zoning approval that requires an access point contrary to state regulations. The state will not have an opportunity to review the access decision until a state permit is required, which may be too late.

The planning and development impacts of a state access management program can be considerable. Development should occur back from and perpendicular to a state highway in order to avoid congestion at highway intersections, but developers may resist relocation and local governments may support them. Careful planning at the local level may be needed to revise circulation systems to meet state access management requirements, and this occurred in some municipalities. The need to comply with state requirements can have a number of impacts on developers and local land use programs, as the problem indicates.

A statute may also provide for access management plans. A plan would supersede state access regulations by providing access management requirements that are designed for a designated length of highway. Access management plans also require close cooperation between the state agency and the local governments that will be affected by an access management plan.

**7-2 STATE CONSIDERATIONS**

**7-2.1 Legal**

**(a) Statutory**

Access management programs require state enabling legislation that will authorize the state transportation agency to carry out and implement the program. The legislation must also deal with relationships between the state agency and local governments in the access management program.

**ACCESS MANAGEMENT PROBLEM  
(Case Study)**

**FACTS:** Highway G is an at-grade highway that bisects Central City. Zenith Development Company planned to build a small shopping center. It was not pleased with the access limitations on its development that would be required if it located on an intersection on Highway G and with the requirement that it pay for a deceleration lane to alleviate the congestion its development would create on the highway. Zenith then bought a tract of land one block back from Highway G, on which it planned to construct its shopping center.

The comprehensive plan and zoning ordinance of Central City provide for commercial development in a strip along Highway G and for two blocks on each side of the highway. The Zenith development is compatible with this zoning. Because the Zenith development would not be adjacent to the highway, Central City was not required by statute to notify the state transportation agency that this development was planned.

However, the state learned about the Zenith development informally. Its studies showed that the development would still increase congestion on the highway, even though it was located one block back. Under state law, Central City is required to pay for deceleration lanes to relieve congestion on state highways created by local development. The state transportation agency notified Central City that a deceleration lane would be required.

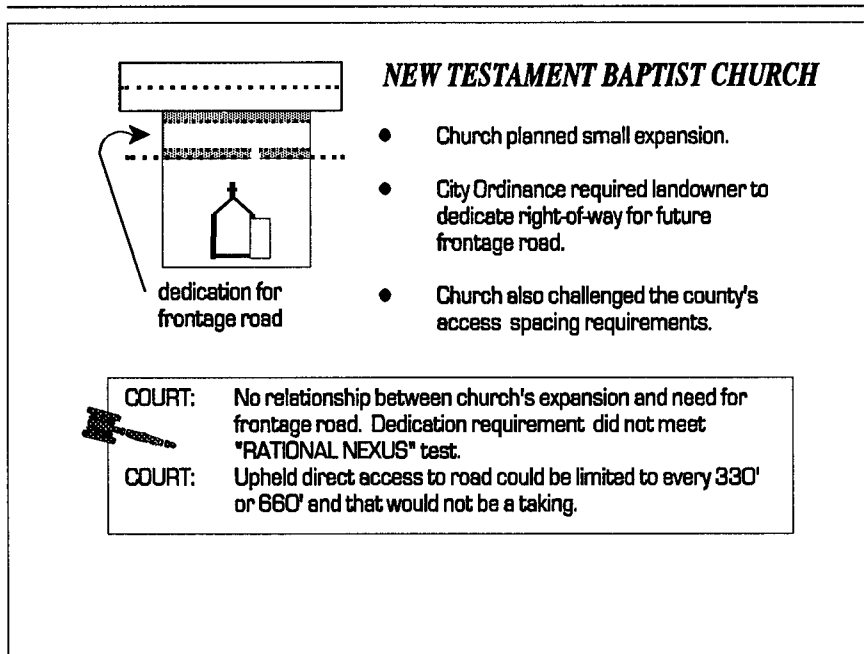
Central City then conducted its own studies and determined that the Zenith development would contribute sufficiently to traffic congestion so that it could be charged with the cost of the deceleration lane. The Central City zoning ordinance allows the city to impose exactions on developers when they seek site plan approval, which is required for the Zenith development. When Zenith applied for site plan approval, the city imposed an exaction requiring Zenith to pay a fee sufficient to meet the costs of the deceleration lane.

**COMMENT:** This problem indicates the complexities that can arise under state access management programs when development plans are affected and when a city's planning and zoning is not closely integrated with the state's access requirements. Access requirements in state access management programs are based on speed and safety, not on land use planning and development factors. In this case, the developer ended up paying the costs of a deceleration lane. The problem is another example of how corridor preservation programs place pressures on local governments to use their police powers to support preservation efforts. It is assumed here that the city has the authority to levy the exaction and that the exaction is constitutional.

(b) Constitutional

The right to compensation is an important limitation on access management programs. As noted earlier, courts recognize the right to access as a property right and will grant compensation to a landowner who is deprived of reasonable access. The compensation issue arises in the denial of highway access both when access is denied on an existing highway and when the construction of a new highway denies reasonable highway access or unreasonably limits access that previously was available. In practice, the requirement of compensation for loss of access is not as forbidding as it sounds. Compensation is required if a landowner is denied all access to a highway, but compensation is not required if a landowner is left with reasonable access to a highway even though he does not receive all of the access he wishes.

For example, if a state grants an access permit that does not allow direct access to a highway but allows access only on a side street, compensation may not be required if a court decides that the access allowed is reasonable. Neither will compensation be required if the access permit requires circuitry of travel that is not unreasonable in order to reach a landowner's property. The map diagram below from a Florida access control case illustrates this principle.



RATIONAL NEXUS:

*Lee County v. New Testament Baptist Church, 507 So. 2d 626 (2nd DCA), rev. denied 515 So. 2d 230 (Fla. 1987)*

Source: Florida Department of Transportation, Access Management Legal Considerations

## Access Management

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The compensation requirement may make it difficult for a state to limit access on its own initiative when a landowner does not apply for an access permit. The state may have to compensate a landowner for access it takes away. An opportunity to provide alternative access may not be present because the landowner has not applied for an access permit and so may not be willing to provide for alternative access on his property.

The law concerning compensation for denial of access varies from one state to another. Some state courts may be more willing to protect property owner access rights than others by holding that a denial of access in an access management program is a taking of property. Judicial application of the taking clause to find a taking when access is unreasonably restricted can limit the effectiveness of an access management program. Compensability for access restriction is problematic even if a state court is not excessively concerned with property owner rights. The law on compensation for access restriction is uncertain and unpredictable. Precedent is doubtful, and each case tends to be decided on its own facts.

### 7-2.2 Institutional

#### (a) Administrative

Access management programs raise a number of institutional problems. One problem is that the enhanced control of land development that access management needs will require management skills in state transportation agencies that these agencies may not previously have. Staff need to be educated in access management techniques. An effective access management program requires careful administration to ensure that access requirements are applied fairly. This requires the careful drafting of road classifications and the access requirements for these roads so that access control objectives are achieved without leading to the imposition of unreasonable access requirements on property owners.

← Need for  
Management  
Skills

#### (b) Problems With Local Governments

Coordination of state access management programs with local governments creates a number of institutional problems. These problems arise because state access management and local land use planning and development control can have different objectives, and these objectives may conflict. Access management at the state level is intended to make highway travel safer and, if corridor preservation is an objective, to maintain and enhance the carrying capacity of highways. State access management programs do not include land use planning. This is a local government function.

← Different  
Objectives of  
State and Local  
Governments

Problems arise because the limited requirements of an access management program may lead the state agency and the local community to view land development problems in a community from a very different perspective. One problem that may arise is that a local government may prefer more intensive development at a particular location than the state's access management regulations contemplate. A major shopping center, for example, may require more access points on a state highway than are allowed under the state's classification system.

When that situation occurs, the developer may put pressure on the local government to resist the state's access management requirements. Although the state may have the legal authority to require the application of its access management requirements, it may not be able to insist on these requirements as a political matter. As noted earlier, it may also be possible for a local government to approve a development without complying with access requirements and without notifying the state transportation agency. Although cooperation with local governments appears to occur most of the time in the programs we studied, conflict between the state and local governments can be damaging to an access management program.

Often the impact of an access management program on a community is indirect. For example, a developer may decide to locate away from a highway in order to avoid access requirements. What access is allowed on feeder streets leading to the highway is then a local decision, but the locality will be under pressure to make improvements to the highway if congestion occurs on the highway because of increased traffic from the development. To avoid this financial burden, the community may then attempt to impose the cost of highway improvements on the developer through an exaction, which may lead to developer resistance.

**(c) Property Owners**

Access management requires cooperation by property owners more than any other regulatory program that is used to carry out corridor preservation. Access management requirements apply only when property owners apply for an access permit, so property owners are always involved in any decision that applies access management standards.

One problem is that large and small developers have different views of access management. Large developers, with large tracts of land, have less difficulty complying with access standards because the size of their property gives them opportunities to negotiate. Small developers with small lots, such as roadside businesses, have fewer access options and may view a loss of access required by state standards as damaging to their business. In Florida, for example, a coalition of small businesses lobbied to obtain changes in the Florida law that made it more acceptable to them.

Another problem is that state access standards often must assume uniformity in development patterns along highways. Most highway-oriented development is linear one-story retail development at the neighborhood service level. If access standards are adopted to fit this kind of development, problems will arise if more intensive development, such as regional shopping centers, occurs along highway corridors.

Access management may also assume that the restrictions it places on access to highways by businesses can be mitigated by rerouting traffic through adjacent streets. This option may not be available in densely urbanized areas like Long Island, where dense urbanization and the presence of a large number of development nodes makes it difficult to move traffic away from principal highways.

## **Access Management**

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Problems may also arise with developers because state access management guidelines may have important impacts on how developments are designed. Placement and design of access can have major consequences for site planning, including the location and amount of parking. Developers may not be happy with the design alternatives available once state access decisions are made.

There also is a close link between access controls and the signage allowed by a community. Businesses denied what they consider to be sufficient access may insist on adequate off-sites signage to compensate for the access denial. Pressure will then arise for the modification of community sign control programs.

Another institutional problem is that access management programs have a major impact on roadside businesses, especially small businesses that are dependent on road access. These businesses may be politically opposed to a state access management program that they perceive as limiting their business opportunities. The state transportation agency needs to develop good political relationships with these groups.

### **7-3 LOCAL CONSIDERATIONS**

#### **7-3.1 Legal**

Most local planning and development controls are not organized to take account of state access management programs that are intended to enhance highway capacity. There may not be any legal authority to issue access permits, or if there is authority it may not be located with the local agencies responsible for planning and development control. Local land use regulation ordinances must include access management authority and must also include provisions that authorize acceptance of state agency access management decisions when these apply. Note that state access requirements will apply only on state roads. Local governments will need corresponding controls over local roads and streets that can be integrated with the state program.

The taking of property issues that can arise out of a denial of access will also occur at the local level if the local government restricts access through the denial or modification of an access request. Since the state agency will be making access management decisions under the state program, there will be no constitutional liability for these decisions at the local level if the local government simply concurs in the state decisions without making an access restriction decision of its own.

#### **7-3.2 Institutional**

Access management programs create a number of institutional problems at the local government level. Some of these are noted in the earlier discussion of institutional problems that will occur at the state level. Effective cooperation with the state transportation agency in the administration of its access management program is essential. This may mean that local governments must give more attention to access problems in their comprehensive plans and development controls. Local governments must also manage their relationships with developers so that developers will be receptive to state access management requirements.

← *Local-State  
Coordination*

Local governments must also make important decisions that will determine how a state access management program will be administered. If the state legislation authorizes local administration of the program, a local government must decide whether it wants to take on this responsibility. A local government must also decide whether it wants to participate in the development of an access management plan with the state if this option is available.

Developers face important institutional problems in working with local and state governments in an access management program. Developers must become aware of the program and the requirements it places on them in showing compliance. Large developers indicated in our interviews, for example, that they normally negotiate with the state to determine what access requirements will apply rather than simply agree to the access requirements specified in the state program. This occurs because opportunities for creative adaptation are possible in larger developments.

#### **7-4 KEY ELEMENTS IN THE USE OF ACCESS MANAGEMENT IN CORRIDOR PRESERVATION**

Access management is a state level program. State legislation authorizing the state transportation agency to implement an access management program is essential. The key elements in the use of access management in corridor preservation are:

- (1) States should adopt or amend access management legislation to make it applicable in corridor preservation.
- (2) Access management programs should reflect development patterns as much as possible and should allow exceptions when state access standards cannot be applied reasonably.
- (3) States should work with developers to utilize development programs that can provide a reasonable economic return while providing adequate limits on highway access.
- (4) State legislation should mandate cooperation between state and local governments in the planning and administration of access management programs.

#### **7-5 SIGNIFICANT BARRIERS AND DETAILED MEASURES FOR REMOVAL**

##### **7-5.1 Inadequate Regulations**

An effective access management program requires state enabling legislation. Most states do not have legislation authorizing access management and, in some that do, the program is not specifically authorized for use in corridor preservation.

## Access Management

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Access management to enhance and preserve highway capacity is a new state transportation function. Obtaining the necessary enabling legislation and funding for this program may meet political resistance.

**Barrier Removal Measure.** States should adopt legislation authorizing access management programs that include the use of access management for corridor preservation. State legislation should include requirements for (1) the classification of state highways, (2) a set for access standards for each classification, and (3) a procedure for access permits.<sup>44</sup> State transportation agencies should be aware that access management to preserve and enhance highway capacity is a new responsibility that requires legislative and funding commitments. *An access management program should not be attempted unless political support can be obtained for necessary legislation and funding.*

### 7-5.2 Property Rights

The restriction of access that occurs in access management programs may require compensation.

**Barrier Removal Measure.** The courts determine whether a restriction on access requires compensation. *States can attempt to educate the judiciary to a more receptive view of state access requirements. States can also avoid the requirement of compensation in some cases by allowing exceptions to access standards that do not endanger the implementation of the access management program. States can also work with developers to adopt alternative development designs that can preserve development objectives while still providing adequate limits on highway access.*

Court decisions requiring compensation for limitations on access can be troublesome to access management programs, and requirements for compensation in some states may limit the extent to which access can be effectively restricted. Nevertheless, the law of compensation for access restriction is reasonable enough in most states to allow a comparatively successful access management program. States should keep in mind that cases claiming compensation for access restriction are highly fact-specific. General principles control only to a limited extent. Careful administration of access management requirements and careful case preparation when access restrictions are challenged should minimize the impact of compensation requirements on access management programs.

### 7-5.3 Lack of State-Local Planning Coordination

Local governments may have planning and land development policies that do not implement state access management requirements.

**Barrier Removal Measure.** *State transportation agencies and local governments need to work closely together to coordinate highway planning, access management and local land use planning and development policies. State review of state agency and local land use plans would also allow better coordination of state access management and local land use planning programs. State*



*legislation should contain an enforceable requirement that state access requirements must be incorporated in local land use plans.* Local governments must also revise their planning and development control programs, when necessary, so that they can be integrated with the state access management program.

#### **7-5.4 Lack of State-Local Coordination in Administration**

Local governments may not cooperate with the state transportation agency in the administration of the state access management program and may approve developments that do not comply with state access requirements.

**Barrier Removal Measure.** *State legislation should address the problem of intergovernmental coordination. It should require local governments to notify the state transportation agency of any applications for development approval that require a state access permit. Local governments should be prohibited from giving development approvals that violate state access standards.* ■

States should adopt site planning standards for development projects that implement the state access management program. Local governments should be required by statute to incorporate state site planning standards in their subdivision and site plan review procedures.

#### **7-5.5 Rigid State Standards**

State access standards may have adverse impacts on the design of development projects, including the number of parking spaces required and the location of parking. State standards may not be compatible with the design of development projects and may force developers to seek a relaxation of local sign regulations in order to mitigate what developers perceive as inadequate highway access.

**Barrier Removal Measure.** *The needs of developers must be carefully considered in access management programs. Unnecessary restrictions on development proposals should be avoided. Highway classifications and access standards in access management programs should reflect actual development patterns as much as possible. Flexibility should be built into the permit system to allow exceptions when state access standards cannot reasonably be applied. States should also consider the use of access management plans for highways that have special land use problems.* ■



# PART 8: Acquisition

## **PART 8: ACQUISITION**

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### **8-1 THE ROLE OF ACQUISITION IN CORRIDOR PRESERVATION**

Land acquisition through voluntary conveyance and involuntary condemnation are important techniques in corridor preservation because they can put land in public ownership that otherwise might be developed. The acquisition programs discussed here are used principally to acquire undeveloped land in highway corridors. A significant number of states also have programs to acquire abandoned railroad rights-of-way in corridor preservation programs. These programs are discussed in **Appendix B**.

The discussion in this Part will focus on acquisition through voluntary conveyance because it is used more frequently than condemnation, although some of the special problems of condemnation will also be noted. A majority of the states contacted in our research used acquisition through voluntary conveyance in corridor preservation programs, but only a few used involuntary condemnation and its use was limited. Acquisition is necessary in corridor preservation programs because land in transportation corridors may be impacted by development prior to the time a transportation facility can be built.

Acquisition plays an important role in corridor preservation programs because it provides an assured method of preventing development that can frustrate a corridor preservation program. Acquisition can also be used to acquire land before it increases so much in value that it frustrates a transportation development program. In Florida, land costs have risen so much in some areas that the cost of land exceeds the cost of construction.

Acquisition of land also is important in corridor preservation programs because it can provide a backup to the use of land use regulation, which may be vulnerable in some jurisdictions where courts might hold a particular regulation to be so restrictive as to constitute a taking of property. A number of states, for example, have legislation that provides initially for the mapping of a highway corridor but also provides for acquisition of land within the corridor if a landowner applies for a development permit. The use of back-up acquisition powers is an essential element in corridor mapping and other police power measures that are used in corridor preservation programs.

States need not acquire full title to land in a transportation corridor. Alternatives are to acquire an option of first refusal on land within a corridor that may be sold for development. An option would give the state transportation agency an opportunity to buy the land before it is sold for development purposes.

States could also acquire an easement in a parcel of land within a transportation corridor that is threatened for development that prohibits development of the land until it is acquired for a transportation project. Because an easement is a conveyance of less than full title to land, it should in theory cost less to acquire than the full title.

Another alternative is for the state to lease land within a transportation corridor that is threatened with development. The state could then sublease the land for farming or other low-intensive land uses until the land is acquired for a transportation project.

Legislation may not give states the authority to acquire options and easements or to lease land within a transportation corridor. States also may need to acquire the property management experience necessary to engage in these protective activities.

## **8-2 FEDERAL CONSIDERATIONS**

### **8-2.1 Funding**

The federal government's role in land acquisition for corridor preservation is limited. The federal government can require consideration of corridor preservation, as it has in ISTEA, and can provide planning funds. It can also provide funding for advance acquisition in corridor preservation, as it has in the 23 U.S.C. §108.

Funding is a critical issue in the use of acquisition powers in corridor preservation programs. Federal legislation through § 108 of the federal highway act has for some time provided loans to the state to acquire land for highways through advance acquisition.<sup>45</sup> The statute creates a revolving fund for loans to the states that the federal agency recaptures when a highway is constructed. Eventually, the loan is repaid through federal funds to the extent that federal funds are used in the project. ISTEA added a new § 108(d) to this provision that authorizes the retroactive reimbursement of states for advance acquisition. Congress imposed a number of restrictions on the use of funds authorized under § 108(d). These statutory conditions are reproduced on the following page.

Conventional federal funding also can be used for personal "hardship" and "protective" buying. Protective buying occurs when the development of land threatens a proposed transportation project.

**CONDITIONS TO THE USE OF FEDERAL FUNDS UNDER § 108(d) FOR  
ADVANCE ACQUISITION**

§ 108 (d) Early acquisition of rights-of-way. . . .

(2) Terms and conditions. The Federal share payable of the costs [of advance acquisition] shall be eligible for reimbursement out of funds apportioned to a State under this title when the rights-of-way acquired are incorporated into a project eligible for surface transportation program funds, if the State demonstrates to the Secretary and the Secretary finds that--

(A) any land acquired, and relocation assistance provided, complied with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970;

(B) the requirements of title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.] have been complied with;

(C) the State has a mandatory comprehensive and coordinated land use, environment, and transportation planning process under State law and the acquisition is certified by the Governor as consistent with the State plans before the acquisition;

(D) the acquisition is determined in advance by the Governor to be consistent with the State transportation planning process pursuant to section 135 of this title;

(E) the alternative for which the right-of-way is acquired is selected by the State pursuant to regulations to be issued by the Secretary which provide for the consideration of the environmental impacts of various alternatives;

(F) before the time that the cost incurred by a State is approved for Federal participation, environmental compliance pursuant to the National Environmental Policy Act [42 USCS §§ 4321 et seq.] has been completed for the project for which the right-of-way was acquired by the State, and the acquisition has been approved by the Secretary under this Act, and in compliance with section 4(f) of the Department of Transportation Act, section 7 of the Endangered Species Act [16 USCS § 1536], and all other applicable environmental laws shall be identified by the Secretary in regulations; and

(G) before the time that the cost incurred by a State is approved for Federal participation, both the Secretary and the Administrator of the Environmental Protection Agency have concurred that the property acquired in advance of Federal approval or authorization did not influence the environmental assessment of the project, the decision relative to the need to construct the project, or the selection of the project design or location.

There are significant limitations in the use of §108 "Q" funds in corridor preservation programs. Revolving loan funds under the program have been used only for land acquisition on known and defined alignments. Until recently, the statute required acquisition within ten years of the loan. Under ISTEA, Congress extended this period to require acquisition within 20 years of the loan. This long a lead time is necessary in corridor preservation programs, as the California chart of corridor preservation activities indicates. The new law is as yet untested.

Section 108 "Q" funds may be used for involuntary acquisition through eminent domain, but states may be unwilling to use federal loan funds when acquisition is involuntary. This reluctance is sometimes due to state statutory provisions that limit the amount of time land acquired through eminent domain may be held by a public agency. State transportation agencies may be unwilling to use eminent domain powers for acquisitions in transportation corridors if this time limit is too short, but acquisition programs may be ineffective if only voluntary acquisition is permitted.

Federal statutory and regulatory requirements also limit the use of § 108 funds for advance acquisition. Loans of "Q" funds are limited to corridors where the NEPA environmental process has been completed. The statute places even more stringent environmental and planning conditions on the use of the new § 108(d) funds for advance acquisition. Securing compliance with all of these conditions can substantially delay advance acquisition, which must be used promptly if it is to be effective in corridor preservation.

Funding for "Q" funds under § 108 also has been episodic and unpredictable. The statute simply does not create a program on which state can rely for necessary funding. A federal commitment to necessary funding is essential to corridor preservation programs because of their long-range horizon, and the possibility that acquisition problems will arise at any time during the corridor preservation period. Another problem has been that "Q" funds often were overcommitted to selected highway alignments.

Underfunding of "Q" funds has also been a perennial problem under §108. It is our understanding that, in some years, only a few million dollars of §108 "Q" funds have been available in such critical states as Florida, which have major transportation facility deficiencies. Yet the State of Missouri spent 15 million dollars acquiring land for corridor preservation on a very limited stretch of highway in St. Louis County. Funding does not meet needs.

This study recognizes that funding for acquisition is a serious problem and assumes that an essential element of any corridor preservation program is a consistent and secure funding source. Advance acquisition raises other significant implementation problems. The following case study illustrates the difficulties of an advance acquisition program that requires detailed environmental clearance in a case where the local government has no other options.

**ADVANCE ACQUISITION  
(Case Study)**

The state department of transportation has plans for a bridge crossing in Granite County. A state route has not yet been adopted for the bridge, but preliminary state studies have been completed that show the bridge alignment and that show the environmental resources that are affected. Formal route adoption by the state is four to seven years away.

Granite County shows the proposed alignment for the bridge in its comprehensive plan. Zenith Development Company, a small local developer, owns a tract of land that is partially covered by the alignment for one of the bridge approaches. Zenith plans a single family residential development on this property. The county adopted a moratorium on development that covered the bridge alignment, but moratoria are limited to two years under state law and the moratorium has expired. The developer has sued the county claiming a temporary taking of his property occurred during the moratorium period. This case is pending.

Zenith received tentative subdivision plat approval for this development prior to the moratorium. In this state, a preliminary subdivision approval vests development rights and cannot be revoked without compensation. Granite County applied for and received funds from a state advance acquisition program to acquire the Zenith property. Granite County is also seeking additional funding for advance acquisition of property in the bridge alignment through an amendment to a federal appropriation bill sponsored by their local congressman.

Zenith has begun building in sections of the project away from the bridge alignment, but the county must soon make a decision on whether to purchase the Zenith property that is covered by the alignment. The state has informed the county that environmental studies required both by state law and NEPA are necessary on the project so that the state can be assured of federal funding once the project is built. The state does not believe that a preliminary environmental study allowed by the tiering process is practical, but a full environmental study will take eight to 16 years. This delay means that Zenith will be able to proceed with the development of the property in the bridge alignment area, and the preservation of this corridor will not be possible. If this occurs, the state will have to start the planning process all over and may have to select an alignment that is less satisfactory and that creates more serious environmental problems.

**Comment:** This case study is based on an actual case that we discovered in our interviews. It illustrates some of the extreme difficulties that may occur when advance acquisition is contemplated in corridor preservation programs. Some of the problems the case presents could be remedied by less intensive environmental review requirements and more availability of federal funding for advance acquisition.



## 8-2.2 Environmental Reviews

Environmental review can be a serious barrier to the use of land acquisition powers in corridor preservation programs. The most important environmental review is the environmental assessment that occurs under NEPA. This Act requires an extended environmental assessment process, as the chart on the following page indicates. This chart also illustrates the number of checkpoints in the NEPA process. (See NEPA Process Flow Chart on following page.)

The most important point to make about this process is that compliance through the preparation of an environmental impact statement can make land acquisition in corridor preservation programs very difficult. The time frame for preparation of an impact statement is often too long.<sup>46</sup> Under some state corridor mapping acts, for example, the state agency must be ready to purchase land within a few months after a landowner within a corridor files a permit for development. That is obviously not possible if a full impact statement is required.

This compliance problem is made more difficult because, as noted earlier, state agencies insist on full compliance with NEPA before they advance funds for early acquisition so that federal reimbursement is secure.

The issue here is not whether compliance with NEPA, and with counterpart state acts, is necessary. The question is whether, and to what extent, land acquisition in corridor preservation programs should be subject to NEPA compliance. This issue has received extensive consideration in earlier reports and is not addressed again in this study in any detail.<sup>47</sup> Transportation officials have argued for a full exemption of land acquisition in corridor preservation programs from NEPA, but FHWA has not agreed. Full exemption is not likely, and our discussions with state officials and land development attorneys active in corridor preservation indicate that full exemption is not desirable.

In addition, a major federal court case held that a public hearing is ordinarily required on the use of §108 advance acquisition funds for hardship or protective buying.<sup>48</sup> A public hearing also imposes substantial delays on the use of acquisition powers in corridor preservation programs. It is our understanding that, at least in some FHWA regions, approval of hardship and protective buying is required from the FHWA regional office in order to ensure compliance with legal requirements. Regional office approval also delays the use of advance acquisition.

It is possible at an early stage to determine that a lengthy environmental assessment is not needed. This is done through a Categorical Exclusion ("CE"), as noted earlier and in the NEPA process flow chart presented on the following page. FHWA regulations provide for CE's but these apply to all agency programs and are not tailored to the problems raised by corridor preservation.<sup>49</sup> Our interviews indicate that the problem with these regulations is that CE's are usually granted on an isolated basis, one parcel of land at a time, as the need for acquisition arises. We found instances in which parcels were grouped together for a CE but we were told that the use of a CE for an entire corridor subject to corridor preservation had not yet been authorized or approved,



or at least was difficult to obtain. The CE process can also be lengthy, as it can take up to at least six months. Another option that should be considered is the preparation of a tiered impact statement on the corridor that would not have to be as detailed as project-specific impact statement that analyzes specific alignments.

NEPA compliance can place pressures on land acquisition in corridor preservation programs. Corridors must be identified before acquisition can be used. This, alone, is a substantial problem as corridor definition can be difficult. The corridor definition problem is complicated if NEPA compliance is considered at the acquisition stage because of the NEPA requirement that alternatives to a transportation facility must be considered. Transportation agencies cannot reasonably identify several alternatives in a corridor for acquisition because of funding limitations and because of the disruption that acquisition of parcels in a number of alternatives would create.


Another problem is that land acquisition in corridor preservation cannot be allowed to prejudice the environmental assessment process because the agency cannot afford to be accused of bias or prejudgment in its assessment. California has attempted to remedy this problem by providing that the acquisition of land through advance acquisition will not prejudice the environmental evaluation of that land when the project is constructed, but this limitation makes land acquisition more tenuous for the state agency.

Tiering of environmental assessments is an alternative to the use of a CE. Tiering is a process that allows a more generalized consideration of environmental impact at early project stages, such as the designation of a transportation corridor, followed by more detailed environmental assessment at the specific project stage. Our interviews indicated that the use of tiering in corridor preservation is very difficult. Agencies believe they must carry out a detailed assessment even at the corridor designation stage, partly because it is difficult to avoid consideration of detailed environmental impacts and partly because they want to be assured of federal reimbursement when the project is constructed.

### **8-3 STATE CONSIDERATIONS**

#### **8-3.1 Legal**

Most advance acquisition for corridor preservation occurs at the state level and is carried out by state transportation agencies in their highway programs. The reason is that states are eligible for §108 loans from the federal government, are responsible for the state highways on which advance acquisition may be needed, and have more extensive funding resources for advance acquisition than local governments.

Legal authority for land acquisition must be granted at the state and local level. The federal government can possibly influence the nature of these powers by conditioning federal highway assistance, but the decision on what powers to confer rests with the states. 

There are a number of statutory limitations in state law that affect the use of advance acquisition in corridor preservation. A taking of property problem does not arise because advance acquisition requires compensation. Three major issues affect the provision of authority for acquisition and condemnation powers:

### KEY ADVANCE ACQUISITION LEGAL ISSUES

- ▶ Does the use of land acquisition and condemnation powers in corridor preservation programs to acquire land in advance of use satisfy the requirement that there must be a proved necessity for the property acquired or condemned?
- ▶ Is there sufficient legal authority at the state and local government level for the use of land acquisition and condemnation powers in corridor preservation programs?
- ▶ Is the legal authority to use land acquisition and condemnation powers in corridor preservation programs adequate for the purpose?

A satisfactory answer to the "necessity" question can be assisted through appropriate statutory declarations of purpose, but the ultimate decision is with the courts. State courts vary in the extent to which they approve advance acquisition and condemnation for corridor preservation purposes, although it is safe to say that what authority exists is generally favorable. We do not believe that the need to find a statutory necessity for an advance acquisition is a serious barrier to corridor preservation, but this problem may require attention in some states.

The legal authority that is granted for land acquisition and condemnation must be adequate for corridor preservation purposes. Most state legislation that allows advance acquisition of land applies to all state programs and is not specific to corridor preservation. Specific statutory authority to acquire land in advance of need for corridor preservation is desirable. A state statute might provide, for example, that any land acquired in advance of need must be used within two years of acquisition, a time limitation that could be a barrier to corridor preservation programs.

Some existing legislation that specifically authorizes advance land acquisition for corridor preservation may also contain features that provide barriers to corridor preservation. New legislation in California, for example, requires approval of advance acquisition in corridors by regional planning agencies, not the state. The statute, in addition, requires environmental approvals. These approvals are intended to substitute for the environmental review provided under the state's environmental policy act, but they may be difficult to meet if an acquisition for corridor preservation must be done quickly. Another statute, generally applicable to all condemnations, requires that all land required by a public agency for public use be used within seven years of its acquisition.

This legislation can place serious limitations on the use of advance acquisition powers, but the most serious limitation is the prohibition, either explicit or in practice, that prevents the state from condemning land involuntarily when landowners refuse to sell. In other states the state agency is reluctant for policy reasons to condemn land involuntarily when a landowner resists. Although this practice may be good policy in view of the need to secure landowner cooperation in transportation programs, it seriously limits corridor preservation.

### 8-3.2 Institutional

#### (a) Funding

Funding is a serious problem at the state level. States are reluctant to use limited funds for advance acquisition to support corridor preservation because this diverts financial resources from the construction of facilities which are needed and which the state may be under severe pressure to construct. States may also believe that retroactive funding under the §108(d) program places them under unjustified financial pressure. States are compelled to risk state funds for advance acquisition on a highway which should, but may not, receive substantial reimbursement with federal funds. As one official put it, advance acquisition is in the federal interest yet states must take the risk that they will not be reimbursed for advance acquisition expenditures. The need to secure federal reimbursement also puts severe pressure on the states to do all that is necessary at the advance acquisition stage so they can ultimately receive federal reimbursement.

← Reimbursement  
Risk

General state revenues have been under severe pressure from medical, welfare and criminal justice programs in recent years in the face of declining revenues. Some states have used bond issues to raise funds for advance acquisition, but the amounts raised have been limited and in many states the need for voter approval makes the issuance of such bonds unlikely. A few states have also created funds for advance acquisition that are funded by general revenues.<sup>50</sup>

#### (b) Administrative Issues

The implementation of advance acquisition programs in state transportation agencies has created complicated administrative problems. Corridor preservation requires participation by both planning and right-of-way staff. The designation of corridors is necessarily part of the planning process, but the advance acquisition that can occur in transportation corridors is the responsibility of the right-of-way office. Indeed, in some states advance acquisition has been carried out so close in time to highway construction that it is considered solely a right-of-way responsibility. The need to use condemnation and valuation skills in the acquisition and condemnation process also requires the use of right-of-way staff.

← Need for  
Coordination

Advance acquisition in corridor preservation will not be a successful program if it is solely a planning or right-of-way responsibility with no coordination between these branches. A more effective way to manage corridor preservation programs must be found. There has been experimentation with an independent corridor preservation program coordinator who draws on staff from a number of divisions, and with the use of joint staff under a chair person from one

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of the branches concerned with the program. There is not enough experience with either approach to determine which will be most effective, but experimentation with different administrative arrangements clearly is necessary. Unfortunately, the corridor preservation program staff was the victim of a budget cut in one state where funding for the transportation agency became limited.

Another institutional issue in the use of acquisition in corridor preservation is that alignments contained in corridor maps may not be specific enough to authorize the use of condemnation powers. States may not be able to use acquisition for a corridor map adopted substantially in advance of construction because precise alignments are not known at that time. One state avoided this problem by taking an entire property that is affected by a corridor map, not just that part affected by the alignment, but this may be an expensive alternative in some cases. Compensation problems may, nevertheless, push states to the condemnation of entire parcels. In Florida, for example, condemnation of entire parcels is preferred because business damages are payable in that state if only part of a parcel is taken, and these damages can be avoided if all of the property is taken.<sup>51</sup>

Advance acquisition creates administrative problems because transportation agencies may be unwilling to assume management responsibilities over land they acquire during the period prior to construction of the transportation facility. Transportation agencies may also be unwilling to engage in advance acquisition because plans may change, land acquired may not be used for a transportation facility, and the agency may have to sell land they previously acquired.

← *Unwanted  
Management  
Responsibility*

### 8-4 LOCAL CONSIDERATIONS

#### 8-4.1 Legal

The same legal problems that affect advance acquisition at the state level also affect local governments. Local governments usually have statutory authority to acquire or purchase land, which should be sufficient as a legal basis for advance acquisition in corridor preservation programs. It would be helpful if specific authority were provided to use acquisition in corridor preservation, especially when necessary to support corridor mapping or other police power programs.



#### 8-4.2 Funding

Funding for advance acquisition is more problematic at the local than it is at the state level. Some local governments have used local revenue or borrowing sources to raise funds for advance acquisition. The sales tax is an important source of funds in California, for example, and we are aware of the use of bond issues in other local jurisdictions. A few jurisdictions, as in the Twin Cities area in Minnesota, have obtained state authority to levy taxes to support advance acquisition for corridor preservation.<sup>52</sup>

Again, the availability of fiscal resources is limited. Local governments everywhere are under severe fiscal pressure, and in many states the requirement of voter approval for tax issues and

bond issues again limits the possibility that local governments can raise adequate fiscal resources. Local funding for advance acquisition is necessarily episodic and erratic. The successful use of funding in some local jurisdictions should not obscure this fact.

#### **8-5 KEY ELEMENTS IN THE USE OF ADVANCE ACQUISITION IN CORRIDOR PRESERVATION**

The courts have usually held there is implied authority in state transportation agency laws to acquire land in advance of an agency's need for a transportation facility. However, the adoption of legislation authorizing advance acquisition for corridor preservation is advisable. The key elements in the use of advance acquisition in corridor preservation are:

- (1) State legislation should authorize the use of advance acquisition in corridor preservation.
- (2) States should acquire adequate management skills for advance acquisition programs.
- (3) Congress should revise the §108 programs for advance acquisition to provide more effective funding sources for corridor preservation.
- (4) State legislation should authorize funding sources for advance acquisition by state and local governments.
- (5) Environmental review under the National Environmental Policy Act should occur at an early stage of the planning process to support corridor preservation.
- (6) Cooperation between FHWA and other federal agencies in coordinating environmental reviews in corridor preservation should be encouraged.

#### **8-6 SIGNIFICANT BARRIERS AND DETAILED MEASURES FOR REMOVAL**

##### **8-6.1 Inadequate Legal Authority**

Legal authority for advance acquisition may not exist or may be inadequate.

**Barrier Removal Measure.** *Legislation should clearly specify that advance acquisition may be used in corridor preservation programs. Legislation should clearly give the state transportation agency the responsibility to carry out advance acquisition for corridor preservation. The legislation should specifically authorize advance acquisition to back up the use of police powers in corridor preservation.* The roles of regional and local governments in advance acquisition programs should be carefully considered. ■

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*Legislation should authorize the use of involuntary powers of condemnation in advance acquisition programs. Legislation should clearly provide for the authority to manage land acquired through advance acquisition and to sell such land if it is no longer needed for a transportation facility. The statute should give the state transportation agency the option to acquire full title to land through advance acquisition; to acquire a lesser interest, such as an easement; to acquire an option; or to lease land from landowners.*

Another option, briefly discussed in the Introduction to this study, is to *carry out environmental assessments on transportation corridors as part of the state and regional long-range transportation planning process mandated by ISTEA.* Environmental assessments of transportation corridors as part of the planning process would provide the environmental review necessary for advance acquisition, which in most cases would not be an environmentally significant action. California has had a similar environmental review process for local comprehensive plans for some time, and has extended it in recent legislation.

An important issue is whether legislation should specify criteria to be applied to determine whether advance acquisition can be carried out, or whether it should simply contain an authorization for advance acquisition and leave the decision on when to use this power to the state and to local governments. Because funds for advance acquisition are limited, some states have established programs in which criteria for acquisition are provided and priorities specified. California is an example. This legislation will direct funding to the most important transportation corridors and projects, but it also requires agencies to adopt and implement policies to determine when acquisition should be authorized. Delays in the use of acquisition powers may result and this may impair the effectiveness of the program.

### 8-6.2 Inadequate Management Skills

Transportation agencies may be unwilling to manage land acquired through advance acquisition or may not have the necessary management skills.

**Barrier Removal Measure.** *State agencies need to acquire the management skills needed to manage properties acquired through advance acquisition. FHWA should provide guidance and training on the acquisition of needed management skills.* ■

### 8-6.3 Inadequate Funding and Cumbersome Requirements

The federal §108 loan program for advance acquisition is inadequate because:

It has been used only for acquisition on known and defined alignments and funds are often overcommitted to specific projects.

Funding has been inadequate and irregular; and

The legislation contains limitations and requirements that make retroactive reimbursement too cumbersome to use with corridor preservation acquisition programs.



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**Barrier Removal Measure.** *Because the §108 loan program is subject to restrictive limitations and funding has not been sufficient it must be substantially revised if advance acquisition is to be an effective technique for corridor preservation. Congress should authorize the use of the §108 loans for land acquisition at an early stage in corridor preservation and to back up the use of police power measures in corridor preservation. Congress must determine the level of funding that is required and provide funding on a consistent basis in response to state advance acquisition programs submitted to and approved by FHWA.* ■

Statutory requirements for advance acquisition should be reexamined. Compliance with some of these requirements, such as the environmental assessment requirement of NEPA and the review requirements of the National Historic Preservation Act, should be authorized on a generic basis for designated highway corridors rather than carried out as states propose individual acquisitions within corridors.

The necessity of public hearings on acquisitions under this program should be reexamined. It does not seem necessary to hold public hearings on each advance acquisition if hearings are held on corridor designation proposals that are part of the state and regional plans mandated by federal legislation. Hearings can be held at that time to consider any need for advance acquisition in designated transportation corridors. Plans should also contain provisions that will ensure compliance with the Uniform Relocation Act and civil rights acts. Federal legislation should be amended to incorporate these changes.

#### **8-6.4 Lack of State/Local Authority**

State and local governments must have the authority to provide funding for advance acquisition in corridor preservation programs.

**Barrier Removal Measure.** *States should provide statutory authority for a funding source that can provide adequate revenue for advance acquisition by state and local governments. Examples are legislation to authorize borrowing for advance acquisition or to authorize the levy of special taxes to create an advance acquisition fund. The fund could also be supported by general revenues. State and local governments need to consider innovative funding of acquisition programs, such as the use of debt obligations payable through reimbursement by state and federal funds.* ■

#### **8-6.5 Lengthy Environmental Review Process**

Environmental review under NEPA is time-consuming and can substantially interfere with advance acquisition efforts. It is impossible to carry out advance acquisition in corridor preservation programs and comply with NEPA's environmental assessment requirements before acquisition occurs. Similar problems arise in states that have environmental assessment laws modeled on NEPA.

**Barrier Removal Measure.** There are a number of measures that can be adopted to facilitate compliance with NEPA in advance acquisition programs for corridor preservation. *Corridors preserved in corridor preservation programs should receive environmental review at the corridor designation stage. Corridors could receive a Categorical Exclusion from environmental review at this point. If a review is conducted it should be limited to brief consideration of environmental issues raised by corridor selection and should not be site-specific to individual parcels. Advance acquisition should occur within the corridor once a corridor environmental assessment has been completed without the need for additional environmental review. States should provide statutory authority to sell parcels acquired through advance acquisition that are not used in highway construction because of environmental objections.* ■

Other administrative adjustments in the environmental assessment process would also be helpful. NEPA regulations authorize federal agencies to grant Categorical Exclusions from environmental assessment procedures to actions that are found not to have environmental effects. Because advance acquisition results merely in change in land ownership, a Categorical Exclusion is justified for this action. FHWA has regulations for categorical exclusions in the NEPA environmental review process, but these regulations cover all actions in FHWA programs and are not specific to advance acquisition in corridor preservation.

*FHWA should adopt regulations dealing solely with Categorical Exclusions for advance acquisition in corridor preservation. These regulations should allow the Categorical Exclusion of entire corridors at the time a corridor is designated. Site-specific environmental reviews would then occur at the construction stage.*

*Tiering is another option that is available under NEPA regulations that can be helpful in advance acquisition for corridor preservation.* Tiering authorizes a limited environmental review of a preliminary governmental action that will require more definite implementation later. A detailed environmental review is carried out when the later implementing action is proposed.

Corridor preservation is an example of a governmental action that can benefit from the tiering process. Advance acquisition is merely a step toward construction of a highway. The acquisition of property in a transportation corridor is a preliminary governmental action that will be implemented later when the highway is constructed. Tiering should allow a limited environmental review of advance acquisition in transportation corridors, and some states have attempted to use tiering for this purpose.

The problem is that it is difficult to carry out only a limited environmental review of a project at the acquisition stage. States want to be assured of federal funding when the transportation facility is constructed and feel compelled to carry out a full environmental review when a parcel of land in a transportation corridor is acquired. Changes in FHWA regulations are needed that will clearly specify the environmental review that is required at the advance acquisition stage in order to assure a state of federal funding.

Another option, previously mentioned in Section 8-6.1, is *to carry out environmental assessments on transportation corridors as part of the state and regional long-range transportation planning process mandated by ISTEA*. Environmental assessments of transportation corridors as part of the planning process would provide the environmental review necessary for advance acquisition, which in most cases would not be an environmentally significant action.

#### **8-6.6 Impact of Other Federal Requirements**

Federal environmental requirements in addition to the environmental assessment required by NEPA, such as the dredge-and-fill permit requirement of the Clean Water Act, are difficult to meet at the corridor stage and may make advance the acquisition of land for corridor preservation difficult when these requirements apply.

**Barrier Removal Measure.** *FHWA should continue to encourage programs of cooperation with other agencies in the coordination of environmental requirements.* Regulatory changes may also be necessary by affected agencies to accommodate problems of environmental review with the need for advance acquisition in corridor preservation programs. ■



# PART 9: Conclusion

## PART 9: CONCLUSION

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Corridor preservation is an important component in transportation programs. Corridors must be reserved for highway and other transportation projects as much as 20 years in advance of construction, and preservation of corridors is essential in order to prevent development in reserved corridor areas and to prevent increases in land prices prior to the time land within the corridor is needed.

Corridor preservation has been an element in transportation programs for some time, but has relied primarily on the voluntary acquisition of land close to the time it is actually needed for a transportation project. Land acquisition has also been inadequately and unevenly funded and is subject to environmental assessment procedures that can impose substantial delays. Delay is fatal in corridor preservation programs because agencies must usually act quickly in response to development pressures within transportation corridors.

Police power measures, such as corridor mapping and the use of planning and development control powers have also been used in corridor preservation, but the use of these powers is not as well developed as the use of advance acquisition. A few states have also experimented with the use of highway access management to preserve and enhance the capacity of highways as a corridor preservation technique.

This study examined a number of techniques that can make corridor preservation more successful. It first reviewed barriers to corridor preservation and the legal and institutional problems they create. The *actors* in corridor preservation were then identified and the roles they play examined. *Fundamental categories of corridor preservation* were then explained.

The study then reviewed a number of programs that are useful in corridor preservation. *An emphasis was placed on local government planning and development control powers*, as much of the effort in corridor preservation must be carried out at the local government level through the use of traditional powers over land use and development. *Corridor mapping* by state and local governments was examined next, and the study then reviewed *access management* and *land acquisition*. Problems with the use of each of these techniques were identified and proposals made to remedy or mitigate these problems. This review indicates that *police power measures* and *access management* have the most potential as techniques to be used in corridor preservation. Funding and environmental review problems make acquisition and condemnation less helpful as corridor preservation measures. The removal of barriers to all of these corridor preservation programs may require intensive political and management efforts, but the importance of corridor preservation in transportation programs indicates that this effort is worthwhile.

ENDNOTES





## ENDNOTES

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- 1 Id.
- 2 Report of the AASHTO Task Force on Corridor Preservation 1-2 (1990).
- 3 Williams, ISTEA: New Directions for Transportation, Land Use Law and Zoning Digest, Vol. 45, No. 7, at 3 (1993).
- 4 58 Fed. Reg. 12064, 12070 (1993).
- 5 23 U.S.C. § 134(f)(10) (metropolitan planning organizations); 23 U.S.C § 135(c)(17) (states).
- 6 58 Fed. Reg. at 12070.
- 7 D. Mandelker, NEPA Law and Litigation 8-33 (2d ed. 1992).
- 8 42 U.S.C. § 7506 (applies to all federally funded, approved or permitted activities).
- 9 58 Fed. Reg. 62188, 62189 (1993).
- 10 58 Fed. Reg. 62188, 62194 (1993).
- 11 40 C.F.R. § 51.404(a)(2)(ii).
- 12 40 C.F.R. § 51.406.
- 13 58 Fed. Reg. 62188, 62210 (1993).
- 14 D. Mandelker & G. Feder, "The Application of the National Environmental Policy Act to Highway Projects," National Cooperative Highway Research Program, Legal Research Digest, No. 15 (1990).
- 15 See D. Mandelker, NEPA Law and Litigation, Ch. 12 (2d ed. 1992).
- 16 Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Comm'n, 599 F.2d 1333 (5th Cir. 1979).
- 17 Federal Highway Admin. & Other Agencies, Applying the Section 404 Permit Process to Federal-Aid Highway Projects (1988).
- 18 See § 1-2.2.
- 19 See generally, D. Mandelker, The Legal Framework for Environmental Review of State and Local Public Works Projects in Advisory Commission on Intergovernmental Relations, Intergovernmental Decisionmaking for Environmental Protection and Public Works (1992)
- 20 112 S. Ct. 2886 (1992).
- 21 483 U.S. 825 (1987).

## Endnotes

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- <sup>22</sup> 114 S. Ct. 2309 1994.
- <sup>23</sup> 112 S. Ct. 2886 (1992).
- <sup>24</sup> Wash. Rev. Code § 36.70A.070(6).
- <sup>25</sup> See Freeman v. State Roads Comm'n, 250 A.2d 250 (Md. 1969) (in condemnation action, court will not consider zoning ordinance adopted to depress value of property prior to condemnation).
- <sup>26</sup> Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y.), appeal dismissed, 409 U.S. 1003 (1972).
- <sup>27</sup> Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258 (Minn. App. 1992) (review denied by supreme court).
- <sup>28</sup> Gordon v. City of Warren Planning & Urban Renewal Comm'n, 199 N.W.2d 465 (Mich. 1972) is a leading case.
- <sup>29</sup> Md. Ann. Code art. 28, § 7-116(a)(4).
- <sup>30</sup> Howard County v. JJM, Inc., 482 A.2d 908 (Md. 1984).
- <sup>31</sup> Maryland-National Capital Park & Planning Comm'n v. Chadwick, 405 A.2d 241 (Md. 1979).
- <sup>32</sup> Chrinko v. South Brunswick Township Planning Bd., 187 A.2d 221 (N.J.L. Div. 1963).
- <sup>33</sup> Montgomery County v. Woodward & Lothrop, Inc., 376 A.2d 483 (Md. 1977).
- <sup>34</sup> For an example of a density transfer authorizing statute see N.Y. Town Law § 281.
- <sup>35</sup> See D. Mandelker & A. Kolis, National Cooperative Highway Research Program, Legal Techniques for Reserving Right of Way for Future Projects Including Corridor Protection (National Cooperative Highway Research Program, Research Results Digest No. 165, 1987); Mandelker, "Interim Development Controls in Highway Programs: The Taking Issue," 4 Journal of Land Use and Environmental Law 167 (1989).
- <sup>36</sup> Cal. Government Code § 64541.
- <sup>37</sup> See D. Mandelker & A. Kolis, National Cooperative Highway Research Program, Legal Techniques for Reserving Right of Way for Future Projects Including Corridor Protection (National Cooperative Highway Research Program, Research Results Digest No. 165, 1987); Mandelker, "Interim Development Controls in Highway Programs: The Taking Issue," 4 Journal of Land Use and Environmental Law 167 (1989).
- <sup>38</sup> Joint Ventures, Inc. v. Department of Transp., 563 So.2d 622 (Fla. 1990), as explained in Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 1994 Fla. Lexis 479.

- <sup>39</sup> Palm Beach County v. Wright, 1994 Fla, Lexis 832 (Fla. 1994).
- <sup>40</sup> Kingston E. Realty Co. v. State, 330 A.2d 40 (N.J. App. Div. 1975). *Contra* Lackman v. Hall, 364 A.2d 1244 (Del. Ch. 1976).
- <sup>41</sup> For a recent state corridor mapping act incorporating the suggestions in these proposals see N.H. Rev. Stat. Ann. §§ 230-A:1 to 230-A-14, reproduced in Appendix F.
- <sup>42</sup> See Part 5 for a discussion of the role of planning in corridor preservation.
- <sup>43</sup> For a comprehensive review of access management see F.J. Koepke & H.S. Levinson, Access Management Guidelines for Activity Centers (National Cooperative Highway Research Program, Report No. 348, 1992). *See also* Federal Highway Administration, Proceedings of the First National Access Management Conference (1993).
- <sup>44</sup> Stout, New Jersey's State Highway Access Management Act in Federal Highway Administration, Proceedings of the First National Access Management Conference 29, 31 (1993).
- <sup>45</sup> 23 U.S.C. § 108.
- <sup>46</sup> U.S. General Accounting Office, Highway Planning. Agencies are Attempting to Expedite Environmental Reviews, but Barriers Remain 1 (1994) (Environmental review process takes two to eight years).
- <sup>47</sup> American Association of State Highway and Transportation Officials [AASHTO], Report of the AASHTO Task Force on Corridor Preservation (1990).
- <sup>48</sup> National Wildlife Federation v. Snow, 561 F.2d 227 (D.C. Cir. 1976).
- <sup>49</sup> 23 C.F.R. §§ 630.114(h)(3), 771.117(d)(12).
- <sup>50</sup> E.g., Va. Code §§ 33.1-137 to 33.1-143.
- <sup>51</sup> See City of Ocala v. Nye, 608 So.2d 15 (Fla. 1992) (city's home rule powers authorized condemnation of entire tract).
- <sup>52</sup> Minn. Stat. Ann. § 473.167.



# APPENDICES



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## GLOSSARY OF KEY TERMS AND DEFINITIONS

### I.

#### GENERAL TERMS

**BASE ZONING DISTRICT:** A zoning district established to reflect the geographical boundaries of basic land use areas, such as residential, commercial, or industrial, within the jurisdiction of a local government.

**COMPREHENSIVE PLAN:** A statement of the goals and objectives for the future development of a community. The comprehensive plan usually contains sections or "elements" on land use, community facilities, transportation and housing. The plan also contains a map that translates the goals and policies of the plan into land use designations indicating where different types of public and private development should locate. The planning policies and map together provide a basis for decisions on land use in the land use regulation process.

**CORRIDOR:** The path of a *transportation facility* that already exists or may be built in the future. (See Rivkin at i, 6-7.) A *corridor* may include not only the land occupied (or to be occupied) by a *transportation facility* but also any other land that may be needed for expanding a *transportation facility* or for controlling access to it. (See AASHTO at 6-2 (citing Florida statute SD-392 passed June 1988).)

However, a *corridor* is not a property interest but a planning concept. Where *transportation facilities* are in the early stages of planning, a *corridor* may not even occupy a precise location. (See AASHTO at 1-4, 2-2.) When public authorities first identify a *corridor*, they may hold no property interests in land within it. Later, however, as part of their efforts at *corridor preservation* or *protection*, public authorities may acquire such property interests. (See, e.g., AASHTO at 1-5, 1-7, 1-9, 3-2 to 3-3; Rivkin at 36, 37, 41 (quoting California's corridor preservation statute, 42 (quoting Florida's corridor preservation statute)).)

**CORRIDOR PRESERVATION OR PROTECTION:** The techniques that public authorities may use to protect the capacity of existing *corridors*, to protect planned *corridors* from inconsistent development (see Rivkin at 6-7; see also AASHTO at 1-2; Glossary Part Two) or to preserve intact transportation or utility corridors that are or may be abandoned (e.g., abandoned railroad rights of way).

The purposes of *corridor preservation* or *protection* include: minimizing or avoiding adverse environmental, social or economic impacts; reducing displacement; preventing the foreclosure of desirable location choices for *transportation facilities*; allowing for the orderly assessment of impacts flowing from the construction of such facilities; permitting orderly project development; and reducing construction costs. (See AASHTO at 1-2.)

The tools of *corridor preservation* or *protection* fall into three general categories: acquiring property rights in land within a *corridor*; regulating the use of such land; negotiating with owners of such land for its preservation in an unimproved condition. (See AASHTO at 1-2, 1-6 to 1-7; see also *infra* Section II.)

**EMINENT DOMAIN (OR CONDEMNATION):** The power of federal, state or local government to take private property for public purposes; a power constitutionally limited by the requirement that government pay just compensation to the owner of the property taken. (United State Constitution, fifth amendment; See *Taking* *infra*.)

**OVERLAY ZONE:** A zoning district consisting of regulations that address specific subjects that require special treatment in light of geographical characteristics and/or zoning policies. The boundaries of the overlay zone "overlay" one or more base zoning districts. Where an overlay district has been designated, the regulations of the overlay district supersede or supplement, as applicable, the regulations of the base zoning district(s).

**PLANNED UNIT DEVELOPMENT (PUD):** A land use approval process, with separate standards, that allows for the planning and review of a development project on one parcel, or one or more contiguous parcels, as a single entity or "unit" using flexible standards to allow for creative design and, where zoning policies indicate, a mix of uses.

**POLICE POWER:** The power of states and their political subdivisions to adopt, i.e., laws and regulations that secure public health, welfare, safety and morals. (Black's Law Dictionary, abridged 5th ed., *s.v.* police power.) State and local governments enact land use regulations under this power.

**RIGHT OF WAY:** (1) a party's property right to pass over the land of another, i.e., an easement (Black's Law Dictionary, abridged 5th ed., *s.v.* right of way); (2) land that is occupied by a *transportation facility* such as a railroad (see *id.*) or that may be needed for a proposed *transportation facility*. (See, e.g., AASHTO at 1-2, 1-9, 3-3, 3-7, 9-2, 9-3, 9-4; Rivkin at i, 45-47.)

The second, broader sense of the term right of way is the sense proper to transportation planning. In this sense, right of way does not denote a real property interest but only the actual or planned site of transportation facility. (See, e.g., Rivkin at 20 (reporting that a state "had actually acquired about 45 percent of the right-of-way" in a certain *corridor*).

**SITE PLAN REVIEW:** A development review process under the authority of the Plan Commission that addresses the site details of a development. It does not address off-site conditions except to the extent that an on-site condition (e.g., ingress/egress) affects off-site conditions (e.g., traffic).

**TAKING:** An act or regulation whereby government puts private property to public use without paying just compensation for that property to its owner. (See *supra* *Eminent domain*.)

A *taking* results when government causes the physical occupation or invasion of property. A *taking* may also result from *police power* regulations which -- either by their terms or by their application to a particular property -- constitute what courts call "regulatory takings" that violate the fifth amendment to



the United States Constitution. Courts have developed several tests for identifying "regulatory takings", and judicial doctrine is still evolving. (See Kolis and Mandelker at 5-15; Mandelker (1989) at 170-87.)

**TRANSPORTATION FACILITY:** General term (undefined by statute, see, e.g., 23 U.S.C. § 101, 49 U.S.C. § 1) designating all means of transportation (e.g., highways, railways, etc.) and the uses and improvements of land that they require. (See, e.g., 23, U.S.C. § 134(a); AASHTO at 1-2, 1-9, 2-2, 2-4; Rivkin at 4 (quoting AASHTO at 1-2), 7, 10.)

## II.

### TERMS AND TECHNIQUES OF CORRIDOR PRESERVATION OR PROTECTION

*Corridor preservation* protects both existing and planned transportation facilities from inconsistent development of land that may be needed for those facilities in the future. (See supra Section A *corridor preservation or protection*.)

The techniques of *corridor preservation* available to governing bodies fall into three general categories as set out below. (See AASHTO at 1-2, 1-6 to 1-7.) But note that some of these techniques -- *dedications*, for example -- are rarely used and largely ineffective as tools of *corridor preservation*, and are listed here for the sake of completeness.

(1) **Negotiation (negotiation with developers of):**

- ▶ *density transfers*
- ▶ *donations*
- ▶ *highway platting*
- ▶ *interim uses*
- ▶ *irrevocable offers to dedicate*
- ▶ *joint public/private development agreements*
- ▶ provision of public facilities (where market forces or *public facilities ordinances* give governing bodies leverage)
- ▶ *reservation agreements*
- ▶ *tax abatements*
- ▶ *transferable development rights (TDR's)*

(2) **Regulation (requiring developers to provide or pay):**

- ▶ *exactions* -- usually imposed by *subdivision ordinances*, these include:
  - *dedications*
  - *impact (or facility) fees*
  - *payments in lieu of required improvements (or in-lieu payments)*
  - *required improvements (or in-kind contributions)*
- ▶ *growth management*
- ▶ *reservations* -- usually required by *official maps* or *maps of reservation* that may designate:
  - *centerline alignments*
  - *rights of way*
- ▶ *setbacks* -- may be required by setback ordinances or *official maps*

**(3) Purchase (purchase from developers or landowners of):**

- ▶ *fee simple*, (acquired in advance of project need), by means of:
  - *eminent domain*
  - *negotiated agreement*
  - *protective buying*
- ▶ *development easements*
- ▶ *options to purchase*

When used to protect existing highways, the techniques just listed serve the policy of *capacity protection*.

**ABANDONED CORRIDOR ACQUISITION:** The purchase or regulation of transportation corridors (highways, railroads, etc.) which are or may be abandoned. (FHWA "Guidelines: Preservation of Transportation Corridors: *Data Forms Preparation Instructions*" (Attachment 1))

In the case of abandoned railroads, authorities may use railbanking principles, or exercise reversionary interests attached to federally granted railroad rights of way. (FHWA "Guidelines: Preservation of Transportation Corridors: *Data Forms Preparation Instructions*" (Attachment 1))

**ACCESS MANAGEMENT:** *See* CAPACITY PROTECTION OR ACCESS MANAGEMENT

**CAPACITY PROTECTION OR ACCESS MANAGEMENT:** *Corridor preservation* policies for the protection of existing highways.

Public authorities may use *capacity protection* to prevent overuse of existing highways either by limiting access to them (*i.e.*, by limiting curbcuts) or by protecting adjacent land needed to widen or improve existing highways to meet increased use. (*See* Rivkin at i, 10-17; *see also* AASHTO at 6-6 (on New Jersey's State Highway Access Management Act of 1989), 8-4).

(*Cf.* FHWA "Guidelines: Preservation of Transportation Corridors: *Data Forms Preparation Instructions*" (Attachment 1) ("[A]ccess management is the protecting of the capacity of existing routes and systems by controlling access rights from adjacent properties. This practice may be described as "entrance permit requirements" in some States.").)

**CENTERLINE ALIGNMENT:** A planned road's centerline as designated on an *official map* or master plan. (*See* AASHTO at 2-5, 6-5 to 6-6 (on New Jersey's alignment preservation statute of 1968).)

**DEDICATION:** A property owner's conveyance of land or of an easement in land to the public for its use, and the public's acceptance of that land or easement. (Black's Law Dictionary, abridged 5th ed.)

*Dedications* may be among the *exactions* imposed on developers by *subdivision ordinances* which, as a prerequisite to the approval of any proposed subdivision of land, require that developers dedicate transportation and utility rights of way to serve the subdivided lots. Unless they serve the specific needs

of proposed subdivisions, however, *dedications* that are uncompensated may be unconstitutional *takings*. For example, a subdivider's uncompensated *dedication* of land to widen an adjacent highway would probably constitute a *taking*. (See Kolis & Mandelker at 16; see also AASHTO at 4-6, 8-4; Rivkin at 28, 45-46.) A street-widening *dedication* in exchange for a *density transfer* may be constitutional, however. (Cf. *infra* Section B *density transfer*.)

**DENSITY TRANSFER:** The assignment of development density credits attributable to a proprietor's land within a *corridor* to that proprietor's contiguous lands outside it, in exchange for the proprietor's *dedication* of the land in the *corridor* to the public. (See Rivkin at 45 (quoting North Carolina statute), 93-94 (describing a Broward County, Florida, density transfer provision).)

**DEVELOPMENT EASEMENT:** A temporary or permanent property interest in developing land, which interest a governing body may purchase to protect land in transportation *corridors* from development. (AASHTO at 1-7, 4-10, 4-11 to 4-12.)

Because the development easement is a lesser interest in land than an estate in *fee simple*, the development easement may cost less to buy. (*Id.*) Local officials who have experimented with the purchase of development easements, however, report that the savings are negligible. (Rivkin at 93 n.75.)

**DONATION:** Gift of *right of way* to a state which -- under section 146(a) of the *Surface Transportation and Uniform Relocation Assistance Act* of 1987 -- may use the donated land's fair market value as a credit toward the state's matching shares in federal aid highway projects. (AASHTO at 9-4; see also *Id.* at 4-2, 6-3.)

**EMINENT DOMAIN:** See *supra* Section I, *eminent domain*.

**EXACTION:** A mandatory contribution by a developer, including the *dedication* of property, whereby the developer bears the costs of infrastructural improvements made necessary by his or her development. (See AASHTO at 1-6 (*dedications*); FHWA "Guidelines: Preservation of Transportation Corridors: *Data Forms Preparation Instructions*" (Attachment 1) (*dedications, impact fees, payments in lieu of required improvements* (or "in-kind contributions"), *required improvements* ("in-kind contributions")); Kolis & Mandelker at 16 (*dedications*); Rivkin at 46, 88-90 (*impact fees, payments in lieu of required improvements, required improvements*)).

**FEDERAL FUNDING PROGRAMS:** The following Federal funding programs can be used in support of preservation initiatives.

23 CFR 712.204(d) - Hardship Acquisition and Protective Buying use conventional Federal funding to acquire property. Hardship acquisition must be based on an adverse impact to a particular owner created by a prospective project. Protective Buying is used to forestall development within a known alignment. Both programs are covered by special provisions in 23 CFR 771 (d) (12) where environmental requirements for handling these forms of acquisition activity are presented.

23 U.S.C. § 108(a), (b) & (c) Basis for Advance Acquisition program that sets up the Right-of-Way Revolving Fund, known as "Q" funds" due to fiscal coding prefix used for program. This program provides Federal loans for right-of-way acquisition under terms set forth in 23 CFR 712.7xx (SubPart G - Right-of-Way Revolving Fund) and 23 CFR Part 130 (Advance of Funds). The program is dependant on annual appropriation and obligational authority. It has been used for individual tract acquisitions, but primarily to fund advance acquisition on identified alignments that have received full environmental clearance. Applications are made annually by the states for the limited amount of funds available.

23 U.S.C. § 108 (d) Basis for Early Acquisition program that provides no up-front Federal funding for property acquisition. The provisions of this new section added by ISTEA provide that Federal funds can be used to reimburse States for acquisitions made under certain conditions if the property is eventually incorporated into an approved Federal-aid project.

Each of the above programs involve the purchase of property potentially needed for project right-of-way. All could be termed advance acquisition programs. While each has specific limitations, each also has capabilities that can support preservation activities. Those limitations and capabilities of each specific program should be understood in order to select the most appropriate way to address acquisition needs prior to the time full project acquisition can be scheduled.

**FEE SIMPLE:** A form of ownership entitling the owner to the entire property owned, along with the unconditional power to transmit the property owned by gift, sale, testament or intestacy. (Black's Law Dictionary, abridged 5th ed., *s.v.* fee simple absolute.)

**GROWTH MANAGEMENT:** A mechanism to time development to ensure that it does not outpace the availability of certain public facilities and levels of service, including highway capacity. (FHWA "Guidelines: Preservation of Transportation Corridors: *Data Forms Preparation Instructions*" (Attachment 1))

**HIGHWAY PLATTING:** Developers' voluntary creation of separate lots for right of way where developers expect public authorities eventually to purchase those lots. (See Rivkin at 93.)

**IMPACT (OR FACILITY) FEE:** A fee imposed by government on developers to recover costs (and no more than those costs) of infrastructure improvements which their developments make necessary. (AASHTO at 4-6, 4-7; see also Rivkin at 46-47.)

Like *dedications*, *impact fees* are constitutionally valid only insofar as they are recover costs directly attributable to the development, and are therefore ineffective tools of *corridor preservation*. (See AASHTO at 4-7; see also *supra* Section B, *dedication*.)

**INTERIM USE:** A permitted low intensity use of *corridor* land pending its eventual acquisition as *right of way*. (Rivkin at 93.)

The advantage of interim uses is that they permit owners to make economical use of their land (as car lots, nurseries, etc.) without developing it inconsistently with its eventual use as *right of way*. (See Rivkin at 25, 29.)

**IRREVOCABLE OFFER TO DEDICATE:** Permitted by California, an irrevocable commitment by a landowner or developer to dedicate specified portions of highway *right of way*, to be acted upon only when needed for the facility. (Rivkin at 93.)

**JOINT PUBLIC/PRIVATE DEVELOPMENT:** Various forms of economic cooperation between governing bodies and private developers (e.g., purchases and leasebacks, tax increment financing, revenue bonds) under which developers or landowners may contribute *right of way* to public authorities. (See AASHTO at 4-14.)

**KEY PARCEL ACQUISITION:** Strategic purchase of parcels within a *right of way*, which parcels are either keystones of the *transportation corridor* or threatened by imminent development. (FHWA "Guidelines: Preservation of Transportation Corridors: *Data Forms Preparation Instructions*" (Attachment 1))

**NEGOTIATED AGREEMENT:** Purchase of land by contract rather than by eminent domain (which some agencies may not be able to use in acquiring right of way in advance of project need).

**OFFICIAL MAP OR MAP OF RESERVATION:** A map -- drawn up by local or state authorities and usually recorded in county recording offices -- which (1) shows actual and proposed *rights of way* and/or *centerline alignments* and *setbacks* for streets and highways, (2) restricts development in those *rights of way* or between those *setbacks*, and (3) allows authorities time to purchase reserved land. (AASHTO at 4-8; FHWA, "Guidelines: Preservation of Transportation Corridors: *Data Forms Preparation Instructions*" (Attachment 1); Kolis & Mandelker at 18; *see also* AASHTO at 6-2, 6-4, 6-5 to 6-6 (describing recent *official map* legislation in Florida, North Carolina and New Jersey); Rivkin at 42-43, 44-45 (describing Florida's and North Carolina's legislation).)

If the enabling legislation that authorizes *official maps* or *reservations* fails to impose time limits on *reservations*, or to permit compensation for parcels or improvements acquired for *right of way*, or to provide for variances when *reservations* impose hardships on landowners, then an *official map* or *reservation* may constitute a *taking*. (AASHTO at 4-8; Kolis & Mandelker at 19-22.)

**OPTION TO PURCHASE:** A contract by which one party obtains from another the right to purchase, at any time during a stated period, a certain good at a certain price. (AASHTO at 4-11.)

Using this device, a governing authority may acquire options on land in a transportation *corridor*, thereby reserving the land at a cost below that of purchasing the land outright. (*Id.* (recommending the use of options to purchase).)

**PAYMENT IN LIEU OF REQUIRED IMPROVEMENT (OR IN LIEU PAYMENT):** A development *exaction* consisting not of the *dedication* of land or the provision of *required improvements*, but rather of a payment covering the cost of building those improvements (typically offsite because the

site is too small to accommodate them). (AASHTO at 4-6; FHWA, "Guidelines: Preservation of Transportation Corridors: *Data Forms Preparation Instructions*" (Attachment 1))

**PROTECTIVE BUYING:** Under federal regulations, the emergency purchase of a parcel for a federally assisted highway project even before final approval of the project's location, because continued private ownership of the parcel pending final approval (1) imposes a hardship on the owner or (2) exposes the *right of way* to the threat of imminent development. (AASHTO at 3-2 to 3-3, 4-2 to 4-3, 4-10, 8-5, citing 23 C.F.R. Parts 711, 712)

**PUBLIC FACILITIES ORDINANCE:** An ordinance prohibiting development approvals where there is insufficient road capacity to handle traffic generated by proposed development. (AASHTO at 2-6.)

In jurisdictions with *public facilities ordinances* developers may agree to make *dedications of right of way* or to construct highway improvements, in order secure the development approvals they need. (Id.)

**PUBLIC LANDS EXCHANGE:** Transfer by federal or state agencies of lands which they own within a transportation corridor whose preservation the law requires or encourages (*e.g.*, federally granted railroad corridors under 16 U.S.C. § 1248). (FHWA, "Guidelines: Preservation of Transportation Corridors: *Data Forms Preparation Instructions*" (Attachment 1))

**REQUIRED IMPROVEMENT (OR IN-KIND CONTRIBUTION):** An *exaction* consisting of the construction of facilities or infrastructure such as streets or highways within or near a development. (FHWA, "Guidelines: Preservation of Transportation Corridors: *Data Forms Preparation Instructions*" (Attachment 1))

**RESERVATION:** The designation of a proposed highway's or street's *right of way*, either on an *official map* or on a subdivision plat approved under a *subdivision ordinance*, in order to prevent development within the reserved *right of way*. (See Kolis & Mandelker at 17 (subdivision ordinance technique); see also *supra* Section II, *official map*).

*Reservations* may constitute *takings* if they are unlimited in time, or if there are no provisions for compensation for land acquired or variances for hardships. (See AASHTO at 4-8 (official maps); Kolis & Mandelker at 19-22 (official maps); Id. at 18 (subdivision reservations).)

**RESERVATION AGREEMENT:** An agreement in which a local government conditions development approvals on developers' agreements to reserve for up to 20 years land within *rights of way* shown on the county's long range transportation plan, and agrees to grant developers *density transfers* if it acquires the reserved land. (See Rivkin at 93-94.)

**RIGHT OF WAY:** See *supra* Section I, *right of way*.

**SETBACK:** A zoning requirement that buildings be a certain distance from property lines, curbs, etc. (sometimes included in *official maps* as well as in zoning ordinances). (See AASHTO at 4-7 (zoning setbacks); Kolis & Mandelker at 15 (zoning setbacks); see also AASHTO at 4-8 (setbacks included in official maps).)

**SUBDIVISION ORDINANCES:** Local ordinances, enacted pursuant to state enabling legislation, regulating the subdivision and platting of land into lots and blocks and roads, usually for residential development. (See Kolis & Mandelker at 16.)

**TAX ABATEMENT:** Reduction of local property tax due on land situated in a *corridor* and left undeveloped -- either by assessing that land as agricultural land in an agricultural use district, or by applying a reduced tax rate to the land's assessed valuation. (See Rivkin at 94 (on Utah and North Carolina tax abatement schemes).)

**TRANSFERABLE DEVELOPMENT RIGHT (TDR):** A government-created and marketable right to develop land, which owners of undeveloped land in transportation *corridors* may sell or retain for their own use on other parcels. (See AASHTO at 4-13.)

As *corridor preservation* techniques *TDR's* may be used to offset the costs of leaving land undeveloped or even to induce proprietors to donate it as *right of way*. (Id.)



## III.

## THE TRANSPORTATION PLANNING CONTEXT

**3C PLANNING:** Continuing, comprehensive and cooperative (regional) transportation planning mandated by section 134 of the Federal-Aid Highway Act of 1962 (effective 1965). (Rosenbloom at 148.)

The Federal Highway Act of 1973 later expanded *3C Planning* to include both highway and transit planning and entrusted them both to *Metropolitan Planning Organizations (MPO's)* (Id.). Thereafter, *3C Planning* developed fully -- although too late to affect the construction, largely completed by the 1970s, of the Interstate system established by the Federal Highway Act of 1956. (Kushner 1983 at 164.)

**CONGESTION MANAGEMENT SYSTEM:** Plan to reduce congestion in *transportation facilities* which are eligible for federal funds, either by reducing travel demand on those facilities or/and by implementing operations management strategies for them. (23 U.S.C.A. § 134(i) (West Supp. 1992).)

*Congestion management systems* must be prepared by all *metropolitan planning organizations (MPOs)* that are responsible for *transportation management areas (TMAs)*, large metropolitan areas with populations above 200,000. (Id.)

**CONGESTION MITIGATION AND AIR QUALITY IMPROVEMENT PROGRAM:** *See* CONGESTION MITIGATION AND AIR QUALITY IMPROVEMENT PROGRAM, *infra* Section IV.

**FEDERAL HIGHWAY ADMINISTRATION REVOLVING FUND:** A fund that loans money to states for early *right of way* acquisitions for projects whose construction is scheduled to begin within 20 years. (23 U.S.C.A. § 108 (West Supp. 1992); *cf.* (AASHTO at 5-1.)

**HIGHWAY TRUST FUND:** Established by the Federal Highway Act of 1956 to receive gasoline tax revenues and spend them on building and maintaining the Interstate highway system, also established by the 1956 Act. (Rosenbloom at 147.)

**METROPOLITAN LONG RANGE PLAN (LRA):** Plan based on a 20-year forecast period and including two basic elements: the identification of *transportation facilities* that should function as parts of a metropolitan region's transportation system; a plan for financing needed projects and securing capital needed to preserve existing *transportation facilities* and to maximize their efficiency. (23 U.S.C.A. § 134(g) (West Supp. 1992); *cf.* Rosenbloom at 149-51.)

*See infra* Section IV, *s.v. nonattainment, state implementation plan.*

*Metropolitan planning organizations (MPOs)* prepare *long range plans*. But in metropolitan areas that are *nonattainment* for ozone or carbon monoxide, *MPOs* must coordinate their *long range plans* with the *transportation control plans (TCPs)* included in *state implementation plans (SIPs)* as required by the Clean

## Appendix A

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Air Act. (23 U.S.C.A. § 134(g) (West Supp. 1992); see also § 135(e) (imposing similar *long range plan* requirement for state transportation planners).)

*See infra* Section IV, *nonattainment, state implementation plan*.

**METROPOLITAN PLANNING ORGANIZATION (MPO):** Established by the Federal Highway Act of 1973 to coordinate highway and transit planning on a regional or metropolitan scale in urban areas with populations above 50,000, and to coordinate the efforts of local planning agencies (Rosenbloom at 148).

*MPOs* prepare *long range plans* and *transportation improvement programs (TIPs)*, and cooperate with state planners in developing *transportation system management* plans. (23 U.S.C.A. §§ 134(g)-(h), 303; cf. Rosenbloom at 149-51.)

*MPOs* that are responsible for large metropolitan regions designated *transportation management areas (TMAs)* by the United States Department of Transportation are also subject to triennial certification by the Department that they comply with federal law and have approved *transportation improvement programs (TIPs)* in cooperation with the state. (23 U.S.C.A. § 134(i) (West Supp. 1992).)

**METROPOLITAN TRANSPORTATION IMPROVEMENT PROGRAM (TIP):** A priority list of federally funded projects or project segments for improving a metropolitan area's transportation system, along with financial plans for implementing those projects or project segments. (23 U.S.C.A. § 135(h) (West Supp. 1992).)

*Metropolitan planning organizations (MPOs)* prepare *Metropolitan TIPs* in cooperation with state transportation planners and local transit operators, and ensure that *TIPs* are consistent with *metropolitan long range plans* and with the requirements of NEPA. (23 U.S.C.A. § 134(g) (West Supp. 1992); see also § 135(g) (metropolitan long range plan), § 135(h) (statewide transportation improvement plan).)

**STATE TRANSPORTATION AGENCY (STA):** Generic term for state transportation authorities.

**STATEWIDE LONG RANGE PLAN (SLRA):** A "long-range transportation plan for all areas of the state" prepared by state transportation planners in cooperation with *metropolitan planning organizations* (with respect to metropolitan areas) and with Indian tribal governments and the Secretary of Interior (with respect to areas under the jurisdiction of Indian tribal governments). (23 U.S.C.A. § 135(e) (West. Supp. 1992).)

*Statewide long range plans* shall include "a long range plan for bicycle transportation and pedestrian walkways for appropriate areas of the State". (23 U.S.C.A. § 135(e) (West. Supp. 1992); see also 23 U.S.C.A. § 134(g) (West. Supp. 1992) (metropolitan long range plan).)

**STATEWIDE TRANSPORTATION IMPROVEMENT PROGRAM (STIP):** A priority list (subject to biennial review by the Secretary of Transportation) of federally funded projects or project segments for improving a state's transportation system, along with financial plans for implementing those projects or project segments. (23 U.S.C.A. § 135(h) (West Supp. 1992).)

State transportation planners must prepare *STIPs* in cooperation with *metropolitan planning organizations* (with respect to metropolitan areas), and *STIPs* must be consistent with *metropolitan transportation improvement programs*, with *statewide long range plans*, and (for areas designated *nonattainment* for ozone or carbon monoxide) with *state implementation plans* required by the Clean Air Act. (23 U.S.C.A. § 135(h) (West Supp. 1992).)

*See infra Section IV, s.v. nonattainment, state implementation plan.*

**TRANSPORTATION SYSTEM MANAGEMENT ELEMENT (TSME):** Plans to be developed by states (working with *metropolitan planning organizations* in metropolitan regions) for operating and maintaining transportation facilities. (23 U.S.C.A. § 303; cf. Rosenbloom at 150; Harvey & Bennett at 10-11, 12-13, 17.)

IV.

THE ENVIRONMENTAL LAW CONTEXT

CLEAN AIR ACT (CAA)  
CLEAN WATER ACT (CWA)  
INTERMODAL SURFACE TRANSPORTATION  
EFFICIENCY ACT (ISTEA)  
NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)  
ENDANGERED SPECIES ACT (ESA)

**AIR QUALITY CONTROL REGION (AQCR):** CAA term (§ 107): region (there may be several in each state) established for the purposes of implementing CAA requirements and measuring compliance with them. (CAA § 107.)

See also *attainment, nonattainment, state implementation plan (SIP)*.

**ATTAINMENT:** CAA term (§ 107(d)(1)(A)(ii)): a classification -- submitted by states to the EPA and then promulgated by it -- of *air quality control regions (AQCRs)* that have met *national ambient air quality standards (NAAQSs)* for air pollutants regulated under the CAA.

See also *nonattainment, state implementation plan (SIP)*.

**CATEGORICAL EXCLUSION (CE):** NEPA term of art (not in NEPA itself): the exemption of federal actions from NEPA by virtue of inclusive an exempted class of actions established by agency regulation. (See AASHTO at B-1 to B-5; see also Anderson, Mandelker & Tarlock at 802-813.)

**CONFORMITY:** CAA term (§ 176(c)): the requirement that federal government approve or fund no state or local projects, programs and plans -- including transportation projects, programs and plans -- unless these meet the requirements of the CAA, specifically those set by *state implementation plans* for *nonattainment* areas. (CAA § 176(c).)

See also *highway sanctions*.

**CONGESTION MITIGATION AND AIR QUALITY IMPROVEMENT PROGRAM (CMAQ) (ISTEA):** funding program established by ISTEA for projects likely to help *air quality control regions* which are *nonattainment for ozone or carbon monoxide* satisfy the Clean Air Act's requirements for *attainment* or otherwise reap air quality benefits because of reductions in vehicle miles traveled or fuel consumed. (See 23 U.S.C.A. § 149 (West Supp. 1992); see also 23 U.S.C. § 104(b)(2) (apportionment of program funds), § 217(a) (inclusion of projects for bike and pedestrian ways in program).)

**CONSULTATION (ESA):** the requirement that all federal agencies, with the advice and assistance of the Secretary of the Interior, ensure that their actions will not jeopardize the continued existence of any *endangered or threatened species*, or destroy or adversely modify its *critical habitat*. (16 U.S.C. § 1536(a)(2); see also § 1536(a)(3).)

If, after *consultation*, the Secretary determines that an agency's action will jeopardize an *endangered* or *threatened species* or its *critical habitat*, the Secretary must give the federal agency a "written statement" of his or her "opinion," the information on which it is based, and the "reasonable and prudent alternatives" which, in the Secretary's judgment, the agency may pursue to comply with the requirements of subsection 1536(a)(2).

The agency is then under an absolute mandate to prevent the destruction of the *endangered* or *threatened species* unless the *endangered species committee* grants an *exemption* for the agency action in question. (See Anderson, Mandelker & Tarlock at 456.)

**CRITICAL HABITAT (ESA):** specific areas -- either within or without the geographical area presently occupied by an *endangered* or *threatened species* -- which are "essential" to its conservation. (16 U.S.C. § 1532(5)(A).)

See also *infra* Section IV, s.v., listing.

**DREDGE AND FILL PERMIT:** CWA term (§ 404): permit issued by the Army Corps of Engineers (§ 404(a)-(f)) -- or by an individual state (under a state's permit program approved by the EPA, § 404(g)-(k)) -- to "discharge ... dredged or fill material into the waters". (§ 404(a).

EPA and Army regulations control the Army Corps' permit program, the definition of "waters" over which the Corps has jurisdiction, and the criteria for granting permits to discharge fill into those "waters". (See Anderson, Mandelker & Tarlock at 445-56.)

**ENVIRONMENTAL ASSESSMENT (EA):** NEPA term of art (not in NEPA itself): an inquiry into whether a proposed federal action will have a significant impact on the environment. (See NEPA § 102(2)(C).)

If no significant impact is found, then a *finding of no significant impact (FONSI)* must be prepared. If, however, a significant impact is found, then an *environmental impact statement (EIS)* must be prepared.

**ENVIRONMENTAL IMPACT STATEMENT (EIS):** NEPA term of art (not in NEPA itself): a "detailed statement" on the environmental consequences of proposed federal actions (e.g., their "environmental impact", their unavoidable "adverse environmental effects", their "irreversible and irretrievable" use of "resources"), as well as "alternatives" to proposed federal actions. (NEPA § 102(2)(C).)

See also *program environmental impact statement (PEIS)*.

**FINDING OF NO SIGNIFICANT IMPACT (FONSI):** NEPA term of art (not in NEPA itself): record of an agency's conclusion, after performing an *environmental assessment*, that a proposed federal action will have no significant impact on the environment.

**HIGHWAY SANCTIONS:** CAA term (§ 179(b)(1)): EPA prohibitions on Department of Transportation approvals or assistance for title 23 highway projects in *nonattainment* areas where states

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fail either to adopt *nonattainment* plans acceptable to the EPA or to meet attainment goals under those plans. (§ 179(a)-(b).)

**LISTING (ESA):** inclusion of a species on a list, published in the Federal Register, of all species determined to be *endangered* or *threatened species*. (16 U.S.C. § 1533(a)-(c).)

**NATIONAL AMBIENT AIR QUALITY STANDARD (NAAQS):** CAA term (§ 109): EPA air pollution standards numerically stating the permissible amount of regulated pollutants per unit of volume and per unit of time. (See § 109; see also Anderson, Mandelker & Tarlock at 171-202.)

In principle there can be as many *national ambient air quality standards* as there are air pollutants that EPA finds to be traceable to mobile or stationery sources and dangerous to public health or welfare. (See § 108(a).) In fact, EPA has developed *national ambient air quality standards* for no more than a handful of pollutants, including: carbon monoxide, lead, nitrogen oxide, ozone, particulates, sulfur dioxide. (Anderson, Mandelker & Tarlock at 200-02.)

See also *attainment, nonattainment, state implementation plan (SIP)*.

**NONATTAINMENT:** CAA term (§ 107(d)(1)(A)(i)): a classification -- submitted by states to the EPA and then promulgated by it -- of *air quality control regions (AQCRs)* that have not met *national ambient air quality standards (NAAQSs)* for air pollutants regulated under by the CAA.

For *AQCRs* that are *nonattainment* areas, states must include in their *state implementation plans (SIPs)* corrective measures required by the CAA (Part D, §§ 171-179). Transportation projects and plans adopted pursuant to federal highway legislation (title 23 of U.S.C.) or the Urban Mass Transportation Act must "implement" the transportation provisions of CAA nonattainment plans and be in "*conformity*" with them (§§ 176(c)).

See also *attainment* and supra Section III, *3C planning, transportation control plan*.

**NONPOINT SOURCE POLLUTION:** CWA term of art (undefined in CWA): water pollution caused by land uses, e.g., feedlots, artificially fertilized agricultural fields, construction sites, all of which may produce polluted rainwater runoff. (See Anderson, Mandelker & Tarlock at 359.)

**NONPOINT SOURCE MANAGEMENT PROGRAM:** CWA term (§ 319): CWA program enacted in 1987 to let states identify in-state waters not likely to attain applicable *water quality standards* because of *nonpoint source pollution*, and (in cooperation with EPA) to develop "best management practices" to control that *nonpoint source pollution*. (CWA § 319.)

See also *water quality criteria*.

**PROGRAM ENVIRONMENTAL IMPACT STATEMENT (PEIS):** NEPA term of art (not in NEPA itself): an *environmental impact statement* on a federal action that is a program or plan.

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Under NEPA the event that triggers the preparation of an *environmental impact statement* is a "proposal[] for legislation and other major Federal actions significantly affecting the quality of the human environment" (NEPA § 102(2)(C)). In some cases, however, the triggering proposal may be a plan or program. In such cases, it may be necessary to prepare a "program" *environmental impact statement* (PEIS). (See Anderson, Mandelker & Tarlock at 833-44.)

See also *tiering* or *tiered analysis*.

**RECORD OF DECISION (ROD):** NEPA term of art (not in NEPA itself): record of a decision to undertake or forego a proposed federal action after performing an *environmental impact statement* on it.

**STATE IMPLEMENTATION PLAN (SIP):** CAA term (§ 110): plan adopted by a state to implement, maintain and enforce *national ambient air quality standards* in the *air quality control regions* of the state.

*State implementation plans* include transportation plans developed in concert with local and state transportation agencies for areas that are nonattainment for ozone, carbon monoxide, or PM-10. (§§ 108(e)-(f), 174).

See also *supra* Section III, *3C planning, transportation control plan*.

**THREATENED SPECIES (ESA):** Any species "likely" to become an *endangered species* in the foreseeable future. (16 U.S.C. § 1532(20).)

See also *supra* Section IV, *critical habitat, listing*.

**TIERING OR TIERED ANALYSIS:** NEPA term of art (not in NEPA itself): the analysis of environmental impacts in stages. Tiering usually begins with a *program environmental impact statement*, and may require a project-specific *environmental impact statement* for projects included in the program if more detailed environmental analysis is necessary.

**WATER QUALITY CRITERIA:** CWA term (§ 304): EPA information "reflecting the latest scientific knowledge" on the concentration and dispersal of water pollutants, and on the effects of those pollutants on human and nonhuman health and welfare and the diversity, productivity and stability of the biological community. (CWA § 304(a)(1).)

See also *water quality standard, basin plan*.

**WATER QUALITY STANDARD:** CWA term (§ 303): state-developed standards for acceptable levels of water pollution in any given stream segment. (CWA § 303(a).)

A *water quality standard* for any given stream segment consists chiefly of two elements: a designated use for that stream segment (recreation, fishing, etc., chosen by the state); and EPA's *water quality criterion* associated with the designated use and establishing permissible levels of water pollution appropriate to it. (CWA § 303(a).)

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**WETLAND:** CWA term of art: water-saturated land contiguous to bodies of water subject to CWA jurisdiction (Anderson, Mandelker and Tarlock at 367-77, relying on EPA's Wetlands Manual, Army Corps regulations, and case law and CWA § 404's *dredge and fill permit* program).

Political controversy surrounds this definition of wetland. Courts have upheld it against challenges by developers (Anderson, Mandelker and Tarlock at 367-77).



## FEDERAL PROGRAMS PERTAINING TO RAILROAD RIGHTS-OF-WAYS

This appendix outlines the federal regulatory framework in which railway corridor preservation might occur. It then explains the process by which freight railways may abandon a rail line and identifies practical and financial tools available to aid in the effort to preserve railway corridors.

### I. Regulatory Framework

- **49 U.S.C. § 10100, et seq.**  
The Interstate Commerce Commission (ICC) derives its power to regulate interstate railroads through the Revised Interstate Commerce Act, 49 U.S.C. § 10100, et seq.
- **49 C.F.R. § 1150 et seq.**  
The Code of Federal Regulations codifies the ICC rail licensing procedures at 49 C.F.R. § 1150 et seq.
- **16 U.S.C. § 1247(d)**  
The National Trails System Act, codified at 16 U.S.C. § 1247(d), allows for interim use on a railroad right-of-way in order to help preserve established railway rights-of-ways. Section 1247(d) is also referred to as Section 8(d).
- **P.L. 102-240, 105 Stat. 1915**  
The Intermodal Surface Transportation Efficiency Act (ISTEA) amends many previous statutes. ISTEA seeks to establish an economically efficient, environmentally sound, long-range transportation plan.

### II. Interstate Commerce Act 49 U.S.C. § 10100 et seq.

Before abandoning a rail line, a freight railroad operating in interstate commerce must receive authorization from the ICC. In order to authorize an abandonment, 49 U.S.C. § 10903(a) requires the ICC to find "that the present or future public convenience and necessity require or permit the abandonment or discontinuance". Even employing the balancing test that the United States

Supreme Court has interpreted the statute as requiring, the ICC has rarely ruled against abandonment.<sup>1</sup>

The ICC may authorize the abandonment of a freight railroad through one of three abandonment procedures: regulated abandonment, notice of exemption and petition for exemption.

#### 2-1 Regulated Abandonment (49 U.S.C. § 10903-04)

The Interstate Commerce Act at 49 U.S.C. § 10903-04 requires railways utilizing the regulated abandonment method to follow certain procedures -- including giving notice to the public and to various agencies -- before beginning the abandonment proceedings. The statute permits the public to protest or comment within thirty days after a railway files an abandonment application. The ICC may determine that an investigation is warranted to determine whether to grant an abandonment. If the ICC concludes that no investigation is necessary, it will grant the abandonment. Because the regulated abandonment procedure requires rail carriers to follow detailed rules and make complex economic showings, rail carriers usually seek abandonment through other methods.

#### 2-2 Notice of Abandonment (49 C.F.R. 1152.50)

The notice of exemption abandonment procedure is available only for lines on which local traffic has not moved for two years. This procedure is much less complicated than the regulated procedure. Here, the carrier need

only file a three-page notice with the ICC, which routinely grants the notice twenty days later through publication in the Federal Register. Thirty days later the ICC grants the exemption. Recently, the ICC expanded the notice requirement for carriers opting for the notice of exemption process by requiring them to publish local newspaper notice by the date they file their notice of exemption application with the ICC.

### **2-3 Petition of Exemption (49 C.F.R. § 1121)**

The ICC recently codified the regulations governing the petition for exemption. The new Rail Exemption Procedures, 49 C.F.R. § 1121, give the ICC discretion to authorize abandonments without formal notice to potential opponents of the abandonment. In order to grant an exemption, the ICC must either find that regulation of the abandonment is not necessary to carry out transportation policy and that the transaction is limited in scope or that regulation of the abandonment is not necessary to protect shippers. The ICC retains the power to request supplementary information from the carrier or solicit comments before authorizing the exemption.

### **III. Reversion of Railway Easements and Federal Programs to Assist in Corridor Preservation**

Railroads hold their rights-of-way through a variety of forms, including fee simple absolute, fee simple determinable and railroad easement. Upon abandonment of a right-of-way, some states hold that the property held by railroad easements automatically reverts to the adjacent property owners. Once the property reverts to the adjacent owners, it becomes much more difficult and costly to reassemble the property in the future in order to construct a railway.

Several federal remedies may assist a party seeking to preserve a railroad corridor, including:

#### **3-1 Discontinuance of Service (49 C.F.R. § 1152.50)**

An interested party may be able to persuade an abandoning carrier to seek only a discontinuance of service rather than a complete abandonment. An abandonment of a rail line removes the line from the ICC's jurisdiction. A discontinuance, on the other hand, allows a railroad to suspend operating the line indefinitely, severs common carrier obligations, but preserves the rail corridor under ICC jurisdiction for possible future use. The discontinuance of service option is less attractive to the railways than abandonment because railway assets remain tied up in the line for the duration of the discontinuance.

#### **3-2 Modified Certificate of Public Convenience (49 C.F.R. § 1150.21)**

The Modified Certificate of Public Convenience applies when a state, political subdivision of a state, or any instrumentality through which the state can act, purchases or leases a fully abandoned line or a line that the ICC has approved for abandonment. If the acquiring public entity operates the line itself, the acquiring party will be considered a common carrier. When an acquiring public entity acquires such a line and contracts with an operator to provide service over the line, however, the operator, not the public entity, incurs common carrier obligations. The operator may specify conditions -- subsidies from shippers or shipment commitments, for example -- which must be met prior to providing services.

### 3-3 National Trails System Act (16 U.S.C. § 1247(d))

Section 1247(d) of the National Trails System Act (sometimes referred to as "Section 8(d)") operates in conjunction with 49 C.F.R. 1152.29 of the ICC implementing rules. Section 1152.29 specifies that "any state, political subdivision, or qualified private organization" may acquire a railroad right-of-way for trail use. If a qualified party seeks to use a right-of-way after abandonment under 49 U.S.C. § 10903-04, the intended use of the trail must be a public use. According to 16 U.S.C. § 1247(d), if a trail user demonstrates its ability to assume future costs and liabilities and to preserve the rail line for future use, the line remains intact and subject to the ICC's jurisdiction. The statute permits the carrier to remove and sell the track and to receive compensation from any interim trail use. Application of section 1247(d) postpones the reversion of any railway rights-of-way easements. Because the statute is available for interim use only if the railroad consents, some railroads charge premiums in exchange for their consent.

### 3-4 49 U.S.C. § 10910

According to 49 U.S.C. § 10910, a government agency or a short line railroad operator may compel an abandoning rail carrier to sell its line *prior to* abandonment. The statute requires the acquiring party to operate the line for at least three years. The statute further requires the acquiring party to pay not less than constitutional minimum value for the property. The value of the railroad line consists of any real estate to which the railroad owns marketable title and the salvage value of the tracks and equipment.

### 3-5 49 U.S.C. § 10905

Title 49, section 10905 allows a shipper, a short line operator, a major carrier, or a government agency to acquire a line *after* the ICC has authorized abandonment. The ICC sets terms and conditions for such acquisitions. The acquiring party must agree to operate the line for at least two years and may not transfer the line, except to the carrier from whom the railway was purchased, for at least five years.

### 3-6 49 U.S.C. § 10906

Each time the ICC authorizes abandonment or discontinuance, 49 U.S.C. § 10906 requires the ICC to consider whether the rail property involved is suitable for any public purpose. If the ICC finds that the property is suitable for public purposes, section 10906 permits the ICC to sell, lease, exchange or otherwise dispose of the property only after following prescribed conditions. Although the statute authorizes the ICC to prohibit the disposal of such property for 180 days unless the ICC first offers the property on reasonable terms for public purposes, the ICC declines to enforce this provision. According to 49 C.F.R. § 1152.28, a party requesting a public use condition under 49 U.S.C. § 10906 must set forth four factors: the conditions sought, the public importance of the condition, the period of time the condition would be operative, and justification for the time period.

## IV. Intermodal Surface Transportation Efficiency Act (ISTEA) P.L. 102-240, 105 Stat. 1915.

### 4-1 ISTEA Generally

ISTEA seeks to establish an economically efficient, environmentally sound, long-range transportation plan. According to

ISTEA, every metropolitan area with a population over 50,000 must establish a metropolitan planning organization (MPO) responsible for developing, in cooperation with the state and affected transit operators, a twenty-year long-range plan and three-year Transportation Improvement Programs and for directing transportation planning.

In developing their long-range plans and programs, ISTEA requires the MPOs to consider a number of factors, including:

- Methods to preserve existing transportation facilities and to improve the efficiency of the existing network;
- the effect of the transportation policies on land use and development, and the consistency of transportation plans and programs with the provisions of all applicable short- and long-term land-use and development plans;
- The effects of all transportation projects to be undertaken in the metropolitan area;
- The overall social, economic, energy and environmental effects of transportation decisions;
- The preservation of rights-of-way for construction of future transportation projects; and
- Methods to enhance the efficient movement of freight.

ISTEA also requires states to develop a comprehensive state transportation plan and establish an ongoing transportation planning process. States must develop twenty-year long-range transportation plans and two-year State transportation improvement programs. ISTEA lists nineteen factors that each state's plan must address, including:

- The inclusion of pedestrian and bicycle facilities in transportation projects;
- International border crossings and access to ports, airports, national parks, historic sites, military installations, and freight distribution;
- The transportation needs of non-metropolitan areas;
- The overall social, economic, and environmental effects of transportation decisions;
- Methods to reduce traffic congestion and to prevent it from occurring in areas not yet congested;
- Methods to expand and enhance transit services and increase the use of such services;
- The effect of transportation on land use and development, including the need for consistency between transportation decision-making and the provisions of short-range and long-range land-use and development plans; and
- Recreational travel and tourism.

#### **4-2 ISTEA Funding for Railway Preservation**

ISTEA includes a number of potential funding sources for the preservation of railway rights-of-way.

##### **(a) Transportation Enhancement Program Funds**

The Transportation Enhancement Program is funded by a ten percent set-aside of Surface Transportation Program (STP) funds. (STP funds highway, transit, ridesharing, and bicycle and pedestrian programs.) The transportation enhancement program

provides approximately \$3 billion for pedestrian and bicycle facilities, acquisition of scenic easements and historic sites, historic preservation of transportation buildings and facilities, conversion of abandoned railways to pedestrian and bicycle trails, archeology, control and removal of outdoor advertising, and mitigation of pollution caused by highway runoff. MPOs must identify in their plans the enhancements they intend to undertake and then must request a portion of the enhancement money given to the state.

**(b) National Highway System Funds**

States can use a portion of their National Highway System funds to construct bike trails adjacent to highways. If the cost of constructing a bikeway includes acquiring a railway right-of-way adjacent to a non-Interstate highway, National Highway System funds may be available.

**(c) National Recreational Trails Trust Fund**

ISTEA establishes a National Recreational Trails Act which furnishes funds to be spent on recreational trails for, among other things, development of urban trail linkages, maintenance of existing recreational trails, acquisition of easements for trails or acquisition of fee simple title to property, construction of new trails on State, county, municipal, or private lands, or under certain conditions, construction of new trails across Federal lands. The Recreational Trails Act is authorized for funding up to \$30 million each year between Fiscal Year 93 and Fiscal Year 97. Each year Congress must appropriate money for the program. In Fiscal Year 93, Congress appropriated \$7.5 million.

State governors must designate the official or agency that will administer

this program at the State level. The Federal Highway Administration (FHWA) will distribute fifty percent of the funds equally among the States. FHWA will allocate the other fifty percent to the States in proportion to the amount of recreational fuel used in each State during the preceding year. FHWA may give grants to private individuals, organizations, city and county governments, or other government entities.

**(d) Congestion Mitigation and Air Quality Improvement Funds**

ISTEA creates a \$6 billion Congestion Mitigation and Air Quality Improvement Program which the U.S. Department of Transportation and the Environmental Protection Agency jointly administer. States with non-attainment areas for ozone and auto emissions under the Clean Air Act of 1990 may apply for these funds. Projects funded under the congestion mitigation program must contribute to the attainment of national air quality standards.

**V. State Examples of Abandoned Railway Rights-of-way**

Numerous examples of acquisition of abandoned railroad rights-of-way exist. Most of the acquiring states acted on an ad hoc basis without statutory authority. Several acquisition programs are conducted under Joint Power Agreements authorized by legislation which allows for cooperation among local governments. State, local or federal grants help pay for the acquisition of the rights-of-way. Acquisition can be difficult when the present owners of the rights-of-way do not cooperate.

Title and ownership, management issues, valuation of the rights-of-way, and environmental issues pose major problems with acquisition. Valuation of the rights-of-way presents some difficulty. There are several methods of valuing right-of-way real estate. Two methods that result in

high valuations are across the fence value (comparing the railway property to abutting property in order to determine its worth) and assemblage value (looking at the value of the property as a part of a larger whole rather than as a separate piece of property).

Environmental problems also arise during the acquisition of a railway right-of-way. Railways may have sprayed chemicals on the property to control the spread of weeds, materials may have spilled or leaked from the railway cars, or adjacent industrial areas may have polluted the right-of-way.

Management problems arise when state and local governments assume the management of operating systems on existing rights-of-way. The governmental entity may not be able to obtain the cooperation of state utility agencies to make operation feasible. Existing and conflicting outstanding operating permits may also complicate operations.

### 5-1 Florida

Florida's Department of Transportation has enacted a statute establishing the procedure for rail corridor acquisition, management and maintenance. Prior to the enactment of this statute (discussed below), no special railway right-of-way acquisition legislation existed in Florida. Abandoning railroads contacted the Florida Department of Transportation (FDOT). FDOT acquired these rights-of-way without conducting a title search or environmental investigation. The new legislation establishes an official procedure for FDOT to acquire a railway. FDOT must indicate its reason for purchasing the railway and its plan for protecting the right-of-way.

According to the new statute, rail corridors available for the Department of Transportation's purchase will be

identified through the Florida Transportation Plan and needs assessment process. The District Right of Way or Planning and Programs Office must establish a plan to establish a corridor's uses. The plan will be used as a departmental guide for management and protection of the corridor. The Rail Corridor management Plan must include the rail corridor's name, an explanation of the corridor's benefit as a public transportation facility, a map showing the location of the corridor, a summary of the types of uses that will be permitted on the corridor and a detailed strategy for preserving and maintaining the corridor. The statute also describes the procedure for acquiring a rail corridor through negotiations.

Once the State has acquired and presently owns an abandoned railway corridor in order to preserve an established right-of-way, a governmental entity may lease the corridor in order to create a recreational trail. Florida's Department of Transportation provides a standard lease which limits the term to twenty years (renewable for up to five years). The lease prohibits the lessee from realizing any profit from the property. Additionally, the lessee must maintain the property and any improvements and must indemnify the lessor from any losses, suits, etc. The use of the right-of-way must not interfere with the "ultimate transportation purposes of the property as determined by [FDOT]"<sup>2</sup> If FDOT determines that the leased right-of-way is needed for transportation reasons, FDOT will work with the lessee to try to accommodate both the trail use and the transportation use.

### 5-2 Illinois

On December 31, 1993, the Illinois Department of Transportation (IDOT) issued its first call for proposals to be

funded the by Illinois Enhancement Program through the Intermodal Surface Transportation Efficiency Act. Proposals involving urban areas must be submitted through the appropriate Metropolitan Planning Organization. Project involving other areas should be submitted directly to IDOT.

According to the Enhancement Program Guidelines, IDOT envisions funding a portion of its Enhancement Funds on projects involving non-motorized vehicle and pedestrian projects, including developing bike and trail facilities. Illinois will have approximately \$20 million to spend on enhancement projects. ISTEA funds will reimburse up to 80 percent of a project's cost. All projects must be sponsored by a unit of government with the authority to levy taxes, such as a state agency or local government.

ISTEA's Enhancement Program is not the only source of efforts to preserve railroad rights-of-way. The Illinois Department of Conservation has also acted to preserve the railway corridors. The Department has purchased both abandoned rights-of-way and land along canals. Local private groups also have purchased abandoned rights-of-way.

### 5-3 Maryland

The Maryland-National Capital Park and Planning Commission is working on a corridor preservation program on the Capitol Crescent, an abandoned railway line that connects Silver Spring with Georgetown. The line will be converted to public transit use

and a hiker-biker trail. The federal Rails-to-Trails Act was used for the Maryland segment and there was a substantial commitment of county funds. ISTEA enhancement funds were also used. The National Park Service purchased the segment in the District of Columbia; the Rails-to-Trails Act was not used for this segment.

There have been management and title problems, and one gap exists in the alignment because a controversy has arisen over the acquisition property owned by the U.S. Corps of Engineers. There was an unsuccessful court challenge to the use conversion. No environmental problems were encountered.

A master plan has been completed for the right-of-way but conflicts have arisen between proposed recreational and transit uses. A proposed light rail may be abandoned for financial reasons and a busway substituted instead. Construction on the hiker-biker trail was to have started in March, 1993. Additional rails-to-trails projects are contemplated.

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**SELECTED STATUTES AUTHORIZING CORRIDOR MAPS, SETBACKS,  
ADVANCE ACQUISITION, ACCESS MANAGEMENT AND IMPACT FEES IN  
CORRIDOR PRESERVATION**

**I. NEW HAMPSHIRE CORRIDOR PROTECTION ACT**

**Authors' Comments:** This statute, adopted in 1991, is an example of a comprehensive corridor protection act. It carefully spells out the relationship between the state corridor protection agency, designated the "layout authority," and local governments in corridor protection. Taking problems are avoided by the provision requiring that land proposed for development in a protected corridor must be acquired unless a permit for development is issued. Advance acquisition is authorized. Note that the statute requires the taking of a less-than-fee interest, designated a "corridor protection restriction," unless there is a finding that taking full title is necessary.

N.H. REV. STAT. ANN. §§230-A:L TO 230-A:14

230-A:1. Definitions.

In this chapter:

I. "Corridor protection restriction" means a deeded conservation restriction, as defined by RSA 477:45, I, which conveys to a unit of government having power to lay out highways the right to wholly or partially prohibit development on a described tract of land within a highway planning corridor for a limited time period stated in the restriction, not exceeding 10 years.

II. "Development" means the subdivision of land or erection or construction of any structures or improvements on such land, or expansions or additions to such land, or any other action which will appreciably increase the future cost of acquiring such land, if such acquisition is required for highway purposes.

III. "Development permit" includes subdivision or site plan approval, building or zoning permit, or any other permit required by a unit of government as a prerequisite to development.

IV. "Layout authority" means the governor and council or a commission appointed by the governor in the case of class I and II highways, or the mayor and aldermen of a city, selectmen of a town, or village district commissioners of a village district in the case of class IV or V highways.

V. "Highway planning corridor" means an area of land which has been designated as such under this chapter.

VI. "Return" means a written report of the highway planning corridor designation proceedings, including the findings of occasion, and a detailed map showing the boundaries of such corridor. Such return need not include a full metes and bounds description of the corridor boundary.

230-A:2. Occasion for Layout.

A layout authority may determine upon hearing whether there is occasion for the designation of one or more highway planning corridors. For class I or II highways, the location shall be proposed by the commissioner of the department of transportation. In making such determination the layout authority shall:

I. Identify public transportation needs for the present and foreseeable future.

II. Determine whether the public interest requires development restriction along proposed planning corridors.

III. Allow flexibility in planning the design of the highway.

IV. Consider methods to prevent disruption and relocation of residential neighborhoods, residences, and businesses and interference with utility facilities.

V. Determine the acquisition costs of subsequently developed property if a highway planning corridor is not established.

VI. Establish the termini and width of the proposed highway planning corridor.

230-A:3. Notice of Hearing.

Notice of the hearing, together with a description of the proposed corridor, shall be given to the same parties with respect to such corridor, and in the same manner, as in the case of a highway layout hearing, pursuant to RSA 230:17-18 or 231:9-10, as the case may be, including every owner of land or other property within the proposed planning corridor.

230-A:4. Hearing.

The layout authority, at the time and place appointed for hearing, shall make a personal examination of the proposed corridors, shall hear all parties interested who may attend, and may adjourn as it sees cause.

230-A:5. Appeal.

Any owner of land or other property aggrieved by a finding of the layout authority on the matter of occasion for the layout of a highway planning corridor or alteration thereof, may appeal to the superior court, for the county in which such land or other property is situated, by petition within 60 days after the filing of the return with the secretary of state as provided in RSA 230-A:6. The burden of proof shall be upon the party seeking to set aside any finding of the layout authority to show that such decision is unlawful or unreasonable. All findings of the layout authority upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said finding is unreasonable or unlawful.

230-A:6. Return.

The layout authority shall make a return of the highway planning corridor, including a detailed map identifying the boundaries of such corridor, and file the return with the secretary of state, with every unit of government having the authority to issue development permits for the property located within such corridor and with the registry of deeds for each county in which such corridor is located.

230-A:7. Effect of Corridor.

After the highway planning corridor return has been filed, no person shall subdivide any land, begin any development, or alter or expand any structure or use of land within such corridor, without first obtaining a corridor permit from the layout authority or its designated agent. The layout authority shall adopt by rules pursuant to RSA 541-A the form for corridor permits, and what constitutes submission of a completed application. No existing structure or established use of property within the corridor shall be affected.

### 230-A:8. Relationship to Other Land Use Permits.

The corridor permit requirement shall be in addition to other federal, state or local permits which may be required for such development, and no development shall be exempt from a corridor permit by reason of any other permit, any grandfather clause, or any other exemption. Authorities issuing other development permits should inform applicants of the corridor permit requirement, but the corridor designation shall not interfere with or delay other development permit procedure, unless agreed to by the applicant. No zoning or other land use ordinance or regulation shall be deemed or required to be altered or modified by the creation of the corridor, but any permits issued under any such ordinance or regulation shall be deemed conditional upon the corridor permit.

### 230-A:9. Action on Application.

Within 60 days after receipt of a completed corridor permit application, the layout authority or its designated agent shall:

- I. Determine that the impact of the proposed development on highway design planning and impact on the cost of possible acquisition is not substantial, and issue the permit;
- II. Notify the applicant of its intent to take an interest in all or part of the land or other property, in which case, the date of notification shall constitute the date of valuation for taking purposes; or
- III. Reach agreement with the applicant on some alternative action.

### 230-A:10. Payment or Tender of Damages.

Within 180 days after notice of intent to take an interest in property has been delivered under this chapter, the layout authority or its designated agent shall pay or tender damages for a specified interest in the applicant's property. The procedure for the payment or tender, and any appeals of assessments, shall be as set forth in RSA 498-A. If the layout authority fails to make a payment or tender within 180 days, the corridor permit shall be deemed to be granted.

### 230-A:11. Corridor Protection Restriction.

All property interests taken under this chapter shall be in the form of a corridor protection restriction, unless the layout authority or its designated agent makes a written finding that the public interest requires taking a greater property interest in the property. Reasons for such a finding may include, but are not limited to, a probable likelihood that the layout will eventually require a taking of greater property interest, or a substantial similarity between the appraised value of the greater property interest and the corridor protection restriction. The layout authority may amend the terms and duration of any corridor protection restriction to meet the needs of its planning process, but the duration of any term thereof shall not exceed 10 years, unless renewed.

### 230-A:12. Other Acquisitions.

The layout authority may acquire corridor protection restrictions or other property interests within the highway planning corridor, absent the submission of a corridor permit application, provided, that, in its discretion, the layout authority determines that such acquisitions are consistent with the purposes of this chapter.

### 230-A:13. Corridor Amendments.

The layout authority may add to the land area of any highway planning corridor, provided, however, that written notice shall be given to each owner of land or other property affected by the amendment, and no determination of whether there is occasion for the designation shall be made unless the amendment is based on new or revised findings of transportation needs.

230-A:14. Termination of Corridor.

The highway planning corridor shall terminate:

I. Upon the filing of a return of highway layout and the acquisition of the property necessary for the highway for which the planning corridor was created; or

II. Upon a declaration by the layout authority that the corridor, or any portion thereof, is discontinued. The discontinuance of a highway planning corridor shall not be subject to appeal, and shall not entitle any person to damages.

## II. NORTH CAROLINA ROADWAY CORRIDOR OFFICIAL MAP ACT

### A. ENVIRONMENTAL IMPACT STATEMENT REQUIREMENT

**Authors' Comments:** This statute requires the preparation of environmental impact studies within one year after corridor designation. Early preparation of impact studies will help expedite advance acquisition of land in corridors when this is necessary.

N.C. GEN. STAT. §136-44.50

(d) Within one year following the establishment of a roadway corridor official map or amendment, work shall begin on an environmental impact statement or preliminary engineering. The failure to begin work within the one-year period shall constitute an abandonment of the corridor, and the provisions of this Article shall no longer apply to properties or portions of properties embraced within the roadway corridor. A city may prepare environmental impact studies and preliminary engineering work in connection with the establishment of a roadway corridor official map or amendments to a roadway corridor official map. When a city prepares a roadway corridor official map for a street or highway that has been designated a State responsibility pursuant to G.S. 136-66.2, the environmental impact study and preliminary engineering work shall be reviewed and approved by the Department of Transportation.

### B. ADVANCE ACQUISITION OF RIGHT-OF-WAY WITHIN THE ROADWAY CORRIDOR

**Authors' Comments:** This is a comprehensive delegation of authority to acquire land within a transportation corridor through advance acquisition. Local funding is authorized, and note that criteria for advance acquisition must be adopted.

N.C. GEN. STAT. §136-44.53 (1993)

(a) After a roadway corridor official map is filed with the register of deeds, the Department of Transportation or the city which initiated the roadway corridor official map is authorized to make advanced acquisition of specific parcels of property when such acquisition is determined by the respective governing board to be in the best public interest to protect the roadway corridor from development or when the roadway corridor official map creates an undue hardship on the affected property owner.

(b) Prior to making any such advance acquisition of right-of-way under the authority of this Article, the Board of Transportation or the respective municipal governing board which initiated the roadway corridor

official map shall develop and adopt appropriate policies and procedures to govern such advanced acquisition of right-of-way and to assure such advanced acquisition is in the best overall public interest.

(c) When a city makes an advanced right-of-way acquisition of property within a roadway corridor official map for a street or highway that has been determined to be a State responsibility pursuant to the provisions of G.S. 136-66.2, the Department of Transportation shall reimburse the city for the cost of such advanced right-of-way acquisition at the time the street or highway is constructed. The Department of Transportation shall have no responsibility to reimburse a municipality for any advanced right-of-way acquisition for a street or highway that has not been designated a State responsibility pursuant to the provisions of G.S. 136-66.2 prior to the initiation of the advanced acquisition by the city. The city shall obtain the concurrence of the Department of Transportation in all instances of advanced acquisition.

(d) In exercising the authority granted by this section, a municipality is authorized to expend municipal funds for the protection of rights-of-way shown on a duly adopted roadway corridor official map whether the right-of-way to be acquired is located inside or outside the municipal corporate limits.

### **III. NEW JERSEY ACCESS MANAGEMENT CODE**

**Authors' Comments:** This statute provide comprehensive authority for a state access management code. The use of access management for corridor preservation is not specifically authorized, but there is nothing in the code that prevents use of access management for this purpose. Note also the delegation in paragraph (h) of the authority to require contributions from landowners for highway facilities. The statute enacts a "fair share" test that should meet constitutional requirements.

N.J. STAT. §27:7-91

a. The Commissioner of Transportation shall, within one year of the effective date of this amendatory and supplementary act, adopt as a regulation under the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.), a State highway access management code (hereinafter, "access code") providing for the regulation of access to State highways. The commissioner shall hold at least five public hearings in various locations throughout the State to receive public comment on the proposed access code, and shall give notice of these hearings at least 15 days in advance thereof in newspapers having general circulation in the localities in which the hearings are to be held. At one of these hearings the members of the Senate Transportation and Communications Committee, or its successor, and at another hearing the members of the Assembly Transportation and Communications Committee, or its successor, shall be invited to sit with the commissioner and participate in the public hearing. In each case the commissioner shall preside at the hearing and it shall be the commissioner's duty to give reasonable notice to the members of the appropriate committee of the time and place of the holding of the hearing. Prior to the holding of the public hearings the commissioner shall submit the draft access code to the advisory committee established pursuant to subsection i. of this section for its comments and recommendations. The advisory committee shall also be afforded the opportunity to provide additional comments and recommendations following the completion of these hearings and before the access code is proposed for adoption under the provisions of the "Administrative Procedure Act."

The Senate Transportation and Communications Committee, or its successor, and the Assembly Transportation and Communications Committee, or its successor, shall also be notified by the commissioner of the provisions of the access code at the time it is proposed for adoption under the provisions of the "Administrative Procedure Act." In addition, following the adoption of the access code, the commissioner shall notify the Senate Transportation and Communications Committee, or its successor, and the Assembly Transportation and Communications Committee, or its successor, of any proposed revisions to the access code at the time these revisions are proposed for adoption under the provisions of the "Administrative Procedure Act."

b. The access code shall establish a general classification system for the State highway system. The classification system shall be based upon the following criteria: (1) the function that segments of State highway serve and are planned to serve within the State highway system and within the general system of streets and highways, (2) the environment within which highways are located, including but not limited to urban and rural environments, (3) the appropriate and desirable balance between facilitating safe and convenient movement of through traffic and providing direct access to abutting property, and (4) the desirable rate of speed and the degree to which through traffic should be protected from major variations in speed. Each State highway segment shall have its classification identified in the access code.

c. For each highway classification identified, the access code shall establish standards for:

(1) The geometric design of driveways and of intersections and interchanges with other streets and highways, (2) the desirability of constructing driveways and interchanges with grade separations, and (3) minimum and desirable spacing of driveways and intersections and interchanges.

The access code also shall set forth alternative design standards for each highway classification which, combined with limits on vehicular use, can be applied to lots which were in existence prior to the adoption of the access code and which cannot meet the standards of the access code.

d. The access code shall set forth administrative procedures for the issuance of access permits. The code shall include a provision providing for a period of time for the renewal, issuance, modification or denial of these permits, not to exceed 200 days from the date of receipt of the completed application for a major access permit and not to exceed 45 days from the date of receipt of the completed application for a minor access permit.

e. The access code shall contain standards suitable for adoption by counties and municipalities for the management of access to streets and highways under their jurisdiction.

f. The commissioner may adopt, as supplements to the access code, site-specific access plans for individual segments of a State highway. Any access plan adopted in accordance with this subsection shall be developed jointly by the Department of Transportation and the municipality in which the highway segment is located and, where a county road intersects the State highway, by the county in which the State highway segment is located. Prior to incorporating a site-specific access plan into the access code, the commissioner shall determine: (1) that the access plan conditions have been incorporated into the master plan and development ordinances of the municipality, (2) that the access plan complies with or exceeds the standards established in the access code, and (3) that an appropriate means of access has been identified for every lot currently having frontage on the highway segment.

g. The access code shall include provision under which any person may submit to the commissioner, in writing, a request for a change in the classification of a specified segment of State highway. This provision shall also require the commissioner to notify affected counties and municipalities of such a request, require the commissioner to respond in writing to the request within a specified time, specify what data, evidence, information, comments, or arguments the commissioner is to consider in evaluating the request, and affirm that any request made by any person is in addition to, and not in lieu of, any other administrative or other remedy that person may have under the "Administrative Procedure Act" or any other law.

h. The access code may require financial contributions toward the cost of constructing public improvements of streets and highways but no permit applicant shall be required to contribute an amount that exceeds his fair share of the costs of off-site improvements that have a rational nexus with the proposed development on the property for which the permit is requested. The "fair share" shall be based upon the added traffic growth attributable to the development.



i. There is established in the Department of Transportation an Access Code Advisory Committee which shall consist of 11 members, three of whom shall be appointed by the Governor upon recommendation of the President of the Senate, no more than two of whom shall be of the same political party; three of whom shall be appointed by the Governor upon recommendation of the Speaker of the General Assembly, no more than two of whom shall be of the same political party; and five of whom shall be appointed by the Governor from among the following: one shall be a traffic engineer, one shall be a developer engaged substantially in residential construction, one shall be a developer engaged substantially in commercial, industrial or office building construction, one shall represent the State Chamber of Commerce, and one shall represent the New Jersey Business and Industry Association. Of the 11 members no more than two shall be developers or represent the interests of developers. The chairman of the committee shall be appointed by the Governor from among the members of the committee. It shall be the duty of the committee to make comments and recommendations on the access code as provided in subsection a. of this section, which shall include analysis of methods and procedures to assure the timely and equitable consideration and processing by the department of access permit requests, and to otherwise consult with and advise the commissioner on the code. The members of the committee shall not receive compensation for their services as members of the committee. Each member shall be reimbursed by the department for his actual expenses necessarily incurred in attending meetings of the committee. The committee shall be dissolved on the 30th day following the adoption of the access code.

#### IV. NORTH CAROLINA BUILDING SETBACK LAW

**Authors' Comments:** This is a comprehensive law authorizing cities to adopt building setback lines. Setbacks must be based on present and anticipated traffic needs. Note there is authority to adopt setbacks for proposed streets. The authors have inserted a provision in brackets specifically authorizing the use of setbacks for corridor preservation. N.C. Gen. Stat. §153A-326 confers on counties the building setback line powers conferred on cities.

#### N.C. GEN. STAT. §160A-306

(a) A city shall have authority to (i) classify all or a portion of the streets in the city according to their size, present and anticipated traffic loads, and other characteristics relevant to the achievement of the purposes of this section, and (ii) establish by ordinance minimum distances that buildings and other permanent structures or improvements constructed along each class or type of street shall be set back from the right-of-way line or the center line of an existing or proposed street. Portions of any street may be classified in a manner different from other portions of the same street where the characteristics of the portions differ.

(b) Any setback line shall be designed

(1) To promote the public safety by providing adequate sight distances for persons using the street and its sidewalks, lessening congestion in the street and sidewalks, facilitating the safe movement of vehicular and pedestrian traffic on the street and sidewalks and providing adequate fire lanes between buildings, and

(2) To protect the public health by keeping dwellings and other structures an adequate distance from the dust, noise, and fumes created by traffic on the street and by insuring an adequate supply of light and air. [and]

[(3) To promote the general welfare by preserving from development land within corridors proposed for new highways or highway widenings as shown on a city comprehensive plan or a long-range transportation plan adopted by the state transportation agency or a regional transportation agency.]

(c) A setback-line ordinance shall permit affected property owners to appeal to the council for variance or modification of setback requirements as they apply to a particular piece of property. The council may vary or modify the requirements upon a showing that

(1) The peculiar nature of the property results in practical difficulties or unnecessary hardships that impede carrying out the strict letter of the requirement.

(2) The property will not yield a reasonable return or cannot be put to reasonable use unless relief is granted, and

(3) Balancing the public interest in enforcing the setback requirements and the interest of the owner, the grant of relief is required by considerations of justice and equity.

In granting relief, the council may impose reasonable and appropriate conditions and safeguards to protect the interest of neighboring properties. The council may delegate authority to hear appeals under setback -line ordinances to any authorized body to hear appeals under zoning ordinances. If this is done, appeal to the council from the board shall be governed by the same laws and rules as appeals from decisions granting or denying variances or modifications under the zoning ordinance.

## V. ILLINOIS ROAD IMPROVEMENT IMPACT FEE LAW

**Authors' Comments:** This Illinois law is one of a number of similar laws states have adopted in recent years that specifically authorize local governments to charge developers impact fees for public improvements. The Illinois law is unusual in its limitation to road improvements. Some of the key definitions in the law are included here along with provisions providing how impact fees are to be calculated and requiring a comprehensive plan as a condition to the use of impact fees.

### §605 ILL. COMP. STAT. 5/5-903. DEFINITIONS

As used in this Division:

"Units of local government" mean counties with a population over 400,000 and all home rule municipalities.

"Road improvement impact fee" means any charge or fee levied or imposed by a unit of local government as a condition to the issuance of a building permit or a certificate of occupancy in connection with a new development, when any portion of the revenues collected is intended to be used to fund any portion of the costs of road improvements. . . .

"Roads, streets or highways" mean any roads, streets or highways which have been designated by the unit of local government in the comprehensive road improvement plan together with all necessary appurtenances, including but not limited to bridges, rights-of-way, tollway ramps, and traffic control improvements.

. . .

"Specifically and uniquely attributable" means that a new development creates the need, or an identifiable portion of the need, for additional capacity to be provided by a road improvement. Each new development paying impact fees used to fund a road improvement must receive a direct and material benefit from the road improvement constructed with the impact fees paid. The need for road improvements funded by impact fees shall be based upon generally accepted traffic engineering practices as assignable to the new development paying the fees.

"Proportionate share" means the cost of road improvements that are specifically and uniquely attributable to a new development after the consideration of the following factors: the amount of additional traffic generated by the new development, any appropriate credit or offset for contribution of money, dedication of land, construction of road improvements or traffic reduction techniques, payments reasonably anticipated to be made by or as a result of a new development in the form of user fees, debt service payments, or taxes which are dedicated for road improvements and all other available sources of funding road improvements. . . .

**§605 ILL. COMP. STAT. 5/5-906. IMPACT FEE ORDINANCE OR RESOLUTION REQUIREMENTS**

(a) An impact fee ordinance or resolution shall satisfy the following 2 requirements:

(1) The construction, improvement, expansion or enlargement of new or existing roads, streets, or highways for which an impact fee is imposed must be specifically and uniquely attributable to the traffic demands generated by the new development paying the fee.

(2) The impact fee imposed must not exceed a proportionate share of the costs incurred or the costs that will be incurred by the unit of local government in the provision of road improvements to serve the new development. The proportionate share is the cost specifically attributable to the new development after the unit of local government considers the following: (i) any appropriate credit, offset or contribution of money, dedication of land, construction of road improvements or traffic reduction techniques; (ii) payments reasonably anticipated to be made by or as a result of a new development in the form of user fees, debt service payments, or taxes which are dedicated for road improvements; and (iii) all other available sources of funding road improvements.

(b) In determining the proportionate share of the cost of road improvements to be paid by the developer, the following 8 factors shall be considered by the unit of local government imposing the impact fee:

(1) The cost of existing roads, streets and highways within the service area or areas.

(2) The means by which existing roads, streets and highways have been financed to cure existing deficiencies.

(3) The extent to which the new development being assessed the impact fees has already contributed to the cost of improving existing roads, streets or highways through taxation, assessment, or developer or landowner contributions paid in prior years.

(4) The extent to which the new development will contribute to the cost of improving existing roads, streets or highways in the future.

(5) The extent to which the new development should be credited for providing road improvements, without charge to other properties within the service area or areas.

(6) Extraordinary costs, if any, incurred in servicing the new development.

(7) Consideration of the time and price differential inherent in a fair comparison of fees paid at different times.

(8) The availability of other sources of funding road improvements, including but not limited to user charges, general tax levies, intergovernmental transfers, and special taxation or assessments.

(c) An impact fee ordinance or resolution shall provide for the calculation of an impact fee in accordance with generally accepted accounting practices. An impact fee shall not be deemed invalid because payment

of the fee may result in a benefit to other owners or developers within the service area or areas, other than the person paying the fee.

#### §605 ILL. COMP. STAT. 5/5-910. COMPREHENSIVE ROAD IMPROVEMENT PLAN

Each unit of local government intending to impose an impact fee shall prepare a comprehensive road improvement plan. The plan shall be prepared by persons qualified in fields relating to engineering, planning, or transportation. The persons preparing the plan shall consult with the Advisory Committee. The comprehensive road improvement plan shall contain all of the following:

- (1) A description of all existing roads, streets or highways and their existing deficiencies within the service area or areas of the unit of local government and a reasonable estimate of all costs related to curing the existing deficiencies, including but not limited to the upgrading, updating, improving, expanding or replacing of such roads, streets or highways and the current level of service of the existing roads, streets and highways.
- (2) A commitment by the unit of local government to cure existing deficiencies where practicable relating to roads, streets, and highways.
- (3) A description of the land use assumptions adopted by the unit of local government.
- (4) A description of all roads, streets or highways proposed to be improved, expanded, enlarged or constructed to serve new development and a reasonable estimate of all costs related to the improvement, expansion, enlargement or construction of the roads, streets or highways needed to serve new development at a level of service not to exceed the level of service on the currently existing roads, streets or highways.
- (5) Identification of all sources and levels of funding available to the unit of local government for the financing of the road improvements.
- (6) If the proposed road improvements include the improvement of roads, streets or highways under the jurisdiction of the State of Illinois or another unit of local government, then an agreement between units of government shall specify the proportionate share of funding by each unit. All agreements entered into by the State must provide that the portion of the impact fees collected due to the impact of new development upon roads, streets, or highways under State jurisdiction be allocated for expenditure for improvements to those roads, streets, and highways under State jurisdiction.
- (7) A schedule setting forth estimated dates for commencing construction of all road improvements identified in the comprehensive road improvement plan.

Nothing contained in this subsection shall limit the right of a home rule unit of local government from imposing conditions on a Planned Unit Development or other zoning relief which may include contributions for road improvements, which are necessary or appropriate for such developments, but are not otherwise provided for in the comprehensive road improvement plan.

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John C. Vance Award, Most Outstanding Paper on Transportation Law Submitted to Transportation Research Board, 1988 (with A. Kolis)

*Professional Associations and Committees*

Advisory Committee, Transportation Research Board, Corridor Preservation for Highways, 1991-92  
Task Force on Model State Enabling Legislation, American Planning Association, 1991-94

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National Advisory Committee on Outdoor Advertising, U.S. Department of Transportation, 1980-81

Committee on Transportation and Land Development Policy, Transportation Research Board, 1973-82

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Mr. Blaesser concentrates in real estate development, land use and environmental law, planning law, economic development and litigation. He represents real estate owners, investors and developers in analyzing and securing requisite land use and development approvals from local governments, negotiating and drafting development agreements, and handling development projects which involve a wide range of environmental transactional and regulatory permitting matters with the U.S. EPA and the U.S. Army Corps of Engineers and U.S. EPA. Mr. Blaesser also works with developers and local governments around the country in structuring public/private partnerships and transactions to achieve economic development objectives and local government open space policies. Mr. Blaesser also has extensive litigation experience in state and federal trial and appellate courts and served as Special Assistant Attorney General for eminent domain actions brought by the Illinois Department of Transportation and the Illinois Department of Conservation. Mr. Blaesser serves as an appointed member of APA's 8-person National Amicus Curiae Committee which monitors important land use cases from state and federal jurisdictions around the country.

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Mr. Blaesser is a principal author and co-editor of the book, Land Use and the Constitution (Planners Press: 1989); co-author of the book, Condemnation of Property: Practice and Strategies for Winning Just Compensation (Wiley Law Publications: 1994); principal author of "Invitations to Abuse of Discretion: Aesthetic and Automatic Reviews," Land Use Law & Zoning Digest (Vol. 42 No. 11; November, 1990); "Testing the Impacts of Bonus-Based Urban Design Controls and Applying Development Design Review in the Downtown," in Zoning Bonuses in Central Cities (APA Planning Advisory Service Report No. 410; September, 1988); "Practical Concerns of the Private Developer in Public/Private Real Estate Ventures," in Developing Real Estate Through Public/Private Ventures (ABA National Institute: 1990); "Impact Fees: The Second Generation," 38 Journal of Urban and Contemporary Law 401 (1990); "Constitutional Constraints on Fees, Takings and Inspections," in Proceedings of the 1990 Institute on Planning and Zoning (University of Illinois at Urbana-Champaign); "Decisional Trends in the Midwest Since the Takings Trilogy," ABA Land Use Regulation Newsletter (Vol. I No. 4: Winter 1990); "Applying the Ripeness Doctrine in Federal Land Use Litigation," 11 Zoning Law and Planning Report 49 (July-August 1988); "Municipal Liability Under the Fair Housing Act: An Update," Land Use Law & Zoning Digest (Vol. 40 No.10; October,



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