

Special Issues for Projects Involving WMATA

I. WMATA's Joint Development Program

The Washington Metropolitan Area Transit Authority (WMATA) has an active public/private Joint Development Program. WMATA aggressively seeks partners to develop WMATA-owned or controlled property in order to achieve the following goals:

1. Promote Transit-Oriented Development (TOD) by giving priority to Joint Development proposals which contain the following smart growth principles: reduce automobile dependency; increase pedestrian/bicycle-originated transit trips; foster safe station areas; enhance surrounding area connections to transit stations, including bus access; provide mixed-use development with housing in compliance with local regulations; and offer the opportunity to obtain goods and services and enjoy active public spaces near transit stations.
2. Attract new riders to the transit system;
3. Create a source of revenue for WMATA; and
4. Assist WMATA local area jurisdictions in recapturing a portion of their past financial contributions and continuing to make subsidy payments by augmenting the local property tax base, as well as other local revenue.

II. FTA Requirements

Because almost all of its property is acquired with some federal financial assistance, WMATA joint development projects are subject to certain Federal Transit Administration ("FTA") requirements and oversight.

FTA must approve all joint development sales or ground leases. FTA requires that WMATA receive a "fair and equitable return" which equals or exceeds "the fair market value of the property." (FTA Circular 5010.C-Appendix at ¶5). "[T]he final transfer value must be based on competition to the extent practicable, and FTA concurrence in the final transfer value is required." *Id.* At ¶6).

WMATA must also retain "continuing control" of the property "as long as they are needed for mass transit." *Id.* at ¶5. This sounds worse than the reality. It is accomplished by covenant or lease provision and has two components. First, the property must always be a "transit oriented development." But residential, office and retail uses all satisfy this test and,

without known exception, this “transit oriented development” covenant will be consistent with local zoning.

The second aspect of “continuing control” involves federal “cross cutting” requirements. Unless the project itself is “federally assisted” (which is rare), there are only anti-discrimination and procurement “cross cutting” requirements. Specifically, the developer must covenant to comply with certain federal laws barring discrimination on the basis of race, color, national origin, sex or disability. *Id.* at ¶9. In addition, the developer must certify that none of its contractors or subcontractors will be subject to federal debarment or suspension sanctions. *Id.* If the project is federally assisted, then many other “cross cutting” requirements apply, including Buy America, NEPA, historic preservation review. *Id.*

III. WMATA Compact Requirements

WMATA is an interstate compact agency (Maryland, Virginia and the District of Columbia). WMATA’s Compact contains two provisions that affect joint development projects. The first is quite straightforward. Section 64 of the Compact requires payment of Davis-Bacon wages on projects “undertaken by the Authority” or “financially assisted by it.” For cases where WMATA replacement facilities are required (*i.e.*, relocating parking spaces or bus bays), those construction contracts must provide for Davis-Bacon wages. However, this requirement does NOT apply to development improvements (*i.e.*, the residential, office or retail buildings).

The second Compact requirement can present more vexing questions. Section 13 of the Compact requires WMATA’s Board to adopt a “mass transit plan” which shall designate “the transit facilities to be provided by the Authority, including the locations of terminals, stations, platforms, parking facilities, and the character and nature thereof...” Before a mass transit plan is amended, the WMATA Board must conduct a public hearing, commonly referred to as WMATA Compact Hearings.

The Board is required to

consider data with respect to current and prospective conditions in the Zone, including, without limitation, land use, population, economic factors affecting development plans, goals or objectives for the development of the Zone and the separate political subdivisions, transit demands to be generated by such development, travel patterns, existing and proposed transportation and transit facilities, impact of transit plans on the dislocation of families and businesses, preservation of the beauty and dignity of the Nation's Capital, factors affecting environmental amenities and aesthetics and financial resources.

WMATA Compact, Section 14(c)(1).

The WMATA Compact Hearing process takes at least 6 months. After the Board authorizes the hearing, official notice is given. The hearing is held in a location near the

development site and is usually chaired by a member of the WMATA Board. A public comment period remains open for two weeks after the hearing. After the record closes, WMATA staff prepares a “staff report” identifying the issues raised by the public and WMATA’s response. Thereafter, the staff report is circulated to the public and a second public comment period follows. Thereafter, the Board will consider the proposed mass transit plan amendment.

When is a Compact Hearing required? In *Saunders v. WMATA*, 359 F.Supp. 457 (D.D.C. 1973), the District Court considered the nature of the transit plan amendment required to trigger a WMATA Compact Hearing:

There is no need for a public hearing on each minor “detail” of Metro plans, but only on the major elements of the plan such as stations, routes, station access points and fan and vent shafts. The word “major” in this sense should not be defined by arguments over semantics, the cost of construction, or size of the facility. The real public interest in opportunity to be heard should be measured in the impact of the facility on people affected, whether that be by actual displacement, taking of property, or removal of trees and altering the character of a neighborhood.

Id. at 461. *Saunders* also illustrates the risk of guessing wrong about what is “major.” The Court issued an injunction preventing construction of vent shafts (scheduled to be built in a residential neighborhood). WMATA will require a WMATA Compact Hearing for all major reconfiguration of its transit facilities, including construction of structured parking garages.

The Compact does not address the question of when the WMATA Compact Hearing needs to be held and there are no hard and fast rules. There is, however, a natural tension, between the scheduling of the WMATA Compact Hearing and the corresponding zoning and land use approval process. As a general rule, the WMATA Compact Hearing should be scheduled between the time the local jurisdiction provides conceptual approval of the plan and that jurisdiction’s later detailed approval. That allows modifications to the plan that might be required by WMATA’s Board to be incorporated into the final site plan.

IV. Recurring Easement Issues

Because each WMATA station, indeed, each piece of real property, is unique, there is no single boilerplate form that can appropriately address all easement issues that might arise in a joint development project. Attached are two examples of different approaches taken for two scenarios. The first is a sale of urban property where WMATA reserves its facilities by easement. The second is a suburban property where the WMATA facilities (station, parking garage) remain on WMATA-owned property and adjacent property is leased to phase tenants.

Key recurring issues are access, infrastructure (especially utilities and roads), and maintenance.