

Guidance Regarding Planning/Design and Construction of Highway Projects (funded with state and/or federal funds) in Light of the Recent Decision Prohibiting Condemnation for New or Extensions of Sidewalks

Effective August 21, 2023

The goals of this document are to:

- Reinforce the department's commitment to project teams giving due consideration and evaluation of alternatives which include the establishment or extension of sidewalk.
- Provide interim design, real estate, and environmental project development guidance until manuals, forms, templates, brochures, and documents can be updated.
- Provide information regarding project options when lands for sidewalks cannot be acquired.

With respect to when an affected parcel may be acquired using condemnation, local units of government should work with their legal counsel to make an independent determination including if and how the decision impacts local projects. For state system projects, designers are to work with their regional and central office staff for determinations.

Applicability

This interim guidance applies to highway projects (planning, design, and construction) funded by state and/or federal funding. This interim guidance does not affect 100% local-only funded projects.

Background Information

This guidance is intended for the period prior to revision of the department's manuals (e.g., FDM) as relating to the planning, design and construction of sidewalks as impacted by the court of appeals decision in *Sojenhomer vs. Egg Harbor*. Municipalities and WisDOT staff should adhere to the guidance in this document as they plan, design and construct applicable projects.

The Court of Appeals for the Third District recently determined in *Sojenhomer vs. The Village of Egg Harbor* that sidewalks are pedestrian ways and as such are covered under the prohibition for condemnation of such facilities for new and extensions of the same. The prohibition affects new or extensions of sidewalks. This decision impacts highway projects regarding whether projects with sidewalks can be completed as planned.

Planning/Design Process

There is no change to the current planning and design process as described in WisDOT FDM chapter 11-46 regarding bicycle and pedestrian elements for complete streets. All projects should be planned as described in this subsection notwithstanding any prohibition on condemnation for sidewalks.

The *Sojenhomer* decision is not a limitation for evaluating sidewalks. It is expected that all projects will continue to give due consideration and evaluation of sidewalk needs.

All pedestrian evaluations should be addressed during project scoping notwithstanding the *Sojenhomer* decision. Give due consideration and evaluation of alternatives which include the establishment or extension of sidewalk. New sidewalk or sidewalk extensions should be evaluated following WisDOT's Facility Development Manual (FDM) existing policies and procedures. Follow the sidewalk design guidance in the FDM for all projects as appropriate, and do not automatically default minimum values.

Environmental Process (NEPA) Considerations

When sidewalk parcels cannot be condemned additional NEPA activity may be required.

If the environmental document *has not* been completed and public involvement activities have shown sidewalks as a design element in all alternatives presented to the public, additional public involvement showing alternative(s) without sidewalk is required per FDM 20-40-20.4 *prior* to completing the *draft* environmental document [Draft Environmental Report (ER), Environmental Assessment (EA), or Draft Environmental Impact Statement (EIS)] or final environmental document [Categorical Exclusion Checklist (CEC) as applicable].

If the draft environmental document evaluated alternatives with *and* without sidewalk, additional coordination per FDM 20-40 will determine if:

- The final environmental document may indicate the selected alternative is one without sidewalk
- The draft environmental document needs to be supplemented
- A new draft environmental document needs to be prepared
- Additional resource agency, tribal, and public/government coordination is required

If the draft environmental document only evaluated alternatives with sidewalk, additional coordination per FDM 20-40 will determine if:

- The draft environmental document needs to be supplemented
- A new draft environmental document needs to be prepared
- Additional resource agency, tribal, and public/government coordination is required

Regardless of how the scope change is documented, additional public involvement is required. Follow FDM 20-40-20 processes and procedures.

If a project has a *signed* final environmental document [CEC, Final ER, Finding of No Significant Impact (FONSI), or Final EIS] and scope changes are made to the selected alternative which eliminate sidewalk, additional coordination per FDM 20-40 will determine if:

- The final environmental document will be re-evaluated
- A new draft environmental document needs to be prepared

Regardless of how the scope change is documented, additional public involvement is required.

Per FDM 20-40-10.1, “additional coordination” means that the project team or Local Program Project Manager must contact the Region Environmental Coordinator (REC). The REC will schedule a meeting with the project team, the EPDS Region Liaison, FHWA, and themselves for the situations described above. The appropriate environmental document type and level of additional public involvement will be determined at that meeting.

If the environmental document, which includes new or extensions of sidewalk, is ready for review and approval, the project team and REC should review and comment on the document. The reviewed and “ready for approval” environmental document should remain with Project Manager until the appropriate steps as described above are completed.

Acquisition Considerations When Parcels for Sidewalks Cannot be Acquired

Local Public Agencies (LPA) should confer with their legal counsel on the risk associated with acquisitions affected by the *Sojenhomer* decision. Consultants working on LPA projects must discuss the above criteria with the local public agency approving authority regarding acquisition strategies. WisDOT state system acquisitions are to work with region and central office to obtain Office of General Counsel (OGC) risk assessments.

With respect to tactics for dealing with the inability to acquire sidewalk parcels where municipalities and WisDOT staff believe they cannot condemn the following should be implemented:

1. If all real estate acquisition options have been exhausted, then cross-section design modifications are to be evaluated. Consider design options that avoid the constrained parcel as condemnation cannot be used for acquiring the right of way. This would be a similar process to when facilities are provided to the maximum extent feasible (e.g., use of less than preferred design values may apply).
2. When condemnation is encountered and there is a *design modification that would allow* for establishment or extension of sidewalk which does not require right-of-way acquisition, it is recommended to use that option. Proceed with the project development process (e.g., real estate acquisitions, final design, and update other design elements).
3. If condemnation is encountered, and a *cross-section design modification is not possible*, it is recommended that the design ensures logical termini of the sidewalk (e.g., at intersections). For state system acquisitions, complete acquisition for only right of way that do not require condemnation and work with the Region Real Estate team to prepare a management plan for the land already acquired. For local program projects municipalities should confer with their legal counsel on the risk associated with acquisitions. Follow department processes and procedures to ensure proper documentation occurs, including change management and project monitoring for project scope, schedule, or budget impacts.

Communication is key. Coordinate between program areas to reflect design decisions and amend documents (i.e., environmental document, Design Study Report, etc.) and hold public/other stakeholder outreach accordingly.

Follow current department change management and program monitoring processes and procedures regarding delivery schedules, scope changes, and cost adjustments. Please note that due to the competitive nature of project awards in the Transportation Alternatives Program (TAP) and the Congestion Mitigation and Air Quality (CMAQ) program, change management requests for cost increases on improvement projects in those programs are not allowed.

For other project-related questions use the federal/state aid project delivery resources on the WisDOT Local Program webpage, <https://wisconsindot.gov/Pages/doing-bus/local-gov/lpm/default.aspx>. If necessary, work with the Regional Local Program Delivery contacts <https://wisconsindot.gov/Documents/doing-bus/local-gov/lpm/lp-contacts.pdf> to coordinate on specific items.

WisDOT recommends projects continue to follow project approval designations and coordinate with Region Local Program Project Delivery contacts as appropriate.

WisDOT designers are advised to continue coordinating with regional and central office staff for assistance on an individual project-by-project basis as appropriate.