

**Delaware Department of Transportation
Division of Transportation Solutions
Design Guidance Memorandum**

Memorandum Number: 4-1

1. Road Design Manual 2. Bridge Design Manual 3. Utilities Design Manual
4. Right of Way Manual 5. Standard Specifications 6. Standard Construction Details
-

Title: **Right to Enter Guidance and Limitations**

Effective date: 5-29-2018

Implementation by: X Project Development, X Bridge Design, X Team Support,
 Utility, X Right of Way, X Planning, X DTC, X Maintenance &
Operations, Other PAR, TAP, Pave & Rehab Projects; Right-of-Way, Traffic Projects,
Routine Maintenance Work

I. Purpose

To establish the procedures to be followed when utilizing the limited authority found in the Delaware Code to enter onto private property to maintain, repair and reconstruct public use facilities.

II. Applicability

This Design Guidance explicitly applies to maintenance and repairs and reconstruction of existing publically financed transportation assets which are to be completed under the police powers of the State. The use of this limited authority is most applicable on DelDOT Projects when existing infrastructure is being maintained, repaired, replaced, or otherwise brought up to current design standards.

Application to other projects and programs will be made on a case by case basis considering the scope of the project with concurrence from the DelDOT Chief of Right of Way.

III. Legal Authority

The Delaware code states that the Department may make repairs and reconstruction of public facilities on private property:

“enter upon the lands or waters of any person for the purpose of surveys, repairs, reconstruction and operation of publicly financed improvements but subject at all times to the responsibility for all and any damages which shall be done to the property of such person or persons”. [17 Del. C. §132 (c)(13)]

Regarding drainage, it states:

“In order to obtain the free passage of water for drainage of any road or causeway under its jurisdiction, the Department or its agents may enter upon any lands contiguous or adjacent to such road or causeway in order to maintain or repair any existing artificial or natural ditch, drain, culvert or sewer”. [17 Del. C. §504(a)]

And:

“In order to keep the waters of ditches, drains, streams and creeks within their proper channels, thereby preventing them from encroaching upon or flooding any road or causeway under its jurisdiction, the Department or its agents may enter upon and occupy the beds of any ditches, drains, streams and creeks contiguous or adjacent to such roads or causeways and perform such work of construction, improvement or maintenance as may be necessary or desirable to prevent such encroachment or flooding”. [17 Del. C. §504(b)]

Additionally, the Code identifies that if a roadway has been maintained at the public expense for 20 years it is deemed publicly owned:

“All public roads, causeways and bridges laid out as such, or made by lawful authority, or which have been used as such and maintained at the public charge for 20 years or more are declared to be common highways. The usage by the public for 20 years or more of any road shall not cause the road to become a common highway or public road unless the same has been maintained at the public charge for 20 years or more.” [17 Del. C. §509 states]

The Code excerpts above grant DelDOT a codified right to enter private property for “surveys, repairs, reconstruction and operation of publically financed improvements”. For purposes of this guidance, the various concomitant components of a roadway, such as: pipes, gutters, water control structures, ditches, drains, culverts, sewers, sidewalks, curb ramps, and traffic control equipment that have been “maintained at the public charge for 20 years or more” are deemed part of the public road or highway and therefore, are “publically financed improvements”.

This authority allows the Department to make in-kind replacements of public-use facilities. Some alteration of slopes, vertical and horizontal dimensions is also allowable, such as to update a facility to current standards, provided the work does not increase the footprint of permanent infrastructure specifically upon the private property, relocate the facility further onto private property, or otherwise increase the burden on the private property.

By the authority described above, the Department is asserting police powers and is not asserting eminent domain powers. Police powers are not considered acquisition activities and therefore just compensation is not owed nor is just compensation to be considered an option.

This authority does not apply to new facilities. Where new facilities are constructed, the Department must use eminent domain powers to acquire necessary property rights to construct the new facilities.

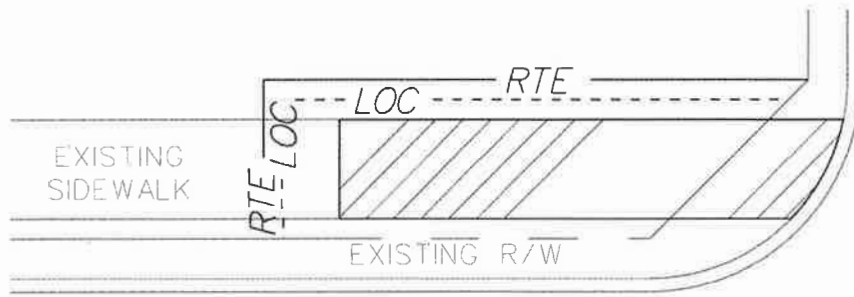
IV. Design Guidance

With the exception of routine maintenance, when the Department intends to exercise its above authority to enter private property to perform repair or reconstruction work on publically financed improvements, plans and/or detailed drawings shall be prepared clearly depicting the limits of the area the Department will enter.

Those limits shall be defined and depicted as a Right to Enter line (RTE) shown on the plans.

The DelDOT Project Manager shall implement the following best practices:

- An RTE line shall be added to the Construction and Right of Way Plans in the areas where the Limit of Construction (LOC) will extend outside of the existing Right-of-Way. For illustration purposes, see figure below.
- A standard project note shall be added to the corresponding Construction and Right-of-Way Plan sheets where the LOC extends outside of the existing Right-of-Way. The note is for both internal Department review purposes and for the contractor's reference. A sample note is attached at **Appendix 'A'**. This note will be added to the Design Resource Center for future use.
- Any features on the parcel within the RTE line that should not be disturbed during the work shall be clearly marked on the plans with a "Do Not Disturb" identifier.



There are some circumstances where a TCE, instead of the statutory RTE, would be appropriate. This decision is based on several factors, including the duration of impact, the benefits to the private property owner, and the effects upon the private property's value. The final decision as to whether land rights, in the form of a TCE, must be acquired will fall to DelDOT's Chief of Right of Way.

V. Notification Requirement

During the design phase of a project, notification shall be sent as a courtesy to the property owner, and tenant if applicable, indicating the Department's intention to exercise its codified right to enter. A templated letter is attached as **Appendix 'B'**. This template will be placed on the Design Resource Center for future use. The intent of the letter is to alert the property owner to the authority of the Department.

If the property owner challenges the Department's proposed entry onto their property, the design Project Manager must make a decision as to whether or not the work can be excluded from the project and/or determine reasonable alternatives under the specific circumstances. The design Project Manager must use engineering judgement and applicable standards when determining whether the work can be excluded. If the design Project Manager chooses not to pursue the original proposed work, a letter to the property owner must be sent that indicates that the Department still maintains the right to enter Authority but that the Department will not pursue the original proposed work. A templated letter is attached as **Appendix 'C'**. If it is deemed necessary to reconstruct the existing facility then the design Project Manager should contact the DelDOT Legal Section to discuss the appropriate path forward to exercise the State's police powers.


VI Construction Phase Design Guidance

If it is determined during construction activities that additional land rights are required, the Chief of Right-of-Way shall be contacted as to appropriate procedures.

VII. Justification

In order to promote efficient and cost effective project delivery.

Prepared by: Committee 5-21-2018
Date

Recommended by:  5-25-18
Chief of Right of Way Date

Approved:  5/25/18
Director of Transportation Solutions Date

Distribution:
Transportation Solutions Assistant Directors
Consultants

APPENDIX A

Where a Right to Enter (RTE) line is designated on the Plans, it indicates locations where the Department already has the right under Delaware Code to enter onto private property to maintain, repair or reconstruct facilities used by the public and maintained at public expense.

DATE

Property Owner
Address
Address

Dear Sir or Madam:

As you may already be aware, the Delaware Department of Transportation (DelDOT) is planning to make improvements in front of your property under the *project name* project. The project is currently in the design phase. Based on DelDOT's pre-design investigation, it appears the *Facility Type* that is currently used by the public, will need to be *repaired/reconstructed Project Manager's description of the justification for repair/ reconstruction*.

As such, we would like to coordinate with you regarding the *Facility Type*. DelDOT plans to make the necessary upgrade at no cost to you, but making the corrections may require that DelDOT or its construction contractor enter your property¹. This will occur only to the extent necessary to effect the corrective work. DelDOT will ensure that precautions are taken to protect your property from damage and perform all necessary restoration and repairs at DelDOT's expense.

Please call us at your earliest convenience so we can discuss the details of proposed construction.

Sincerely,

Group Engineer

cc: *Assistant Director*
(Project Manager)
(Project Engineer)
(Consultant – if applicable)
File

Note 1: Title 17, Delaware Code, Section 132(c)(13) states: “[The Department may] Enter upon the lands or waters of any person for the purpose of surveys, repairs, reconstruction and operation of publicly financed improvements but subject at all times to responsibility for all and any damages which shall be done to the property of any such person or persons. .”

DATE

Property Owner
Address
Address

Dear Sir or Madam:

The Delaware Department of Transportation (DelDOT) has received your communication and is aware of your objection to the Department or its agent entering your property. The Department still recognizes its right to enter but in this case has decided to not reconstruct the existing ***Facility Type*** on your property as a courtesy.

Sincerely,

Group Engineer

cc: ***Assistant Director***
(Project Manager)
(Project Engineer)
(Consultant – if applicable)
File