

LOOKING AT THE LAST FIVE YEARS

INTRODUCTION BY VIVIAN NGUYEN

Wow. We did it. One of the most difficult years is now behind us, and we can look forward to new and exhilarating opportunities. Here's to being cautiously optimistic about what 2021 has in store for us. I, for one, hope that it involves a plethora of toilet paper and good health.

That being said, I think we all know we'll be discussing the ongoing chaos for months to come. Let's be honest — we're only human, and we tend to find solace in commiserating about our mutual misery. While it's cathartic to discuss everything we've been through as we stare at a screen and waiting for our colleagues to finish buffering, I'd like to focus our attention on some of the positive aspects that have resulted from the past year and provide a little distraction and tips for best practices in the industry as we move forward.

I was discussing this idea with one of our seasoned authors for Right of Way Magazine, Jim Kent (whose article is also featured in this section), and he had a lot of valuable insight to offer about what our reality will look like in this industry as we recover from the pandemic:

“Doing business as one did in the 20th century and the first decade of the 21st will absolutely not work in the post-pandemic world of citizens’

consciousness of their power to take care of their communities,” said Kent, JD President of the JKA Group and Social Ecology columnist for Right of Way Magazine. “Project managers and corporate hierarchy will have to shift from an intrusion model (i.e. ‘we know what is best’) to an empowerment model (i.e. ‘together we will figure out the benefits of the projects to the people impacted and larger society’) where listening and learning through listening is key. Recognizing that people and their communities for the first time stand on an equal basis with the project will be the New Reality.”

Jim has many excellent points. This last year has affected all of us, but perhaps the societal changes we've experienced will bring about better practices, more innovative ways of problem solving and continuing to care about one another as we form a “New Reality” that merges what we knew with what we could be. However, in order to look forward, it's essential to look back on what we've learned.

The following articles are some of Right of Way Magazine's favorites from the past five years; their important practices and tips have withstood the test of time and continue to be relevant to the right of way industry. Hopefully these articles present a pleasant distraction from all the stress and will remind you of what really matters and why you are a part of this exciting, ever-changing industry.

Without any further ado, let's take a trip back in time together.

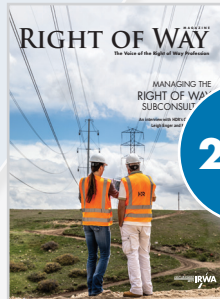
RIGHT OF



2020

March/April

The Mindful Negotiator



2019

July/August

Value Buildings if They're Not Being Taken?



2018

January/February

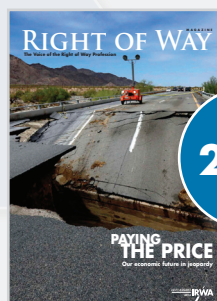
The Power of Community Engagement



2017

March/April

Leveraging Data and Metrics



2016

July/August

Do We Have Time For That?

WAY



The Mindful Negotiator

The importance of showing empathy

BY SHELLIE RABAGO

I'm always excited to get a new project. Although I realize it means that I will be crazy busy for the next few months, it also means I have the opportunity to meet an eclectic group of people I wouldn't typically get the chance to encounter. Over the past several years I have worked with many large corporations, families and even a few famous people. Convincing owners to sell their property to a condemning agency, even if it's a partial amount of it, is not an easy task — especially if they have occupied the property for decades or raised their children there and every square foot embraces a special memory.

For larger corporations, it's pretty much always about the amount of the offer. There's no emotional connection to the property — it's a business deal just like any other. It's a different situation for the elderly couple who has lived in their home for over 50 years. They have an emotional connection to their property and as a negotiator, I have to be understanding of the situation and show empathy. Essentially, I have to be mindful.

I have been in situations where landowners have gotten angry with me and other situations where landowners have done nothing but cry. Whether the emotion is that of anger or tears, as a mindful negotiator it is important that I remember to have understanding for the tears and that I do not become reactive to the anger.

Saying I am a "mindful negotiator" isn't just a way to make my job sound flashier than it is. Mindfulness is an important component of being good at my job. Every aspect of negotiating can be improved by being more mindful.

What is Mindfulness?

Mindfulness is the rudimentary human ability to be fully present, aware of where you are and what is going on around you, and not being overly reactive or overwhelmed by it. Or as Jon Kabat-Zinn put it, "Mindfulness means paying attention in a particular way: on purpose, in the present moment, and nonjudgmentally."

In practice, it means being grounded in the moment instead of in our thoughts. It means seeing what is happening right now for what it really is as opposed to our stories of what we think it is. It means letting go of preconceived notions.

Key Factors of a Mindful Negotiator

I often meet people who tell me they would love to do my job or that it must be a great job. While I must agree that it is a great job, not everyone who can communicate and speak well can become a mindful negotiator. Yes, excellent communication skills are an essential trait for a negotiator, but there are a lot of factors that come together to make a negotiator mindful.

Be Present

Being present sounds easy, right? But how many of us are really in the moment when we are meeting with a landowner? Are we not thinking about our next meeting and the status report that is already overdue? Are we not trying to remember everything that needs to be asked and what's the next thing we need to say? Do we have a desire to check our phone?

Being present means putting that phone away and focusing solely on the meeting with your landowner. You cannot just be there in the situation and half-heartedly involved because you are distracted. When you feel your mind wandering someplace else, make it a point to bring your attention back. Look into the eyes of the person you are talking to. Try to pick up on more detail. For instance, how do they present themselves or what kind of movements are they making? Staying curious will help you stay present.

Listen to What is Being Said

Effective communication begins with the fundamental skill of listening. The majority of good speakers are not reliable listeners. One great way to be more mindful of others is to listen well and not with the intention of merely replying. It is a natural response for humans to be automatically thinking about what we want to say next when someone else is speaking. While it is natural, it's not something we should be led by. If you notice yourself doing this, it is a good idea to slow down, take a breath, and redirect your thoughts and attention back to what the speaker is saying. This then communicates to your landowner that not only do you hear what is being said, but that you are genuinely interested.

Often, when people are talking to us we feel that it is necessary to offer advice. However, most of the time people just want to be heard and are not actually looking for advice or solutions. By offering advice we often, without even realizing it, make the conversation about us and the speaker can end up feeling unheard. Try asking questions of your landowner when they are upset instead of offering advice or talking about your own experiences.

Have Empathy

We live in a self-dominated world with self-promotion made easier by various social media outlets. It's no surprise then that we tend to view life through our own experiences and belief systems. Having empathy means that you can understand a situation from another person's point of view.

To better understand the people I work with, I often remind myself how much I love my home and how I would feel if someone approached me about an involuntary acquisition, and how I may react. Empathy is one of the most important factors that make an agent a mindful negotiator. You have to be willing to understand that the landowner may want to share the stories about the life of their property and this will also help them to unwind their emotional attachment to the property.

If you take the time to really think about these things, you can really make a difference. Humans tend to gravitate towards those who they feel understand them. It's impossible to understand someone else if you make everything about you.

Don't Take Yourself So Seriously

One of the most important parts of being mindful is not just being aware of what is going on, but also accepting it in a non-judgmental manner. This applies not just to the empathy we extend others, but also ourselves.

A big part of this means understanding that we're not so different from anyone else. Whether it's the powerful CEO or the elderly couple who need extra time and help from other family members to decipher what is going on. We are all just doing the best we can, and all of us have our own stories going on in our heads.



2020

March/April

The Mindful Negotiator

That means that if your landowner is late for a meeting or keeps changing their mind about what they want or gets angry at you because they blame you for their predicament, the first thing to do is to remember to take a breath and smile. Better still, think of something funny that really makes you laugh. While we might already feel the anger bubbling up inside us, it's important not to react too quickly and remember that laughter is often times the best medicine for this.

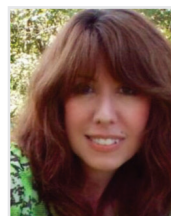
We must remember not to take ourselves too seriously, and often times other people's reactions to us are more about other things that are maybe going on in their lives and not necessarily about us personally. In doing so, our actions are thought out, rather than reactionary.

Meditation Really Works

One of the most popular ways of practicing mindfulness is through sitting meditation. A common practice is to sit still for a set amount of time — say, 10 minutes — and use an anchor to focus on (typically the breath). The goal is to notice when our mind is wandering and to bring it back to the anchor time and time again. Sitting meditation is just one form of mindfulness practice. The goal of these practices is to bring mindfulness into our daily lives — whether we are working or spending time with friends or family.

In Summary

I feel that practicing these elements of mindfulness has made me better at my job. While these tips seem simple, it might take some practice to make them a habit. As with anything else, the more you practice, the more natural it will become. 🌱



Originally from the South Coast of England, Shellie is currently working towards a master's degree in psychology at Capella University. She has worked for Universal Field Services for over five years and is currently Lead Negotiator and Condemnation Coordinator of the Dallas, TX Office. When not working or studying, Shellie likes to travel and learn about different cultures and traditions.

VALUE BUILDINGS IF THEY'RE NOT BEING TAKEN?

Shedding light on complicated valuations

BY CHRIS PETERSON, STEPHEN ROACH AND ERIC SCHNEIDER



Imagine an agency client has called you to appraise a neighborhood shopping center on a busy thoroughfare. The reason for the appraisal is that a portion of the property is being acquired for a road-widening project and as part of the project, they are taking a temporary construction easement (TCE) on a portion of the parking lot for equipment storage. None of the shopping center improvements are being touched and the client, who is sensitive to both timing and fee, is asking for an appraisal of only the land since that is what is being affected.

An acquisition of only the land on an improved property is a fairly common appraisal scenario in right of way acquisitions. On the surface, it can appear to be a straightforward assignment. But what happens when the assignment is not straightforward, and the acquisition ends up substantially impacting not only the area directly impacted, but the shopping center as well?

Valuing Only the Land

One of the first questions to ask is whether an appraiser can value only the land, even though the property is improved. To answer that question, we look to an appraiser's professional standards, specifically the Uniform Standards of Professional Appraisal Practice. A frequently asked question in USPAP discusses whether an appraisal of only the land under a shopping center can comply with USPAP.

The answer is yes. This type of assignment is certainly one that an appraiser can perform. However, to achieve credible assignment results, the appraiser must identify the characteristics of the property that are relevant to the type and definition of value, as well as the intended use of the appraisal. These types of characteristics include whether the subject property is only a physical segment of the property, such as land. Further, an appraiser is not required to value the whole when the subject of the appraisal is determined to be a partial interest.

Is it Credible?

The next question becomes whether valuing only the land of an improved property provides credible assignment results. This question is a little more complicated because the answer involves looking beyond a particular assignment. However, like with the previous question, the answer starts with USPAP.

USPAP contains the Scope of Work Rule and in this rule, there are three tasks that an appraiser must perform for each appraisal assignment. These include 1) identifying the problem to be solved, 2) determining and performing the scope of work necessary to develop credible assignment results and 3) disclosing the scope of work in the report.

With respect to identifying the appraisal problem, certain “assignment elements” need to be addressed to assist with the scope of work determination. Of particular note is the intended use of the appraiser’s opinions and conclusions, as well as the subject of the assignment and its relevant characteristics. Both of these elements are needed to assist in determining the type and extent of the research and analysis to perform.

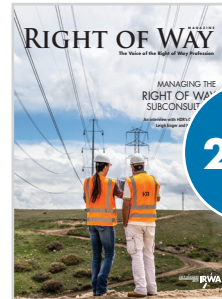
The other component to consider is what constitutes an acceptable scope of work. USPAP provides some guidance on this, stating that the scope of work is acceptable when it meets or exceeds the expectations of regular intended users for similar assignments and the actions of an appraiser’s peers when performing the same or similar assignment.

To put this into context, the appraisal problem in the right of way arena generally involves valuing a property to assist in determining just compensation related to the acquisition. If the assignment is, like our example, a TCE in the parking lot of a shopping center, the “relevant characteristics” could include only researching and analyzing information related to the land. Furthermore, the typical agency may expect only a valuation of the land and other appraisers who specialize in right of way may perform the same land-only analysis.

Is it Appropriate?

Everything discussed thus far seems to be straightforward. If only the land is being affected and if both clients and appraiser colleagues would consider the land only, then it seems that a valuation of the land satisfies an acceptable scope of work and could lead to credible results. However, there are times when the valuation of the property as

improved is critical, both analytically and procedurally. After all, how does the appraiser know that the improvements are not damaged by the acquisition if they are not appraised? Attorneys often argue that the relevant property (the larger parcel) was not actually appraised if only the land is analyzed and valued. In addition, damages to a remainder are typically determined by subtracting the value of the remainder after the taking from the value of the remainder as part of the



2019

July/August

Value Buildings if They're Not Being Taken?

whole; if neither of those analyses were performed for an improved property, an argument can be made that the appraiser has no basis for a conclusion that the remainder is not adversely impacted by the acquisition and the project.

An Evidentiary Perspective

In eminent domain proceedings, lawyers, judges and the jury scrutinize the sales used by appraisers to value the property acquired. For this article, this litigation process will be analyzed within the framework of California law, but the same general premise applies regardless of the jurisdiction.

The use of a sales comparison approach for an improved property in California is guided by Evidence Code section 816. This code section explains how comparable sales in the marketplace are comparable to the subject to be valued. According to the Evidence Code section 816:

In order to be considered comparable, the sale or contract ... must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued.

The obvious question this section poses is: if the subject is improved, how can a sale be comparable if the sale is not improved? Notice that the code section does not

distinguish between a part-take and a full-take. The code section very clearly and very directly instructs appraisers on how “comparability” is determined in eminent domain proceedings. To dive a bit deeper into the question posed, consider California Civil Jury Instruction number 3506:

In determining the fair market value of the property you must consider both the value of the land and whether any buildings, machinery, or other equipment attached to the property increase or decrease the value of the property.

This instructs the jury that it *must* consider how an improvement, such as a building, contributes to the subject’s valuation. How can a jury do so if the comparables used by an appraiser are vacant, but the subject is improved? Isn’t a parcel of dirt completely different than a shopping center?

A Closer Look at Part-Takes

A major component of just compensation in many part-take acquisitions in eminent domain comes from establishing “severance damages.” These damages reflect that the functional utility and other characteristics of the remainder may have been impacted by a part-take; they are the diminution in the value of the property that remains after the acquisition. When the acquisition of property is only a portion of a “larger parcel,” compensation *must* include the difference in the fair market value of property in its “before” condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken.

A part-take can and likely will affect an improved property much different than a frontage acquisition of a vacant lot lacking entitlements to develop. A part-take on an improved property supporting a business may drastically impact parking, access, circulation and/or business operations. If an improved property is valued using a land sale, does that land sale truly “shed light” on the value of the subject that is to be acquired as the law has instructed?

On the other hand, if a part-take does not affect an improvement or does not negatively impact a business, then that part-take may only impact land. But then why wouldn’t a land sale accomplish the valuation required for such a part-take? It is possible that a frontage take of a vacant lot is analogous to a frontage take impacting a parcel improved with an office building if the acquisition does not impact parking, access, circulation or other functional attributes of the property. To value only land acquired, the appraiser can use only sales of land to determine a land value.

Why does all this legal stuff matter? If a judge determines that a sale does not “shed light” on the value of the property to be acquired, or more specifically, that a land sale does not “shed light” on a part-take of an improved parcel, a jury would not be able to use that land sale in determining the value of the acquisition. Equally as important is that the failure of valuing the property as improved may mask severance damages that would have been established with a valuation of the property as improved.

What’s the Risk?

According to California law, an agency may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets certain criteria. One of the requirements is that the agency must establish an amount that it believes to be just compensation and offer the property owner no less than the amount of its approved appraisal. Therefore, if a court determines that the appraisal was sufficiently flawed and that it could not possibly represent a reasonable estimate of probable compensation, the court could decide that since no code-compliant offer was made, the adoption of the resolution of necessity was improper. This means that the complaint was also improper.

By way of example, one of the authors was retained to review a deposit appraisal involving a commercial property in Southern California. The analysis included only a valuation of the land and therefore ignored the possibility of damages resulting from a significant loss of parking during a protracted construction period, a permanent loss of parking, the creation of an on-site circulation problem and other material issues. When the public agency requested an order for possession, these issues were raised and the court denied the agency’s motion for possession to begin construction of the project. Having committed to a construction timeline and having entered into agreements with the construction contractor that required possession of the project right of way by a certain date, the agency had no choice but to make a significantly enhanced offer to the property owner to settle the matter.

The improvements should have been considered and valued in the deposit appraisal. The appraiser’s failure to do so resulted in a significant problem for the agency. This is not an isolated incident either, as we are also aware of a matter where a court negated the resolution of necessity on similar grounds, requiring the agency to start the entire process over to acquire the property. Neither of the appraisers who performed these deposit appraisals did their clients any favors. Both had determined to use a scope of work that ultimately created significant problems and costs for their agency clients.

If an improved property is valued using a land sale, does that land sale truly shed light on the value of the subject that is to be acquired...?

Conclusion

In determining what is to be appraised, the valuation of only the land *may be* acceptable under professional standards as long as the relevant subject characteristics are properly identified and disclosed. This would include disclosure of the existence of the improvements, whether or not the property as improved is valued, in order for the report to not be misleading.

Professional standards also dictate that the scope of work must be sufficient to develop credible assignment results in the context of the intended use. The determination of the scope of work is ultimately the decision of the appraiser (not the decision of the client as subtly mentioned in our shopping center example). The appraiser must be prepared to demonstrate that the scope of work is sufficient to produce credible assignment results. Depending on the nature of the taking, the valuation of the land only may be sufficient. However, often a valuation as improved is needed, even if there is no direct acquisition of the improvements.

It is also important to know what intended users expect and what an appraiser's peers are doing. In some cases, it may be that an appraisal of the land only could be what is expected for an agency. Additionally, an appraiser (and his or her peers) can decide that it is acceptable to value just the land portion of an improved property for a deposit appraisal. However, what if the appraisal will be used for trial purposes? This is a far less common scenario.

In our experience, trial attorneys expect a valuation of the property as improved, and an analysis of the property as improved is generally performed by appraisers during the trial phase. This is not to say that an appraiser must never appraise an improved property as vacant or never appraise only the land for trial. However, if a valuation as improved is expected by intended users and is commonly done by an appraiser's peers, then that should be done pursuant to an acceptable scope of work.

USPAP warns that an appraiser “must not allow assignment conditions to limit the scope of work to such a degree that the assignment results are not credible in the context of the intended use.” The appraiser must fully identify the appraisal problem, conduct all the necessary research and analysis, and disclose what is necessary in the report. If the appraisal is performed properly in the context of professional standards, the appraiser becomes a valuable component of ensuring the property owner's just compensation, whether the appraiser is retained by the agency or the owner's counsel. Either way, an appraiser who is excluded from testifying because he or she didn't value the improvements puts their client at great risk. ❄️



Attorney Chris Peterson of Peterson Law Group Professional Corporation focuses on Eminent Domain, Inverse Condemnation, Government tort liability, Dangerous Conditions, Landslides & Debris Flows and some personal injury cases. He has helped his clients achieve excellent results both by settlement and by jury verdicts. He was recently nominated for the American Bar Association's 2019 "On the Rise Top 40 Young Lawyers" award, a national recognition.



Stephen Roach, MAI, SRA, AI-GRS has been an appraiser for over 40 years. Since 1986, he has been co-owner of Jones, Roach, & Caringella, Inc., a real estate valuation and consulting firm based in San Diego. His appraisal assignments have included numerous partial acquisitions and other significant and complex assignments throughout the United States. He also has extensive deposition and trial testimony experience.



Eric Schneider, MAI, SRA, AI-GRS is a Senior Appraiser with Jones, Roach, & Caringella, Inc., a real estate valuation and consulting firm based in San Diego. He has over 10 years of experience in real estate valuation. He is a past president of IRWA Chapter 11 and received the chapter's Professional of the Year award in 2020.



THE POWER OF COMMUNITY ENGAGEMENT

Preventing project opposition requires a cultural component in the decision-making process

BY JAMES A. KENT, JD

With traditional project planning, there appears to be little problem identifying potential roadblocks that can lead to costly delays. However, it is often the community's opposition to a project that causes the most significant challenges. All too often, the local community first learns about a project after decisions are made and the project is underway. Clearly, that's too late.

In launching a new project, working with the local community beforehand has become critical to its success. As one executive told me, "Once people understand how the project will benefit them, they will typically support it."

But rather than start with understanding the project benefits, the company starts with its traditional design and route planning, with little consideration to how the project may impact the social and cultural aspects that exist within the community. Since every community operates within its own cultural boundary, anything that intrudes on it has the potential to ignite a negative reaction. And this only serves to delay the project, sometimes halting it altogether. People want to be able to predict, participate in and control their environment in a manner that maintains or improves their well-being. That means companies must rethink how they operate if they want to avoid potential opposition.

Reality Check

A project will either be welcomed by the community or be fought by it. If the disruption caused by project opposition can be taken off the table, the company will gain an enormous financial and time advantage. But this requires that the social and cultural component be addressed early on in the planning phase. Otherwise, the company can only react when trouble surfaces.

When the citizens impacted by a new project are taken by surprise, they are likely to react. Before long, there's fierce

opposition to the project, leaving the company with little recourse other than to defend it. The response is to throw more resources at the problem, launching public relations campaigns and organizing formal meetings. But this one-way communication only serves to intensify the conflict. Once a company is perceived as the villain, more and more citizens join in the effort to oppose the project. If only those impacted by the project had been considered beforehand.

The social and cultural environment of a project's location now requires the greatest attention. To prevent complexity from occurring, it is essential to understand the political, cultural and social world within which projects eventually have to function. And this requires the project team to become knowledgeable about the people where the project is located.

A New Concept Emerges

Understanding the dynamics within the impacted community is no easy task. To implement will require a new team to be integrated into the project planning methodology: The Community Engagement Team.

The Community Engagement Team would be responsible for becoming fully immersed in the local community, with the goal of understanding their local networks, engaging in a two-way dialogue about the project and learning about the issues and concerns that currently exist.

The challenge is to look beyond the project's timeline and budget — to see the project from the community's point of view. But this necessitates a two-way dialogue based on engaging, learning and listening. It requires companies to work collaboratively with citizens before the final decisions are set in stone, and this can only happen with face-to-face interactions. People need to know that their issues are being heard. By demonstrating that the company understands those concerns, trust can begin to develop. And once people no longer feel threatened, they have the space to view the new project as a potential benefit rather than an intrusion.

Right of way professionals should form the bulk of this new team. They are the ones that have early involvement with the landowners. From their community vantage point, they will know who to talk to, timing and sequence concerns and the kind of language to use in media handouts. They can also provide valuable input into the public relations strategy to ensure it aligns with the local culture.

Armed with all this knowledge, the team can ensure that the issues and concerns are addressed before project implementation. The project can then be absorbed into the fabric of the community without causing disruption.

Hindsight is 20/20

Looking back, we can see that the Keystone XL Pipeline project would have benefited from this new model. In this case, formal opposition occurred, and the farmers who could have grounded the issue locally were not there to have a voice in the project. Outside ideological groups gained control, and all the company could do was throw money at the problem in the form of lawyers, lobbyists, paid consultants and massive advertisement campaigns.

In these situations, locals often shift their allegiance from understanding the potential benefits of the project to supporting the vocal opposition. At that point, the project has become too complex for the company to manage and often results in billions of dollars spent trying to manage chaos with no way out.

In the Keystone XL example, many local governments — which were initially in favor of the project — eventually became opposed. The company spent millions on trying to influence the political system at all levels after the fact. They were of no help as the issue eventually returned to a well-organized network of Nebraska farmers who had been there all along, opposing the project over worries about the Ogallala Aquifer. That issue could have been taken off the table early had the company realized the spiritual relationship that the farmers, their families and support systems had with that water.

The Invisible Suddenly Appear

It is vital to recognize that these local informal networks are functioning 24/7 within the community. And while they are often invisible on a day-to-day basis, they are the first to appear when a catastrophe occurs.

Think about the power of the self-organizing networks that formed after the hurricanes in Texas, Florida, Puerto Rico and the Virgin Islands. Citizens — through their own internal processes — organized immediate rescue operations. Human brigades were assembled to remove rubble in hopes of finding buried neighbors. Everyday citizens formed rescue teams to supply and distribute whatever resources they could

get, and every life saved became a spontaneous celebration. Natural leaders emerged. They formed quickly because of word-of-mouth communications, knowledge of the local terrain and a shared mission to help neighbors and strangers in real-time situations.

Managing Social Risk

We believe that using the Community Engagement Team concept before a project is officially launched will result in dramatic benefits. Many projects, however are launched without input from the right of way professionals who are tasked with negotiating with local property owners. Without adequate time to develop trust and relationships, property owners are often caught by surprise when an agent shows up and they first learn about the new project. Practically overnight, disruption and backlash begin to surface.

Rather than spending time and money on public relations campaigns, those resources would be better served if they were used to build relationships and trust within the community impacted by the project. This requires more time being spent listening and responding, and less time on telling, promoting and acting like an authority. Once the self-organizing networks understand how they can participate in and benefit from the project, they can serve as a buffer to opposition groups that have their own agenda.



2018

January/February

The Power of Community Engagement

Integrating a Community Engagement Team to prevent costly complexity from occurring will be a new idea for many. However, the project environment today is toxic in almost every aspect of development. To remove the threat of the social impacts is a tremendous step toward creating stability and maintaining the sustainability of projects. But this requires action, and that means implementing a strategy for managing social risk into every phase of an infrastructure project. 🌱



Jim Kent, M.A., J.D., President of JKA Group. As a global social ecologist, he focuses on collaboration as an alternative to conflict and confrontation when introducing site/corridor projects to local communities. His Social Ecology columns, directed at the art and science of engaging citizens through their culture, have appeared in the Right of Way Magazine for over 10 years. He is the co-developer of IRWA Course 225, Social Ecology: Listening to Community. He can be reached at: www.jkagroup.com.

LEVERAGING DATA AND METRICS

Key ingredients to right of way project success

BY STEVEN CLARK



The right of way industry has many distinct challenges when it comes to successfully completing projects. Since everything from governmental regulations to economic uncertainty and budget constraints can negatively impact a project, it has become critical to understand these dynamics and be prepared to mitigate any potential risks.

When you consider the key ingredients that can help ensure a successful right of way project, effective communications may be the single most important factor. I've heard it said that an experienced project manager — one who is hardworking and has integrity — could actually bring a bad project back to life. By effectively communicating with clients, landowners and agents in the field, the project manager can earn respect, and this leads to better decision-making and reaching agreements more quickly.

Managing expectations throughout the life of a project is also vital to a project's success, and this is where data comes into play. How will a client know if their project is on track? Are there data points that can help give a client confidence that their project is on schedule? Can it show what might be causing any delays? And what about monitoring the budget?

The Importance of Data

Good data — and metrics derived from good data — can enhance communication, assist with decision-making and help build strong relationships with clients, landowners and team members. And although data is easy to collect, understanding which data is relevant is a more challenging task.

Examining the importance of data and its ability to positively impact a project's success is an important first step. So what exactly is data? The word has been around for centuries and represents the fundamental building blocks of information. Plural for the Latin word "datum," data was used by philosophers in the mid-1600s to describe "things known or assumed as facts, making the basis of reasoning or calculation." As one might imagine, the rise of digital computing brought new meaning to the word and its definition changed to represent a more modern understanding of "transmittable and storable computer information."

Data is just as important today as it was hundreds of years ago, however, the means by which we capture and record it has changed dramatically. Technological advances over the last 20 years alone have given businesses the ability to collect and store large volumes of data, and business leaders are often left to question the usefulness of all the data available.

Comparing Data to Information

While we are living in the information age, many are unaware of the distinct difference between data and information, especially since we have a tendency to use these words interchangeably.

Data can be defined as independent facts, figures and other details. Information, on the other hand, is data that is processed, interpreted, organized, structured or presented so as to make it meaningful or useful. In other words, information is data with context.

Take the landowner's address as an example. The U.S. postal service generally requires seven key pieces of data for an individual property owner's address: first name, last name, street number, street name, city, state and zip code. Note, this number can vary depending on the scenario, such as when there's a corporate landowner or P.O. box. If you look at any one of these data points independently, you don't really have any meaningful information. However, by combining all seven data points together, we have context, and the data becomes information that tells us exactly what we need to track down the owner.

The zip code, which was introduced by the U.S. Postal Service back in 1963, is an acronym for "Zone Improvement Plan." It was originally designed to provide a geographical data context for faster mail delivery, and today even more context can be provided by using technology that "geocodes" a landowner's address to GPS coordinates. Geocoding is the process of transforming a postal address to an actual location on the Earth's surface. Without geocoding technology, it would be extremely difficult to reliably display a landowner's address on a modern web-based map service, like Bing, Google or Esri. The importance of providing data with

context is also why many companies have their own Geographic Information System (GIS) departments to help process land data and provide meaningful information to project teams and decision makers.

Mix in the Metrics

In considering the key ingredients to project success, it's vital to establish which data points can help assure a client that their project is going well. One of the main challenges we see, especially on larger projects, is how to accurately communicate project status to the client in terms of the cost to date, schedule and impact on the overall budget. While data points alone do not convey the entire story, data points with context can be a powerful tool, as this gives clients the information they need to fully understand the overall health of their project.

Since we need good data to generate good metrics, the key is to identify what level of detail is needed before the project is underway. By definition, metrics are just a specific type of information that can be captured and measured over time. The best time to define a project's metrics of success is during the project initiation and planning phases before the project execution gets started. On a right of way project, knowing key metrics such as tract/parcel acquisition status, rate of acquisition, number of acquisitions by agent and landowner status by tract/parcel can all help facilitate better decision-making, as well as enhance communication within a project team.

There are several ways to mitigate the risk of not collecting the right data during project execution. First, emphasize the importance of up-front planning and understand which pieces of data will provide the best information for everyone involved. Secondly, make sure you allocate enough time to put the right processes in place to effectively capture data, while leveraging the available technology so that you can easily store information and present it to project team members and clients. Finally, a well-organized training program can help ensure the team fully understands the importance of processes and procedures, as well as why capturing certain pieces of data can be critical to a project's success.

Now let's take a look at an actual project that shows individual data points that are combined for display on a web-based GIS system. In reviewing the image above, think about what data had to be captured in order to make this information meaningful to a right of way agent, project manager or client.

The first step was to capture different sets of GPS coordinates so that we could accurately position tracts and parcels on the map. After assigning an ID to each tract/parcel, we used colors to indicate the survey permission status so that we can track in real time which ones have survey permission granted and which are pending or denied. Once we add the landowner information, we have a visually powerful presentation that allows clients to review and process significant details in a relatively short time.

By integrating the right data, we can measure the pace at which survey permission is being granted for our project. These kinds of metrics help a project manager better forecast when a project phase might be nearing completion. By determining up front that survey permission status is a key piece of data to capture, a project team can become more efficient in managing the various project phases. Taking it a step further, another helpful metric is agent productivity, which is easy to achieve by associating each agent with a tract/parcel.

Combined with survey permission status, it can be easy to spot if agents are running into issues with landowners. Let's take that a step further and say you want to look at overall acquisition timeline of a project. By adding an "acquisition status" data point to each tract/parcel, we can see how quickly or slowly the status changes as acquisitions happen over time. This makes it easier to forecast when the acquisition phase will be completed.

Recipe for Success

Using the right data and creating relevant metrics can be a powerful combination. The key is to be smart about the data you want to track and not overburden a project team with the potential inefficiencies associated with data input. By determining up front which data to capture and identifying the best way to leverage the metrics, right of way project teams can better communicate with their clients and enhance their overall performance while saving everyone time and money.

Deciding which metrics will be most valuable can be a challenging process, but the overall benefits provided by good metrics are well worth the effort. 🌟



March/April

Leveraging Data and Metrics



Steven Clark is Vice President of Technology Solutions at Contract Land Staff. With more than 18 years experience in team leadership, software development and project management, he oversees the company's technical vision and proprietary technology development.



DO WE HAVE TIME FOR THAT?

Practical tips for compressed linear projects

BY STEVE CHASTAIN, SR/WA

Time is perhaps the most critical component of every major infrastructure project, and rarely is too much time the problem. Project schedules are built around in-service or completion dates that are often immovable. These fixed dates roll backwards across a project — impacting every discipline in the process. Sooner or later, every right of way team will incur a project where the completion timeline begs the question, “How will we possibly get all this done by then?”

Success will require strategic planning, creative approaches to traditional tasks and a unified consensus among all project disciplines. From receipt of the request for proposals (RFP) through to the notice to proceed (NTP) for construction, the project team will have to take advantage of every timesaving opportunity available.

Navigating the RFP

Service providers will often see the first glimpse of a compressed timeline when they review the RFP. For the most part, right of way departments have limited input with regards to the project’s start or completion date, leaving them with no other choice than to look to the service provider for solutions.

It’s not unusual for the RFP to have missing project details, and even asking the right questions (provided time is available) may not offer enough clarity. The team will have no other choice but to make logical assumptions for the missing information. While this is a normal part of every

RFP, assumptions can lead to increased risk for both parties. The service company risks losing the project if they’re too cautious, while depending too heavily on a best-case scenario could leave them with a project that is not financially viable. The soliciting company risks awarding a project based on promises that simply can’t be kept. Regardless of how much information is available, the respondent will need to provide a detailed approach, resumes for key personnel and a ‘not to exceed’ cost estimate.

Agreed Upon Assignment

Once the project is awarded, project concerns and their respective schedule impacts will come together in a service agreement. The assumptions made and agreed to earlier in the discussion phase will serve to create a de facto schedule based on available data at the time of the award. At this point, the importance of a clearly defined schedule cannot be overstated.

The executed agreement, which is right of way’s principal deliverable, is totally dependent on other disciplines hitting their schedules. Any failure to meet a proposed schedule for project deliverables, regardless of the cause, can result in a cascading schedule failure. However, it is typically the normal occurrences that come into play, not negligent ones.

For instance, if an unforeseen routing concern arises and engineering needs time to adjust the design, then surveying may miss its delivery date for acquisition exhibits. Once again, there is a domino effect. If acquisition is delayed, survey support may be extended. The new route may change the title commitments, or perhaps the title assignments that have already been completed are now rendered null. Either way, the right of way schedule just got tighter.

Anticipating Cost Implications

With each and every project, service companies put their reputation on the line. Delivering the project on schedule and within the budget is their primary goal. Missed delivery dates or an expanding scope can create a financial strain, and revisiting the project's budget as changes occur can be challenging.

Projects that start with short timelines and a variety of unknowns will seldom translate into a cheaper deliverable. This makes it essential to anticipate cost implications, particularly with time and material associated with the schedule assumptions. Compressed right of way schedules typically translate into a larger acquisition staff, less stakeholder involvement, shorter negotiation windows and increased litigation potential.

It has become increasingly common for companies to request a "not to exceed" estimate for right of way services. For a service provider to meet this demand, all parties must agree to the project's scope, schedule and deliverables. A written change order process should be implemented and carefully adhered to. Any unforeseeable events that lead to a change order should be acted upon as they occur. As time passes or changes in key personnel occur, the ability to provide data that supports the change order will likely diminish.

Managing the Volume

To maximize coverage and accelerate the schedule, service providers may increase the number of agents, but lower the number of tracks per agent. This approach works best for title and survey permitting when all parcels are available and can be evenly distributed. However, this can become more challenging as the project transitions into the acquisition phase. This is because plats and exhibits are needed for acquisition, but they will likely not arrive all at once.

Project exhibits will usually feed into acquisition at an irregular rate with their volume increasing as the effort advances toward completion. They will require review and correction, further limiting the availability of acquisition ready parcels. Agents will be split between ongoing survey support and acquisition. Tract per agent advantages will not be fully realized until all plats have been delivered and approved.

Since there is limited time for the negotiations, careful consideration should be given to the initial offer. The amount of time a landowner is given to consider their property value can play a significant role in meeting the schedule. Some landowners will not be able to move at the project's desired speed. Cost and time implications associated with litigation, appraisal and/or construction delay must be considered when reviewing counteroffers or reroutes proposed by the landowner. The key is to know when you're out of time and plan the transition to litigation as a part of your schedule. Higher condemnation rates and the associated project costs should be considered when developing the project budget.

Anticipating Route Refinements

Much like details missing from the original RFP, new issues may arise after the preliminary route has been developed. The time spent in the preliminary review may not have revealed issues that commonly extend the refinement process. Any number of issues can arise during survey permitting, title research or during the environmental/cultural permitting review process.

A preliminary route is usually distributed to the right of way team during the project kick-off. However, once the agents begin contacting landowners, new issues will arise. A landowner may have concerns and recommend a route change based on planned development. There may be conservation easements or protected/endangered species that necessitate a reroute. Regardless of the issue, any kind of route refinement will likely cause delays and increase the need for more title and survey manpower.

Reroutes can also have the potential to broaden the stakeholder impact, which in turn, affects the required notifications. Alternate routes will require vetting and may result in no-go scenarios that cause further delays. And every delay diminishes the window of opportunity for voluntary acquisitions.

Opportunities in Permitting

It is essential that the right of way team move quickly to identify permit concerns so that they can develop a complimentary permitting schedule. Typical right of way permitting tasks associated with roads, railways and utility crossings can be accomplished within a compressed schedule. Even special or conditional use permits can be managed effectively if identified early and targeted as priorities for routing, design and survey.

If there is sufficient design and routing information available, the permitting process can begin before the acquisition phase. There are other timesaving processes that can be used. For example, by using typical drawings for crossings, it's possible to consolidate multiple road crossings into a single permit for a county, parish or local municipality.



2016

July/August

Do We Have Time For That?

Departments of transportation and railroad projects will require more site specific permitting for each crossing, and may require insurance bonding that should be anticipated. Utilities will have specific crossing concerns, especially those that impact their operations, and often require crossing coordinates in order to respond to encroachment requests. If there are plans to parallel a utility, a parallel encroachment agreement for construction may be required. Environmental and cultural permitting is typically outside the right of way scope.

Planning for Legal Assistance

Even though a statutory constraint associated with property access and possession falls outside the control of right of way, it can have a tremendous impact on the acquisition schedule. The project's legal team will need to outline specific ways to manage survey access and the eminent domain process.

Many states have liberal statutes that allow surveyors to enter property without the landowner's permission. Sometimes subject to challenge, the question of what surveys they permit is at the heart of their dispute. Were the statutes written so as to envision geotechnical, environmental and cultural surveys for infrastructure projects or common boundary surveys? What about drones? Even where the management team is confident in their right to access, gaining that access when the landowner has refused becomes a concern for the project's legal team.

A common approach used in overcoming this access obstacle is a temporary restraining order (TRO). However, TROs can have a negative impact on stakeholder relationships, and as such, have the potential to affect acquisition beyond the impacted parcel or landowner. Whether sought immediately or in mass, the process of petitioning for and serving them can further erode the compressed schedule and should be anticipated. Identifying potential TRO candidates as early as possible and advising the management team is essential for planning the best approach.

Assuming eminent domain is a viable option, the process for taking possession differs from state to state. Commonly referred to as "quick take" states, a condemnor can take possession before adjudication of compensation. In simplest terms, this allows for construction to begin while the compensation issue is resolved through the courts. Tracts placed in condemnation do not delay the notice to proceed for construction. If the project is not in a quick take state, the schedule implications of using eminent domain may further compress the acquisition schedule. In either scenario, eminent domain takes time. Often more detailed exhibits and plats are required, along with appraisals and certified title. Failure to factor these tasks into the original project schedule will often result in unforeseen and costly delays.

Strategic Ways to Expedite the Process

A project with an accelerated schedule can be successfully completed on time, but it requires an informed approach with specific processes tailored to the schedule. In other words, an accelerated schedule will require a streamlined plan that integrates whatever timesaving options are available.

The following strategies — categorized by surveying, title and acquisition — have been used successfully to overcome schedule constraints.

1 Surveying Shortcuts:

Use survey notification in place of survey permission. If notification is all that's required, use a survey notification letter with the applicable statute that grants the right to survey, along with a survey description. A landowner's signature or response is not required. Mailed only a few days ahead of survey field activities, it can be followed up with a phone call to ensure receipt and answer questions. However, a landowner can still refuse access.

Consider survey payments. These are becoming a more common approach in areas where time and/or opposition are critical factors to project success.

Exhibits are faster than plats. GIS driven exhibits (where permitted) are quicker to produce, and turnaround time for review and correction is faster. Sealed plats are still typical when eminent domain is involved.

Use exhibits and plats. The acquisition start can be accelerated with exhibits, even when there are plans to use plats for acquisition. Exhibits that illustrate the right of way and workspace with rough dimensions can be used to begin negotiations pending plat delivery. The exhibits must have sufficient detail so that the agent can show the impact of the easement and gain agreement with the landowner on unit pricing for right of way and workspace acreages and damages. Once final plats are available, negotiations can conclude based on actual dimensions in the plat using the agreed upon unit pricing for each impacted component.

2. Title Shortcuts:

Vary the scope of the limited title certificate (LTC). Its purpose is to insure that the appropriate parties are included in the negotiations. But the number of years covered by an LTC is a measure of risk, and since there is no industry standard, it's important to consider a reasonable risk in terms of negotiations, and establish the scope accordingly. Fee purchases will also require certified title.

Advance estate concerns to legal. Unknown heir estate issues cannot be easily resolved in the LTC process. Advance these to legal as they are identified.

Extra time is needed for subordinations. These are typically long-lead items, so consider the time constraints and risks when deciding whether or not to subordinate.

Acquire utility easement information early on. Foreign utility easement information can play a significant role when crossing or paralleling an existing easement. In most cases, the details of these agreements can be acquired from the utility. Title efforts in this regard should be the exception and not the rule. As with foreign utilities, information can usually be obtained from the agency impacted.

Time is needed for eminent domain proceedings. Since these have higher title standards, a project's timeline and strategy for filings and petitions should be carefully considered in developing the overall project schedule.

3. Acquisition Alternatives:

Identify long-lead tracts and target those as priorities. Large corporations, non-residents and foreign ownership are long-lead concerns. Churches and institutions often need committee approval, while timber companies may want special provisions that take longer to resolve. Municipalities may require public approval before proceeding.

Evaluate large parcels with the greatest impact and target them for early acquisition. With a compressed schedule, clearing as much right of way for construction as possible is crucial. In the event that acquisition is delayed, costly construction move arrounds will be minimized.

Consider Right of Entry agreements. These allow construction to begin while negotiations continue. To expedite the process, a company may offer financial incentives such as a guaranteed settlement minimum in exchange.

Pursue settlement agreements. If the landowner will agree to a settlement pending delivery of the final components (such as a plat), the process of granting access for construction can be accelerated. Incentives for signing these agreements will vary.

Sign-on bonuses can accelerate the process. Many companies have had success with offering an incremental bonus based on how quickly a landowner reaches an agreement. Consider a cut-off date to incentivize early signing with the largest bonus for those who sign within the first two weeks, less in the next two weeks, and no bonus for signing after 30 days.

Mail-out offers is the fastest way to get offers to landowners. While not the preferred option, there are some cases where condemnation schedules limit the negotiation timeframes, and mail-out offers are unavoidable. Any impact can be mitigated if planned for and openly discussed with landowners during the initial project phase.

Provide the acquisition team with a list of approved provisions for construction. These can be offered in a side-letter agreement. Approved agreements will minimize legal review and further empower the agents to close without further consultation.

Summary

When it comes to overcoming tight project schedules, there are a number of approaches that will help ensure timely project completion. However, success will require strategic planning, creative approaches and open communication among all project disciplines.

With immovable in-service and completion dates, capturing every timesaving opportunity available can make all the difference — as long as these do not have the potential to cause a negative reaction from landowners or the community. Balancing the viable options with the industry's desire for improved stakeholder relations will ensure the company and the service provider are able to maintain their goodwill in the community. 🌟



Steve presently serves as the Southeast Division Director for ORC Utility & Infrastructure Land Services, LLC. He has over 30 years of right of way and project management experience. Steve is the President of the Carolinas Chapter 31 of the IRWA and was recognized as the 2019-2020 Professional of the Year for both Chapter 31 and Region 6 of the IRWA.