

<h1 style="margin: 0;">Regulatory Analysis Form</h1> <p style="margin: 0;">(Completed by Promulgating Agency)</p> <p style="margin: 0;">(All Comments submitted on this regulation will appear on IRRC's website)</p>		<p>INDEPENDENT REGULATORY REVIEW COMMISSION</p>	
<p>(1) Agency Transportation</p>		<p style="writing-mode: vertical-rl; transform: rotate(180deg);">RECEIVED IRRC 2018 MAR - 8 P 2:00</p>	
<p>(2) Agency Number: Identification Number: 18-479</p>			
<p>(3) PA Code Cite: 67 Pa. Code, Chapter 441</p>			
<p>(4) Short Title: Access to and Occupancy of Highways by Driveways and Local Roads</p>			
<p>(5) Agency Contacts (List Telephone Number and Email Address):</p> <p>Primary Contact:</p> <p>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</p> <p>Secondary Contact:</p> <p>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</p>			
<p>(6) Type of Rulemaking (check applicable box):</p> <p><input checked="" type="checkbox"/> Proposed Regulation</p> <p><input type="checkbox"/> Final Regulation</p> <p><input type="checkbox"/> Final Omitted Regulation</p>		<p><input type="checkbox"/> Emergency Certification Regulation;</p> <p><input type="checkbox"/> Certification by the Governor</p> <p><input type="checkbox"/> Certification by the Attorney General</p>	
<p>(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)</p> <p>Chapter 441 exercises the Pennsylvania Department of Transportation's (Department) statutory authority to promulgate a regulation controlling the location, design, construction, and maintenance of:</p>			

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 proposed amendments clarify 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 June 9, 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 proposed amendment 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.

(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 proposed regulatory amendments 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 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.

(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.

As a significant percentage (approximately 40 percent) of HOPs are applied for and issued to non-fee title holders of property, the Department believes that the proposed regulation will have no impact on the regulated community as the regulation formally clarifies the regulatory definition section in line with current practice.

(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.

(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. 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. Lastly, social impacts attributable to this regulation are remote and not easily ascertainable.

(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.

(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 Department's 3,000 annual HOP applications are applied for and issued to non-fee title holders of property. As such, the proposed 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 are once more established requirements under Pub. 282; thus the regulated community is already incurring these costs to comply with established practice.

(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 proposed 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.

(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 proposed 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.

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

(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 proposed amendments 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 in detail 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: 5/17/2018
- C. The expected date of delivery of the final-form regulation: 4/18/2018
- D. The expected effective date of the final-form regulation: 6/9/2018
- E. The expected date by which compliance with the final-form regulation will be required: 6/9/2018
- 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.

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FOR FILING DOCUMENTS
WITH THE
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(Pursuant to Commonwealth Documents Law)

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

Angela M. Elliott
By: _____
(Deputy Attorney General)

3-6-18
Date of Approval

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 1/19/2018

BY *[Signature]*
Secretary of Transportation

Check if applicable
Copy not approved. Objections attached.

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

BY *[Signature]*

FEB 14 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 PROPOSED 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 Proposed 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), proposes to amend 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 These Amendments to the Regulations

The purpose of these amendments 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 Amendments

Significant amendments to the chapter include the following:

The proposed 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).

Persons and Entities Affected

These regulations affect all applicants for highway occupancy permits to access state highways who propose to create an access point to a State highway or to change the design, operation or locations 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 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 Administrative Code.

Fiscal Impact

These regulations should not increase costs for the Commonwealth or local governments. No 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, the Act of June 25, 1982 (P.L. 633, No. 181), *as amended*, 71 P.S. § 745.5(a), the agency submitted a copy of these proposed regulations on March 8, 2018 to the Independent Regulatory Review Commission and to the Chairpersons of the House and Senate Transportation Committees. In addition to submitting the regulations, the agency has provided the Commission and the Committees with a copy of a detailed Regulatory Analysis Form. A copy of this material is available to the public upon request.

Under Section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed regulations within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria that have not been met. The Act specifies detailed procedures for review, prior to final publication of the regulation, by the Department, the General Assembly and the Governor of comments recommendation, or objections.

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.

Public Comments

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed amendments to 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, within 30 days of publication of this notice in the *Pennsylvania Bulletin*.

Contact Person

The contact person for this regulation is Richard Roman, P.E., Director, Bureau of Maintenance and Operations, Commonwealth Keystone Building, 400 North Street, Harrisburg, PA 17108-2047; Telephone number (717) 787-6899.

Leslie S. Richards

Secretary of Transportation

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:

Acceleration lane—The portion of roadway adjoining the traveled way constructed for the purpose of enabling a vehicle entering a roadway to increase its speed to a rate at which it can safely merge with traffic.

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[*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:

- (1) fee title to property,
- (2) an estate or other legal interest in property, such as an easement, a lease, a license, or subsurface rights, or
- (3) 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.

* * * * *

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.

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§ 441.3. Permit application procedure.

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(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. If the applicant does not hold fee title to the property, the applicant must notify the fee title holder that an application has been submitted.

* * * * *

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

* * * * *

(6) Shall contain proof [of ownership] that the applicant is an owner. 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.

(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 Sections 35.23-35.32 (relating to protests and intervention). The Department may 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 set forth in subparagraph (ii), unless released by the Department.

