

DEPARTMENT OF TRANSPORTATION

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Making Conservation
a California Way of Life.

May 18, 2020

Vincent Mammano, Division Administrator
Federal Highway Administration
650 Capitol Mall, Suite 4-100
Sacramento, California 95814-4708

Dear Mr. Mammano:

We are in receipt of your correspondence relating to various Caltrans right of way use agreements for temporary emergency homeless shelters previously approved by FHWA. Your May 7, 2020 letter revoked the lease agreement for I-280 (adjacent to Evans and Selby Streets in San Francisco) and states that FHWA is reviewing its approval for the Beacon Street Park and Ride lot in Los Angeles, the 5th and Bryant Streets location in San Francisco and the 13th and Division Streets location in San Francisco. Your May 14, 2020 letter withdrew FHWA approval of the lease for the 50/99 (W/X Streets) location in Sacramento.

We are confused by FHWA's recent communications on this issue. After receiving FHWA's May 7 letter, initially we understood the concern to be with Caltrans issuing NEPA determinations for leases on the interstate, yet several locations in the Bay Area and Sacramento may not be on interstate rights of way. We request that any revocation of approval for these locations be suspended until it is determined which locations are in fact on interstate rights of way. Even more confusing, FHWA issued the NEPA Categorical Exclusion for the 50/99 Sacramento lease, which action we understand is now potentially revoked.

The purpose of this letter is to ask for further clarification of the basis for FHWA's intended revocation of its approval of certain right of way use agreements and waiver of fair market value lease rates at several locations in California. We also request FHWA specifically identify any perceived deficiencies with the leases previously approved and the steps necessary to resolve these issues. Lastly, we

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request clarification of FHWA's policy for use of interstate facilities for emergency homeless shelters/feeding programs as permitted by recent state statutes.

NEPA Determination

Under the relevant federal regulations and memorandum of understandings Caltrans and FHWA entered, FHWA ratification was not needed because it delegated to Caltrans the authority to issue NEPA determinations for these projects. Caltrans developed these leases in close coordination with your staff and in accordance with 23 CFR 710 et seq, 23 U.S.C. 326 CE Assignment Memorandum of Understanding (2019) (326 MOU-FHWA assignment of NEPA Determination to Caltrans); 23 U.S.C. 327 Memorandum of Understanding (327 MOU) and the 2015 Stewardship and Oversight Agreement executed between FHWA and Caltrans. The 326 MOU clarifies that this includes any activity listed in 23 CFR 771.117(c); 23 CFR 771.117(d) and Appendix A to the MOU, which specifically addresses airspace leases. (23 CFR 710 et seq). As such, Caltrans NEPA CE determinations should be considered valid.

Fair Market Value

23 CFR 710.403(e) states that fair market value is determined by the state, either through statute or court decision. Senate Bill 211 statutorily authorizes below fair market value rent for defined emergency shelter/feeding program uses. To be clear, these lease agreements are for temporary uses only and do not dispose of highway right-of-way or create any permanent non-transportation uses. Even if a less than fair market value waiver is needed, FHWA provided it. The leases were developed in coordination with and approved by FHWA on the basis that the temporary emergency shelters and feeding programs are in the public's interest. Anything done to impede the public's interest and benefit in creating these temporary leases would be unfortunate.

Safety and Interstate Investment Concerns

As you are aware, California has a significant homeless population, many of whom are already living on interstate rights of way. Caltrans annually expends substantial resources to mitigate the impact to the state and interstate highways due to this use. The purpose of these leases, developed in coordination with FHWA staff, is to reduce litter and injuries to homeless persons by moving homeless individuals from operating rights of way to temporary emergency shelters. As such, Caltrans sees these leases as an innovative solution to an

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existing problem. We share FHWA's safety and operational concerns. Caltrans conducts a rigorous and comprehensive evaluation by a multidisciplinary team of each location to assess potential safety and operational impacts and to determine if a location is suitable for this secondary use. If not identified as an appropriate location due to safety and operational issues, Caltrans will not consider a right of way use agreement for that location and does not submit a proposed lease agreement to FHWA.

Non-Transportation Uses

By their very nature, right of way use agreements are developed to allow for secondary, non-transportation uses of operating right of way that do not create safety or operational impacts to users or to the highway facilities, in accordance with 23 CFR 710 et seq. The subject lease with local public agencies would provide temporary emergency shelter and feeding programs authorized by state statute (see Streets and Highways Code section 104.30) and is allowable based on public interest findings pursuant to federal regulation.

Reasonable Reliance on FHWA Approvals

FHWA's unexpected revocations of the right of way use approvals have created a highly unfortunate situation for all parties. Caltrans and our local partners reasonably relied upon the FHWA approvals previously granted and have executed right of way use agreements, the intent of which is to serve the public's interest. Caltrans has already executed agreements with our local public partners. These local partners have already entered into third party construction contracts and expended significant funds in furtherance of the leases.

We look forward to further clarification and suggested resolutions to resolve these issues.

Sincerely,



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Director

c: Nicole Nason, FHWA Administrator