

Date: May 20, 2004

464-04-02

Subject: 67 Pa. Code, Chapter 441
Who can be the applicant for a driveway permit

To: All District Executives

From: Gary L. Hoffman, P. E. /s/
Deputy Secretary for Highway Administration

Background

The following statewide policy is being implemented based on a legal review I requested as a result of recent questions on the above subject. A broader interpretation of who can apply for driveway permits is being implemented based on current circumstances, as noted below.

The highway occupancy regulations provide: "Permit applications shall be submitted in the name of and executed by the owner of the property." 67 Pa. Code §441.3(b). The regulations further provide: "Permits will be issued only to the owners of the property. Permits will not be issued to contractors of the property owner nor to any person other than the owner of the property." 67 Pa. Code §441.5(b). The term own is defined as: "To hold title to land or a building or a tenant in a lease that will not terminate within 15 years of the permit issuance date." 67 Pa. Code §441.1.

Department Publication 282 (available to the public) until recently indicated that the applicant for a driveway permit "must be the property owner, have an equitable interest (e.g., buyer under an agreement of sale), or have a long term lease (15 years or more) or be a person who has mineral rights." Publication 282, Highway Occupancy Permit Handbook, dated September, 1993, p. 4. On October 24, 2000, the Office of Chief Counsel rendered an opinion indicating that the term "owners" should be limited to those holding record or legal title (fee simple owners) and 15-year tenants. The recently revised and republished Publication 282 (now called the Highway Occupancy Permit Guidelines) and the Highway Occupancy Permit (HOP) Manual (Publication 170), which is for internal Department use, both indicate that the applicant for a HOP must be the owner of the property as defined in Section 441.1. This language was used in anticipation of the proposed revisions to Chapter 441.

Proposed Revisions to Chapter 441

Proposed revisions to Chapter 441 will soon be forwarded for review and promulgation. The changes will define owner to be: "A person who holds fee title to land or a person who holds an estate or other legal interest in property, such as an easement, a lease, a license, subsurface rights, or an equitable interest under a sales agreement or option to purchase." The applicant will need to include a copy of the deed and deed book reference showing ownership, or other verification of an estate or interest in the property acceptable to the Department. If it does

not have a fee interest or a leasehold interest, the applicant will be required to demonstrate that the holder of the fee interest and lessee, if any, does not dispute the applicant's right to apply for a permit at the location, or will be required to indemnify the Department against liability to the holder of the fee interest and lessee, if any.

Pending implementation of the revised regulations, a broader interpretation of owner is appropriate. This would require a case by case analysis of the documentation of ownership presented by an applicant. Three different possibilities and procedures could apply:

1. If it is a fee simple owner or a 15-year tenant, the applicant is an owner that can be issued a permit. This determination can be made by the District Permit staffs.
2. If it is neither a fee simple owner nor a 15-year tenant, the applicant can be recognized as an owner without legal review if they do either of the following:
 - a. The applicant secures the signature on the application of the holder of the fee interest and lessee, if any, of the property; or
 - b. The applicant submits a release executed by the holder of the fee interest and lessee, if any, of the property, in favor of the Department and in a form acceptable to the Department. Interim forms of releases (use M-950 RFO release for fee owners and use M-950 RT release for tenants) are posted on the "P" Drive under "permits shared" in the HOP Forms Folder. The releases should be recorded with the HOP permit.
3. If the applicant is neither a fee simple owner nor a 15-year tenant and is unable to produce either of the options set forth in 2a and 2b above, the District should submit a package to the Office of Chief Counsel that includes the following items:
 - a. A copy of the legal document or other verification from the applicant of an estate or interest in the property, which will be reviewed by the Office of Chief Counsel to determine whether the applicant holds a legitimate estate or other legal interest in the property;
 - b. A statement from the applicant or their attorney setting forth in detail what steps were taken to obtain releases from the fee title owner and lessee, if any, which information will be reviewed by the Office of Chief Counsel to determine whether a release could not be reasonably obtained;
 - c. Proof from the applicant that written notice was given to the fee title holder and lessee, if any, of the pendency of the application and of the right to appeal (which will be further identified under proposed subsection 441.3(u)); and
 - d. A written statement from the District that they have confirmed that the driveway will be located within the confines of the area to which the applicant claims an estate or other legal interest in property.

If alternative three is implemented, issuance of a permit will be conditioned upon the applicant executing an indemnification agreement in favor of the Department and in a form acceptable to the Department. The form of that indemnification will be provided when the Office of Chief Counsel notifies the District that the applicant should be recognized as an owner. At its discretion, the District may also require the applicant to provide additional security in a form and amount acceptable to the Department.

These interim procedures will expire upon the adoption and formal implementation of proposed revisions to Chapter 441.

If you have any questions, please contact either William Cressler (717-787-3128), Thomas Haist (717-787-3128), or Walter Knerr (717-783-6473).

460/WLK/jb (717-783-6473)

cc: Bureau Directors, Highway Administration
Bureau of Maintenance and Operations Division Chiefs
William Cressler, Office of Chief Counsel
Thomas Haist, Office of Chief Counsel
Walter Knerr, Keystone Bldg-6, BOMO
District Permit Managers
Eric Madden, Policy Director
Forms Management, Office Services
Penny Frey, Sales Store