

**DATE:** June 12, 2012

**SUBJECT:** SOL on Access Approval Procedures – Impacts to Access of Neighboring Owners; and the Forms of Indemnification

**TO:** District Executives

**FROM:** Charles C. Goodhart, Director /s/ *Charles C. Goodhart*  
Bureau of Maintenance and Operations

Access release procedures and the forms of indemnification used in the Department's Highway Occupancy Permit (HOP) program for driveways and local roads are being updated as part of a general review of the program. This Strike-off Letter (SOL) is intended to implement procedures to secure an approval rather than a release to address properties whose access rights may be impacted by an HOP project. The procedures will facilitate Department reviews and provide guidance on obtaining approval from impacted property owners within the limits of work on HOP projects. For cases where approvals due to impacts to access cannot be obtained, the form of indemnification (M-950 IA) and corresponding policy are being modified to facilitate the execution of indemnification by HOP applicants. Additionally, the other two indemnification forms (M-950 ID and M-950 IDW) are being revised consistent with the revisions to the M-950 IA. This SOL has been assessed as "cost-decreasing" and "time-decreasing."

Form M-950 R1, Approval Procedure Worksheet and Letter, is replacing Form M-950 R, Agreement of Release. The Department is also adding the option for an applicant to obtain a property owner's signature on the HOP plan signifying approval in place of the approval letter.

For indemnification, there are three Department forms that are being revised. They are M-950 IA (Access), M-950 ID (Drainage), and M-950 IDW (Design Waiver). Revisions include removal of the "personal guarantee" as a prerequisite to obtaining indemnification, and a simplification of insurance requirements. The M-950 X (Certificate of Insurance) form will no longer be utilized as part of the driveway indemnification process.

The changes are effective immediately and the attached updated forms shall be utilized if the old forms have not been executed as part of a pending application. The following sheets are to be used to update the existing publications. Please place in the publications and destroy SOLs 470-09-02, Access Release Procedures and 470-09-07, SOL on the Form of Indemnification:

- Pub. 170, HOP Manual, pp 2, 6, 66A through 66H, 70, 70A, 236 through 237A, and 242.
- Pub. 282, HOP Guidelines, pp 2, 5, 50A through 50H, 54, 54A, 172 through 173A, 178 and 185.

Should you have any questions, please contact Glenn C. Rowe, P.E., Chief, Traffic Engineering and Permits Section, at 717-783-6479.

Attachments

4700/RCB/hmq

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#### ACCESS APPROVAL PROCEDURES – IMPACTS TO ACCESS OF NEIGHBORING OWNERS

##### Background

There are two specific regulations which require the Department to recognize the access rights of neighboring owners when reviewing an application:

1. If an auxiliary lane must be located in front of property of another person the applicant must secure the approval of the other person or indemnify the Commonwealth against any action the other person may bring against the Commonwealth. 67 Pa. Code §441.8(j)(5). An auxiliary lane is defined as either acceleration or deceleration lanes, or left turn stand by lanes, including center left turn lanes. 67 Pa. Code §441.8(j). Transition areas are not considered an auxiliary lane for purposes of this regulation; that is, approval or indemnification is required under this regulation only where any portion of the full width of the lane is located in front of the other person's property.
2. A permittee is responsible to pay all fees, costs and expenses incident to or arising from the permit work, including the cost of related highway improvements which increased traffic necessitates. 67 Pa. Code §441.6(4)(i). The Commonwealth Court has determined that this regulation allows the Department to require an applicant to construct improvements to preserve the access rights of those owners impacted by permit work. *Popple v. Department of Transportation*, 575 A.2d 973 (Pa. Cmwlth. 1990). Examples of such a restriction requiring correction would include where installation of a median barrier, new signalization or the taper at the end or beginning of an auxiliary lane limits turning movements from a pre-existing driveway.

These regulations and the constitutional right of access held by property owners require the Department, when reviewing an application, to balance the rights of an applicant and those of property owners whose access will be impacted by permit work. The procedures set forth below, which may require an engineering study of alternative access options or an appraisal or loss assessment of impacts on the value of affected property, provide that balance. The Department may not automatically accept indemnification when the access rights of another are implicated.

The access rights of landowners abutting public highways are two fold: a right to ingress and egress on and off the highway and a reasonable right to connect to the public road system. The Department is liable for damages if it unreasonably interferes with these property rights. Liability in condemnation is more readily recognized for direct impacts to the ability to get on and off the highway than indirect impacts to the landowner's connection to the road system. That is, circuity of travel, in some cases, may be determined to be unreasonable.

The situations that fall within the procedure are categorized as follows:

1. Existing driveways (whether they have a permit or not) that are impacted by permit work, but need not be reconstructed or have turning movements restricted. For example, an auxiliary lane will be located at the driveway or there is an impact other than reconstruction or a turning movement restriction due to permit work not involving an auxiliary lane.
2. An auxiliary lane will be located along property frontage at which there is no existing driveway; and
3. Existing driveways (whether they have a permit or not) that must be reconstructed or have turning movements restricted due to permit work. A reconstruction is where the driveway must be physically reconfigured, modified, relocated or removed. A turning movement restriction is where there is a loss of turning movement due to permit work.

The applicant in the first two situations can address the neighboring owner's access by obtaining either an approval letter, or a signature on the HOP plan signifying approval. In the third category, however, the applicant will first be required to ask the impacted landowner to obtain a permit for the reconstructed/restricted driveway. Except for this difference the procedure applicable to the three situations is the same.

These procedures do not apply when additional land is required, either permanently or temporarily, from the neighboring landowner. The rights of the neighboring owner are dealt with in the acquisition process in those situations. Nor do the procedures apply to frontage without an existing driveway unless an auxiliary lane is being located along the frontage. In this situation the neighboring landowner has not yet exercised their right of access; therefore, only the very specific auxiliary lane regulation is applicable.

### **Approval Procedures**

1. Identify impacted properties.

The applicant must identify in its initial submission of the HOP plans all properties within the limits of the permit work that may be impacted using Form M 950R1, a worksheet for identifying impacted properties. This will include all properties along which an auxiliary lane would be located as well as those properties whose existing driveways would be: (1) reconfigured, modified, relocated or removed, or (2) operationally affected by the permitted work (e.g., loss of turning movement, limited to right in right out, median limitations, traffic signal proximity limitations, etc.).

2. Department review of impacted properties.

The District, upon receipt of the HOP plans and Form M-950 R1, must review and approve the initial determination of the applicant as to impacted properties. This may result in the addition or deletion of properties to be considered.

3. Obtain approval letters or applications for HOPs; document contacts.

The applicant must attempt to obtain the required approvals or have the property owner submit an HOP application (M-945A or M-950A), as appropriate, from the affected property owner(s). If an affected property owner refuses to apply for a permit or supplement if there is an existing permit for the driveway, the applicant must seek to obtain an approval letter or plan signature from the property owner. In all cases, written and personal contacts with affected property owner(s) must be documented if subsequently needed to justify the approval of action other than obtaining a new application or approval. Alternatives proposed by the affected property owner(s) should also be documented.

4. Provide engineering study of alternatives and contact information if necessary.

If an approval (letter, plan signature, or HOP application submission as applicable) cannot be obtained from an affected property owner, the applicant must explore remedies to mitigate the adverse impact on the property through the design process at its own expense. This may lead to reasonable mitigation alternatives or a conclusion that such measures are unreasonable from a design or economic standpoint.

The engineering study of alternatives (or mitigation plan) is intended to assist the Department in determining the reasonableness of the applicant's attempt to provide an engineering solution to the access impact on the third party. It must contain sufficient detail to document the impact of the permit work on the property and identify possible design alternatives or other mitigation for the impact. Alternatives proposed by the affected property owner must be considered. One of three conclusions must ultimately be recommended:

- a. The design has been modified such that there is no longer any impact on the initially affected property;
- b. The design has been modified through reasonable and prudent engineering alternatives to mitigate but not eliminate the impacts on the property; or
- c. Justification is provided that no mitigation is feasible from an engineering or economic standpoint.

The study should include or have attached to it documentation of the contacts with affected property owners. The study should be a standalone document sealed by an engineer.

5. Department review of engineering study and contact documentation.

The Department must review the engineering study and contact documentation to determine whether the recommendations are acceptable. The reasonableness and availability of an engineering solution must be evaluated on a case by case basis.

a. No impact due to design changes.

If the design has been altered to eliminate any impact on the initially affected property the Department must determine if the new design is acceptable. If so, the applicant should be requested to inform the property owner of the design change. No further action must be taken by the applicant in this situation.

b. Mitigation alternatives proposed.

Proposed mitigation alternatives must be both reasonable and constructible. The intent is to ensure the affected property will ultimately be provided safe and reasonable access. If accepted as such by the Department the applicant must share the design changes with the affected property owners in a new attempt to obtain approval. An example that may be considered reasonable and constructible but will not completely eliminate the impact of the property would be if the applicant proposes a median along a property frontage that restricts an existing full-access driveway to a right-in/right-out only driveway, the applicant may propose a secondary full-access driveway onto a side street that abuts the impacted property.

c. No mitigation feasible; loss assessment.

A conclusion that no mitigation is feasible must be adequately justified. To accept such a recommendation the Department must agree that the documentation and evidence submitted by the applicant proves there is no reasonable and prudent engineering design alternative available to reduce or eliminate the adverse impact to the affected property. If the recommendation is accepted the Department must then determine whether the impact may result in an unconstitutional deprivation of access to the affected property.

The District right-of-way unit should be consulted to assess whether the impact on the affected property may give rise to a condemnation claim for unreasonable interference with access, i.e. may be unconstitutional. This review should consider that direct interference with ingress and egress is considered more substantial under the law than circuitry of travel impacts and that the work will be performed by a private property owner, albeit within public right-of-way. For instance, a proposed left turn lane for low-volume driveway in front of a minimum use driveway along low ADT rural collector could have minimal impact on the operational effect on existing driveways and therefore be reasonable. But a proposed median barrier adjacent to a signal for a new high volume driveway, converting an existing medium volume retail store full movement access to right-in/right-out only access, would be a significant impact and may therefore be an unreasonable interference with access.

If a determination is made that the interference with access is not unreasonable, the District should request the applicant to execute the M-950 IA Indemnification Access. Refer to Chapter 3 (Indemnification) for guidance on completing the M950 IA. If the interference is determined to be potentially unreasonable, the Department should request the applicant to perform a loss assessment or appraisal.

In no event should an engineering solution to remedy a third party owner's property be imposed on an applicant that would render the applicant's property valueless for its intended use, impose an unreasonable economic burden, or result in an unconstitutional deprivation of access. For example, where the cost of the engineering solution alone exceeds the anticipated post development fair market value of the property, it could be unreasonable to impose the cost of remediation on the applicant because this result could be unconstitutionally confiscatory. On the other hand, an increase in construction or engineering expense alone will not justify accepting indemnification rather than requiring an approval on a purely economic rationale.

Where there are no feasible engineering alternatives to a situation in which another's driveway must be relocated or removed or property acquired from the landowner, indemnification is not an option. Condemnation is an option if the municipality will agree to do so in accordance with a right-of-way delegation plan approved and executed by the Department. If the affected property owner has threatened legal action against the Department and/or the applicant as a result of the Department's determination to authorize condemnation by the municipality, the Department may also condition issuance of the permit on provision of appropriate security in the form of a letter of credit, cash, bond or other security acceptable to the Department.

6. Provide loss assessment or appraisal of impact, if necessary.

When the District Permit Office determines that a loss assessment or appraisal of the impacts on value is required, the District Permit Manager will consult the Central Permit Office for a final determination. If an assessment or appraisal is required, the applicant must submit the assessment or appraisal to the District Permit Office for review prior to making an offer to the property owner. Any loss assessment or appraisal prepared by or for an affected property owner should also be provided to the Department for review. Although the Department need not approve loss assessments or appraisals submitted to it the results of reviews will be considered in determining whether the applicant and affected property owner have acted reasonably.

7. Share alternative plan or compensation offer with impacted owners.

Where a mitigation recommendation in an engineering study or a loss assessment or appraisal has been accepted by the Department the applicant must again seek to obtain an approval from the affected property owner. Again, written and personal contacts with affected property owners must be documented if subsequently needed to justify the

approval of action other than obtaining an approval. Alternatives proposed by the affected property owner should be documented.

8. Department review of contact documentation.

If approval is not obtained the applicant must present all contact documentation for review by the District. If the District determines that reasonable mitigation and/or offers of compensation have been unreasonably rejected by the affected property owner then the District should request the applicant to execute the M-950 IA Indemnification unless the interference with access is unreasonable. The District may require that the reasonable mitigation be implemented even if the property owner does not provide approval.

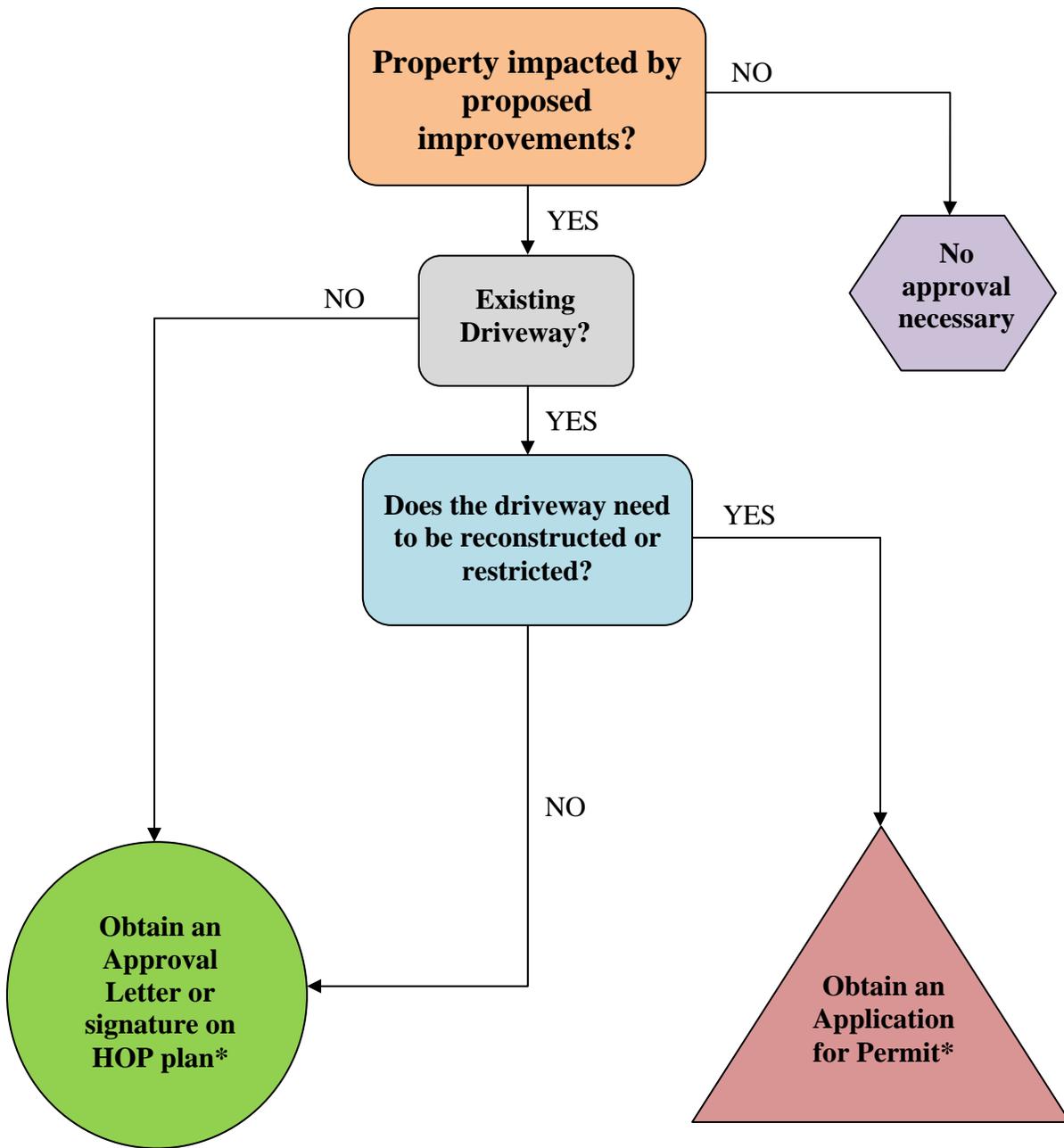
If the interference with access is determined unreasonable by the Department or entry onto the land of the property owner is required, condemnation is an option if the municipality will agree to do so in accordance with a right-of-way delegation plan approved and executed by the Department. If the affected property owner has threatened legal action against the Department and/or the applicant as a result of the Department's determination to authorize condemnation by the municipality, the Department may also condition issuance of the permit on provision of appropriate security in the form of a letter of credit, cash, bond or other security acceptable to the Department.

The application should be denied if: 1) the permit work requires entry onto land of another that has or will not be acquired by condemnation or otherwise; 2) the permit work requires the relocation or removal of another's driveway and his access rights have not or will not be acquired by condemnation or otherwise; 3) the interference with access is determined constitutionally unreasonable and his access rights have not or will not be acquired by condemnation or otherwise; 4) the efforts of the applicant to obtain approval and to provide mitigation or compensate an affected property owner are determined not to have been reasonable; or 5) the applicant refuses to execute the M950 IA Indemnification.

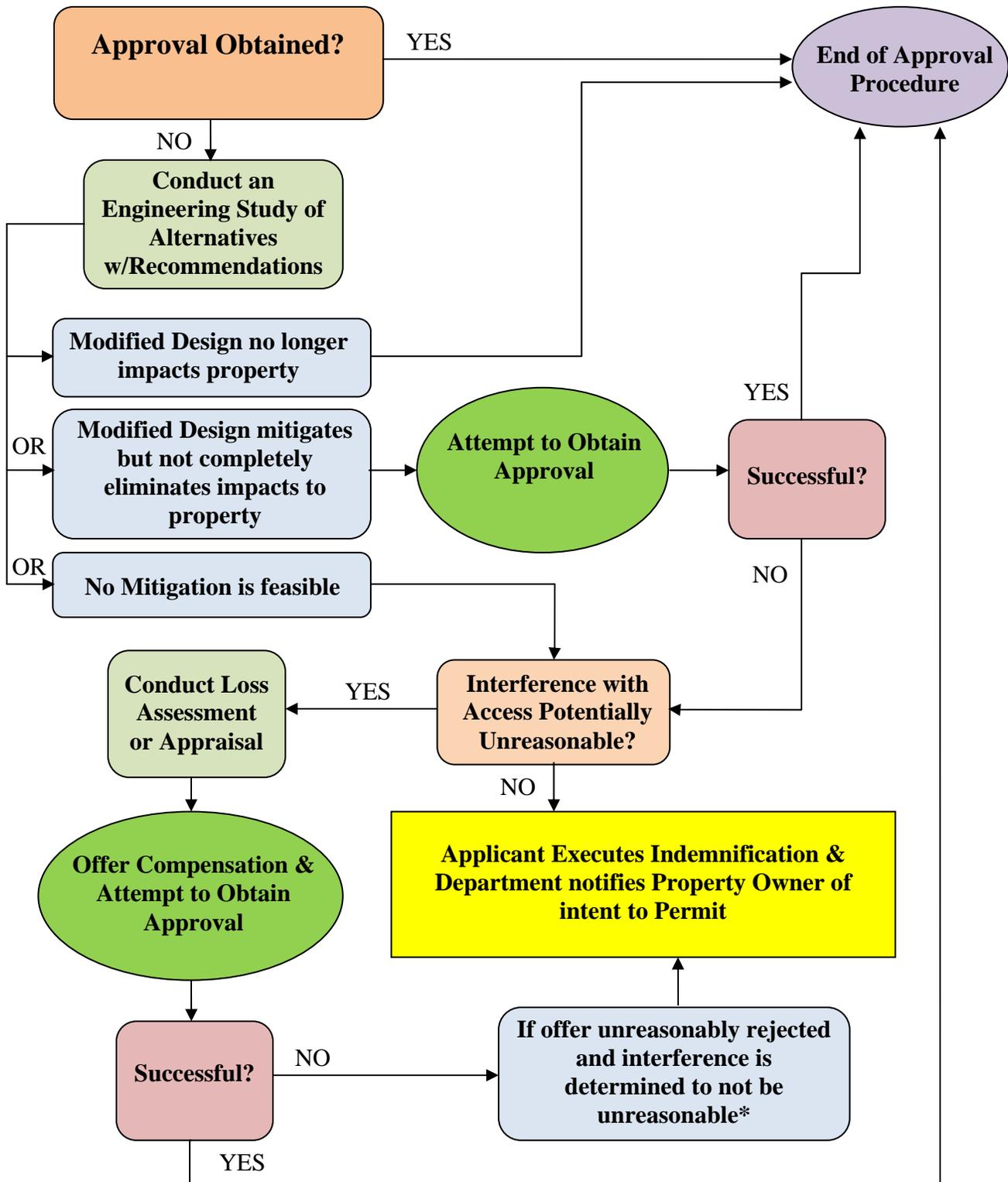
9. Department notice to impacted landowners.

If the District determines that the applicant has proposed reasonable mitigation and/or compensation which is unreasonably rejected by the affected property owner, written notice of its intention to issue the permit should be sent to the property owner prior to issuance of the permit. If the affected property owner's driveway is permitted, the letter to the property owner should include notice of the procedure to seek intervention in the permit process and/or to object to issuance of the permit. 1 Pa. Code sect. 35.23-27, Protests and Intervention. If the affected driveway owner has been granted intervention, the District should provide 15 days advance written notice of its intention to issue the permit.

**FLOW CHART FOR APPROVAL PROCEDURES – IMPACTS TO ACCESS OF NEIGHBORING OWNERS**



\*If unsuccessful at obtaining an Approval Letter, signature on HOP Plan or Application, continue to next page.



\* If interference is unreasonable, refer to Section 8 of the text under Approval Procedures.

## Indemnification

- a. Utility Indemnification Agreement (Form M-945 I and M-950 IC) is required under:
  1. Section 459.3(b)(2)(i)(A) relating to applicants not in the utility service business. In the case of applicants who are not in the business of providing utility service, the Indemnification Agreement (M-945 I and M-950 IC) will satisfy the indemnity requirement in Clause (A). Other requirements for insurance (Clause B), restoration security (Clause C), and facility maintenance (Clause D), shall be executed in an amount at least as high as may be required to cover PennDOT's exposure under the Permit.
  2. Section 459.12(b)(1) relating to modifications of Regulation 459 conditions. Whenever a modification is granted, the District Executive may, if requested, decide to excuse the applicant from executing an Indemnification Agreement (Form M-945 I and M-950 IC), submitting new or additional security (i.e., could the modification result in additional damage to the highway?), and providing a Certificate of Insurance (Form M-945 X) for the life of the facility.

Thus, Form M-945 I Indemnification Agreement and M-950 IC Indemnification Covenant are to be used for Regulation 459 – Utilities. These forms may not be modified. Although the M-950 IC is used for Regulation 441 – Access, different indemnification forms are used as discussed below.

Section 4 of the agreement requires insurance that covers both property and personal injuries in an amount equal to the limits contained in the *Sovereign Immunity Act* (presently \$250,000 per individual and \$1,000,000 in the aggregate per occurrence). Evidence of required insurance must be submitted to the District Permit Manager initially and upon the future sale or transfer of any interest in the property.

Section 10 of the agreement requires a covenant to be added to the deed stating that the Indemnity Agreement's obligations attach to the land and pass with it on any transfer. If an application is made for a waiver/modification, the applicant must present a copy of a deed to the site showing the addition of the covenant. The applicant then has five working days to provide documentation from the Recorder of Deeds Office demonstrating such filing.

The use of these forms is explained in Chapter 8 (Indemnification Agreement; Form M-945 I and Covenant; Form M-945 IC) of this Manual.

- b. Access Indemnifications (Forms M-950 IDW, M-950 IA, M-950 ID, and M-950 IC) are required under:
1. Section 441.3(h) relating to inability to obtain a drainage release, where a drainage release or satisfactory drainage controls are not feasible – use Forms M-950 ID and M-950 IC.
  2. Section 441.5(e)(1)(v) relating to applicants requesting a waiver of design requirements – use Forms M-950 IDW and M-950 IC.
  3. Section 441.8(j)(5) relating to placing an auxiliary lane in front of another person's property – use Forms M-950 IA and M-950 IC.

The use of these forms is explained in Chapter (Indemnifications; Forms M-950 IDW, M-950 IA and M-950 ID; and Covenant, Form M-950 IC) of this Manual.

## Indemnifications; Forms M-950 IDW, M-950 IA and M-950 ID; and Covenant, Form M-950 IC

### Purpose

The appropriate indemnification and covenant, when executed together, provide standard, concise, and easy to use documentation when additional indemnification is required under the following Regulation sections:

1. 67 PA Code, Section 441.3(h), relating to drainage - use Forms M-950 ID & M-950 IC.
2. 67 PA Code, Section 441.5(e)(1)(v), relating to waiver - use Forms M-950 IDW & M-950 IC.
3. 67 PA Code, Section 441.8(j)(5), relating to lane in front of another property - use Forms M-950 IA & M-950 IC.

These forms are designed to be used for additional indemnification under these Regulation 441 sections only. (Use Forms M-945 I & M-950 IC for additional indemnification under Regulation 459.)

### General

Indemnification cannot be accepted by the Department unless the required prerequisites are met. See Chapter 3 of this Manual on design waiver requirements; Chapter 3 on obtaining approvals from neighboring property owners whose access is impacted by auxiliary lanes and other features of an applicant's project; and Chapter 3 on obtaining permission from neighboring property owners impacted by drainage changes.

The applicant should be made aware of the form of indemnification that will be required while a design waiver or other process is being considered to avoid surprise at the end of the process.

The forms may not be modified except in special circumstances and only with review and approval of the Bureau of Maintenance and Operations (BOMO) and Office of Chief Counsel (OCC). Two situations where modification of the form may be appropriate would be where a housing development is involved and where security for the indemnification is appropriate. In the former situation it may not be appropriate to require the terms of the indemnification to pass to the purchaser of each lot through the indemnification covenant. Please note that special negotiations on the terms of an indemnification can be time-consuming and are strongly discouraged.

### Preparation

The appropriate indemnification and covenant are to be submitted to the Department for approval before the Permit may be issued.

The pending Permittee's name, address and Application Number need to be specified in the blank spaces on Page 1.

Section 1; Liability, Loss or Damage. The three indemnifications are intended to protect the Department from liability relating to the specific matter under consideration. That is, M-950 IDW is intended to protect the Department from liability arising from the condition(s) for which a design waiver is being granted; M-950 IA is intended to protect the Department from liability for access impacts on other properties arising from the permit work; and M-950 ID is intended to protect the Department from liability for drainage impacts on other properties arising from the permit work.

When using the design waiver indemnification (M-950 IDW), the formal approval of the design waiver must be attached to the indemnification as Exhibit A. See Chapter 3 of this manual relating to the formal approval of design waivers.

When using the access indemnification (M-950 IA) the specific impacted property owners identified for which approval was not obtained must be listed and attached to the indemnification as Exhibit A. In addition to the name of the impacted property owners, the addresses and/or other identifiers (e.g. tax parcel numbers) of the impacted properties should be provided.

When using the drainage indemnification (M-950 ID) the specific impacted property owners identified for which a release was not obtained must be listed and attached to the indemnification as Exhibit A. In addition to the name of the impacted property owners, the addresses and/or other identifiers (e.g. tax parcel number) of the impacted properties should be provided

Section 3; Duration. The duration of the indemnification is limited under M-950 IA and M-950 ID to the six-year statute of limitations period for lawsuits under the Eminent Domain Code. The indemnification provided under M-950 IDW can be released in writing by the Department if the subject for which the permit was issued (e.g. a driveway) has been removed, closed or otherwise extinguished, or if the condition for which a design waiver was granted is corrected to meet Department requirements (e.g. a future project corrects the deficiency for which the waiver was granted).

Section 4; Insurance. Section 4 requires the applicant to obtain liability insurance, and add the Commonwealth as an *additional insured* to its insurance in the amounts specified. Insurance is the backbone of the indemnification and a certificate of insurance must be provided before the indemnification is accepted. Insurance shall remain in effect for the duration of the indemnification except for impacts to access where the insurance shall remain in effect until the date of final inspection and acknowledgement of completion by the Commonwealth of all work authorized by the Permit has been completed.

In the case of form M-950 IA, the Department may require additional security in the form of a Letter of Credit if a loss assessment or appraisal is warranted for impacted properties in which the Permittee did not obtain approval.

Section 9: Covenant Running with the Land. Section 9 requires the applicant to prepare a Covenant (see **Form M-950 IC**) containing the statement that the indemnification has been executed and that all subsequent purchasers, heirs, assigns or transferees of any legal or beneficial interest in the property take it subject to the obligations imposed herein as *covenants running with the land*. This section also requires the covenant to be recorded in the Recorder of Deeds Office. See section on recording below.

This section may be excused by the District Executive if the applicant can justify why the requirement should not apply. If the section is excused the indemnification will only be binding on the permittee and the Department will lose the protections provided by it if the permittee sells the property.

The Department should be cautious in excusing this requirement because the failure to have a covenant running with the land would limit the indemnification to the time during which the permittee owns the land for which the permit was issued. Excusing the requirement may be appropriate if the risk of having to exercise the indemnification is very small and/or the likelihood of the land being sold is low.

If the covenant requirement is excused the District Executive must sign a memorandum evidencing the excusal. That memorandum is then attached to the indemnification as Exhibit B for all three forms.

As noted, special covenant language may be appropriate when the development for which the permit is being issued consists of residential units that will be resold as lots. The BOMO and OCC must be consulted in preparing alternate language.

### Signature

The signature page is to be prepared and executed by the applicant. The Permittee's name must be entered on the Permittee line exactly as it appears on the HOP application.

The indemnification must be signed by a person or persons with authority with respect to the site for which the Permit is issued, for instance:

1. Regulation 441.1 defines persons that may qualify as owners. In the case where the tenant of a lease is the applicant (a supermarket or convenience store, etc.), both the tenant and the landlord must sign the indemnification.
2. See Appendix F (Signature Authority Guide) of the Right of Way Manual for information on the appropriate person to execute the documents.
3. The indemnification covenant is to be attested and sealed by a notary public.

### Recording

When the Covenant is required, the Indemnification and Covenant shall be recorded in the appropriate County Recorder of Deeds Office with the permit. See Chapter 8 (Recording Copy; Form M-945 RC) for generic recording procedures.

## Access Approval Procedure Worksheet and Sample Letter; Form M-950 R1

### Purpose

This worksheet assists applicants as they make their way through the access approval procedure steps. It provides a way for the applicant to track their progress as they identify impacted property owners, attempt to obtain approvals or applications, or begin the indemnification process if necessary. This completed form should be submitted to the District Permit Office for review and approval of the initial determination of impacted properties, and as supporting documentation of applicant contact with impacted property owners.

Also part of the form is a sample approval letter template to be used if approval is needed from an impacted property owner. The letter should be modified for the specific application and impact the applicant is attempting to obtain approval for.

### Preparation

Begin by documenting all property owners (and addresses) within the limits of work on the Phase 1 worksheet. Continue to work across the rows and onto the Phase 2 worksheet as necessary until:

1. Property owner will not be impacted by project.
2. Impacted property owner approval is obtained by signed HOP plan or letter.
3. A driveway application (M-950 A or M-945 A) is obtained.
4. Determination is made to begin the indemnification process.

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### 3.6 -- ADDITIONAL HOP APPLICATION REQUIREMENTS

#### ACCESS APPROVAL PROCEDURES – IMPACTS TO ACCESS OF NEIGHBORING OWNERS

##### Background

There are two specific regulations which require the Department to recognize the access rights of neighboring owners when reviewing an application:

1. If an auxiliary lane must be located in front of property of another person the applicant must secure the approval of the other person or indemnify the Commonwealth against any action the other person may bring against the Commonwealth. 67 Pa. Code §441.8(j)(5). An auxiliary lane is defined as either acceleration or deceleration lanes, or left turn stand by lanes, including center left turn lanes. 67 Pa. Code §441.8(j). Transition areas are not considered an auxiliary lane for purposes of this regulation; that is, approval or indemnification is required under this regulation only where any portion of the full width of the lane is located in front of the other person's property.
2. A permittee is responsible to pay all fees, costs and expenses incident to or arising from the permit work, including the cost of related highway improvements which increased traffic necessitates. 67 Pa. Code §441.6(4)(i). The Commonwealth Court has determined that this regulation allows the Department to require an applicant to construct improvements to preserve the access rights of those owners impacted by permit work. *Popple v. Department of Transportation*, 575 A.2d 973 (Pa. Cmwlth. 1990). Examples of such a restriction requiring correction would include where installation of a median barrier, new signalization or the taper at the end or beginning of an auxiliary lane limits turning movements from a pre-existing driveway.

These regulations and the constitutional right of access held by property owners require the Department, when reviewing an application, to balance the rights of an applicant and those of property owners whose access will be impacted by permit work. The procedures set forth below, which may require an engineering study of alternative access options or an appraisal or loss assessment of impacts on the value of affected property, provide that balance. The Department may not automatically accept indemnification when the access rights of another are implicated.

The access rights of landowners abutting public highways are two fold: a right to ingress and egress on and off the highway and a reasonable right to connect to the public road system. The Department is liable for damages if it unreasonably interferes with these property rights. Liability in condemnation is more readily recognized for direct impacts to the ability to get on and off the highway than indirect impacts to the landowner's connection to the road system. That is, circuity of travel, in some cases, may be determined to be unreasonable.

The situations that fall within the procedure are categorized as follows:

1. Existing driveways (whether they have a permit or not) that are impacted by permit work, but need not be reconstructed or have turning movements restricted. For example, an auxiliary lane will be located at the driveway or there is an impact other than reconstruction or a turning movement restriction due to permit work not involving an auxiliary lane.
2. An auxiliary lane will be located along property frontage at which there is no existing driveway; and
3. Existing driveways (whether they have a permit or not) that must be reconstructed or have turning movements restricted due to permit work. A reconstruction is where the driveway must be physically reconfigured, modified, relocated or removed. A turning movement restriction is where there is a loss of turning movement due to permit work.

The applicant in the first two situations can address the neighboring owner's access by obtaining either an approval letter, or a signature on the HOP plan signifying approval. In the third category, however, the applicant will first be required to ask the impacted landowner to obtain a permit for the reconstructed/restricted driveway. Except for this difference the procedure applicable to the three situations is the same.

These procedures do not apply when additional land is required, either permanently or temporarily, from the neighboring landowner. The rights of the neighboring owner are dealt with in the acquisition process in those situations. Nor do the procedures apply to frontage without an existing driveway unless an auxiliary lane is being located along the frontage. In this situation the neighboring landowner has not yet exercised their right of access; therefore, only the very specific auxiliary lane regulation is applicable.

### **Approval Procedures**

1. Identify impacted properties.

The applicant must identify in its initial submission of the HOP plans all properties within the limits of the permit work that may be impacted using Form M 950R1, a worksheet for identifying impacted properties. This will include all properties along which an auxiliary lane would be located as well as those properties whose existing driveways would be: (1) reconfigured, modified, relocated or removed, or (2) operationally affected by the permitted work (e.g., loss of turning movement, limited to right in right out, median limitations, traffic signal proximity limitations, etc.).

2. Department review of impacted properties.

The District, upon receipt of the HOP plans and Form M-950 R1, must review and approve the initial determination of the applicant as to impacted properties. This may result in the addition or deletion of properties to be considered.

3. Obtain approval letters or applications for HOPs; document contacts.

The applicant must attempt to obtain the required approvals or have the property owner submit an HOP application (M-945A or M-950A), as appropriate, from the affected property owner(s). If an affected property owner refuses to apply for a permit or supplement if there is an existing permit for the driveway, the applicant must seek to obtain an approval letter or plan signature from the property owner. In all cases, written and personal contacts with affected property owner(s) must be documented if subsequently needed to justify the approval of action other than obtaining a new application or approval. Alternatives proposed by the affected property owner(s) should also be documented.

4. Provide engineering study of alternatives and contact information if necessary.

If an approval (letter, plan signature, or HOP application submission as applicable) cannot be obtained from an affected property owner, the applicant must explore remedies to mitigate the adverse impact on the property through the design process at its own expense. This may lead to reasonable mitigation alternatives or a conclusion that such measures are unreasonable from a design or economic standpoint.

The engineering study of alternatives (or mitigation plan) is intended to assist the Department in determining the reasonableness of the applicant's attempt to provide an engineering solution to the access impact on the third party. It must contain sufficient detail to document the impact of the permit work on the property and identify possible design alternatives or other mitigation for the impact. Alternatives proposed by the affected property owner must be considered. One of three conclusions must ultimately be recommended:

- a. The design has been modified such that there is no longer any impact on the initially affected property;
- b. The design has been modified through reasonable and prudent engineering alternatives to mitigate but not eliminate the impacts on the property; or
- c. Justification is provided that no mitigation is feasible from an engineering or economic standpoint.

The study should include or have attached to it documentation of the contacts with affected property owners. The study should be a standalone document sealed by an engineer.

5. Department review of engineering study and contact documentation.

The Department must review the engineering study and contact documentation to determine whether the recommendations are acceptable. The reasonableness and availability of an engineering solution must be evaluated on a case by case basis.

a. No impact due to design changes.

If the design has been altered to eliminate any impact on the initially affected property the Department must determine if the new design is acceptable. If so, the applicant should be requested to inform the property owner of the design change. No further action must be taken by the applicant in this situation.

b. Mitigation alternatives proposed.

Proposed mitigation alternatives must be both reasonable and constructible. The intent is to ensure the affected property will ultimately be provided safe and reasonable access. If accepted as such by the Department the applicant must share the design changes with the affected property owners in a new attempt to obtain approval. An example that may be considered reasonable and constructible but will not completely eliminate the impact of the property would be if the applicant proposes a median along a property frontage that restricts an existing full-access driveway to a right-in/right-out only driveway, the applicant may propose a secondary full-access driveway onto a side street that abuts the impacted property.

c. No mitigation feasible; loss assessment.

A conclusion that no mitigation is feasible must be adequately justified. To accept such a recommendation the Department must agree that the documentation and evidence submitted by the applicant proves there is no reasonable and prudent engineering design alternative available to reduce or eliminate the adverse impact to the affected property. If the recommendation is accepted the Department must then determine whether the impact may result in an unconstitutional deprivation of access to the affected property.

The District right-of-way unit should be consulted to assess whether the impact on the affected property may give rise to a condemnation claim for unreasonable interference with access, i.e. may be unconstitutional. This review should consider that direct interference with ingress and egress is considered more substantial under the law than circuitry of travel impacts and that the work will be performed by a private property owner, albeit within public right-of-way. For instance, a proposed left turn lane for low-volume driveway in front of a minimum use driveway along low ADT rural collector could have minimal impact on the operational effect on existing driveways and therefore be reasonable. But a proposed median barrier adjacent to a signal for a new high volume driveway, converting an existing medium volume retail store full movement access to

right-in/right-out only access, would be a significant impact and may therefore be an unreasonable interference with access.

If a determination is made that the interference with access is not unreasonable, the District should request the applicant to execute the M-950 IA Indemnification Access. Refer to Chapter 3 (Indemnification) for guidance on completing the M950 IA. If the interference is determined to be potentially unreasonable, the Department should request the applicant to perform a loss assessment or appraisal.

In no event should an engineering solution to remedy a third party owner's property be imposed on an applicant that would render the applicant's property valueless for its intended use, impose an unreasonable economic burden, or result in an unconstitutional deprivation of access. For example, where the cost of the engineering solution alone exceeds the anticipated post development fair market value of the property, it could be unreasonable to impose the cost of remediation on the applicant because this result could be unconstitutionally confiscatory. On the other hand, an increase in construction or engineering expense alone will not justify accepting indemnification rather than requiring an approval on a purely economic rationale.

Where there are no feasible engineering alternatives to a situation in which another's driveway must be relocated or removed or property acquired from the landowner, indemnification is not an option. Condemnation is an option if the municipality will agree to do so in accordance with a right-of-way delegation plan approved and executed by the Department. If the affected property owner has threatened legal action against the Department and/or the applicant as a result of the Department's determination to authorize condemnation by the municipality, the Department may also condition issuance of the permit on provision of appropriate security in the form of a letter of credit, cash, bond or other security acceptable to the Department.

6. Provide loss assessment or appraisal of impact, if necessary.

When the District Permit Office determines that a loss assessment or appraisal of the impacts on value is required, the District Permit Manager will consult the Central Permit Office for a final determination. If an assessment or appraisal is required, the applicant must submit the assessment or appraisal to the District Permit Office for review prior to making an offer to the property owner. Any loss assessment or appraisal prepared by or for an affected property owner should also be provided to the Department for review. Although the Department need not approve loss assessments or appraisals submitted to it the results of reviews will be considered in determining whether the applicant and affected property owner have acted reasonably.

7. Share alternative plan or compensation offer with impacted owners.

Where a mitigation recommendation in an engineering study or a loss assessment or appraisal has been accepted by the Department the applicant must again seek to obtain an approval from the affected property owner. Again, written and personal contacts

with affected property owners must be documented if subsequently needed to justify the approval of action other than obtaining an approval. Alternatives proposed by the affected property owner should be documented.

8. Department review of contact documentation.

If approval is not obtained the applicant must present all contact documentation for review by the District. If the District determines that reasonable mitigation and/or offers of compensation have been unreasonably rejected by the affected property owner then the District should request the applicant to execute the M-950 IA Indemnification unless the interference with access is unreasonable. The District may require that the reasonable mitigation be implemented even if the property owner does not provide approval.

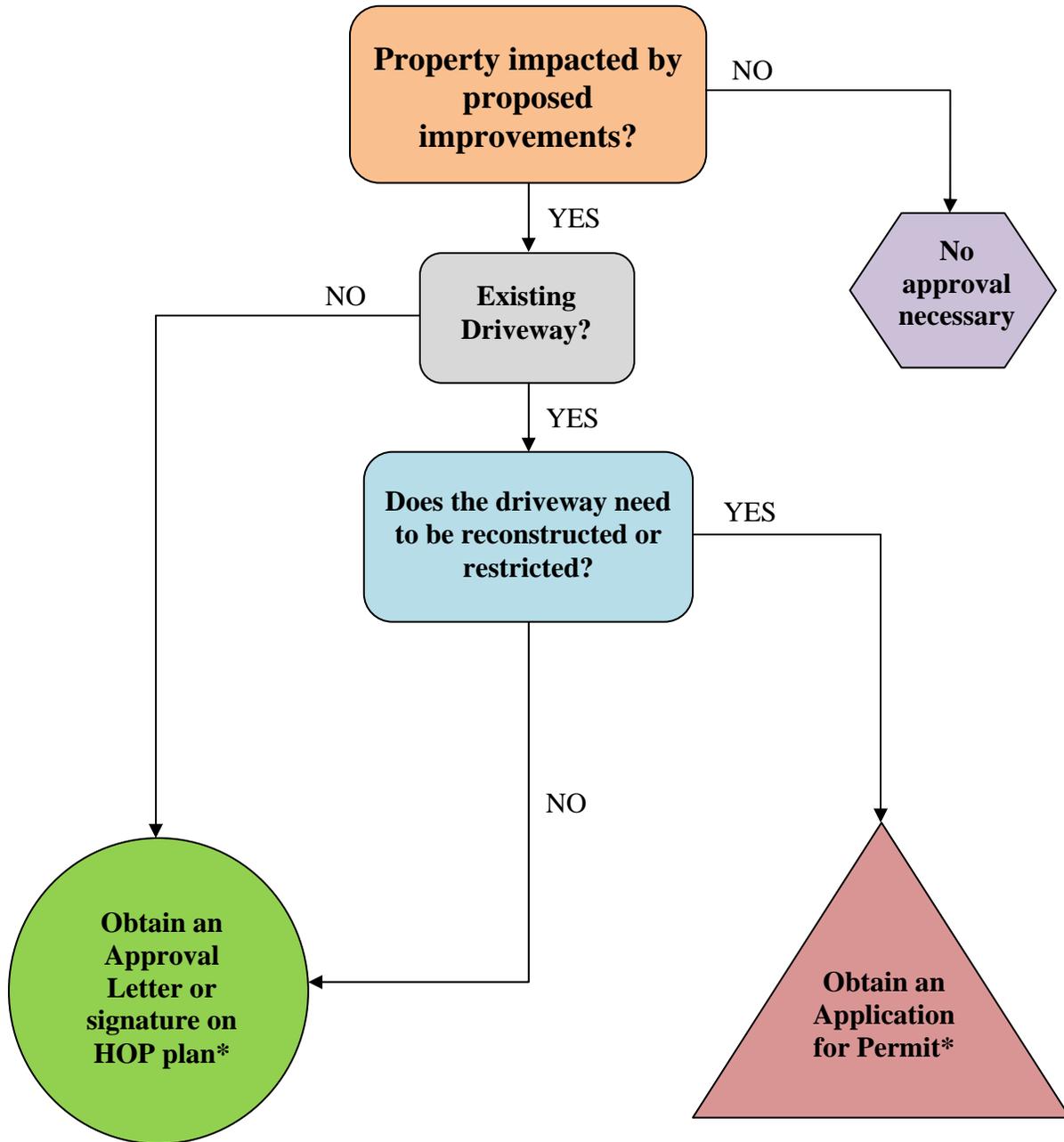
If the interference with access is determined unreasonable by the Department or entry onto the land of the property owner is required, condemnation is an option if the municipality will agree to do so in accordance with a right-of-way delegation plan approved and executed by the Department. If the affected property owner has threatened legal action against the Department and/or the applicant as a result of the Department's determination to authorize condemnation by the municipality, the Department may also condition issuance of the permit on provision of appropriate security in the form of a letter of credit, cash, bond or other security acceptable to the Department.

The application should be denied if: 1) the permit work requires entry onto land of another that has or will not be acquired by condemnation or otherwise; 2) the permit work requires the relocation or removal of another's driveway and his access rights have not or will not be acquired by condemnation or otherwise; 3) the interference with access is determined constitutionally unreasonable and his access rights have not or will not be acquired by condemnation or otherwise; 4) the efforts of the applicant to obtain approval and to provide mitigation or compensate an affected property owner are determined not to have been reasonable; or 5) the applicant refuses to execute the M950 IA Indemnification.

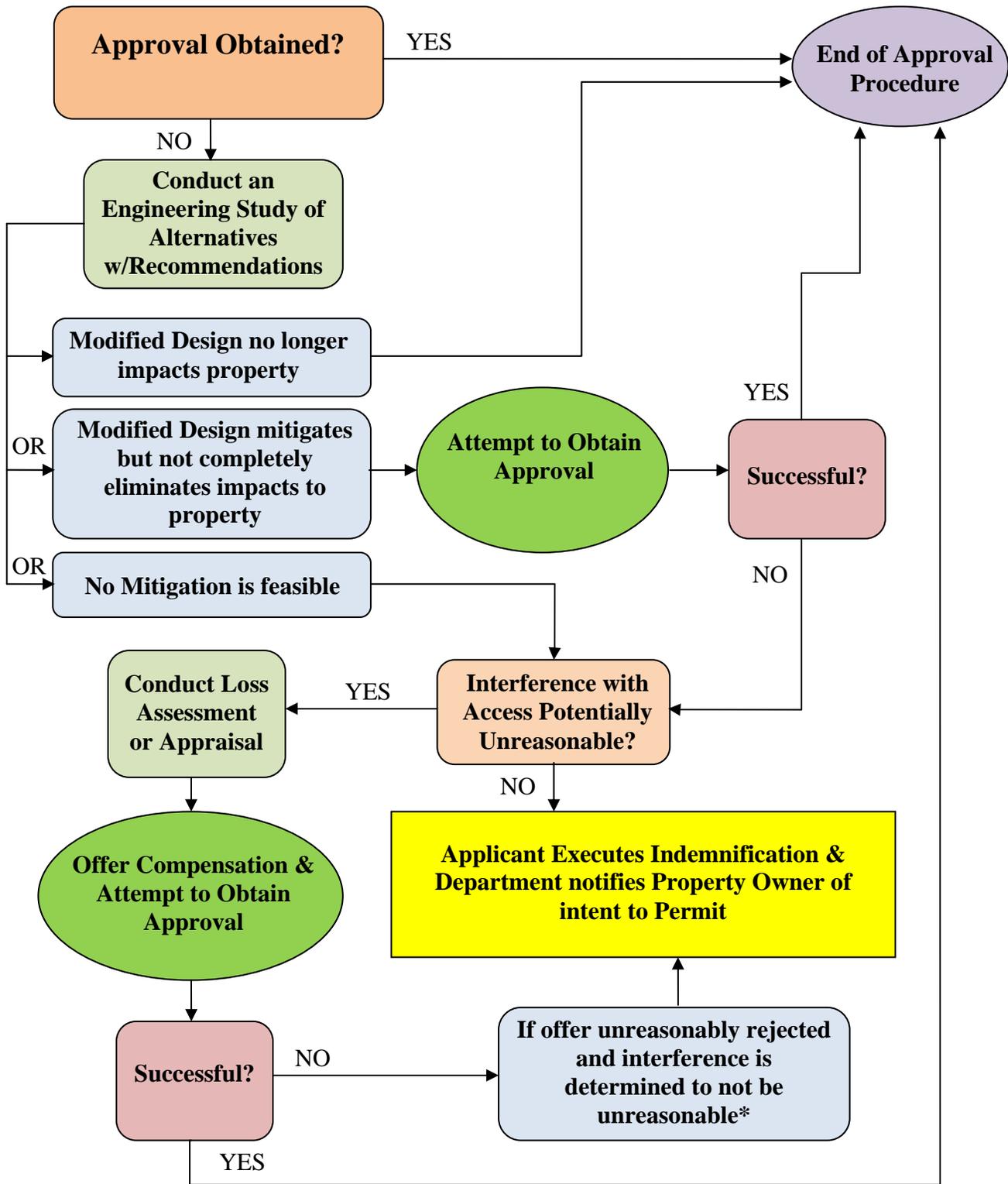
9. Department notice to impacted landowners.

If the District determines that the applicant has proposed reasonable mitigation and/or compensation which is unreasonably rejected by the affected property owner, written notice of its intention to issue the permit should be sent to the property owner prior to issuance of the permit. If the affected property owner's driveway is permitted, the letter to the property owner should include notice of the procedure to seek intervention in the permit process and/or to object to issuance of the permit. 1 Pa. Code sect. 35.23-27, Protests and Intervention. If the affected driveway owner has been granted intervention, the District should provide 15 days advance written notice of its intention to issue the permit.

**FLOW CHART FOR APPROVAL PROCEDURES – IMPACTS TO ACCESS OF NEIGHBORING OWNERS**



\*If unsuccessful at obtaining an Approval Letter, signature on HOP Plan or Application, continue to next page.



\* If interference is unreasonable, refer to Section 8 of the text under Approval Procedures.

## Indemnification

- a. Utility Indemnification Agreement (Form M-945 I and M-950 IC) is required under:
  1. Section 459.3(b)(2)(i)(A) relating to applicants not in the utility service business. In the case of applicants who are not in the business of providing utility service, the Indemnification Agreement (M-945 I and M-950 IC) will satisfy the indemnity requirement in Clause (A). Other requirements for insurance (Clause B), restoration security (Clause C), and facility maintenance (Clause D), shall be executed in an amount at least as high as may be required to cover PennDOT's exposure under the Permit.
  2. Section 459.12(b)(1) relating to modifications of Regulation 459 conditions. Whenever a modification is granted, the District Executive may, if requested, decide to excuse the applicant from executing an Indemnification Agreement (Form M-945 I and M-950 IC), submitting new or additional security (i.e., could the modification result in additional damage to the highway?), and providing a Certificate of Insurance (Form M-945 X) for the life of the facility.

Thus, Form M-945 I Indemnification Agreement and M-950 IC Indemnification Covenant are to be used for Regulation 459 – Utilities. These forms may not be modified. Although the M-950 IC is used for Regulation 441 – Access, different indemnification forms are used as discussed below.

Section 4 of the agreement requires insurance that covers both property and personal injuries in an amount equal to the limits contained in the *Sovereign Immunity Act* (presently \$250,000 per individual and \$1,000,000 in the aggregate per occurrence). Evidence of required insurance must be submitted to the District Permit Manager initially and upon the future sale or transfer of any interest in the property.

Section 10 of the agreement requires a covenant to be added to the deed stating that the Indemnity Agreement's obligations attach to the land and pass with it on any transfer. If an application is made for a waiver/modification, the applicant must present a copy of a deed to the site showing the addition of the covenant. The applicant then has five working days to provide documentation from the Recorder of Deeds Office demonstrating such filing.

The use of these forms is explained in Chapter 8 (Indemnification Agreement; Form M-945 I and Covenant; Form M-945 IC) of this Manual.

- b. Access Indemnifications (Forms M-950 IDW, M-950 IA, M-950 ID, and M-950 IC) are required under:
1. Section 441.3(h) relating to inability to obtain a drainage release, where a drainage release or satisfactory drainage controls are not feasible – use Forms M-950 ID and M-950 IC.
  2. Section 441.5(e)(1)(v) relating to applicants requesting a waiver of design requirements – use Forms M-950 IDW and M-950 IC.
  3. Section 441.8(j)(5) relating to placing an auxiliary lane in front of another person's property – use Forms M-950 IA and M-950 IC.

The use of these forms is explained in Chapter (Indemnifications; Forms M-950 IDW, M-950 IA and M-950 ID; and Covenant, Form M-950 IC) of this Manual.

## Indemnifications; Forms M-950 IDW, M-950 IA and M-950 ID; and Covenant, Form M-950 IC

### Purpose

The appropriate indemnification and covenant, when executed together, provide standard, concise, and easy to use documentation when additional indemnification is required under the following Regulation sections:

1. 67 PA Code, Section 441.3(h), relating to drainage - use Forms M-950 ID & M-950 IC.
2. 67 PA Code, Section 441.5(e)(1)(v), relating to waiver - use Forms M-950 IDW & M-950 IC.
3. 67 PA Code, Section 441.8(j)(5), relating to lane in front of another property - use Forms M-950 IA & M-950 IC.

These forms are designed to be used for additional indemnification under these Regulation 441 sections only. (Use Forms M-945 I & M-950 IC for additional indemnification under Regulation 459.)

### General

Indemnification cannot be accepted by the Department unless the required prerequisites are met. See Chapter 3 of this Manual on design waiver requirements; Chapter 3 on obtaining approvals from neighboring property owners whose access is impacted by auxiliary lanes and other features of an applicant's project; and Chapter 3 on obtaining permission from neighboring property owners impacted by drainage changes.

The applicant should be made aware of the form of indemnification that will be required while a design waiver or other process is being considered to avoid surprise at the end of the process.

The forms may not be modified except in special circumstances and only with review and approval of the Bureau of Maintenance and Operations (BOMO) and Office of Chief Counsel (OCC). Two situations where modification of the form may be appropriate would be where a housing development is involved and where security for the indemnification is appropriate. In the former situation it may not be appropriate to require the terms of the indemnification to pass to the purchaser of each lot through the indemnification covenant. Please note that special negotiations on the terms of an indemnification can be time-consuming and are strongly discouraged.

### Preparation

The appropriate indemnification and covenant are to be submitted to the Department for approval before the Permit may be issued.

The pending Permittee's name, address and Application Number need to be specified in the blank spaces on Page 1.

Section 1; Liability, Loss or Damage. The three indemnifications are intended to protect the Department from liability relating to the specific matter under consideration. That is, M-950 IDW is intended to protect the Department from liability arising from the condition(s) for which a design waiver is being granted; M-950 IA is intended to protect the Department from liability for access impacts on other properties arising from the permit work; and M-950 ID is intended to protect the Department from liability for drainage impacts on other properties arising from the permit work.

When using the design waiver indemnification (M-950 IDW), the formal approval of the design waiver must be attached to the indemnification as Exhibit A. See Chapter 3 of this manual relating to the formal approval of design waivers.

When using the access indemnification (M-950 IA) the specific impacted property owners identified for which approval was not obtained must be listed and attached to the indemnification as Exhibit A. In addition to the name of the impacted property owners, the addresses and/or other identifiers (e.g. tax parcel numbers) of the impacted properties should be provided.

When using the drainage indemnification (M-950 ID) the specific impacted property owners identified for which a release was not obtained must be listed and attached to the indemnification as Exhibit A. In addition to the name of the impacted property owners, the addresses and/or other identifiers (e.g. tax parcel number) of the impacted properties should be provided

Section 3; Duration. The duration of the indemnification is limited under M-950 IA and M-950 ID to the six-year statute of limitations period for lawsuits under the Eminent Domain Code. The indemnification provided under M-950 IDW can be released in writing by the Department if the subject for which the permit was issued (e.g. a driveway) has been removed, closed or otherwise extinguished, or if the condition for which a design waiver was granted is corrected to meet Department requirements (e.g. a future project corrects the deficiency for which the waiver was granted).

Section 4; Insurance. Section 4 requires the applicant to obtain liability insurance, and add the Commonwealth as an *additional insured* to its insurance in the amounts specified. Insurance is the backbone of the indemnification and a certificate of insurance must be provided before the indemnification is accepted. Insurance shall remain in effect for the duration of the indemnification except for impacts to access where the insurance shall remain in effect until the date of final inspection and acknowledgement of completion by the Commonwealth of all work authorized by the Permit has been completed.

In the case of form M-950 IA, the Department may require additional security in the form of a Letter of Credit if a loss assessment or appraisal is warranted for impacted properties in which the Permittee did not obtain approval.

Section 9: Covenant Running with the Land. Section 9 requires the applicant to prepare a Covenant (see **Form M-950 IC**) containing the statement that the indemnification has been executed and that all subsequent purchasers, heirs, assigns or transferees of any legal or beneficial interest in the property take it subject to the obligations imposed herein as *covenants running with the land*. This section also requires the covenant to be recorded in the Recorder of Deeds Office. See section on recording below.

This section may be excused by the District Executive if the applicant can justify why the requirement should not apply. If the section is excused the indemnification will only be binding on the permittee and the Department will lose the protections provided by it if the permittee sells the property.

The Department should be cautious in excusing this requirement because the failure to have a covenant running with the land would limit the indemnification to the time during which the permittee owns the land for which the permit was issued. Excusing the requirement may be appropriate if the risk of having to exercise the indemnification is very small and/or the likelihood of the land being sold is low.

If the covenant requirement is excused the District Executive must sign a memorandum evidencing the excusal. That memorandum is then attached to the indemnification as Exhibit B for all three forms.

As noted, special covenant language may be appropriate when the development for which the permit is being issued consists of residential units that will be resold as lots. The BOMO and OCC must be consulted in preparing alternate language.

### Signature

The signature page is to be prepared and executed by the applicant. The Permittee's name must be entered on the Permittee line exactly as it appears on the HOP application.

The indemnification must be signed by a person or persons with authority with respect to the site for which the Permit is issued, for instance:

1. Regulation 441.1 defines persons that may qualify as owners. In the case where the tenant of a lease is the applicant (a supermarket or convenience store, etc.), both the tenant and the landlord must sign the indemnification.
2. See Appendix F (Signature Authority Guide) of the Right of Way Manual for information on the appropriate person to execute the documents.
3. The indemnification covenant is to be attested and sealed by a notary public.

### Recording

When the Covenant is required, the Indemnification and Covenant shall be recorded in the appropriate County Recorder of Deeds Office with the permit. See Chapter 8 (Recording Copy; Form M-945 RC) for generic recording procedures.

## Access Approval Procedure Worksheet and Sample Letter; Form M-950 R1

### Purpose

This worksheet assists applicants as they make their way through the access approval procedure steps. It provides a way for the applicant to track their progress as they identify impacted property owners, attempt to obtain approvals or applications, or begin the indemnification process if necessary. This completed form should be submitted to the District Permit Office for review and approval of the initial determination of impacted properties, and as supporting documentation of applicant contact with impacted property owners.

Also part of the form is a sample approval letter template to be used if approval is needed from an impacted property owner. The letter should be modified for the specific application and impact the applicant is attempting to obtain approval for.

### Preparation

Begin by documenting all property owners (and addresses) within the limits of work on the Phase 1 worksheet. Continue to work across the rows and onto the Phase 2 worksheet as necessary until:

1. Property owner will not be impacted by project.
2. Impacted property owner approval is obtained by signed HOP plan or letter.
3. A driveway application (M-950 A or M-945 A) is obtained.
4. Determination is made to begin the indemnification process.

M-949 C	Utility Sketch (Surface Opening)
M-950 A	Application for Minimum Use Driveway
M-950 D1	Deed, Fee Simple
M-950 D2	Deed of Easement
M-950 D3	Deed of Easement (Drainage)
M-950 H	Acknowledgment – Reimbursement Obligation For Application Review
M-950 IA	Indemnification Agreement (Driveway Access)
M-950 ID	Indemnification Agreement (Drainage)
M-950 IDW	Indemnification Agreement (Design Waiver)
M-950 IC	Declaration of Covenant (Use with M-945 I & M-950I)
M-950 K	HOP Obligation Bond
M-950 K1	HOP “Blanket” Bond
M-950 L	Letter of Credit
M-950 MPC	Land Use Questionnaire      PENNDOT Web
M-950 R1	Access Approval Procedure Worksheet and Sample Letter
M-950 X	Certificate of Insurance



## Access Approval Procedure - Impacts to Access of Neighboring Owners Phase 1 Worksheet

**Directions:** This worksheet is intended to help HOP applicants through the access approval procedures (Pub. 282, Ch. 3.6 - HOP Guidelines). Document all property owners within the limits of work, and work across the columns to determine whether an approval (letter or signed plan) or HOP application (M-950 A or M-945 A) is required. Please use the included sample approval letter template if warranted.

**Note: Continue to Phase 2 Worksheet if approval procedure is not resolved.**

	All Property Owners within the Limits of Work	Property Owner Address	Property Impacted by Proposed Improvements (See Pub. 282, Ch. 3.7 - Approval Procedures)?	Existing Driveway accessing SR?	Driveway Needs Reconstructed, Relocated or Restricted?	Approval Obtained?	Application Obtained?
			Yes = Next Column	Yes = Next Column	Yes = Obtain Application	Yes = End of procedure	Yes = End of procedure
			No = No Approval Necessary	No = Obtain Approval	No = Obtain Approval	No = Continue to Phase 2 Worksheet	No = Continue to Phase 2 Worksheet
1	smith		Yes	No	N/A		
2							
3							
4							
5							
6							
7							
8							
9							
10							
11							
12							
13							
14							
15							
16							
17							
18							
19							
20							



Property owner name(s)  
Street Address  
City, State ZIP  
Date

HOP Applicant  
Street Address  
City, State ZIP

**RE: Approval for Impacts to Access of Neighboring Property Owners**  
Highway Occupancy Permit (HOP) Application No. 123456  
Municipality Name, County Name  
SR 1234 Segment 0000 Offset 0000

Dear Sir/Madam:

I have reviewed the proposed improvements along my property frontage associated with your development referenced above. I am aware that an auxiliary lane and/or other features under the Permit will be installed along my property frontage

I am also aware that the proposed improvements located along my property frontage may restrict where a future access may be located and/or may restrict certain turning movements at a future access.

With that, I approve the proposed improvements, including the auxiliary lane, along my property frontage as shown on your plan titled xxxxxxxxxx and dated xx/xx20xx.

Sincerely,

Property owner name



## INDEMNIFICATION

67 PA Code, Section 441.8(j)(5), relating to lane in front of another property and/or  
67 PA Code, Section 441.6(4)(i), relating to costs and expenses of highway improvements

THIS INDEMNIFICATION is by \_\_\_\_\_, with an address of \_\_\_\_\_ (the "Permittee") for the DEPARTMENT OF TRANSPORTATION, COMMONWEALTH OF PENNSYLVANIA (the "Commonwealth").

WHEREAS, the Permittee has applied to the Commonwealth for a permit (the "Permit") to occupy the Commonwealth's legal right-of-way with a driveway or structure at the location and for the purposes more fully described in Highway Occupancy Permit Application Number \_\_\_\_\_, and associated highway occupancy permit condition statement and supplements.

NOW, intending to be legally bound, as an express condition to issuance of the Permit hereunder, the Permittee enters into the following indemnification, which is to be binding upon the Permittee, its heirs, successors and assigns:

### SECTION 1 - LIABILITY, LOSS OR DAMAGE

The Permittee hereby indemnifies the Commonwealth from all suits, damages, claims and demands which owners of the properties identified in Exhibit "A" attached hereto and incorporated herein by reference may assert under the provisions of the Eminent Domain Code, 26 Pa.C.S. § 101 et seq., by reason of interference with access due to construction and operation of auxiliary lanes and/or other features under the Permit. This Indemnification is in addition to that provided for under 67 Pa. Code §441.6(13).

### SECTION 2 - EXPRESS CONDITION PRECEDENT

Full performance of all conditions and covenants of this Indemnification upon terms satisfactory to the Commonwealth is an express condition precedent to the issuance of the Permit. It is hereby acknowledged that the Commonwealth will not accept substantial compliance with the terms and conditions of this Indemnification by the Permittee. Inaction or lapse of time shall not constitute a bar to the pursuit of any legal or equitable remedy available to the Commonwealth in any court of competent jurisdiction.

### SECTION 3 - DURATION

The obligations of the Permittee under this Indemnification to the Commonwealth shall commence upon the date of execution hereof and shall continue in full force and effect until the expiration of six years from the date of final inspection and acknowledgement of completion by the Commonwealth of all work authorized by the Permit.

### SECTION 4 - INSURANCE

The Permittee shall obtain insurance for public liability and property damage to cover any loss that may be incurred for or on account of any matter, cause or thing arising out of the permitted construction. The policy shall be occurrence based and the amount of insurance shall be at least \$250,000 per person and at least \$1,000,000 per occurrence. The Commonwealth shall be added as an additional insured on the policy. The obligation of the Permittee to maintain insurance shall remain in effect until the date of final inspection and acknowledgement of completion by the Commonwealth of all work authorized by the Permit. A certificate of insurance for the Permittee shall be presented to the District Permit Manager prior to issuance of the Permit.

### SECTION 5 - REQUIREMENT OF NOTICE TO COMMONWEALTH

The Permittee shall notify in writing, within ten days, by registered mail, return receipt requested, both the District Office Permit Manager and the Permit Section, Office of Chief Counsel, Pennsylvania Department of Transportation, P.O. Box 8212, Harrisburg, PA 17105-8212 of any and all claims made against the Permittee which pertain to the subject of the

Permit.

**SECTION 6 - OBLIGATION OF PERMITTEE TO DEFEND CLAIMS**

The Permittee, upon request of the Commonwealth, shall defend, or pay and provide for the reasonable cost of such defense, including attorneys fees, the Commonwealth, its officers, agents and employees, against any and all claims brought or actions filed against the Commonwealth, either as an original or an additional defendant, with respect to the subject of the indemnity contained herein, whether such claims or actions are rightfully or wrongfully brought or filed. The Permittee hereby waives any and all rights to join the Commonwealth as an additional defendant in any actions arising as a result of the grant of the Permit or as a result of any construction, design or subsequent use that is the subject of the Permit.

Notwithstanding the foregoing provisions, the Commonwealth may employ or provide attorneys of its own selection to appear and defend any claims or actions on behalf of the Commonwealth, at the Permittee's sole cost and expense.

**SECTION 7 - REIMBURSEMENT FOR EXPENSES AND ENFORCEMENT OF INDEMNIFICATION**

The Permittee shall reimburse the Commonwealth for any necessary expenses, attorneys' fees or costs incurred in the enforcement of any part of this Indemnification within ninety (90) days after receiving written notice that the Commonwealth has incurred them.

**SECTION 8 - SEVERABILITY**

If any section of this Indemnification is found to be invalid by any court of competent jurisdiction, such finding shall not render the rest of this Indemnification invalid.

**SECTION 9 - COVENANT RUNNING WITH THE LAND**

Unless excused in writing by the applicable Commonwealth District Executive or his/her designee, the Permittee shall cause a covenant to be executed concerning the property which is the subject of this Indemnification, reciting that this Indemnification has been executed and that all subsequent purchasers, heirs, assigns or transferees of any legal or beneficial interest in the property take it subject to the obligations imposed herein as covenants running with the land. The covenant shall be recorded in the Office of the Recorder of Deeds of the appropriate county or counties. A copy of the executed covenant, Form M-950 IC, shall be presented to the District Permit Manager prior to the granting of the Permit, together with evidence that the covenant will be submitted to the Office of the Recorder of Deeds for recording in the Grantor/Grantee Index. If excused, memorandum of District Executive attached as Exhibit "B."

**SECTION 10 - INDEMNIFICATION DOES NOT CREATE RIGHTS IN THIRD PARTIES**

Nothing contained in this Indemnification shall confer a third party beneficiary right of action upon any person whatsoever and nothing set forth in this entire Indemnification shall be construed so as to confer upon any person or entity other than the Commonwealth, its officers, agents and employees, any right of action either under this Indemnification or in any manner whatsoever.

IN WITNESS WHEREOF, the undersigned have set their hands this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

PERMITTEE

BY: \_\_\_\_\_

*Applicant: do not write below this line -- for Department of Transportation use only*

- Certificate of insurance from Permittee supplied.
- Covenant Form M-950 IC received (unless excused by Commonwealth).
- Recording Copy Form M-945 RC verifying covenant (Form M-950 IC) will be recorded in appropriate County Courthouse Grantor/ Grantee Index supplied (unless covenant requirement excused by Commonwealth).
- Exhibit "A" owners of properties included in the indemnification
- Exhibit "B" memorandum from District Executive attached if Section 9 covenant requirement is excused.
- Letter of credit to secure Indemnification if applicable.
- Indemnification properly executed. See Appendix F (Signature Authority Guide) to Right of Way Manual.

LIST OF PROPERTIES INCLUDED IN INDEMNIFICATION

1.

2.

3.

4.

Memorandum Excusing Covenant Requirement

**[This exhibit is to be a memorandum signed by the applicable District Executive or her/his designee; use only if Sections 9 is excused.]**



## INDEMNIFICATION

67 PA Code, Section 441.3(h), relating to flow of water onto another property

THIS INDEMNIFICATION is by \_\_\_\_\_, with an address of \_\_\_\_\_ (the "Permittee") for the DEPARTMENT OF TRANSPORTATION, COMMONWEALTH OF PENNSYLVANIA (the "Commonwealth").

WHEREAS, the Permittee has applied to the Commonwealth for a permit (the "Permit") to occupy the Commonwealth's legal right-of-way with a driveway or structure at the location and for the purposes more fully described in Highway Occupancy Permit Application Number \_\_\_\_\_, and associated highway occupancy permit condition statement and supplements.

NOW, intending to be legally bound, as an express condition to issuance of the Permit hereunder, the Permittee enters into the following indemnification, which is to be binding upon the Permittee, its heirs, successors and assigns:

### SECTION 1 - LIABILITY, LOSS OR DAMAGE

The Permittee hereby indemnifies the Commonwealth from all suits, claims and demands which owners of the properties identified on Exhibit "A" attached hereto and incorporated by reference may assert against the Commonwealth based in whole or in part an increase in the flow of water onto the identified properties, including any action brought pursuant to the provisions of the Eminent Domain Code, 26 PA.C.S Section 101 et seq., This indemnification is in addition to that provided for under 67 Pa. Code Section 441.6(13).

### SECTION 2 - EXPRESS CONDITION PRECEDENT

Full performance of all conditions and covenants of this Indemnification upon terms satisfactory to the Commonwealth is an express condition precedent to the issuance of the Permit. It is hereby acknowledged that the Commonwealth will not accept substantial compliance with the terms and conditions of this Indemnification by the Permittee. Inaction or lapse of time shall not constitute a bar to the pursuit of any legal or equitable remedy available to the Commonwealth in any court of competent jurisdiction.

### SECTION 3 - DURATION

The obligations of the Permittee under this Indemnification to the Commonwealth shall commence upon the date of execution hereof and shall continue in full force and effect until the expiration of six years from the date of final inspection and acknowledgement of completion by the Commonwealth of all work authorized by the Permit.

### SECTION 4 - INSURANCE

The Permittee shall obtain insurance for public liability and property damage to cover any loss that may be incurred for or on account of any matter, cause or thing arising out of the permitted construction. The policy shall be occurrence based and the amount of insurance shall be at least \$250,000 per person and at least \$1,000,000 per occurrence. The Commonwealth shall be added as an additional insured on the policy. The obligation of the Permittee to maintain insurance with the Commonwealth as an additional insured shall remain in effect for so long as this Indemnification is in effect. A certificate of insurance for the Permittee shall be presented to the District Permit Manager prior to issuance of the permit.

### SECTION 5 - REQUIREMENT OF NOTICE TO COMMONWEALTH

The Permittee shall notify in writing, within ten days, by registered mail, return receipt requested, both the District Office Permit Manager and the Permit Section, Office of Chief Counsel, Pennsylvania Department of Transportation, P.O. Box 8212, Harrisburg, PA 17105-8212 of any and all claims made against the Permittee which pertain to the subject of the Permit.

**SECTION 6 - OBLIGATION OF PERMITTEE TO DEFEND CLAIMS**

The Permittee, upon request of the Commonwealth, shall defend, or pay and provide for the reasonable cost of such defense, including attorneys fees, the Commonwealth, its officers, agents and employees, against any and all claims brought or actions filed against the Commonwealth, either as an original or an additional defendant, with respect to the subject of the indemnity contained herein, whether such claims or actions are rightfully or wrongfully brought or filed. The Permittee hereby waives any and all rights to join the Commonwealth as an additional defendant in any actions arising as a result of the grant of the Permit or as a result of any construction, design or subsequent use that is the subject of the Permit.

Notwithstanding the foregoing provisions, the Commonwealth may employ or provide attorneys of its own selection to appear and defend any claims or actions on behalf of the Commonwealth, at the Permittee's sole cost and expense.

**SECTION 7 - REIMBURSEMENT FOR EXPENSES AND ENFORCEMENT OF INDEMNIFICATION**

The Permittee shall reimburse the Commonwealth for any necessary expenses, attorneys' fees or costs incurred in the enforcement of any part of this Indemnification within ninety (90) days after receiving written notice that the Commonwealth has incurred them.

**SECTION 8 - SEVERABILITY**

If any section of this Indemnification is found to be invalid by any court of competent jurisdiction, such finding shall not render the rest of this Indemnification invalid.

**SECTION 9 - COVENANT RUNNING WITH THE LAND**

Unless excused in writing by the applicable Commonwealth District Executive or his/her designee, the Permittee shall cause a covenant to be executed concerning the property which is the subject of this Indemnification, reciting that this Indemnification has been executed and that all subsequent purchasers, heirs, assigns or transferees of any legal or beneficial interest in the property take it subject to the obligations imposed herein as covenants running with the land. The covenant shall be recorded in the Office of the Recorder of Deeds of the appropriate county or counties. A copy of the executed covenant, Form M-950 IC, shall be presented to the District Permit Manager prior to the granting of the Permit, together with evidence that the covenant will be submitted to the Office of the Recorder of Deeds for recording in the Grantor/Grantee Index. If excused, memorandum of District Executive attached as Exhibit "B."

**SECTION 10 - INDEMNIFICATION DOES NOT CREATE RIGHTS IN THIRD PARTIES**

Nothing contained in this Indemnification shall confer a third party beneficiary right of action upon any person whatsoever and nothing set forth in this entire Indemnification shall be construed so as to confer upon any person or entity other than the Commonwealth, its officers, agents and employees, any right of action either under this Indemnification or in any manner whatsoever.

IN WITNESS WHEREOF, the undersigned have set their hands this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

PERMITTEE

BY: \_\_\_\_\_

*Applicant: do not write below this line -- for Department of Transportation use only*

- Certificate of insurance from Permittee supplied.
- Covenant Form M-950 IC received (unless excused by Commonwealth).
- Recording Copy Form M-945 RC verifying covenant (Form M-950 IC) will be recorded in appropriate County Courthouse Grantor/ Grantee Index supplied.
- Exhibit "A" owners of properties included in the indemnification
- Exhibit "B" memorandum from District Executive attached if Section 9 covenant requirement is excused.
- Indemnification properly executed. See Appendix F (Signature Authority Guide) to Right of Way Manual.

LIST OF PROPERTIES INCLUDED IN INDEMNIFICATION

1.

2.

3.

4.

Memorandum Excusing Covenant Requirement

**[This exhibit is to be a memorandum signed by the applicable District Executive or her/his designee; use only if Section 9 is excused.]**

EXHIBIT "B"



## INDEMNIFICATION

67 PA Code, Section 441.5(e)(1)(v), relating to design waiver

THIS INDEMNIFICATION is by \_\_\_\_\_, with an address of \_\_\_\_\_ (the "Permittee") for the DEPARTMENT OF TRANSPORTATION, COMMONWEALTH OF PENNSYLVANIA (the "Commonwealth").

WHEREAS, the Permittee has applied to the Commonwealth for a permit (the "Permit") to occupy the Commonwealth's legal right-of-way with a driveway or structure at the location and for the purposes more fully described in Highway Occupancy Permit Application Number \_\_\_\_\_, and associated highway occupancy permit condition statement and supplements.

NOW, intending to be legally bound, as an express condition to issuance of the Permit hereunder, the Permittee enters into the following indemnification, which is to be binding upon the Permittee, its heirs, successors and assigns:

### SECTION 1 - LIABILITY, LOSS OR DAMAGE

The Permittee hereby undertakes to indemnify fully the Commonwealth, its officers, agents and employees, of and from damages or injury to persons or property in a claim or suit seeking to impose liability on the Commonwealth, its officers, agents or employees, arising out of any and all claims, demands, costs, or judgments of any type and any act or omission of the Permittee or the Permittee's contractor, agent, servant, employee or other person engaged or employed in conjunction with the construction, design or use of the structure or facility that is the subject of the Permit based in whole or in part upon the design waiver(s) attached hereto as Exhibit "A," it being the intent of this provision to absolve and protect the Commonwealth, its officers, agents, and employees from any and all loss by reason of the design waiver(s). This Indemnification is in addition to that provided for under 67 Pa. Code §441.6(13).

### SECTION 2 - EXPRESS CONDITION PRECEDENT

Full performance of all conditions and covenants of this Indemnification upon terms satisfactory to the Commonwealth is an express condition precedent to the issuance of the Permit. It is hereby acknowledged that the Commonwealth will not accept substantial compliance with the terms and conditions of this Indemnification by the Permittee. Inaction or lapse of time shall not constitute a bar to the pursuit of any legal or equitable remedy available to the Commonwealth in any court of competent jurisdiction.

### SECTION 3 - DURATION

The obligations of the Permittee under this Indemnification shall commence upon the date of execution hereof and shall continue in full force and effect until the Commonwealth releases the Permittee in writing from the obligation of this Indemnification because the subject for which the permit has been issued has been removed, closed, or otherwise extinguished in accordance with the then existing regulations of the Commonwealth or the condition for which a design waiver was granted is corrected to meet Commonwealth requirements.

### SECTION 4 - INSURANCE

The Permittee shall obtain insurance for public liability and property damage, including coverage for contractual liability, to cover any loss that may be incurred for or on account of any matter, cause or thing arising out of the permitted construction. The policy shall be occurrence based and the amount of insurance shall be at least \$250,000 per person and at least \$1,000,000 per occurrence. The Commonwealth shall be added as an additional insured on the policy. The obligation of the Permittee to maintain insurance with the Commonwealth as an additional insured shall remain in effect for so long as this Indemnification is in effect. A certificate of insurance for the Permittee shall be presented to the District Permit Manager prior to issuance of the permit.

**SECTION 5 - REQUIREMENT OF NOTICE TO COMMONWEALTH**

The Permittee shall notify in writing, within ten days, by registered mail, return receipt requested, both the District Office Permit Manager and the Permit Section, Office of Chief Counsel, Pennsylvania Department of Transportation, P.O. Box 8212, Harrisburg, PA 17105-8212 of any and all claims made against the Permittee which pertain to the subject of the Permit.

**SECTION 6 - OBLIGATION OF PERMITTEE TO DEFEND CLAIMS**

The Permittee, upon request of the Commonwealth, shall defend, or pay and provide for the reasonable cost of such defense, including attorneys fees, the Commonwealth, its officers, agents and employees, against any and all claims brought or actions filed against the Commonwealth, either as an original or an additional defendant, with respect to the subject of the indemnity contained herein, whether such claims or actions are rightfully or wrongfully brought or filed. The Permittee hereby waives any and all rights to join the Commonwealth as an additional defendant in any actions arising as a result of the grant of the Permit or as a result of any construction, design or subsequent use that is the subject of the Permit.

Notwithstanding the foregoing provisions, the Commonwealth may employ or provide attorneys of its own selection to appear and defend any claims or actions on behalf of the Commonwealth, at the Permittee's sole cost and expense.

**SECTION 7 - REIMBURSEMENT FOR EXPENSES AND ENFORCEMENT OF INDEMNIFICATION**

The Permittee shall reimburse the Commonwealth for any necessary expenses, attorneys' fees or costs incurred in the enforcement of any part of this Indemnification within ninety (90) days after receiving written notice that the Commonwealth has incurred them.

**SECTION 8 - SEVERABILITY**

If any section of this Indemnification is found to be invalid by any court of competent jurisdiction, such finding shall not render the rest of this Indemnification invalid.

**SECTION 9 - COVENANT RUNNING WITH THE LAND**

Unless excused in writing by the applicable Commonwealth District Executive or his/her designee, the Permittee shall cause a covenant to be executed concerning the property which is the subject of this Indemnification, reciting that this Indemnification has been executed and that all subsequent purchasers, heirs, assigns or transferees of any legal or beneficial interest in the property take it subject to the obligations imposed herein as covenants running with the land. The covenant shall be recorded in the Office of the Recorder of Deeds of the appropriate county or counties. A copy of the executed covenant, Form M-950 IC, shall be presented to the District Permit Manager prior to the granting of the Permit, together with evidence that the covenant will be submitted to the Office of the Recorder of Deeds for recording in the Grantor/Grantee Index. If excused, memorandum of District Executive attached as Exhibit "B."

**SECTION 10 - INDEMNIFICATION DOES NOT CREATE RIGHTS IN THIRD PARTIES**

Nothing contained in this Indemnification shall confer a third party beneficiary right of action upon any person whatsoever and nothing set forth in this entire Indemnification shall be construed so as to confer upon any person or entity other than the Commonwealth, its officers, agents and employees, any right of action either under this Indemnification or in any manner whatsoever.

IN WITNESS WHEREOF, the undersigned have set their hands this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

PERMITTEE

BY: \_\_\_\_\_

*Applicant: do not write below this line -- for Department of Transportation use only*

- Exhibit "A" Design Waiver Approval attached.
- Certificate of insurance from Permittee supplied.
- Covenant Form M-950 IC received (unless excused by Commonwealth).
- Recording Copy Form M-945 RC verifying covenant (Form M-950 IC) will be recorded in appropriate County Courthouse Grantor/ Grantee Index supplied.
- Exhibit "B" memorandum from District Executive attached if Section 9 covenant requirement is excused.
- Indemnification properly executed. See Appendix F (Signature Authority Guide) to Right of Way Manual.

Design Waivers

**[This exhibit is to be the fully executed Design Waivers  
which are the subject of the Indemnification.]**

EXHIBIT "A"

Memorandum Excusing Covenant Requirement

**[This exhibit is to be a memorandum signed by the applicable District Executive or her/his designee; use only if Section 9 is excused.]**

EXHIBIT "B"