Proposed Asset Disposition Guidance-FAQs

National Defense Authorization Act (NDAA): Transit Property Disposition Options for Affordable Housing

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Agenda

• Notice of Proposed Asset Disposition Guidance and request for comments
• Changes to the NDAA and asset disposition options
• What is the purpose of the FAQs?
• Frequently Asked Questions
  • Key definitions
  • Statutory requirements
  • How to use this provision
Notice of Proposed Asset Disposition Guidance

Notice posted in the Federal Register on March 15, 2023
Request for public comments closes

**April 14, 2023**

How to leave comments-

After review and consideration of the comments, FTA will issue a final version of the guidance

Read the **Proposed Asset Disposition Guidance FAQs** posted on the FTA website

- Check here for the webinar slides and recording


More information about **Transit Oriented Development (TOD)** on FTA website

[https://www.transit.dot.gov/TOD](https://www.transit.dot.gov/TOD)
What are the changes to the NDAA?

How did the National Defense Authorization Act (NDAA) for Fiscal Year 2022 change the disposition options for FTA recipients in 49 USC § 5334(h)(1)?

The law added a new disposition option for assets (property) acquired with federal assistance that are no longer needed for the originally authorized purpose. This is in addition to prior provisions allowing transfers to local governments.

Under the new provision, FTA may authorize the transfer of property to:

- A local governmental authority
- Non-profit organization
- Other third-party entity

... if, among other factors, it will be a necessary component of a transit-oriented development (TOD) project and includes affordable housing.
What is the purpose of the Proposed Asset Disposition Guidance FAQs?

These FAQs serve as interim guidance, before final guidance is incorporated into circulars.

The FAQs will provide useful guidance, including:

• Definitions for key terms-
  • Transit-oriented development
  • Asset
  • Third-party entity
  • Necessary component
• The statutory requirements related to this new provision
• How to use this provision
  • What is the effective date for assets to be transferred under this provision
  • How to apply, qualify, and use this provision
  • How to determine fair market value
  • What if a third-party does not meet requirements during 30-year term
Definitions

How does FTA define “Transit Oriented Development (TOD)”?

• There is no statutory definition for TOD.
• FTA proposes to define TOD as real property development that includes a mix of commercial, residential, office and entertainment uses centered around or located near a transit station that is served by reliable public transit with a mix of other transportation options.

What is considered an “asset”?

• An “asset,” as it relates to Transit Oriented Development, should be read to mean “real property.”
• Defined in 49 C.F.R. § 262.3 to include: "land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment."

How is a “third party entity” defined?

• “Third party entity” is not defined in statute, though it may include private developers, companies, or organizations with a demonstrated satisfactory history of construction or operation of affordable housing development. It would not include a local government authority or non-profit organization.

What constitutes a “necessary component” of a proposed TOD project?

• An asset is a “necessary component” of TOD if the proposed project would not proceed without the asset or would be significantly smaller in scope.
What are the statutory requirements to use this new provision?

- The asset is a **necessary component** of a proposed transit-oriented development project;

- The transit-oriented development project will **increase transit ridership**;

- At least **40 percent** of the housing units offered in the transit-oriented development, including housing units owned by nongovernmental entities, **are legally binding affordability restricted** to tenants with incomes at or below 60 percent of the area median income and owners with incomes at or below 60 percent of the area median income, which shall include at least **20 percent** of such housing units offered restricted to tenants with incomes at or below 30 percent of the area median income and owners with incomes at or below 30 percent of the area median income;
What are the statutory requirements to use this new provision?

The asset will remain in use for **at least 30 years** after the date the asset is transferred; and

With respect to a transfer to a **third-party entity**;

i. a local government authority or nonprofit organization is **unable to receive** the property; and

ii. the overall **benefit of allowing the transfer is greater** than the interest of the Government in liquidation and return of the financial interest of the Government in the asset, after considering fair market value and other factors; and

iii. the third party has demonstrated a **satisfactory history of construction or operating an affordable housing** development.
When does this provision become effective?

• The effective date was December 27, 2021, when the National Defense Authorization Act (NDAA) for Fiscal Year 2022 (FY22) was signed into law.

Can assets disposed of prior to December 27, 2021, be applied to current or future TOD projects?

• No. Assets disposed of prior to this date cannot use this provision.
• If it meets the statutory criteria and is approved by FTA, dispositions where assets may be transferred to a local governmental authority without repayment of the federal interest remain an option as well*
• Other options to encourage affordable housing near transit may also be available. Please contact your regional office for technical assistance if this is of interest.

*Per 49 USC § 5334(h)(1)(A)
How will FTA “approve” transactions using this disposition method?

• FTA recipients interested in using this provision should send their FTA Regional Office a request letter with documentation demonstrating that the disposition meets the legal requirements at the time of transfer and for the subsequent 30-year period.
• Any active awards related to the assets must include the disposition request, approval, and related documentation.
Demonstrating qualifications

How does an FTA recipient demonstrate that “the transit-oriented development project will increase transit ridership?”

- The NDAA provision *ties increased ridership to affordable housing*
- FTA will *require* that **at least 20% of the total floor area ratio (FAR)** of the development be **dedicated to affordable housing** to meet this requirement.
- FTA *recommends* that at least **50% of the TOD’s FAR is dedicated to housing or other community benefits**
  - E.g., community centers, educational or other community-serving uses such as libraries, childcare, public health or workforce development centers

*Per 49 USC § 5334(h)(1)(B)(v)(I)*
Demonstrating qualifications for transfer to a third-party entity

How does an FTA recipient demonstrate that a “local government authority or nonprofit organization is unable to receive the property”?

• To propose transferring the asset to another third-party entity, the recipient must attest in writing that a local government authority or nonprofit organization is unable to receive the property*
• The attestation should be supported with a description of the recipients’ efforts supporting this representation

How do I demonstrate a satisfactory history of construction and/or operation of an affordable housing development?

• In their request to the Regional Office, recipients should include information on a third party’s past affordable housing projects sufficient to demonstrate a likelihood of success for the proposed TOD
• E.g., project delivered on time, within budget, occupancy rates, etc.

*Per 49 USC § 5334(h)(1)(B)(v)(I)
How does FTA determine that the overall benefit of allowing the transfer to a third-party entity is greater than the interest of the government in liquidation?

- FTA will consider the **fair market value of the asset**, amongst other factors.
- FTA will not prescribe or develop specific studies or analyses. Though a baseline market analysis is not required, it can help recipients identify the following information:

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>Fair market value of FTA-assisted property</td>
<td></td>
</tr>
<tr>
<td>Value percentage of property/ assets out of total project cost</td>
<td></td>
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<tr>
<td>Expected transit ridership increase and revenue generated for public transportation</td>
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<tr>
<td>Expected amount of housing generated by the project</td>
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<tr>
<td>The potential social benefits of providing additional affordable housing</td>
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<tr>
<td>Development risks and benefits</td>
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<tr>
<td>Economic development activity and general economic conditions of the region/area</td>
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<tr>
<td>Existing conditions of the project property</td>
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</tbody>
</table>
What are the ramifications if the asset is transferred to a local governmental authority, non-profit organization, or other third-party entity, but that third party entity fails to meet any of the criteria under 49 USC § 5334(h)(1)(B) during the 30-year term of the agreement?

• If an asset is transferred and the recipient falls out of compliance with the legal criteria within the 30-year term of the agreement, FTA will require the recipient to compensate FTA a percentage of the fair market value at the time of transfer or at the time the noncompliance commences, whichever is greater.
  - Percentage owed will be based on the
    - Federal contribution to the original acquisition
    - The number of years that the asset was used for TOD and affordable housing in accordance with the statute
  - Parties may also arrange for a return of the asset, if the circumstances and timeframe allow without significant difficulty or added expense.
Notice of Proposed Asset Disposition Guidance

Links

Transit Oriented Development (TOD)- https://www.transit.dot.gov/TOD

Contact Us
Leave formal questions or comments at https://www.regulations.gov/document/FTA-2022-0029-0001 For questions about this guidance, please reach out to us directly-
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