



April 5, 2013

U.S. Department of Transportation  
1200 New Jersey Avenue, SE  
Docket Operations, M-30  
West Building Ground Floor  
Room W12-140  
Washington, DC 20590-0001

**RE: Docket No. FTA-2013-0013**

Dear Docket Clerk:

On behalf of the more than 1,500 member organizations of the American Public Transportation Association (APTA), I write to provide comments on the Federal Transit Administration's (FTA) Joint Development: Proposed Circular, which was released for comment on March 6, 2013, at 78 FR 14620.

*About APTA*

APTA is a non-profit international trade association of more than 1,500 public and private member organizations, including public transit systems; high-speed intercity passenger rail agencies; planning, design, construction and finance firms; product and service providers; academic institutions; and state associations and departments of transportation. More than ninety percent of Americans who use public transportation are served by APTA member transit systems.

APTA speaks for its members. Its Board of Directors reiterated that fact on March 9, 2013, when it adopted the following statement: "While APTA encourages its members to provide specific examples or impacts in support of the association's positions, APTA crafts its comments to represent those of all APTA members. The association goes to great lengths to ensure its regulatory comments represent the consensus views of our members. Every APTA member has the opportunity to review drafts, participate in discussions, and assist in crafting those consensus comments. In short, we speak with a single voice and, when the rare instance occurs that we cannot reach consensus, we do not speak at all. APTA's comments are those of our more than 1,500 members. This consensus-based method of crafting regulatory comments is a factor underlying APTA's selection of one of Washington's most trusted brands in a broad survey conducted by the National Journal and we encourage all federal agencies to recognize the representative nature of the association's regulatory comments."

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## **GENERAL COMMENTS**

APTA appreciates FTA's efforts to consolidate its guidance, practices, and procedures into one comprehensive circular. We offer the following comments to assist in crafting that single document suitable for application across the broad spectrum of joint development projects.

Our overarching concern is in preserving the flexibility necessary for such broad application, while providing clear and concise requirements, objective evaluation criteria, and the certainty of those requirements and criteria that is vital to drawing private capital to public transportation developments.

We also believe each of the statutory elements of joint development, economic development, incorporation of private investment, enhanced effectiveness of public transportation, and occupants contributing a fair share of costs, along with a fair share of revenue, must be viewed and reviewed within the context of other benefits realized. Administratively establishing set criteria, whether for revenue or one of the other factors, steps away from this context and diminishes the other factors.

Finally, we believe it imperative that FTA refrain from placing itself in the role of second guessing local authorities on whether a project offers "meaningful" levels of benefit, be it economic development, revenue, or private investment. With dramatic variation from region to region, local authorities are best suited to make those decidedly local decisions, based on their evaluations of local conditions and community priorities. FTA has neither the local expertise nor reasonable standards by which to make such decisions and, as such, should defer to local authorities.

## **COMMENTS ON FTA REQUESTS**

FTA has specifically requested comments on assessing what constitutes a "fair share of revenue." As discussed above, we believe reliance on revenue as a standalone measure is inappropriate. Instead, FTA should require grantees to consider the cumulative *transit benefit* or *net benefit to transit*. APTA believes that a fair net benefit to transit would include consideration of not only a fair share of revenue but also those other benefits listed in 49 USC 5302(3)(G). A fair share of revenue can only be determined in context with the other aspects of the net benefit to transit. In some applications, zero may be a fair share of revenue, where other benefits are prevalent. Ultimately, FTA should simply restate the statutory elements of joint development and rely on grantees' governing bodies to determine whether, in context, a fair share of revenue has been secured.

FTA has specifically requested comments on a process to review and approve or concur in a joint development project. Since there is no concrete proposal in the draft guidance, we believe FTA should, after consideration of comments and drafting of such a proposal, open the proposal to public comment prior to adoption.

Whatever form this final concurrence process takes, it should provide for early, timely FTA concurrence and it should be sufficiently clear and concise to ensure consistent interpretation across FTA regions. It is this clarity and consistency that will make transit projects more attractive to potential partners. The substantial investment of time and resources necessary to reach a final development agreement are daunting in any project scenario. Predictable, early action by FTA is a key element of making transit joint development projects desirable in the marketplace.

APTA believes that any review of concurrence requests should follow a two-step modified version of the checklist approach provided in FTA's 2007 guidance. If agencies are able to meet FTA checklist requirements, no further review should be necessary. If not, recipients should be allowed to document how deviations from the standard checklist would produce positive results.

Finally, as developments often happen over a multi-year period, project sponsors require the flexibility to modify the terms of an agreement, consistent with the approved project parameters, as the project more fully develops.

## **SPECIFIC COMMENTS**

In defining "disposition" (Chapter I), FTA should clearly state that contribution of property in which there is a federal interest does not amount to "disposition."

In defining "shared use" (Chapter I), FTA should clarify that, consistent with the terms of its more recent master agreements, a continuing transit purpose is sufficient to meet the requirement that uses be defined in the original grant agreement and that this concept would be extended to property obtained under older master agreements without that language.

There are several instances throughout the draft where "program income" is discussed. Although the definitions section correctly cites to 49 CFR Part 18 and notes that program income is limited to the grant period, the discussion in other places within the draft suggest a far broader meaning. As an example, section IV.3.a.(1) of the draft states "FTA's interpretation of the Common Grant Rule...brings revenues derived from a joint development, from leases or other conveyances, within the definition of program income." FTA should note in this and other instances where program income is discussed, that program income is only that earned during the grant period.

In assessing the net benefit to transit (Chapter III), FTA should adopt the position that benefits such as station area safety, market innovation, and community support may be considered, since such benefits are physically or functionally related to transit.

APTA also believes the local agency is best positioned to determine that the joint development transaction is commercially fair and reasonable, to include whether rental payments that do not fully reimburse actual costs are sufficient, in light of other benefits realized, or whether revenue realized is a fair share. APTA urges FTA to continue the direction established in the 2007 guidance, which reads "FTA shall defer to the decision of the project sponsor, negotiating and contracting at arm's length with third parties to determine what is a fair share of revenue."

Paragraphs III.3.a.(2) and III.3.c each refer to FTA withholding concurrence in a joint development project if the private investment or revenue expected is "not meaningful." While FTA has recognized the subjective nature of the phrase when considering revenue, it is also problematic when considering the level of private investment. In each case, the phrase introduces uncertainty likely to have a chilling effect on the market. Instead, FTA should defer to local determinations of meaningful and adopt a standard that would only allow FTA to overturn such a local decision if it was clearly erroneous.

For clarity, FTA should remove the discussion of disposition of real property from this circular since the transfers contemplated for joint developments would not amount to dispositions. A brief mention and referral to Circular 5010.1, which would direct recipients to a more complete discussion of these items without risking confusion with joint development, would be preferable.

APTA appreciates FTA's effort to clarify its requirements for the joint development of parking lots and commends FTA for maintaining the policy of not requiring a one-to-one replacement of parking. For the foreseeable future, providing access to transit via the automobile will be a means to increase transit use. It is a strategy especially well suited to low density regions with long commutes. However, a growing segment of the market prefers not to have a car. The best way for transit to capture this growing market segment is to provide more housing and destinations that are transit supported. FTA support of joint development of parking lots assists recipients to increase ridership and evolve with the preferences of their communities.

APTA recommends the following revisions to clarify the language:

- Delete "These types of projects frequently occur on park-and-ride lots near rail stations." FTA's direction should not be construed to be limited to rail transit.
- Clarify that "Useful Life" applies to the FTA funded improvements such as asphalt and lighting and not to the use itself. An example of how FTA would have the project sponsor account for the remaining useful life would be helpful.
- Clarify that one-to-one replacement of utilized park and ride spaces is not required if the joint development will produce more ridership and/or park and ride demand can be met elsewhere.

APTA encourages FTA to coordinate this drafting effort with the ongoing proposed rulemaking for expanding the list of categorical exclusions (CE) and to specifically provide appropriate CEs for joint development projects. This would expedite project delivery and encourage private sector participation.

As an adjunct to this guidance, we urge FTA to publish and maintain a list of all FTA-assisted joint development projects to provide a ready database of methods and approaches.

We appreciate the opportunity to assist FTA in this important endeavor. For additional information, please contact James LaRusch, APTA's chief counsel and vice president corporate affairs, at (202) 496-4808 or [jlarsch@apta.com](mailto:jlarsch@apta.com).

Sincerely yours,



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President & CEO

MPM/jpl