



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA-2013-0013]

Notice of Issuance of Final Circular: Guidance on Joint Development

AGENCY: Federal Transit Administration (FTA), DOT

ACTION: Notice – Issuance of Joint Development Circular

SUMMARY: The Federal Transit Administration (FTA) has issued and placed in the docket and on its Website final Agency guidance, in the form of a circular, on joint development. This circular provides guidance to recipients of 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 a joint development project can qualify for FTA assistance; (3) describes the legal requirements applicable to the acquisition, use, and disposition of real property acquired with FTA assistance; (4) outlines the most common crosscutting requirements applicable to FTA-assisted joint developments; and (5) describes FTA’s process for reviewing a joint development project proposal. This circular incorporates provisions of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Public Law 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. This final circular is the result of the notice issued by FTA that appeared in the **Federal Register** on March 6, 2013, entitled “Joint Development: Proposed Circular”.

DATES: The effective date of the circular is October 1, 2014. Projects for which sponsors have executed joint development agreements with third parties before October 1, 2014 will be considered according to FTA's existing guidance and statements of policy.

FOR FURTHER INFORMATION CONTACT: For legal questions, contact Christopher T. Hall, Office of Chief Counsel, Federal Transit Administration, 1200 New Jersey Avenue, Southeast, Room E54-413, Washington, DC 20590-0001. For policy questions, contact Sharon Pugh, Office of Budget and Policy, Federal Transit Administration, 1200 New Jersey Avenue, Southeast, Room E52-322, Washington, DC 20590-0001. For program questions, contact the appropriate FTA Regional Office.

SUPPLEMENTARY INFORMATION: This notice does not contain a copy of the final circular. A copy of the final circular and comments and material received from the public, as well as any documents indicated in the preamble as being available in the docket, are part of docket number FTA-2013-0013. For access to the DOT docket, please go to www.regulations.gov at any time or to Docket Operations, M-30, U.S. Department of Transportation, 1200 New Jersey Avenue, Southeast, Room W12-140, Washington, DC 20590-0001 between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The final circular is also available on the FTA web site at <http://www.fta.dot.gov/about/13716.html>.

This Notice is organized in the following sections:

- I. Introduction
- II. Chapter Summary

III. Response to Comments Received

I. Introduction

It is FTA's policy to maximize the utility of FTA-assisted projects and to encourage recipients to generate program income through joint development. One of the primary benefits of joint development is revenue generation for the transit system, such as income derived from rental or lease payments, as well as 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 services.

This final circular is intended to guide interested parties through the FTA program and policy requirements that must be considered when pursuing a joint development project that is FTA-assisted or that will make use of real property that was previously acquired with FTA assistance. In the past, FTA has appended its guidance on joint development to its circulars 5010.1D, 9030.1D, and 9300.1B, guidance for Grant Management Requirements, Urbanized Area Formula Program, and Capital Investment Program (New/Small Starts), respectively, and has published **Federal Register** Notices of Final Agency Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law (72 FR 5788, Feb. 7, 2007) and Policy on Transit Joint Development (62 FR 12266, Mar. 14, 1997). FTA has decided to consolidate these references into a single circular to provide guidance to its grantees on how to use FTA assistance or FTA-assisted real property for joint development.

A summary of the final circular follows. The final circular itself is not included in this notice; an electronic version may be found on FTA's web site at www.fta.dot.gov/ or on the Docket at www.regulations.gov as part of docket number FTA-2013-0013. Paper copies of the final circular may be obtained by contacting FTA's Administrative Services Help Desk at (202) 366-4865.

II. Chapter Summary

A. Chapter I – Introduction and Background

Chapter I is an introductory chapter. It defines terms used throughout the circular, provides a brief background of FTA's authorizing legislation, the effect of the circular, and instructions for how to contact FTA.

B. Chapter II – Circular Overview

Chapter II introduces the substance of the circular. It describes joint development as a concept and distinguishes between it and the related concepts of transit-oriented development (TOD), pedestrian and bicycle projects, and public private partnerships (PPP or P3). It also lists several elements of a joint development capital project, including the funding sources, project eligibility criteria, crosscutting Federal requirements, and restrictions on the use of real property acquired with Federal assistance.

C. Chapter III – FTA Assistance for Planning and Capital Projects

Chapter III describes the eligibility requirements for an FTA-assisted joint development capital project or planning activity.

FTA planning grants are available to assist States, metropolitan planning organizations, local governments, transit agencies, and others to plan public transportation projects, including joint development.

FTA program funds may be used to support capital projects. MAP-21 provides the most recent authorization for FTA programs. MAP-21 explicitly includes joint development within the definition of capital project. This circular describes the MAP-21 provisions on joint development, and explains each element of the statutory eligibility criteria, all of which must be satisfied. Chapter III is largely based on previously published guidance on the eligibility of joint development activities for FTA funding (72 FR 5788, Feb. 7, 2007).

D. Chapter IV – Real Property Considerations

Chapter IV reviews the requirements applicable to the acquisition, use, and disposition of real property acquired with FTA assistance. Chapter IV gives special attention to the circumstances that are most likely to be part of an FTA-assisted joint development project, including conveyance of real property for joint development purposes, protection of the Federal government's interest in how the real property is used, the maintenance of satisfactory continuing control of real property in the context of a joint development project, and the incidental use of real property for non-transit purposes. Chapter IV also discusses considerations for the adaptation and/or reuse of FTA-assisted parking facilities for joint development purposes.

E. Chapter V – Crosscutting Federal Requirements

Chapter V reviews Federal cross-cutting requirements that are not unique to joint development projects, but which have application to all FTA-assisted projects, including

joint development projects funded by FTA or using real property acquired with FTA assistance.

F. Chapter VI – Joint Development Project Review Process

Chapter VI describes FTA’s process for reviewing a joint development project proposal. This chapter documents and discusses the framework FTA uses for analyzing a proposed joint development project, including how it assesses the four eligibility criteria. The chapter also discusses how and what the grantee should submit as a proposal to FTA for review.

This chapter was not included in the proposed circular. Rather, FTA stated its intent to include in the final circular a chapter on FTA’s review process and sought stakeholder input on the same in the notice of availability of the proposed circular. FTA has considered that stakeholder input in composing the final Chapter VI.

III. Response to Comments Received

On March 6, 2013, FTA published in the **Federal Register** a Notice of Availability of Proposed Circular and Request for Comments (notice of proposed joint development circular) (78 FR 14020). In its notice of proposed joint development circular, FTA stated its intent to guide interested parties through the FTA program and policy requirements that must be considered when pursuing a joint development project using FTA assistance or FTA-assisted real property. The notice itself included a chapter summary of the proposed circular, as the proposed circular itself was not included in the notice; instead, information on obtaining an electronic version of the proposed circular was provided.

Twenty-four parties submitted comments in response to FTA's March 6, 2013, notice of proposed joint development circular. FTA hereby responds to these comments by topic and in the following order: (a) Notice of Proposed Circular Generally; (b) Fair Share of Revenue; and (c) FTA Review Process.

(a) Notice of Proposed Circular Generally

The intended purpose of FTA's notice of proposed joint development circular was to provide guidance to recipients of FTA financial assistance on how to use FTA funds or FTA-assisted real property for joint development. The circular: (1) defined the term "joint development"; (2) explained how a joint development project can qualify for FTA funding; (3) described the legal requirements applicable to the acquisition, use, and disposition of FTA-assisted real property; and (4) outlined the most common crosscutting Federal requirements.

FTA received twenty-one general comments covering a wide range of subjects, including affordable housing, applicability, car sharing, eligibility criteria, FTA policy, program income, real property, TOD, and value capture. Several commenters addressed multiple and overlapping subjects within the general category. Most commenters requested clarification of subjects discussed or specific terminology used in the circular. Across the board, commenters were receptive to FTA providing consolidated and comprehensive guidance concerning joint development.

Seventeen commenters addressed concerns regarding real property, including disposition, incidental use, mandatory contractual provisions, parking, satisfactory continuing control, shared use, subordination, and transfers. Thirteen commenters sought clarification on application of the eligibility criteria, and distinguishing between activities

eligible for FTA assistance as joint development and other capital transit projects. Ten commenters asked FTA to clarify application of the guidance concerning non-FTA-assisted property, joint development application to all modes of public transportation rather than just to rail, and application of the “originally authorized purpose”. Six commenters questioned the focus of FTA’s stated joint development policy. Six commenters addressed FTA’s stated position on the concept of value capture. Five commenters asked FTA to explicitly designate affordable housing development as a type of joint development, commensurate to the recognition given in the Capital Investment Program (New/Small Starts). Three commenters sought clarification on program income. Two commenters addressed distinguishing between FTA’s usage of the terms *joint development* and *TOD* and the usage employed by the transit industry. One commenter requested FTA to provide specific categorical exclusions for joint development under the National Environmental Policy Act (NEPA). Another commenter requested FTA to consider car-sharing as a transit mode eligible for joint development. One commenter requested requiring more safety training for commercial drivers.

FTA Response: FTA is pleased by the positive and supportive responses provided by the majority of commenters to its proposed circular. The questions and comments received identified several topics for which FTA has provided additional clarification in the final circular. Some comments, however, addressed subjects that are beyond the scope of this circular, but will be useful in development of FTA programs and guidance in the future. This circular consolidates all of the existing FTA guidance on joint development, and supersedes any FTA guidance on joint development contained in other sources. Thus, this circular supersedes, in their entirety, discrete previously issued

guidance on joint development, including FTA's 2007 guidance and 1997 policy described above. This circular does not supersede in entirety any existing FTA circulars that include guidance on joint development, but rather only supersedes the specific joint development guidance contained therein. Affected circulars will be amended according to their regular update cycles.

Joint development may be undertaken in conjunction with any mode of public transportation, e.g., bus, bus rapid transit, transit malls, light rail, heavy rail, commuter rail, or ferry. Federal transit law explicitly includes stations and terminals used by intercity bus and intercity passenger rail systems, except that provided by Amtrak, for joint development eligibility. Car sharing services, even if located in close proximity to a transit facility, are not considered to be public transportation as they are not open to the general public or a segment of the general public defined by age, disability, or low income.

Joint development is an eligible capital transit project by statute, and is considered to be within the scope of all capital grants unless expressly prohibited by a specific term or condition of the grant. Under the terms of FTA's Master Agreement, joint development is considered an "originally authorized purpose" of prior grants made for real property acquisition.

The terms "joint development" and "transit-oriented development" (TOD) are often used interchangeably within the transit industry. Whereas FTA distinguishes between them, FTA recognizes that some recipients consider TOD as joint development and vice versa. FTA considers a transit operator to be a direct partner or participant in joint development projects. While a transit operator may be a stakeholder in TOD, FTA

considers TOD to have a broader, community-sized scope. This circular is not applicable to all joint development projects undertaken by FTA grantees. This circular applies only to joint development projects that use either FTA-assisted real property or FTA funds in the joint development project itself, and, therefore, have a Federal interest. FTA realizes that its grantees may undertake transit-oriented development or joint development without any Federal interest. This final circular does not apply to such projects. FTA reserves further discussion on TOD for a future document.

FTA's policy is to maximize the utility of FTA-assisted projects and to encourage the generation of program income through joint development. Benefits of joint development primarily include revenue generation for transit, as well as efficient land use, economic development, increased transit ridership, shared project costs, and improved transit connectivity. The siting and development of transit service adds to property values near transit stations, and that colocation of residential, commercial, and retail establishments with the transit system enhances social and economic returns for the community. FTA's treatment of joint development revenues as program income enables a grantee to apply such revenues to the operating or capital costs of the transit system. Therefore, joint development projects should be planned and undertaken to generate revenue for the transit system from the added value it creates, and project sponsors should negotiate project benefits, whenever possible, on the basis of the value added to the property by the joint development. Joint development is among the value capture strategies most commonly used to fund and/or finance transit, although other value capture strategies are also utilized.

Although joint development is intended to realize value capture from transit, FTA acknowledges that many transit agencies have incorporated affordable housing goals into their joint development policies. FTA does not wish to interfere with local policy goals relative to joint development. Accordingly, FTA does not designate the types of joint development projects that a grantee may undertake or give preference to any particular types of joint development projects.

Section 5302(3)(G) of title 49, United States Code, establishes the following criteria for determining whether a joint development improvement is eligible as an FTA-assisted project under Federal transit law. An eligible joint development project must: (1) either enhance economic development or incorporate private investments, such as commercial and residential development; (2) 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; (3) provide a fair share of revenue that will be used for public transportation; and (4) 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. No new criteria have been established, although this final circular imposes constraints on the fair share of revenue criterion. All four criteria must be satisfied for a joint development project to be eligible for FTA assistance. The final circular provides additional information concerning satisfying these criteria.

Grantees often undertake joint development, not as an FTA-assisted activity, but as an incidental use of property that was previously acquired using FTA assistance. FTA-assisted real property may be used for joint development provided that the joint

development is compatible with the approved purposes of the property and the recipient will retain satisfactory continuing control of the property to ensure that the Federal interest is protected and the property continues to serve its transit purpose. FTA must concur in any incidental uses of FTA-assisted property.

Interests in real property that was acquired with FTA assistance may be conveyed or encumbered for the purpose of joint development. The final circular provides additional discussion of satisfactory continuing control and mechanisms for preserving the use of FTA-assisted real property for its transit purpose. The final circular also clarifies the mandatory contractual provisions necessary to protect the Federal interest when FTA-assisted real property is conveyed to a third party for the purpose of joint development.

The final circular provides additional information to clearly distinguish between a conveyance of real property for the purpose of joint development and the disposition of excess real property no longer needed for transit purposes. Once FTA-assisted real property is disposed of, the Federal interest in the property is extinguished, and that property may not be used in an FTA-assisted joint development project. In contrast, FTA retains an interest in the use of real property that has been conveyed for the purpose of joint development. Additionally, the final circular clarifies the distinction between incidental use and shared use, and considerations for the modification of FTA-assisted parking facilities for joint development purposes.

FTA does not provide a specific funding program for joint development. Rather, joint development is considered a kind of capital project and may be funded by most FTA capital programs. Because the joint development project may take a variety of forms and

be funded by multiple programs, the applicable Federal requirements will vary. Requirements of the specific FTA funding program used must be adhered to for FTA-assisted joint development.

NEPA categorical exclusions are a category of actions that, based on past experience with similar actions, do not individually or cumulatively have a significant effect on the environment. FTA's categorical exclusions are set out at 23 CFR 771.118(c). The exclusion at 23 CFR 771.118(c)(10) is often referred to as the joint development exclusion and most FTA-assisted joint development projects should qualify under this exclusion. However, even actions that would normally be classified as categorically excluded may require environmental review under certain circumstances, and a project sponsor should work with its FTA regional office to determine what level of environmental review is required for a project.

The comment regarding commercial driver's licenses is beyond the scope of this circular.

(b) Fair Share of Revenue

In the notice of availability of the proposed joint development circular, FTA invited comments specifically concerning the "fair share of revenue" criterion. FTA did not expressly define the term "fair share of revenue" or set a monetary threshold for the same. Instead, FTA proposed to reserve the right to decline funding for a joint development project if the project would not generate a meaningful amount of revenue. FTA sought comment on how it should assess whether a project will generate a "fair share of revenue," including any measures or criteria FTA should use.

FTA received sixteen comments, most of which were opposed to FTA's proposal. Of particular concern was the change in policy regarding FTA's deference to grantee decisions concerning the fair share of revenue determination and FTA's right to decline funding for the joint development if a meaningful amount of revenue is not generated, expressed by ten commenters. Another major concern, raised by ten commenters, was the lack of consideration for all benefits that accrue to transit from a joint development project, beyond solely the revenue generated by the joint development. Additional concerns raised regarded FTA's proposal not to treat increased fare box receipts attributable to the joint development as "revenue" for purposes of the "fair share of revenue" criterion. Further, FTA's refusal to include fare box receipts as "revenue" for this criterion was considered as a barrier to partnerships in joint development and other transit infrastructure development given the constrained financial environment in which local match requirements are made.

A few commenters suggested that FTA should adopt standards, provide financial criteria, and establish parameters and required documentation for fair share of revenue determinations. Some commenters recommended use of a cost-benefit analysis or a ratio of transit share relative to project revenues, including careful examination of market conditions, in determining a fair share of revenue. While no comments proffered definitions for either "fair share of revenue" or "meaningful," several commenters requested that FTA define these terms. One commenter endorsed FTA's proposal, noting that FTA should consider maximizing competition and ensuring a high return-on-investment in capturing the value of transit improvements, and should actually determine the fair share of revenue for projects at the Federal level.

FTA Response: The fair share of revenue criterion is not new for joint development. Historically, FTA has taken the position that questions, such as what is a fair share, and what form it should take, would be negotiated between the parties involved in the joint development. FTA's 2007 guidance on joint development emphasized deference to the decisions of the project sponsor, negotiating and contracting at arm's length with third parties, to determine what constitutes a fair share of revenue. However, constraints on the availability of transit funding at all levels of government mandate that transit systems take advantage of innovative funding strategies, including value capture. Accordingly, FTA seeks to ensure that recipients are fairly remunerated for the use of FTA assistance for joint development projects. The final circular establishes as a minimum threshold for the amount of revenue that a recipient cumulatively receives from a joint development project the amount of the original Federal investment in the joint development project. This is a minimum threshold for revenues received from an FTA-assisted joint development project; it is anticipated that grantees will generally negotiate at a higher level the amount of revenue they will receive from the joint development.

There is no "one-size-fits-all" fair share of revenue determination, just as there is no "one-size-fits all" joint development project. Inherent to the negotiating process are considerations for the type of project to be undertaken and priorities that the transit agency and local government seek to advance through the joint development project. Beyond the minimum threshold described above, the fair share of revenue should reflect the respective goals and priorities of the parties involved in the joint development. While it is possible to project the potential revenue production from a joint development project,

it is difficult, from an economic perspective, for FTA to determine the precise share any party should receive. This is due to many factors that are difficult to quantify, such as market power, local development priorities (social, economic, or a mix of both), agglomeration effects, and other influences.

In determining the fair share of revenue it should receive, the project sponsor must rely on market analyses and other due diligence examinations. Although it is reasonable to presume that these types of efforts are standard practice on the part of grantees, the final circular makes conduct of such analyses a requirement. Appended to the final circular are documentation to be completed by the grantee in identifying pertinent project financial information and certifying conduct of the required due diligence.

Some commenters proposed that FTA should consider a joint development project's non-revenue benefits to transit in addition to the potential for revenue generation. FTA does consider such benefits to transit under the second criterion. The second criterion concerns overall benefits to transit provided by the joint development, including enhanced effectiveness and enhanced intermodal transportation. FTA also gives consideration for increased fare box receipts generated as a result of the joint development under this transit benefit criterion rather than under the fair share of revenue criterion. To be eligible for FTA's participation, a joint development must satisfy each of the statutory criteria, and while non-revenue benefits to transit are considered, they cannot satisfy the statutory requirement for a fair share of revenue.

(c) FTA Review Process

The proposed circular did not include a chapter on the process FTA will follow to review and approve a proposed joint development project. FTA sought comments for consideration in preparing the chapter for inclusion in the final circular.

Eleven commenters submitted to the docket on the FTA review process. Six commenters requested FTA to modify the current checklist approach to grant automatic approval if there is indication that the criteria will be satisfied. Five commenters recommended that FTA establish a mechanism to modify joint development agreements throughout the grantee's negotiations with developers to reflect changes. Five commenters raised concerns of the timeliness and consistency of FTA reviews across its regions, and requested that the process be clear, simple and flexible, and include graphics. One commenter requested FTA to coordinate its review with the U.S. Department of Housing and Urban Development for projects incorporating affordable housing. Another commenter asked that FTA provide examples of approved projects and their associated financial information. One commenter requested that FTA make the new chapter available for public comment.

FTA Response: The majority of commenters acknowledge the ease of using the current Joint Development Checklist for submitting joint development proposals for FTA review. As a checklist, it is a rote exercise by the grantee to indicate that statutory criteria have been met. It is, therefore, understandable that FTA should be asked to provide automatic approval when the grantee has indicated meeting all of the criteria, with the grantee retaining supporting documentation should FTA request it. Because it is merely a checklist, however, it provides limited information to FTA on the substance and design of the project. Therefore, FTA has broadened the checklist, including some

parameters, to identify pertinent information about the proposed joint development project. The new document, Joint Development Project Request Form, is intended to facilitate discussion between the grantee and FTA concerning the joint development proposal by reflecting those considerations that the grantee and its partners may find most useful during the project development process. Additionally, this form requires the grantee to identify documentation used to justify its submission.

FTA recognizes that joint development negotiations require considerable exchanges and deliberations between parties, and that development of the joint development agreement undergoes a rigorous process. Adding to this difficulty is the imposition of certain Federal requirements on the grantee's joint development partners. To account for changing circumstances over the course of the project's development, FTA has established a tiered approach to reviewing joint development proposals. Project sponsors may, and are strongly encouraged to, submit a preliminary proposal for FTA review to frame how eligibility criteria may be satisfied relative to specific elements of the proposed joint development, and to identify explicit terms and conditions to which the joint development partners must agree.

The final circular provides additional guidance to all stakeholders to consider for a joint development proposal. A primary objective of the circular is to clarify FTA joint development requirements and their compliance. Accordingly, it is FTA's expectation that the circular will improve the efficiency of the grantee's submission and of FTA's review.

Joint development is frequently used to provide or retain affordable housing in local communities. As such, it promotes community livability and sustainability by

providing transportation options for those served by the transit system. FTA has been an active participant in the Administration's Partnership for Sustainable Communities, and continues to strive to overcome barriers imposed by Federal requirements. To the extent appropriate, FTA will coordinate joint development with Federal housing programs to achieve procedural efficiencies.

FTA sought examples of joint development projects that illustrate the many issues that are encountered; none were received. While FTA cannot include actual projects in its guidance, it does provide illustrative examples of specific elements of joint development projects in the final circular.

Therese W. McMillan
Acting Administrator

[FR Doc. 2014-20097 Filed 08/22/2014 at 8:45 am; Publication Date: 08/25/2014]