

April 5, 2013

Peter M. Rogoff
Administrator, Federal Transit Administration
U.S. Department of Transportation
1200 New Jersey Ave SE
Washington, DC 20590

Docket Number FTA–2013–0013: Joint Development – Notice of Availability of Proposed Circular and Request for Comments

Dear Administrator Rogoff:

Enterprise Community Partners and the National Housing Conference¹ appreciate the opportunity to submit comments on the Federal Transit Administration’s (FTA’s) [Notice of Availability of the Proposed Joint Development Circular and Request for Comments](#). We applaud FTA’s explicit recognition of the benefits of joint development, its policy to encourage transit agencies to utilize this tool to bring additional benefits to public transit systems, and its effort to simplify the joint development process by combining all relevant policies into one Circular. There is a history of successful joint development projects that include affordable housing and community facilities/services, and the Proposed Circular maintains the regulatory framework in which this is possible. However, we believe that changes could be made to the Circular that would improve both the inclusiveness and overall performance of joint development projects by encouraging greater adoption of these types of projects. Drawing on our expertise in the fields of affordable housing, community development, and transit-oriented development, we offer the following comments:

- A. FTA should explicitly include affordable housing as a permissible joint development project. Furthermore, FTA should leverage the recent changes to the Major Capital Investments Projects

¹ **Enterprise Community Partners (Enterprise)** is a national nonprofit organization that creates opportunity for low- and moderate-income people through affordable housing in diverse, thriving communities. Enterprise provides financing and expertise to community-based organizations for affordable housing development and other community revitalization activities throughout the U.S. Since 1982, Enterprise has raised and invested more than \$11.5 billion in equity, grants and loans to help build or preserve nearly 300,000 affordable rental and for-sale homes to create vital communities and more than 410,000 jobs nationwide.

The **National Housing Conference (NHC)** represents a diverse membership of housing stakeholders including tenant advocates, mortgage bankers, non-profit and for-profit home builders, property managers, policy practitioners, realtors, equity investors, and more, all of whom share a commitment to a balanced national housing policy. Since 1931, NHC has been dedicated to ensuring safe, decent and affordable housing for all in America – That commitment bringing together our broad-based membership has earned us a reputation as the United Voice for Housing engaging in nonpartisan advocacy on housing issues.

(New Starts/Small Starts) regulations and highlight joint development as a tool for meeting the new affordable housing-related rating factors.

- B. We believe that FTA should continue its policy of allowing flexibility in determining the Fair Share of Revenue earned by joint development projects, as described in the proposed guidance.
- C. FTA should make clear that the aforementioned flexibility applies both for leased property and for property that is sold with a deed restriction or other legal instrument that ensures that the FTA funding recipient maintains continuing control.
- D. FTA should remove or clarify its reservation of the right to decline funding if the project does not “generate a meaningful amount of revenue,” and give FTA funding recipients maximum flexibility in determining that it is receiving a fair share of revenue.
- E. Significant lessons can be learned from examining the experiences of FTA funding recipients and developers in undertaking joint development projects.

In addition to these comments, we support the comments and recommendations offered by the Center for Transit-Oriented Development in their response, particularly as they relate to the relationship between joint development and incidental use, parking requirements, and the joint development approval process.

A. Explicitly Include Affordable Housing as a Permissible Project; Highlight Connection to New Starts/Small Starts Rating Factors

According to the Proposed Circular, FTA has an interest in a funding recipient’s joint development project when “(1) FTA funds are used for a capital project related to the development or (2) joint development takes place on real property that was, or will be, purchased with funds administered by FTA,” and that such projects can include “commercial, residential, or mixed-use development” (Definitions, I-2). Under this definition, the development of affordable housing has been and continues to be an eligible type of joint development, given that it clearly falls under the category of residential development. That being said, we recommend that the Circular should explicitly list affordable housing as an eligible type of joint development because the development of affordable housing near public transit stations is important to the achievement of federal transportation objectives.

In addition to providing direct revenue to the FTA funding recipient, residential and commercial development in close proximity to public transit stations can increase and stabilize ridership, which provides a financial benefit to the transit system. Ridership can be further enhanced by paying attention to the types of projects that are built. Research shows that lower-income households make up a significant portion of transit ridership.² Therefore, affordable housing and community facility/services

² Nearly 66 percent of transit users had household incomes below \$50,000 (in 2004 dollars). Neff, John, and Larry Pham. 2007, May. A Profile of Public Transportation Passenger Demographics and Travel Characteristics Reported in On-Board Surveys. Washington, DC: American Public Transportation Association.

projects that focus on increasing transit access to these households can further enhance the effectiveness of the project itself through increased ridership and the associated benefits for alleviating traffic congestion and improving the environment through reductions in vehicle miles traveled.

In a separate context, FTA has already recognized the importance of affordable housing to the inclusivity and overall functioning of public transportation projects by adopting rating factors for its New Starts program that measure both “existing affordable housing in the project corridor” and “policies in place to support maintenance of or increases to the share of affordable housing in the project corridor” (49 CFR Part 611 Appendix A). Given that decisions related to affordable housing development are often made by municipal governments, housing departments and agencies, and the private sector, joint development is one of the most powerful and direct tools at a New Starts project sponsor’s disposal to comply with these standards.

To underscore the importance of affordable housing in achieving these goals and the connection with New Starts, we recommend adding language to the final Joint Development Circular that explicitly highlights the role of affordable housing joint development activities and policies in achieving a high rating for New Starts projects. Please refer to Appendix A for specific suggested language.

B. Maintain Flexibility in Calculating a Fair Share of Revenue

We support FTA’s decision to continue to give flexibility in determining the fair share of revenue, and to refrain from setting a monetary threshold (Criterion 3, page III-6). As stated above, the development/preservation of affordable housing near transit has the potential to provide additional revenue to the FTA funding recipient beyond what could otherwise be expected. Therefore, FTA funding recipients undertaking joint development should have the flexibility to look beyond the amount of revenue that can be obtained upfront and account for these ongoing incremental revenue streams when determining that it is receiving a “fair share of revenue.”³

Some benefits of joint development are not easy to quantify. They can include direct benefits (such as efficiencies from coordinating maintenance and services with a joint development partner) or indirect community benefits (such as revitalization of the surrounding neighborhood, increases in the local tax base, and broader economic development effects). Therefore, we recommend that FTA explicitly recognize that joint development can be used as a tool to meet goals other than direct revenue generation.

C. Provide Greater Clarity on the Eligible Methods of Land Conveyance for Joint Development

We believe that Circular could be further improved by providing greater clarity on the manner in which transit agencies can convey land to a third-party partner for joint development. Based on our

³ These incremental revenue streams could account for both (1) the increased ridership resulting from the development project, as opposed to the existing site use; and (2) the additional travel mode capture rate for projects that serve low- and moderate-income populations.

conversations with practitioners in several markets, there seems to be differences of opinion on whether land or other real property intended for joint development must be leased, or whether it can also be sold under specific conditions.

There is general acceptance that the FTA funding recipient may enter into a lease agreement with a third party to undertake an eligible joint development project, provided that the recipient receives a fair share of revenue as part of this agreement (using the standards described above) and other relevant joint development criteria.

However, there seems to be misunderstanding on whether a real estate asset can be sold under certain conditions as part of a joint development project. Based on our conversations with practitioners and our reading of the relevant laws and regulations, the concept of “satisfactory continuing control” is a criterion that must be met for the project to be considered an eligible joint development. A recipient can maintain the requisite satisfactory continuing control if legal instruments are in place to ensure that the project continues its originally authorized public transportation purpose for the duration of its useful life.⁴ A straightforward, fee-simple sale – without other conditions – would not satisfy this requirement, and therefore the transaction would not qualify as joint development and would have to meet the relevant property disposition guidelines.⁵

Based on our conversations and analysis, we believe that a transaction (including a sale) with terms that include a legal instrument (such as a deed restriction, easement or covenant) that meets FTA’s standards of “satisfactory continuing control” would be eligible for joint development. In this scenario, it is our understanding that the “fair share of revenue” standard would apply. This would allow the FTA funding recipient to accept a lower upfront purchase price for the property, provided that there is sufficient ongoing incremental revenues (as described in Section B of this letter) to meet the “fair share of revenue” standard. These types of projects are already being implemented by recipients such as TriMet in Portland to great success (see Section E below).

These conclusions may not be clear to readers under the guidance as currently drafted. Without explicit clarification that such projects are eligible, we are concerned that in some cases a more restrictive reading of these rules might be adopted that limits the eligible methods of conveyance for real estate for joint development projects. To correct these different interpretations and eliminate uncertainty, we strongly recommend that FTA explicitly clarify that real property for joint development can be both sold and leased using the fair share of revenue standard, provided that the FTA funding recipient maintains satisfactory continuing control and meets other relevant criteria.

⁴ Circular Overview, II-1; Eligibility of Joint Development as a Capital Project, II-4; Real Property Considerations, IV-2

⁵ Real Property Considerations, IV-7

D. Clarify FTA's Right to Decline Funding

The Proposed Circular includes a change that mandates that FTA must have an opportunity to review and approve the amount of revenue received by the funding recipient as “meaningful” (Criterion 3, III-6). However, the Circular does not define what is meant by this term. According to previous versions of the joint development guidance, this determination is currently made at the sole discretion of the recipient’s Board of Directors or similar governing body.⁶ While we recognize FTA’s interest in ensuring that FTA-funded joint development projects are financially beneficial, we are concerned that: (1) this additional layer of review will add to the compliance burden for joint development and lead to delays in project implementation and (2) the lack of clarity on what constitutes “meaningful revenue” could lead to projects being unnecessarily rejected by FTA. Given the often limited resources to support transit-related activities, it is in the interest of FTA funding recipients to ensure that they are receiving a fair or meaningful return. Therefore, we believe that an additional layer of review from FTA is unnecessary. However, if FTA decides to retain this proposal in the Final Circular, we offer two recommendations:

- FTA should work with its funding recipients to develop an efficient, timely review process that minimizes applicant burden.
- FTA should work with its funding recipients to provide greater clarity on what constitutes a meaningful amount of revenue while still preserving the recipients’ flexibility in determining that it is achieving a sufficient financial return or meeting other policy goals.

E. Issues that Arise in Joint Development Projects

FTA has requested that respondents highlight specific issues that arise in joint development projects. In 2009, Enterprise and FRESC released a report that highlighted best practices in joint development.⁷ The report analyzed transit agency approaches to affordability in joint development in 24 of the 25 major

⁶ Notice of Final Agency Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law, Federal Register Volume 72, Number 25 (7 February 2007), <http://www.gpo.gov/fdsys/pkg/FR-2007-02-07/html/E7-1977.htm>

⁷ Pollack, M. and Kniech, R. (2010). *Making Affordable Housing at Transit a Reality: Best Practices in Transit Agency Joint Development*. Denver: FRESC and Enterprise Community Partners.

Projects analyzed as part of this report included:

- Downtown Redmond (386 rental units, 20% affordable up to 80% AMI); King County DOT/Metro Transit - Seattle metropolitan region
- West Gresham Apartments (27 rental units affordable between 30-60% AMI), Tri-Met, Portland metropolitan region
- Strobbridge Court (96 rental units for seniors and families earning 40-50% AMI) BART, San Francisco metropolitan region

transit agencies in the country. Though the survey was not limited to projects in which FTA has an interest, many of its findings are useful in highlighting best practices and challenges related to FTA joint development. We offer the following observations, based on the report and our continuing work in this field:

- Transit agency joint development policies can have a significant impact on the provision of affordable housing near transit. As of 2009, at least nine transit agencies had joint development policies that include affordable housing and six others had practices of including affordable units in projects even in the absence of written policy. Policies included specific percentage goals, a related affordable housing trust fund, and non-binding policies requiring agencies to “encourage” or “support” affordable housing. As a result, joint development projects have included over 3,400 units of affordable housing, with many more expected to have been subsequently completed and placed-into-service.
- Surveyed transit agencies reported that affordable housing generates increased ridership and fare revenue, creates efficiencies and cost savings through shared parking, and increases equitable access to transit.
- Several jurisdictions have successfully utilized a competitive RFP process where an affordability goal is explicitly stated or is given preference in the selection process, for both land sales and long-term leases.
- Transit agencies have the ability to be “patient landholders,” able to keep control of important properties for development at a later date (i.e., when the transit station is operational). This is an important role in the development of transit-oriented affordable housing, as resources for holding land for development are often limited.
- Transit agencies, such as Tri-Met in Portland, OR, have established the best practice of demonstrating that a fair share of revenue can be earned by incorporating the long term fare revenue increases from increased ridership as a compensating factor for a lower up-front land cost.
- Institutional culture and expectations make a difference.
 - At the time the report was written, Bay Area Rapid Transit (BART; California) had no official policy on affordable housing. However, the combination of BART’s institutional willingness and a strong set of statewide policies that provide a framework for transit-oriented affordable housing have resulted in the development of several affordable housing projects. In Los Angeles, there is a non-binding policy that “encourages” income diversity in residential housing; as a result, 22% of joint development units are affordable.

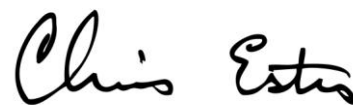
- Conversely, some transit agency staff members and/or their board of directors take a more narrow view of their role, focusing more on the issues more directly related to the operation of the transit system. Others prefer to maximize upfront revenue/profits rather than seeking out arrangements which serve multiple policy goals. Finally, a transit agency may lack the resources or capacity to undertake more complex joint development projects. In these scenarios, it is more difficult to undertake equitable joint development projects. Potential partners must dedicate additional time and resources to building relationships with key stakeholders and highlighting the benefits of transit-oriented affordable housing and community development projects. We hope that this guidance will spur more agencies to reconsider their views on joint development.
- Joint development can require a much lengthier implementation process than some other real estate transactions. In addition to the standard time it takes to design a project; assemble financing; obtain site control, necessary entitlements and permits; and construct a project, partners in a joint development project must also account for the time it takes to go through the FTA approval process. Shortening development timelines can reduce both complexity and cost, creating more efficient results for both the developer and the FTA funding recipient. Therefore we encourage FTA to consider additional measures to streamline its approval processes and maximize efficiency. In order to streamline joint development projects that incorporate affordable housing, we recommend that FTA continues to work with the Department of Housing and Urban Development to reduce or eliminate any duplicative reviews or approvals.

Once again, we commend FTA on the important steps it has taken thus far to clarify its joint development policies and maximize the community benefits of public transit investments. We greatly appreciate the opportunity to share our experience and ideas. We stand ready to work with FTA moving forward to successfully implement joint development projects, and to promote best practices in promoting healthy communities through transit-oriented affordable housing and community development. Please contact Michael Spotts, Senior Policy Analyst; Enterprise Community Partners (mspotts@enterprisecommunity.org) for any questions or clarifications.

Sincerely,



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Enterprise Community Partners



Chris Estes
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Appendix A: Recommended Language Highlighting Nexus between Joint Development and Major Capital Investments Projects

Relationship between joint development and Major Capital Investment Projects (New Starts/Small Starts)

In 2013, FTA amended its rule governing the New Starts/Small Starts program (49 CFR Part 611; Appendix A). The Final Rule included the adoption of rating factors that measure both “existing affordable housing in the project corridor” and “policies in place to support maintenance of or increases to the share of affordable housing in the project corridor.” Residential development that includes an affordable housing component is an eligible joint development activity, and therefore can be utilized by project sponsors to help meet these respective standards.

The following are illustrations of some of the ways in which affordable housing joint development activities can assist project sponsors in developing a successful New Starts proposal:

- Existing affordable housing in the project corridor (Existing Land Use Criterion)⁸ – A joint development project that is implemented within a proposed project corridor and incorporates legally binding affordability restricted housing units (as defined in the New Starts Final Guidance) would increase the supply of existing affordable housing within the proposed corridor, which is measured as part of the Existing Land Use Criterion.
- Local plans and policies in place to support maintenance of or increases to affordable housing in the project corridor (Economic Development Criterion)⁹ – In order to receive a strong rating under this criterion, project sponsors will have to demonstrate that there is a proactive effort on the part of local stakeholders, including the transit agency or other FTA funding recipient, to develop and preserve affordable housing in the proposed project corridor. Joint development activities can assist transit agencies or other project sponsors with demonstrating this proactive commitment to affordable housing near planned transit stations in several ways, including but not limited to: (1) adopting policies for joint development that set requirements, thresholds, goals or preferences for projects that incorporate affordable housing; (2) dedicating resources (including monetary and real property) specifically for joint development projects with an affordable housing component; and (3) undertaking joint development activities with an affordable housing component within the project corridor, thus demonstrating developer activity.
- Enrichments (Cost Effectiveness Criterion)¹⁰ – An enrichment is an “improvement to the transit project that is non-integral to the basic functioning of the project, whose benefits are not captured in whole by other criteria, and is carried out simultaneous with grant execution and may be included in the Federal grant.” The purchase of real property for an eligible joint

⁸ 49 CFR Part 611; Appendix A (f)(5)

⁹ 49 CFR Part 611; Appendix A (g)(1)(ii)

¹⁰ 49 CFR Part 611; Appendix A (a)(1)

development activity (including affordable housing) qualifies as an enrichment to the project. According to the final rule, the costs that project sponsors incur by undertaking such activities will not count against the project's cost effectiveness rating.