

6.

DONATIONS and CREDITS

23 USC 323
49 CFR § 24.103
49 CFR § 24.104

Property owners whose real property is needed for a highway project may make a gift or donation of the property, or any part of it, or of any of the compensation paid for it, to the agency needing the property.

REFERENCES

A donation may be made at any time during the development of the project or during the acquisition phase of the project. At the time of the donation, the donor of the property must be informed of his or her right to receive just compensation for the property being donated. Some States also require that an appraisal of the donated property's fair market value be conducted and that the estimate of fair market value be disclosed to the donor. Check appropriate State regulations for pertinent requirements.

Donations made by a Federal agency are not eligible for project credit purposes but donations from private owners are eligible for State/local matching share credits.

6.0.1. THE VALUE OF A DONATION

A donation of real property may have separate values for differing purposes. Generally, the value of the donation to the agency by the property owner will be the fair market value of the donated property. A value determined as a result of negotiation with a property owner is not acceptable as a basis for determining a credit to the State's share of project costs. The value of the donated property must be estimated by a qualified appraiser.

Real property may be donated for project right-of-way and the State may receive a credit for the donation towards its share of project costs by the FHWA. However, certain restrictions apply. Environmental requirements must be met. Donations may also be made in exchange for construction features; and dedications may be considered donations. Assessments against properties for highway improvements may be viewed as coercive since the benefits derived from the project are general to the community and not specific to the adjacent property.

SUMMARY

Where the property owner wishes to use the donation for a tax deduction, the owner should seek advice from the Internal Revenue Service regarding their current rules for valuation. It is typically the property owner's responsibility to ascertain the fair market value of the property for tax deduction purposes. For example, the donor may need to secure the services of an independent appraiser to determine its value. The IRS requirements may preclude the donor from utilizing for tax purposes the agency's fair market value estimate regardless of whether it is prepared by either a staff or fee appraiser.

DO NOT BE FOOLED into accepting the donation of a contaminated property where the clean-up cost exceeds the value of the property.

BE CAREFUL!

The State may claim the value of the donated property as a credit against its matching share of project costs as long as certain conditions are met. The value of the donated property must be determined through an appraisal by a qualified appraiser for the purposes of calculating a credit to the State's matching share of project costs. The state may use the value of the donated property as part of its matching share of project costs provided the donated property is lawfully obtained by the state, is incorporated into the right-of-way for the project, is not land described in Section 138, and FHWA determines will not influence the environmental assessment of the project. (23 USC 323 (b))

6.0.1.1. THE APPRAISAL OF A DONATION

As stated in Section 6.0.1, donations of real property may have a separate value for different purposes. For the purpose of establishing a credit to the State's participation in project costs, the fair market value of the property is used. Where a State has an eminent domain appraisal of property which includes donated property, it may use an appraisal made specifically for the purpose of determining the amount of a credit, or the amount may be abstracted from a current eminent domain appraisal made by the State if the conditions listed in Section 6.0.1. are met.

The value of the donated property must be estimated by a qualified appraiser. The date of value is the same as the date of the donation, i.e., the date the donation becomes effective, or when equitable title vests in the State, whichever is earlier. The appraiser must appraise the property in conformity with the provisions of 49 CFR 24.103 and 24.104 subject to the following conditions:

- ! Increases and decreases in the value of the donated property caused by the project are to be excluded.
- ! The appraisal shall not reflect damages or benefits to the remaining property.

! The value of the donated property includes the contributory value of any improvements.

6.0.2. PROJECT CREDIT FOR DONATIONS AND ACQUIRED LANDS

Title 23 U.S.C. 323 allows States to credit the non-Federal share of project costs with the fair market value of land donated to and incorporated into a specific project. The National Highway Designation Act of 1995 and the Transportation Equity Act for the 21st Century of 1998 amended 23 U.S.C. 323 to allow donated funds, materials, and services to be used as the State’s matching share of project costs. (23 USC 323 (c) (d) (e))

For credit purposes, donations and acquired lands are essentially treated the same as incurred costs. For example, the donated item must qualify as a participating cost meeting eligibility standards and be within the scope of the project. A state may use the value of the donated property as part of its matching share of project costs provided the donated property is incorporated into the project. A donation credit can only be applied to a Federal-aid highway project, and it must be a project related to and requiring the donated land.

The State may claim the value of the donated property or acquired lands as a credit

against its matching share of project costs by valuing the donated property through an appraisal by a qualified appraiser for the purposes of calculating a credit to the State's matching share of project costs.

Where an 80-20 project has incurred cash costs of \$1 million and the value of donations total \$100,000, the project would have a total value of \$1,100,000. To determine the Federal/State pro rata shares, apply the appropriate ratio to the total value of the project. To determine the actual cash outlay by the State, calculate the State’s pro rata share, then deduct the value of the donation.

20% STATE/80% FEDERAL PROJECT COSTS

Actual Cash Outlay for Costs Incurred	\$1,000,000
Value of Donations	+ <u>100,000</u>
Total Value of Project	\$1,100,000
Federal Pro Rata Share	\$ 880,000
State Pro Rata Share	+ <u>220,000</u>
Total Project Value	\$1,100,000
State Pro Rata Share	\$ 220,000
Value of Donations	- <u>100,000</u>
Cash Outlay by State	\$ 120,000

Example 1

When calculating the pro rata share of project costs, the donation should be treated the same as a cost incurred. The value of the donation is added to the total project costs and the appropriate pro rata calculation made. If the value of the donation exceeds the State’s pro rata share of total project costs, the Federal pro rata share is limited to the amount of actual cash outlay for the project.

For example, where an 80-20 project has incurred cash costs of \$1 million and the value of donations or acquired lands total \$100,000, the project would

have a total value of \$1,100,000. To determine the Federal/State pro rata shares, apply the appropriate ratio to the total project value as shown in example 1. The State's actual cash outlay will be the difference between the State's pro rata share of the total project value less the value of the donation(s).

If the value of the donation(s) or acquired lands exceeds the State's pro rata share of the total value of the project, then the Federal pro rata share is limited to the amount of actual cash outlay for the project as shown in example 2.

Credits to the State's matching share cannot exceed the State's matching share of the total costs for the project. If donations to the State for a project result in credits which exceed the State's matching share of right-of-way costs for the project, such excess credits cannot be used on other projects. However, the State's matching share for project phases other than right-of-way, such as preliminary engineering and construction, can be credited for such excess right-of-way donations.

The State can always increase its matching share, if desired, by receiving donations for the project with a total value amount which is in excess of the non-Federal share of the project. This would decrease the Federal share payable on the project in accordance with 23 U.S.C. 120(i) and be subject to any other procedures relating to that provision.

If the value of a donation(s) exceeds the State's pro rata share of the total value of the project, then the Federal pro rata share is limited to the amount of actual cash outlay for the project. To determine the amount of pro rata share of project cash outlay, apply the appropriate ratio to the total value of the project, then determine the Federal pro rata share by deducting the value of the donation from the State's pro rata share of the total project value. If the result is zero or less, the Federal pro rata share is limited to the actual cash outlay for the project.

**20% STATE/80% FEDERAL
PROJECT COSTS**

Actual Cash Outlay for Costs Incurred	\$1,000,000
Value of Donations	<u>+ 500,000</u>
Total Value of Project	\$1,500,000
Federal Pro Rata Share	\$1,200,000
State Pro Rata Share	<u>+ 300,000</u>
Total Project Value	\$1,500,000
State Pro Rata Share	\$ 300,000
Value of Donations	<u>- 500,000</u>
Cash Outlay by State	\$ 0
Federal Cash Contribution to Project =	\$1,000,000

In this example, the value of the donation exceeded the State's pro rata share of the total value of the project thereby limiting the Federal participation to \$1,000,000.

Example 2

By statute, a donation credit is limited in scope and is not necessarily connected to just compensation required for eminent domain acquisition. There are specific fiscal procedures for the treatment of donation credits. Applicable State and local law must also be adhered to.

6.0.3. ENVIRONMENTAL REQUIREMENTS

A donation made prior to the approval of any environmental document required by NEPA is subject to certain restrictions. A state may not accept a donation prior to approval of environmental documentation required by NEPA if the documents which effect the transfer do not clearly address the conditions described below. If for any reason the State cannot comply with these requirements, it may not accept the donation prior to processing and approving the environmental document. If the State fails to comply with or enforce those conditions, it could jeopardize the eligibility of the project for Federal-aid funding.

Agency files must indicate that the donation will not preclude the study and consideration by the agency of all alternatives to a proposed alignment. Even though the property to be donated is relatively small, the document transferring the property to the receiving agency must also state that all alternatives to an alignment will be studied and considered.

The acceptance of the donated property must not influence the environmental assessment of a project including the decision about the need to construct the project or the selection of a specific location for the project. In other words, the acquiring agency must not be influenced by the donation of the property in its decision on which alternative to approve.

The documents transferring the property to the receiving agency through the State's donation procedures must include a provision to re-vest the property in the grantor or successors in interest if the donated property is not required for the alignment chosen. If the donated property is not used for the project, the agency must give it back. However, much of this has to do with State and/or local law. There may be time limits for the return of the property, or there may be other factors which may allow the agency to retain ownership. Check State and local laws for applicable requirements.

The owners must be fully informed of the right to receive just compensation for the acquisition of the property if it is desired. The owners must also be fully informed that they are entitled to have an appraisal made of the property along with an offer of just compensation. The owner may release the agency from either or both of the obligations. This is a property owner option. Also, an appraisal is not required if the STD determines that an appraisal is unnecessary because the valuation problem is uncomplicated and the fair market value of the property is estimated to be \$2,500 or less. States may seek approval for higher appraisal waiver limits, up to \$10,000 and conflict of interest waivers. Because the STD has this option, the owner's release of the agency's obligation to provide an appraisal is not required in this case.

6.1. DONATIONS IN EXCHANGE FOR CONSTRUCTION FEATURES

The acquiring agency may accept a property owner's offer to donate property or a portion thereof in exchange for construction features or services rendered that will benefit the property owner. However, for the purposes of crediting the value of the donation to the State's share of project costs, such donation is limited to the fair market value of the property donated less the value of the construction features or services received by the donor.

The value of the donated property and the construction features or services in the donation equation may balance each other and thus result in no credit to State funds not only because they balance each other but because such donation would be an ineligible credit to State funds since the donation was not given freely without the expectation of a benefit in return for the donation. For example, during the negotiation process a property owner counteroffers the State's fair market value offer with a proposal to "donate" the property needed for the project if the State will improve access to the remainder. While the property is freely given to the State by the owner, the owner is anticipating the receipt of a benefit in the form of enhanced access to the remaining property. The cost of the enhanced access to the remainder may completely offset or exceed the value of the donated property.

The trade or exchange in the example above does not consider the effects of the enhanced access to the remainder and the appraisal (to determine the amount of credit, if any) cannot reflect damages or benefits to the remainder. The donor's motive in such a trade is the anticipated increase in value to the remainder over the value of the whole property prior to the severance of the part needed for the project and offset the value of the property donated.

What must be considered is the value of the agreed upon construction features versus the value of the property donated. If the value of the donated property exceeds the value of the construction features, then the difference between these two may be eligible for a credit to the State's share of project costs. However, if the value of the donated property is less than or equal to the agreed upon construction features, then no credit to the State's share of project costs can be given. An appraisal by a qualified appraiser must be conducted to determine the relative values of the property donated and the agreed upon construction features or services.

6.2. DEDICATIONS

An acquiring agency may accept a parcel of land that a developer of a subdivision has dedicated or proposes to dedicate for street purposes in developing a subdivision. The agency may also accept the land if the dedication is done pursuant to the local planning process or at the request of the property owner for use concessions. The transfer of title to such land varies from jurisdiction to jurisdiction. In some jurisdictions, a deed may be necessary; in others, the acceptance by the local zoning office of a master plan filed by the developer is all that's needed.

Right-of-way acquired through normal zoning and subdivision procedures requiring the donation or dedication of strips of land in the normal exercise of police power is not considered an acquisition or taking in the constitutional sense. Thus, payment of just compensation or compliance with the provisions of the Uniform Act is not required since police power is used.

<--- This is not a donation that can be credited to the project since payment of just compensation is not required.

THIS IS NOT A DONATION!

Land obtained in this manner may be incorporated into a Federally-assisted project without jeopardizing participation in other project costs. However, any dedication undertaken to circumvent federal requirements is unacceptable and may result in Federal funds being withdrawn from the project.

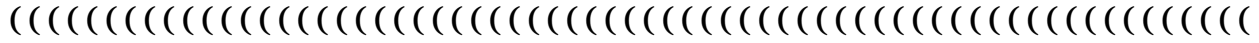
6.3. ASSESSMENTS

Assessments are sometimes levied against properties adjacent to a public project because these properties are the direct beneficiaries of the public improvement. For example, when a local jurisdiction installs a new branch to a sewer system to service all properties along the branch, the local government may assess or tax the properties adjacent to the project for the benefits of providing the public sewer system to these properties. To recapture the capital expense of the sewer system, the local government charges the adjacent property owners an amount usually based on a formula. The assessment can be of two types: Special and general, and both may be applied at the same time. The special assessment is normally limited in duration and is used to recoup the capital expenditure for the project. The general assessment is used to maintain and operate the system.

Assessments against properties adjacent to highway projects may be viewed as coercive since the community in general usually benefits from the project. Property owners adjacent to the project should not be asked to bear the burden of the cost of a community improvement. Suggesting that if the property owner does not accept the acquiring agency's fair market value offer, the property owner will be assessed the property's pro rata share of the project cost is illegal under Federal law. The Uniform Act forbids an acquiring agency from taking any coercive action in order to compel an owner to agree on a price for their property.

For example, when federal funds are involved, an acquiring agency may not levy a special assessment against only those properties which are to be partially acquired for the public improvement in order to recapture funds expended for the project. This would constitute a form of forced donation, which is coercive and thus unacceptable.

However, an acquiring agency may utilize an assessment procedure (if permitted or required by State law) to recapture funds expended for a public improvement provided that the assessment is levied against all properties directly benefitting from the project.



D:\PDG\donate.wpd:000504100402