

MEMORANDUM No. 36

TO: Design Professionals providing services to
Kentucky's K – 12 Public Schools

FROM: Greg Dunbar, AIA, Manager
District Facilities Branch

DATE: ~~August 23~~ July 8, 2016

RE: Design, Approval and Funding for Improvements on Public Rights of Way for School Projects

Sections 184 and 186 of the Constitution of Kentucky address the use of public school funds. Opinions of the Kentucky Attorney General provide guidance regarding improvements which are not on school property. OAG 75-362 and OAG 75-613 state “**schools funds may not be expended for the construction of entrances to school property within the rights of way of state highways and the expense of such entrances must be borne by the state department of transportation (now transportation cabinet).**” By extension, this prohibition also applies to improvements in the rights of way maintained by local agencies such as city governments and county fiscal courts and requires funding by that agency. However, in the past, the prohibition may not have been understood by districts and their design professionals. Consequently, district funds were inappropriately expended. The design of entrances may have been done late in the design process, or in extreme cases, after the project was bid with the expectation that funding would be provided by others. These circumstances were not acceptable to the Kentucky Department of Education (KDE) or the Kentucky Transportation Cabinet (KYTC). To address these issues, KDE incorporated language in **702 KAR 4:160 Capital Construction Process** (effective 9-6-2013) to formalize the requirement for entrance design to follow the same process and timeline as the building design. In spite of this change, both agencies have encountered projects that are not compliant.

Given that funding for school entrances depends upon the approval and allocation by other agencies, it is imperative that districts engage the appropriate agency at project initiation and keep the agency engaged throughout the design and approval process.

Work in the right of way of state maintained roads is funded by the Kentucky Transportation Cabinet Secretary's **Discretionary Fund**. For funding consideration, projects involving KYTC are to conform with PE-601, the “School Sites” Chapter of the Division of Maintenance Permits Manual. The process is administered by KYTC's Central Office Permits Branch. Local agencies may have their own design standards and requirements for approval of a funding commitment. In general, involving the affected agency as early in the project as possible is advisable, but in this period of shrinking resources, it now becomes imperative in order to assure the availability of funding for school entrances, exits and related construction.

Acquisition of a school site is subject to compliance with **702 KAR 4:050 Building sites; inspection, approval** and **KRS 177.057, Required consultation on highway access prior to purchase of property for school facility**. Inspection and approval of a school site by both KDE and KYTC are required. If a district is contemplating purchasing property, the superintendent shall contact the District Facilities Branch (DFB) and request site inspections of potential sites. DFB will coordinate the inspections with the district, KYTC and our office.

Existing school sites for which a project involving site improvements in a right of way are anticipated require the approval of the design and a funding commitment from the affected agency.

For approval by KDE, all capital construction projects (new construction, renovations and additions) are subject to compliance with **702 KAR 4:160**. This regulation requires the submission of a BG-1 Project

Application Form (BG-1) by the district to initiate a project and approval by KDE. Approval is based on a number of considerations including “Funds Available.”

When a proposed project is expected to involve improvements in the right of way, the initial BG-1 shall include an estimate or state “TBD” (to be determined) in Column B “Funds Available” on the “KYTC Reimbursement” line and indicate the source of the funds (KYTC or local government) needed for these improvements.

After approval of a BG-1, **702 KAR 4:160** requires the following to be submitted to KDE for approval:

- Schematic Design phase submittal with a site plan. This also is a contractual requirement of the Owner-Architect Agreement.
- Design Development phase submittal to include a copy of the signed letter of transmittal sent to the Kentucky Transportation Cabinet or other agency having jurisdiction regarding proposed entrance and right-of-way improvements.
- Construction Documents Phase submittal to include board-approved completed drawings and project manual and proof of submission of completed construction documents to other agencies having jurisdiction (this includes KYTC or local government).

DFB has developed the following procedure to separately identify the costs of improvements in the right of way for reimbursement purposes:

- Work in the right of way shall be identified on the drawings as an “Alternate”, described in the “Alternates” section in the project manual and identified in the “Alternate Bids” portion of the Form of Proposal.
- Appropriate unit prices related to work in the right of way shall be described in the “Unit Prices” section in the project manual and identified in the “Unit Prices” portion of the Form of Proposal.
- Following receipt of bids, the amount of the reimbursement as determined by the “Alternate” price shall be noted on the KYTC Reimbursement line of the revised BG-1 and submitted with other post bid information to KDE. This amount shall be supported by a Memorandum of Agreement between the district and the party responsible for reimbursement.

Failure by a district and its design professional to comply with statutory and regulatory requirements related to obtaining the approval of the design of improvements in the right of way and the associated funding commitment from the effected agency may result in the project not being approved for construction.

For project specific questions, please contact the district assigned DFB Project Manager located on the following page: <https://www.education.ky.gov/districts/fac/Pages/default.aspx>

For questions regarding KYTC requirements, contact Greg Preece, Manager, Central Office Permits Branch at Greg.Preece@ky.gov.

Your cooperation on this matter is appreciated.

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