



U.S. Department
of Transportation

**Federal Transit
Administration**

CIRCULAR

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XXXX, 2013

**Subject: FEDERAL TRANSIT ADMINISTRATION GUIDANCE ON JOINT
DEVELOPMENT**

1. **PURPOSE.** This circular provides guidance to recipients of Federal Transit Administration (FTA) financial assistance on how to use FTA funds or FTA-funded real property for joint development. This circular: (1) defines the term “joint development”; (2) explains how to determine which joint development activities are eligible for FTA funding; (3) describes the legal requirements applicable to the acquisition, use, and disposition of FTA-funded real property; and (4) outlines the most common crosscutting requirements.

This circular incorporates provisions of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141(2012), advances the goals of 49 U.S.C. § 5315 by informing FTA recipients of opportunities for private sector participation in public transportation projects, and includes the most current guidance for the federal public transportation program.

The requirements outlined in this circular are intended to assist recipients in administering FTA-funded projects and in complying with federal rules. Recipients must comply with all statutory and regulatory requirements, including those not specifically mentioned in this circular.

2. **AUTHORITY.** Federal transit law, chapter 53 of title 49, United States Code.
3. **CANCELLATION.** This circular consolidates and supersedes all of the existing FTA guidance¹ on joint development including, but not limited to, that mentioned in the following sources:
 - a. [Policy Statement on the Eligibility of Pedestrian and Bicycle Improvements Under Federal Transit Law](#) (76 FR 52046, Aug. 11, 2011);
 - b. [Notice on Final Agency Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law](#) (72 FR 5788, Feb. 7, 2007);
 - c. [Policy on Transit Joint Development](#) (62 FR 12266, Mar. 14, 1997);
 - d. [FTA Circular 5010.1D](#), Grant Management Requirements;

¹ As a result of the passage of MAP-21, FTA will have to update many of its program specific circulars. This circular will supersede guidance in those circulars pertaining to joint development.

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- e. [FTA Circular 4220.1F](#), Third-Party Contracting Guidance;
 - f. [FTA Circular 9030.1D](#), Urbanized Area Formula Program: Program Guidance and Application Instructions;
 - g. [FTA Circular 8100.1C](#), Program Guidance for Metropolitan Planning and State Planning and Research Grant Programs;
 - h. [FTA Circular 9300.1B](#), Capital Investment Program Guidance and Application Instructions; and
 - i. [FTA Circular 9040.1F](#), Non-Urbanized Area Formula Program Guidance and Grant Application Instructions.
4. WAIVER. FTA reserves the right to waive any provisions of this circular to the extent permitted by federal law or regulation.
 5. FEDERAL REGISTER NOTICE. When the final circular is published, FTA will add a citation to the *Federal Register* notice that announces its availability.
 6. AMENDMENTS TO THE CIRCULAR. FTA reserves the right to update this circular to reflect changes in policy, revised or new guidance and regulations that undergo notice and comment, without further notice and comment on this circular. FTA will post updates on its website at www.fta.dot.gov. The website allows the public to register for notification when FTA issues *Federal Register* notices or new guidance. Please visit the website and click on “sign up for e-mail updates” for more information.
 7. ACCESSIBLE FORMATS. This document is available in accessible formats upon request. To obtain paper copies of this circular as well as information regarding these accessible formats, call FTA’s Administrative Services Help Desk, at 202-366-4865. Individuals with hearing impairments may contact the Federal Relay Service at 1-800-877-8339 for assistance with the call.

Peter M. Rogoff
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FEDERAL TRANSIT ADMINISTRATION GUIDANCE ON JOINT DEVELOPMENT

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CHAPTER I

INTRODUCTION AND BACKGROUND

1. THE FEDERAL TRANSIT ADMINISTRATION (FTA). FTA is one of ten modal administrations within the U.S. Department of Transportation (DOT). Headed by an Administrator who is appointed by the President of the United States, FTA functions through a Washington, DC, headquarters office, ten regional offices, and five metropolitan offices that assist transit agencies in all 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, and federally recognized Indian tribes.

The federal government, through FTA, provides financial assistance to develop new transit systems and help improve, maintain, and operate existing systems. FTA oversees thousands of grants to hundreds of State and local transit providers, primarily through its regional and metropolitan offices. These recipients are responsible for managing their programs in accordance with federal requirements, and FTA is responsible for ensuring that recipients follow federal statutory and administrative requirements.

2. AUTHORIZING LEGISLATION. Most federal transit laws are codified at 49 U.S.C. chapter 53. Authorizing legislation is substantive legislation enacted by Congress that establishes or continues the legal operation of a federal program or agency. Congress typically amends FTA's authorizing legislation every six years. FTA's most recent authorizing legislation is the Moving Ahead for Progress in the 21st Century Act (MAP-21), Public Law 112-141, signed into law July 6, 2012. MAP-21 authorizes FTA programs for federal fiscal year (FY) 2013 and FY 2014.
3. HOW TO CONTACT FTA. FTA's regional and metropolitan offices are responsible for the provision of financial assistance to FTA recipients and oversight of grant implementation for most FTA programs. Certain specific programs are the responsibility of FTA headquarters. Inquiries should be directed to either the regional or metropolitan office responsible for the geographic area in which you are located.

Visit FTA's website, <http://www.fta.dot.gov>,² or contact FTA Headquarters at the following address and phone number:

Federal Transit Administration
Office of Communications and Congressional Affairs
1200 New Jersey Avenue, SE
Washington, DC 20590
Phone: 202-366-4043
Fax: 202-366-3472

4. GRANTS.GOV. FTA posts all competitive grant opportunities on Grants.gov. Grants.gov is the one website for information on all discretionary federal grant opportunities. Led by

² Please refer to FTA's website for links to [guidance and regulations](#) referred to in this circular.

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the U.S. Department of Health and Human Services (DHHS) and in partnership with federal grant-makers including 26 agencies, 11 commissions, and several States, Grants.gov is one of 24 federal cross-agency e-government initiatives. It is designed to improve access to government services via the Internet. More information about Grants.gov is available at <http://www.grants.gov>.

5. **DEFINITIONS.** All definitions in 49 U.S.C. 5302 apply to this circular as well as the following definitions:
- a. **Disposition:** The settlement of the federal interest in property that is no longer needed for the originally authorized purpose. *See generally* 49 C.F.R. 18.31; FTA Circular 5010.1 Chapter IV.
 - b. **Federal Interest:** The percentage of FTA's financial contribution to the purchase of property needed for a capital project. FTA may relinquish its interest in property through the disposition process outlined at 49 U.S.C. 5334(h) and 49 C.F.R. part 18.
 - c. **FTA Assistance:** The financial contribution in the form of a grant made by FTA to a recipient. A recipient may use FTA funds for either capital, operating, or planning expenses.
 - d. **Incidental Use:** The limited authorized non-transit use of real property and equipment acquired with FTA funds for purposes of providing transit service. Such use must be compatible with the approved purposes of the project and not interfere with intended public transportation uses of project assets.
 - e. **Joint Development:** A public transportation project that is integrally related to and often co-located with commercial, residential, or mixed-use development. FTA has an interest in joint development when: (1) FTA funds are used for a capital project related to the development; or (2) joint development takes place on real property that was, or will be, purchased with funds administered by FTA. Joint development may include partnerships for public, private, and/or non-profit development associated with fixed-guideway (rail or bus) transit systems that are being improved through new construction, renovation, or extension. Joint development may also include bus and intermodal facilities, intercity bus and rail facilities, transit malls, and historic transportation facilities.
 - f. **Program Income:** Gross income received by the recipient or sub-recipient directly generated by a FTA grant-supported activity, or earned only as a result of the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report. 49 C.F.R. 18.25. Program income resulting from joint development may be used for eligible capital and operating expenses. Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of 49 U.S.C. 5334(h)(4), and 49 C.F.R. 18.31 and 18.32.

- g. Public Transportation: Regular, continuing shared-ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income; does not include intercity passenger rail transportation provided by Amtrak, intercity bus service, charter bus service, school bus service, sightseeing service, courtesy shuttle service for patrons of one or more specific establishments, or intra-terminal or intra-facility shuttle services. 49 U.S.C. § 5302(14).
- h. Public Transportation Purpose: The activities for which an FTA grant was originally awarded.
- i. Recipient: An entity to which FTA awards a grant in support of a specific project. FTA does not take an active role in or retain substantial control over projects financed with grant funds, as set forth in 31 U.S.C. 6304.
- j. Satisfactory Continuing Control: The legal assurance that FTA-funded property will remain available to be used for its originally authorized purpose throughout its useful life until disposition.
- k. Sub-recipient: An entity that receives an FTA grant indirectly through a recipient.
- l. Shared Use: Instances in which a project partner, separate from the recipient, occupies part of a larger facility and pays for its pro rata share of the construction, maintenance, and operations costs. Shared uses are declared at the time of grant award. *See* FTA Circular 5010.1D at I-9. Shared use and incidental use are distinguishable. An incidental use does not affect a property's transit capacity or use, and can be approved after the award of the grant.
- m. Subordination: When real property is used to secure a debt, "subordination" refers to making the federal interest in the property junior to that of another lienholder.
- n. Value Capture: A type of public financing mechanism where the public sector recoups costs over time as a result of increases to the value of real estate generated through investments in public transportation. While value capture on the large scale often occurs through a special assessment district, tax-increment financing, or similar mechanism, joint development is a meaningful value capture mechanism to be applied on the small scale of one or more related parcels of real property and is the mechanism used most often for public transportation purposes. FTA encourages all forms of value capture that may contribute to the operation, maintenance or expansion of public transportation service.

CHAPTER II

CIRCULAR OVERVIEW

1. **INTRODUCTION AND CONTEXT.** The purpose of this circular is to provide guidance to recipients on how FTA funds or FTA-funded real property may be used for joint development. “Joint development” commonly refers to the coordinated development of public transportation facilities with other, non-transit development, including commercial and residential development. Coordinated development often involves private and public entities, and is supportive of the private sector participation provisions of 49 U.S.C. § 5315. The transit and non-transit developments are integrally related to one another and are often co-located on the same real estate. Joint development may take place on property associated with any mode of public transportation.

This circular provides instructions on how to develop FTA-funded real property in a manner that improves coordination between the public and private sector, and public transportation and other forms of transportation. Strategic, coordinated joint development can enhance the value of both the transit and non-transit, public and private activities taking place on real property, resulting in an efficient use of real estate, reduced distances between transportation and destinations, and focused economic development for communities.

As a matter of policy, FTA encourages recipients to undertake joint development, and promotes the recipient’s ability to work with the private sector and others to pursue joint development. Joint development may be pursued through new grants or with property previously acquired. A recipient maintains satisfactory continuing control over a joint development project by ensuring that it continues to have a public transportation purpose. Proceeds derived from a joint development project may be considered program income, which the recipient may apply to eligible capital and operating expenses.

Although related in purpose—creating vibrant, compact, mixed-use, economically successful communities near public transportation—joint development and transit-oriented development (TOD) differ in several material respects and for purposes of applying FTA’s rules. Joint development projects occur on real property with a Federal interest or with an FTA-assisted project on non-transit real property; hence, the recipient is an active partner in joint development. TOD has a neighborhood scope and encompasses as little as several parcels of property to an entire community; the recipient is a stakeholder, but often is not a partner, in TOD. Thus, while joint development is a form of TOD, it is much smaller in scope and, because it is funded or takes place on land that was funded by FTA, Federal requirements apply to a joint development project that may not apply to an entire TOD. The applicability of Federal requirements notwithstanding, FTA’s policy is to encourage TOD in all appropriate circumstances. Both joint development and TOD leverage FTA-funded projects to develop local economies and to encourage private investment near public transportation.

Another key distinction is between a joint development project and a public-private partnership (PPP). A joint development project is a specific manner of developing

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federally funded real property or a federally funded transit project, and, in most circumstances, includes the participation of a private entity. PPP is a term of art used in the transportation industry and other sectors to refer to a specific form of procurement, wherein a public entity “partners” with the private sector to assume certain project responsibilities that have traditionally been performed by the public sector. Thus, while a joint development project may include coordination between and the sharing of responsibilities by the public and private sectors, it is not a PPP, per se. A public transportation agency is not precluded from using a PPP to procure its private partner in a joint development project, however.

Because there is no separate FTA-funded program specifically for joint development, this circular does not present requirements that are unique to joint development. Rather, it presents general requirements from the perspective of undertaking a joint development project. FTA funds used for joint development are subject to the requirements of the grant program through which they were received.

2. APPLICABLE PROGRAMS. FTA can support joint development through its various planning and capital assistance programs. This circular should be used in conjunction with FTA’s circulars that provide guidance specific to each program. The FTA programs available for funding joint development are identified in chapter III of this circular.
3. FTA JOINT DEVELOPMENT POLICY. FTA’s policy is to maximize the utility of FTA-funded projects and encourage transit agencies to generate program income through joint development. The benefits of joint development include revenue generation for the transit system through “value capture” mechanisms, such as income derived from rental or lease payments, and private sector contributions to public infrastructure. Other benefits include shared costs, efficient land use, reduced distance between transportation and other activities, economic development, increased transit ridership, and improved transit connectivity.

The revenue a recipient receives from an FTA-assisted joint development project is treated as program income and may be used towards eligible capital and operating expenses of providing transit service. It is FTA’s policy to give recipients maximum flexibility within the law to work with the private sector and others to pursue joint development. Therefore, as long as the recipient complies with federal requirements, achieves a meaningful level of economic development or private investment, and receives a fair rent, or equivalent payment, for the costs associated with leased space in an FTA-funded facility, FTA will usually defer to the decisions of the recipient’s decisions about the particulars of a joint development project.

4. FRAMEWORK FOR ANALYZING A PROPOSED JOINT DEVELOPMENT. FTA funds may be used to pay for many aspects of a joint development, including costs associated with eligible planning and capital activities. There are two categories of issues that FTA typically considers when presented with a proposed joint development: (1) eligibility issues associated with either the use of FTA grant funds or the use of program

income towards a capital project; and (2) issues associated with the acquisition, use, and disposition of real property that was or will be purchased with FTA funds.

5. ELIGIBILITY OF JOINT DEVELOPMENT AS A CAPITAL PROJECT.

- a. Source of Funds. FTA recipients may fund joint development with new FTA grants or with program income generated by an existing project. When the source of funds is a new grant, project sponsors shall apply for funding under an authorized FTA program. To be eligible for funding, both a stand-alone joint development and a joint development within a larger project must satisfy the eligibility requirements in the definition of capital project at 49 U.S.C. 5302(3)(G), as interpreted by FTA in this circular, and as amended by MAP-21. Revenues derived from a joint development are program income as that term is defined at 49 C.F.R. 18.25(g) (throughout this Circular, 49 C.F.R. parts 18 and 19 will be referred to as the “Common Grant Rule”). Program income may be used for eligible capital and operating expenses of providing transit service.
- b. Eligibility Criteria. This circular incorporates the statutory interpretation FTA made in its 2007 guidance on the eligibility of joint development project under federal transit law (72 FR 5788, Feb. 7, 2007), and its 2010 guidance on the eligibility of bicycle and pedestrian improvements (76 FR 52046, Aug. 19, 2011). Per the eligibility criteria set forth at 49 U.S.C. 5302(3)(G), a new joint development must do the following to be eligible for FTA funding:
 - (1) Create an economic benefit by enhancing economic development or incorporating private investment;
 - (2) Provide a public transportation benefit by either: (a) enhancing the effectiveness of a public transportation project and relating physically and functionally to the public transportation project, or (b) establishing new or enhanced coordination between public transportation and other transportation;
 - (3) Produce revenue and reserve a fair share of that revenue for public transportation; and
 - (4) Provide that a person occupying space in a facility constructed with FTA funds must pay a fair share of the costs of the facility through rental payments or other means.
- c. Real Property. Recipients may use either existing or newly acquired FTA funded real property to pursue joint development.
- d. Use. The Common Grant Rule at 49 C.F.R. 18.31(b), requires that real property acquired with FTA assistance be used by the recipient for the originally authorized purpose as long as needed for that purpose. The Common Grant Rule also prohibits a recipient from disposing of real property or encumbering its title or other interests without FTA approval. Discussed below are several requirements on the use of real

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property for a new capital project or for the incidental use of property previously acquired with FTA funds.

- e. Acquisition. Real property must be acquired, managed, and used in accordance with the Uniform Assistance and Real Property Policies Act of 1970, as amended (Uniform Act), 42 U.S.C. Chapter 61; implementing regulations at 49 C.F.R. part 24; FTA's Master Agreement; FTA Circular 5010.1, Grant Management Requirements; and all other applicable laws, regulations, and guidance. FTA Circular 5010.1 provides guidance on the use of FTA funds for the acquisition of real property.
- f. Satisfactory Continuing Control. Recipients must maintain "satisfactory continuing control" over property purchased with FTA funds. Joint development must not interfere with a recipient's continuing control over the use of property or the recipient's ability to continue to carry out the originally authorized purpose for which the property was acquired.
- g. Incidental Use. Recipients may pursue joint development through the authorized incidental use of real property acquired with FTA assistance. Incidental uses of real property are non-transit uses of the property made possible by transit operating circumstances. Authorized incidental use of real property acquired with FTA assistance must:
 - (1) Be compatible with the approved purposes of the project; and
 - (2) Not interfere with the intended public transportation uses of the property nor the recipient's ability to maintain satisfactory continuing control.
- h. Disposition. Recipients must request disposition instructions when real property acquired with FTA funds is no longer needed for the originally authorized purpose. FTA will also instruct recipients on how to handle the proceeds derived from the disposition of FTA funded real property. Once disposed, real property may not be used for a joint development project.
- i. Crosscutting Requirements. Upon receipt of FTA funds, a recipient agrees to follow a set of standard terms, conditions, and requirements. These "crosscutting requirements" apply to all FTA-funded projects. The sponsors of a joint development should pay particular attention to those requirements outlined in chapter V of this circular.

CHAPTER III

FTA ASSISTANCE FOR PLANNING AND CAPITAL PROJECTS

FTA can support joint development through its various planning and capital assistance programs. The programs available for funding joint development are identified in this chapter.

1. **FTA PLANNING ASSISTANCE FOR JOINT DEVELOPMENT.** FTA assistance is available for planning activities that support joint development.³ Such assistance is also available for transit station area planning that may facilitate transit-oriented development. In general, these planning grants are available to assist States, authorities of the States, metropolitan planning organizations (MPOs), and local governmental authorities with preparing transportation plans and programs, planning, engineering, designing, and evaluating a public transportation project, and conducting technical studies related to public transportation in addition to other statutorily eligible activities. Also, Federal Highway Administration (FHWA) planning program funds may be available, through the MPO, to support planning for joint development. As with all FTA grants, transportation planning funds used for joint development must be programmed in the Unified Planning Work Program, the State Planning and Research Program, or the Transportation Improvement Program in accordance with Federal transportation planning requirements.

Joint development planning activities may also be eligible for assistance from other federal agencies such as the U.S. Department of Housing and Urban Development, the U.S. Environmental Protection Agency, the U.S. Department of Commerce, the U.S. Department of Health and Human Services, and the U.S. Department of Agriculture. Please refer to the appropriate agency's website for more information.

2. **FTA CAPITAL ASSISTANCE FOR JOINT DEVELOPMENT.** Under federal transit law, joint development is a kind of transit capital project.⁴ As such, recipients may fund joint development using any FTA funding source that is available to assist a capital project.
 - a. **Chapter 53 Programs.** When the source of funds is a new grant, the funds will be awarded under a particular FTA program. Each FTA grant program has its own requirements and criteria for eligibility. So, depending on the activities involved, a joint development may not be eligible for funding under every program. The FTA grant programs that can be applied to capital projects are:
 - (1) Section 5307: Urbanized area formula grants
 - (2) Section 5309: Fixed guideway capital investment grants
 - (3) Section 5310: Formula grants for the enhanced mobility of seniors and individuals with disabilities

³ See FTA Circular 8100.1C, Program Guidance for Metropolitan Planning and State Planning and Research Program Grants, September 1, 2008, and FTA Circular 9030.1D, Urbanized Area Formula Program: Program Guidance and Application Instructions, 5-01-2010.

⁴ 49 U.S.C. § 5302(3)(G) (definition of "capital project").

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- (4) Section 5311: Formula grants for rural areas
 - (5) Section 5337: State of good repair grants
 - (6) Section 5339: Bus and bus facilities formula grants
- b. FHWA Flexible Funds. In addition to these FTA grant programs, certain funding programs administered by FHWA, including the Surface Transportation Program and the Congestion Mitigation and Air Quality Improvement Program, may be used for public transportation purposes.⁵ These “flexible” funds are administered as FTA funds and take on the requirements and eligibility of the FTA program to which they are transferred.
- c. Program Income. Recipients are encouraged to earn program income to defray program costs. Revenue generated from a federally assisted asset is program income⁶ and should be considered as a funding source. Program income may be applied to capital or operating costs associated with any public transportation purpose.
3. ELIGIBILITY REQUIREMENTS. An eligible joint development project must satisfy the four eligibility criteria set forth in the statutory definition of capital project at 49 U.S.C. 5302(3)(G). This definition also specifies common joint development activities that are eligible for FTA funds and activities that are ineligible for FTA assistance.

Eligible joint development activities must:

- Either enhance economic development or incorporate private investment, such as commercial and residential development;
- Either enhance the effectiveness of public transportation and be related physically or functionally to public transportation, or establish new or enhanced coordination between public transportation and other transportation;
- Provide a fair share of revenue that will be used for public transportation; and
- Provide that a person occupying space in a joint development facility shall pay a fair share of the costs of the facility through rental payments or other means.

⁵ 49 U.S.C. 5334(i).

⁶ See 49 C.F.R. parts 18 and 19 concerning program income generally.

The Four Criteria

(i) The economic benefit criterion is satisfied by...	<ul style="list-style-type: none">• Enhancing economic development <p>-OR-</p> <ul style="list-style-type: none">• Incorporating private investment
(ii) The public transportation criterion is satisfied by...	<ul style="list-style-type: none">• Enhancing the effectiveness of a public transportation project and relating physically or functionally to that public transportation project <p>-OR-</p> <ul style="list-style-type: none">• Establishing new or enhanced coordination between public transportation and other transportation
(iii) The revenue criterion is satisfied by...	<ul style="list-style-type: none">• Providing a fair share of revenue for public transportation that will be used for public transportation
(iv) The tenant contributions criterion is satisfied by...	<ul style="list-style-type: none">• Requiring that a person occupying space in a joint development facility shall pay a fair share of the costs of the facility through rental payments or other means

- a. **Criterion One: Economic Benefit.** To receive FTA funding for joint development the project must either (a) enhance economic development or (b) incorporate private investment. In accordance with the statute’s use of the disjunctive “or” rather than the conjunctive “and,” FTA shall determine that a transportation improvement satisfies the first criterion for funding if the transportation improvement produces either effect.
- (1) **Enhances Economic Development.** A recipient may satisfy this criterion by demonstrating that the joint development will add value to privately or publicly funded economic development activity occurring in close proximity to a public transportation facility.
 - (2) **Incorporates Private Investment.** Private investment need not be monetary; it may take the form of real property, or some other benefit to be generated initially or over

the life of the joint development. The amount and form of private investment shall be negotiated by the parties to the joint development, *i.e.*, the recipient and its partner(s). While FTA will not set a monetary threshold for private investment, it reserves the right to decline funding for a joint development project if the level of private investment or economic development is not meaningful.

b. Criterion Two: Public Transportation Benefit. This criterion presents two possible means of satisfaction: the joint development project can (a) enhance the effectiveness of a public transportation project to which it is related physically or functionally, or it can (b) establish new or enhanced coordination between public transportation and other transportation.

(1) Enhances the Effectiveness of a Public Transportation Project and Is Related Physically or Functionally to That Public Transportation Project. Any reasonable forecast of the joint development impacts that enhance the effectiveness of a public transportation project shall satisfy the criterion. These impacts may include, but are not limited to, any of the following:

- Increased ridership
- Shortened travel times
- Wayfinding
- Deferred transit operating or capital costs
- Improved access to public transportation

The disjunctive requirement of physical “or” functional relationship allows for a joint development to be built separately from, but in functional relationship to, a public transportation project. A joint development satisfies this element if it has a physical or functional nexus to a public transportation project.

(a) Physically Related. A joint development is physically related to a public transportation project if it provides a direct physical connection to public transportation services or facilities. Some examples of physical relationships are:

- Projects built within or adjacent to public transportation facilities
- Avenues of access that connect directly to public transportation, *e.g.*, bicycle paths, pedestrian paths, or parking spaces
- Connections between public transportation and airports, train stations, and other transportation facilities

- Projects using air rights over public transportation facilities
- (b) Functionally Related. A joint development is functionally related to a public transportation project if by activity and use, with or without a direct physical connection, it enhances the use of, connectivity with, or access to public transportation. A joint development can also be functionally related to a public transportation project if it provides a transportation-related service (such as remote baggage handling or shared ticketing) or community services (such as daycare or health care) for the public.

FTA's considerations include, among other things, whether there is a reduction in travel time between the joint development project and the public transportation facility, reasonable access between the joint development and the public transportation facility, and increased trip generation rates resulting from the relationship between the joint development and the public transportation facility. A more convenient connection between public transportation and a retail or community development would satisfy the requirement that the joint development project achieve a functional relationship.

A functional, rather than physical, relationship permits an FTA assisted joint development to be located outside the structural envelope of a public transportation facility and even to be separated by an intervening street, major thoroughfare, or unrelated property. However, a functional relationship will not ordinarily extend beyond the distance most people can be expected to safely and conveniently walk or bicycle to use the transit service.⁷

- (2) Establishes New or Enhanced Coordination between Public Transportation and Other Transportation. FTA will accept reasonably supported judgments of new or enhanced coordination from the project sponsor.
- (a) "Public transportation" is defined as "regular, continuing shared-ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income," and it does not include school bus, charter, sightseeing, intra-terminal or intra-facility shuttle service, courtesy shuttle service for patrons of one or more specific establishments, intercity bus transportation, or intercity passenger rail transportation provided by Amtrak. FTA interprets the term "other transportation" to mean all forms of transportation that are not public

⁷ In 2011, FTA published a statement of policy in the *Federal Register* on the subject of the functional relationship between pedestrian and bicycle improvements and public transportation. Within one-half mile of a public transportation stop or station, pedestrian improvements have a *de facto* functional relationship to public transportation. Within three miles of a public transportation stop or station, bicycle improvements have a *de facto* functional relationship to public transportation. Pedestrian and bicycle improvements beyond these distances may also have a functional relationship to public transportation, but the relationship is not *de facto* and must be demonstrated. See Final Policy Statement on the Eligibility of Pedestrian and Bicycle Improvements under Federal Transit Law (76 FR 52046, Aug. 19, 2011), for detailed information.

transportation, including, but not limited to, airplane, school bus, charter bus, sightseeing vehicle, intercity bus and rail, automobile, taxicab, bicycle, and pedestrian transportation.

- (b) Connections that can establish new or enhanced coordination between public transportation and other transportation may include proximate or shared ticket counters, termini, park-and-ride lots, taxicab bays, passenger drop-off points, waiting areas, shared or coordinated signage, schedules, ticketing, and bicycle paths and sidewalks that connect public transportation to other transportation facilities. Projects that shorten the distance between public transportation termini and other transportation shall be presumed to enhance coordination. Pedestrian and bicycle improvements that are physically located outside the structural envelope of a public transportation facility may nonetheless be functionally related to the public transportation.⁸
- c. Criterion Three: Fair Share of Revenue.⁹ What amounts to a fair share of revenue, and what form it takes, shall be negotiated between the parties involved in the joint development. A fair share of revenue is not limited to cash payments made to a transit agency. It may also take the form of an increase in revenue received by a transit agency, for example, in its capacity as landlord or as a result of increased passenger traffic due to the joint development. The recipient must report to FTA the source of such fair share of revenue. While FTA will not expressly define the term “fair share of revenue” and will not set a monetary threshold, it reserves the right to decline funding for a joint development project if the project does not generate a meaningful amount of revenue.

To qualify as a fair share of revenue, FTA requires the following:

- (1) The recipient’s Board of Directors (or equivalent governing body) must determine, following reasonable investigation, that the terms and conditions of the joint development (including, without limitation, the share of revenues for public transportation that shall be provided thereby) are commercially reasonable and fair to the recipient;
 - (2) FTA must be provided an opportunity to review and approve the amount of revenue as meaningful; and
 - (3) Such revenue must be used for public transportation. This enhances the ability of a public transportation provider to negotiate for financial benefits in exchange for the benefits it will convey through the joint development.
- d. Criterion Four: Fair Share of Costs. A joint development must provide that a person making an agreement to occupy space in a facility constructed with FTA assistance

⁸ See note 7, *supra*.

⁹ Note, that this criterion is distinct from Criterion Four, discussed below.

must pay a fair share of the costs of the facility. “Person” here includes natural persons as well as business entities. As with the “fair share of revenue” described in Criterion Three, FTA will not attempt to define what amounts to a fair share of the costs of the facility and will not impose a particular valuation methodology. FTA will accept reasonable valuation methodologies used by the recipient to determine a fair share of the costs of the facility. However, FTA reserves the right to decline funding if the rental payment, or other means, are less than the actual cost to the transit agency to operate and maintain the space in its facility.

The fair share may be paid in the form of rental payments, but may also take other forms. Recipients and their partners/tenants have flexibility to form agreements other than for rent, so long as the value of such agreements is equal to the costs of operating and maintaining the leased space.

4. Eligible Activities. Certain capital costs are eligible for FTA assistance. Some of these activities are specifically included in the joint development definition of capital project, and some are eligible under other definitions of capital project. Common eligible capital costs may include, but are not limited to:
 - a. Property acquisition, and the relocation of residents and businesses;
 - b. Demolition of existing structures;
 - c. Site preparation;
 - d. Utilities, including utility relocation and construction;
 - e. Building foundations, including substructure improvements for buildings constructed over transit facilities;
 - f. Walkways, including bicycle lanes and pedestrian connections and access links between public transportation services and related development;
 - g. Pedestrian and bicycle access to a public transportation facility;
 - h. Construction, renovation, and improvement of intercity bus and intercity rail stations and terminals;
 - i. Renovation and improvement of historic transportation facilities;
 - j. Open space, including site amenities and related streetscape improvements such as street furniture and landscaping;
 - k. Safety and security equipment and facilities (including lighting, surveillance, and related intelligent transportation system applications);
 - l. Facilities that incorporate community services such as daycare and health care;

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- m. A capital project for, and improving, equipment or a facility for an intermodal transfer facility or transportation mall;
 - n. Construction of space for commercial uses, although FTA may not fund the outfitting of a commercial space (see “Ineligible Activities” below);
 - o. Capital project and equipment for an intermodal transfer facility or transportation mall, including acquisition of facilities and equipment, roadbeds, tracks and bus ramps, pedestrian concourses, parking facilities, park-and-ride services, improvements to existing bus or rail transit terminals, stations, major transfer points, and shelters as well as other facilities directly related to the linking of public transportation facilities with other modes of transportation;
 - p. Transportation-related furniture, fixtures, and equipment (FFE) are eligible costs in all cases; however, due to the restriction at 49 U.S.C. § 5302(3)(G)(vi) against outfitting commercial spaces (other than intercity bus or rail stations) or public facilities not related to public transportation, FFE for such spaces are ineligible;
 - q. Parking improvements with a public transportation justification and use, or with an intercity bus or intercity rail justification and use, in connection with joint development;
 - r. Project development activities, including design, engineering, construction cost estimating, environmental analysis, real estate packaging and financial projections (operating income and expenses, debt service, and cash flow analysis), and negotiations to secure financing and tenants; and
 - s. Professional services, including reasonable and necessary costs incurred to hire professionals to prepare or perform the activities described above, or to assist the grantee in reviewing the same.
5. Ineligible Activities. FTA’s authorizing legislation expressly prohibits it from funding two kinds of activities in particular: (1) the “outfitting” of a commercial space and (2) construction of part of a public facility not related to public transportation.
- a. Outfitting of a Commercial Space. With the exception of intercity bus and rail facilities, FTA funds may not be used to “outfit” space that will be occupied by a commercial, for profit entity. FTA interprets the terms “outfit” and “outfitting” to mean the purchase and installation of items needed for exclusively commercial, for profit purposes. For example, the products needed to outfit a café or coffee shop would include signage, shelving, displays, furniture, food preparation equipment, lighting, cash registers, etc.

While the statute prohibits FTA from outfitting a commercial space, FTA funds may be used to construct the “shell” of a facility that will be occupied by a commercial entity, as long as the statutory eligibility criteria are met. To illustrate, FTA funds could be

used to construct a facility that would be occupied by a coffee shop or news stand in exchange for rent payments. FTA could assist in the construction of the overall facility that includes the commercial space, but could not pay for seating in the commercial areas, shelving, countertops, or other commercial equipment. (Note: as discussed above, occupants of a facility must pay a fair share of the costs of the facility through rental payments or other means.)

- b. Public Facility Not Related to Public Transportation. Although geographic vicinity to public transportation can sometimes create a relationship between a non-transit public facility and public transportation, activities associated with a public facility that has merely a *de minimis* connection to public transportation are not eligible. Moreover, geographic closeness to public transportation is not the sole eligibility criterion. A public facility must satisfy the same criteria described above to be considered an eligible public transportation project. A public facility that lacks a physical or functional relationship to public transportation, or does not provide an economic benefit or a fair share of revenue to public transportation will not be eligible. All criteria must be satisfied. For example, absent the satisfaction of other eligibility criteria, FTA funds could not be used to purchase classrooms for a university merely because a bus stop is located in the vicinity.

CHAPTER IV

REAL PROPERTY CONSIDERATIONS

1. INTRODUCTION. Joint development often involves real property that is conveyed by the transit operator to a third party. Conveyances include, but are not limited to, leases, covenants, and easements. Regardless of whether it is purchased by a transit operator or a third party, real property purchased with FTA assistance must be acquired, managed, used, and disposed of in accordance with applicable laws and regulations. The recipients of FTA funds may acquire and transfer rights to real property in various forms, including but not limited to fee simple ownership, surface rights, air rights, leases. This chapter clarifies the relationship between federal transit law and regulations, and FTA's policies regarding the acquisition, use, and disposition of real property.
2. ACQUISITION OF REAL PROPERTY WITH FTA ASSISTANCE. Property acquisition is an eligible activity under the definition of capital project. Real property must be acquired, managed, and used in accordance with the Uniform Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act), 42 U.S.C. Chapter 61, as implemented at 49 C.F.R. part 24; the Common Grant Rule of 49 C.F.R. part 18; FTA's Master Agreement; FTA Circular 5010.1, Grant Management Requirements; and all other applicable laws, regulations, and guidance.

The purposes of the Uniform Act are to ensure: (1) the fair treatment of owners of real property that is acquired for federal and federally assisted projects; (2) that people displaced by a federally supported project are treated fairly and consistently; and (3) that acquiring agencies implement the regulations in a manner that is efficient and cost-effective. The requirements of the Uniform Act apply to all real property to be used in a federally assisted project, regardless of whether the property acquisition was itself federally assisted.

Recipients pursuing joint development shall identify parcels of land that may require the displacement of protected persons or entities and develop solutions to ensure that they are in compliance with the Uniform Act. FTA Circular 5010.1D requires recipients to develop a Real Estate Acquisition Management Plan (RAMP). RAMPs are used to assess the possible issues associated with and feasibility of the acquisition of real estate needed for a capital project. Depending on the complexity of the joint development project,¹⁰ a recipient's RAMP shall include, among other things, a relocation plan.¹¹

3. USE OF REAL PROPERTY. FTA encourages the pursuit of joint development that can raise revenue for the transit system and enhance transit ridership. In approving a use of real property, or property rights, FTA will rely on the project participants, including, notably, the grant recipient, to determine the appropriate use of real property for joint development, so long as the recipient ensures that the real property remains available for

¹⁰ Relocation planning is required if the property acquisition will displace individuals, families, businesses, or non-profit organizations.

¹¹ See 49 C.F.R. part 24 for direction on relocation planning.

its originally authorized purpose and maintains satisfactory continuing control. Recipients must obtain FTA's concurrence for incidental uses of FTA-funded real property, and must seek instructions from FTA when disposing of property that is no longer needed for the originally authorized purpose.

- a. Use. The use of real property is governed by the Common Grant Rule at 49 C.F.R. 18.31 (b), which provides: "Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purpose; and the grantee or subgrantees shall not dispose of or encumber its title or other interests."

- (1) Originally Authorized Purpose. Since October 1, 1996, the FTA Master Agreement has allowed the originally authorized purpose of a grant agreement to include "joint development purposes that generate program income to support transit purposes." FTA's interpretation of the Common Grant Rule at 49 C.F.R. 18.25(g)(2) brings revenues derived from a joint development, from leases or other conveyances, within the definition of program income, thereby permitting their use for eligible capital and operating expenses where the recipient maintains satisfactory continuing control of the property, ensures that the federal interest in the property is reasonably protected, and otherwise meets the eligibility criteria set forth in 49 U.S.C. 5302(3)(G).

When the real property or real property rights are no longer needed for the originally authorized purpose, recipients must request disposition instructions from FTA. The proceeds of a disposition are not considered program income. A fee simple sale of real property always results in a disposition. Once it is sold, such property will be unavailable for a joint development project.

- (2) Joint Development Transfers. An outright prohibition on the encumbrance of title to real property has historically affected a recipient's ability to secure willing partners to participate in joint development. In many cases, this occurred because FTA viewed any lien against FTA-funded property as a disposition. Thus, the project sponsor was unable to secure financing at market rates because FTA refused to allow the real property to be used as collateral for a loan. Because federal transit law recognizes joint development as an eligible grant purpose, FTA may authorize a recipient to encumber the title to, or interest in, real property acquired with FTA assistance, so long as the recipient can maintain satisfactory continuing control over the property and ensures that federal interest in the property will be reasonably protected. This does not result in a disposition.

- (a) Subordination of the Federal Interest. FTA encourages the use of non-transit investments through private participation to fund or

finance joint development. FTA recognizes that many of the arrangements a recipient may enter into pursuant to a joint development may require subordination of the federal interest to that of a third party. FTA's Master Agreement states FTA's policy on the subordination of the federal interest in property acquired with FTA assistance.

FTA retains an interest equal to the federal share of the costs of the real property until FTA relinquishes its interest in that property. As a result, recipients shall not dispose of, modify the use of, or change the terms of the title to real property or any other interest in the site or facilities in which FTA has an interest without express written consent from FTA. Absent express written consent from FTA, a recipient may not encumber real property by executing any written, oral or other arrangement that would either adversely affect the federal interest in the property or impair the recipient's satisfactory continuing control of the use of the project property. For example, a recipient may enter into the following arrangements, but may not do so without first obtaining FTA's express written consent:

- Transfer
- Sale
- Lease
- Lien
- Pledge
- Mortgage
- Easement
- Covenant
- Third-party contract
- Sub-agreement
- Grant anticipation note
- Innovative finance arrangement, such as a cross-border lease or a leveraged lease

(b) Mandatory Contractual Provisions. Any joint development agreement that subordinates or encumbers FTA's interest in real property must contain provisions that:

- Extend the requirements of the grant or cooperative agreement between the recipient and FTA;
- Ensure that the recipient maintains satisfactory continuing control of the property;

- Ensure that the federal interest in the property will be reasonably protected; and
- Ensure that the recipient participates in any further transfer or disposition of the real property in a manner consistent with this and other applicable guidance, laws, or regulations.

These requirements should not be a deterrent to the pursuit of joint development. In fact, private investment is one of the two ways that a joint development may satisfy one of the threshold requirements for eligibility. It is FTA's policy to give recipients maximum flexibility within the law to work with the private sector and others for purposes of determining what arrangements having an effect on real property slated for joint development are most suitable to the joint development and the parties involved.

- b. Incidental Use. FTA Circular 5010.1, Grant Management Requirements, defines incidental use as "the authorized use of real property acquired with FTA assistance for purposes of transit service but which also has limited non-transit use due to transit operating circumstances." Incidental uses must be compatible with the approved purposes of the project and not interfere with either the intended public transportation uses of the property or the recipient's ability to maintain satisfactory continuing control.
- (1) As stated above, FTA's policy is to permit maximum flexibility in determining the best and most cost-effective use of FTA-funded property. To this end, FTA encourages incidental use of real property for purposes of joint development that can raise additional revenues for the transit system and enhance system ridership. Income received from authorized incidental use is program income and may be retained by the recipient (without returning the federal share) if the income is used for eligible transit capital and operating expenses. This income cannot be used as part of the local share of the grant from which it was derived. However, it may be used as part of the local share of another FTA grant.
 - (2) Many joint development projects may include incidental uses of FTA-funded real property. For example, allowing nearby theaters and restaurants to use transit parking spaces during the transit system's off-hours is an incidental use. So is temporary use of transit property as a staging area for nearby construction unrelated to the joint development project. To the extent that the following activities are allowed in a manner that ensures satisfactory continuing control over the ability to use the real property for its originally authorized purpose, FTA considers these and other uses to be permissible incidental uses:

- Parking facilities used by public transportation patrons during the day and theater and restaurant patrons at night;
 - Leasing of space in a station for a newspaper stand or coffee shop when the additional uses do not interfere with the original purpose authorized in the grant; and
 - The lease of air rights over transit facilities.
- (3) FTA Circular 5010.1D, Grant Management Requirements, provides guidelines for the incidental use of real property. Incidental use of property is subject to the following considerations:
- (a) Needed Property. This policy applies only to property that continues to be needed and used for an FTA project or program. It is FTA's intention to assist only in the purchase of property that is needed for an FTA project.
 - (b) Purpose and Activity. The use must not compromise the safe conduct of the intended purpose and activity of the initial public transit project activity.
 - (c) Satisfactory Continuing Control. The use must not in any way interfere with the recipients' satisfactory continuing control over the use of the property or the recipients' continued ability to carry out the project or program.
 - (d) Non-Profit Use. While FTA is particularly interested in encouraging incidental use as a means of supplementing transit revenues, non-profit uses are also permitted under certain circumstances.
 - (e) Income. Income received from the authorized incidental use of air rights may be retained by the recipient (without returning the federal share) if the income is used for eligible transit capital and operating expenses. This income cannot be used as part of the local share of the grant from which it was derived. However, it may be used as part of the local share of another FTA grant.
- (4) FTA approval is required before an incidental use may occur. If the incidental use is implemented as described in the grant application, FTA approval of the grant constitutes approval of the incidental use. Contracts, lease agreements, or subrecipient agreements will be examined for requirements imposed on the use of FTA-funded real property. A recipient must ensure that contractors, lessees, and subrecipients using FTA-funded real property do not interfere with the property's project purposes. This can be achieved through annual certifications of use, site

visit inspections, or deed restrictions. Moreover, while FTA is particularly interested in encouraging incidental use as a means of supplementing transit revenue, non-profit uses are permitted under certain circumstances with FTA's approval.

- c. Satisfactory Continuing Control. FTA does not allow for the unrestricted transfer, conveyance, or encumbrance of property acquired with FTA assistance. In all circumstances, the recipient must obtain FTA concurrence that it has secured "satisfactory continuing control" of FTA-funded real property.
 - (1) Mechanisms for Preserving Public Transportation Purpose. Ultimately, FTA will decide whether a proposed transfer, conveyance, or encumbrance will preserve the property's public transportation purpose. In making this determination, FTA will look to the contractual agreement or other instrument between the recipient and the private developer or other third party to determine whether it incorporates provisions that both allow the recipient to adequately maintain satisfactory continuing control and ensure that the private developer or third party will actually proceed with the development as approved by FTA.

Any number of legally enforceable mechanisms may be acceptable. Satisfactory continuing control may be evidenced by a real property transaction or clauses in a contract that are totally separate from the land transaction. For example, a recipient may receive an equity position in the non-transit portion of the development as payment for the land. As part of that documentation, a recipient should expect a clause assuring that access to the real property for its originally authorized purpose will be maintained for the life of the project. This assurance may take the form of an easement.
 - (2) Duration. For structures, the requirement that a recipient maintain satisfactory continuing control remains for the useful life of the project. For the underlying real property, the satisfactory continuing control requirement remains indefinitely and until the recipient disposes of the real property. Current laws and regulations affecting property bought with federal grant funds are quite clear—a recipient is allowed to dispose of the property (cede satisfactory continuing control) if it applies the proceeds to a new federally eligible capital project or it returns the pro-rata federal share of any net sales proceeds of the property to FTA (the disposition requirements are discussed in more detail below).
4. DISPOSITION OF REAL PROPERTY. As required by 49 C.F.R. 18.31(b), real property acquired with FTA assistance must be used for the originally authorized purpose. When such real property is no longer needed for the originally authorized purpose, a recipient must request disposition instructions from FTA. Once disposed, real property may not be used for a joint development project.

a. Disposition Methods.

- (1) Sale of Property. FTA may authorize the sale of property no longer needed for the originally authorized purpose for which it was acquired. 49 U.S.C. 5334(h)(A); 49 C.F.R. 18.32. Pursuant to 49 U.S.C. 5334(h)(4)(B), net proceeds from such a sale should be used by the recipient to reduce the gross project costs of other eligible capital projects. If the recipient cannot use the proceeds towards the capital costs of another eligible project, then the recipient will be required to compensate FTA for the federal interest in the property pursuant to 49 C.F.R. 18.31(c)(2).
 - (2) Retention of Title. FTA may authorize retention of title to real property no longer needed for the originally authorized purpose. Recipients will be required to compensate FTA for the federal interest in the property. Upon disposition under this method, recipients would be authorized to use the property for a transit or non-transit use. 49 C.F.R. 18.31(c)(1).
 - (3) Transfer of Title.
 - (a) Approved Third Party. FTA may authorize the transfer of property no longer needed for the originally authorized purpose to FTA or to a third party designated or approved by FTA. 49 C.F.R. 18.31(c)(3).
 - (b) Local Governmental Authority. When real property is no longer needed for the originally authorized purpose, FTA may authorize a recipient to transfer the property to a local governmental authority to be used for a public purpose pursuant to 49 U.S.C. 5334(h), if:
 - The asset will remain in public use for at least five years after the date the property is transferred;
 - There is no purpose eligible for FTA assistance for which the property should be used;
 - The overall benefit of allowing the transfer is greater than FTA's interest in the liquidation and return of FTA's share in the asset, after consideration of fair market value and other factors; and
 - There is no interest in acquiring the asset for federal government use.
5. PARKING. FTA-funded real property that was originally used as a surface parking lot for automobiles can later be converted to a joint development project. These types of

projects frequently occur on park-and-ride lots near rail stations. When surface parking is converted to a joint development use, FTA does not require the project sponsor to replace existing automobile parking spaces at a one-to-one ratio. However, the project sponsor must consider the following factors:

- a. Useful Life. FTA must approve of any change in use (or disposition) of an asset before the end of its useful life. Thus, if a project sponsor wishes to replace an FTA-funded parking lot with a joint development project, it must first determine whether the asset has reached the end of its useful life. If useful life remains, then the project sponsor must account for the remaining federal interest in the asset prior to any change or disposition.
- b. Public Transportation Benefit. As with any FTA-funded joint development project, the change in use from parking to joint development must benefit public transportation. The benefit may accrue by enhancing the effectiveness of public transportation or by establishing new or enhanced coordination between public transportation and other transportation. Typically, a project sponsor demonstrates a public transportation benefit through studies indicating that the change in use will result in higher ridership on its system.
- c. Prior Grant Commitments. Projects funded pursuant to a Full Funding Grant Agreement, or similar contract, require the recipient to achieve certain “user benefits.” Whenever a project sponsor seeks to change the use (or dispose) of real property purchased with funds from such an agreement, FTA must concur that the change will not violate the terms of the funding agreement.
- d. NEPA. A change in use from parking to joint development may trigger the need for additional National Environmental Policy Act (NEPA) analysis. If there are no FTA funds in the conversion from parking, the need for additional environmental analysis will depend on the timing of the change, i.e., on whether the original project is still under construction and whether there is an open grant for that project. A project sponsor should work with the FTA regional office to determine whether additional environmental analysis is needed.

CHAPTER V

CROSSCUTTING FEDERAL REQUIREMENTS

1. MASTER AGREEMENT. FTA's Master Agreement contains the terms and conditions governing the administration of a project supported with assistance from FTA through a grant agreement, cooperative agreement, Transportation Infrastructure Finance and Innovation Act (TIFIA) loan, loan guarantee, or line of credit. The requirements of the Master Agreement will vary depending on the type of project, the program under which it is funded, and the recipient's status as a State or local government, private nonprofit entity, or private for-profit entity. This chapter highlights some of the most common requirements encountered by joint developments, regardless of the project sponsor or the FTA program under which the project is financially assisted.
2. PLANNING AND ENVIRONMENTAL REQUIREMENTS. When FTA funds will be used for the joint development, transportation planning requirements apply.¹² As for any FTA-assisted capital project, a joint development, or a larger project that includes joint development, must be included in the applicable metropolitan transportation plan and the Transportation Improvement Program (TIP). In rural areas, the long-range statewide transportation plan (LRSTP) and Statewide Transportation Improvement Program (STIP) must include the proposed effort.

Planning and environmental requirements will vary depending on the nature of the project and FTA's involvement. Common joint development scenarios include the following:

- a. FTA Is Financially Assisting the Joint Development as Part of a Fixed Guideway Capital Investment or Other Large Project:
 - (1) The large transit project that includes the joint development must be included in the metropolitan transportation plan and the TIP (projects in an approved TIP are required by regulation to be included in the STIP without change).
 - (2) The National Environmental Policy Act (NEPA)-mandated environmental review of the larger transit project must include consideration of the impacts of the joint development that is part of that project. If land for the joint development is being acquired as part of the larger project but the joint development itself will not occur for several years after the rest of the large transit project has been completed and is in operation, then only the reasonably foreseeable impacts of the joint development need to be included in the NEPA review of the large project.

¹² Federal transportation planning regulations are jointly administered by FTA and FHWA. See Statewide and Metropolitan Transportation Planning, Final Rule (72 FR 7224, Feb. 14, 2007).

b. FTA Is Financially Assisting the Joint Development as a Separate Standalone Project:

- (1) In a metropolitan area, the joint development project must be included in the metropolitan transportation plan and TIP. If the standalone project is part of a joint development program consisting of multiple joint development projects and is not a regionally significant project, it may be included in the plan and TIP within that grouping of similar projects (projects in an approved TIP are required by regulation to be included in the STIP without change).
- (2) In a rural area, the joint development project must be included in the LRSTP and STIP. If the standalone project is part of a joint development program in rural areas consisting of multiple joint development projects and is not a regionally significant project, it may be included in the STIP within that grouping of similar projects.
- (3) An environmental review of the joint development project in accordance with 23 C.F.R. part 771 is required.

c. FTA Has a Financial Interest in the Property on Which the Joint Development Will Be Located, But FTA Is Not Financially Assisting the Implementation of the Joint Development:

- (1) A joint development may make use of real property that was originally acquired with FTA's financial assistance for a different transit purpose. If the real property was acquired specifically for the joint development, it will fall under paragraph (b) above. Because the real property was acquired for a purpose other than joint development, the project sponsor will usually be required to obtain FTA's lack of objection to the joint development plan before beginning the joint development. (Otherwise, the FTA financial interest would have to be returned to FTA or redirected to another eligible transit project.) If FTA is not funding the actual development of the property and is not otherwise involved in project decisions, the FTA planning and environmental requirements would not apply.

3. ENVIRONMENTAL PROTECTIONS AND HISTORIC PRESERVATION. A joint development that is financially assisted by FTA is subject to various federal environmental requirements. The common federal environmental protections that are relevant to joint development include;

- (a) NEPA, 42 U.S.C. § 4321 *et seq*;
- (b) Council on Environmental Quality regulations on compliance with NEPA, 40 C.F.R. part 1500 *et seq*.
- (c) FHWA/FTA regulations, "Environmental Impact and Related Procedures," 23 C.F.R. part 771;

- (d) Advisory Council on Historic Preservation regulations on compliance with Section 106, "Protection of Historic and Cultural Properties," 36 C.F.R. part 800; and
 - (e) U.S. DOT restrictions on the use of public parks, recreation areas, wildlife refuges, and publicly or privately owned historic sites, unless the FTA makes the specific findings required by 49 U.S.C. 303 (commonly referred to as "section 4(f)").
 - (f) Additional environmental regulations and executive orders may also apply in specific cases.
4. PROCUREMENT. Procurements that are assisted with FTA funds must adhere to certain standards. Among these, is the general requirement for full and open competition. FTA grantees may not use exclusionary or discriminatory specifications, or geographic restrictions. For a full description of procurement requirements that must be observed, and for guidance, refer to the Master Agreement and FTA Circular 4220.1, Third-Party Contracting Guidance.

If the procurement will make use of union labor, any project labor agreement must comply with Executive Order No. 13502, "Use of Project Labor Agreements for Federal Construction Projects."

5. LEASES AND CONVEYANCES. A joint development sponsor may wish to lease or convey an interest (including a lien or other encumbrance on title) in real property that was acquired with FTA assistance. The federal interest that must be represented in such a lease or conveyance will depend on whether FTA is also financially assisting the construction of improvements on the real property.
- a. No FTA Assistance for New Improvements. If the joint development involves a ground lease or transfer of FTA funded real property, and there is no FTA financial assistance for new improvements, then the following requirements apply to the lessee or transferee and must be incorporated into the lease or the conveyance instrument:
 - (1) Language found at 49 C.F.R. 26.7 binding the lessee or transferee not to discriminate based on race, color, national origin, or sex;
 - (2) Language found at 49 C.F.R. 27.7, 27.9(b), and 37 binding the lessee or transferee not to discriminate based on disability and binding the same to compliance with the Americans with Disabilities Act with regard to any improvements constructed; and
 - (3) Language contained in FTA's Master Agreement, updated annually in October, particularly relating to conflicts of interest, debarment and suspension.

- b. FTA-Assisted Construction of Joint Development. If the construction of the joint development is also assisted by FTA, then the following requirements will apply and must be incorporated into the lease or conveyance instrument:
- (1) Buy America. Language making it clear that the steel, iron, and manufactured goods used in the federally assisted project are produced in the United States, as described in 49 U.S.C. 5323(j) and 49 C.F.R. part 661;
 - (2) Planning and Environmental Analysis. Language making it clear that the grantee must comply with, and the federally assisted project is subject to the requirements of:
 - (a) The FHWA/FTA metropolitan and statewide planning regulations at 23 C.F.R. part 450;
 - (b) The National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321 *et seq.*
 - (c) Executive Order No. 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (59 FR 7629, Feb. 16, 1994);
 - (d) Council on Environmental Quality regulations on compliance with NEPA, 40 C.F.R. Part 1500 *et seq.*
 - (e) FHWA/FTA regulations, “Environmental Impact and Related Procedures,” 23 C.F.R. part 771;
 - (f) Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, involving historic and archaeological preservation;
 - (g) Advisory Council on Historic Preservation regulations on compliance with Section 106, “Protection of Historic and Cultural Properties,” 36 C.F.R. part 800; and
 - (h) Restrictions on the use of certain publicly owned parklands and historic resources, unless the FTA makes the specific findings required by 49 U.S.C. 303.
 - (3) Cargo Preference. Language making it clear that items imported from abroad and used in the federally assisted improvements were shipped predominantly on U.S.-flag ships and that the project complies with 46 C.F.R. part 381, to the extent these regulations apply to the joint development;

- (4) Seismic Safety. Language certifying that a structure conforms to seismic safety standards, as contained in 49 C.F.R. part 41;
 - (5) Energy Assessments. Language making it clear that the transferee(s) or joint developer agrees to perform a mandatory, energy assessment as prescribed by 23 C.F.R. part 771 and 42 U.S.C. 8373(b)(1) for any buildings constructed, reconstructed or modified with FTA assistance. The assessment shall be incorporated into the Environmental Impact Statement or Environmental Assessment, if the project has one; otherwise the assessment shall be provided with the application for FTA assistance;
 - (6) Lobbying provisions at 49 C.F.R. part 20;
 - (7) Labor Protection. Language making it clear that the transferee or joint developer will adhere to labor protection requirements applying to federal projects, such as:
 - (a) Davis-Bacon, 49 U.S.C. 5333(a), 40 U.S.C. 3141 *et seq.*, and 29 C.F.R. part 5;
 - (b) Copeland “Anti-Kickback” Act as amended, 18 U.S.C. 874 and 29 C.F.R. part 3;
 - (c) Contract Work Hours and Safety Standards Act, 40 U.S.C. 3701 *et seq.* and 29 C.F.R. part 5; and
 - (d) Provisions concerning the protection of transit employees, 49 U.S.C. 5333(b);
 - (8) Civil Rights Requirements. Title 49 U.S.C. 5332 and DOT implementing regulations at 49 C.F.R. part 21 (effecting Title VI of the Civil Rights Act of 1964), 49 C.F.R. part 26 (participation by Disadvantaged Business Enterprises in DOT financial assistance programs) and 49 C.F.R. parts 27 and 37 (respectively, nondiscrimination on the basis of disability in programs or activities receiving federal financial assistance and transportation services for individuals with disabilities); and
 - (9) Uniform Relocation. If the federally funded site to be improved is occupied by other than the recipient and the occupant is displaced, the transferee(s) or joint developer must comply with 42 U.S.C. 4601 *et seq.* and the regulations at 49 C.F.R. part 24.
6. CIVIL RIGHTS. Recipients and their third-party participants must comply with the federal transit law’s prohibition against discrimination on the basis of race, color, creed, national origin, sex, or age. Recipients and third-party participants are subject to Equal Employment Opportunity requirements, myriad federal civil rights requirements (Civil Rights Act, Americans with Disabilities Act, environmental justice requirements, Age

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Discrimination in Employment Act, etc.), and DOT regulations implementing federal civil rights laws.

Certain civil rights requirements follow real property acquired with FTA assistance, even if FTA funds are not involved in the construction of joint development improvements. See the previous section of this chapter, “Leases and Conveyances.”

In addition to the Master Agreement, recipients should refer to the most current versions of FTA Circular 4702, Title VI Requirements and Guidelines; FTA Circular 4703, Environmental Justice Policy Guidance; and FTA Circular 4704, Equal Employment Opportunity Program Guidelines.