Regulatory Analysis Form

(Completed by Promulgating Agency)

(All Comments submitted on this regulation will appear on IRRC's website)

INDEPENDENT REGULATORY REVIEW COMMISSION

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(1) Agency
Transportation

(2) Agency Number: 18
Identification Number: 18-479

IRRC Number: 3200

(3) PA Code Cite: 67 Pa. Code, Chapter 441

(4) Short Title: Access to and Occupancy of Highways by Driveways and Local Roads

(5) Agency Contacts (List Telephone Number and Email Address):

Primary Contact:

Richard Roman, P.E., Director
Bureau of Maintenance and Operations
Commonwealth Keystone Building, 400 North Street
Harrisburg, Pennsylvania 17120-0064
Telephone: (717) 787-6899
Email: RIROMAN@pa.gov

Secondary Contact:

Robert J. Pento, P.E., Section Chief
Traffic Engineering and Permits
Bureau of Maintenance and Operations
Commonwealth Keystone Building, 400 North Street
Harrisburg, Pennsylvania 17120-0064
Telephone: (717) 783-6265
Email: RPENTO@pa.gov

(6) Type of Rulemaking (check applicable box):

- ☐ Proposed Regulation
- ☒ Final Regulation
- ☐ Final Omitted Regulation
- ☐ Emergency Certification Regulation;
  - ☐ Certification by the Governor
  - ☐ Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

Chapter 441 exercises the Pennsylvania Department of Transportation's (Department) statutory authority to promulgate a regulation controlling the location, design, construction, and maintenance of:

driveways; local roads; drainage facilities; structures; means of ingress, egress and access; and other property within the State highway right-of-way through highway occupancy permits. The final-form regulation clarifies who can apply for such a permit and includes additional requirements for applicants that do not hold fee title to the property adjoining the state highway right-of-way.

(8) State the statutory authority for the regulation. Include specific statutory citation.

The authority for this rulemaking is contained in Section 420 of the State Highway Law, Act of June 1, 1945, P.L. 1242, No. 428, *as amended* (36 P.S. Section 670-420).

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

This rulemaking (which amends an existing regulation) is not mandated by any federal or state law or court order, or federal regulation but is required pursuant to an administrative decision of the Joint Committee on Documents dated December 14, 2017.

The regulation is necessary to clarify the term "owner," which is not currently defined in the regulations. In that clarification, the Department includes a balanced review reflecting property and constitutional rights of property holders and builds in protections for the Department when an applicant is not a fee title holder of property adjoining the state highway right-of-way.

Currently, highway occupancy permit (HOP) applicants are limited to owners of property and certain leasehold interests. More specifically, the term "own" is defined in the existing regulation as "...hold[ing] title to land or a building or to be a tenant in a lease that will not terminate within 15 years of permit issuance date." The regulations do not require that an "owner" hold title in fee.

The Honorable Brett J. Miller of the 41st Legislative District raised concerns with guidance in the Department's Highway Occupancy Permit Operations Manual, Publication (Pub.) 282, that allowed non-fee title holders to apply for permits. Representative Miller contended that Publication 282 was an unpromulgated regulation. The matter was referred to the Independent Regulatory Review Commission for consideration at its public meeting on November 16, 2017. IRRC concluded that the provisions of Pub. 282 relating to who can apply for a highway occupancy permit should be promulgated as a regulation and referred the matter to the Joint Committee on Documents. Pursuant to Section 7.1 of the Regulatory Review Act, 71 P.S. § 745.7a, *as amended*, the Joint Committee on Documents ordered the promulgation of a regulation during its meeting of December 14, 2017. Promulgation of this regulation must be completed on or before September 8, 2018. If the Department does not promulgate the regulation, it must "desist from the Department's practice of accepting an application for a highway occupancy permit from a person other than the fee owner of the property or the tenant in a lease that will not terminate within 15 years of the permit issuance date" as per the order of the Joint Committee.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

Relevant to the Department's careful review of property and constitutional rights of property holders,

persons with certain legal interests in property, including easements and mineral rights, have a constitutional right of reasonable access to property which may only be denied under compelling circumstances. *See Hardee's Food Systems Inc. v PennDOT*, 495 Pa. 514 (Pa. 1981). This constitutional protection extends a right of entry to the surface property to a lessee of oil and natural gas estates to provide access to what it owns subsurface. *See Belden & Blake Corporation v. DCNR*, 600 Pa. 559 (Pa. 2009); *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286 (Pa. 1893); *Turner v. Reynolds*, 23 Pa. 199, 206 (Pa. 1954). In view of this case law, the definition of "own" must apply to more than those who hold title in fee to apply for a permit. To conclude otherwise, the courts would likely determine that the existing regulation poses an unconstitutional restriction of access as it would diminish or even abrogate the rights of any person with a valid legal interest in property that allows for access but is not held in fee title.

Additionally, depriving a person who holds such an interest, including a means of access to the property, may constitute a taking without just compensation. A *de facto* taking, also referred to as inverse condemnation, can occur when a court finds that the effect of a governmental action is tantamount to the destruction of an interest in private property for which just compensation must be paid, even though no formal condemnation proceedings were instituted. A *de facto* taking "occurs when the entity clothed with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of his property." *Griggs v. Allegheny Co.*, 168 A.2d 123 (Pa. 1961); *see also McElwee & Son, Inc. v. Southwestern Pa. Transp. Auth.*, 948 A.2d 762 (Pa. 2008). Regulations that deprive an owner of all economically beneficial or productive use of property may constitute a taking. *Machipongo Land & Coal Co. v. DEP*, 799 A.2d 751 (Pa. 2002). The Eminent Domain Code provides a mechanism for property owners to seek compensation for alleged de facto takings. 26 Pa.C.S. § 502(c). If the regulation is not amended and Department is prohibited from issuing HOPs to non-fee title holders, the Department and Commonwealth taxpayers could be responsible for the attendant costs of *de facto* taking claims.

The final-form regulation clarifies that a person who holds an estate or other legal interest in property such as an easement holder or mineral estate - with concomitant access rights - may apply for a highway occupancy permit to gain access to the property to effectuate those rights. In other words, the applicant does not need to hold title in fee.

As requested by IRRC, we addressed the potential impacts to Commonwealth taxpayers for costs of litigation if a fee title holder withholds consent to a Department-issued HOP. *See* Comment and Response Document, Comment 20, pages 24-25. In sum, current practice has not reflected a significant amount of litigation, excepting minimal PennDOT Administrative Docket matters, where fee title holders object to a third party application. Only three such cases (all utility-related) have arisen in the past 14 years. *See also* RAF # 19 and #21. Accordingly, any such impacts are negligible.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

No. There are not any provisions more stringent than federal standards.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

Generally, other states are like Pennsylvania. The term "owner" is not defined and it is unclear how other states handle situations where an applicant has a valid legal right to access property but is not the underlying fee owner. Below is a survey of law and policy guidance offered on publicly available websites.

Virginia – Like Pennsylvania's requirement for a highway occupancy permit, Virginia law at 24 Va. Admin. Code § 30-21-20 requires a "land use permit" for any work done within the right-of-way. The Virginia Department of Transportation's website indicates that land use permits can be issued to the highway right-of -way abutting property owner to install entrances and to "[a] person, organization or government authorized to assume the responsibility and liability for an approved activity within the highway right-of-way. The law does not provide a definition for "property owner."

http://www.virginiadot.org/business/resources/land_use_regs/newPermitPackages/Frequently_Asked_Questions.pdf

New Jersey - The New Jersey State Highway Access Management Code, N.J. Admin. Code § 16:47-1.1), provides the following relating to access permits:

"Applicant" means a private party or entity, municipality, county, or any public agency applying for an access permit. The applicant shall own the lot where the access is sought.

"Own" is not defined.

"Lot" means a single tax map parcel or two or more tax lot parcels which are in common ownership, have a unity of use and are contiguous. All land adjacent to a State highway is considered to be part of a lot.

"Permittee" means the owner of a lot which has an access permit or the municipality or county having a permit for a street.

Guidance on the NJDOT's website indicates that applications for driveways can only be signed by the lot owner or a representative holding an appropriate power of attorney. A completed power of attorney

form shall be submitted with the application when the lot owner does not sign the application. For shared access between lots, at the time of the development application for each lot, an application, signed by the owner of the lot, and separate fee shall be submitted for each lot. For easements or access through lots adjacent to the highway, the application shall be signed by the owner of the lot adjacent to the highway. The term "owner" is not defined and no guidance could be found regarding how the state handles situations where the underlying fee owner does not agree to apply for the driveway permit for the easement holder's access.

New York - The New York Code, Rules and Regulations (Title 17, Chapter IV, Subchapter B), N.Y. Comp. Codes R. & Regs. tit. 17 § 4(B), require any person, institution, corporation, or other entity desiring permanent or temporary access to a state highway to obtain a work permit from the department to provide an entrance and/or exit.

Applications for work permits will be accepted only from property owners or their authorized agents. Certification of legal ownership or owner's authorization may be required. The term "owner" is not defined.

Oklahoma - According to Oklahoma DOT's Driveway Agreement form, the applicant must either be the owner or have the legal right to possession and control of the parcel of property adjacent to the right-of-way frontage within which the said proposed driveway is to be constructed.

Texas - Texas defines "Permittee" in their Administrative Code (Title 43, Part 1, Chapter 11, Subchapter C, 43 Tex. Admin. Code § 1.11(C)) as "[a] real property owner, or the owner's authorized representative, who receives an access connection permit from the department to construct or modify an access connection from the owner's property to a highway on the state highway system." The term "real property owner" is not defined.

Colorado - "Applicant" means any person, corporation, entity or agency applying for an access permit.

"Permittee(s)" means any person, unit of government, public agency or any other entity that owns a fee interest in the property served, to whom an access permit is issued. The permittee is responsible for fulfilling all the terms and conditions of the permit.

"Property owner" means a person who holds a fee simple title to the property for which access to the state highway is being sought.

However, it appears that interests in property other than fee interests are considered because Colorado's application instructions regarding the Property Owner (Permittee) requires the name and contact information of "the legal property owner (owner of the surface rights)" and indicates that "having a contract on the property is not a sufficient legal right to that property for purposes of this application. If the access is to be on or across an access easement, then a copy of the easement MUST accompany this application." *See* https://www.codot.gov/library/forms/cdot0137.pdf (providing a form and instructions from which the above is derived).

Maryland – Per Md. Code Regs. 11.04.05.01 (Code of Maryland Regulations), the following is a

descriptive listing of a portion of the parties authorized to apply for a permit. The words "commercial", "industrial", and "subdivision", used singularly or collectively in the following text, shall include all entrances other than those for an individual residence:
(1) Owners, or their duly authorized representatives (developers, contractors, tenants, lessees, etc.), of land newly being developed commercially, industrially, or as a subdivision, all desiring access to a State highway;
(2) Parties desiring to establish a new public street intersection or modify an existing public street intersection;
(3) Parties desiring to change existing entrances or create new entrances into existing commercial or industrial facilities, and subdivisions;
(4) Parties desiring to modify, expand, or in any other manner make improvement to an existing facility, which will increase or change the type of vehicular generation or traffic pattern;
(5) Parties desiring to change use or occupancy of an existing facility;
(6) Parties owning, occupying, leasing, or using a commercial or industrial facility (which was in existence before 1957) that is not fully channelized in accordance to permits issued by the Administration and which is now deemed hazardous from the viewpoint of access;
(7) Parties desiring to do any work within or across the State highway right-of-way.

Ohio – The State Highway Access Management Manual provides:

1.4.50. "Permittee" means any person, unit of government, public agency or any other entity that can own property, to whom an access permit is issued. The permittee, normally the property owner served by the access, is responsible for fulfilling all the terms and conditions of the permit; and,

2.3.2. Permit applications shall include a completed Department Form No. MR 505 and any attachments necessary for the Department to review and assess the application accurately and thoroughly. Permit applications must bear the complete name(s), address(es), telephone number(s), and signature(s) of the property owner(s). Application by the contractor or anyone other than the owner of the property, or his authorized agent is not acceptable.

MR 505
Applications for public roads, commercial accesses, or residential driveway approaches shall only bear the signature of the property owner, the company owner, or the corporate official responsible for construction and maintenance of the installation placed in the highway right-of-way.

Conclusion
It is anticipated that the final-form regulation will improve the Commonwealth's competitiveness with other states regarding economic development by clarifying who can be an applicant. As the definition of required permit applicants is not well settled in adjoining states—Pennsylvania will be at a competitive advantage, especially for out-of-state persons or entities seeking permits. Moreover, the final-form regulation will avoid unnecessary delay and potential litigation where an applicant has a clear legal right to access but is not the underlying fee owner

At IRRC's request (per its comments), we engaged in outreach to several states and a national consultant. Practices relative to notice vary. The Department's further research is set forth in in its Comment and Response Document, which is herein incorporated by reference as though set forth at

length. *See* Comment and Response Document, attachment (providing a multi-state comparison).

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

This rulemaking will not directly affect other regulations of the Department.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

Before the need for this regulation arose, the Department has been diligently working on a regulatory package to comprehensively amend Chapter 441 (including the definition of "own"). As part of that effort, the entirety of Chapter 441 (as amended) was shared with the following stakeholders:

Pennsylvania Municipal Advisory Committee, International Council of Shopping Centers, Pa Food Merchants Association, Association for Convenience and Fuel Retailing, Pennsylvania Builders Association, The Pennsylvania Retailers Association, Council of State Retail Associations and Utility Highway Liaison Committee.

The Department received feedback from only the PA Builders Association, and met with them on separate occasions to discuss and address their concerns. No comments were made regarding the final version, which included the changes being proposed herein.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

Any person, business or local government intending to obtain access to or from a roadway under the jurisdiction of the Department will be affected by the regulation. An approximate number of people who will desire to do so at any given time cannot be calculated. Currently the Department issues approximately 3,000 such HOPs each year.

This rulemaking should not have any adverse effects to HOP permittees.

The rights of fee title holders will not be adversely affected by the final-form regulation. Where PennDOT grants a HOP application filed by a non-fee title holder, the non-fee title holder has already been granted the right to entry and possession through a prior amicable transaction or a court order. There is no change by way of this regulation in the fee title holder's ability to: 1) challenge the issuance of the permit in an administrative forum; or 2) challenge the right of an applicant to a permit in the first instance.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

The individuals and entities identified in response to question number 15 will be required to comply. As noted above, the Department issues approximately 3,000 HOPs each year.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

Positive financial, economic and social impacts are anticipated for the general public and all HOP permittees. Clarity as to an appropriate permittee will realize efficiencies. Moreover, clarity as to appropriate HOP applicants should avoid the need for research or litigation, which will have a positive financial and economic impact to taxpayers. Also, as discussed throughout the RAF and the Comment and Response Document, clarity provided to the application process, especially where an applicant is a non-fee title holder, will result in less litigation—which has a positive financial and economic impact on permittees and taxpayers. *See also* Comment and Response Document, pp. 25-26.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The regulation's clarification of the term "owner" will establish a binding norm to be uniformly applied. Case law has consistently held that ownership must include property interests other than fee simple absolute ownership. This regulation will not pit competing interests in property at odds with each other but will recognize legally viable interests in property in a permitting process that encourages owners with competing interests to reach consensus either outside or within litigation.

The benefits of the proposed regulation outweigh any cost or adverse effect for fee title holders because it avoids further litigation where the non-fee title holder has already been granted the right to entry and possession through some prior amicable transaction or a court order. This regulation provides for notification to the fee title holder where a highway occupancy permit application is submitted by a non-fee title holder, and an opportunity for the fee title holder to protest the application or file an intervention petition. Minimally, Administrative Docket fees of $100.00 per action are required (as mentioned by IRRC and the public). Notice provisions were included in the final-form regulation to help mitigate any potential adverse effects to the fee title holder and ensure they can exercise their rights. *See also* Comment and Response Document, p. 26.

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

A specific estimate of the costs and/or savings to the regulated community cannot be calculated. As mentioned above, 40 percent of the HOP applications for commercial, industrial, and retail uses are applied for and issued to non-fee title holders of property. As such, the final-form regulation is not expected to have any impact on the regulated community as the regulation formally clarifies the regulatory definition section consistent with current practice. Moreover, a specific estimate of any costs or savings cannot be determined because the number of applications per month or annually is unknown,

and fluctuates based upon economic conditions and regional development trends in Pennsylvania. Despite this regulation's clarification of current practice, it is expected that a clearer definition of "owner" should result in reduced legal and/or consulting costs. Provisions applicable to applicants that are not fee title holders of property will include legal costs to indemnify the Department and record a covenant running with the land, but these requirements have been the practice since 2004; thus the regulated community is already incurring these costs to comply with established practice. From 2004-2017, 56 petitions to intervene in highway occupancy permits were filed, averaging 4 per year. Only 3 of those matters related to disputes between the fee title holder and the applicant. Comment and Response Document, p. 26. *See also* Comment and Response Document, pp. 27-28 for additional information permitting to the types of permit applications.

The final-form regulation does not result in any potential fees or costs to the fee title holder that would not be present if PennDOT were required to restrict permit applicants to fee title holders. In fact, fee title holder costs may increase in that instance because an applicant with a valid and documented right to access would have no recourse in the administrative forum against a fee title holder that will not apply for a permit on behalf of the non-title holder. As such, the non-fee title holder would be forced to use the courts to compel the fee title holder to apply for the permit. In that instance, the non-fee title holder would be permitted to seek attorney's fees and costs necessary to enforce its right to access and possession. Attorney's fees and costs are not available to the non-fee title holder in the administrative forum.

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The final-form regulation will not result in any costs and/or savings to local governments.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

Costs and/or savings to state government cannot be calculated in view of the answers to the above sections 14 and 19 (explaining that this regulation reflects current practice). A clearer definition of "owner" will reduce legal costs incurred in litigating matters related to interests in property. This change should reduce the number of administrative challenges and a reduction in collected filing fees. Even then, those challenges to date have been minimal at the Administrative Docket level. *See* RAF #19 above; Comment and Response Document, p. 26.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

The final-form regulation sets forth procedures that have been in place with the Department for more than a decade. No legal, accounting or consulting procedures, or additional reporting, recordkeeping or

other paperwork is required to give effect to this regulation as the costs incurred have become the norm for the past 16-plus years. In fact, a clear definition of "owner" should result in reduced administrative legal costs as discussed above.

(22a) Are forms required for implementation of the regulation?

No new forms will be required for implementation of this regulation.

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here.** If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

The Department does not anticipate that any new forms will be required for implementation of this regulation. All current HOP forms can be found at: http://www.penndot.gov/Doing-Business/Permits/HighwayOccupancyPermits/Documents/HOP%20Related%20Forms.pdf

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	$	$	$	$	$	$
Regulated Community	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
Local Government	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
State Government	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
Total Savings	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
COSTS:						
Regulated Community	None	None	None	None	None	None
Local Government	None	None	None	None	None	None
State Government	None	None	None	None	None	None
Total Costs	None	None	None	None	None	None
REVENUE LOSSES:	None	None	None	None	None	None
Regulated Community	None	None	None	None	None	None
Local Government	None	None	None	None	None	None
State Government	None	None	None	None	None	None
Total Revenue Losses	None	None	None	None	None	None

(23a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY – 14/15	FY - 15/16	FY - 16/17	Current FY 17/18
Highway Occupancy Permits	$14 Million	$11 Million	$13 Million	$8 Million (as of December 31 2017)

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

(a) An identification and estimate of the number of small businesses subject to the regulation.
(b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
(c) A statement of probable effect on impacted small businesses.
(d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

No adverse impact on small businesses is anticipated with the final-form regulation due to its applicability to all prospective HOP applicants. Clearer definitions will benefit all persons and businesses of all sizes.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

No special provisions have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers. This regulation will apply to all applicants. The law already provides an adequate mechanism by which affected groups or persons may file requests to intervene in the permitting process or appeal the issuance of a HOP through the Department's administrative docket.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

No alternative regulatory provisions were considered.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

a) The establishment of less stringent compliance or reporting requirements for small businesses;
b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
c) The consolidation or simplification of compliance or reporting requirements for small businesses;
d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and
e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

These amended regulations are consistent with existing Department policies and practices. There is no expected adverse impact on small businesses. Nevertheless, the Department offers the following:

(a) All businesses (small and large) intending to access property owned or leased by them (and adjacent to Department right-of-way) are required to comply with these amendments to the regulation; thus less stringent requirements are not feasible.
(b) In view of the broad applicability to all prospective HOP applicants, there are no less stringent schedules or deadlines for compliance or reporting requirements for small businesses.
(c) Again, in view of the broad applicability of the regulation, consolidation or simplification of compliance or reporting requirements for small businesses is not practical.
(d) This regulatory package is not one to which performance standards for small business can be entertained.
(e) Lastly, due to the broad applicability of this regulation to all prospective HOP applicants, disparate treatment of any applicant, including small businesses, is impracticable.

These amended regulations are consistent with existing Department policies and practices.

(28) If data is the basis for this regulation, please provide a description of the data, explain <u>in detail</u> how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

Data does not form the basis for this regulation.

(29) Include a schedule for review of the regulation including:

A. The length of the public comment period: 30 days

B. The date or dates on which any public meetings or hearings will be held: 6/28/2018

C. The expected date of delivery of the final-form regulation: 5/24/2018

D. The expected effective date of the final-form regulation: August 2018

E. The expected date by which compliance with the final-form regulation will be required: August 2018

F. The expected date by which required permits, licenses or other approvals must be obtained: N/A

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

These regulations will be reviewed periodically as appropriate to ensure continued effectiveness.

CDL-1

FACE SHEET
FOR FILING DOCUMENTS
WITH THE
LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality. Attorney General.

By: _____
(Deputy Attorney General)

_____
Date of Approval

☐ Check if applicable
Copy not approved. Objections attached.

Copy of below is hereby certified to be true and correct copy of a document issued, prescribed or promulgated by:

Department
of
Transportation
(Agency)

DOCUMENT/FISCAL NOTE NO. 18-479
DATE OF ADOPTION 5/22/2018

BY _____
Secretary of Transportation

Copy below is hereby approved as to form and legality. Executive or Independent Agencies.

BY Marion H. J. Lee

MAY 24 2018
(Date of Approval)

(Deputy General Counsel)
~~(Chief Counsel, Independent Agency)~~
(Strike Inapplicable Title)

☐ Check if applicable. No attorney General Approval or Objection within 30 days after submission.

NOTICE OF FINAL RULEMAKING

DEPARTMENT OF TRANSPORTATION

TITLE 67, TRANSPORTATION

Part I – Department of Transportation

Subpart B. Nonvehicle Code Provisions

Article III – Highways

Chapter 441 – Access to and Occupancy of Highways by Driveways and Local Roads

TITLE 67. TRANSPORTATION

PART I. DEPARTMENT OF TRANSPORTATION

SUBPART B. NONVEHICLE CODE PROVISIONS

ARTICLE III. HIGHWAYS

CHAPTER 441. ACCESS TO AND OCCUPANCY OF HIGHWAYS BY DRIVEWAYS AND LOCAL ROADS

Notice of Final Rulemaking

Preamble

The Pennsylvania Department of Transportation (Department) under Section 420 of the State Highway Law, Act of June 1, 1945, P.L. 1242, No. 428, *as amended* (36 P.S. Section 670-420), amends 67 Pa. Code Chapter 441, *Access to and Occupancy of Highways by Driveways and Local Roads*, as set forth in Annex A to this Notice.

Purpose of This Chapter

The purpose of this chapter is to exercise the Department's statutory authority to promulgate a regulation controlling the safe location, design, construction and maintenance of: driveways; local roads; drainage facilities; structures; means of ingress, egress and access; and other property within the state highway right-of-way.

Purpose of this Final-Form Rulemaking

The purpose of this final-form rulemaking is to clarify the provisions relating to who may apply for a permit to construct or alter driveways; local roads; drainage facilities; structures; means of ingress, egress and access; and other property within the state highway right-of-way, and set forth application requirements that strike a careful balance between the interested parties' property rights.

Significant Provisions of the Final-Form Regulation

Significant amendments to the chapter include the following:

The amendments to Section 441.1, *Definitions*, remove the current definition of "own" and add the terms "owner" and "person." Most significant is the term "owner," which clarifies that ownership of legal interests are not limited to owners of property holding fee absolute title or certain leasehold interests.

The regulation amends Section 441.3(b) to use the term "owner" and to require an applicant that is not the holder of fee title to the property to notify the fee title holder that an application has been submitted. Section 441.3(e)(6) is amended to require applicants to prove that they are an "owner," where such proof shall be in the form of a copy of the valid legal document or court order verifying the applicant's legal estate or interest in the property. Section 441.3(e)(7)(i) is added to require applicants other than fee title holders to submit additional information, including proof that either: 1) the fee title holder consents to the application; or 2) the applicant provided notice of the submission of the application to the fee title holder apprising the fee title holder of the administrative rights available to

the fee title holder. The Department may not grant or deny the permit application until 30 days from the fee title holder's receipt of notice.

Section 441.3(e)(7)(ii) also requires applicants other than fee title holders to submit a written statement whereby such applicants indemnify and defend the Department from suits, damages, claims and demands of any type brought by the fee title holder because of the Department granting a permit to the applicant. Lastly, under Section 441.3(e)(7)(iii), applicants other than fee title holders must provide proof that a covenant running with the land has been recorded to ensure that subsequent property owners are bound to the indemnification provisions of Section 441.3(e)(7)(ii).

Summary of Comments and Changes

Notice of the proposed rulemaking, with a 30-day public comment period was published in the *Pennsylvania Bulletin* on March 17, 2018 at 48 Pa.B. 1563. Accordingly, the public comment period opened on March 17, 2018 and closed on April 16, 2018. The Department received four comments during the public comment period, three from two public commentators (one commentator submitted two comments), and one from the Honorable Brett R. Miller, State Representative, 41st Legislative District. Thereafter, the Independent Regulatory Review Commission's (IRRC) review period commenced, and IRRC submitted comments to the Department on May 16, 2018.

The Department carefully reviewed and considered each comment submitted by the public and IRRC. To that end, the Department prepared a Comment and Response Document, which reflects each comment received and the Department's response. This Comment and Response Document was submitted to IRRC and is available on its website

at: www.irrc.state.pa.us (search by Regulation # 18-479, or IRRC # 3200); or upon request through the information provided in the "Contact Person" section of this Notice. A summary of the most significant comments and changes between the proposed and final rulemakings follow:

Concerns raised throughout the public and IRRC comments stem from the contention that the Department is "choosing sides" in a conflict between competing property interest holders. In sum, these comments, which conflate the issuance of a highway occupancy permit with making legal determinations impacting property rights, are misguided. Either through negotiations or following a final determination of a court or other judicial entity, third parties obtain property rights that are less than and may not be consonant with the rights of a fee title holder. Chapter 441 does not address that conflict.

Instead, the purpose of Chapter 441 is to "to regulate the location, design, construction, maintenance and drainage of access driveways, local roads, and other property within State highway right-of-way for the purpose of security, economy of maintenance, preservation of proper drainage and safe and reasonable access." 67 Pa. Code § 441.2(a). The Department does not adjudicate property interests through the highway occupancy permit process, but rather assesses whether an applicant has established an already-existing property interest with a right to access for the purposes of granting a highway occupancy permit.

If a third party has an easement over the land of another and the only way to use, and give effect to, that easement is to access the easement from the state highway right-of-way, the Department must grant a highway occupancy permit or face legal action from the holder of the easement, who would have a valid legal claim that the Department's refusal

to grant a highway occupancy permit is a *de facto* taking of property because such a refusal would be tantamount to interfering with the rights of the easement holder. *See, e.g., Duquesne Light Company v. Longue Vue Club*, 63 A.3d 270, 279 (Pa. Super. Ct. 2013)(relating to the rights of easement holders); *Turner v. Reynolds*, 23 Pa. 199, 206 (Pa. 1854)(relating to rights of possession).

Comments focusing on impacts to fee title holders are not entirely accurate in their characterization of the net effect of this regulation. This regulation does not restrict fee title holder rights but instead gives fee title holders notice of third party highway occupancy permit applications and encourages fee title holders' participation in the permitting process (both at the issuance and appellate levels). The determination of the fee title holders' rights vis-à-vis a third-party interest in real property is not negotiated or adjudicated as part of the highway occupancy permit process and this fact should not be lost in the numerous public comments. Stated otherwise, to the extent that the fee title holder's rights have been "restricted" by the granting of a property interest to a third party–such as a through the eminent domain process—that property interest has been already established (and must be proven) at the time the third party applies for the highway occupancy permit, or the Department would not grant the permit.

As noted above, each public, legislative and IRRC comment is fully addressed in the Department's Comment and Response Document. Changes based on those comments have been made to the Regulatory Analysis Form as requested by IRRC; however, the text of the final-form regulation, as contained in Annex A, remains as submitted on proposed.

Persons and Entities Affected

This final-form regulation affects all applicants for highway occupancy permits to access state highways who intend to create an access point to a State highway or to change the design, operation or location of existing access. These applicants include owners of legal interests in property who require access to the property to exercise their property rights, such as easement holders and mineral estate holders, as well as fee title holders.

The final-form regulation carefully balances the interest of all interested parties. Where the applicant does not hold fee title, the fee title holder must be notified that an application has been submitted, which provides the fee title owner an opportunity to object to the application process under the provisions of the General Rules of Administrative Practice and Procedure (1 Pa. Code, Part II); specifically, the sections concerning Protests (1 Pa. Code §§ 35.23 & 35.24) and Intervention (1 Pa. Code §§ 35.27—35.32). These objections in the form of a protest or intervention can be filed with the Department through its Administrative Docket.

Fiscal Impact

These regulations should not increase costs for the Commonwealth or local governments. No new fiscal impacts to the regulated community are anticipated because the changes are consistent with current practices that have been in place since 2002.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 8, 2018, the agency submitted a copy of the proposed regulation, published at 48 *Pa.B,*

1563, to the Independent Regulatory Review Commission and to the Chairpersons of the House and Senate Transportation Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department considered all comments from IRRC and the public. No comments were received from the House and Senate Committees.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on _____, 2018, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____, 2018, and approved this final-form rulemaking.

Sunset Provisions

The Department is not establishing a sunset date for these regulations since these regulations are needed to administer provisions required under Section 420 of the State Highway Law (36 P.S. Section 670-420). The Department, however, will continue to closely monitor these regulations for their effectiveness.

Contact Person

The contact person for this regulation is Jeffrey M. Spotts, Regulatory Counsel, Pennsylvania Department of Transportation, Commonwealth Keystone Building, 400 North Street, Harrisburg, Pennsylvania 17120-8212; Telephone number (717) 787-5299; and e-mail address: jespotts@pa.gov.

Leslie S. Richards

Secretary of Transportation

pennsylvania
DEPARTMENT OF TRANSPORTATION

COMMENT AND RESPONSE DOCUMENT

ACCESS TO AND OCCUPANCY OF HIGHWAYS BY DRIVEWAYS AND LOCAL ROADS

67 Pa. Code Chapters 441
48 Pa.B. 1563 (March 17, 2018)
Department of Transportation Regulation #18-479
(Independent Regulatory Review Commission #3200)

Introduction

On March 17, 2018, the Department of Transportation (Department) published notice of a proposed rulemaking concerning revisions to 67 Pa. Code Chapter 441, opening a 30 day public comment period.

The proposed amendments to Chapter 441 clarify who can apply for a permit to construct or alter driveways; local roads; drainage facilities; structures; means of ingress, egress and access; and other property within the state highway right-of-way.

The proposed rulemaking will be effective upon publication of the final-form regulation in the *Pennsylvania Bulletin.*

Public Comment Period and Public Hearings

Notice of the public comment period on the proposed amendments was published in the *Pennsylvania Bulletin* on March 17, 2018 (48 Pa.B. 1563). The Department's public comment period opened on March 17, 2018 and closed on April 16, 2018. Thereafter, the Independent Regulatory Review Commission's (IRRC) review period commenced and closed on May 16, 2018.

This document quotes the comments received during the public and IRRC comment periods. Each comment is listed with an identifying number assigned to each commentator. Where one comment is quoted and another commentator submitted a similar comment, the quoted comment is identified as originating from more than one commentator.

A list of the commentators, including name and affiliation (if any) can be found on page 3 of this document. The House and Senate Transportation Committees did not submit comments on the proposed regulation; however, one commentator is a member of the Pennsylvania General Assembly.

Copies of all comments received by the Department are posted on the web site of the Independent Regulatory Review Commission (IRRC) at: http://www.irrc.state.pa.us; search by Regulation #18-479 or IRRC # 3200.

Table of Commentators for the Department of Transportation's
Proposed Rulemaking for
Access to and Occupancy of Highways by Driveways and Local Roads
Department of Transportation # 18-479
(IRRC # 3200)

ID	Name/Address
1.	Representative Brett R. Miller 41st Legislative District P.O. Box 202041 Harrisburg, PA 17120-2041
2.	John Timothy Gross 41st District Constituent jtimgross@gmail.com
3.	Lynda Like Conestoga, PA Lynda6818@gmail.com
4.	Independent Regulatory Review Commission 333 Market Street, 14th Floor Harrisburg, PA 17101

Acronyms used in this Comment/Response Document

PennDOT – Pennsylvania Department of Transportation
IRRC – Independent Regulatory Review Commission
HOP – Highway Occupancy Permit
RFO – Release of Fee Owner

COMMENTS AND RESPONSES

1. **Comment:**

> It must be stated at the outset that Pennsylvania has a long tradition of fee title holder property rights. In fact, Pennsylvania, from its very founding, has enshrined into the very first section of our Constitution the primacy of property rights: "§ 1. Inherent rights of mankind. All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. (Emphasis added). The incredible importance of and priority given to property rights cannot be underestimated or diminished. While it is true that fee title ownership was in view at the writing of Article 1, Section 1, even if it is granted that the same "ownership" rights are extended to those with a legal interest in a property, the fact remains that at the very least, there is an equal interest in the property and neither is to be shown preference. The offering of these new regulations by PennDOT strongly suggests a preference to those with a legal interest in a property and not those of the fee title holder. Deference to the legacy of the historic understanding of the concept of the primacy of fee title holder rights is in keeping with the historic understanding and use of this concept. Dramatically altering the historic understanding and usage of who owns property is not a compelling public interest.

(1)(4).

Response: PennDOT agrees that the "incredible importance of and priority given to property rights cannot be underestimated or diminished." However, PennDOT disputes the contention that there is a "historic understanding of the concept of the primacy of fee holder title rights" that requires "[d]eference to [its] legacy." No legal authority is cited indicating that fee title holders have "primacy." To the contrary, fee title holders, simply have different interests in property than those who hold property interests other than that of fee title.

An access easement holder's right to access is generally equal to that of the fee title holder's right to access, although a mineral right holder's interest in a property's subsurface is often greater than the fee title holder's right to the property's subsurface. Property owned in fee is often encumbered by non-fee interests such as easements and subsurface mineral rights. The scope of a non-fee property interest is generally set forth in the instrument or law creating the interest. *Duncan v. Gheen*, 185 Pa. Super. Ct. 328 (1958). Easement holders have broad rights to use a fee owner's property to access easement property even if ingress and egress to the easement property is not contemplated in the easement agreement. *See Duquesne Light Company v. Longue Vue Club*, 63 A.3d 270, 279 (Pa. Super. Ct. 2013) ("Pennsylvania law has carved out a right of access across servient land to easement-holders with a right to maintain the easement property . . . whether or not the language of the easement agreement provides for such access."). Similarly, a subsurface owner of mineral rights has the "right of possession even as against the owner of the soil so far as necessary to carry on . . . mining operations." *Turner v. Reynolds*, 23 Pa. 199, 206 (Pa. 1854).

Chapter 441, as amended, recognizes these long-standing principles of real property law and are in no way intended to give preference to any particular type of property interest, but rather, they seek to clarify PennDOT's responsibility to provide access to a state highway to any party with a bona fide legal right to such access. Further, the regulatory purpose of Chapter 441 is to provide for "security, economy of maintenance, preservation of proper drainage and safe and reasonable access" within the State highway right-of way. The manner in which the permittee holds title to the property abutting the highway is wholly unrelated to the security, economy of maintenance, preservation of proper drainage and safe and reasonable access. As such, PennDOT's only concern with the applicant is whether the applicant has a legitimate right to access the property in question. Confirmation of a valid and documented interest in the property, that includes the right of access whether in fee or a lesser interest, or a signed and notarized release from the fee owner, is sufficient.

2. **Comment:**

> Even if ownership rights of those with a legal interest in a property were to be considered on par with the ownership rights of fee title holders, this, in no way, abrogates the rights of the fee title holder. The issue at hand is not ownership, per se, but access. Neither entity in this case loses these rights. From the cited Belden and Blake case: *"Chartiers* imposed a duty on Belden & Blake to exercise its rights in a reasonable manner, with due regard to the surface owner's rights, and noted both parties may be restrained by a court of equity if necessary. *Id*" *Ironically, the PA Supreme Court said* "However, a property owner's interests and rights cannot be lessened, nor their reasonable exercise impaired without just compensation, simply because a governmental agency with a statutory mandate comes to own the surface,' *Belden and Blake case cited by PennDOT. In the instant case, the government is not a player, but the fee simple owner is nonetheless entitled to the same constitutional property protections as the government. The court further recognizes in Belden that* "the government and its agencies must be held to the same standard as any other surface owner. DCNR may *seek* additional conditions because of its mandate, but it has no authority to *impose* them unilaterally without compensation." Nor should PennDOT be allowed to grant rights to a fee simple property owner's land without the payment of just compensation.

(1, 2).

Response: PennDOT agrees that the issue being addressed by the proposed regulatory changes is access and not ownership. Indeed, PennDOT's only interest in the dispute over property interests between fee title holders and a third party involves access to the state highway right of way. This comment appears to assert that the proposed regulatory revisions will abrogate the rights of fee title holders, but does not state how.

PennDOT also agrees that the law requires just compensation where a property interest is taken by an entity properly exercising its eminent domain powers. It is for this very reason that PennDOT implemented the current policy in Publication (Pub.) 282 and seeks to revise the regulations to make it clear that non-fee title holders may apply for a highway occupancy permit where they have a property interest or estate that includes the access contemplated by the permit. Were PennDOT

to be required to deny a highway occupancy permit to a person or entity with a valid property interest that includes the right to access, this would amount to a regulatory taking that would require just compensation. Conversely, granting a highway occupancy permit to a non-fee title holder who has a valid property interest that includes the right to access does not lessen the fee-title holder's interest or amount to a taking of the fee-title holder's property – the fee-title holder's property rights have already been "lessened" by virtue of the legal interest held by the non-fee title holder.

The comment, quoted above, mischaracterizes both the plain language and the intent of the proposed regulatory change. It asserts that, by issuing a highway occupancy permit to a non-fee title holder, PennDOT is granting "rights to a fee simple property owner's land without the payment of just compensation." PennDOT in no way purports to "grant rights to a fee simple property owner's land without the payment of just compensation" by virtue of the proposed regulations or its past policies under the current regulations. The intention of the proposed regulatory revision is merely to clarify the existing regulation by specifically permitting applicants that already have a documented right to access a parcel of land to apply for a permit to place that access point along a state highway. While the majority of highway occupancy permits issued to non-fee title holders are issued to persons or entities who have acquired an access right amicably, PennDOT recognizes that some fee owners may not have *amicably* granted access rights to a potential permit applicant. However, such as in the case referred to by the commentator, the applicant's rights to access the property were previously obtained by the applicant via the eminent domain process. If IRRC were to reject PennDOT's final-form regulation, then a property interest lawfully acquired through the eminent domain process is rendered meaningless, notwithstanding the fact that a Federal Court has granted the condemnor, after the posting of the required bond to secure just compensation, a right of entry and possession. *See, e.g., Transcontinental Gas Pipe Line Co. v. Permanent Easement for 0.03 Acres*, 2017 U.S. Dist. LEXIS 129459 (M.D. Pa. 2017).

To ensure that highway occupancy permits are only issued to persons or entities that have a valid property interest allowing the access contemplated by the permit, the permittee is required to show proof of such interest and to notify the fee title holder. The fee title holder then has an opportunity to intervene in the permitting process pursuant to the procedures set forth in the General Rules of Administrative Practice and Procedures in the *Pennsylvania Code* (1 Pa. Code, Part II) and set forth any reasons why the applicant's legal interest in the property does not include the contemplated access.

3. **Comment**:

> PennDOT's statement that the courts "would likely determine that the existing regulation (is) unconstitutional" is one of conjecture. PennDOT is not the court and it is not PennDOT's job to place itself in the position of deciding a decision of such consequence. This is clearly a matter that is within the jurisdiction of the courts. PennDOT is a state agency, and as stated above, should give deference to the historical understanding and use of the term "own" as meaning the fee title holder.

(1,2).

Response: PennDOT's assertions are based on a legal analysis of the statutory authority and case law. If PennDOT is required to prevent non-fee title holders from applying for highway occupancy permits under the current regulatory language and there is a challenge to that action, PennDOT would be in a position where it would have to defend a legal position that it does not believe is correct.

PennDOT disagrees that the historical understanding and use of the term "own" is limited to that of the fee title holder. The term "own" is also used to denote possession of lesser interests such as easements and subsurface rights. For example, the Commonwealth Court has noted that a party can "*own* an easement appurtenant." *Phoenixville v. Kovach*, 449 A.2d 793, 795 (Pa. Cmwlth. 1982) (emphasis added). Further, the Pennsylvania Supreme Court has defined the ownership of property as "practically all valuable rights . . . in any and every thing that is subject of ownership by man, including every valuable interest which can be enjoyed as property . . . and extending to every species of valuable right or interest in either real or personal property, or in easements . . ." *Schuster v. Pennsylvania Turnpike Commission*, 149 A.2d 447, 453 (Pa. 1959).

At least one Pennsylvania court has implicitly recognized that PennDOT can issue highway occupancy permits to non-fee title holders. After granting a utility company a temporary construction easement, the Court of Common Pleas of Lycoming County ordered PennDOT to allow the utility to apply for a highway occupancy permit and to otherwise treat the utility as property owners of the construction easement. *In re Condemnation of temporary Constr. Easement Across Lands of Lauchle*, 2014 Pa. Dist. & Cty. Dec. LEXIS 3405, 42 Pa. D. & C. 5th 63 (2014). Note, however, that highway occupancy permits are not typically brought up in condemnation proceedings and, therefore, most condemnation orders grant access rights but do not specifically address permitting. The permitting process is primarily focused on ensuring that access points are safe and in the best interests of the motoring public.

4. **Comment:**

> In light of the fact that even PennDOT concludes that Pennsylvania's regulations are directly in alignment with the regulations of other states, and in particular to the states bordering Pennsylvania, there is, therefore, no compelling reason to change Pennsylvania's regulations concerning ownership of land, as there is no evidence that other states are doing the same. As PennDOT notes, the conclusion is the record clearly shows that PA is clearly in line with what other states are doing, that is, requiring the fee title owner to obtain the necessary permits and to be the signatory on the transaction as interpreted by the comentator.

(1).

Response: This comment mischaracterizes the information provided and assumes what PennDOT "concludes." As set forth in the RAF, some states do not define the term "own" for purposes of who can apply for an access permit (states vary in the nomenclature – permits are generally for "encroachment," "access", or "occupancy") and some states do have provisions for non-fee title holders to apply. The conclusion is that the matter is handled differently throughout the nation, and courts are often left to clarify.

The Court of Appeals in Ohio has addressed the matter of highway access permits and the effect on fee title holders and has held that an owner of property abutting on a public highway possesses as a matter of law, not only the right to use the highway in common with other members of the public, but also a private right or easement for the purpose of ingress and egress to and from his property - even where it was necessary for the access drive to be constructed on the fee owned by another. *Moody v. Rider*, Court of Appeals of Ohio, Fifth Appellate District, December 19, 1988, 1988 Ohio App. LEXIS 5135, 1988 WL 138502; *see also Miller v. Berryhill Nursery Co.*, 7 Ohio App. 2d 30 (1966). In such instances, the Ohio Department of Transportation would be obligated to issue access permits to non-fee title holders.

Other state courts have also spoken to the issue in a manner consistent with PennDOT's position that a permit should not be denied where the applicant has a property interest that includes the use contemplated by the permit. See *Williams Place, LLC v. State ex rel. Dep't of Transp.*, 187 Wn. App. 67 (2015) (Washington Court of Appeals recognizes that a company can apply for an access permit using an easement); *State by & Through DOT v. Hanson*, 162 Ore. App. 38 (1998) (Oregon Court of Appeals holds that the state was required to pay just compensation for inverse condemnation where it denied a permit for access to a state highway to an easement holder).

Again, the proposed regulations are based on a legal analysis of Pennsylvania statutory authority and case law. If PennDOT is required to prevent non-fee title holders from applying for highway occupancy permits under the current regulatory language and there is a challenge to that action, PennDOT would be in a position where it would have to defend a legal position that it does not believe is correct.

From the regulatory perspective, PennDOT is authorized to promulgate a regulation governing highway access. This regulatory package's genesis is a complaint by the commentator that resulted in the Joint Committee on Document's order to promulgate PennDOT's current practice as a regulation. This regulation formalizes the practices and policy that is presently set forth in Pub. 282. It is Pub. 282 that is consistent with similarly situated states; not the current regulatory language.

5. Comment:

> While it is true that PennDOT has the right to grant or deny access to the state's property or to a consenting owner's property, it does not have authority to grant access to another person's property without authorization. Nor does it have the right to deny the fee title holder the right to the use and enjoyment of his/her property by the granting of access to others.

(1).

Response: The final-form regulation in no way seeks to give PennDOT the authority to grant access to another person's property without authorization, nor would they abrogate the fee-title holder's right to use and enjoy his or her property by granting access to others. The final-form regulation make it clear that a highway occupancy permit can only be issued to an applicant who already has a right to access the fee title holder's property. The proposed amendments in the final-form regulation merely seeks to clarify that a person with an existing property interest that includes

the right of access contemplated in the permit can apply for a highway occupancy permit. In these cases, the legal right of access has already been obtained through some other mechanism, such as an easement granted by the fee title holder's predecessor in interest or through eminent domain. The only reason that PennDOT becomes involved in reviewing the property interest is because the proposed access happens to be from a State highway. The extent of the property interests has already been established and PennDOT's only concern is whether the applicant's property interest includes the right to access from the State highway. If it does not, PennDOT would not issue a permit.

Further, under the commentator's reading of the current regulations, PennDOT does not have the right to grant access "to a consenting owner's property." (emphasis added). Rather, the commentator's arguments are based on the belief that the term "owner" should be limited to the fee simple owner and, therefore, only the fee simple owner can be the permit applicant. This is different from having the fee owner simply consent to a non-fee title holder's permit application, as is PennDOT's practice as set forth in Pub.282. The distinction is important because the applicant is required, per 67 Pa. Code § 441.6(13), to indemnify the Commonwealth from all liabilities for damages or injury for any act or omission relating to the permit for a period of two years after the completion of the permitted work. A fee title holder who consents to the non-fee title holder's access to the state highway should not be required to take on the burden of the regulatory indemnification when the access point is for the benefit of the non-fee title holder. Should the commentator's position be accepted, it is unlikely that fee-title holders - even those who do not dispute the access right - would be willing to be the permit applicant because of the required indemnification.

6. Comment:

> PennDOT discussed the issue of de facto takings in terms of the entity with a legal interest in a property but not in terms of the fee title holder. Should this regulation be changed, PennDOT will be placing itself in the position of granting access to the entity with a legal interest in a property while simultaneously engaging in a de facto taking without just compensation of the fee title holder's property.

(1).

Response: The final-form regulation seeks only to recognize property interests that have already been granted. The final-form regulation provides adequate protection to all property owners by affording the opportunity to intervene in the administrative process. Where there is a dispute between the fee title holder and the party applying for a highway occupancy permit as to whether the right to access is included in the applicant's property interest, the fee title holder is entitled to intervene and present the reasons for the access dispute. In no event would PennDOT issue a highway occupancy permit where the right to access has not been established.

7. Comment:

> In the potential scenario where a fee title owner has not agreed to sign an application to allow another entity with a legal interest onto his/her property,

PennDOT must not arbitrarily assume that the applicant's position is automatically correct, nor should PennDOT insert itself into what is a private contractual discussion between two entities. By granting the permit to the one, PennDOT has cut off negotiations and essentially taken away negotiating rights from the fee title holder. Such negotiations can include such factors as hours of operation, storm water considerations, property disturbance and restoration agreements, well protection, ingress and egress to a property during construction, verifying structural integrity of buildings on the property, noise and light disturbance, relocation arrangements, emergency protocol, indemnification, etc. PennDOT should recognize the standing of the fee title holders and give great deference to their rights and needs. (1)

In both the Chartier and Belden cases the court seemed to assume that some sort of negotiation for the easement had taken place or could take place in a court of equity as access to property always has a monetary value. It's assumed that some sort of compensation has been arranged even when an owner of subsurface rights requires surface access to utilize those subsurface rights.

Justice Saylor's dissent in Belden sums up the argument nicely: The seminal decision in *Chartiers Block Coal Co. v. Mellon,* 152 Pa. 286, 25 A. 597 (1893), recognizes the reality that these types of land-rights disputes present complex matters involving the ordering of competing and compelling interests and are subject to litigation. *See Chartiers,* 152 Pa. at 298, 25 A. at 599. Other courts have recognized that surface and subsurface owners generally address the terms on which mineral rights holders' easements will be effectuated via agreements. *See, e.g., Amoco Production Co. v. Thunderhead Investments, Inc.,* 235 F. Supp. 2d 1163, 1167 (D.Colo.2002); *United States v. Minard Run Oil Co.,* Civ. No. 80-129 Erie, 1980 U.S. Dist. LEXIS 9570, at *14 (W.D.Pa. Dec. 16, 1980) (explaining that "the parties should attempt to reach a reasonable accommodation so that each may reasonably enjoy his respective property rights.").

(1, 2).

Response: The final-form regulation does not permit PennDOT to "arbitrarily assume that the applicant's position is automatically correct" or to "insert itself into what is a private contractual discussion between two entities." For purposes of permitting access to the State highway, PennDOT's interests are the safety of the traveling public and whether the applicant has a valid legal right to access the property from the State highway. To the extent that the concerns raised (hours of operation, storm water considerations, property disturbance and restoration agreements, well protection, ingress and egress to a property during construction, etc.) relate to the fee title holder's property, those concerns are not affected by PennDOT's granting a highway occupancy permit and nothing prevents the fee title holder from seeking agreements from the permittee or initiating a separate legal action to address those concerns. Indeed, the scope and nature of the applicant's right of access is defined either through the arm's length transaction between the fee owner and the applicant, or in the case of eminent domain, by the very nature of the interest acquired by the condemnor.

Nothing in PennDOT's authorizing statute, the State Highway Law (36 P.S. §§ 67-101 *et seq.*), allows or requires PennDOT to delay the issuance of a permit or to deny a permit because of private concerns unrelated to the safety of the traveling public.

8. Comment:

While PennDOT offered various arguments in regard to property rights as to why the proposed changes in their regulations were in the public interest, they offered no explanation of the compelling interest to the public in why they mandated indemnification from the applicant for PennDOT's actions (see 441.3(e)(7)(ii) and 441.3(e)(7)(iii)). PennDOT must not be allowed to force the applicant to grant indemnification so that the applicant assumes all the costs and penalties of litigation. The reasons for this are:

i. PennDOT will place itself in a position in which it can act with impunity. No government agency should set itself apart from culpability for its actions.

ii. By forcing such blanket indemnification, a situation is created whereby bias or outright corruption by unethical individuals could occur within PennDOT because there is impunity for their actions. Disallowing these regulations protects the citizens by maintaining consequences for illegal or unethical behavior on the part of government employees.

iii. The demand for the indemnification shows that PennDOT is anticipating lawsuits against them for de facto taking claims, denial of use and enjoyment of one's property, interference in private contractual negotiations, etc., by fee title owners who believe their rights have been violated. The likelihood that these type of lawsuits will occur increases dramatically because PennDOT has inserted itself into the private contractual negotiations between two parties by taking sides of one "owner" over another, while simultaneously denying the fee title holder of the use and enjoyment of his property.

The fee simple owner must also be indemnified against any claims arising from the use of the driveway by the third party. *Belden* itself verifies the posting of bond or other form of indemnification is appropriate.

As important as negotiating with the surface owner for the right to install a driveway, the indemnification of the fee simple surface owner against any and all liability is a must. In fact, a major point of having to apply for a HOP is so that sight distances, slope and grade are properly vetted to eliminate, to the greatest extent possible, the likelihood of an automobile accident as a result of the driveway being installed inappropriately and being used for ingress and egress onto a state-owned road. While PennDOT is indemnified against any claim for having issue the HOP, the fee simple property owner seems burdened with liability which is unacceptable.

An additional area of concern related to proposed regulatory language related to indemnification includes the fact that if PennDOT mandates proof of indemnification for itself, then it should mandate that the entity with a legal interest in a property also indemnifies the fee title holder from any damages as well. To mandate that the state be protected but not the fee title holder is to send the exact wrong message to the citizens of Pennsylvania. Our system of government rejects the notion that government exists for its own interests and that the people serve the government. Rather, government is to serve the needs of the people. This proposed change is not a compelling reason for such regulatory language. The current regulation be left alone, with the addition of required indemnification of the property owner against any and all claims resulting from the use of the HOP.

(1,2).

Response: The indemnification does not allow PennDOT to act with impunity. The indemnification in the final-form regulation requires the applicant to defend the Commonwealth only from suits *by the fee holder* because of the granting of the permit, such as failure to comply with the permit or law. What this does is place an additional risk on the applicant and emphasizes the importance of attempting to obtain the fee title holder's consent to the applicant's request for a permit, thereby encouraging private negotiations regarding the intended use of the fee title holder's land as it relates to the access point. PennDOT does not anticipate any increase in lawsuits from fee title holders and, in fact, this process contemplated by the final-form regulation has been PennDOT's practice since 2004 and there has been no litigation from fee title holders challenging PennDOT's issuance of a permit to a non-fee title holder at the Common Pleas and appellate levels. PennDOT disputes that the proposed regulation indicates that it is "taking sides," PennDOT is merely recognizing valid and documented legal interests in property that allow the access intended by the permit and any suggestion to the contrary is speculative and not conducive to analyzing whether the regulation is in the public interest.

Further, the indemnification only becomes an option after the applicant has provided proof of a valid legal estate or interest in the property that allows the access contemplated in the permit. If the fee title holder does not consent, the applicant must also provide written notice of the submission of the application to the fee title holder and advise of the administrative right to intervene in the permitting process. The final-form regulation requires PennDOT to wait 30 days after this notice is received before granting or denying the permit. The proposed language thus requires the applicant to prove to PennDOT that the notice was in fact received. These requirements strike an appropriate balance of the competing property-interest holders and provide adequate protection to both the applicant and the fee title holder.

Finally, the terms and conditions of the right to access, or ingress and egress, are spelled out in the document granting the applicant the use contemplated in the permit – an easement, a court order, a lease, etc. Any shift in liability or responsibility relating to the particular access point chosen is appropriately addressed privately by the property owners with competing or overlapping interests. The concerns in this comment extend far beyond the precise access point along the State highway. A general indemnification provision favoring the fee title holder in regulations addressing

occupancy of the State highway would not provide the benefit that the comment suggests. The indemnification in favor of PennDOT strictly relates to claims brought *by the fee title holder* against PennDOT arising from the issuance of a permit to a non-fee title holder.

9. **Comment:**

Additional problems with the proposed regulatory language include PennDOT's requirement of proof of notice. Section 441.3(7)(i)(B) does not specify what "written notice" is. Is notice valid for first class delivery, hand delivery, delivery by a constable, or signed-returned receipt? The vagueness of this language could lead to misinterpretation and loopholes.

Related to the language mandating notice, Section 441.3(7)(i)(B) does not specify or require that the fee title holder has actually received the notice. It only specifies receipt of the written notice being delivered. This language does not take into account multiple potential scenarios impacting the recipient such as illness, or travel, or misdirected mail, etc., and appears to penalize the fee title owner should one of these scenarios occur and the fee title holder not be able to receive the mail. The language as it exists now does not - in any way -present a compelling interest for the need for this regulation. In fact, it does the opposite. Should this regulation go in, at the very least, it would need to contain language that PennDOT would not act until 30 days after PennDOT received confirmation that the notice had been actually received by the fee title holder. Otherwise, an unscrupulous applicant could give notice to PennDOT but wait 29 days to deliver the notice to the applicant, leaving one day for the fee title holder to respond. The current language does not make this clear. Further, it is customary in many governmental and business transactions that multiple attempts be made to contact one party for purposes of legal matters. These include two or three different attempts (each able to be documented) of contacting the impacted party regarding the legal matter. Further, thirty days is not enough notice for the fee simple owner to retain counsel and counsel to file a brief in a court of equity should the fee simple owner wish to contest the permit. From Belden *"Chartiers* clearly places the burden on the surface owner to seek legal redress to prevent or restrain the subsurface owner's exercise of its rights. *See Chartiers,* at 598 (subsurface owner's exercise of rights "will be restrained, within proper limits, by a court of equity if this becomes necessary ...."). We reiterate that it is for the surface owner to challenge the subsurface owner's reasonable exercise of its rights, not the converse."

(1).

Response: It is not possible nor practical to attempt to address every potential notice scenario in a regulation. Agencies are generally allotted considerable discretion in administering and implementing programs, including notice requirements. The final-form regulation provides that PennDOT will not grant or deny a permit until 30 days after receipt of written notice by the fee title holder. This necessarily requires the applicant to prove to PennDOT that the fee title holder in fact received notice. Proof could include an affidavit, a signed certified mail receipt, an acknowledgment or other communication from the fee title holder, etc. PennDOT does not desire

to prescribe specific methods and create additional forms to further complicate the process. PennDOT believes that 30 days is an adequate amount of time for a fee title holder to determine whether to contest the applicant's right to apply for a permit and to notify PennDOT pursuant to the General Rules of Administrative Practice and Procedure (1Pa. Code, Part II). These rules provide a process to request an extension of time should the individual seeking to intervene require an extension. *See* 1 Pa. Code. § 31.15 (relating to extensions of time). The General Assembly has determined that 30 days is sufficient time for a condemnee to file preliminary objections to a declaration of taking after the condemnee is served with notice of condemnation. *See* 26 Pa.C.S. § 306(a). As such, the General Assembly has implicitly approved of a 30 day time frame for these types of matters. Moreover, submitting a knowingly false statement to PennDOT would potentially subject the applicant to criminal prosecution for submitting an unsworn falsification to authorities. A fee simple holder is not required to retain counsel or "file a brief in a court of equity" during that timeframe. Any communication putting PennDOT on notice that the fee title holder contests, i.e. through exercising its right to intervene, the non-fee title holder's right to access contemplated by the permit within 30 days would be sufficient for PennDOT to delay action on the permit until an intervention proceeding is complete. PennDOT would then grant or deny the permit application and both parties would have the opportunity to appeal the decision to the Administrative Docket.

10. **Comment:**

One item that is noticeably lacking in the proposed regulations is that PennDOT does not require verification that the easement agreement that is provided to PennDOT is the most current agreement. In the midst of the many such transactions, engineering changes, legal concerns, economic changes, etc., these variables often make it necessary for an easement agreement to be altered. In such cases, verification that the most recent easement agreement is in hand is of paramount importance so that the fee title holder may be protected.

(1).

Response: The final-form regulation requires "a copy of the valid legal document or court order verifying the applicant's legal estate or interest in the property." An easement agreement that is not the most current agreement does not meet the regulatory requirement. If, as the commentator suggests, state agencies were required to independently research and validate the documentation submitted by permit applicants, the timing of the permitting process would increase exponentially, significantly impairing economic development in the Commonwealth. The concern is alleviated by the requirement that the applicant notify the fee title holder. The fee title holder can intervene and raise the issue of whether the purported property interest is in fact valid.

11. **Comment:**

The 5th Amendment of US Constitution states as follows: "...nor shall private property be taken for public use without just compensation." Eminent domain cases do occur from time to time, but in the instances where they do occur, it is essential that the land only be taken after due notice, due process, and due payment. PennDOT should not grant any applicant with a legal interest in

an eminent domain proceeding a highway occupancy permit until payment has been made in full. Once this has occurred and the negotiations are complete, then payment can be made and, though many times a difficult situation, at least the 5th Amendment of the US Constitution would have been followed and the fee title holder would have been paid in full. While the other provisions dealt mostly with PA law, this item has to do with our US Constitution and presents yet another reason why there is no compelling reason to change the current proposed regulation.

(1).

Response: No legal authority is cited to support the concept of not granting an applicant "with a legal interest in an eminent domain proceeding a highway occupancy permit until payment has been made in full." This position ignores the fact that condemnors sometimes obtain the legal right to possess the condemned property prior to compensation being paid "in full." [1] There are three legal mechanisms to acquire property pursuant to eminent domain. Under each method, the condemnor obtains the legal right of possession at a different point during the proceedings. Payment does not necessarily dictate when a condemnor has the right to enter the property. In reviewing whether an applicant has a valid property interest in eminent domain situations, PennDOT engages its Office of Chief Counsel to review the documents provided and determine whether the right to possess the property has been acquired under the applicable law as follows.

Condemnations under Pennsylvania's Eminent Domain Code, 26 Pa.C.S. §§ 101 et seq.

Title to the condemned property passes to the condemnor on the filing of the declaration of taking, however, possession does not pass to the condemnor on that date. 26 Pa.C.S. § 302(a)(2); *Nicoletti v. Allegheny Co. Airport Auth.*, 841 (A.2d 156 (Pa. Commw. 2004). After the expiration of the time for filing preliminary objections to the declaration of taking by the condemnee (30 days as provided in 26 Pa.C.S. § 306), the condemnor is entitled to possession or right of entry upon payment of or a written offer to pay to the condemnee the amount of just compensation as estimated by the condemnor.

If preliminary objections to the declaration of taking are filed, the court may issue a writ of possession conditioned upon payment to the condemnee or into court of the estimated just compensation and any other terms as the court may direct.

Condemnation under Pennsylvania's Business Corporation Law of 1988, 15 Pa.C.S. 1511

If a condemnor and any condemnee cannot agree on the amount of damages sustained, the condemnor may make a verified application to the court for an order directing the filing of a bond to the Commonwealth, in an amount and with security to be approved by the court, for the use of

[1] It is unclear what the commentator means by "in full", but if the reference is to the ultimate final determination of condemnation damages, such an argument is not supported by the law. In general, as noted in the response above, condemnors are entitled to possession upon the payment of estimated just compensation or the posting of a bond representing that amount. The determination of final compensation may be litigated for some time, and laws regarding the application of eminent domain are structured precisely to avoid landowners from holding legally valid acquisitions hostage while the parties resolve the compensation issue.

the persons who may be found to be entitle to the damages sustained. 15 Pa.C.S. § 1511(g)(2)(i). Upon entry of a court order approving the bond, the title that the corporation acquires in the right-of-way or easement passes to the corporation and the corporation is entitled to possession. 15 Pa.C.S. § 1511(g)(2)(iii).

Federal Eminent Domain, Fed.R.Civ.P. 71.1

Federal condemnations are controlled by Rule 71.1 of the Federal Rules of Civil Procedure, unless a statute specifically authorizes the immediate possession to a condemnor (known as a "quick-take") apart from this Rule. *See*, e.g., 40 U.S.C. § 3114. Even though Rule 71.1 does not contain procedures for dealing with right of entry and possession, the condemning authority, under traditional procedures, takes possession of the property after the determination and payment of just compensation. *East Tennessee National Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004) (citing *Kirby Forest Industries v. United States*, 467 U.S. 1, 3-4 (1984). Notably, and relevant to the commentator impacted by this regulation, Congress did set forth specific procedures for condemnations apart from Rule 71.1 in the National Gas Act (NGA), 15 U.S.C. § 717 *et seq.* (2006) to secure surface and subsurface interests for the storage and movement of natural gas. However, like Rule 71.1, the NGA does not provide for the immediate possession to a condemnor. Nevertheless, United States District Courts, including the Middle District of Pennsylvania, have invoked their equitable powers to grant immediate possession through the issuance of a preliminary injunction. *Transcontinental Gas Pipe Line Co. v. Permanent Easement for 0.03 Acres*, 2017 U.S. Dist. LEXIS 129459 (M.D. Pa. 2017). In such a case, PennDOT would review the court ordered preliminary injunction to determine whether the encompasses the use contemplated by the permit and proceed accordingly. In the absence of a court order of immediate entry and possession, the condemnor is not entitled to possession until condemnation proceedings are completed and a condemnation order is issued. *East Tennessee National Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004).

This comment arises, in part, from a constituent of the 41st Legislative District that was impacted by the Federal eminent domain process. In determining that it was appropriate to issue a highway occupancy permit to the non-fee title holder in that case, PennDOT appropriately looked to a recorded federal court order (attached hereto for reference) to confirm that the applicant had the right to access and possess the land in question. As the order granted such rights only upon filing of the required bond, PennDOT further confirmed that the required bond had in fact been posted. This very situation demonstrates the need for PennDOT to have the authority to issue permits to non-fee title holders where the right to access is clear. To prevent PennDOT from doing so would place the Commonwealth in a position where it would knowingly deny a non-fee title holder a right that it had clearly been granted by the court.

12. **Comment:**

> PennDOT's argument that PA may achieve a competitive advantage with other states is conjecture at best, for the vast majority of said applicants would be from people within Pennsylvania, not out-of-state individuals doing business in PA. Further, even if there was a competitive advantage due to this proposed change – and there isn't one – this would still not be a relevant argument to do away with fee owner's property rights.

(1).

Response: While we acknowledge that many applicants are domiciled in Pennsylvania, PennDOT's multi-state analysis of permitting processes as they relate to non-fee title holders shows a diverse and unclear approach in other states. For an out-of-state developer comparing states and deciding where to locate a business, Pennsylvania (which will have clarity in the process by way of this final-form regulation) is at an advantage in relation to another state where these issues remain unresolved. Albeit potentially not the deciding factor, this final-form regulation will remove an administrative burden in the interest of attracting businesses to the Commonwealth.

13. **Comment:**

PennDOT' s argument that changing this language will avoid delays and potential litigation is conjecture and cannot be accepted at face value as evidenced by the fact that the current status of Pennsylvania's law, which is in keeping with PA's adjoining states, has shown absolutely no record of such delays or litigation.

The argument that the fee simple owner's property rights must be taken away to avoid delays or potential litigation clearly shows a diminished value being placed on the fee simple owner's property rights. Pennsylvania, from its very founding and enshrined into the very first section of our Constitution notes the primacy of property rights: "§ 1. Inherent rights of mankind. All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. (Emphasis added) Indeed, PA's Constitution must be acknowledged: Property rights must supersede potential delays and/or litigation that one of the parties might have to undergo. Additionally, as summarized in Hardee's Food Systems Inc. v PennDOT, 495 Pa. 514 (Pa. 1981), "...property rights can only be denied in compelling circumstances." (See also: Wolf v. Department of Highways, 422 Pa. 34, 39, 220 A.2d 868, 871 (1966); Rolling Green Golf Club Case, 374 Pa. 450, 456, 97 A.2d 523, 525 (1953); Breinig v. Allegheny County, 332 Pa. 474, 480, 2 A.2d 842, 847 (1938).) The fee title holder's property rights can only be denied in compelling circumstances which cannot be litigated by PennDOT.

Potential delay or litigation (though no evidence exists to suggest that this has or will occur) is not a "compelling circumstance" sufficient enough to deny a fee property owner of his/her property rights.

Finally, it very well could be argued that if PennDOT's proposed regulations were to be approved, litigation may, in fact, increase. There are several reasons for this 1) PennDOT's granting of a lease holder's access to a fee title owner's property who objects, is acting as the court and simultaneously denying the fee title owner's property rights. This is not the jurisdiction nor

purview of PennDOT. Further, 2) PennDOT, in making such decisions is acting as a "taking" of the fee simple owner's property and thus becomes the comdemnor. As such, PennDOT's mandate for indemnification in the newly proposed language in 441.3(7)(ii) and 441.3(7)(iii) is in direct contradiction of the Eminent Domain Code, 26 P.S. § 1-612 (Supp. 1981), which provides in pertinent part: "All condemnors, including the Commonwealth of Pennsylvania, shall be liable for damages to property abutting the area of an improvement resulting from change of grade of a road or a highway, permanent interference with access thereto, or injury to surface support, whether or not any property is taken." Clearly, PennDOT's proposed rules will work in contradiction to their stated aims and will bring about increased litigation.

(1).

Response: The final-form regulation formalizes the process in place for the last 14 years. Since that time, there has been minimal litigation at PennDOT's Administrative Docket concerning an applicant's right to apply, namely because legal questions asserted in the comment have been addressed by negotiations or legal action that is interpreted and applied. PennDOT is confident, however, that if it were to be required to deny non-fee title holders who have a valid right to access a mechanism for applying for a highway access permit, litigation would result in almost every instance at the expense of taxpayers. The right to access state highways is a Constitutional property right that cannot be taken without compensation. See *Breinig v. County of Allegheny*, 2 A.2d 842, 847-48 (Pa. 1938). PennDOT cannot "unduly intermeddle" with the property rights of abutting landowners. *Ristvey v. Pa. Dep't of Transp.*, 52 A.3d 425, 432 (Pa. Cmwlth. 2012).

Further, the comment that PennDOT, in granting a highway occupancy permit to a valid applicant, is tantamount to a taking is simply not correct. It is not only incorrect, but a misstatement of PennDOT's role on the highway occupancy permit process. PennDOT is never acting as a condemnor in the context of reviewing and granting or denying applications highway occupancy permit. Rather, where the eminent domain process was used to obtain a property interest, the applicant for the highway occupancy permit is typically the condemnor; and where PennDOT grants a highway occupancy permit to the applicant, he/she has proven a valid legal interest in the property with a right to access. The reference to consequential damage claims is under Section 612 of the Eminent Domain Code (now codified at 26 Pa. C.S. § 714) is not relevant here as it most often addresses physical actions by a condemnor to a highway that affects the abutting property. The granting of a highway occupancy permit is the opposite of that situation.

14. **Comment:**

It is also clear that should the current regulation remain as is, it will have no adverse effect on the HOP permittees.

(1).

Response: PennDOT disagrees, particularly with regard to commercial developments. Commercial developments involve a number of concerns including zoning, engineering, local approvals, financing, and real estate transactions that all affect how and when the final plan can move forward. Often, real estate transactions are contingent upon the resolution of attendant

permitting issues, whereby an agreement of sale specifically indicates that a non-fee title holder can apply for a permit on behalf of the fee title holder. The timing and issuance of highway occupancy permits play a role in how these developments and transactions are structured.

15. **Comment:**

> Owners with competing interests do exist but the negotiating playing field is not level. In eminent domain cases, the fee title holder is easily overwhelmed with the complexity, the staff, money, resources, and pressure from individuals whose only interests are those of the company. As such, the landowner, being under such overwhelming odds simply can't compete. And, when the only defense the fee title owner has left -the right to "acquiring, possessing and protecting property" has been taken away by his own government, what confidence can one have in his own government?

(1).

Response: The issues discussed in this comment are not regulated by 67 Pa. Code Chapter 441. The purpose of Chapter 441 is to "regulate the location, design, construction, maintenance and drainage of access driveways, local roads, and other property within State highway right-of-way for the purpose of security, economy of maintenance, preservation of proper drainage and safe and reasonable access." 67 Pa. Code § 441.2(a). Neither the State Highway Law nor Chapter 441 grant authority to governmental bodies or private companies to acquire property through eminent domain, and the final-form regulation does not impact a landowner's rights to challenge that process. Moreover, the comment ignores the significant substantive and procedural safeguards built into federal and state commendation proceedings. *See e.g.* 26 Pa. C.S. § 301 et seq.

16. **Comment:**

> The statements [relating to estimated costs and savings] are not accompanied by any documentable evidence. In any case, even if they were, the cost savings are de minimis. In addition to this, administrative challenges occur for multiple reasons and as stated previously, could very well increase because of a change to this regulation.
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> ***
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> On November 16, 2017, by a 5-0 vote, the IRRC ruled that PennDOT's actions of implementing broader definitions of the definition of property owner were a violation of the Regulatory Review Act. On December 14,2017,by a7-3 vote, the Joint Committee on Documents affirmed the guidance of the IRRC and ordered PennDOT to either promulgate a regulation or desist from using their expanded definition. PennDOT's admission of being not following the Regulatory Review Act for over a decade is troubling and does not present a strong track record of avoiding administrative problems by following legislative directives, nor does it evoke a sense of confidence in the agency's ability to avoid the same in the future. This is particularly true in light of the fact that PennDOT has admitted

that it has twice before started to promulgate these regulations and twice before failed to follow through.

In conclusion, for the above reasons and considerations, I am requesting that the current regulations remain in place. And, if the decision is made to proceed with the regulations, I am requesting that the specific suggestions be incorporated into any revised regulatory language.

(1).

Response: As indicated in the RAF, costs and savings cannot be calculated because the amendments in the final-form regulation reflect PennDOT's current practice. The RAF is designed to assess the extent to which a regulatory change will have negative or positive financial impacts. Because this final-form regulation formalizes a well-established process, the net economic impact of the regulation is negligible because the regulatory process is not changing current practice. As such, no documentation can be provided to show positive or negative impacts—there are none. However, if non-fee title holders are required to litigate whether they could apply for a highway occupancy permit, after already acquiring the right to access (whether amicably or as a result of litigation), that would certainly cause an increase in costs for the applicant and delay the construction of the proposed access. The ability to ascertain the precise economic impact in that scenario is again not something that can be easily determined because the cost of any litigation will be driven by the fact-sensitive nature of litigation, a party's selected legal counsel if they choose counsel.

Notwithstanding the past, this final-form rulemaking, per Order of the Joint Committee on Documents, will consider all suggestions and comments, and formalize PennDOT's processes in the public interest.

17. **Comment:**

In several of the cases cited by PennDOT as support for the proposed regulation the issue at hand was previously acquired mineral rights verses [sic] the rights of the fee simple or surface rights property owner. Although useful to demonstrate the problem of competing property interests the Belden, Amoco, and the Chartiers Block coal cases seem not to be an apple to apples comparison with the immediate issue. In each of those cases the mineral rights to the property had been acquired by those companies prior to the acquisition of the fee simple property and the accompanying surface rights by a third party. Timing is important.

Surely a buyer of a property in which the mineral rights were not included as a matter of the recorded deed, the buyer would or should have expected the owner of the subsurface rights to, at some point in the future, require access to the surface of the property to exploit those owned rights. In other words, the entity that became the fee simple owner of the surface rights entered into the ownership understanding a separate entity had rights to access the property, or an easement to access those previously acquired rights would likely be attached at some point in the future. Indeed, the purchase of the fee simple property may well have bought the property at a discount for that very reason which is almost equivalent to having

been compensated for those lost rights in advance. That is not the case with this issue.

(2).

Response: Where a non-fee title holder's interest includes a right to access, that right is not altered based on when the interest was obtained. The interest and access rights are set forth in the legal document or court order granting the rights. For purposes of determining whether a highway occupancy permit can be issued, when the access rights were acquired is of no consequence, so long as the right to access is established at the time of the application.

18. **Comment:**

The Hardees Food Systems Inc. [case] is even further off point and in fact while doing some research on that HOP, the PA Supreme Court, while positing the rights of Hardees to apply for the HOP, referred the matter back to PennDOT for reconsideration. In speaking with an employee engaged in zoning matters in Lower Allen township this morning I came to find out that apparently either PennDOT did not issue the HOP allowing access to Old Gettysburg Road as the applicant had requested or Hardees themselves decided it was not in the company's interest to use the state road as an access point. It seems they ended up using a township road for access instead. An issue at the core of this problem was stated by the proposed applicant for the HOP. In a letter sent to a 41st District landowner telling them they must sign the form M950-AA, the company stated *"In federal condemnation proceedings, title to the easements being condemned does not pass to Transco until compensation is paid."* At the time the letter was sent, the landowner had yet to be condemned, and in fact has yet to be paid "just compensation" for the easement, which raises the question does Transco have the necessary and legal possessory property interests to apply for the HOP even now.

(2).

Response: This comment references a specific permit application rather than commenting on the proposed regulation. PennDOT's analysis of whether a highway occupancy permit applicant has valid possession of the property in dispute is addressed in the response to Comment 11. As noted, right of entry and possession passed in the federal condemnation case upon the posting of the required bond per the court order, and not the payment of just compensation.

19. **Comment:**

The letter of law before your current changes in progress is the property owner is the sole owner. Your own letter to me states just that. Your office sent me a notice of application for a driveway on my property from Williams in June 2017. They had no rights to my property and as such I should not have even received this notice and on top of that your office 'charged' me a 100.00 fee to be an intervener in this process. Unbelievable! I was never informed of the process of this application and disputed this right of way. Williams was in violation of applying for this permit and your office in my opinion, was an accessory to this

demand. I didn't get eminent domain served on me until September 2017. You are to me guilty of injustice to me or you would not now be changing this law to accommodate Williams. No one even emailed or called me to notify me about approving their application. I found out as I stood in front of a bulldozer demanding paperwork from your office. I guess my 100.00 didn't cover that consideration. And now with this amendment to this law you are making sure your office is covered against any wrong doing going forward. You even have Williams paying for any legal fees for any future law suits. What are you doing for the landowner whose land was forcibly taken if any lawsuits are in the future? Your office is to protect the citizens of this state. For the state to approve a hops permit without any compensation to the landowner is in my opinion one more instance of ignoring and profiting from the landowner. We used to have rights as a property owner but this law takes away another right of the 'sole' owner.

Representative Miller captured the essence of the issue and eloquently outlined the position of his constituent property owners. Anything I could write would be redundant and likely less eloquent, nonetheless I want to be sure to express my support.

Thank you IRRC and JCD for your time and your consideration of the confusing regulation which left some property owners bewildered as to their rights under the law.

(3).

Response: These comments reference a specific permit application rather than commenting on the proposed regulation. While PennDOT is understanding of the landowner impacted by eminent domain proceedings, the highway occupancy permitting process is not the place to re-litigate or collaterally attack a condemnation order. In the particular permit application referenced by the commentator, PennDOT did not issue a permit until it confirmed that the applicant had the right of entry and possession by virtue of posting the bond per the recorded federal court order.

The following comments were submitted by Commentator 4 (the Independent Regulatory Review Commission).

20. **Comment:**

Determination of whether the regulation is in the public interest; Clarity, feasibility and reasonableness of the regulation; Implementation procedures; Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review; and Possible conflict with statutes.

Preamble and the Regulatory Analysis Form (RAF)

Section 5.2 of the RRA (71 P.S.: 745.5b) directs the Independent Regulatory Review Commission (TRRC) to determine whether a regulation is in the public interest. When making this determination, IRRC considers criteria such

as the clarity, feasibility and reasonableness of the regulation. To make that determination, IRRC must analyze the text of the Preamble and the proposed regulation and the reasons for the new or amended language. IRRC also considers the information a promulgating agency is required to provide under Section 5(a) of the RRA (71 P.S. § 745.5(a)) in the Regulatory Analysis Form (RAF).

The explanation in the Preamble and the information contained in the RAF are not sufficient to allow the Commission to determine if the regulation is in the public interest. In the Preamble to the proposed regulation, the Department summarizes significant amendments. However, it does not provide an explanation for the proposed changes and new language. Without a detailed description of the regulation and its impact, it is difficult to determine whether the requirements in the rulemaking are reasonable or feasible. We ask the Department to provide a more detailed explanation of the amendments in the final rulemaking submittal.

(4).

Response: PennDOT's final-form rulemaking, including this document, has been updated to establish that this rulemaking is in the public interest.

Comment:

The Department identifies persons or entities affected by the proposed regulation as owners of legal interests in property, such as easement holders and mineral estate holders, as well as fee title holders. The Department's responses to RAF #10, #12, 5, #17 and #18 do not address the impact of the proposed amendments on fee title holders. For instance:

- In RAF #10, the Department states that the compelling public interest that justifies the regulation is to prevent the Commonwealth taxpayers from being responsible for the attendant costs of de facto taking claims that may arise if the Department is prohibited from issuing Highway Occupancy Permits (HOPs) to non-fee title holders. It does not include, however, the potential burden on Commonwealth taxpayers for costs of litigation if a fee title holder withholds consent to a Department-issued HOP.

(4).

Response: Current practice has not reflected a significant amount of litigation, excepting minimal PennDOT Administrative Docket matters, where fee title holders object to a third party application. As the one commentator noted (commentator 3), there is a $100.00 fee for filing an Administrative Docket action. The Department currently evaluates the parties' legal interests, often after an agency or tribunal establishes those rights. Under the current order of the Joint Committee on Documents, either PennDOT promulgates a revised regulation or it can no longer issue any highway occupancy permits to non-fee title holders. Without the final-form regulation, unless the fee title holder submits the application, the taxpayers are burdened with potential costs of de facto taking claims where a non-fee title holder with a valid and documented right to access

is unable to exercise that right by virtue of the fact that PennDOT cannot issue a permit securing a safe manner of access to the highway.

In the most basic scenario, if person A acquires an easement across person B's property and that easement bisects or abuts one public road—a state highway—there will either be express language or its implied in that easement, in order to give it effect, that access to the easement from a state highway is necessary. A highway occupancy permit is the means of obtaining that necessary access. Current practice to be reflected in this final-form regulation reflects this reality. If PennDOT cannot grant access to someone holding an easement, PennDOT is certain that there will be litigation ranging from someone wanting to build a home on a land-locked parcel to a commercial developer, and those are costs that are presently not borne by taxpayers. If PennDOT renders an easement worthless—that is a de facto taking. It is clearly in the public interest to approve this final-form regulation to prevent a substantial burden to all property owners.

Comment:

- In response to RAF #12, the Department states "Pennsylvania will be at a competitive advantage, especially for out-of-state persons or entities seeking permits. Moreover, the proposed amendments will avoid unnecessary delay and potential litigation where an applicant has a clear legal right to access but is not the underlying fee owner." A significant amendment to the Department's regulations includes a required written notice by the applicant to the fee title holder regarding the application. What are other states' policies regarding fee title holder notification? We ask the Department to include this information in the RAF to the final-form regulation.

(4).

Response: Please refer to the chart included with the response to the third bullet point in Comment 24, below.

Comment:

- In RAF #15, the Department concludes that the rulemaking should not have any adverse effects on HOP permittees. However, it does not address how fee title holders may be affected by the proposed changes. The Department should revise its response to RAF #15 to address any adverse effects the proposal may have on fee title holders.

(4).

Response: The RAF has been revised accordingly.

Comment:

- In RAF #17, it is unclear who will benefit from the positive financial, economic and social impacts that the Department anticipates as a result

of the implementation of the regulation. What are the financial, economic and social impacts?

(4).

Response: See revised RAF.

Comment:

- Similarly, the Department's response to RAF #18 does not speak to the benefits of the proposal outweighing any cost and adverse effects for fee title holders. The Department should include in the final rulemaking a description of any benefits that outweigh costs and adverse effects for fee title holders.

(4).

Response: See revised RAF.

Comment:

In estimating the costs and or savings to the regulated community and state government, the Department explains that establishing a clear definition of "owner" should reduce legal costs incurred in litigating matters related to interests in property, the number of administrative challenges and a reduction in collected filing fees. (RAF #19 and #21) It is uncertain from the proposed regulation's Preamble or RAF how many administrative challenges or litigations occur with the HOP application process each year. Neither the Preamble nor the RAF illustrate the scope of the situation that is to be addressed by the proposal.

(4).

Response: The RAF has been revised, accordingly. Only a handful of petitions to intervene or protest are filed each year with the Administrative Docket. From 2004-2017, 56 petitions to intervene in highway occupancy permits were filed, averaging 4 per year. Only 3 of those matters related to disputes between the fee title holder and the applicant. As in the cases referenced by the commentators, all 3 involved condemnation orders for utility installations.

Comment:

The Department reports that approximately 3,000 HOPs are issued each year and about 40 percent of those are applied for and issued to non-fee title holders of property. (RAF #19) Of the approximately 1,200 HOPs issued to non-fee title holders of property, how many were issued with fee title holder consent? How many protests or administrative challenges are filed each year? In order for this Commission to determine whether the regulation is in the public interest, the Department should provide this information as part of the final-form regulation submittal.

(4).

Response: While this information would undoubtedly prove valuable to the Commission's analysis of this regulation, there is no PennDOT business reason to track the nature of an application at this level of granularity. Accordingly, the permitting system is not designed to do such and limitations in that system make it difficult to provide the figures requested without manually reviewing each of the approximate 3,000 permit files.

Upon further clarification with the program area, the estimated 40% of permits issued to non-fee title holders in 2017 were for driveways related to retail developments only and only included permit records that included documents that had the letters "RFO" in their description. The RFO is the Release of Fee Owner where the fee title holder is not the applicant. The query, however, did not capture the driveway permits issued to non-fee owners who were unsuccessful in obtaining a release, but were issued a permit under Pub. 282, pg. 20, section 3. requiring a copy of the document establishing the estate or other legal interest, review by counsel, a statement detailing the steps taken to obtain the release from the fee owner, proof of written notice to the fee owner that included notice of the right to appeal, confirmation from the district office that the proposed driveway was within the confines of the documented estate or other legal interest in the property based, and an indemnification.

Recognizing the limitations of the data, PennDOT has pulled the following information for 2017:

2,767 driveway permits were issued

1,053 of these permits were for Residential uses; an RFO count is not available, though it would be minimal, if any, because of the nature of the use and because the fee owner is the applicant.

647 of these permits were for a variety of uses such as Lodging, Medical, Mixed-Use, Office, or Recreational; of which 47 were issued with a RFO.

853 of these applicants indicated an Industrial/Agricultural use; 107 (13%) included RFOs

214 of these applicants indicated a Retail use; 77 (36%) included RFOs

The above numbers do not include instances where an RFO could not be secured and a permit was issued pursuant to process described above whereby PennDOT determines that the applicant had demonstrated a documented valid legal interest in the property that includes the right to access. A query for "indemnification" for 2017 permits showed a total of 18 permit records. However, counsel reviewed at least 45 indemnifications during 2017.

Based on the information available, of the 1,067 (853 + 214) permits issued for Industrial/Agricultural or Retail uses, a minimum of 299 (RFOs for Industrial/Agricultural uses and Retail uses, plus counsel's count of indemnification reviews: 107 + 77 + 45) or 21% were issued to non-fee title holders. Again, this only captures RFOs and Indemnifications that the system could identify via a query and the informal number of property interest reviews provided by counsel. It would not capture any RFOs or

Indemnifications that were not indicated as such in the naming convention used to upload the document into the electronic permitting system.

Legislative Comments

Comment:

The Department is proposing to delete the term "own" and replace it with an expanded definition of "owner" which includes not only the person holding fee title to the property, but others with legal or equitable interests in the property. (§ 441.1 relating to Definitions) The proposal also establishes an application procedure and permit application requirements for applicants other than the tee title holder. These requirements include proof of property owner consent or proof that the applicant has provided written notice regarding the submission of the application and administrative rights to the fee title holder. (§ 441.3 relating to Permit application procedure).

Representative Brett Miller believes the issue at hand is access and who has the authority to grant it, rather than clarification of ownership. He is concerned that the Department's proposed amendments relating to "own" and "owner" ignore a longstanding tradition of fee title holder property tights. He states that "Dramatically altering the historic understanding and usage of who owns property is not a compelling public interest."

He also feels the Department's proposed process for non-fee title holders suggests a preference for those with a legal interest in the property and not the fee title holder. In the event where a fee title owner has not agreed to sign an application to allow another entity onto his/her property, Representative Miller assets that the "Department should not arbitrarily assume that the applicant's position is automatically correct, nor should PennDOT insert itself into what is a private contractual discussion between two entities. By granting the permit to the one, PennDOT has cut off negotiations and essentially taken away negotiating rights from the fee title holder."

Like Representative Miller, we also question whether it is appropriate and reasonable for the Department to determine what right of reasonable access is. In situations where the fee title holder withholds consent, the Department should not interfere with private negotiations unrelated to the Department's function. Implementation of this rulemaking would allow the Department to make such determinations that are usually made by the courts. We believe issuing HOPs without fee title holder consent represents a policy decision of such a substantial nature that it should be reviewed by the General Assembly.

Representative Miller also raises other questions regarding whether certain provisions conflict with the state's Eminent Domain law. § 441.3 (e)(7)(ii) and (iii).

We will review the Department's response to Representative Miller's concerns as part of our consideration of whether the final regulation is in the public interest.
(4, 1).

Response: In no event does the Department determine "what right of reasonable access is," nor does it make determinations that are within the jurisdiction of the courts. Rather, the Department reviews determinations that have already been made by the court (or amicably agreed to by predecessors in title) to confirm that there is a valid and documented property interest with a right to access such that an HOP can be issued within the agency's inherent authority. For instance, in the case referenced by the commentators, the Department reviewed a federal court order to confirm that the applicant had a right to access, entry and possession. The order is attached for illustration. See paragraph (2) of the order for the language that the Department relied on to grant the permit. In that case, the Department also confirmed that the required bond was posted to effectuate the grant per the court order.

21. **Comment:**

Economic or fiscal impacts of the regulations; and the nature and estimated cost of legal, consulting or accounting services which the public or private sector may incur.

In the Preamble, the Department states that no fiscal impacts to the regulated community are anticipated because the changes are consistent with current practices that have been in place since 2002.

Comments received from a private citizen suggest that fee title holders who exercise their rights to protest an application will incur administrative fees and possibly costs for legal or consulting services to navigate the appeal process. The Department in its responses to RAF #17, #18, and #19, does not take into account these potential fees or costs to the fee title holder. The Department should revise its responses when it prepares the final rulemaking to include any potential fees or costs to the fee title holder.
(4).

Response: The RAF has been revised accordingly.

22. **Comment:**

Section 441.1. Definitions. Clarity.

"Owner" is defined as "A person holding: (i) fee title to property, (ii) an estate or other legal interest in property, such as an easement, a lease, a license, or subsurface rights, or (iii) **an equitable interest in property under a sales agreement or an option to purchase; provided that such estate or other legal or equitable interest in property includes the use requested in the permit.**" [Emphasis added]

Subparagraph (iii)

We have the following questions:

- How will the Department determine whether the interest in a property has risen to the level of ownership?

- The definition includes the proviso that the "legal or equitable interest in property includes the use requested in the permit." How can the permit include the use requested if the permit has not yet been granted? If the intent of the Department is to include the requested use in the permit application, the provision should be included in the section for application procedures.

We ask the Department to explain its intent and the reason for including Subparagraph (iii) in the definition of "owner."

(4).

Response: PennDOT will determine whether the interest in property has risen to the level of ownership for purposes of a highway occupancy permit by reviewing the record documents relating to the tract and any court orders granting property interests.

The phrase "includes the use requested in the permit" relates to the type of highway occupancy permit being requested. This could include temporary construction access, minimum use driveways serving a single-family home, low or medium volume driveways for smaller housing developments, or high-volume driveways for commercial purposes. While most recorded property interest documents will not specify the particular type of access, a statement of purpose in an easement or the facts set forth in a court order will indicate whether the use is for a private residential access, a commercial development, or entry to install or service a utility. If the materials before PennDOT are unclear, pertinent information will be requested.

Subparagraph (iii) in the definition of "owner" allows a person holding an equitable interest in property under a sales agreement or an option to purchase to apply for a permit. The provision recognizes long-standing principles of real property law. It is included because of the nature of transactions used in real estate development. The law distinguishes between "legal owner" "equitable owners" of property. Whereas the former holds legal title to real estate, the latter does not. An equitable owner is one who is recognized in equity as the owner because use and title belong to that person, even though legal title may belong to someone else. See *Black's Law Dictionary*, Ninth Edition, 2009. In the context of real property, an equitable owner's interest may ripen into legal ownership upon the performance of all conditions contained in a contract for sale of the property. Where one has entered into a sales agreement which is subject to a condition precedent, both legal and equitable ownership remain in the seller until such time as the condition precedent is satisfied. *In re: Condemnation by Central Bucks School District*, 2 D&C 3d 696, 700 (Bucks 1977), citing *Reed v. Lukens*, 44 Pa. 200 (1863). However, it is well established in Pennsylvania that when an *unconditional* agreement for the sale of land is signed, the purchaser

becomes the equitable or beneficial owner through the doctrine of equitable conversion. "The [seller] retains a mere security interest for the payment of the unpaid purchase price." *Didonato v. Reliance Standard Life Insurance Company*, 249 A.2d 327, 329 (Pa. 1969). "The execution of an agreement of sale of real property converts, through the doctrine of equitable conversion, the seller's interest into personalty and the buyer's interest into realty. The seller is said to hold legal title as trustee for the purchaser." *In re Estate of Highberger*, 360 A.2d 580, 581 (Pa. 1976). Regardless of whether closing has occurred or a deed has been recorded, the point at which the purchaser becomes the equitable owner should be sufficient to allow the purchaser to apply for a highway occupancy permit and proceed with the intended development. In these cases, the seller typically agrees that the buyer can apply for the permit, but the seller does not want to be the applicant because the regulations require the applicant to generally indemnify the Commonwealth for a period of two years after the permit is issued (See 67 Pa. Code §441.6(13)).

23. **Comment:**

Section 441.3. Permit application procedure. --Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors.

In the Preamble to the proposed regulation, the Department states the purpose of the regulation is "to clarify the provisions relating to who may apply for a permit to construct or alter driveways; local roads; drainage facilities; structures; means of ingress, egress and access; and other property within the state highway right-of-way, and set forth application requirements that **strike a careful balance between the interested parties' property rights.**" [Emphasis added.]

New Section 441.3 (e)(7)(i)(A) and (B) establishes the permit application process and required information for applicants that are non-fee title holders. Applicants must provide to the Department proof of either the fee title holder's consent or that the applicant has notified the fee title holder of the submission the HOP application and their administrative rights through a written notice. The new section also presumably affords the fee title holder 30 days to review/acknowledge the application before the Department grants or denies the application.

We have several questions regarding this new section: How does the Department define "written notice?" How will the applicant demonstrate to the Department that the fee title holder received written notice about the HOP application and administrative rights? What if the fee title holder objects/protests to the application'? How did the Department determine that 30 days was a reasonable and fair amount of time for the fee title holder to acknowledge, accept or protest the application? Does the timeline for the Department's granting or denying of an HOP change when there is a notice of protest?

Since the sections referenced under I Pa. Code 35.23, 35.24 and 35.27-35.32 do not clearly delineate the protest process or timeline, how will a fee title holder that wishes to object to an application know what steps to take? We ask the

Department to explain how it will implement the permit process and the permit process when there is a protest by a fee title holder to the application.
(1, 4).

Response: This comment is partially addressed in the response to comment 9, above. Additionally, the term "written notice" is not defined by regulation.

If a fee title holder objects to the approval of a highway occupancy permit application by filing a protest under 1 Pa. Code § 35.23, the fee title holder will not become a party to the application process. *See* 1 Pa. Code § 35.24. However, PennDOT considers the contents of the protest in making its decision to approve or deny an application. 1 Pa. Code § 35.24. A fee title holder may become a party to the application process by filing a Petition to Intervene under 1 Pa. Code § 35.27 and 67 Pa. Code § 491.6(d). A fee title holder may also appeal the issuance of a permit by filing a request for hearing under 1 Pa. Code § 35.121 and 67 Pa. Code § 491.3.

The thirty-day timeframe is consistent with the time periods for parties to answer orders to show cause, appeal administrative decisions to the secretary, and request administrative hearings under the PennDOT's Administrative Practice and Procedures. 67 Pa. Code §§ 491.3(b)(1), 491.9(d), 491.12(a).

PennDOT's timeframe for granting or denying a permit application may change on the filing of a protest because PennDOT may require additional time to review and consider the contents of a protest prior to making its final determination. The timeframe for granting or denying an application may also change upon the filing of a petition to intervene. When intervention is granted, the application review process is delayed because the fee title holder will have an opportunity to participate in PennDOT's review of the highway occupancy permit application by submitting comments to PennDOT after having the opportunity to review the application and submitted documentation. The applicant is then given an opportunity to respond to the intervener's comments. PennDOT considers all comments and responses before making its final determination.

Comment:

We note that the permitting process, as proposed, assumes there are only two "owners" -the fee title holder and the applicant- However, there can be multiple ownership interests and easements agreements in play. We recommend the Department amend this section to require disclosure of all ownership interests in a property and provide notice to all owners.

Section 441.3(e)(7)(ii) requires applicants other than fee title holders to submit a writter. statement that indemnifies the Commonwealth against any actions by the fee title holder of the property as a result of granting the HOP to the applicant. We suggest the Department revise this subparagraph to protect the Department from any action that may be taken by the fee title holder and also by any ownership interests in the property.
(4).

Response: PennDOT acknowledges that there can be multiple ownership interests. However, requiring notice to all persons with an interest in the property, recorded or unrecorded, particularly those that would not be impacted by the permit or would not have an interest sufficient to provide standing to challenge the permit, would be unduly burdensome and time consuming for permit applicants. Moreover, the notice to fee owners addressed by this package address the core issue raised by Representative Miller in his complaint to the JCD. Notice to other interest holders was not part of the complaint nor has the Department been made aware that any lack of notice to other interest holders has created any issues or concerns.

Amending only section 441.3(e)(7)(ii) to require disclosure to all ownership interests in a property and provide notice to all owners would result in treating fee title holders differently than non-fee title holders; i.e., non-fee title holders would be required to notify all other owners, but a fee title holder would not be required to notify any other owners. The problem that the comment seeks to remedy by the suggested revision would still exist. Conversely, with the suggested revision, fee title holders would proceed without permission from non-fee title holders even though the non-fee title holder's access rights may be affected. The only way to solve this inequity would be to require all applicants to notify all other owners of the application for a highway access permit. This would drastically increase the cost for simple single-use driveways, as an applicant would not be able to verify that no other owners exist without assuming the cost of a title search. There can also be multiple mineral rights holders and utilities having easements to run lines that fee title holders would be required to notify pursuant to the suggested change. Tracking down and contacting the entities holding these interests would be costly and would be of little benefit because many of those interests would not be impacted by the proposed access of the fee holder.

24. **Comment:** Miscellaneous

- The Department should revise its response to RAF #29 regarding the timeline for delivery of the final-form regulation;

(4).

Response: The RAF has been revised accordingly.

Comment:

- The Department's website contains several HOP-related forms. It should provide an electronic link for these forms in its response to RAF #22b;

(4).

Response: The RAF has been revised accordingly.

Comment:

- The Department's response to RAF #12 includes a survey of several states' laws and policies regarding applicants and permittees. We ask the Department to reach out to other states to determine how other ownership interests are addressed and to

share how the implementation of this regulation compares to other states' handling of similar situations;

(4).

Response: In order to meet the deadlines intrinsic in the regulatory review process and ensure compliance with the Joint Committee on Documents order, PennDOT prepared answers to these comments and obtained approvals within the Department and the executive offices in less one week. While every effort was made to obtain the information sought by IRRC, the time constraints imposed on PennDOT did not allow for a more thorough survey of laws, regulations, policy, and practices of other states. PennDOT does, however, attach a chart showing the information it could gather during the allotted time.

PennDOT also reached out to the Access Management subcommittee of the Transportation Research Board and received the following email from a national transportation consultant:

> Currently I am working with several state DOTs on their access programs. They frequent[ly] seek comparisons on what are[sic] other states are doing. Recently I have looked at NC, VA, GA, LA, TN, IA, AR, CO (my home), MS, and KS. Like you, most prefer the property owner. But, property owners can be absentee, or otherwise difficult or impossible to reach. Gas stations often have 99 yr leases with total control but not ownership, some ownerships are equity funds, equally hard to reach, some estates have property managers with varying authority as to what they can do, and the signer might be an officer of the corporate owner.
>
> It's a bit irregular overall and some states are not sure about why they do what they do. My experience in legal proceedings and licensing law leads me to the conclusion that since an access permit is a license to encroach on public right of way, it is NOT a grant of a right, it is revocable, it is a licensing action by the state, the real issue is having a permittee that can fulfil[l] the obligations of the license granted. So in Colorado as an example, the DOT staff person must do enough investigation and document in the file that the applicant has the authority to apply and be the permittee. If not the fee owner, it's a judgement call. The owner is preferred, but the lessee is allowable if the owner is not available. The terms of the permit must be carefully selected and written. Your rules, Chapter 441, mention permittee obligations frequently. These obligations must to incorporated [sic] as permit terms.
>
> ***
>
> Another legal aspect would be the property owner suing the State with the claim that the state had no authority to issue the permit to the lessee and any loss that the owner incurs is a claim against the state. Colorado believes if they have sufficient information in the application record, they can defend their permitting of the lessee. All application records should be permanent so as to protect the state and document proper permitting procedures.

The issuance of a license includes liabilities, creates liabilities. If I recall, the PennDOT permit includes indemnification clauses. So the proposed permittee should not sign the permit if they cannot fulfill the indemnification terms of the permit.

States vary on licensing laws. So what might work in some states may not work in Pennsylvania. So to some extent you seeking information from other states may not be that helpful. A member of the PA office of the attorney general with extensive experience in the APA and licensing laws and case law would be a good resource for you.

***

Philip Demosthenes, Principal @ Philip B Demosthenes LLC
Independent transportation consultant and national expert specializing in access management programs, policies and corridor analysis for over 40 years.

Comment:

- We recommend that the Department delete the last paragraph beginning with "As a significant percentage (approximately 40 percent). . ." in its response to RAF #14 as it does not pertain to the question.

(4).

Response: The RAF has been revised accordingly.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC 2800 POST OAK BOULEVARD HOUSTON, TEXAS 77251-1396, Plaintiff, v. PERMANENT EASEMENT FOR 1.33 ACRES AND TEMPORARY EASEMENTS FOR 2.28 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1202476100000, 4160 MAIN STREET, CONESTOGA, PA 17516 LYNDA LIKE A/K/A LINDA LIKE 4160 MAIN STREET CONESTOGA, PA 17516 AND ALL UNKNOWN OWNERS, Defendants.	CIVIL ACTION – LAW Docket No. 5:17-CV-00720

A TRUE COPY CERTIFIED TO FROM THE RECORD
DATED: SEP - 8 2017
ATTEST: Steve Tomes
DEPUTY CLERK, UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ORDER

AND NOW, this 23rd day of August, 2017, upon consideration of Plaintiff's Omnibus Motion for Preliminary Injunction for Possession of Rights of Way by August 18, 2017 Pursuant to the Natural Gas Act and Federal Rules of Civil Procedure 71.1 and 65, and the accompanying documents, Defendant's opposition thereto, and Plaintiff's Reply, and after a hearing and oral argument being held, it is hereby **ORDERED** that the Motion is **GRANTED**. It is further **ORDERED** as follows:

(1) Transcontinental Gas Pipe Line Company, LLC ("Transco") has the substantive right to condemn the following easements and rights of way (collectively referred to as the "Rights of Way"):

a. A permanent right of way and easement of 1.33 acres, as described as "Area of Proposed CPLS R/W" in Exhibit A attached hereto, for the purpose of constructing, operating, maintaining, altering, repairing, changing but not increasing the size of, replacing and removing a pipeline and all related equipment and appurtenances thereto (including but not limited to meters, fittings, tie-overs, valves, cathodic protection equipment, and launchers and receivers) for the transportation of natural gas, or its byproducts, and other substances as approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017), together with a right of way and easement to construct, maintain, operate, repair, alter, replace, and remove cathodic protection equipment and the necessary appurtenances thereto, such as but not limited to poles, guy wires, anchors, rectifiers, power lines, cables, deep well anode and anode ground beds under, upon, and over the permanent access easement, and conducting all other activities as approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017); together with all rights and benefits necessary or convenient for the full enjoyment or use of the right of way and easement. Further, the landowner shall not build any permanent structures on said permanent right of way or any part thereof, will not change the grade of said permanent right of way, or any part thereof, will not plant trees on said permanent right of way, or any part thereof, or use said permanent right of way or any part thereof for a road, or use said permanent right of way or any part thereof in such a way as to interfere with Transco's immediate and unimpeded access to said permanent right of way, or otherwise interfere with Transco's lawful exercise of any of the rights herein granted without first having obtained Transco's approval in writing; and the landowner will not permit others to do any of said acts without first having obtained Transco's approval in writing. Transco shall have the right from time to time at no additional cost to landowners to cut and remove all trees including trees considered as a growing crop, all undergrowth and any other obstructions that may injure, endanger or interfere with the construction and use of said pipeline and all related equipment and appurtenances thereto; and

b. Temporary easements of 2.28 acres, as described as "Area of Proposed Temporary Work Space #1" and "Area of Proposed Temporary Work Space #2" in Exhibit A attached hereto, for use during the pipeline construction and restoration period only for the purpose of ingress, egress and regress and to enter upon, clear off and use for construction and all

other activities approved by the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017).

(2) Upon filing the bond required below, beginning August 18, 2017, Transco is granted access to, possession of and entry to the Rights of Way for all purposes allowed under the Order of the Federal Energy Regulatory Commission dated February 3, 2017, Docket No. CP15-138-000, 158 FERC ¶ 61,125 (2017);

(3) In the event of a violation of this Order by Defendants, such as interference with Transco's possession of the Rights of Way by Defendants or by third parties who are authorized by Defendants to be on the Property, the U. S. Marshal Service, or a law enforcement agency it designates, shall be authorized to investigate and to arrest, confine in prison and/or bring before the Court any persons found to be in violation of this Order and in contempt of this Order, pending his/her compliance with the Court's Order.

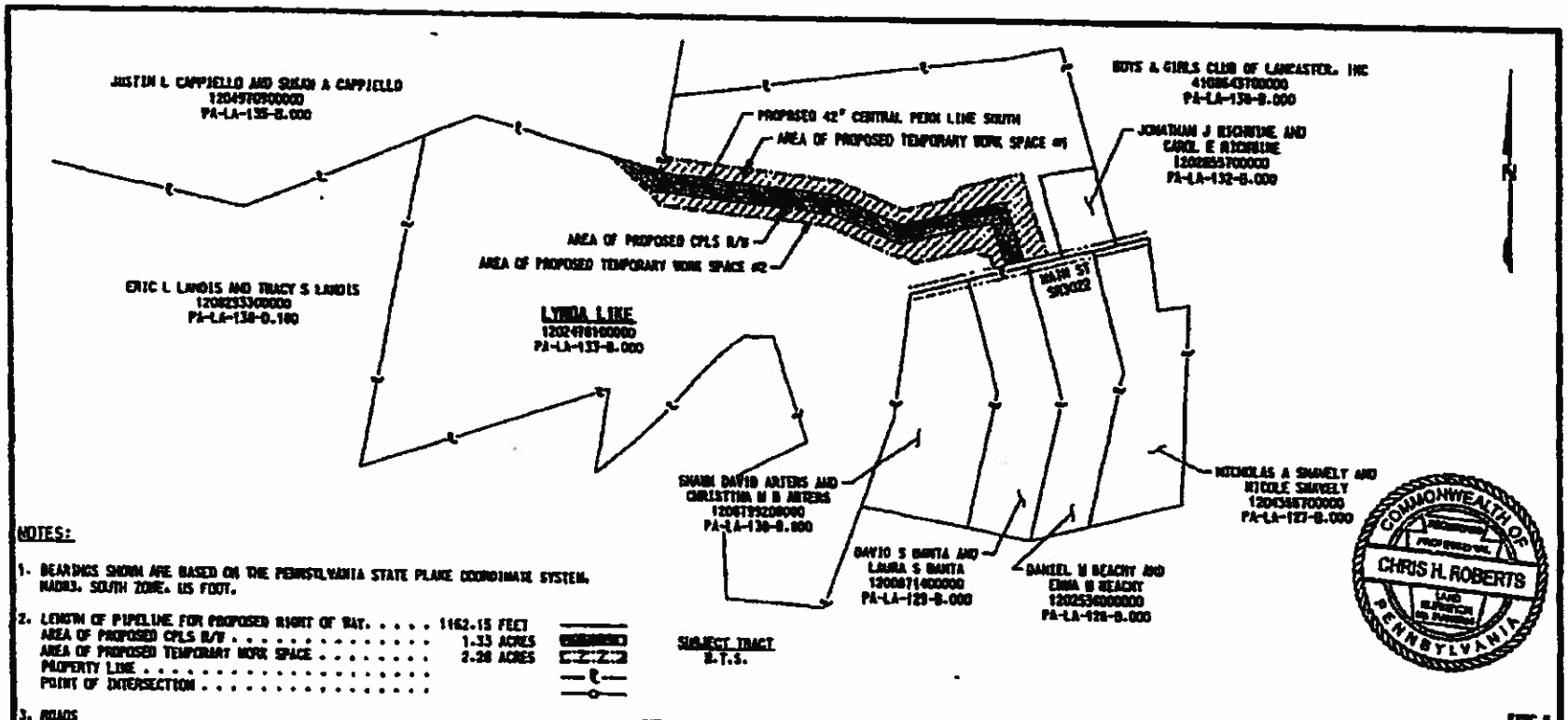
(4) Transco shall post a bond in the amount of $40,440.00 as security for the payment of just compensation to Defendants.

(5) Transco shall record this Order in the Office of the Recorder of Deeds for Lancaster County, Pennsylvania.

BY THE COURT

Jeffrey L. Schmehl, J.

EXHIBIT A



NOTES:

1. BEARINGS SHOWN ARE BASED ON THE PENNSYLVANIA STATE PLANE COORDINATE SYSTEM, NAD83, SOUTH ZONE, US FOOT.

2. LENGTH OF PIPELINE FOR PROPOSED RIGHT OF WAY . . . . . 1162.15 FEET
   AREA OF PROPOSED CPLS R/W . . . . . 1.33 ACRES
   AREA OF PROPOSED TEMPORARY WORK SPACE . . . . . 2.28 ACRES
   PROPERTY LINE . . . . . —℄—
   POINT OF INTERSECTION . . . . . —○—

3. ROADS

   WE HAVE NOT DETERMINED THE FEE OWNERSHIP OF THE ROADS SHOWN, AND FOR THE PURPOSES OF THIS EXHIBIT HAVE ASSUMED THAT ADJOINING LANDOWNERS RETAIN AN INTEREST IN THE PROPERTY SUBJECT TO THE RIGHT OF WAY OF ALL ROADS SHOWN OTHER THAN INTERSTATE HIGHWAYS.

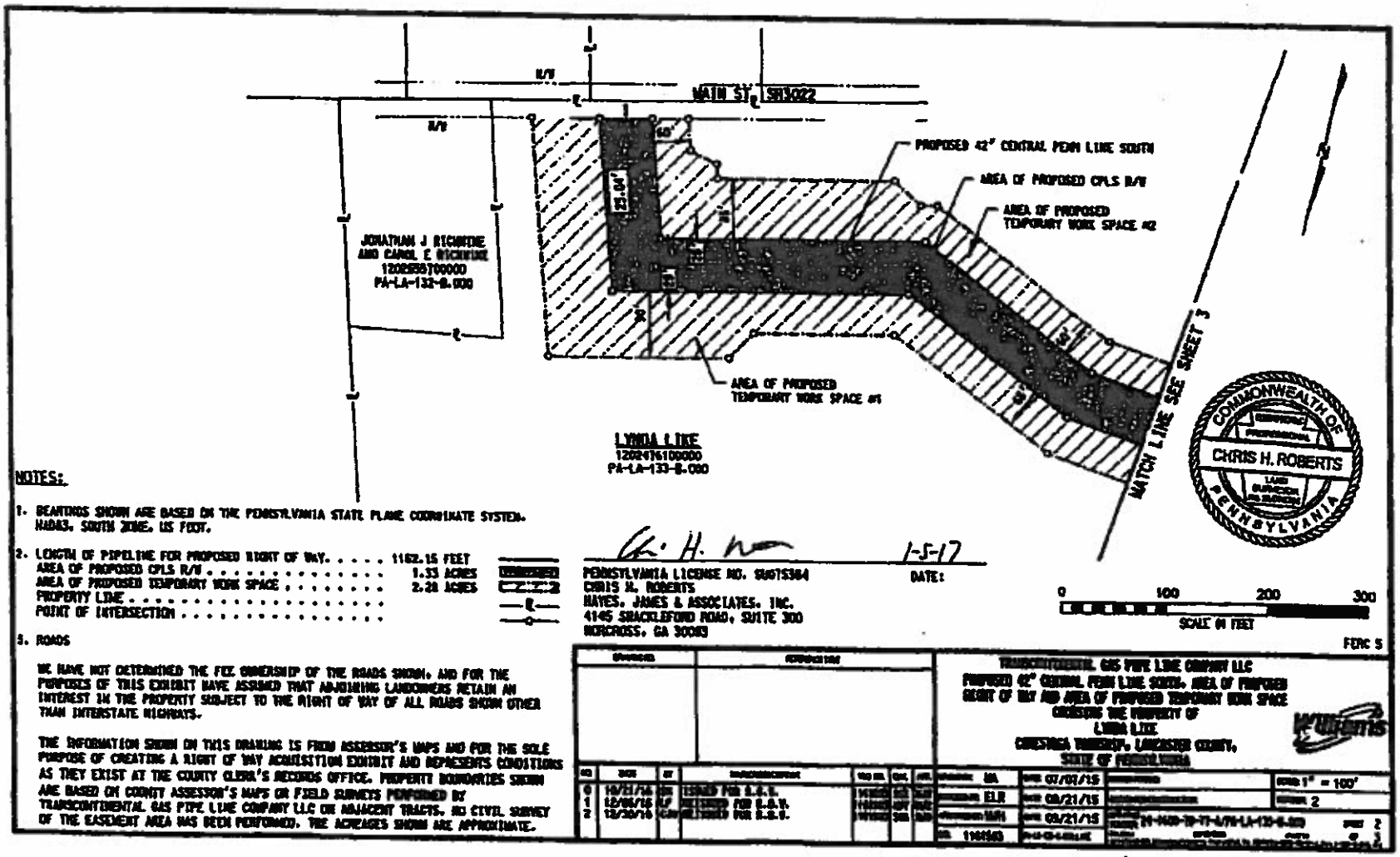
   THE INFORMATION SHOWN ON THIS DRAWING IS FROM ASSESSOR'S MAPS AND FOR THE SOLE PURPOSE OF CREATING A RIGHT OF WAY ACQUISITION EXHIBIT AND REPRESENTS CONDITIONS AS THEY EXIST AT THE COUNTY CLERK'S RECORDS OFFICE. PROPERTY BOUNDARIES SHOWN ARE BASED ON COUNTY ASSESSOR'S MAPS OR FIELD SURVEYS PERFORMED BY TRANSCONTINENTAL GAS PIPE LINE COMPANY LLC ON ADJACENT TRACTS. NO CIVIL SURVEY OF THE EASEMENT AREA HAS BEEN PERFORMED. THE ACREAGES SHOWN ARE APPROXIMATE.

NO.	DATE	BY	DESCRIPTION
0	10/21/15	CH	ISSUED FOR R.O.W.
1	12/04/15	LV	REVISED FOR R.O.W.
2	12/30/15	CH	REVISED FOR R.O.W.

TRANSCONTINENTAL GAS PIPE LINE COMPANY LLC
PROPOSED 42" CENTRAL PENN LINE SOUTH, AREA OF PROPOSED RIGHT OF WAY AND AREA OF PROPOSED TEMPORARY WORK SPACE CROSSING THE PROPERTY OF
LYNDA LIKE
CONESTOGA TOWNSHIP, LANCASTER COUNTY,
STATE OF PENNSYLVANIA

Williams

DRAWN: MA 07/01/15
CHECKED: ELR 09/21/15
APPROVED: MJB 09/21/15
SCALE: N.T.S.
DRAWING: 20-1000-30-T1-A/PA-LA-133-R.000
SHEET 1 OF 2
PERC 5



NOTES:

1. BEARINGS SHOWN ARE BASED ON THE PENNSYLVANIA STATE PLANE COORDINATE SYSTEM. NAD83, SOUTH ZONE, US FOOT.

2. LENGTH OF PIPELINE FOR PROPOSED RIGHT OF WAY . . . . . 1182.15 FEET
AREA OF PROPOSED CPLS R/W . . . . . 1.33 ACRES
AREA OF PROPOSED TEMPORARY WORK SPACE . . . . . 2.28 ACRES
PROPERTY LINE . . . . . —℄—
POINT OF INTERSECTION . . . . . —○—

3. ROADS

WE HAVE NOT DETERMINED THE FEE OWNERSHIP OF THE ROADS SHOWN, AND FOR THE PURPOSES OF THIS EXHIBIT HAVE ASSUMED THAT ADJOINING LANDOWNERS RETAIN AN INTEREST IN THE PROPERTY SUBJECT TO THE RIGHT OF WAY OF ALL ROADS SHOWN OTHER THAN INTERSTATE HIGHWAYS.

THE INFORMATION SHOWN ON THIS DRAWING IS FROM ASSESSOR'S MAPS AND FOR THE SOLE PURPOSE OF CREATING A RIGHT OF WAY ACQUISITION EXHIBIT AND REPRESENTS CONDITIONS AS THEY EXIST AT THE COUNTY CLERK'S RECORDS OFFICE. PROPERTY BOUNDARIES SHOWN ARE BASED ON COUNTY ASSESSOR'S MAPS OR FIELD SURVEYS PERFORMED BY TRANSCONTINENTAL GAS PIPE LINE COMPANY LLC OR ADJACENT TRACTS. NO CIVIL SURVEY OF THE EASEMENT AREA HAS BEEN PERFORMED. THE ACREAGES SHOWN ARE APPROXIMATE.

C. H. R. 1-5-17

PENNSYLVANIA LICENSE NO. SU075384
CHRIS H. ROBERTS
HAYES, JAMES & ASSOCIATES, INC.
4145 SHACKLEFORD ROAD, SUITE 300
NORCROSS, GA 30093

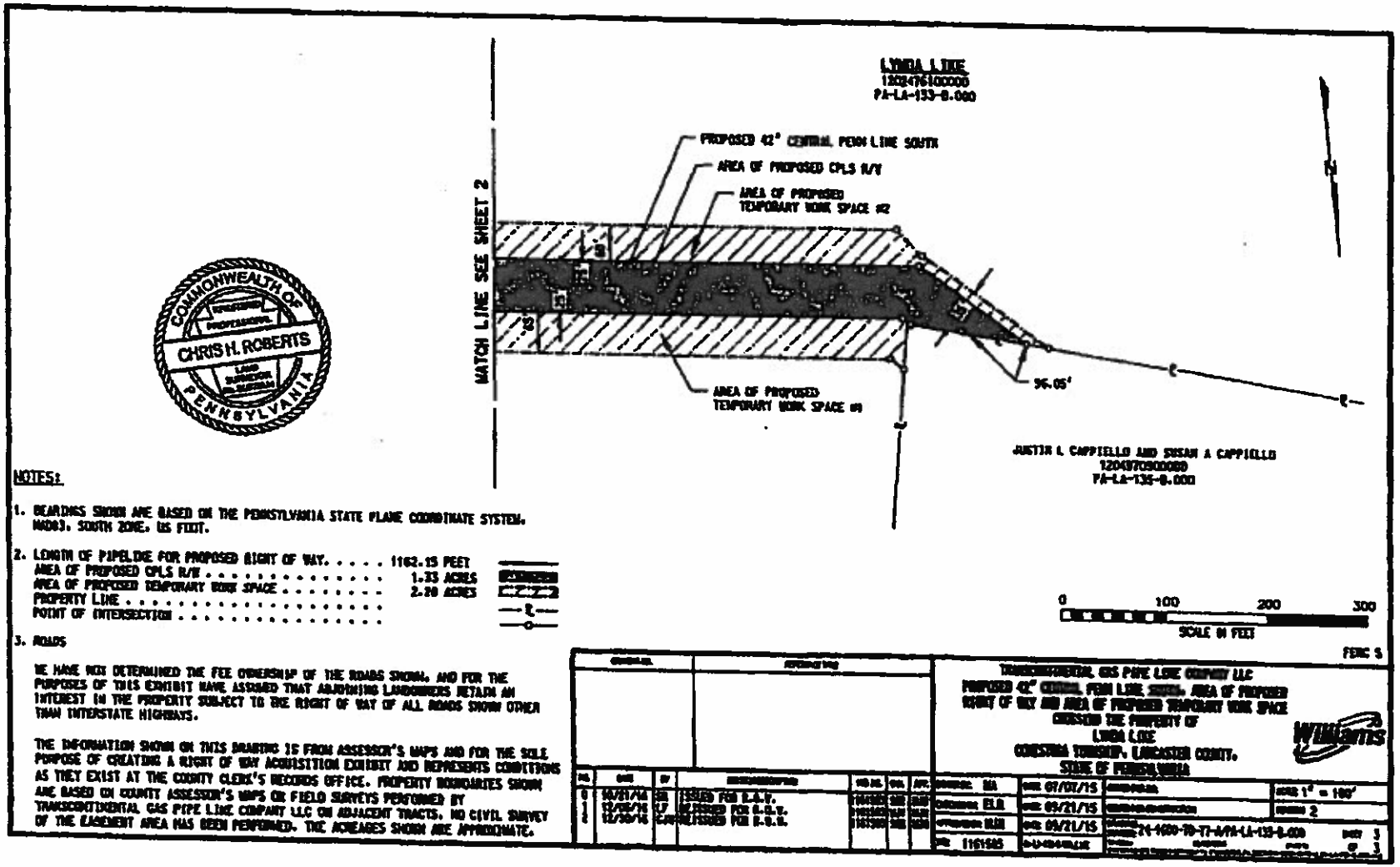
DATE:

NO	DATE	BY	DESCRIPTION
0	10/21/15		ISSUED FOR E.S.E.
1	12/08/15		ISSUED FOR E.S.E.
2	12/30/15		ISSUED FOR E.S.E.

TRANSCONTINENTAL GAS PIPE LINE COMPANY LLC
PROPOSED 42" CENTRAL PENN LINE SOUTH, AREA OF PROPOSED RIGHT OF WAY AND AREA OF PROPOSED TEMPORARY WORK SPACE CROSSING THE PROPERTY OF
LYNDA LIKE
CONESTOGA TOWNSHIP, LANCASTER COUNTY,
STATE OF PENNSYLVANIA

DRAWN BY: MA 07/01/15 SCALE: 1" = 100'
CHECKED BY: ELR 09/21/15 SHEET: 2
APPROVED BY: 09/21/15
DWG. NO. 1101163

FERC 5



COMMONWEALTH OF PENNSYLVANIA
PROFESSIONAL
CHRIS H. ROBERTS
LAND SURVEYOR

NOTES:

1. BEARINGS SHOWN ARE BASED ON THE PENNSYLVANIA STATE PLANE COORDINATE SYSTEM, NAD83, SOUTH ZONE, US FEET.

2. LENGTH OF PIPELINE FOR PROPOSED RIGHT OF WAY . . . . . 1162.15 FEET
AREA OF PROPOSED CPLS R/W . . . . . 1.33 ACRES
AREA OF PROPOSED TEMPORARY WORK SPACE . . . . . 2.20 ACRES
PROPERTY LINE . . . . . —℄—
POINT OF INTERSECTION . . . . . —○—

3. ROADS

WE HAVE NOT DETERMINED THE FEE OWNERSHIP OF THE ROADS SHOWN, AND FOR THE PURPOSES OF THIS EXHIBIT HAVE ASSUMED THAT ABUTTING LANDOWNERS RETAIN AN INTEREST IN THE PROPERTY SUBJECT TO THE RIGHT OF WAY OF ALL ROADS SHOWN OTHER THAN INTERSTATE HIGHWAYS.

THE INFORMATION SHOWN ON THIS DRAWING IS FROM ASSESSOR'S MAPS AND FOR THE SOLE PURPOSE OF CREATING A RIGHT OF WAY ACQUISITION EXHIBIT AND REPRESENTS CONDITIONS AS THEY EXIST AT THE COUNTY CLERK'S RECORDS OFFICE. PROPERTY BOUNDARIES SHOWN ARE BASED ON COUNTY ASSESSOR'S MAPS OR FIELD SURVEYS PERFORMED BY TRANSCONTINENTAL GAS PIPE LINE COMPANY LLC ON ADJACENT TRACTS. NO CIVIL SURVEY OF THE EASEMENT AREA HAS BEEN PERFORMED. THE ACREAGES SHOWN ARE APPROXIMATE.

NO.	DATE	BY	DESCRIPTION
0	10/01/14	SR	ISSUED FOR E.A.V.
1	12/08/14	LT	RE-ISSUED FOR E.O.S.
2	12/30/14	CAP	RE-ISSUED FOR E.O.S.

TRANSCONTINENTAL GAS PIPE LINE COMPANY LLC
PROPOSED 42" CENTRAL PENN LINE SOUTH, AREA OF PROPOSED RIGHT OF WAY AND AREA OF PROPOSED TEMPORARY WORK SPACE CROSSING THE PROPERTY OF
LYNDA LIKE
CONESTOGA TOWNSHIP, LANCASTER COUNTY,
STATE OF PENNSYLVANIA

WILLIAMS

DRAWN: BA	DATE: 07/07/15	SCALE: 1" = 100'
CHECKED: ELB	DATE: 09/21/15	REVISION: 2
APPROVED: ELB	DATE: 09/21/15	DRAWING: 24-1600-70-T7-M/H-LA-133-0.000
JOB: 1161585		SHEET 3 OF 3

FERC S

Lancaster County
Bonnie L. Bowman
Recorder of Deeds
150 N. Queen Street
Suite 315
Lancaster, PA 17603
Phone: 717-299-8238
Fax: 717-299-8393

INSTRUMENT # : 6355762
RECORDED DATE: 09/15/2017 03:34:54 PM

3900353-00234

LANCASTER COUNTY ROD

OFFICIAL RECORDING COVER PAGE Page 1 of 8

Document Type: MISC - NON MORTGAGE	**Transaction #:** 3767164 - 5 Doc(s)
Transaction Reference:	**Document Page Count:** 7
Document Reference:	**Operator Id:** lgordon

RETURN TO: (Email)
Carey Seyler
2578 Interstate Drive
STE 101
Harrisburg, PA 17110
8323341719

SUBMITTED BY:
Carey Seyler
2578 Interstate Drive
STE 101
Harrisburg, PA 17110

*** PROPERTY DATA:**
Parcel ID #:

Municipality:
School District:

*** ASSOCIATED DOCUMENT(S):**

FEES / TAXES:

RECORDING FEE: MISC - NON MORTGAGE	$13.00
CRC #6544	$2.00
RIF #6543	$3.00
WRIT TAX	$0.50
EXTRA PAGE FEE	$6.00
Total:	$24.50

INSTRUMENT # : 6355762
RECORDED DATE: 09/15/2017 03:34:54 PM

I hereby CERTIFY that this document is recorded in the Recorder of Deeds Office in Lancaster County, Pennsylvania.

Bonnie L. Bowman

Bonnie L. Bowman
Recorder of Deeds

PLEASE DO NOT DETACH

THIS PAGE IS NOW PART OF THIS LEGAL DOCUMENT

NOTE: If document data differs from cover sheet, document data always controls.
***COVER PAGE DOES NOT INCLUDE ALL DATA, PLEASE SEE INDEX AND DOCUMENT AFTER RECORDING FOR ADDITIONAL INFORMATION.**

Permit Regulation from other States

State	Type of Permit	Who Can Apply	Source	Practice Where Applicant is Not Fee Owner	Notice to Fee Owner or Others with Ownership Interests
West Virginia	Encroachment Permit	Except where the right of access has been limited by or pursuant to law, every owner or occupant of real property abutting upon any existing state highway has a right of reasonable means of ingress to and egress from such state highway.	WV Code § 17-4-47 Form MM-109 Permit	Counsel for WV indicates that the issue of ownership has not been before his office in the past. The permit staff indicated that some sort of documentation is required showing the right to access, but the type of documentation is not specified.	Not required.
New Jersey	Access Permit	"Applicant" means a private party or entity, municipality, county, or any public agency applying for an access permit. The applicant shall own the lot where the access is sought. "Own" is not defined.	N.J. Admin. Code § 16:47-1.1	Statewide permits manager has never encountered a situation where the issue of ownership or the applicant's right to a permit was disputed.	Not required.
Texas	Permit to Construct Access Driveway Facilities	Applications for permits shall be made by the "property owner" or their authorized representative, who shall represent all parties in interest.	43 Tex. Admin. Code § 1.11(C)	Per counsel, the definition of permittee is "real property owner." A party with an access easement is a real property owner and could be granted a permit over the underlying fee owner's objection.	Not required.

Permit Regulation from other States

Colorado	Access Permit	If the applicant is not the owner of the property, the application is to be signed by the property owner or their legally authorized representative (or other acceptable written evidence). The signature constitutes agreement with this application by all owners-of-interest unless stated in writing. If a permit is issued, the property owner, in most cases, will be listed as the permittee. Proof of ownership may be required. "Permittee" means any person or entity that owns a fee interest in the property served.	CCR § 601-1 CDOT Form 137, State Highway Access Permit Application	Per a regional permits manager, while the regulations define permittee as a fee owner, in practice, this is not always the case. If a fee owner does not concur in the application, permits have been issued based on the legal right to access of the non-fee holder – for instance, where a subsurface owner requires access to extract the resources, Colorado recognizes that right and issues the permit without the fee owner's consent and will issue a permit.	Evidence of concurrence or knowledge of the fee owner is required. There are no specific procedures or documents required. Some regions accept approval of local land use process as proof that affected land owners have knowledge.
Maryland	Access Permit	Owners, or their duly authorized representatives (developers, contractors, tenants, lessees, etc.), of land newly being developed commercially, industrially, or as a subdivision, all desiring access to a State highway can apply for a permit, however, this list is not to be construed as all-inclusive. Applications for residential accesses can be made by an individual or corporation desiring	COMAR 11.04.05.01 COMAR 11.04.06.01	A representative from the permit staff indicates that he has never encountered a situation where a fee owner did not agree to the permit being issued to a non-fee title holder. In that instance, the matter would likely be referred to counsel for review.	No requirement for notice in the law but counsel would review where there is a dispute.

Permit Regulation from other States

		to construct an entrance to serve a private residence. The application has a signature line for the property owner in addition to the applicant. The application does not define "property owner."			
Mississippi	Right of Way Encroachment Permit	There are no stated ownership requirements for permit applicants. "Applicant" is defined as the person or entity applying for a driveway permit.	Chapter 04018 MDOT Access Management Manual MND-001 Application	District 1 permit staff indicates that there are no formal regulations addressing ownership, but where an easement owner rather than a fee owner applies, he attaches the easement document to the permit.	Not required.
Minnesota	Access (Driveway) Permit	Permits are issued to the owner or occupant having a right of direct private access to property abutting a highway. "Owner" is not defined. The application should be submitted by the property owner. Applications may be submitted by an agent, tenant, contractor, or developer only if they include written authorization from the property owner. The application includes a field for the property owner, in addition to	Minn. Stat. § 160.18 MnDOT Access Management Manual 4.1.1 Form 1721	Non-fee title holders are permitted to apply if they are occupants having a right of direct private access to the property.	Not required.

Permit Regulation from other States

		the applicant, but does not require the property owner's signature.			
North Carolina	Driveway Access Permit	The law does not require an applicant to have a specific type of ownership, however, the application requires the signature of the owner. "Owner" is not defined.	Policy on Street and Driveway Access, pursuant to G.S. 136-18(5) and 136-93	A representative from the permit staff indicates that he has never encountered a situation where a fee owner did not agree to the permit being issued to a non-fee title holder, but if it did arise, NCDOT would work it out.	No notice provisions, but the owner would have to be notified in order to secure a signature on the application.
Delaware	Entrance Permit	Applications for entrance permits include a signature line for the property owner. "Property owner" is not defined.	Standards and Regulations for Access to State Highways 1-1	The Permit Engineer indicates that permits would be issued to a non-fee title holder without the signature of the fee title holder where there is a valid recorded cross access easement.	No notice provisions, but the owner would have to be notified in order to secure a signature on the application.
Florida	Connection Permit	An applicant may be the property owner or the owner's authorized agent. The Department will also accept a connection permit application by a person holding an unrecorded interest in the property, such as a lease, that includes the right of access to the property, upon written proof of authorization from the property owner to submit the application executed before a notary public.	14-96.002, F.A.C. Form 850-040-15	Applicant must have a recorded interest that includes the right of access.	Not required.

Permit Regulation from other States

		"Property owner" means the person holding the recorded title to property abutting the State Highway System, and other persons holding a recorded interest that includes the right of access. The application form includes a checkbox to indicate whether the applicant is an owner, lessee, or has a contract to purchase.			

Annex A

TITLE 67. TRANSPORTATION

PART I. DEPARTMENT OF TRANSPORTATION

Subpart B. NONVEHICLE CODE PROVISIONS

ARTICLE III. HIGHWAYS

CHAPTER 441. ACCESS TO AND OCCUPANCY OF HIGHWAYS BY DRIVEWAYS AND LOCAL ROADS

§ 441.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Minimum use driveway—A residential or other driveway which is used or expected to be used by not more than 25 vehicles per day.

[*Own*—To hold title to land or a building or be a tenant in a lease that will not terminate within 15 years of the permit issuance date.]

***Owner*—A person holding:**

(i) fee title to property,

(ii) an estate or other legal interest in property, such as an easement, a lease, a license or subsurface rights, or

(iii) an equitable interest in property under a sales agreement or an option to purchase;

provided that the estate or other legal or equitable interest in property includes the use requested in the permit.

Pavement edge—The edge of the main traveled portion of any highway, exclusive of shoulder.

Permanent curbing—Plain or reinforced cement concrete curb which meets Department standards.

Permit—A highway occupancy permit (Form M-945P) issued by a district office pursuant to this chapter.

Person—**[Any natural person, firm, copartnership, association, corporation, or political subdivision.] An individual, business entity, association, political subdivision, authority, Federal or Commonwealth agency, or other entity recognized by law.**

* * * * *

§ 441.3. Permit application procedure.

(a) *General rule.* No driveway, local road or drainage facility or structure shall be constructed or altered within State highway right-of-way and no drainage facility of the Department may be altered or connected onto without first obtaining a permit from the Department. A permit may not be required for maintenance.

(b) **[*Who may execute applications.*] *Who may apply for a permit.*** Permit applications **[shall] must** be submitted in the name of **[and executed by]** the owner of the property. **If the applicant does not hold fee title to the property, the applicant shall notify the fee title holder that an application has been submitted.**

(c) *Where to submit application.* Permit applications shall be submitted to either the district or county office having jurisdiction over the county in which the proposed work will be performed.

(d) *When to submit applications.* Permit applications shall be submitted prior to the construction of any building which the proposed driveway will serve to assure that the driveway can be constructed in accordance with this chapter.

(e) *Application procedure and required information.* Permit applications:

(1) Shall be submitted in person or by mail on a properly completed Department Form M-945A.

(2) Shall be signed by the applicant.

(3) Shall include five sets of plans, of a quality sufficient for microfilming, detailing the location and pertinent dimensions of both the proposed installation and related highway features.

(4) Shall be accompanied by a check or money order, payable to the Department, in the appropriate amount, as set forth in § 441.4 (relating to permit fees).

(5) Shall be submitted to the Department at least 30 days prior to the anticipated start of work.

(6) Shall contain proof **[of ownership]** **that the applicant is an owner**. **The proof must be in the form of a copy of the valid legal document or court order verifying the applicant's legal estate or interest in the property.**

(7) Shall, when submitted by an applicant other than a fee title holder, contain:

(i) Proof of one of the following:

(A) The fee title holder consents to the application.

(B) The applicant provided written notice of the submission of the application to the fee title holder apprising the fee title holder of the administrative rights relative to the permit application under 1 Pa. Code §§ 35.23, 35.24 and 35.27—35.32. The Department will not grant or deny the permit application until 30 days after receipt of the written notice by the fee title holder.

(ii) A signed written statement, whereby the applicant agrees to indemnify and defend the Commonwealth (if requested) from all suits, damages, claims and demands of any type whatsoever by the fee title holder of the property because of granting the permit to the applicant, such as a failure of the permittee or other person to comply with the permit or any other statutes, ordinances or regulations in connection with the permit.

(iii) Proof that the applicant executed and recorded in the Office of the Recorder of Deeds in the appropriate county or counties, a covenant running with the land providing that all subsequent purchasers, heirs, assigns or transferees of the property take the property subject to the indemnification in subparagraph (ii), unless released by the Department.

(f) *Traffic control plan.* Submission of the traffic control plan shall be as follows:

* * * * *

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

May 24, 2018

David Sumner, Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, Pennsylvania 17101

Re: Final Rulemaking, Regulation # 18-479
67 Pa. Code, Chapter 441
Access to and Occupancy of Highways by Driveways and Local Roads

Dear Mr. Sumner:

Enclosed please find the Face Sheet, Preamble Annex A, Regulatory Analysis Form, and Comment and Response Document for amendments to Chapter 441 of the Department of Transportation's (Department) regulations which the Department intends to adopt in accordance with the provisions of Section 5 of the Regulatory Review Act, Act of June 25, 1982, P.L. 633, *as amended*.

Copies of these materials were also delivered today to the majority and minority chairpersons of the Pennsylvania House and Senate Transportation Committees.

The Department will provide the Independent Regulatory Review Commission with any assistance required to facilitate a thorough review of this regulation. Thank you for your attention.

Very truly yours,

Jeffrey M. Spotts,
Regulatory Counsel

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE REGULATORY REVIEW ACT

I.D. NUMBER:	18-479
SUBJECT:	Access to and Occupancy of Highways by Driveways and Local Roads
AGENCY:	DEPARTMENT OF TRANSPORTATION

TYPE OF REGULATION

Proposed Regulation

X Final Regulation

Final Regulation with Notice of Proposed Rulemaking Omitted

120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation
a. With Revisions b. Without Revisions

RECEIVED
IRRC
2018 MAY 24 P 2:23

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
		HOUSE COMMITTEE ON TRANSPORTATION
5/24/18	Nancy L Cole	MAJORITY CHAIR **HON. JOHN TAYLOR**
5-24-18		MINORITY CHAIR **HON. WILLIAM F. KELLER**
		SENATE COMMITTEE ON TRANSPORTATION
5-24-18	C. Boyer	MAJORITY CHAIR **HON. JOHN C. RAFFERTY, JR.**
5/24/18		MINORITY CHAIR **HON. JOHN P. SABATINA, JR.**
5/24/18		*INDEPENDENT REGULATORY REVIEW COMMISSION*
		~~*ATTORNEY GENERAL* (for Final Omitted only)~~
		LEGISLATIVE REFERENCE BUREAU (for Proposed only)

May 24, 2018