

## Side-by-side comparison of 23 CFR 710 Subpart D—Real Property Management

Old Rule	Updated (New) Rule
<p><b>§ 710.401 General.</b></p> <p>This subpart describes the acquiring agency's responsibilities to control the use of real property required for a project in which Federal funds participated in any phase of the project. Prior to allowing any change in access control or other use or occupancy of acquired property along the Interstate, the STD shall secure an approval from the FHWA for such change or use. The STD shall specify in the State's ROW operations manual, procedures for the rental, leasing, maintenance, and disposal of real property acquired with title 23 of the United States Code funds. The State shall assure that local agencies follow the State's approved procedures, or the local agencies own procedures if approved for use by the STD.</p>	<p><b>§ 710.401 General.</b></p> <p>This subpart describes the grantee's responsibilities to control the use of real property acquired for a project in which Federal funds participated in any phase of the project. The grantee shall specify in its approved ROW manual or RAMP, the procedures for the maintenance, ROW use agreements, and disposal of real property interests acquired with title 23 funds. The grantee shall assure that subgrantees, including local agencies, follow Federal requirements and approved ROW procedures as provided in § 710.201(c) and (d) of this part.</p>
<p><b>§ 710.403 Management.</b></p>	<p><b>§ 710.403 Management.</b></p>
<p>(a) The STD must assure that all real property within the boundaries of a federally-aided facility is devoted exclusively to the purposes of that facility and is preserved free of all other public or private alternative uses, unless such alternative uses are permitted by Federal regulation or the FHWA. An alternative use must be consistent with the continued operation, maintenance, and safety of the facility, and such use shall not result in the exposure of the facility's users or others to hazards.</p>	<p>(a) As provided in § 710.201(h), FHWA and SDOT may use their Stewardship/Oversight Agreement to enter into a written agreement establishing which approvals the SDOT may make on behalf of FHWA, provided FHWA may not assign to the SDOT the decision to allow any ROW use agreement or any disposal on or within the approved ROW limits of the Interstate, including any change in access control. The assignment agreement provisions in § 710.201(h) and this paragraph do not apply to non-SDOT grantees.</p>
<p>(b) The STD shall specify procedures in the State manual for determining when a real property interest is no longer needed. These procedures must provide for coordination among relevant STD organizational units, including maintenance, safety, design, planning, right-of-way, environment, access management, and traffic operations.</p>	<p>(b) The grantee must ensure that all real property interests within the approved ROW limits or other project limits of a facility that has been funded under title 23 are devoted exclusively to the purposes of that facility and the facility is preserved free of all other public or private alternative uses, unless such non-highway alternative uses are permitted by Federal law (including regulations) or the FHWA. An alternative use, whether temporary under 710.405 or permanent as provided in 710.409, must be in the public interest, consistent with the continued operation, maintenance, and safety of the facility, and such use must not impair the highway or interfere with the free and safe flow of traffic (see also 23 CFR 1.23). Park and Ride lots are exempted from the provisions of this part. Park and Ride lots requirements are found 23 USC 137 and 23 CFR 810.106.</p>
	<p>(c) Grantees shall specify procedures in their approved ROW manual or RAMP for determining when a real property interest is excess real property and may be disposed of in accordance with this part, or is a real property interest that may be made available for an alternate use under a ROW use agreement. These procedures must provide for coordination among relevant State organizational units that may be interested in the proposed use or disposal of the real property. Grantees also shall specify procedures in their ROW manual or RAMP for determining when a real property interest is excess and when a real property</p>

	interest may be made available under a ROW use agreement for an alternative use that satisfies the requirements described in paragraph (b) of this section.
(c) The STD shall evaluate the environmental effects of disposal and leasing actions requiring FHWA approval as provided in 23 CFR part 771.	(d) Disposal actions and ROW use agreements, including leasing actions, are subject to 23 CFR part 771.
(d) Acquiring agencies shall charge current fair market value or rent for the use or disposal of real property interests, including access control, if those real property interests were obtained with title 23 of the United States Code funding, except as provided in paragraphs (d) (1) through (5) of this section. Since property no longer needed for a project was acquired with public funding, the principle guiding disposal would normally be to sell the property at fair market value and use the funds for transportation purposes. The term fair market value as used for acquisition and disposal purposes is as defined by State statute and/or State court decisions. Exceptions to the general requirement for charging fair market value may be approved in the following situations:	(e) Current fair market value must be charged for the use or disposal of all real property interests if those real property interests were obtained with title 23, United States Code, funding except as provided in paragraphs (e)(1) through (6) of this section. The term fair market value as used for acquisition and disposal purposes is as defined by State statute and/or State court decisions. Exceptions to the requirement for charging fair market value must be submitted to FHWA in writing and may be approved by FHWA in the following situations:
(1) With FHWA approval, when the STD clearly shows that an exception is in the overall public interest for social, environmental, or economic purposes; nonproprietary governmental use; or uses under 23 U.S.C. 142(f), Public Transportation. The STD manual may include criteria for evaluating disposals at less than fair market value. Disposal for public purposes may also be at fair market value. The STD shall submit requests for such exceptions to the FHWA in writing.	(1) When the grantee shows that an exception is in the overall public interest based on social, environmental, or economic benefits, or is for a nonproprietary governmental use. The grantee's ROW manual or RAMP must include criteria for evaluating disposals at less than fair market value, and a method for ensuring the public will receive the benefit used to justify the less than fair market value disposal.
(2) Use by public utilities in accordance with 23 CFR part 645.	(2) Use by public utilities in accordance with 23 CFR part 645.
(3) Use by Railroads in accordance with 23 CFR part 646.	(3) Use by railroads in accordance with 23 CFR part 646.
(4) Use for Bikeways and pedestrian walkways in accordance with 23 CFR part 652.	(4) Use for bikeways and pedestrian walkways in accordance with 23 CFR part 652.
(5) Use for transportation projects eligible for assistance under title 23 of the United States Code, provided that a concession agreement, as defined in section 710.703, shall not constitute a transportation project.	(5) Uses under 23 U.S.C. § 142(f), Public Transportation. Lands and ROWs of a highway constructed using Federal-aid highway funds may be made available without charge to a publicly owned mass transit authority for public transit purposes whenever the public interest will be served, and where this can be accomplished without impairing automotive safety or future highway improvements.
	(6) Use for other transportation projects eligible for assistance under title 23 of the United States Code, provided that a concession agreement, as defined in § 710.703, shall not constitute a transportation project exempt from fair market value requirements.
(e) The Federal share of net income from the sale or lease of excess real property shall be used by the STD for activities eligible for funding under title 23 of the United States Code. Where project income derived from the sale or lease of excess property is used for subsequent title 23 projects, use of the income does not create a Federal-aid project.	(f) The Federal share of net income from the use or disposal of real property interests obtained with title 23 funds shall be used by the grantee for activities eligible for funding under title 23. Where project income derived from the use or disposal of real property interests is used for subsequent title 23-eligible projects, the funds are not considered Federal financial assistance and use

	of the income does not cause title 23 requirements to apply.
(f) No FHWA approval is required for disposal of property which is located outside of the limits of the right-of-way if Federal funds did not participate in the acquisition cost of the property.	<b>(See § 710.409(e))</b>
(g) Highway facilities in which Federal funds participated in either the right-of-way or construction may be relinquished to another governmental agency for continued highway use under the provisions of 23 CFR 620, subpart B.  [64 FR 71290, Dec. 21, 1999, as amended at 73 FR 77503, Dec. 19, 2008]	<b>(See § 710.409(f))</b>
<b>§ 710.405 Air rights on the Interstate.</b>	<b>§ 710.405 ROW use agreements.</b>
(a) The FHWA policies relating to management of airspace on the Interstate for non-highway purposes are included in this section. Although this section deals specifically with approval actions on the Interstate, any use of airspace contemplated by a STD must assure that such occupancy, use, or reservation is in the public interest and does not impair the highway or interfere with the free and safe flow of traffic as provided in 23 CFR 1.23.	(a) A ROW use agreement for the non-highway use of real property interests may be executed with a public entity or private party in accordance with 710.403 and this section. Any non-highway alternative use of real property interests requires approval by FHWA, including a determination by FHWA that such occupancy, use, or reservation is in the public interest; is consistent with the continued use, operations, maintenance, and safety of the facility; and such use does not impair the highway or interfere with the free and safe flow of traffic as described in § 710.403(b) of this part. Except for Interstate Highways, where the SDOT controls the real property interest, the FHWA may assign its determination and approval responsibilities to the SDOT in their Stewardship/Oversight Agreement.
(1) This subpart applies to Interstate facilities which received title 23 of the United States Code assistance in any way.	(1) This section applies to highways as defined in 23 U.S.C. 101(a) that received title 23, United States Code, financial assistance in any way.
(2) This subpart does not apply to the following:	(2) This section does not apply to the following:
(i) Non-Interstate highways.	
(ii) Railroads and public utilities which cross or otherwise occupy Federal-aid highway right-of-way.	(i) Uses by railroads and public utilities which cross or otherwise occupy Federal-aid highway ROW and that are governed by other sections of this title;
(iii) Relocations of railroads or utilities for which reimbursement is claimed under 23 CFR part 140, subparts E and H.	(ii) Relocations of railroads or utilities for which reimbursement is claimed under 23 CFR part 140, subparts E and H, 23 CFR part 645, or 23 CFR part 646, subpart B; and
(iv) Bikeways and pedestrian walkways as covered in 23 CFR part 652.	(iii) Bikeways and pedestrian walkways as covered in 23 CFR part 652.
(b) A STD may grant rights for temporary or permanent occupancy or use of Interstate system airspace if the STD has acquired sufficient legal right, title, and interest in the right-of-way of a federally assisted highway to permit the use of certain airspace for non-highway purposes; and where such airspace is not required presently or in the foreseeable future for the safe and proper operation and maintenance of the highway facility. The STD must obtain prior FHWA approval, except for paragraph (c) of this section.	(b) Subject to the requirements in this subpart, ROW use agreements for a time-limited occupancy or use of real property interests may be approved if the grantee has acquired sufficient legal right, title, and interest in the ROW of a federally assisted highway to permit the non-highway use. A ROW use agreement must contain provisions that address the following items: (1) Ensure the safety and integrity of the federally assisted facility; (2) Define the term of the agreement;

	<p>(3) Identify the design and location of the non-highway use;</p> <p>(4) Establish terms for revocation of the ROW use agreement and removal of improvements at no cost to the FHWA;</p> <p>(5) Provide for adequate insurance to hold the grantee and the FHWA harmless;</p> <p>(6) Require compliance with nondiscrimination requirements;</p> <p>(7) Require grantee and FHWA approval, if not assigned to SDOT, and SDOT approval if the agreement affects a Federal-aid highway and the SDOT is not the grantee, for any significant revision in the design, construction, or operation of the non-highway use; and</p> <p>(8) Grant access to the non-highway use by the grantee and FHWA, and the SDOT if the agreement affects a Federal-aid highway and the SDOT is not the grantee, for inspection, maintenance, and for activities needed for reconstruction of the highway facility.</p> <p>Additional terms and conditions appropriate for inclusion in ROW use agreements are described in FHWA guidance at <a href="http://www.fhwa.dot.gov/real_estate/practitioners/right-of-way/corridor_management/airspace_guidelines.cfm">www.fhwa.dot.gov/real_estate/practitioners/right-of-way/corridor_management/airspace_guidelines.cfm</a>. The terms and conditions listed in the guidance are not mandatory requirements.</p>
<p>(c) An STD may make lands and rights-of-way available without charge to a publicly owned mass transit authority for public transit purposes whenever the public interest will be served, and where this can be accomplished without impairing automotive safety or future highway improvements.</p>	<p><b>(See § 810.212)</b></p>
	<p>(c) Where a proposed use requires changes in the existing highway, such changes shall be provided without cost to Federal funds unless otherwise specifically agreed to by the grantee and FHWA.</p>
	<p>(d) Proposed uses of real property interests shall conform to the current design standards and safety criteria of FHWA for the functional classification of the highway facility in which the property is located.</p>
<p>(d) An individual, company, organization, or public agency desiring to use airspace shall submit a written request to the STD. If the STD recommends approval, it shall forward an application together with its recommendation and any necessary supplemental information including the proposed airspace agreement to the FHWA. The submission shall affirmatively provide for adherence to all policy requirements contained in this subpart and conform to the provisions in the FHWA's Airspace Guidelines at: <a href="http://www.fhwa.dot.gov/realestate/index.htm">www.fhwa.dot.gov/realestate/index.htm</a>.</p>	<p>(e) An individual, company, organization, or public agency desiring to use real property interests shall submit a written request to the grantee, together with an application supporting the proposal. If FHWA is the approving authority, the grantee shall forward the request, application, and the SDOT's recommendation if the proposal affects a Federal-aid highway, and the proposed ROW use agreement, together with its recommendation and any necessary supplemental information, to FHWA. The submission shall affirmatively provide for adherence to all requirements contained in this subpart and must include the following information:</p> <p>(1) Identification of the party responsible for developing and operating the proposed use;</p>

	<p>(2) A general statement of the proposed use;</p> <p>(3) A description of why the proposed use would be in the public interest;</p> <p>(4) Information demonstrating the proposed use would not impair the highway or interfere with the free and safe flow of traffic;</p> <p>(5) The proposed design for the use of the space, including any facilities to be constructed;</p> <p>(6) Maps, plans, or sketches to adequately demonstrate the relationship of the proposed project to the highway facility;</p> <p>(7) Provision for vertical and horizontal access for maintenance purposes;</p> <p>(8) A description of other general provisions such as the term of use, insurance requirements, design limitations, safety mandates, accessibility, and maintenance as outlined further in this section; and</p> <p>(9) An adequately detailed three-dimensional presentation of the space to be used and the facility to be constructed if required by FHWA or the grantor. Maps and plans may not be required if the available real property interest is to be used for leisure activities (such as walking or biking), beautification, parking of motor vehicles, public mass transit facilities, and similar uses. In such cases, an acceptable metes and bounds description of the surface area, and appropriate plans or cross sections clearly defining the vertical use limits, may be furnished in lieu of a three-dimensional description, at the grantee's discretion.</p>
<p><b>§ 710.407 Leasing.</b></p>	<p><b>§ 710.407 Reserved.</b></p>
<p>(a) Leasing of real property acquired with title 23 of the United States Code, funds shall be covered by an agreement between the STD and lessee which contains provisions to insure the safety and integrity of the federally funded facility. It shall also include provisions governing lease revocation, removal of improvements at no cost to the FHWA, adequate insurance to hold the State and the FHWA harmless, nondiscrimination, access by the STD and the FHWA for inspection, maintenance, and reconstruction of the facility.</p> <p>(b) Where a proposed use requires changes in the existing transportation facility, such changes shall be provided without cost to Federal funds unless otherwise specifically agreed to by the STD and the FHWA.</p> <p>(c) Proposed uses of real property shall conform to the current design standards and safety criteria of the Federal Highway Administration for the functional classification of the highway facility in which the property is located.</p>	<p><b>(See ROW Use Agreements at § 710.405)</b></p>
<p><b>§ 710.409 Disposals.</b></p>	<p><b>§ 710.409 Disposal of excess real property.</b></p>
<p>(a) Real property interests determined to be excess to transportation</p>	<p>(a) Excess real property outside or within the approved right-of-way</p>

<p>needs may be sold or conveyed to a public entity or to a private party in accordance with § 710.403(d).</p>	<p>limits or other project limits may be sold or conveyed to a public entity or to a private party in accordance with § 710.403(a)(c)(d)(e)(f) and this section. Approval by FHWA is required for disposal of excess real property unless otherwise provided in this section or in the FHWA-SDOT Stewardship/Oversight Agreement.</p>
<p>(b) Federal, State, and local agencies shall be afforded the opportunity to acquire real property interests considered for disposal when such real property interests have potential use for parks, conservation, recreation, or related purposes, and when such a transfer is allowed by State law. When this potential exists, the STD shall notify the appropriate resource agencies of its intentions to dispose of the real property interests. The notifications can be accomplished by placing the appropriate agencies on the States' disposal notification listing.</p>	<p>(b) Federal, State, and local agencies shall be afforded the opportunity to acquire excess real property considered for disposal when such real property interests have potential use for parks, conservation, recreation, or related purposes, and when such a transfer is allowed by State law. When this potential exists, the grantee shall notify the appropriate agencies of its intentions to dispose of the real property interests determined to be excess.</p>
<p>(c) Real property interests may be retained by the STD to restore, preserve, or improve the scenic beauty and environmental quality adjacent to the transportation facility.</p>	<p>(c) The grantee may decide to retain excess real property to restore, preserve, or improve the scenic beauty and environmental quality adjacent to the transportation facility.</p>
<p>(d) Where the transfer of properties to other agencies at less than fair market value for continued public use is clearly justified as in the public interest and approved by the FHWA, the deed shall provide for reversion of the property for failure to continue public ownership and use. Where property is sold at fair market value no reversion clause is required. Disposal actions described in 23 CFR 710.403(d)(1) for less than fair market value require a public interest determination and FHWA approval, consistent with that section.</p> <p>[64 FR 71290, Dec. 21, 1999, as amended at 67 FR 12863, Mar. 20, 2002]</p>	<p>(d) Where the transfer of excess real property to other agencies at less than fair market value for continued public use is clearly justified as in the public interest and approved by FHWA under § 710.403(e), the deed shall provide for reversion of the property for failure to continue public ownership and use. Where property is sold at fair market value, no reversion clause is required.</p>
	<p>(e) No FHWA approval is required for disposal of excess real property located outside of the approved ROW limits or other project limits if Federal funds did not participate in the acquisition cost of the real property.</p> <p>(f) Highway facilities in which Federal funds participated in either the ROW or construction may be relinquished to another governmental agency for continued highway use under the provisions of 23 CFR part 620, subpart B.</p> <p>(g) A request for approval of a disposal must demonstrate compliance with the requirements of § 710.403(a)(c)(d)(e)(f) and this section. An individual, company, organization, or public agency requesting a grantee to approve of a disposal of excess real property within the approved ROW limits or other project limits, or to approve of a disposal of excess real property outside the ROW limits that was acquired with title 23 of the United States Code funding, shall submit a written request to the grantee, together with an application supporting the proposal. If the FHWA is the approving authority, the grantee shall forward the request, the SDOT recommendation if the proposal affects a Federal-aid highway,</p>

	the application, and proposed terms and conditions, together with its recommendation and any necessary supplemental information, to FHWA. The submission shall affirmatively provide for adherence to requirements contained in this section and must include the information specified in §§ 710.405(e)(1) through (9).
--	--