
APPENDIX B

JOINT DEVELOPMENT PROJECTS

1. INTRODUCTION. This appendix contains guidelines for undertaking joint development projects. It also contains a set of questions most frequently asked about the concept of joint development and provides responses to those questions, with examples. This appendix implements the joint development policy announced in the [Federal Register on March 14, 1997](#), which is available at www.fta.dot.gov on the FTA Home Page.
2. JOINT DEVELOPMENT PROJECTS. Joint development is any income-producing activity with a transit nexus related to a real estate asset in which FTA has an interest or obtains one as a result of granting funds (the "Assisted Real Estate Asset"). Joint development projects must meet three tests: statutory definition, financial return, and highest and best transit use. These tests are discussed in the paragraphs below.

Joint development projects are commercial, residential, industrial, or mixed-use developments that are induced by or enhance the effectiveness of transit projects. Joint development projects include private, for-profit, and non-profit development activities usually associated with fixed guideway transit systems that are new or being modernized or extended. Such projects can also be associated with new intermodal transfer facilities, transit malls, and Federal, state, or local investments in existing transit facilities. FTA capital funds may be used to facilitate private development that enhances transit; these funds may not be used for purely private development such as construction and permanent financing costs related to the design or construction of residential, retail, or other commercial, public, and private revenue-producing facilities not associated with transit-related development.

3. REQUIREMENTS RELATED TO STATUTORY DEFINITION. A joint development transportation project must be compatible with the statutory definition of a capital project:
 - a. It is a transportation project that enhances economic development or incorporates private investment including commercial and residential

development, pedestrian and bicycle access to a mass transportation facility, and the renovation and improvement of historic transportation facilities, because the project -

1. Enhances the effectiveness of a mass transit project, and is related physically or functionally to that mass transit project; or
2. It establishes new or enhanced coordination between mass transportation and other transportation; and,
3. It provides a fair share of revenue for mass transportation use.

4. OTHER DEFINITIONS RELATED TO THE CAPITAL PROJECT DEFINITION.

- a. *Physically Related.* A project is physically related to a capital project if it provides a direct physical connection with transit services or facilities. This includes projects using air rights over transit stations or projects built within or adjacent to transit facilities.
- b. *Functionally Related.* A project is functionally related to a capital project if it is related by activity and use, and it is functionally linked (with or without a direct physical connection) to transit services or facilities. Also, a project is functionally related to a capital project if it provides a beneficial service to the public (or community service) and enhances use of or access to transit. Functional relationships do not extend beyond the distance most people reasonably can be expected to walk to use a transit service. The eligible project area for a functionally related project is estimated to be within a radius of approximately 1,500 feet from the center of a transit facility. The eligible project area for a functionally related project will be identified by the grantee in consultation with FTA's Regional Office on a case-by-case basis.

5. FINANCIAL RETURN REQUIREMENTS.

- a. Each grantee must negotiate a fair and equitable return in the form of cash and other benefits to be generated as a result of the FTA investment.
- b. All projects must generate a one-time payment or ongoing revenue stream for transit use, the present value of which equals or exceeds the fair market value of the property. See paragraph 6 for discussion of fair market value.
- c. After October 1, 1996, all FTA Master Agreements allow the use of real property for appropriate project purposes "including joint development purposes that generate program income to support transit purposes;" this is the Federal agency authorization required by 49 C.F.R. 18.25(g)(2) by which the revenues are brought within the definition of program income and can be used for transit capital, planning, and operating purposes. While a grant is still open, the transit agency must apply all revenues from any *sale* of real property (which does not qualify as a joint development

transfer) to the grant purposes, or must return the revenues to FTA, or must obtain FTA approval to use the revenue to reduce gross project costs in another capital project. If the transit agency transfers an Assisted Real Estate Asset from an open grant and maintains continuing control and otherwise meets the three joint development program tests, the transit agency may retain as program income all the revenues that accrue.

- d. For open grants predating October 1, 1996, all the terms of the current Master Agreement apply, so subparagraph c above controls.
- e. Closed grants made in 1983 or thereafter may be reopened to allow for the use of Assisted Real Estate Assets in joint development projects. However, for those closed grants made between 1983 and October 1, 1996, the grant purpose and terms, as necessary, must be amended to allow for joint development. Aside from the requirement that the income be used for transit capital, planning, or operating expenses, FTA generally sets no further conditions on income from a closed grant.
- f. Program income includes current or future returns generated from, but not limited to, transfer or lease of property, mortgage proceeds, or returns stemming from participation in distribution of project revenues.
- g. Agreements which transfer title or rights in land or facilities acquired as part of the FTA project must contain provisions which--
 - 1. Extend the requirements, as appropriate, of the FTA Grant Agreement; (see paragraph 9) and,
 - 2. Ensure that the grantee retains continuing control of the assets as long as they are needed for mass transit. This continuing control may be demonstrated by an easement, by a reversionary interest, by a covenant running with the land, by a contractual clause in the joint development agreement, or more commonly, by some combination of these assuring the transit agency that the joint development project will maintain its physical or functional relationship to transit, will continue to enhance coordination between modes, or will in fact result in increased mass transportation usage.
 - 3. Ensure that a person making an agreement to occupy space in a facility under this subparagraph shall pay a reasonable share of the costs of the facility through rental payments and other means.

6. HIGHEST AND BEST TRANSIT USE REQUIREMENT.

- a. The calculation of equitable return required in paragraph 5 must be based on the appraised market value as represented either by highest and best use of the property or by highest and best transit use of the property, taking into account in either valuation the local transportation, land use, and economic development plans. Highest and best transit use is that combination of residential, commercial, retail, public, and/or parking space and amenities to be included in the joint development, which is

calculated to produce the greatest level of social, economic, and financial benefit to the transit system and the community that it serves.

- b. If the grantee structures a joint development project to include the transfer of an Assisted Real Estate Asset, then the final transfer value must be based on competition to the extent practicable, and FTA concurrence in the final transfer value is required.

7. ELIGIBLE COSTS FOR JOINT DEVELOPMENT PROJECTS. Eligible project costs for joint development projects include, but are not limited to, the following:

- a. Design, engineering, and environmental analyses, as appropriate. (Formula program funds are more appropriate for planning and feasibility analysis.)
- b. Real estate packaging for a specific joint development project including preliminary design and engineering; estimates of operating income and expenses and capital costs; and negotiations to secure financing, developers, and prime tenants.
- c. Land acquisition, relocation, demolition of existing improvements, and site preparation, as appropriate.
- d. Foundations and substructure improvements for buildings over transit facilities.
- e. Open space, and pedestrian connections and access links between transit services and related development.
- f. Other facilities and infrastructure investments needed to induce significant private investment and to improve access between new or existing development and transit facilities.
- g. Utility work. The eligibility of costs of utility work associated with private investment will be considered on a case-by-case basis. FTA grant funds will pay for costs of utility work that are attributable to non-FTA project purposes only when--
 1. The utility services a joint private and transit use; or
 2. The utility lines will be located under a co-located street or sidewalk or within other common elements so that it would benefit the project to provide adequate capacity at the outset of the project.
- h. Safety and security equipment and facilities (including lighting, surveillance and related intelligent transportation system applications).
- i. Facilities that incorporate community services such as daycare or health care.
- j. Parking elements. All FTA participation in financing parking improvements must have a public transit justification and use. Parking elements of joint development projects which meet this general rule will be considered on a case-by-case basis.
- k. Professional Services Contracting Costs. Grantees may incur reasonable and necessary costs for consultants to prepare or perform items a through j above, or to assist the grantee in reviewing the same.

8. FUNDS THAT MAY BE USED IN JOINT DEVELOPMENT PROJECTS. No dedicated funding has been established for joint development projects. Joint development activities are eligible for funding under all Title 49 capital programs, including the Capital Program (Section 5309), the Urbanized Area Formula Program (Section 5307), the Non-urbanized Area Formula Program (Section 5311), and the Elderly and Persons with Disabilities Program (Section 5310). CMAQ and STP funds transferred from the Federal Highway Administration to be administered by FTA may also be used to support joint development projects. (See Chapter III, paragraph 2a for a discussion of flexible funds.)
9. APPLICATION OF OTHER FEDERAL REQUIREMENTS TO PRIVATE SECTOR PROJECTS. In a joint development project, FTA must determine whether, and to what degree, various Federal rules apply to the privately funded, non-transit portion of the project. The applicability of Federal requirements (such as those of the National Environmental Policy Act (NEPA), the Davis-Bacon Act, third party procurement requirements, and Buy America) will be resolved on a case-by-case basis for joint development projects involving the transfer of real property. FTA will work with the grant applicant to determine whether, and the extent to which, such Federal requirements apply, particularly to any private development, and the most appropriate procedures for satisfying the requirements. Proposals should be submitted as early as possible in the joint development process. This will allow FTA staff to help the grantee structure an approvable proposal in the least time possible and determine which cross-cutting requirements must be applied to the particular project. Nevertheless, the following cross-cutting requirements are expected to apply in the indicated circumstances:
 - a. If the joint development involves a ground lease or transfer of federally assisted real estate and there is no Federal 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. 23.7 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 and 49 C.F.R. 27.9(b) 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;
 3. language contained in the FTA MA(4), dated October 1, 1997, and found in Section 3 Subparagraphs (a)(1), (a)(2), and (b) thereof relating to conflicts of interest and debarment.
 - b. If the construction of improvements is also federally assisted, then in addition to paragraph 9a above, at least the following requirements also will apply and must be incorporated into the lease or the conveyance instrument:

1. Buy America - language making it clear that the steel, iron, and manufactured goods used in the joint development project are produced in the United States, as described in 49 U.S.C. § 5323(j) and 49 C.F.R. Part 661. The reader is referred to Chapter VI, paragraph 15 of this circular for further information about Buy America requirements.
2. Planning and Environmental Analysis - language making it clear that the grantee must comply with, and the joint development project is subject to the requirements of: the FHWA/FTA metropolitan and statewide planning regulations at 23 C.F.R. Part 450; the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321, et seq. ("NEPA"); Executive Order No. 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 59 Fed. Reg. 7629, Feb. 16, 1994; FTA statutory requirements on environmental matters at 49 U.S.C.5324(b); Council on Environmental Quality regulations on compliance with the NEPA, 40 C.F.R. 1500 et seq.; FHWA/FTA regulations, "Environmental Impact and Related Procedures," 23 C.F.R. Part 771; Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, involving historic and archaeological preservation; Advisory Council on Historic Preservation regulations on compliance with Sec. 106, "Protection of Historic and Cultural Properties," 36 C.F.R. 800; and restrictions on the use of certain publicly owned lands 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 joint development 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 Conservation and Recycled Products - Transferee(s) or joint developer agrees to comply with the mandatory energy efficiency standards and policies within the applicable state energy conservation plans issued in compliance with the Energy Policy and Conservation Act, 42 U.S.C. 6321 et seq.
6. Lobbying - 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 Davis-Bacon - 49 U.S.C. § 5333(a) and 40 U.S.C. 276a through 276a(7) and 29 C.F.R. Part 5; Copeland "Anti-Kickback " Act as amended, 18 U.S.C. 874 and 40 U.S.C. 276c and 29 C.F.R. Part 3; and Contract Work Hours and Safety Standards Act, 49 U.S.C. 327 through 332 and 29 C.F.R.

Part 5 and 40 U.S.C. 333 and 29 C.F.R. Part 1926; as well as 49 U.S.C. 5333 (b) concerning protection of transit employees.

8. Civil Rights Requirements - 49 U.S.C. § 5332.
9. Program Fraud - Transferee(s) or joint developer agrees to comply with Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. 3801 et seq. and 49 C.F.R. Part 31. Penalties may apply for noncompliance.
10. Language making it clear that the level of Federal participation in the joint development provides no U.S. Government obligation to third parties in the project.
11. Uniform Relocation - If the federally assisted site to be improved is occupied by other than the grantee 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.

- c. In any instance in which FTA determines that NEPA applies to the joint development, the level of environmental analysis will depend upon the complexity of the project and its likely impacts. In some instances, minimal review will be necessary, in which case FTA will issue a Categorical Exclusion. Joint development activities that portend significant environmental impacts, however, will necessitate the preparation of an Environmental Assessment or an Environmental Impact Statement. See generally the FTA Environmental Impact and Related Procedures at 23 C.F.R. Part 771.

10. NOTES TO READER. Before undertaking a new joint development, a grant applicant is encouraged to turn to Chapter X, "Regional Offices," select the FTA Regional Office responsible for the grant applicant's locality, and telephone that office to discuss the kind of project planned. Such a dialogue, early in the project planning process, will ensure that the joint development proposal will be reviewed on a timely basis.

The statements included in this appendix reflect typical project situations. Instructions given and policy statements appearing in the circular are not intended to be read as inflexible FTA mandates. They are instead set forth as guidelines which FTA generally applies to typical projects. Early dialogue with the FTA Regional Office will clarify the degree to which a new joint development project conforms to, or differs from, previous FTA experience.

11. FREQUENTLY ASKED QUESTIONS AND SOME PRACTICAL EXAMPLES.

- a. What is joint development? It is an income-producing activity involving a third party, taking place on or with an Assisted Real Estate Asset (described in paragraph 2 above). The third party is the source of the income to the grantee; the third party is the party to whom the property is transferred or the lessee who leases the space.

- b. What is the limitation on new improvements for joint development? The purpose of the Joint Development Policy is to facilitate the use of an Assisted Real Estate Asset for transit oriented joint development. Thus, FTA will support, or allow the use of grant funds for, the construction of a structure that includes a transit facility. However, FTA is unlikely to allow FTA grant funds to support a free-standing facility (such as an apartment building or an office tower) that is not part of a transit facility. (See question 11f for the definition of a shell for joint development.)
- c. Does joint development require a private or nonprofit developer? Not really. The third party's role need not be that of developer; it may be that of a lessee. For example, the transit agency can lease out its excess space to a senior care or day care provider, in which case the transit agency is the "developer" under FTA's policy. If, however, the project is to build an office/retail complex in the air space above a transit station, only a very large transit agency will have the means to borrow the sums necessary to build and finance the structure. It will be much easier (though not absolutely necessary) to have a private partner who builds and manages the development.

One transit authority has created a private subsidiary (limited partnership) to assist it in developing property around an historic central station. This project will create six floors of multi-family rental housing. The project will be financed with a combination of historic preservation tax credits, low-income housing tax credits, and mortgage revenue bonds issued by the city. The transit operator is also a partner in the joint development. The transit operator will receive a share of the project revenues for the life of the limited partnership.

- d. What is highest and best transit use? A property's highest and best use is the use--from among reasonably probable and legal alternative uses that are physically possible, appropriately supported, and financially feasible--that results in the highest anticipated selling price. The way highest and best transit use differs from highest and best use is through recognition that value to the transit system is not in the selling price alone.

Highest and best transit use is that combination of financial return and other transit benefits, such as increasing ridership, reducing trip durations or improving connections between trips, that maximizes the value of the asset to transit.

For example, a transit agency identified several properties adjoining existing or planned transit stations that it wished to use for joint development. One particular property was oddly shaped, but with substantial road frontage. A request for development proposals resulted in offers to build 8 or 10 townhouses with garages. This option would produce the highest immediate cash proceeds to the transit system.

However, the transit agency sought and was granted revised zoning on the property, allowing up to 160 moderate income apartments to be offered for rent. The moderate-income rental use will take a long time to produce cash flow and proceeds to the grantee, but in the interim, the moderate-income rental use is projected to increase transit ridership by (conservatively) 32,000 trips per year, which are estimated to be worth between \$18,000 and \$24,000 per year in additional farebox revenues. It is anticipated that these residents will also provide economic support for new retail space in the surrounding community. FTA regards this decision as satisfying the "highest and best transit use" criterion.

- e. How much land may be purchased by a grantee? A town is currently planning improvements to its bus transit system, including a downtown transfer center. The center is being planned as a multi-use facility, which will include a tourist information center, small retail businesses, and possibly a bank. To make this eventual development a reality may require that the transit agency acquire a larger amount of land than is necessary for the transit center alone. FTA will assist the transit operator's land acquisition activities with grant funds, as described in paragraphs 7a through 7e of this appendix. Generally, FTA will not support land purchases more than 1,500 feet from the center of the transit facility.
- f. What is an "envelope" or "building shell" for a joint development? The transit agency may wish to encourage local economic activity at its facilities. Under the Joint Development policy, the transit agency may build an "envelope," or rehabilitate an existing transit owned facility. Envelope or building shell means (but is not limited to) load bearing walls, roof, foundation, substructure improvement, site design, and engineering. "Tenant finishes," however, are not eligible for FTA reimbursement. These include partition walls, furniture, equipment, shelving, lighting, drapes, floor coverings, and other items specific to the business intended to be operated.

A Neighborhood Travel and Jobs Center involved just such a development. There, the local transit authority was allowed to convert an existing office building into a \$3 million Neighborhood Travel Center. The center will serve as a terminal for bus lines to industrial jobs and will provide the focus for a downtown redevelopment "campus" including jobs training, child care facilities, and a privately-financed development bank. The tenant finishes for each of these ancillary activities will be paid for with non-grant funds, though grant funds were used to rehabilitate the building itself. The tenants will pay market rate rent to the transit authority.

- g. What is the difference between a sale and a joint development transfer? A sale does not involve continuing control of the real property by the grantee and fails to establish a nexus between the Assisted Real Estate Asset and

an ongoing transit purpose as outlined in paragraph 3 of this appendix. Proceeds from a sale are not program income and must be returned to FTA pursuant to 49 CFR 18.31(c)(2).

In contrast, a joint development transfer meets the statutory definition test outlined in paragraph 3 of this appendix, the grantee exercises continuing control over the transferred real estate, and the financial and highest and best use tests of the Joint Development Policy are met. The proceeds from a joint development transfer are considered program income, which may be retained by the grantee. (See paragraph 5c.)

Here is an example of a joint development transfer: a rapid rail station includes 6.3 acres for a "park and ride" area. A developer has been approved to build 160 residential units and 17,000 square feet of service retail space on a portion of this area. The transit operator transfers 3.4 acres to the developer for use in the joint development. The development will generate more transit trips and more non-fare revenue than the displaced parking spaces provided. The transit agency will retain the income generated from this land transfer as program income and will be assured of satisfactory continuing control through covenants running with the land. Should the developer re-sell the land in the future, the covenants bind the next owner to a transit-oriented use of the land.

- h. Will NEPA and other Federal cross-cutting requirements discourage private participation? It is the will of the Congress that the Federal cross-cutting requirements govern grantees' use of FTA's financial assistance. To the extent that a grantee joins with a private or nonprofit developer to undertake joint development using FTA grant funds in whole or in part for the improvements to the site, it is that grantee's role to obtain the grant funds necessary to make the joint development financially feasible and to supply its expertise in meeting the applicable Federal requirements. For example, if the proposed land use is known from the outset, a grantee can reduce the risk to the private or nonprofit developer by using transit resources to perform the necessary environmental studies before choosing a partner. Alternatively, a project may be structured so that the grantee selects a development partner, the grantee and the partner jointly determine the highest and best transit use, and the grantee then performs the necessary environmental studies before its private or nonprofit partner becomes responsible for any costs. Such incentives can attract new participants to transit joint development.
- i. Are all incidental uses joint development? No, not all incidental uses are joint development. (FTA permits the incidental use of transit equipment and property for purposes other than provision of transit service, provided the use is compatible with the approved purposes of the project and does not interfere with intended uses of project assets.) 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. These uses, however, are not joint development. In contrast, the acquisition of land or the redesign of space to allow for additional parking to be used by local theaters and restaurants could be considered as a joint development project - to the extent the acquisition or redesign is justified by a transit use - and should be discussed with the Regional Office.

- j. What is the difference between "joint development" and "transit-oriented development?" The term joint development is a subset of transit-oriented development. While all joint development is transit-oriented development, not all transit-oriented development meets the three tests of statutory definition (transit nexus), financial return, and highest and best transit use. Some transit-oriented development undertaken by private parties benefits from its proximity to transit without the use of an Assisted Real Estate Asset and/or without the use of FTA funds for new improvements. Such totally private projects are simply not governed by this circular.

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