

**FDOT Six-Month Update:  
Auditor General Audit Report 2020-040  
Operational Audit: Right-of-Way Relocation Assistance Program**

**Note:** Report 2020-040 (October 2019) included responses from the Florida Department of Transportation (Department) and counter-responses from the Auditor General (AG). To facilitate review, both the original responses and AG counter-responses have been included below in **gray** text; updates follow in **black** text.

**Report 2020-040—General Statement**

**Original General Statement from Department of Transportation**

Payment of relocation assistance and moving costs to persons displaced by transportation facilities or related projects, is provided for in Florida Administrative Code Rule 14-66, which incorporates by reference 49 Code of Federal Regulation Part 24. Per 23 CFR 710.201(c), FHWA must review and approve of the Department's Right of Way manual to ensure consistency with applicable federal laws and regulations. The attached email includes FHWA's memo dated December 12, 2018, approving the Department's Right of Way Manual and email approval of procedural update of Section 1.1 on August 7, 2017.

The AG report erroneously equates the terms "document" and "documentation" to mean a narrative or explanation. The single provision within with the relevant Federal regulations makes clear that documentation typically means providing supporting documents and not a narrative or explanation. 49 C.F.R. § 24.207(a) states: "Documentation. Any claim for a relocation payment shall be supported by such documentation as may be reasonably required to support expenses incurred, such as bills, certified prices, appraisals, or other evidence of such expenses." Section 9.2.14 of the FDOT Right of Way Procedures Manual contains a similar explanation of the term "documentation." Throughout the ROW Procedures Manual, the term "explain" rather than the term "document" is routinely used where a narrative is required to be created rather than relying upon existing documentation. For example, Section 9.4.21.3(B), makes the distinction between "fully explain" and "documented" clear when it states, "Any variation in size between the acquired and replacement dwellings must be fully explained and documented." Without doubt, these terms have different meanings.

To ascertain whether sufficient documentation exists to support a relocation decision or finding requires a complete review of the entire project and parcel files which was, admittedly, not done for this audit. A selective review of requested documents is insufficient to determine whether a particular issue is sufficiently documented, or when required, explained.

A narrative explanation summing up the totality of why a certain determination was made is not required by Federal rule or FDOT procedure. The recommendations, one through

three, are counterproductive, are likely to increase litigation, would increase the administrative workload on the Department and likely will not be approved by the FHWA since these recommendations are diametrically opposed to federal regulation.

## **AG Counter Response to Original General Statement**

In responding to the findings and recommendations, Department management provided a general statement in addition to specific responses regarding each finding. In the Department's general statement and responses to Findings 1 through 3, Department management indicated that our report erroneously equated the terms "document" and "documentation" to mean a narrative or explanation and stated that our recommendations to those findings were counterproductive, likely to increase litigation, would increase the Department's administrative workload, and likely not be approved by the Federal Highway Administration (FHWA) since they were diametrically opposed to Federal regulations. Additionally, in the Department's general statement, management indicated that to ascertain whether sufficient documentation exists to support a relocation decision or finding requires a complete review of the entire project and parcel files which was, admittedly, not done for this audit.

Notwithstanding Department management's general statement, nowhere in our report do we define either "document" or "documentation" or even suggest that such terms mean a narrative or explanation. Further, the point of our findings and recommendations were not to increase the Department's workload or increase the possibility of litigation, but rather, to ensure that the basis for the expenditure of public funds is adequately documented in Department records. With respect to the Department's assertion that a complete review of the entire project and parcel files had not been conducted for this audit, we reviewed all supporting documentation provided by the Department for each selected payment included in our audit testing. At no time during the audit, nor in management's response, did the Department cite specific instances where the Department had not provided all records necessary for audit. Additional comments regarding management's responses to Findings 1 through 3 are included after each finding.

### **General Statement—Six-Month Follow-up Response**

#### ***Statement of Program Purposes, Related Risks, and Risk Response***

The public purposes of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, require balancing competing risks. The use of eminent domain, even in pursuit of the overall public good, has the potential to dispossess and traumatize citizens. Accordingly, 49 CFR 24.1 requires the Department to pursue the following objectives simultaneously:

- to encourage and expedite negotiations with property owners, to avoid
  - litigation and congestion of the courts (which may be associated with construction delays as well as additional costs), and
  - loss of public confidence in the government;

- to ensure displaced persons do not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole; and
- to be efficient and cost effective to the extent possible in the pursuit of these goals.

The legislative background of 49 CFR 24.1, as documented at 50 FR 8955-01, makes clear that efficiency and cost effectiveness are not “more important than providing the assistance or protection due an owner or displaced person.” Our federal partner, FHWA, monitors the Department closely to ensure it strikes the right balance among competing public interests in timely construction of strategically important projects, citizens’ rights, and cost.

The Department uses a system of checks and balances to ensure its projects, budgeted in the billions, can be completed on time and in budget with minimal harm to citizens of the State of Florida. These checks and balances include the employment of independent licensed appraisers and trained relocation agents, to ensure property owners and displaced persons are treated fairly and consistently in accordance with federal regulation. As noted in a recent program assessment<sup>1</sup> by FHWA, the Department is one of the few state agencies in the country to provide formal training to its relocation agents.

During the AG’s audit, the Department forwarded some sample files to FHWA, which confirmed the files complied with its documentation standards. Based on additional feedback provided by the AG in its final report, **the Department subsequently forwarded the complete set of files reviewed by AG during its audit to FHWA (86 files in total). In an e-mail dated February 10, 2020 (Attachment 1), FHWA confirmed all files met FHWA’s compliance standards. In addition, FHWA recently released the following statement concerning the Department’s Right-of-Way Relocation Assistance program in a recent program assessment:**

The State Auditor General’s (AG) Office issued an Operational Audit Report in October 2019 on FDOT’s Right of Way Relocation Assistance Program. The AG’s report noted five findings related to (1) comparable replacement dwellings; (2) last resort housing; (3) fixed payments in lieu of actual moving and related expenses; (4) mortgage interest differential payments; and (5) collecting SS numbers. FDOT disputes the first three findings and accepted the latter two findings. Central Office ROW asked FHWA to review some of their last resort housing calculations and justifications to make sure they were compliant with federal requirements. FHWA found all examples and related procedures to meet minimum federal requirements. The soundness of FDOT’s Relocation program has been confirmed on numerous occasions through ROW [Right of Way] QARs [Quality Assurance Reviews] and PARs [Performance and Accountability Reviews]. **We suspect the auditors may not fully**

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<sup>1</sup> FY21 Addendum to the PY18 Right of Way Program Assessment FHWA - Florida Division (April 2020).

**understand our federal relocation requirements or are seeking documentation beyond federal requirements.** <sup>2</sup> [emphasis and acronym definitions supplied]

The Department and FHWA will continue to review files during the joint annual Quality Assurance Review to ensure compliance with State and Federal policies and procedures. The Department is one of the few state agencies in the country to conduct its Quality Assurance Reviews jointly with FHWA, in cooperation with the regional office's Division Realty Officer (DRO).

The recommendations made by the Auditor General would result in the Department pursuing a more aggressive cost containment strategy than mandated by federal regulations at the expense of property owners and displaced persons involuntarily injured by our powers of eminent domain. They would require the Department to second-guess the decisions of trained relocation agents, in case the agent might have secured a better deal if the agent had not merely met the minimum standard, rather than the preferred (and therefore optional) best practice suggested by the regulations, in all cases.

These recommendations place the Department at risk of violating the balanced approach to competing risks mandated by Federal law. The potential benefits (cost savings) are far outweighed by the potential costs, including:

- Temporary or permanent suspension of federal funding for strategically important construction projects, due to FHWA questioning of whether displaced persons had received adequate compensation. The Department has suffered costly construction delays in the past due to such questions.
- Loss of public confidence and resulting litigation. Due to the emotional burden associated with displacement, great sensitivity needs to be shown to avoid the appearance of strong-arming the public, within the constraints and caps on different forms of compensation set by federal regulations.
- Construction delays during changing market conditions, as homes come on and off the market more rapidly than relocation agent's ability to identify at least three comparable dwellings. The cost of delays far outweighs the modest savings realized for trimming reimbursement below the allowable caps.

**To avoid these greater risks, the Department chooses to bear the risk associated with not accepting the Auditor General's recommendations for Findings 1-3.** However, the Department has identified a best practice in use by some districts to ensure the completeness of relocation files by the use of a detailed support documentation checklist (Attachment 2). The Department's Right-of-Way

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<sup>2</sup> Ibid.

Office will be adopting this best practice into its statewide guidance for all districts to follow, as noted in its specific responses below.

## **FINDING 2020-040-1**

**Finding 1: Comparable Replacement Dwelling Determinations:** Contrary to Department policies and procedures, Department records did not always evidence the reason at least three comparable replacement dwellings were not identified during the replacement housing assistance process. Additionally, Department records did not adequately demonstrate the population from which comparable replacement dwellings were selected.

**Recommendation: The AG recommends that Department management revise policies and procedures to require that Department records evidence the population from which comparable replacement dwellings are selected and ensure that, when three replacement dwellings are not identified during the replacement housing assistance process, Department records evidence the reason.**

### **Finding 1: Original Agency Response and Corrective Action Plan**

The Department disagrees with Finding 1. The AG's report fails to identify the parcel file and project file being referenced in the findings, making it difficult to directly address the findings and recommendations. That said, Title 49 CFR s. 24.204(a) requires a minimum of one comparable replacement dwelling. Chapter 9.2.6.1 of the Right of Way Manual also states that at least one comparable replacement dwelling is made available. The procedure (9.4.28.1) prefers three but requires that there must be at least one. If three are not available, the file will be so **documented**; "limited market" or "fast-moving market" is a sufficient reason pursuant to the procedures and FHWA. The finding that the 17 files do not contain sufficient justifications is simply untrue. All files included sufficient justifications if less than three comparables were used. The relocation agents computing Replacement Housing Payments are subject matter experts. It is not a Department procedural requirement or Federal requirement to list available dwellings on the market or document the reason that a comparable was chosen over a different available comparable in the market. The procedure requires (with reason) that the file is documented to show the selected comparables' similarities to the subject property. The number one comparable must be equal to or better than the displacement dwelling. Per procedure 9.4.28.1(C), comparable replacement dwellings will be selected from the neighborhood of the displacement dwelling, or in a nearby or similar neighborhood where housing costs are the same or higher than the displacement dwelling.

The procedure the Department must follow when looking for comparable dwellings is found in 49 C.F.R. § 24.403(1) & (4) which provide:

If available, at least three comparable replacement dwellings shall be examined and the payment computed on the basis of the dwelling most nearly representative of, and equal to, or better than, the displacement dwelling...

To the extent feasible, comparable replacement dwellings shall be selected from the neighborhood in which the displacement dwelling was located or, if that is not possible, in nearby or similar neighborhoods where housing costs are generally the same or higher.

In other words, the Department, in a very limited time, will attempt to find three dwellings for sale in 1) the same neighborhood and if that is not feasible, the Department will look in 2) nearby neighborhoods or in 3) similar neighborhoods. Note that the first two criteria are geographically-tied while the third criteria is not, which helps explain why there are comparable replacement dwellings 17 or even 38 miles from the displacement dwelling. By using terms such as "if available" and "to the extent feasible," the procedure is obviously designed to provide the Department great flexibility and is not designed to burden the Department with onerous paperwork.

The recommendation increases the Department's administrative burden that is not required by law, rule or procedure. By comparison, in standard real estate appraisals, the appraiser lists the comparable sales that are used, but does not list sales that were looked at and then rejected on the basis they are not comparable or not as comparable as the sales that are used. Listing sales that are reviewed, but not used, should be avoided, where their existence could be taken out of context and used in an adversarial proceeding against the Department.

### **Finding 1: AG Counter-Response to Original Department Response**

Department management indicated in their written response that our report failed to identify the specific parcel files and projects referenced in the finding, making it difficult to address the finding and recommendation. Department management also indicated that "the finding that the 17 files do not contain sufficient justifications is simply untrue" and that "all files included sufficient justifications if less than three comparables were used." Notwithstanding this response, during our audit Department management requested, and we provided, a listing identifying the parcel and project information for the 17 payments included in our audit testing. Our finding does not suggest that Department records for the 17 payments did not evidence the reason more comparable replacement dwellings were not identified, rather, the finding indicates that Department records for the 17 payments did not adequately demonstrate the population from which comparable dwellings were selected. Department records for 3 of the payments, however, did not evidence the reason more comparable replacement dwellings were not identified. Consequently, the finding and related recommendation stand as presented.

## Finding 1: Six Month Follow-Up Response

### *Specific Comments for Finding 1*

See “Statement of Program Purposes, Related Risks, and Risk Response” (General Statement--Six-Month Follow-up Response), above. As noted in this statement, based on additional feedback provided by the AG in its final report, **the Department subsequently forwarded the complete set of files reviewed by AG during its audit to FHWA**. In an e-mail dated February 10, 2020 (Attachment 1), FHWA confirmed **all files met FHWA’s compliance standards**.

The Department will continue to follow Federal and state regulations and FHWA guidelines, which:

- require, at a minimum, identification of at least one (1) comparable dwelling;
- recommend identification of up to three (3) comparable dwellings *when possible* (2 CFR 24.204 (a)) or *if available* (2 CFR 24.403(a)(1));
- do not require the Department to demonstrate the population from which comparable dwellings were selected; and
- do not require detailed justifications for documenting why more than one (1) comparable dwelling could not be identified (e.g., compared to short phrases such as “limited market” or “fast moving market”).

The Department and FHWA will continue to review files during their annual Quality Assurance Review to ensure compliance with State and Federal policies and procedures.

As a best practice to ensure the quality of its support documentation, the Department’s Right of Way Office is currently working to incorporate the attached checklist (Attachment 2) into its statewide guidance. It also continues to encourage identification of three (3) comparable dwelling when possible. In all other respects, the Department **accepts the risk associated with not accepting the Auditor General’s recommendations for Finding 1**, for reasons provided in the “Statement of Program Purposes, Related Risks, and Risk Response” (General Statement--Six-Month Follow-up Response), above.

**Estimated Completion Date:** December 31, 2020 (the next milestone for internal follow-up monitoring by OIG) or earlier (as soon as approvals for policy update are obtained).

## FINDING 2020-040-2

**Finding 2: Replacement Housing of Last Resort Assistance Payments:** The Department did not always adequately document the basis for providing replacement housing of last resort assistance payments to displaced persons.

**Recommendation: The AG recommends that Department management ensure that the basis for providing replacement housing of last resort assistance payments is sufficiently documented in Department records in accordance with Federal regulations.**

### Finding 2: Original Agency Response and Corrective Action Plan

The Department disagrees with Finding 2. The Definition that Florida uses for Last Resort Housing in the Right of Way Manual, Chapter 9.1, specifically states that *Last Resort Housing is a provision of replacement housing by techniques developed for such purpose, when a highway project cannot proceed to construction because suitable, comparable and/or adequate replacement sale or rental housing is not available and cannot otherwise be made available to displacees within the payment limits established by law.* Essentially, if the file is documented with "Last Resort Housing" only, that is the justification by the pure definition in the procedure, nothing else is needed. This definition is an acceptable justification, as outlined in Title 49 CFR s. 24.4040). Other types of justification are also acceptable for FHWA, such as "exceeds RHP threshold," as the Department cannot prohibit payment in situations where the RHP threshold is exceeded. The RHP and possibility of HLR are tied to the entire parcel file, as value for the subject property and the need for superior comps based on DS&S conditions, or the unavailability of comparables generally lead to HLR. It is the FHWA's and Department's mission to ensure that the displacees are not worse off than they were in the subject property, as that would not be compliant with Federal Regulations. Exceeding the payment threshold is commonplace, and the Department is required to pay HLR to ensure the displacee is not unduly burdened.

The FHWA in an email dated September 30, 2019, confirmed the Department's documentation, as described above, is consistent with federal regulations and Department procedures. Any further documentation is inconsistent with FHWA requirements and increases the potential for litigation.

### Finding 2: AG Counter-Response to Original Department Response

Department management indicated in their written response that, if the file is documented with "Last Resort Housing" only, by pure definition, no other justification is needed for the payment. Department management further indicated that the Federal Highway Administration (FHWA) in an e-mail dated September 30, 2019, confirmed that the Department's documentation was consistent with Federal regulations and Department procedures. Notwithstanding the Department's



response, as indicated in the finding, Federal regulations (Title 49, Section 24.404, Code of Federal Regulations) state that any decision to provide replacement housing of last resort assistance payments must be adequately justified on either a case-by-case basis or a determination that little, if any, comparable replacement housing is available. Thus, the basis for the Department's assertion that last resort housing payments are self-justifying is not readily apparent. Further, in confirming with the FHWA that the Department's documentation was consistent with Federal regulations and Department procedures, the Department provided the FHWA documentation for three example replacement housing of last resort assistance payments, two of which were not subject to our audit procedures and a third that was not an audit exception. Consequently, the finding and related recommendation stand as presented.

### **Finding 2: Six Month Follow-Up Response**

See "Statement of Program Purposes, Related Risks, and Risk Response" (General Statement--Six-Month Follow-up Response), above. As noted in this statement, based on additional feedback provided by the AG in its final report, **the Department subsequently forwarded the complete set of files reviewed by AG during its audit to FHWA.** In an e-mail dated February 10, 2020 (Attachment 1), FHWA confirmed **all files met FHWA's compliance standards.**

As a best practice to ensure the quality of its support documentation, the Department's Right of Way Office is currently working to incorporate the attached checklist (Attachment 2) into its statewide guidance. In all other respects, the Department **accepts the risk associated with not accepting the Auditor General's recommendations for Finding 2,** for reasons provided in the "Statement of Program Purposes, Related Risks, and Risk Response" (General Statement--Six-Month Follow-up Response), above.

**Estimated Completion Date:** December 31, 2020 (the next milestone for internal follow-up monitoring by OIG) or earlier (as soon as approvals for policy update are obtained).

## **FINDING 2020-040-003**

**Finding 3: Fixed Payments In Lieu of Payment for Actual Moving Expenses:** Department records for some fixed payments in lieu of actual moving and related expenses did not clearly evidence that the displaced entities would incur a substantial loss of existing patronage and such loss was not apparent given the nature of the entity and move.

**Recommendation:** The AG recommends that Department management ensure Department records clearly evidence for all fixed payments in lieu of payment for actual moving expenses that a displaced entity will incur a substantial loss of existing patronage in accordance with Federal regulations.

### Finding 3: Original Agency Response and Corrective Action Plan

The Department disagrees with Finding 3. A displaced business may be eligible to choose a fixed payment in lieu of the payments for actual moving and other related expenses and actual, reasonable reestablishment expenses. This fixed payment to a business is based on the business's average annual net earnings over a two-year period and shall not be less than \$1,000 or more than \$40,000 (amount updated through MAP-21).

Per 49 CFR 24.305(a)(2), a business is eligible for the payment if it meets the following criteria:

The business cannot be relocated without a substantial loss of its existing patronage (clientele or net earnings). **A business is assumed to meet this test unless the Agency determines that it will not suffer a substantial loss of existing patronage.**

When the "assumption provision" was first adopted, there were some objections to the inclusion of the legal presumption. However, the Secretary of the United States Department of Transportation commented:

Several comments were received objecting to the last sentence of (a)(1) beginning "A business is assumed to meet this test \* \* \* " The Department believes that a business move under a Federal or federally-assisted program **almost always results in the disruption of business activity and a consequent loss of patronage.** In those cases in which this is not so, the Department believes **the burden of proof should be on the displacing agency.** Therefore, no change has been made in this standard [of the adopted rule].

*See Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act); Acquisition for Federal and Federally-Assisted Programs, 50 FR 895501 (March 05, 1985) (emphasis supplied).* Therefore, per 49 CFR 305(a)(2), the Department must assume that the displaced business will have a loss of existing patronage due to the move. Documentation of a legal presumption is neither logical nor required.

The Department is authorized to challenge this assumption only if it is factually clear that a substantial loss of patronage will **NOT** occur. If the Department denies a displaced business eligibility due to lack of evidence of loss of patronage, it is the Department's burden to document and prove otherwise. It is only when the Department attempts to overcome the legal presumption where it is then logical and required to document the reasons the assumption does not apply.

Trying to document the reasons that a loss of patronage will actually occur, when loss of patronage is assumed to occur, is contrary to federal regulation, increases

the administrative burden on the Department and increases the likelihood of litigation.

### **Finding 3: AG Counter-Response to Original Department Response**

Department management indicated in their written response that documentation of a legal presumption that a business will incur a substantial loss of its existing patronage is neither logical nor required. Additionally, Department management stated that it is only when the Department attempts to overcome the legal presumption where it is

logical and required to document the reasons the assumption does not apply. However, as cited by Department management in their response, the Secretary of the United States Department of Transportation has stated that a business move under a Federal or Federally assisted program almost always results in the disruption of business activity and a consequent loss of patronage, in those cases in which this is not so, the Secretary stated that the burden of proof was on the displacing agency. Thus, the presumption of a loss of patronage does not appear to relieve the Department from assessing the validity of the assumption in all instances and ensuring that the public record clearly evidences the assessment. Consequently, the finding and related recommendation stand as presented.

### **Finding 3: Six Month Follow-Up Response**

**As stated in the AG's counter-response, the *burden of proof only falls on the displacing agency when assistance is denied*. See "Statement of Program Purposes, Related Risks, and Risk Response" (General Statement--Six-Month Follow-up Response), above. As noted in this statement, based on additional feedback provided by the AG in its final report, **the Department subsequently forwarded the complete set of files reviewed by AG during its audit to FHWA**. In an e-mail dated February 10, 2020 (Attachment 1), FHWA confirmed **all files met FHWA's compliance standards**.**

The Department will continue to follow FHWA's guidelines regarding the assumption of a businesses' loss of patronage and will document this assumption within the file. If the businesses are not assumed to meet this test, the file will reflect factual clear evidence of such.

The Department **accepts the risk associated with not accepting the Auditor General's recommendations for Finding 3**.

**Estimated Completion Date:** Completed.

## **FINDING 2020-040-04**

**Finding 4: Mortgage Interest Differential Payments:** The Department did not always correctly calculate mortgage interest differential payments and, as a result, underpaid some displaced homeowners.

**Recommendation: The AG recommends that Department management ensure that mortgage interest differential payments are correctly calculated and paid to displaced homeowners in accordance with Federal regulations and Department policies and procedures.**

### **Finding 4: Original Agency Response and Corrective Action Plan**

The Department concurs. The issues that were discovered were corrected, and additional payments were made to those displacees. Also, to ensure this is not a widespread issue, future Quality Assurance Reviews are reviewing 100% of MIDP to ensure they were calculated correctly, and pen and ink changes have been made to the procedure to ensure that there is clarity with the fact that escrow amounts (insurance and taxes) included in mortgage payments are not included in the calculation for MIDP.

### **Finding 4: Six Month Follow-Up Response**

Corrected Right of Way Procedure 9.4.22.3 to reflect proper calculation methods.

**Estimated Completion Date:** Completed as of 10/24/2019.

## **FINDING 2020-040-05**

**Finding 5: Collection of Social Security Numbers:** The Department did not always provide displaced persons the correct purpose for collecting their social security number (SSN) or the specific Federal or State law governing the collection, use, or release of the SSNs.

**Recommendation: The AG recommends that Department management take appropriate steps to demonstrate compliance with applicable statutory requirements for the collection and use of SSNs.**

### **Original Agency Response and Corrective Action Plan**

The collection of SSN is a Department of Financial Services' (DFS) requirement for processing payments to individuals. The Department will clarify with DFS the statutory authority to collect the SSNs.

### **Finding 5: Six Month Follow-Up Response**

The Department will update the Request for Taxpayer Identification Number Form 575-030-27 to provide the purpose for collecting social security numbers (see Attachment 3).