


**INTEROFFICE COMMUNICATION  
OFFICE OF REAL ESTATE**

**DATE:** January 18, 2011

**TO:** All Regional Projects Managers  
All District Real Estate Administrators

**FROM:** James J. Viau, Administrator, Office of Real Estate 

**SUBJECT:** Amending procedure to secure mortgage releases

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Effective January 24, 2011, the department's procedure for securing a mortgage release is amended as set forth below in Attachment A. Changes are highlighted in gray-scale text. The formal policy on the Office of Real Estate's website will be updated at the time of the next quarterly DRRC revisions.

The previous procedure required a mortgage release when any area acquired by ODOT was encumbered by a mortgage, with the exception of temporary easements needed during construction. The amended procedure provides discretionary exceptions to the Regional Projects Manager or a like official from an LPA for securing a mortgage release when Fair Market Value is established at an amount of \$5,000.00 or less. This exception may not be used when the real property is mortgaged and there is an improvement or fixture in the acquired area (see Section 5301.61 of the Ohio Revised Code that controls the removal of fixtures or improvements from mortgaged property).

This new procedure requires the Notice of Intent to Acquire and Good Faith Offer (NIAGFO) be modified by insertion of a new paragraph into the "Good Faith Offer" section of the form. The paragraph alerts the owner that the acquisition may occur without ODOT securing a partial mortgage release and puts the owner on notice that they should consult their loan and mortgage documents concerning a possible requirement to apply proceeds from the acquisition to any outstanding loan balance. The amended NIAGFO is provided below as Attachment B and the new paragraph is highlighted in gray-scale text. The NIAGFO will be amended and available on the Office of Real Estate web page as of the effective date of this amended mortgage procedure.

Should you have any questions regarding these changes, please do not hesitate to contact Doug Maitland at (614) 466-6802 or Wayne Pace at (614) 995-3541.

JJV:DSM:dm  
Attachments

C: Jim Barna, James Young, Randy Lane, CO Real Estate Managers

# Attachment A

## 5203.09 Mortgage Releases

### I. General

- A. Except in those instances where mortgage releases are not required pursuant to Section B of these procedures, mortgage releases are required for any property right acquired by ODOT that is encumbered by any mortgage.
1. A mortgage holder (mortgagee) is a part of the ownership of the property to be acquired/appropriated and must provide a release of the mortgage lien as part of the process of ODOT taking title to the property.
  2. Most mortgages, conventional or private, contain an eminent domain/condemnation clause and/or an acceleration clause requiring the proceeds of the acquisition/appropriation to be applied to the unpaid balance of the mortgage. If the proceeds are not applied to the unpaid balance, the mortgage holder may be able to declare the entire unpaid balance as due and payable. In exchange for delivering a mortgage release, a mortgage holder, at its election, may require all or some portion of the compensation to be paid by ODOT and applied against the unpaid balance of the mortgage.
  3. A complete and general release (satisfaction) of a mortgage is required anytime the parcel to be acquired is a total take of the owner's property (i.e., no residue) that is encumbered by the mortgage. When only a part of the property is acquired, a partial release of mortgage shall be obtained from the mortgagee.
  4. When a mortgage release is needed and cannot be secured, the parcel is to be appropriated.
- B. Exceptions to procedure requiring a mortgage release
1. At the discretion of the Region Projects Manager or an official from the LPA for local projects, a mortgage release is not required when FMVE has been established at an amount that is \$5,000.00 or less. However, this exception cannot be used when the real property is mortgaged and there is an improvement or fixture in the acquired area (see Section 5301.61 of the Ohio Revised Code that controls the removal of fixtures or improvements from mortgaged property). For the purposes of these procedures, improvement or fixture shall mean building or structure. When a Region Projects Manager elects to not secure a mortgage release, the negotiator must inform the property owner to review their loan and mortgage

documents concerning possible requirements to apply proceeds from a public acquisition to the outstanding loan balance, or to contact their lender about their responsibilities and obligations when part of the property is acquired for public use. The NIAGFO references this guidance and the negotiator shall explain this information during presentation of the offer to the owner.

2. There is an exception for temporary construction easements, but only when the temporary easement does not create a permanent, negative affect on the residue (e.g., removal of a structure).

## II. Procedure for Mortgage Releases

- A. Every mortgage release must be recorded and, the recorded release shall be a part of the acquisition file documenting the acquisition.
- B. The process to secure a mortgage release can be time consuming requiring much persistence from those managing the acquisition phase of the project. Therefore, the process to secure a release needs to start as soon as possible.

**Procedural Guidance:** To ensure adequate time to obtain releases from lenders and to record these releases it may be prudent to start the process to secure mortgage releases immediately after the initial offer of compensation. The negotiator will verify the existence of any mortgage with the owner will explain to the owner the need to secure a release and will obtain contact information about the lender from the owner. The negotiator (or the owner) may then contact the lender explaining the property is being acquired for a transportation project and determine the lender's process for providing a release of mortgage.

- C. The negotiator must work with the owner to secure a mortgage release. The first step in the process to secure a mortgage release is to telephone the mortgage holder to determine the mortgage holder's requirements for the release.
  1. Often, a mortgage holder will not give information to the negotiator without permission from the property owner. It is recommended the negotiator have the owner sign ODOT form RE 100 (Authorization to Obtain Partial Mortgage Release). See the Addenda of this section of ODOT's Real Estate Manual for an example of this form. The RE 100 may be downloaded from the Office of Real Estate web page.
    - a. The RE 100 is sent by the negotiator to the mortgage holder. Once the mortgage holder has received the RE 100, the mortgage holder may provide to the negotiator the information needed to obtain a release.
  2. The person securing the mortgage release should use ODOT's release form, either the RE 240 or RE 241. The lender may use their form and this is acceptable if the ODOT project manager reviews the form to ensure it releases the property described in the Exhibit(s) A from the mortgage.

- a. The correct version of ODOT's release of mortgage form is on Real Estate web page.
    - i. The RE 240 is the Release of Part of Premises From Lien of Mortgage. This form is used for all types of mortgages, but not land contracts. The Exhibit A (i.e., the RX form with the legal description of the take area) is attached to the release form.
    - ii. RE 241 is the Release of Part of Premises From Land Contract and is used for land contracts. The Exhibit A (i.e., the RX form with the legal description of the take area) is attached to the release form.
  3. Often, a mortgage holder will request ODOT to provide copies of its right of way plans, appraisal report, instrument and legal description, and to advise when ODOT anticipates closing the acquisition.
- D. Mortgage holders may charge a processing or service fee for a mortgage release. The service charge for a mortgage release shall be paid by ODOT as an incidental expense as required by 49 CFR 24.106; however, ODOT may elect to not pay "excessive" fees charged by the mortgage holder. When a mortgagor holder demands an "excessive" fee for a release of mortgage:
1. The negotiator should bypass the telephone clerk and negotiate with a higher level manager having decision-making authority at the lending institution.
  2. The negotiator shall attempt to negotiate with the mortgage holder, explaining that ODOT will pay recording fees and will do most of the work associated with the release.
  3. If the mortgage holder refuses to reduce its fee to a level ODOT deems reasonable, the negotiator shall inform the agency acquisition projects manager. This manager may need to seek assistance from AGO.
  4. If the service fee insisted on by the mortgage holder is excessive, or the mortgage holder makes other demands ODOT deems to be unreasonable, or the mortgage holder fails to provide adequate information in a reasonable period of time, then ODOT may need to appropriate the property.
- E. Once the mortgage holder states the amount of money it wants from the compensation to be paid for the property, the negotiator shall communicate this amount to the owner. If the owner and the mortgage holder cannot agree on the amount each is to receive, the property shall be appropriated.
- F. Unless the parcel has to be appropriated, it will move forward in the acquisition process and a closing will be scheduled. See section 5700 of ODOT's Real Estate Manual for more information regarding the closing process.

G. Paying the Mortgage holder

1. If the owner and mortgage holder agree on the allocation of the compensation to be paid for the property, the negotiator shall obtain two warrants and make separate payments to the owner and mortgage holder.
  - a. The negotiator/closing agent must be aware that no payment can be made to any mortgage holder unless there is a signed W-9 and Vendor Information Change form (VIF) on file with ODOT.
2. The process described in subsection G.1 may not always be possible. Another option is to use a local bank to disburse funds, especially if the mortgage is held by the local bank. The negotiator/closing agent may deposit the state's warrant for the full amount of compensation in the bank. The bank may deduct the amount required for it to execute a release of mortgage and can issue a bank check to the owner for the amount of the owner's share of compensation.
3. If the bank holding the mortgage is not local and a local bank will not act as an escrow agent, the negotiator/closing agent may use a title company. The process is the same as discussed in subsection G.2 above.
  - a. A title company may charge a fee for performing this service. If the fee is reasonable, ODOT shall pay the fee as an Incidental Expense as permitted in 49 CFR 24.106.
4. Once the mortgage holder is paid, the negotiator/closing agent must ensure the mortgage release is secured, recorded and a copy of the recorded mortgage release must be maintained in the acquisition file.

# Attachment B

Rev. 01/2010

## NOTICE OF INTENT TO ACQUIRE AND GOOD FAITH OFFER

[Insert Date]

[Insert name of owner – should match name on title report]

[Insert address where owner resides]

[Insert city, state, zip code]

Re: [Insert County-Route-Section]

Parcel Number: [Insert parcel number to be acquired per highway plan]

Interest Acquired: [Insert the interest acquired, i.e. WD, LA, SL]

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### THE NOTICE OF INTENT TO ACQUIRE

TO: [Insert name of owner – should match name on title report]

The Ohio Department of Transportation [“ODOT”] needs your property for a highway project identified as [Insert County-Route-Section] and will need to acquire the following from you:

[Insert the description of the property to be acquired, for example: Parcel 3WD is a Warranty Deed with Reservation of access. This means fee simple title is being acquired, but the residue property will retain reasonable access to the road.]

Ohio law authorizes ODOT to obtain [Insert the property right(s), i.e. Parcels 3 WD and 3 T] from your property for the public purpose of a highway project. The legal description of your property that ODOT needs for the highway project is set out in the Good Faith Offer that is included with this Notice of Intent to Acquire, that legal description is referred to as **Exhibit A** in the Good Faith Offer.

The Good Faith Offer included with this Notice of Intent to Acquire is ODOT’s determination of the fair market value of your property. This fair market value (FMV) is what a willing buyer who is under no compulsion to buy and a willing seller who is under no compulsion to sell would value your property on the open market.

You will have a minimum of 30 days from the time you receive the Good Faith Offer included with this Notice of Intent to Acquire to accept or reject the offer. We are available to discuss the offer with you at any time. If you reject the offer or we are unable to come to an agreement, we may have to exercise our eminent domain authority to appropriate your property. This will require a court procedure. In a court proceeding, you may disagree with whether our offer reflects the fair market value of the property.

**HERE IS A BRIEF SUMMARY OF YOUR OPTIONS AND LEGALLY PROTECTED RIGHTS:**

1. By law, ODOT is required to make a good faith effort to purchase [Insert the property right(s), i.e. Parcels 3 WD and 3 T].
2. We are to provide you with a written offer and the appraisal or valuation upon which we base that offer. The amount offered to you will not be less than the approved fair market value estimate of the property needed for the project. This compensation is based on the valuation of your property by qualified real estate personnel who have analyzed current market data. Their valuation work has been reviewed by a preapproved review appraiser prior to ODOT establishing its fair market value estimate for your property needed for the project.
3. **You do not have to accept this offer** and ODOT is not required to agree to your demands.
4. You are to be provided a copy of the valuation document during the first negotiation visit by an agent of ODOT.
5. You are to be provided with pertinent parts of the highway plans which are:  
[Insert the identification of the plan sheets given to the owner, i.e. Summary Sheet, Detail sheet, Cross Section sheet]
6. The Plan Letter Attachment included with the Good Faith Offer attached to this Notice Of Intent To Acquire describes the interest in the real property that is to be acquired from you, the description and location of the real property to be acquired, and any improvements such as buildings or structures situated on the property to be acquired, if any.
7. You will be provided with a booklet entitled "When ODOT Needs Your Property". This booklet briefly explains the acquisition process and your rights in this process.
8. You have the right to seek the advice of an attorney, real estate appraiser, or any other person of your choice in this matter.
9. You have the right to object to ODOT's decision to acquire your property by writing, within ten business days of receiving this notice, to:

Governor [Insert Governor's Name]  
Care of: Ohio Department of Administrative Services  
General Services Division  
Real Estate Services  
4200 Surface Road  
Columbus, Ohio 43228-1395

And to:

[Insert ODOT Director Name], Director  
Ohio Department of Transportation  
1980 West Broad Street  
Columbus, Ohio 43223

The Governor has the discretion to veto this project, and if he does, it will not proceed.

10. If you do not accept this offer, and we cannot come to an agreement on the acquisition of [Insert the property right(s), i.e. Parcels 3 WD and 3 T], ODOT has the right to file suit to acquire [Insert the property right(s), i.e. Parcels 3 WD and 3 T] by eminent domain in the county in which the property is located. This action, referred to as an “appropriation proceeding” ensures your rights will be fully protected while at the same time allowing the construction of the highway project to proceed for the benefit of all.
11. When filing the appropriation, the Director of Transportation will deposit the value of the property sought to be acquired with the court. At that time, ODOT gains the right to enter upon and use the property acquired subject to Section 163.06 (B) of the Ohio Revised Code. If you agree to accept the deposited money as full payment, the appropriation case will be closed.
12. If you are not satisfied with the amount of the deposit, you must file an answer with the court in the manner and within the time specified in the summons which is served upon you by the court. Once the answer is filed, you may apply to the court to withdraw the deposited money, subject to the rights of any other parties having an interest in the property. Withdrawing your share of the deposit does not interfere with your right to have a jury determine the FMV of your property. Interest will not accrue on any money deposited under this procedure. If the money withdrawn under this procedure should exceed the final award, the owner will be required to return the excess payment.
13. As part of your answer you may request a trial by jury. After a trial, a jury will decide the amount you are to be awarded for your property that is acquired, for the damage that is caused by the acquisition, if applicable, and for other damages permitted by law, which could either exceed or be less than our offer. At the trial you may testify and present evidence as to the value of your property.
14. If your property qualifies as an “Agricultural Use” as defined under ORC 163.21 (C)(2), and a jury awards you an amount that is more than 150% of ODOT’s final offer as determined by law, you may be entitled to recover attorney fees and other litigation costs.
15. You also have the right to request that the issue of the value of your property be submitted to nonbinding mediation. You must submit your written request for mediation to the court within ten business days after you file your answer. If a settlement is not reached at mediation, the matter will proceed to a jury valuation trial.



**THE GOOD FAITH OFFER**

The amount offered to you in good faith as just compensation for the acquisition of Parcel [Insert parcel number to be acquired per highway plan], [Insert the interest acquired, i.e. WD, LA, SL], of Project [Insert County-Route-Section] is:

Real Property To Be Acquired ..... [Insert Amount]

Damages To Your Property Which Is Not Acquired..... [Insert Amount]

Temporary Construction Easement ..... [Insert Amount]

Total Good Faith Offer ..... [Insert Amount]

Tenant-owned improvements, if any, are to be identified in this Good Faith Offer, and if there are any such improvements, the amount offered to you does not include compensation for these improvements. [Insert a sentence to state if there are tenant-owned improvements or not. If there are improvements, they need to be identified. For example: For this acquisition there is a tenant-owned improvement which is a sign owned by Jersey Baptist Church. This good faith offer does not include compensation for this sign.]

Your property may be encumbered with a mortgage lien as security for a loan. It is possible that ODOT may conclude this acquisition of property without obtaining a partial release of such mortgage lien from your lender. In that event, you as the borrower and grantor of the mortgage lien should consult your loan and mortgage documents concerning possible requirements to apply proceeds from a public acquisition to your outstanding loan balance, or contact your lender about responsibilities and obligations when part of your property is acquired for public use.

While ODOT may not provide legal advice, we will make all efforts to answer questions you have concerning this process and provide any copies of the law or our records that you may need to fully understand your rights, the project, and the process. If you have any questions concerning this matter, you may contact us at:

Ohio Department of Transportation

Office of Real Estate

[Insert name of the Region office]

[Insert mailing address of Region office]

[Insert phone number of Region office]

*Signature of contact person - Delete this instruction from final version*

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[Insert typed name and title of contact person]

[If person is a consultant, Insert - Agent of (name the consulting company)]

[Insert phone number of contact person]

**ACKNOWLEDGMENT OF RECEIPT  
OF  
NOTICE OF INTENT TO ACQUIRE AND GOOD FAITH OFFER**

Re: [Insert County-Route-Section]  
Parcel Number: [Insert parcel number to be acquired per highway plan]  
Interest Acquired: [Insert the interest acquired, i.e. WD, LA, SL]

Each of the undersigned acknowledges that a copy of the foregoing Notice of Intent to Acquire and Good Faith Offer was delivered to the undersigned by ODOT. This Acknowledgment of Receipt of Notice of Intent to Acquire and Good Faith Offer does NOT indicate or imply in any way that the undersigned has waived or will waive any objections the undersigned might have, to ODOT's efforts to acquire the undersigned's property. Furthermore, the undersigned's signature on this Acknowledgment of Receipt of Notice of Intent to Acquire and Good Faith Offer does NOT indicate or imply in any way that the undersigned has accepted or will accept any of the terms, provision or conditions set out in this Good Faith Offer.

\_\_\_\_\_  
(Owner's signature)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Print owner's name)

\_\_\_\_\_  
(Owner's signature)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Print owner's name)