

Corridor Preservation Techniques

Corridor preservation strategies fall into three general categories: acquisition of property rights (which can be divided into full fee simple acquisition, and less-than-fee-simple methods), regulation of land use, and negotiation with the landowner for preservation of land in an unimproved condition (2). Each category contains many strategies, with each strategy having its own benefits and consequences.

The major objectives, as discussed at greater length in the preceding chapter, are minimizing the costs to government while also minimizing impacts and constraints on landowners. There are also secondary objectives, such as reduction of safety hazards, implementation of a comprehensive plan, and avoidance of unnecessary future construction. In some cases the government will eventually want the whole parcel and may want to constrain development entirely. In other cases they just want part of the parcel and are primarily concerned with just making sure that development will not eventually be in the way; but do not want to prevent development in general.

A government's choice of strategy is intrinsically tied to the impact that the government is seeking to minimize. Further, the availability of any given technique is by state law, as many strategies require specific enabling legislation. For example, the state of Utah relies on cities to use police powers to preserve corridors in light of the state's limited authority (2). Survey results suggest that local governments conduct the majority of corridor preservation activities (1). Finally, some methods, in particular land acquisition, are more expensive than others, and so financial constraints will impact the choice of strategy as well.

More detailed information on alternative corridor preservation strategies, as well as benefits and consequences of the different strategies, are outlined in the following sections.

A.1 Fee Simple Acquisitions

The most extreme and expensive form of preservation is actually purchasing the property. By acquiring rights in fee simple, the state or local government owns the land and has ultimate control over the corridor, and can best preserve the land for highway use. However, early acquisition of fee-simple rights involves a number of issues in addition to the expense.

The primary issue involves the potential for future federal reimbursement of ROW acquisition costs. Normally federal project funding could be used to purchase ROW; it can be applied ex post to earlier purchases only under certain conditions. These primarily revolve around the desire to make sure that the eventual project and the supporting

environmental impact study are not unduly affected by the fact that money has already been invested in a certain ROW alignment. One specific point is the need for some kind of environmental study before purchase. The objective of this is to ensure that environmental impact problems do not come to light after significant amounts of money have already been invested, and that there is no incentive to minimize or ignore these problems because of the sunk costs. There is also a requirement for some form of public involvement prior to land being purchased; again to avoid a situation where the public is coerced into accepting a particular solution because of the money that has already been invested.

Fee-simple acquisitions take four different forms with somewhat differing issues involved:

- Hardship acquisition
- Donation
- Protective acquisition
- General early acquisition

Hardship Acquisition is only available in certain specified situations at the request of the landowner, for example, health, safety, financial hardship or inability to sell due to public knowledge of an upcoming project. As such, it is not useful as a proactive preservation tool, as the state lacks control over hardships of landowners. These purchases can potentially be reimbursed from federal funds after federal approval of the project, and can be done before full environmental approval.

Donation is when the landowner voluntarily gives the land title to the state, typically to gain tax benefits. It is only available in certain specified situations at the will of the landowner. For projects using federal money, the donor must be advised of the right to property valuation and payment. As with hardship acquisition, this is not that useful as a proactive preservation tool since the government cannot coercively solicit donations.

Protective Acquisition is aimed at preventing significant additional costs or imminent development. It is quite limited from the standpoint of federal cost reimbursement: Reimbursement of advance acquisition is limited to 'one or a limited number' of parcels under imminent threat of development, but only if acquired after a preferred location is established and public involvement conducted. Early acquisition (before federal project agreement) is constrained by a land-use planning prerequisite to which few states can conform (3).

An important point in this regard is the need to insure that the purchase will not influence the environmental assessment, in the sense of causing the purchased alignment to be unduly favored over other possibilities. While this is potentially a proactive preservation strategy, it is constrained in its applicability because of the limited number of individual properties to which this category can legally be applied.

General Early Acquisition is just the fee-simple purchase of land for fair market value, with no other conditions attached. This can be financially difficult as it requires a funding source other than federal money. Some states have dedicated funding:

- California – \$25 million fund; 20 year limit on holding land;
- Utah – Revolving loan fund; funded through tax on rental cars;
- Arizona – Funded through gas tax.

With regard to future federal reimbursement, it is possible to credit these costs toward the state portion (match) of costs on projects with federal funding in certain circumstances. For early acquisition of total takes, properties acquired must be on all possible alignments of the future highway (3).

The Federal Highway Administration cautions that purchases with state money before completion of the Environmental Impact Statement (EIS) could jeopardize future receipt of federal money (4). The issue is whether, in retrospect, the acquisition influenced the construction of the project or location choice. States like Florida attempt to get around this by completing categorical exclusion documents for property acquired through voluntary purchase, followed by a full EIS for the project. The categorical exclusion document assesses potential environmental impacts for specific land purchases (4).

A.2 Less Than Fee Simple Acquisitions

These are preservation strategies in which the government acquires some direct control over how a particular parcel is used, but short of actually buying the parcel. There are three broad categories here:

- Options to purchase
- Purchase of development rights
- Property exchange

In a **Purchase Option** the state pays a landowner for the right to purchase a property at a specified future date, for a specified price. A somewhat less restrictive version of this is a right of first refusal, where there is no date specified, but the state is given the first chance to buy (or refuse to buy) the land if the owner decides to sell. This tactic will prevent major development as the current owner has little incentive to invest in improvements when the future sale price is already fixed. It is a low-cost way to prevent development in the short term, and allows the property to remain on the tax rolls and economically productive (although constraining possibly useful improvements). It can be preferable to direct purchase in cases where design is not finalized and the state is not sure exactly how much of a parcel will be needed, so that the amount of land eventually purchased can be minimized.

However, this is a short-term strategy. Long-term options would be very difficult to value and subject to considerable risk in the eventual price paid. Short-term options would need

to be renewed if the state is not yet ready to purchase the land when the option comes due, and this could become an administrative burden. Over a longer period, the ongoing cost of purchasing options could be higher than the opportunity cost of just buying the land directly. Finally, this should be thought of as insurance, or as a way of buying time; the cost of the option does not count against the eventual purchase price.

Purchasing Development Rights is a related but slightly different tactic. In this case the government pays compensation to the landowner for imposing a restriction on development of land in a corridor. Compared to the purchase options described earlier, this is a less restrictive strategy as it can be applied specifically to those aspects of development that the government wishes to forestall, while not necessarily constraining other, less problematic types of development on the parcel. This can be designed as a permanent easement pending fee-simple purchase, or as a temporary easement. As with future purchase options, this costs less than full acquisition in the short run, requires no property management on the part of the government, and allows the land to stay on tax rolls and remain economically productive. However, it is also similar in that the price paid does not count against the future cost of the land, and in that it can be expensive in fast-growing areas where development could be lucrative. The specific legality of this in Minnesota is also unclear; it may require expressed legislative authority.

Property Exchange is a type of transfer of development rights. An example would be the state providing a property owner with different land in exchange for a development plan consistent with the state's needs. There are only circumstantial opportunities for this as it is limited in most states to surplus land already owned. This is just paying a landowner with other land rather than with money. Minnesota's Constitution requires unanimous approval of the governor, the attorney general and the state auditor and that the land be used for the same trust as the land exchanged was to be used.

A.3 Land Use Regulation

Strategies for regulating land use require little capital investment, and attribute some of the cost to the developer, but they also require increased administrative costs to local governments exercising police power. These strategies are tailored to limiting development, but require legal justifications beyond cost savings, and are more likely to be perceived as coercive. From the perspective of the state, such methods can require considerable coordination with local officials, and typically cannot be applied directly as can purchases of land or development rights.

There are six methods discussed here:

- Access Management Regulations
- Setback Regulations
- Ordinances or Zoning
- Site-Plan Review and Subdivision Controls

- Conditional Use/Interim Use Permits
- Dedications and Exactions

Access Management Regulations, such as limitations on curb cuts, seek to preserve the capacity of existing highways to limit future land acquisition needs. Such regulations have the benefit of limiting immediate capital investment and, if successful, may limit long-term needs for new roadways. However, governments must ensure that reasonable access is allowed to property owners.

As an example, in Wisconsin an administrative rule mandates that any new land recording (consolidation, platting, etc.) along a preserved corridor must be approved by the state; also that localities must conduct corridor studies to identify priority corridors and address preservation issues. Another rule mandates that no private access to state highways is allowed and establishes setbacks where no improvements can take place (1).

Of the available techniques, access management techniques are among the most widely used, but least discussed. Respondents to an American Planning Association (APA) survey reported that limiting curb cuts is the most widely used preservation strategy, followed by mandatory dedications from subdivisions, official maps, and landowner agreements (1). Accordingly, some researchers have suggested that “corridor preservation” should be called “corridor management” to shift focus to maintenance of existing highways as well as planned ones (4).

Setback Regulations are prohibitions on building on a property within a specified distance from the property line. They cannot be established solely for highway purposes or because of intent to acquire; legitimate purposes include aesthetics and safety. It may in some cases be possible to reduce setback regulations of the line not adjacent to the corridor to mitigate impacts from exaction, donation, or agreement to leave undeveloped. These are likely to be most useful when a minimal amount of land is needed; very large setback requirements are unlikely to be justifiable by typical reasons.

Ordinances and Zoning are the use of local power to regulate the intensity of land use. They can be used to restrict building in the right of way of a mapped transportation facility without a variance. These methods will not necessarily keep land from being developed, but can be used to keep it in a low-intensity state. It is not legal to “downzone” or zone with “acquisitory intent,” that is, denying a request for a zoning change solely because of a highway. Ordinances and zoning cannot be targeted, arbitrarily applied, or piecemeal; they must be based on uniform planning criteria. As such they may be less useful than other techniques when the corridor preservation need is very localized or specific to a few parcels.

Site-Plan Review and Subdivision Controls can be used by local governments to supervise the development process so that growth is consistent with adequate access and infrastructure. Many counties and cities require development approval as part of police power. This allows negotiation for adequate setbacks and open space for future needs.

However, it needs the cooperation of developers. Legally, a plan must be approved if it meets all legal requirements, regardless of the impact on the transportation corridor. There may be a need for compensation for takings if plan approval is conditioned on the adjustment (3).

Conditional Use/Interim Use Permits allow individual landowners permits for low-intensity uses for a limited time period. This method is probably best for areas that are years away from construction; the land might as well be used in the meantime, but only for uses that will be low-cost to take down. The conditions defining “low-intensity” must be clear; this requires long-range planning and coordination between the state and locality. The cooperation of the landowner is needed, and it is likely that some sort of compensation must be paid if the land has not already been set aside for highway purposes.

Dedications and Exactions are an exercise of local police power; generally considered an impact fee paid with land instead of cash. They are assessed to a developer in exchange for development approval, a zoning change or a conditional use permit. According to the APA survey cited earlier, mandatory dedication (exaction) is the second most commonly used preservation technique (1).

Two United States Supreme Court cases (*Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Nollan et ux. v. California Coastal Commission*, 483 U.S. 825 (1987)) are the controlling standards for assessing the validity of dedications or exactions. The *Nollan/Dolan* cases create a “rough proportionality” test, which requires that the extent of exaction must be roughly proportional to the impacts of development based upon an individual determination. Further, a nexus is required between the exaction and the state need. A detailed, accurate record of assessment of impacts and determination of dedication necessary is needed. This method is easier to apply at the local level as it requires the cooperation of local permitting authorities, however, it may be possible for the state to work with these authorities to achieve its objectives.

As an example, the state of Nebraska has legislative authority through its mapping powers to preserve 300 feet on either side of an alignment. The state department of transportation (DOT) works with localities and the public to determine which corridors should be identified as priority corridors for preservation. After priority corridors are identified, they are filed with all permitting agencies so that when a local agency receives a permit request for construction along preserved alignments, it must submit the permit to DOT for approval. The DOT has 60 days to accept or deny the request for development.

The state and local governments may also negotiate an agreement with the permit applicant so long as the agreement maintains the integrity of the corridor. If the permit request is ultimately rejected, then the state has 180 days to acquire the property. Most of the variation among states in this category lies in how states determine priority corridors and how the policies are implemented. Nebraska heavily relies on its localities to negotiate agreements with developers to preserve rights-of-way (1).

A.4 Negotiation With Landowner (Mitigation)

The final category includes techniques to mitigate the impact of highway development on property owners. These techniques can include: transfers of development rights; density transfers; impact fee credits; and tax abatement (2, 3, 4). These techniques may be used in tandem with regulatory or acquisitory action to mitigate consequences to landowners (4). These strategies can also be used to negotiate with a landowner in exchange for property rights or an agreement to limit development (4). Finally, mitigation of impacts may be used to increase the perceived legitimacy of state action, both in a public relations sense, and specifically relating to takings litigation.

These differ from the land use regulations discussed in the previous section in that they apply to individual properties; most likely in cases where the general-purpose regulations do not achieve the necessary land set-asides. These are really just variations on the theme of acquiring development rights; they are all ways of acquiring long-term easements on parts of properties without a direct payment as such. In some cases the payment is in the form of in-kind exchanges for other rights of value, and in other cases there are indirect monetary exchanges.

But in every case the payment, such as it is, is made by the local government. This is another critical way in which these techniques differ from the simple purchase of development rights, which can be done by the state. These methods all need the cooperation of the local government, which in turn requires that the local government see some value to itself in making these sacrifices.

The state obviously benefits from these methods in that no payments need to be made. Even the local government benefits from the fact that little capital investment is needed for these techniques. In addition, the landowner retains the use of the land, within the limits set by the agreement.

There are four categories:

- Transferable Development Rights
- Density Transfers
- Impact Fee Credits
- Tax Abatement

A **Transferable Development Right** is a government-created right to develop land. The owner may sell or retain the right to use on parcels other than the land in the alignment. For example, the landowner could develop a separate piece of property at the same density as the land in the corridor, even if such density would otherwise not have been allowed in that location.

With a **Density Transfer** the landowner leaves some land vacant for highway purposes, and is then allowed to cluster development in excess of ordinary limits, so that the

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remaining property can be developed with the same total number of housing units, or feet of floor space, as would have been allowed on the full parcel.

An **Impact Fee Credit** is the waiver of impact fees on a development. An impact fee is a fixed sum of money assessed as a condition to issuance of a building permit (or occupancy permit or plat approval). The fee is levied to fund services and facilities necessary to serve the new development (in a proportionate amount to the need generated by the development). Some states give developers fee credits in exchange for dedication of land to the city in transportation corridors. States and local governments arguably need legislative authority to assess impact fees. Minnesota has yet to enact enabling legislation and the Minnesota Supreme Court has yet to definitively rule on the constitutionality of impact fees in the absence of legislation (*Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681(Minn. 1997)).

Tax Abatement involves allowing the landowner to exclude the land in the corridor for the purposes of property taxes in exchange for an agreement to leave the land undeveloped or used at lower intensity.

Source: 2005. Barnes, Gary and Sarah Watters. Appendix A from “The Financial Benefits of Early Acquisition of Transportation Right of Way”, a report for the Minnesota Department of Transportation.