

# Comments of the Independent Regulatory Review Commission



## Department of Transportation Regulation #18-479 (IRRC #3200)

### Access to and Occupancy of Highways by Driveways and Local Roads

May 16, 2018

We submit for your consideration the following comments on the proposed rulemaking published in the March 17, 2018 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Transportation (Department) to respond to all comments received from us or any other source.

- 1. 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 (IRRC) 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.

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, #15, #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.
- 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.
- 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.
- 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?
- 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.

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.

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.

## *Legislative Comments*

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 fee 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 rights. 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 asserts 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.

## **2. Economic or fiscal impacts of the regulation; 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.

### 3. 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. 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 1 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.

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 written 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.

## **5. Miscellaneous**

- The Department should revise its response to RAF #29 regarding the timeline for delivery of the final-form regulation;
- The Department’s website contains several HOP-related forms. It should provide an electronic link for these forms in its response to RAF #22b;
- 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; and
- 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.