



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA-2022-0029]

Interim Asset Disposition Guidance

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Interim Guidance and response to public comments

SUMMARY: The Federal Transit Administration (FTA) hereby establishes Interim Guidance to provide clarity on an asset disposition option under the National Defense Authorization Act (NDAA) for Fiscal Year 2022. Under the new provision, FTA may authorize the transfer of real property acquired or improved with Federal assistance, but no longer needed for the originally authorized purpose, to a local governmental authority, nonprofit organization, or other third-party entity if certain statutory criteria are met.

DATES: The effective date of this Interim Guidance is **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: One may access this interim guidance and public comments on the proposed guidance at docket number FTA-2022-0029. For access to the docket, please visit <https://www.regulations.gov> or the Docket Operations office located in the West Building of the United States Department of Transportation, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For policy guidance questions, contact Maggie Schilling, Office of Budget and Policy, Federal Transit Administration, 1200 New Jersey Ave. SE, Room E52-315, Washington, DC 20590, phone: 202-366-1487, or email margaret.schilling@dot.gov. For legal questions, contact Kathryn Loster at (202) 360-2322 or

email kathryn.loster@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

This guidance explains changes made to 49 U.S.C. 5334(h)(1) by the National Defense Authorization Act (NDAA) for Fiscal Year 2022 (Pub. L. 117-81). Specifically, section 6609 of the NDAA added a new disposition option for real property acquired or improved with Federal assistance that are no longer needed for the originally authorized purpose. Under the new provision, FTA may authorize the transfer of property to a local government authority, nonprofit organization, or other third-party entity if, among other criteria enumerated in the law, it will be used for transit-oriented development and include affordable housing.

FTA published a notice of availability of the proposed asset disposition guidance and request for comments on March 15, 2023 (88 FR 16076), and the comment period ended April 14, 2023. This notice provides a summary of the comments received, responses and guidance clarifications from FTA, and the publication of the interim guidance in the form of FAQs, which is available on the agency's public website at <https://www.transit.dot.gov/funding/funding-finance-resources/interim-asset-disposition-guidance>.

II. Response to Public Comments

FTA received comments from five respondents on its Proposed Asset Disposition Guidance. The commenters represent transit agencies and industry stakeholders, including the American Public Transportation Association, Sound Transit, and the Local Initiatives Support Corporation. In this section, FTA responds to public comments in the following topical order: (A) General Comments; (B) Eligibility; (C) Review and Approval Process; (D) Affordable Housing Requirements; (E) Monitoring Requirements; (F) Other Requirements; and (G) Categorization of Special Purpose Entities. One commenter raised issues that are outside the scope of the Proposed Guidance and Legislative Authority, and FTA does not address those concerns in this Interim Guidance.

A. General Comments

- i. Two commenters expressed support for the legislative change, which provides this additional asset disposition option, and the benefit this will have on Transit Oriented Development and affordable housing. One comment notes this guidance is helpful and constructive.

FTA Response: FTA appreciates these comments and the transit agency and industry stakeholder support for affordable housing.

B. Eligibility

- i. One commenter requested clarity on whether provisions apply to real property that was either acquired *or* improved with FTA assistance. For example, those improved as part of an FTA-assisted project, even if it was originally acquired with non-federal funds.
- ii. One commenter requested clarity on whether provisions in question apply to projects whose Federal funding source was an FTA-administered RAISE grant or flexed funds from other Operating Administrations, such as Federal Highway Administration (FHWA).

FTA Response:

- i. In accordance with the definition of “real property” in 49 CFR 262.3, eligible assets include land improvements. FTA will provide additional clarity in the Interim Guidance.
- ii. This provision applies to assets acquired, or improved, with FTA-administered funds, including those flexed over from other operating administrations such as FHWA. FHWA funds flexed to FTA allow utilization of 49 U.S.C. 5334(h)(1) disposition provisions and these funds take on Chapter 53 elements. RAISE grants are not authorized under Chapter 53. As such, any property funded by a RAISE grant would be outside the scope of this provision.

C. Review and Approval Process

- i. A commenter requested confirmation that a disposition under this new provision is

approved by an FTA Regional Administrator and does not require publication in the *Federal Register*.

FTA Response:

- i. This disposition option does not require publication in the *Federal Register*. Further, requests for asset disposition under this provision follow existing asset disposition approval processes, beginning with the FTA Regional Office and may involve additional review by FTA Headquarters offices.

D. Affordable Housing Requirements

- i. A commenter noted that the language includes owner income requirements, which they state is not necessary for affordable rental housing projects since they are required to serve low-income households, and they recommend removing this language for affordable rental housing projects.
- ii. Clarification is requested on whether affordability requirements are kept intact if the asset is subsequently sold or changes partnership after the initial transfer.
- iii. Additionally, a commenter requested clarification regarding FAQ 2(c) of the Proposed Guidance, on whether the 20 percent of units that must meet the 30 percent area median income (AMI) are included within the total 40 percent of units that must meet the 60 percent AMI level.
- iv. Request for clarification on whether the non-housing space within an affordable housing project is exempt from the ongoing housing requirement.

FTA Response:

- i. This is a statutory requirement, per 49 USC 5334(h)(1)(B)(i)-(iii), and as such cannot be removed from this guidance. However, FTA clarifies that only individuals purchasing or renting units that are sold or rented as affordable owner-occupied units need to meet these income thresholds. The income requirement does not apply to the developer or property owner offering rentals.

- ii. FTA confirms that the affordability requirements remain intact for the 30-year period, even if the asset is sold or changes partnership. The FTA recipient disposing of the property under this provision is responsible for ensuring compliance with this requirement.
- iii. The guidance states that at least 40 percent of housing units must be legally binding affordability restricted to tenants and owners at or below 60 percent AMI, *which shall include* at least 20 percent of such housing units restricted to tenants and owners at or below 30 percent AMI. This is read to mean that the 20 percent of units that must meet 30 percent AMI are included within the total 40 percent of units that must meet the 60 percent AMI, meaning that at least 8 percent of the *total* amount of housing units must meet 30 percent AMI. Please note that this requirement is separate from the requirement that at least 20 percent of the total floor area ratio of the development be dedicated to affordable housing. The Interim Guidance will be amended to include this clarification.
- iv. The requirement that 20 percent of the total floor area ratio (FAR) applies to the totality of the project, including non-housing space. The FTA recommendation is that, further, at least 50 percent of the TOD's FAR is dedicated to housing or other community benefits; this also applies to the totality of the project. The requirements for 40 percent of housing units to be legally binding affordability restricted to tenants and owners at or below the 60 percent AMI level, which includes 20 percent of units restricted at or below the 30 percent AMI level, apply only to the project's housing space.

E. Monitoring Requirements

- i. A requirement of this asset disposition option includes monitoring of affordable housing requirements over a 30-year term. Two commenters expressed that a monitoring requirement may place an undue burden on an agency.

Further, commenters recommended that FTA allow the long-term monitoring to be performed by other entities that conduct compliance monitoring activities, including the

new ownership entity, other public agencies, state housing finance agencies, and other housing agencies with subsidies in the project that require long-term affordability. Other suggestions include a standard reporting mechanism to ease the burden.

FTA Response:

- i. The Proposed Guidance did not prescribe how the recipient must ensure compliance with affordable housing requirements over the 30-year term. The requirement for a property to remain in use and compliant with affordable housing requirements for 30 years after the date of transfer is a statutory requirement. FTA recognizes that there are many ways in which a recipient could ensure oversight and compliance with this requirement, including long-term monitoring by a third party or other public agency.

F. Other Requirements

- i. Under this provision, an asset can be transferred to a Third-Party Entity if a Local Government Authority or Nonprofit Organization is “unable to receive” the property. A commenter requested clarification on whether “choosing not to receive” is assumed to be the same as “unable to receive.”

FTA Response:

- i. Under this provision, a local government or nonprofit entity “choosing not to receive” the property can be considered the same as “unable to receive.” Documentation demonstrating that the property has been offered and refused would be sufficient to meet this requirement.

G. Categorization of Special Purpose Entities

- i. Three commenters requested that FTA clarify that Special Purpose Entities created by a nonprofit organization for the purpose of utilizing Low-Income Housing Tax Credits (LIHTC) will be treated as nonprofit organizations, rather than third-party entities, for the purposes of transferring eligible assets under this provision.

Nonprofit developers typically form Special Purpose Entities (e.g., Limited Liability

Companies or Limited Partnerships) to utilize the LIHTC available under Internal Revenue Code (IRC) 26 U.S.C. Chapter 42. As commenters note, LIHTC encourages private parties to invest in affordable housing projects, constituting an important and commonly used method for financing affordable housing. While the Special Purpose Entity is a private entity, it may be controlled and managed by the nonprofit housing developer. This is important to clarify because, in some cases, the Special Purpose Entity may not be able to satisfy the statutory requirements for transfer to a third-party entity, such as demonstrating a “satisfactory history of constructing or operating an affordable housing development;” this is because a new Special Purpose Entity is created for each project and would not have a history of past projects.

FTA Response:

- i. FTA recognizes that this is a common concern among transit agencies and stakeholders interested in utilizing this provision. FTA further notes that Special Purpose Entities receiving LIHTC’s may take many different forms. In interpreting Special Purpose Entities formed for the purpose of utilizing LIHTCs under this provision, FTA will look to which party (i.e., public or nonprofit vs. for-profit entity) has control over the project. Ownership may be transferred to a for-profit entity to facilitate the use of tax credits for the project only if the public or nonprofit entity demonstrates in its application that it retains control over the property (i.e., still considered “owned” for purposes of this provision). Sufficient control may be satisfied by any of the following: (1) a fee simple interest in the Project property, (2) owns 51 percent or more of the general partner interests in a limited partnership or 51 percent or more of the managing member interests in a limited liability company with all powers of the general partner or managing member, (3) owns a lesser percentage of the general partner or managing member interests and holds control rights, or (4) owns 51 percent or more of all ownership interests in a limited partnership or limited liability company and holds certain control

rights.

“Control rights,” as referenced above, include control over leasing of the project (e.g., exclusively maintaining and administering the waiting list, performing eligibility determinations) and consent rights over certain areas, such as changing the number of affordable housing units, setting utility allowances, selecting the management agent, or setting the operating budget. FTA will treat a Special Purpose Entity as a nonprofit entity under this asset disposition provision if they meet the above requirements.

III. Interim Guidance

FTA has reviewed and deliberated over the public comments received for the Proposed Asset Disposition Guidance. All feedback was appreciated and informative for further shaping this guidance. FTA makes made the following amendments in the Interim Asset Disposition Guidance:

The Interim Asset Disposition Guidance is amended to provide a response to comments requesting that Special Purpose Entities using Low Income Housing Tax Credits (LIHTC) are treated as a nonprofit entity under this provision. FTA will allow Special Purpose Entities using LIHTCs to be treated as nonprofits if the nonprofit entity retains control over the project, as detailed above.

Additionally, FTA amends the guidance to provide additional clarity on the area median income (AMI) percentage requirements. Some commenters voiced confusion over the statutory requirements that 40 percent of the housing units offered must be legally binding affordability restricted to tenants and owners at or below 60 percent AMI, which shall include at least 20 percent offered to tenants and owners at or below 30 percent AMI. FTA will clarify that this is 20 percent out of the 40 percent, not 20 percent out of the totality of the project.

On the eligibility requirements to use this provision, FTA amends the guidance to clarify that this provision applies to assets that have been acquired or improved with FTA assistance,

including FTA-administered Federal funds that have been flexed over from other Operating Administrations, such as Federal Highway Administration (FHWA). However, this provision does not apply to assets acquired or improved with FTA-administered RAISE grants, as discussed above.

FTA amends the guidance to provide additional clarifying language on the options available for compliance monitoring during the 30-year term, to include third party oversight.

Nuria I. Fernandez,

Administrator.

[FR Doc. 2023-23946 Filed: 10/30/2023 8:45 am; Publication Date: 10/31/2023]