



U.S. Department
of Transportation
**Federal Highway
Administration**

California Division

March 30, 2021

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In Reply, Refer To:
HDA-CA

Toks Omishakin, Director
California Department of Transportation
1120 N Street
Sacramento, CA 95814

Subject: Alternative Uses of the Highway Right-of-Way Guidance

Dear Mr. Omishakin,

The Federal Highway Administration (FHWA) is issuing this letter to provide Caltrans guidance for addressing emerging types of alternative uses of the highway right-of-way (ROW).

This letter highlights one type of alternative use of the ROW, i.e. providing services for people experiencing homelessness, for which FHWA may approve an alternative use request and Fair Market Value (FMV) exception, provided they comply with safety requirements (see below) and FHWA real property management regulations at 23 CFR 1.23 and 23 CFR Part 710.

This letter also outlines the process that FHWA will follow when reviewing requests for:

- 1) alternative uses of Federal-aid highway ROW;
- 2) exceptions to the FMV requirement; and
- 3) alternative uses of Park and Ride lots constructed or acquired with Federal-aid highway funds.

Consistent with 23 CFR 1.23 and 23 CFR Part 710, requests for alternative uses of the ROW may not be approved unless proper measures are in place to ensure the safety of the traveling public, the users of any facility in the ROW, and the structural and operational integrity of the highway facility.

ACCEPTABLE ALTERNATIVE USES OF THE ROW

Shelters or Other Facilities that Provide Services for People Experiencing Homelessness

FHWA has determined that temporary alternative use of the ROW for shelters and other facilities that provide services to people experiencing homelessness provide urgently needed social benefits to impacted individuals and the public at large. FHWA will consider such shelter or facility as an acceptable alternative use of the Interstate or Non-Interstate highway ROW, if it complies with safety requirements and Federal property management regulations at 23 CFR 1.23 and 23 CFR Part 710.

Based on the social benefits that would result from these facilities, FHWA also has determined that shelters and other facilities that provide services to people experiencing homelessness located on Interstate or Non-Interstate highway ROW, may qualify for an exception to the FMV requirement under 23 U.S.C. 156(b) (23 CFR 710.403(e)(1)).

Note that for all alternative uses, including shelters and other facilities that provide services to people experiencing homelessness, Caltrans will continue to document the basis for both the alternative ROW use approval and the FMV exception (if one is required).

PROCESS FOR APPROVAL OF ALTERNATIVE USES OF THE ROW

If the alternative use is located within the ROW of a Federal-aid Highway, the use will be considered an alternative use of the ROW that must comply with Federal property management regulations at 23 CFR 1.23 and 23 CFR Part 710. Utility uses and alternative uses of Park and Ride lots are exceptions, as they are subject to 23 CFR Part 645 and Part 810, respectively.

FHWA may approve alternative uses of the ROW if FHWA determines that such occupancy, use, or reservation is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic thereon (23 CFR 1.23(c)).

Certain provisions must be included in a ROW Use Agreement for a time-limited alternative use of a Federal-aid Highway (23 CFR 710.405). Caltrans must specify procedures in the ROW Manual for determining when a real property interest may be made available under a ROW use agreement (23 CFR 710.403(c)).

FHWA will not approve any request for alternative use of the ROW unless measures are included to ensure the safety of the traveling public, the users of any facility in the ROW, and the structural and operational integrity of the highway facility. As an example, any alternative use (other than transportation uses that are designed to be safely accommodated) within the median of the ROW is generally unsafe and in most cases, will not be approved as an allowable use of Interstate or Non-Interstate ROW.

Alternative ROW Use Approval for Non-Interstate ROW

The Stewardship and Oversight (S&O) Agreement between FHWA and Caltrans delegates 23 CFR 1.23 and Part 710 FHWA approvals for the alternative use of **Non-Interstate** highway ROW to Caltrans. Therefore, for alternative ROW Use approval on Non-Interstate ROW, Caltrans:

- 1) Determines if the proposed use is in the public interest and would not impair the highway or interfere with the free and safe flow of traffic thereon.
- 2) Considers the proposed ROW Use Agreement using the procedures outlined in the FHWA-approved State DOT ROW manual.
- 3) May approve a ROW Use Agreement that complies with requirements in 23 CFR 710.405.

Alternative ROW Use Approval for Interstate ROW

If the alternative use would be **within the Interstate highway ROW**, then Caltrans will submit the request package to FHWA, and FHWA will provide timely input on and review of the request under 23 CFR 1.23 and 23 CFR Part 710, subpart D, and 23 U.S.C. 111. FHWA is the approving authority for proposals for alternative uses of Interstate highway ROW.

PROCESS FOR APPROVAL OF ALTERNATE USES OF PARK AND RIDE LOTS

There are three statutory provisions in title 23, United States Code, that States use to construct and operate Park and Ride lots: 23 U.S.C. 137 (Fringe and corridor parking facilities), 142 (Public transportation), and 149 (Congestion mitigation and air quality improvement (CMAQ) program).

Those statutes authorize the use of Federal-aid funds for those activities, and impose certain restrictions on the use of the lots. When considering potential use of a Park and Ride lot for purposes not expressly allowed under 23 U.S.C. 137 or 142, FHWA evaluates whether the original purpose of the lot will be adversely affected. For example, if CMAQ program funds were used to construct the Park and Ride lot, any proposed use that would result in a reduction of the congestion or air quality benefits stemming from the lot, would not be an acceptable alternative use of the lot. FHWA will make this determination for any proposal involving Park and Ride lots that were constructed pursuant to 23 U.S.C. 137 or 142, and those lots involving the use of CMAQ funding (23 U.S.C. 149).

When making this determination, the FHWA will consider:

- 1) the past, current, and foreseeable future parking and transit-related occupancy rates of the Park and Ride lot;
- 2) the number of parking spaces that would remain if the proposed use will result in any temporary reduction in parking capacity;
- 3) impacts on any transit-related activities on the lot;
- 4) the impacts on safety and operation of the Park and Ride lot; and
- 5) any additional State and local commitments related to the original use of funds, including those commitments made through the National Environmental Policy Act (NEPA) review.

If FHWA determines that the proposed alternative use of the Park and Ride lot will not conflict or otherwise adversely impact the transportation functions at the site, the alternative use may be approved; provided that adequate measures are in place to protect the continued operation, maintenance, and safety of the facility.

In addition, Park and Ride lots in the Interstate ROW are subject to 23 U.S.C. 111(a) provisions prohibiting States from permitting automotive service stations or other commercial establishments for serving motor vehicle users.

PROCESS FOR APPROVAL OF FAIR MARKET VALUE EXCEPTIONS

Alternative uses of the ROW, meaning any non-transportation use, are subject to 23 U.S.C. 156 requirements to charge FMV for the lease or disposal of ROW if the property was acquired with Federal-aid highway funding. FHWA can approve an exception for a social, environmental, or economic purpose (23 U.S.C. 156(b) and 23 CFR 710.403(e)). This responsibility may not be assumed by Caltrans.

Caltrans will submit requests for exceptions to the FMV requirement (for both Interstate and non-Interstate ROW) to FHWA. FHWA is the approving authority for requests for FMV exceptions.

APPLICABILITY OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

NEPA applies to proposed actions that involve Federal funds or approvals, including alternative ROW use proposals handled by Caltrans pursuant to the S&O Agreement with FHWA. As a result of the need for the approvals outlined above (both alternative ROW uses and exceptions to FMV), alternative uses of Federal-aid highway ROW and of Park and Ride lots constructed or acquired with Federal-aid highway funds, are subject to NEPA (23 CFR 710.403(d)).

The contents of this letter do not have the force and effect of law and are not meant to bind California or the public in any way; however, all cited statutes and regulations must be complied with. This letter is intended only to provide clarity regarding existing requirements under the law or FHWA policies.

ROW USE AGREEMENT LEASE TERMS

FHWA will work with your office to determine appropriate timeframes for the ROW Use Agreements. If you need additional information, please contact Paul Schneider at (916) 498-5014 or Paul.Schneider@dot.gov.

Sincerely,

Vincent Mammano
Division Administrator
Federal Highway Administration