

PROPOSED RULEMAKING

DEPARTMENT OF TRANSPORTATION

[67 PA. CODE CH. 441]

Access to and Occupancy of Highways by Driveways and Local Roads

The Department of Transportation (Department), under section 420 of the State Highway Law (36 P.S. § 670-420), proposes to amend Chapter 441 (relating to access to and occupancy of highways by driveways and local roads) to read as set forth in Annex A.

Purpose of Chapter 441

The purpose of Chapter 441 is to exercise the Department's statutory authority to promulgate a regulation controlling the safe location, design, construction and maintenance of: driveways; local roads; drainage facilities; structures; means of ingress, egress and access; and other property within the State highway right-of-way.

Purpose of These Proposed Amendments

The purpose of these proposed amendments is to: 1) clarify the provisions relating to who may apply for a permit to construct or alter driveways; local roads; drainage facilities; structures; means of ingress, egress and access; and other property within the State highway right-of-way; and 2) and set forth application requirements that strike a careful balance between the interested parties' property rights.

Significant Provisions of the Proposed Amendments

Significant proposed amendments to Chapter 441 include the following:

The proposed amendments to § 441.1 (relating to definitions) delete the current definition of "own" and add the terms "owner" and "person." Most significant is the term "owner," which clarifies that ownership of legal interests are not limited to owners of property holding fee absolute title or certain leasehold interests.

Proposed amendments to § 441.3(b) (relating to permit application procedure) use the term "owner" and to require an applicant that is not the holder of fee title to the property to notify the fee title holder that an application has been submitted. Section 441.3(e)(6) is proposed to be amended to require applicants to prove that they are an "owner," where the proof must be in the form of a copy of the valid legal document or court order verifying the applicant's legal estate or interest in the property. Section 441.3(e)(7)(i) is proposed to be added to require applicants other than fee title holders to submit additional information, including proof that either: 1) the fee title holder consents to the application; or 2) the applicant provided notice of the submission of the application to the fee title holder apprising the fee title holder of the administrative rights available to the fee title holder. The Department will not grant or deny the permit application until 30 days from the fee title holder's receipt of notice.

Proposed § 441.3(e)(7)(ii) also requires applicants other than fee title holders to submit a written statement whereby the applicants indemnify and defend the Department from suits, damages, claims and demands of any type brought by the fee title holder because of the Department granting a permit to the applicant. Lastly, under proposed § 441.3(e)(7)(iii), applicants other than fee title holders shall provide proof that a covenant

running with the land has been recorded to ensure that subsequent property owners are bound to the indemnification provisions of proposed § 441.3(e)(7)(ii).

Persons and Entities Affected

These regulations affect all applicants for highway occupancy permits to access State highways who propose to create an access point to a State highway or to change the design, operation or locations of existing access. These applicants include owners of legal interests in property who require access to the property to exercise their property rights, such as easement holders and mineral estate holders, as well as fee title holders.

The regulation carefully balances the interest of all interested parties. Where the applicant does not hold fee title, the fee title holder shall be notified that an application has been submitted, which provides the fee title owner an opportunity to object to the application process under The Administrative Code of 1929 (71 P.S. §§ 51—732).

Fiscal Impact

These regulations should not increase costs for the Commonwealth or local governments. No fiscal impacts to the regulated community are anticipated because the changes are consistent with current practices that have been in place since 2002.

Regulatory Review

Undersection 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)) on March 8, 2017, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Transportation Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking by the Department, the General Assembly and the Governor.

Sunset Provisions

The Department is not establishing a sunset date for these regulations since these regulations are needed to administer provisions required under section 420 of the State Highway Law. The Department, however, will continue to closely monitor these regulations for their effectiveness.

Public Comments

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking to Jeffrey M. Spotts, Regulatory Counsel, Department of Transportation, Commonwealth Keystone Building, 400 North Street, Harrisburg, PA 17120-8212, (717) 787-5299, jespotts@pa.gov within 30 days of publication of this proposed rulemaking in the *Pennsylvania Bulletin*.

Contact Person

The contact person for this proposed rulemaking is Richard Roman, P.E., Director, Bureau of Maintenance

and Operations, Commonwealth Keystone Building, 400 North Street, Harrisburg, PA 17108-2047, (717) 787-6899.

LESLIE S. RICHARDS,
Secretary

Fiscal Note: 18-479. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 67. TRANSPORTATION

PART I. DEPARTMENT OF TRANSPORTATION

Subpart B. NONVEHICLE CODE PROVISIONS

ARTICLE III. HIGHWAYS

CHAPTER 441. ACCESS TO AND OCCUPANCY OF HIGHWAYS BY DRIVEWAYS AND LOCAL ROADS

§ 441.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Minimum use driveway—A residential or other driveway which is used or expected to be used by not more than 25 vehicles per day.

[*Own*—To hold title to land or a building or be a tenant in a lease that will not terminate within 15 years of the permit issuance date.]

Owner—A person holding:

- (i) fee title to property,
- (ii) an estate or other legal interest in property, such as an easement, a lease, a license or subsurface rights, or
- (iii) an equitable interest in property under a sales agreement or an option to purchase; provided that the estate or other legal or equitable interest in property includes the use requested in the permit.

Pavement edge—The edge of the main traveled portion of any highway, exclusive of shoulder.

Permanent curbing—Plain or reinforced cement concrete curb which meets Department standards.

Permit—A highway occupancy permit (Form M-945P) issued by a district office pursuant to this chapter.

Person—[Any natural person, firm, copartnership, association, corporation, or political subdivision.] An individual, business entity, association, political subdivision, authority, Federal or Commonwealth agency, or other entity recognized by law.

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§ 441.3. Permit application procedure.

(a) *General rule.* No driveway, local road or drainage facility or structure shall be constructed or altered within State highway right-of-way and no drainage facility of the Department may be altered or connected onto without first obtaining a permit from the Department. A permit may not be required for maintenance.

(b) [*Who may execute applications.*] Who may apply for a permit. Permit applications [shall] must be submitted in the name of [and executed by] the owner of the property. If the applicant does not hold fee title to the property, the applicant shall notify the fee title holder that an application has been submitted.

(c) *Where to submit application.* Permit applications shall be submitted to either the district or county office having jurisdiction over the county in which the proposed work will be performed.

(d) *When to submit applications.* Permit applications shall be submitted prior to the construction of any building which the proposed driveway will serve to assure that the driveway can be constructed in accordance with this chapter.

(e) *Application procedure and required information.* Permit applications:

(1) Shall be submitted in person or by mail on a properly completed Department Form M-945A.

(2) Shall be signed by the applicant.

(3) Shall include five sets of plans, of a quality sufficient for microfilming, detailing the location and pertinent dimensions of both the proposed installation and related highway features.

(4) Shall be accompanied by a check or money order, payable to the Department, in the appropriate amount, as set forth in § 441.4 (relating to permit fees).

(5) Shall be submitted to the Department at least 30 days prior to the anticipated start of work.

(6) Shall contain proof [of ownership] that the applicant is an owner. The proof must be in the form of a copy of the valid legal document or court order verifying the applicant's legal estate or interest in the property.

(7) Shall, when submitted by an applicant other than a fee title holder, contain:

(i) Proof of one of the following:

(A) The fee title holder consents to the application.

(B) The applicant provided written notice of the submission of the application to the fee title holder apprising the fee title holder of the administrative rights relative to the permit application under 1 Pa. Code §§ 35.23, 35.24 and 35.27–35.32. The Department will not grant or deny the permit application until 30 days after receipt of the written notice by the fee title holder.

(ii) A signed written statement, whereby the applicant agrees to indemnify and defend the Commonwealth (if requested) from all suits, damages, claims and demands of any type whatsoever by the fee title holder of the property because of granting the permit to the applicant, such as a failure of the permittee or other person to comply with the permit or any other statutes, ordinances or regulations in connection with the permit.

(iii) Proof that the applicant executed and recorded in the Office of the Recorder of Deeds in the appropriate county or counties, a covenant running with the land providing that all subsequent purchasers, heirs, assigns or transferees of the property take the property subject to the indemnification in subparagraph (ii), unless released by the Department.

(f) *Traffic control plan.* Submission of the traffic control plan shall be as follows:

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[Pa.B. Doc. No. 18-396. Filed for public inspection March 16, 2018, 9:00 a.m.]