Incentives to Encourage Equitable Development in Los Angeles County Transit Oriented Districts

Joint Development and Other Land Disposition Strategies to Encourage New Residential or Mixed-Use Development on Transit Agency Land

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INTRODUCTION

This project is evaluating the need for additional tools, funding and financing strategies, policies, or actions to achieve equitable transit-oriented districts through new market rate, mixed-income, and affordable residential development near passenger rail and bus rapid transit stations throughout Los Angeles County. Equitable transit-oriented districts, as defined for the purpose of this analysis, prioritize investments in the production of homes at all income levels and preservation of affordable homes, protect the social fabric of neighborhoods, and allow residents to walk, bike, and take transit to education opportunities, jobs, shops, and services.

As part of this larger body of work, this briefing paper analyzes federal and state requirements related to transit agency engagement in joint development, with a focus on how LACMTA can strengthen its role in achieving equitable TOD through land sale, land discount, and/or land donation. The paper incorporates three unique research components to gauge the ability of LACMTA to engage in these activities:

- Federal Transit Administration (FTA) guidance on joint development and related activities
- California specific legal guidance on land sales and transfers, and
- National examples where transit agencies have used joint development or other mechanisms to spur additional market-rate, mixed-income, and affordable housing and mixed-use development.

Joint development is a specific type of transit-oriented development in which a transit agency partners with one or more other public agencies or private developers to develop land near a transit station. Transit agencies engage in joint development for a variety of reasons, including increased ridership from the development, revenues stemming from the sale or lease of the property, or general economic or community development goals. For the most part, joint development is a secondary focus for most transit agencies, with the daily challenges of providing service and meeting operating needs occupying the bulk of staff time. Joint development projects can be complex and time-consuming, as well as politically divisive. Nonetheless, there are a number of examples from around the country, including Los Angeles, of successful joint development projects, which have benefited both the transit agency and the surrounding community.

One of the barriers to increased use of joint development is lack of clarity surrounding federal requirements. FTA has long recognized this issue, and in March 2013 issued a draft Circular that attempts to clearly lay out what transit agencies can and cannot do with land that was purchased with federal dollars.[1] (Federal requirements do not apply to land that was not purchased with federal funds.) This briefing paper explains the federal joint development rules, with particular focus on those elements that affect LACMTA's ability to sell or lease land on terms designed to support affordable residential

[1] Except as otherwise indicated herein, the draft circular restates long-standing FTA guidance and policies related to joint development, which are not expected to change in the final circular.

development. In general, the paper concludes that federal requirements are sufficiently flexible as to allow LACMTA to engage in joint development on terms designed to promote affordable housing near transit.

Because transit agencies are subject to state requirements surrounding the disposition of their land as well as federal requirements, this paper also addresses the California legal and regulatory context in which LACMTA operates. The paper includes analysis of the California Constitution and statutes as well as legislative history and related case law. This paper concludes that California law does not present a barrier to most joint development transactions that use land sale, land discounts, or land donations to promote affordable residential development.

Finally, the paper provides examples of joint development strategies and techniques from around the country that have been used by transit agencies to complete joint development projects. The paper focuses on agency experience specifically with land sale, land discount, and land donation, and also covers other strategies that are often implemented by joint development staff such as explicit affordability policies, flexible payment structures, and strategic land acquisition, each of which have been used successfully to increase affordable or mixed-income residential development near transit. While some of these strategies have already been employed by LACMTA, this paper presents a panoply of options that could be considered to help strengthen LACMTA's role in joint development. In this brief, LACMTA joint development staff was interviewed with the same set of questions as staff from other national transit agencies. However, the full range of options covered in this paper were not extensively addressed in that interview.

JOINT DEVELOPMENT: FEDERAL REQUIREMENTS[2]

Joint development is considered under federal transit law to be a type of capital project in which transit agencies can engage.[3] In other words, any federal transit program funds that are authorized to be used for capital projects can be used for joint development. Typically, transit agencies engage in joint development by selling or leasing land to a public, private, or nonprofit developer.

The Federal Transit Administration (FTA) has issued several sets of guidance to transit agencies related to requirements for joint development projects. On March 7, 2013, FTA issued a proposed circular intended to compile all joint development guidance into a single document. In the proposed circular,

[2] This paper provides only a general overview of federal joint development and land disposition requirements. It should not be understood as an exhaustive examination of all relevant federal law. The lawfulness of any particular project will depend on the specific details of that transaction and must be reviewed on an individual basis. In addition to the documents cited herein, this section draws from *Transit Law's Impact on Local Joint Development: An Explanation of Real and Perceived Barriers to Affordable Housing*, issued by the Los Angeles Neighborhood Based CDC Coalition with support from the Local Initiatives Support Corporation. Draft paper, March 2013.

[3] Section 5302(3)(G) of Title 49, United States Code.

FTA defines joint development as "a public transportation project that is integrally related to and often co-located with commercial, residential, or mixed-use development."[4]

The circular goes on to explain that "FTA has an interest in joint development 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."[5]

FTA also specifies that "joint development may include partnerships for public, private and/or non-profit development associated with fixed-guideway (rail or bus) transit systems that are being improved through new construction, renovation, or extension. Joint development may also include bus and intermodal facilities, intercity bus and rail facilities, transit malls, and historic transportation facilities."[6]

Joint development can occur either as a part of a new federal grant or through property previously acquired using FTA funds. Some common examples of previously-acquired property used for joint development include surface parking lots, bus or transit storage facilities, or construction staging sites after the project is complete. Under a new federal grant, a transit agency can make a strategic acquisition of land that will be used for joint development (e.g., TriMet in Portland, Oregon, Miami-Dade Transit; see discussion below). Air rights may also be leased or sold under joint development regulation. (Under an air rights transaction, the subsurface transit use must remain the same and access must still be maintained to the transit facility.)

In a joint development project the transit agency must maintain satisfactory continuing control over the land: the legal assurance that the property will be used for a public transportation purpose in perpetuity or until disposition rules apply. (See below for discussion of disposition rules.) In other words, the transit agency must maintain enough control of the property to ensure that it will be able to meet its operational needs. Typically, this is accomplished via the terms of the lease or in cases of a sale, through an easement allowing access to transit facilities.

Note: There is no specific FTA-funded program for joint development; FTA supports joint development through its existing planning and capital assistance programs such as the New Starts program, which funds new fixed-guideway and bus rapid transit lines, as well as extensions to existing lines. Some joint development planning activities can also be supported through other federal agencies such as the U.S. Housing and Urban Development Department, U.S. Department of Agriculture and the U.S. Environmental Protection Agency.

[4] *Federal Transit Administration Guidance on Joint Development*, Chapter I, Page I-2. Draft Circular, March 2013.
[5] *Federal Transit Administration Guidance on Joint Development*, Chapter I, Page I-2. Draft Circular, March 2013.
[6] *Federal Transit Administration Guidance on Joint Development*, Chapter I, Page I-2 Draft Circular, March 2013.

Joint Development Eligibility Requirements

The federal government supports the creation of "vibrant, compact, mixed-use, economically successful communities near transit" and provides discretion and maximum flexibility within existing regulations to create such communities near transit.[7] Under the federal definition of joint development, a joint development project must do the following:

1) Create an economic benefit by enhancing economic development or incorporating private investment, such as commercial and residential development;
2) Provide a public transportation benefit by either: (a) enhancing the effectiveness of a public transportation project and relating physically and functionally to the public transportation project or (b) establishing new or enhanced coordination between public transportation and other transportation;
3) Produce revenue and reserve a fair share of that revenue for public transportation; and
4) Provide that a person occupying space in a facility constructed with FTA funds must pay a fair share of the costs of the facility through rental payments or other means. [8]

FTA's joint development guidelines provide for a fairly broad interpretation of both commercial and residential development that enhances the effectiveness of public transportation, and does not expressly prohibit community-serving uses or affordable housing.[9] The list of eligible activities for joint development includes "facilities that incorporate community services such as daycare and health care." Affordable housing is neither specifically listed, nor is it prohibited as an eligible use, and this list is not exhaustive of other community uses.[10]

Fair Share of Revenue

The amount of a fair share of revenue and the form it takes, are negotiated between the parties involved in the joint development. In other words, what constitutes a fair share of revenue is up to the discretion of local authorities, generally the transit agency Board of Directors. Fair share of revenue is not limited to cash payments and may include an increase in revenue received by a transit agency, for example from rents (in its role as a landlord) or from increased passenger traffic from the joint development.[11] As such, FTA does **not** expressly define the term fair share, nor does it set a monetary threshold. FTA only requires the following:

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[7] *Federal Transit Administration Guidance on Joint Development*, Draft Circular, Chapter II, Page II-1, March 2013.
[8] *Federal Transit Administration Guidance on Joint Development*, Draft Circular, Chapter II, Page II-3 and Chapter III, Page III-2, March 2013.
[9] *Transit Law's Impact on Local Joint Development: An Explanation of Real and Perceived Barriers to Affordable Housing*, issued by the Los Angeles Neighborhood Based CDC Coalition with support from the Local Initiatives Support Corporation. Draft paper, March 2013.
[10] *Transit Law's Impact on Local Joint Development: An Explanation of Real and Perceived Barriers to Affordable Housing*, issued by the Los Angeles Neighborhood Based CDC Coalition with support from the Local Initiatives Support Corporation. Draft paper, March 2013.
[11] *Federal Transit Administration Guidance on Joint Development*, Draft Circular, Chapter III, Page III-6, March 2013.

1) The transit agency's Board of Directors (or equivalent government body) must determine that the terms and conditions of joint development are commercially reasonable and fair to the transit agency;
2) FTA must be provided an opportunity to review and approve the revenue as meaningful; and
3) The revenue must be used for public transportation.[12]

Based on the above parameters, no federal requirement appears to exist requiring a joint development project to generate a specific amount of revenue or the highest potential revenue for the site.[13] It is also important to keep in mind the distinction between *fair share of revenue* and *fair market value*. Fair market value is a legally defined term meaning the "most probable price that equipment or property would bring in a competitive and open market."[14] Fair market value is based on an appraisal of the land, which generally takes the value of the transit system into consideration. FTA does not require fair market value from joint development projects, just a fair share of revenue as defined above. (Fair market value is a requirement in other situations, however, such as sale of surplus property under federal law and in some instances under state law, as discussed later in this paper.) The proceeds from a joint development project (sale or lease) may be considered program income for the transit agency, which means they are eligible to be used for either capital or operating expenses.[15]

Fair Share of the Costs

Joint development projects require that the entity agreeing to occupy the space in a FTA-funded facility pay a fair share of the costs of the facility. Therefore, as long as the rental payment or other means of payment are at least equal to, but not less than the cost to the transit agency to operate and maintain the leased space, then a fair share of the costs of operating the facility can be met.[16] Thus, there is no federal requirement to charge the highest possible rent or market-rate rent on transit property used for joint development.

Real Property as Collateral under Joint Development

In the past, FTA has not allowed real property to be used as collateral for a loan under joint development. In one of the few new elements included in the draft circular, FTA now proposes to authorize "a recipient to encumber the title to, or interest in, real property acquired with FTA assistance,

[12] *Federal Transit Administration Guidance on Joint Development*, Draft Circular, Chapter III, Page III-6, March 2013.
[13] *Transit Law's Impact on Local Joint Development: An Explanation of Real and Perceived Barriers to Affordable Housing*, issued by the Los Angeles Neighborhood Based CDC Coalition with support from the Local Initiatives Support Corporation. Draft paper, March 2013.
[14] Grant Management Circular, 5010.1D. Federal Transit Administration, Chapter I, Page I-5, August 2012.
[15] Defined in 49 CFR 18.25 9g (referred to as the Common Grant Rule)
[16] *Federal Transit Administration Guidance on Joint Development*, Draft Circular, Chapter IV, Page III-7, March 2013.

so long as the recipient can maintain satisfactory continuing control over the property and ensures that federal interest in the property will be reasonably protected. This does not result in a disposition."[17]

This *proposed* change in structure would allow subordination of the federal interest in cases of private participation to fund or finance joint development. FTA is expected to provide further clarification on the meaning of this proposal in the final version of the circular. If this proposed guideline is adopted, it would allow for greater flexibility to more readily finance joint development projects (with FTA approval) and positively impact transit agencies' ability to partner in more development projects.

Conclusions Related to Federal Requirements for Joint Development

In general, the federal guidelines are supportive and flexible in allowing transit agencies to determine the use of property, provided FTA can approve and have oversight in the joint development process. FTA's goal for transit agencies is to maximize revenue and encourages transit agencies to undertake joint development and work with the private sector and others.[18] Transit agencies engaged in active joint development projects have learned to work effectively within the federal rules, as the examples discussed later in this paper demonstrate.

SURPLUS PROPERTY DISPOSITION: FEDERAL REQUIREMENTS

Under federal grant management rules, when federally encumbered property is no longer needed for the originally intended purpose, it becomes surplus property, at which point it can be disposed of. In the case of transit, when a property no longer has a public transportation purpose, then a transit agency (or other applicable authority) can request disposition instructions from FTA. During the disposition process, FTA may relinquish its interest in the property and provides instructions on how to handle the proceeds from the disposition.[19]

Surplus property disposition is distinct from joint development: property used in joint development has a continuing public transportation purpose, whereas surplus property does not. In other words, once a property is determined to be surplus, the joint development rules discussed above do not apply. Once surplus property is disposed of, the transit agency need not maintain continuing control or any other interest in the property. Title to the property can be transferred for fee simple ownership; in contrast, title under joint development may not be transferred in fee simple, as the transit agency must retain continuing control. Except in the case of transferring title to a public agency, fair market value is required during disposition.

[17] *Federal Transit Administration Guidance on Joint Development*, Draft Circular, Chapter IV, Page IV-2, March 2013.
[18] *Federal Transit Administration Guidance on Joint Development*, Draft Circular, Chapter II, Page II-1, March 2013.
[19] See 49 USC 5334 (h) and 49 CFR part 18

Generally, if property is no longer needed for the purpose of transit, a transit agency must request disposition instructions from the FTA. The FTA instructions will generally provide for one of the following alternatives:

1. *Sale of Property* – FTA can authorize the sale of a property that is no longer needed for its original purpose (See, 49 USC 5334(h)(A); 49 C.F.R. 18.32.) The proceeds from the sale must either be applied to another federally eligible capital project or compensate the FTA by returning a portion of any net sales proceeds of the property to the FTA, based upon the portion of the original purchase price that was paid for with federal funds.[20] Federal rules require the property to be sold for fair market value.[21]
2. *Retention of title* – FTA may authorize that the transit agency retain the title but would be required to compensate FTA for the federal interest in the property.
3. *Transfer of title* – FTA may authorize the transfer of a title to a third party or local government authority for a public purpose other than public transportation, with approval by FTA and satisfying the following:
    a. The assets remains in public use for a least five years after the date the property is transferred;
    b. There is no purpose eligible for FTA assistance for which the property should be used;
    c. The overall benefit of allowing the transfer is greater than FTA's interest in the liquidation and return of FTA's share in the asset, after consideration of fair market value and other factors; and
    d. There is no interest in acquiring the asset for federal government use.

The last alternative allows a transit agency to transfer land to a local housing agency, for example, to develop affordable housing.[22] Provided that the above requirements are satisfied, a transit agency could transfer land to a public agency for free without needing to compensate FTA.

Under the Common Grant Rule, the proceeds of a disposition are not considered program income and once sold, the property is not available for joint development. The revenues from a disposition must either be placed toward another open capital project or returned to the FTA.

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[20] *Federal Transit Administration Guidance on Joint Development*, Draft Circular, Chapter IV, Page IV-7, March 2013

[21] As defined above, fair market value is a legally defined term that provides the "most probable price that an equipment or property would bring in a competitive and open market." Fair market value is required under federal surplus land disposition rules.

[22] *Transit Law's Impact on Local Joint Development: An Explanation of Real and Perceived Barriers to Affordable Housing*, issued by the Los Angeles Neighborhood Based CDC Coalition with support from the Local Initiatives Support Corporation. Draft paper, March 2013.

SURPLUS PROPERTY DISPOSITION: CALIFORNIA-SPECIFIC REQUIREMENTS[23]

This section considers whether California state law restricts the ability of LACMTA to sell or lease surplus land[24] at less than fair market value, in order to support development, such as housing affordable to lower-income transit dependent riders. In answering this question, the following sources were reviewed: California Constitution, California Government Code sections 54220-54232 (known as the Surplus Land Act); California Government Code sections 54235-54238.7 (known as the Roberti Law), California Health and Safety Code (Sections 34201, 34501, 37000-37001.5, and 50074), California Public Contract Code, California Public Utilities Code (Sections 30000-33021, 130000-130455, and 130521), related case law and legislative history, California Attorney General opinions, LACMTA's "Disposition of Surplus Real Property" policy,[25] LACMTA's "Joint Development Policies and Procedures",[26] and LACMTA Funding Sources Guides (2006, 2008, 2012).[27]

Review of the above sources found barriers to disposing of surplus property for affordable housing purposes at less than fair market value in two limited situations. First, as described in Section 3, property originally acquired with "gas tax" funds must generally be disposed of at fair market value under Article XIX of the California Constitution. However, if that property qualifies as "surplus residential property" and the disposition helps to mitigate against the environmental effect of displacement (by preserving and expanding the supply of housing affordable to families of low and moderate income), the California Constitution does not prohibit sale at less than fair market value. Second, through a priority of disposition process outlined in the Roberti Law and described in more detail in Appendix B, in some circumstances, "surplus residential property" that is developed as single or multifamily housing must first be offered to former owners, occupants, and/or housing-related entities at prices ranging from acquisition price to fair market value.

Except in the above two scenarios, this analysis found no relevant barriers to LACMTA's disposition or joint development of land for affordable housing at less than fair market value. LACMTA's own policies

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[23] This paper provides only a general overview of the legal authority for these transactions. It should not be understood as an exhaustive examination of all relevant state law. The lawfulness of any particular project will depend on the specific details of that transaction and must be reviewed on an individual basis.

[24] For purposes of California law, surplus land means "land owned by any local agency, that is determined to be no longer necessary for the agency's use except property being held by the agency for the purpose of exchange." CAL. GOV'T CODE § 54221(b). Because projects fitting within federal law's definition of joint development must have a continuing transit purpose, it does not appear that California's Surplus Land Act (discussed in section 3, below) would generally apply to these projects. However, this issue has not been definitively decided under California law, and the applicability of the Surplus Land Act should only be determined on a project-level basis.

[25] Available at: http://www.metro.net/about_us/library/images/Disposition%20of%20Surplus%20Real%20Property.pdf

[26] Available at: http://www.metro.net/projects_studies/joint_development/images/JDP_polices-procedures.pdf

explicitly acknowledge the *ability* to sell at less than fair market value - but are *structured* to encourage disposition at or above fair market value.

1. LACMTA's Enabling Statutes Do Not Require Fair Market Value or Competitive Bid Processes

LACMTA was created by the merger of the Southern California Rapid Transit District (SCRTD) and the Los Angeles County Transportation Commission (LACTC). Its enabling statutes are located in Public Utilities Code sections 130050.2-130051.28, which abolish SCRTD and LACTC, and create LACMTA in their place.[28] Following the creation of LACMTA, both the statutes governing SCRTD[29] and LACTC[30] govern LACMTA.[31] These statutes grant LACMTA broad powers to acquire and dispose of real property.[32] **Review of these statutes finds no barriers to LACMTA's disposition of property for less than fair market value (including selling, leasing, jointly developing, or otherwise disposing of surplus real property). In addition, no requirements were found in these statutes that LACMTA utilize competitive bid processes when disposing of such property.**

LACMTA's authorizing statutes grant the agency broad discretion to decide *how* to pursue optimal transit service for the people of Los Angeles County. The authorizing statutes specifically reserve to Metro several exclusive powers and responsibilities, including "[e]stablishment of overall goals and objectives to achieve optimal transport service for the movement of goods and people on a countywide basis."[33] Further, the authorizing statutes of LACMTA's predecessors (the Southern California Rapid Transit District and the Los Angeles County Transportation Commission) give LACMTA broad discretion in pursuing its ultimate purpose of optimal transit service.[34]

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[28] Public Utilities Code section 130051.2 creates Metro, while section 130051.13 abolishes SCRTD and LACTC and states that Metro succeeds to all of powers and duties of these bodies. Section 130051.14 merges those entities into Metro, stating that any references to SCRTD or LACTC "shall be deemed to refer to [Metro]."

[29] CAL. PUB. UTIL. CODE §§ 30000-33201.

[30] CAL. PUB. UTIL. CODE §§ 130000-130455.

[31] CAL. PUB. UTIL. CODE § 130051.14.

[32] CAL. PUB. UTIL. CODE § 30600 ("The district [SCRTD, now Metro] may take by grant, purchase, gift, devise, or lease, or by condemnation, or otherwise acquire, and hold and enjoy, real and personal property of every kind within or without the district necessary or incidental to the full or convenient exercise of its powers. That property includes, but is not limited to, property necessary for, incidental to, or convenient for joint development and property physically or functionally related to rapid transit service or facilities. The board may lease, sell, jointly develop, or otherwise dispose of any real or personal property within or without the district when, in its judgment, it is for the best interests of the district so to do."); CAL. PUB. UTIL. CODE § 130521 ("The commission [LACTC, now Metro] may . . . lease, develop, jointly develop, maintain, operate, or dispose of any property, right, or interest in the manner that is necessary or desirable to carry out the objects and purposes of this chapter.").

[33] CAL. PUB. UTIL. CODE § 130051.12(a)

[34] *See* CAL. PUB. UTIL. CODE §§ 30530; 30600 (granting broad powers to SCRTD to act in interest of district); 130220-139221 (granting LACTC powers).

Research has established that affordable housing opportunities near transit are necessary to achieve the goal of optimal public transit service. A recent study by the California Housing Partnership Corporation confirms that while people of all income levels are more likely to use transit if it is proximate to their homes, low-income people use transit much more often than others.[35] Another study shows that LACMTA risks a transit usage *decline* to the extent that core transit users cannot afford to live near transit as housing costs near transit rise.[36] Therefore, LACMTA policies promoting affordable housing, such as selling or leasing surplus land to affordable housing providers for less than fair market value, are consistent with LACMTA's goal of optimal transit service and are allowable under LACMTA's authorizing statutes.

For these reasons, other transit agencies have taken actions to support affordable housing, consistent with their transit planning mission. For example, the San Francisco Metropolitan Transportation Commission (SFMTC) recently contributed $10 million to the Bay Area's Transit-Oriented Housing Fund, a revolving loan fund for affordable housing developers. Although SFMTC is a metropolitan planning organization under federal law, both Metro and SFMTC have analogous purposes under California law.[37] Similarly, as discussed in more detail on page 22 and 28, the Portland Tri-County Metropolitan Transportation District of Oregon purchased property adjacent to one of its rail lines specifically for the purpose of having it developed into affordable residential units, and sold it at a discount sales price – the discounted price was justified by an expected increase in fare revenue.[38]

LACMTA's enabling statute does not require fair market value or a competitive bid process. Moreover, the statutes grant LACMTA broad discretion in how to achieve its fundamental purpose of optimizing transit service. This discretion includes maintaining and increasing core transit ridership by promoting affordable housing near transit through, for example, sales and leases below fair market value.

2. The California Constitution Presents Limited Barriers to the Disposition or Joint Development of Surplus Public Land for Less Than Fair Market Value

A. Disposing of Surplus Land for Affordable Housing at Less Than Fair Market Value Does Not Violate Article XVI's Prohibition Against Gifts of Public Funds

Article XVI, Section 6, of the California Constitution generally prohibits public entities from providing gifts of public funds. Conveying public property at below-market rates could, in some situations, violate

[35] California Housing Partnership Corporation, Building and Preserving Affordable Homes Near Transit: Affordable TOD as Greenhouse Gas Reduction and Equity Strategy 3 (Jan. 2013).
[36] Dukakis Center for Urban and Regional Policy, Maintaining Diversity in America's Transit-Rich Neighborhoods: Tools for Equitable Neighborhood Change 24-29 (Oct. 2010).
[37] *See* CAL. GOV'T CODE § 66502 (stating that the function of SFMTC is "to provide comprehensive regional *transportation planning* for the region") (emphasis added).
[38] TriMet, Livable Portland: Land Use and Transportation Initiatives (Nov. 2010). The statute authorizing TriMet grants it a purpose similar to that of LACMTA. *See* OR. REV. STAT. § 267.080 (stating that a mass transit district may be created "for the purpose of *providing a mass transit system* for the people of the district") (emphasis added).

Article XVI. Specifically, Section 6 prohibits "the making of any gift, of any public money or thing of value to any individual, municipal or other corporation."[39] One could argue that an agreement to sell or rent property below fair market value could constitute an illegal gift of a public "thing of value" in the form of the discount in price. However, "public credit may be extended and public funds disbursed if a direct and substantial public purpose is served and nonstate entities are benefited only as an incident to the public purpose."[40] In such a case, "the benefit to the state from an expenditure for a public purpose is in the nature of consideration and the funds expended are therefore not a gift" but are deemed consideration for a contract with the state.[41] Thus, sale or lease of public property for less than fair market value is constitutional where the sale or lease involves a valid public purpose.

Whether a particular activity serves a valid public purpose for which public funds may be expended is generally determined by the Legislature.[42] The Legislature has affirmed numerous times that increasing the stock of affordable housing for low- and moderate-income residents is not only a valid public purpose, but is a chief priority for the state.[43] The California Court of Appeal confirmed this in *Winkelman v. City of Tiburon,* holding that a below-market rate transfer of property to a private developer was not an impermissible gift of public funds because it would "promote the public purpose of encouraging the construction of moderate and low income housing."[44] Therefore, the state constitutional prohibition against gifts of public funds does not bar LACMTA from conveying its properties for less than fair market value for the public purpose of increasing the availability of affordable housing, whether those properties are conveyed to public agencies or private parties.

B. Article XIX Requires Fair Market Value at Disposition for Surplus Nonresidential Property Acquired with "Gas Tax" Funds

Article XIX of the California Constitution restricts the use of state "gas tax" funds—including the State Highway Users Account, taxes on motor vehicle fuels, and fees and taxes imposed on the use of motor vehicles[45]—to transportation-related purposes, such as the planning, construction, and improvement of streets and highways, and public mass transit.[46] Article XIX declares these funds to be held in trust for the State, and prohibits the use of these funds for non-transportation-related purposes.[47] Generally,

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[39] CAL. CONST. art XVI, § 6.
[40] *California Housing Finance Agency v. Elliott* (1976) 17 Cal. 3d 575, 583.
[41] *County of Alameda v. Carleson* (1971) 5 Cal. 3d 730, 745-46.
[42] *See Elliott* at 583.
[43] *See, e.g.,* CAL. GOV'T CODE §§ 37364, 54235; CAL. HEALTH & SAFETY CODE § 34201(c) ("the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent"); CAL. HEALTH & SAFETY CODE § 34501.
[44] *Winkelman v. City of Tiburon* (1973) 32 Cal. App. 3d 834, 845.
[45] *See* Metro, Funding Sources Guide (2012); Metro, Funding Sources Guide (2008); Metro, Funding Sources Guide (2006).
[46] CAL. CONST. art. XIX, §§ 2-3.
[47] *Id.*

disposing of *non-residential* property acquired with gas tax funds for less than full market value is prohibited because it constitutes an impermissible use of the public trust.[48]

In answer to the question of whether the Constitution prohibits a public agency from selling or renting surplus *residential* real property acquired with gas tax funds at less than the property's fair market value, the Attorney General has opined that below-market sales or rentals of such properties are constitutionally permissible "if the property qualifies as surplus residential property under the affordable housing legislation known as the Roberti Law."[49] This exception only applies where the property to be sold qualifies as "surplus residential property" as defined by the Government Code.[50] It is unclear whether and to what extent LACMTA has such property. It is possible that a transit agency could acquire residential properties with the intent of removing the housing and building transit facilities. If the properties are later determined not to be needed for these facilities, the property would become surplus. Surplus residential property is discussed in greater detail in Appendix B.

3. The California Surplus Land Act Does Not Prohibit the Disposition or Joint Development of Surplus Property at Less Than Fair Market Value

California Government Code sections 54220-54232, known as the Surplus Land Act, outline local government agencies' powers and duties regarding surplus land. The Surplus Land Act states generally that "housing is of vital statewide importance to the health, safety, and welfare of the residents of this state and that provision of a decent home and a suitable living environment for every Californian is a priority of the highest order."[51] The Act also states that "there is a shortage of sites available for housing for persons and families of low and moderate income and that surplus government land, prior to disposition, should be made available for that purpose."[52]

The Surplus Land Act applies to LACMTA, and requires LACMTA to offer surplus property to local public agencies in which jurisdiction the land is located, and to certain "housing sponsors" for the purpose of developing low- and moderate-income housing. Section 54222(a) requires that prior to the disposition of a property, the local agency[53] that owns the property shall send a written offer to sell or lease the

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[48] *See* 92 Ops. Cal. Att'y Gen. 73 (citing *Provident Land Corp. v. Zumwalt* (1938) 12 Cal. 2d 365, 375).
[49] 92 Ops. Cal. Att'y Gen. 73.
[50] *See id.* "Surplus residential property" is defined as "land and structures owned by any agency of the state that is determined to be no longer necessary for the agency's use, and that is developed as single-family or multifamily housing, except property being held by the agency for the purpose of exchange. Surplus residential properties shall only include land and structures that, at the time of purchase by the state, the state had intended to remove the residences thereon and to use the land for state purposes." CAL. GOV'T CODE § 64236(d). *See also* Appendix B of this memo.
[51] CAL. GOV'T CODE § 54220(a).
[52] *Id.*
[53] Government Code section 54221 defines "local agency" as "every city, whether organized under general law or by charter, county, city and county, and district, including school districts of any kind or class, empowered to acquire and hold real property."

land for the purpose of developing low- and moderate-income housing to any local public entity and to housing sponsors (upon written request).[54] Section 54227 requires the agency to give first priority to the entity that agrees to use the site for housing for persons and families of low or moderate income unless the land is designated or is being used as park land. Agencies may also purchase surplus property and then convey to nonprofit or for-profit affordable housing developers.[55] Certain surplus land, with small lot sizes, is exempt from these requirements.[56]

In addition to the requirement to offer surplus land to local agencies, the Surplus Land Act requires LACMTA to send written offers directly to "housing sponsors" for the development of low-and moderate-income housing, upon written request. Health and Safety Code section 50074 defines "housing sponsor" as an entity certified by the California Housing Finance Agency as qualified to own, construct, acquire or rehabilitate a housing development. However, no apparent housing sponsor list or certification procedure exists to help effectuate this process. As well, LACMTA's Disposition of Surplus Real Property policy makes no mention of the requirement to offer land to housing sponsors. The legal requirement to make an offer directly to housing sponsors upon written request could be a potentially important mechanism to transfer land to nonprofit developers interested in developing affordable housing. However, the apparent lack of a housing sponsor list or other mechanism to qualify nonprofit developers as "housing sponsors," and to provide notice to nonprofit developers so they can request an offer from LACMTA, may effectively serve as a barrier to nonprofit procurement of properties for affordable housing.

Once LACMTA receives notice from an entity desiring to purchase or lease the land (e.g. the local public agency, or the housing sponsor, as the case may be), it is required to enter into good faith negotiations to determine a mutually satisfactory sales price. If a price cannot be agreed upon within 60 days, LACMTA is permitted to dispose of the land without further application of the Surplus Land Act.[57]

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[54] CAL. GOV'T CODE § 54222(a). Notice must be sent "to any local public entity, as defined in Section 50079 of the Health and Safety Code, within whose jurisdiction the surplus land is located. Housing sponsors, as defined by Section 50074 of the Health and Safety Code, shall be sent, upon written request, a written offer to sell or lease surplus land for the purpose of developing low- and moderate-income housing." Health & Safety Code section 50074 defines "housing sponsor" as one of several different types of entities "certified by the agency pursuant to rules and regulations of the agency as qualified to either own, construct, acquire or rehabilitate a housing development . . ." Health & Safety Code section 50054 defines "agency" in that section as the California Housing Finance Agency. However, during a phone conversation, staff at CHFA were unfamiliar with the term and, after investigating further, revealed that the CHFA had not created any rules or regulations for certifying housing sponsors. The term comes from a 1977 bill that appears to be "dead letter" law.

[55] CAL. GOV'T CODE § 54224.

[56] Section 54222 does not apply to the disposal of exempt surplus land. CAL. GOV'T CODE § 54222.3. "Exempt surplus land" is defined as land that is less than 5,000 square feet in area or less than the local minimum legal residential building lot size, whichever is less, or land that is less than 10,000 square feet with no record access; and is not contiguous to land used by a state or local agency for parks or recreation, or affordable housing, and is not within an enterprise zone or a designated program area. *See* CAL. GOV'T CODE § 54221(e)-(f).

[57] CAL. GOV'T CODE § 54223.

The Surplus Land Act contains no express requirement that property be disposed of for fair market value. Indeed, Section 54226 states, "[n]othing in this article shall be interpreted to limit the power of any local agency to sell or lease surplus land at fair market value or at less than fair market value, and nothing in this article shall be interpreted to empower any local agency to sell or lease surplus land at less than fair market value."[58] While the Act previously contained an express requirement that land be disposed of at fair market value[59], that requirement was removed pursuant to a 1982 amendment reordering the disposition procedure to make affordable housing the first priority.[60] Section 54226 was added with this amendment, and establishes that there is no requirement in the Surplus Land Act that surplus land be sold or leased for fair market value (unless required by other legal obligations of the disposing agency).[61]

As described above, the Surplus Land Act outlines a procedure for disposition of surplus land, leaving the issue of sales price to the parties' negotiating processes, and expressing a clear preference that such land be used for affordable housing purposes and given first priority for such use.[62] **The Act does not represent a legal barrier to LACMTA's transfer of property to other entities for development.**

4. Consistent with the Surplus Land Act, LACMTA's Policies Do Not Prohibit Disposition of Surplus Land for Less Than Fair Market Value, though Joint Development Policy Requires a "Fair Market Return"

Consistent with the Surplus Land Act, LACMTA's internal policies do not expressly prohibit disposition of property for less than market value. However, in practice, the internal policies effectuate the goal of achieving a fair market return in both disposition and joint development of LACMTA's assets.

A. Disposition of Surplus Real Property

LACMTA's Disposition of Surplus Real Property Procedures (Disposition Procedures) require that surplus land be disposed of through a competitive bid process, but only after local agencies, housing sponsors, and adjacent property owners, in this order, have had the opportunity to submit offers to purchase or lease the property.[63] The procedures require LACMTA to offer its surplus property to (a) public agencies

[58] CAL. GOV'T CODE § 54226.
[59] CAL. GOV'T CODE § 54222, Stats. 1979 Ch. 942 § 3 (1979) (amended 1982).
[60] CAL. GOV'T CODE § 54222, Stats. 1982 ch. 1442 § 3 (1982).
[61] CAL. GOV'T CODE § 54226, Stats. 1982 ch. 532 § 11 (1982).
[62] CAL. GOV'T CODE § 54222. The Legislature has indicated the importance of concentrating housing and development near transit: "Studies of transit ridership in California indicate that a higher percentage of persons who live or work within walking distance of major transit stations utilize the transit system more than those living elsewhere. The Legislature also notes that the Federal Transit Administration gives priority for funding of rail transit proposals to areas that are implementing higher-density, mixed-use development near major transit stations." CAL. GOV'T CODE § 54220 (c).
[63] Metro, Disposition of Surplus Real Property (Disposition Procedures), *available at* http://www.metro.net/about_us/library/images/Disposition%20of%20Surplus%20Real%20Property.pdf.

pursuant to the Surplus Land Act; (b) adjacent property owners; and (c) to the party who submits the highest bid. Interestingly, no mention is made in the Disposition Procedures of the offer to "housing sponsors" required by the Surplus Land Act and described in Section IV of this memo.

While LACMTA's Disposition Procedures do not expressly prohibit disposition at less than fair market value, they do appear to incorporate a fair market value requirement in a number of circumstances. First, in the context of competing bids from public agencies, LACMTA's Disposition Procedures give first priority to the public agency that agrees to use the property for affordable housing (with certain exceptions) and second priority to the public agency that offers *fair market value*. The Disposition Procedures related to public agencies appear, therefore, to add a fair market value requirement that is not actually required by the Surplus Land Act.

Second, LACMTA's Disposition Procedures establish a competitive sealed bid or public auction process (also not required by the Surplus Land Act) if a sale is not accomplished after the required offers have been made to public agencies and adjacent land owners. While the Disposition Procedures do not expressly prohibit sale to these parties at *less* than fair market value, the reality in implementation of the competitive bid process is that the property will be sold to the party who makes the highest offer, which may in some cases be well above appraised value.[64]

Finally, LACMTA's Disposition Procedures acknowledge LACMTA's ability to convey surplus property for less than fair market value when determined to be in LACMTA's "best interest."[65] Specifically, "less than fair market value may be accepted if it is determined to be in the best interest to sell the property for a negotiated amount that is subsequently approved by the CEO or the Board of Directors."[66] This would appear to be consistent with the discretion afforded LACMTA by the Surplus Land Act.

B. Joint Development

LACMTA's Joint Development Policies and Procedures (Joint Development Policies) expressly seek developments that generate a "fair market return."[67] The Joint Development Policies encourage projects which do not require commitment of LACMTA's financial resources, minimize any investment risk, and maximize asset security for LACMTA. Projects are encouraged which create a long-term source of revenue to LACMTA and allow LACMTA to participate in the increase in value of its real estate assets over time.

Despite the fair market return criteria, the Joint Development Policies can be used to support affordable housing joint development projects because project criteria expressly include consideration of:

[64] *See* Disposition Procedures at 7 ("The apparent highest bidder will be determined and announced.").
[65] *Id.* at 1.
[66] *Id.*
[67] Metro, Joint Development Policies and Procedures at 1, *available at* http://www.metro.net/projects_studies/joint_development/images/JDP_polices-procedures.pdf.

"responsiveness to community needs for housing…" and the provision of a "range of housing types" to meet diverse incomes, "particularly if such diversity of housing is not currently provided within walking distance of the transit system."[68]

5. Conclusions Related to State Law

Based upon the laws reviewed, the primary restrictions on LACMTA's ability to dispose of land for less than fair market value are contained in Articles XVI and XIX of the California Constitution. In the context of affordable housing, Article XVI's prohibition against gifts of public funds does not prevent disposition for less than fair market value, because affordable housing presents a valid public purpose. However, Article XIX does require public agencies to receive fair market value upon disposition of property acquired with gas tax funds, unless the property qualifies as "surplus residential property" under the Roberti Act. Under the Roberti Act, "surplus residential property" that is developed as single or multifamily housing must first be offered to certain parties at prices ranging from acquisition price to fair market value. It is unclear how much of LACMTA's surplus property was acquired with gas tax funds or how much of this property fits the definition of surplus residential property.

In general, the procedures prescribed in the Government Code for disposing of surplus land and surplus residential property support the development of such properties for affordable housing purposes. Except in the limited circumstances described above, these procedures generally do not prohibit property transfers at below-market rates to enable such development, and the Legislature has affirmed numerous times the benefits this provides to the people, agencies, and State of California.[69] LACMTA's own policies acknowledge the discretion LACMTA has by allowing for below-market rate transfers of surplus properties when determined to be in the best interest of LACMTA.

LAND SALE, LAND DISCOUNT, AND LAND DONATION: EXAMPLES FROM OTHER TRANSIT AGENCIES

The following section reviews requirements related to land sale, land discounts, land donation, and land transfer and provides examples of each from other transit agencies. Based on interviews conducted with these agencies, residential development, including affordable housing, can be supported while also allowing the transit agency to benefit from the overall joint development or land disposition transaction. The strategies below represent the primary mechanisms by which transit agencies support production of new housing through joint development or land disposition. In some cases, the strategies are applicable to both affordable and market-rate housing, while in other cases, they are specific to affordable housing.

[68] *Id.* at 2-3.
[69] *See, e.g.,* CAL GOV'T CODE §§ 37364, 54220, 54235.

1. Land Sale

Although there is a general belief that joint development requires property to be leased, that is not always the case. Transit agencies engaged in joint development may either lease property or sell property, provided a deed restriction or easement is maintained to retain satisfactory continuing control. In and of themselves, selling or leasing land are not strategies for encouraging development. Either can be successfully used to support residential or mixed-use development, including affordable housing. The decision of whether to sell or lease depends on the *context* of the sale and the *needs and preferences* of the transit agency.

Some transit agencies prefer to sell property rather than lease because they either need a large infusion of cash upfront, or they do not have the institutional capacity to manage leases over the long term. On the other hand, some transit agencies prefer to lease because leasing creates a steady revenue stream over time, or because they do not believe that public land should be sold to private owners. For example, LACMTA and the Washington Metropolitan Area Transit Authority (WMATA), both large transit agencies, prefer to lease land, but will sell in circumstances where a land sale does not compromise operating needs and where project progress and success depend on the developer owning the land.

In some cases, the type of project proposed to be built will determine whether the underlying property is leased or sold. Residential development that is intended for home ownership often cannot get financing unless the developer owns the underlying property, so in those cases, the transit agency will typically sell the land, even if its general preference is to lease.

There are two ways to sell land:

1. Sale under joint development – Transit agencies have the ability to sell land under joint development, provided that the land has a transit purpose and the transit agency maintains satisfactory continuing control, keeping the property perpetually in a transit use. This strategy is not a surplus land disposition. The land must be sold with restrictions to maintain access either through an easement, covenant, or other "reservation of rights." Under federal law, a sale under joint development need not be made for fair market value; it must only return a fair share of revenue to the transit agency.

2. Sale under disposition – When there is no transit purpose, land can be sold with permission from the FTA. Under disposition rules, the transit agency must receive fair market value for the land. Under California law, however, land that is no longer necessary for an agency's use must first be offered to certain parties, e.g., housing sponsors, and for certain purposes, foremost among them the development of low- and moderate-income housing. The State Surplus Property Act does not expressly set the price at which land can be disposed of.

TriMet, which operates light rail, bus, and commuter rail service in Portland, Oregon, for example, has sold property under joint development rather than lease because it does not have the institutional

capacity to manage leases over the long term. Its parcels are also small and would not be a significant source of revenue over time. When a property is sold by TriMet it not only has a restriction to maintain satisfactory continuing control, but also has development controls embedded in the transaction. As will be discussed in the section below, several joint developments sponsored by TriMet required a certain amount of affordable units. TriMet's willingness to sell is not based on its support for affordable housing, but on its own agency needs.

In another example, the Charlotte Area Transit System (CATS) in Charlotte, NC has completed one joint development deal at the Scaleybark station, which also occurred as a sale of land with restrictions. CATS wanted upfront cash, and developers in the Charlotte area typically do not want to lease transit agency land. CATS negotiated a deal that included a covenant requiring a minimum of 80 affordable housing units to be placed on the land, out of an approximately 200 overall units. The requirement for affordable housing was developed in support of a City of Charlotte policy, which encourages a minimum of five percent up to a maximum of 25 percent of any development with multi-family units to be assisted units. In addition to the requirement for affordable housing, CATS also maintains continuing control of the land, as required by the FTA. It is important to note that CATS is a transit department housed within the City of Charlotte, making it easier to justify supporting particular city policies from other departments related to development and affordability.

In both examples the agencies placed a requirement for affordable housing as a condition of sale in the joint development process. A transit agency would also be able to structure similar requirements while leasing land, if that is their preference (as it is for LACMTA). LACMTA has completed deals as leases in the past and there is no evidence that a "sell" structure would enable them to have better development deals, except possibly in cases in which the developer wants to create homeownership units.

Alternative Sale Strategy: Property Exchange via Land Disposition

In some cases, an exchange of property with an adjacent land owner can facilitate a development project. For example, a property owner near a Utah Transit Authority station was unable to build a desired development on the land he owned because of the way it was situated. He purchased a parcel of UTA land with 90 parking spaces for fair market value, and then sold his parcel to UTA. UTA required him to rebuild the parking spaces on the land the agency purchased, and he was then able to develop the land that UTA had formerly owned. In this case, the project built was market-rate residential.

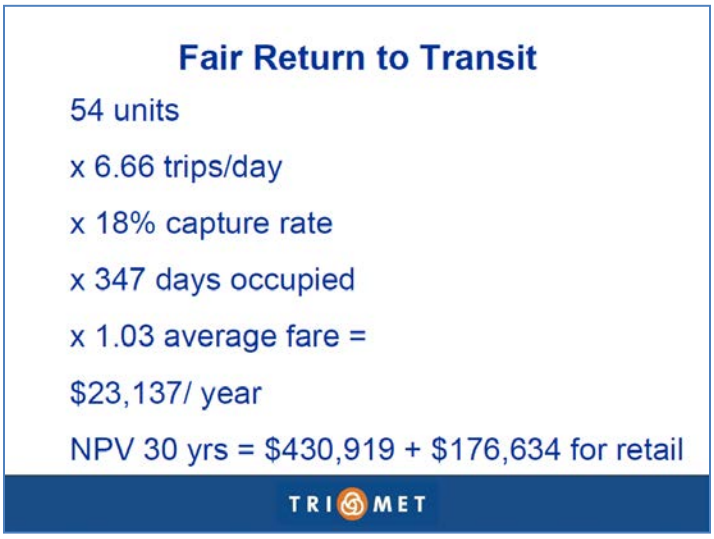
In the UTA example, the property exchange was not joint development, but rather a disposition of land for fair market value, and purchase of an adjacent parcel. As discussed above, when FTA views a project as a disposition of surplus land, its rules require the transit agency to receive fair market value for that land. Therefore, it is unlikely that a transit agency could discount or donate land in a property exchange to support development. In addition, California's Surplus Land Act has requirements for offering the surplus property to local public agencies and housing sponsors. Nonetheless, it is important for LACMTA to understand that this mechanism is available, as it can be used for mixed-use or affordable residential

development if that is what the adjacent landowner plans to build and state law requirements can be met.

2. Land Discount

The only stipulation in federal joint development rules regarding the sale or lease price of land is that the transit agency must receive a fair share of the revenue from the project. What constitutes a fair share of revenue is determined locally: the transit agency's Board of Directors must find that the terms of the joint development project are "commercially reasonable and fair to the [agency]."[70] Under recently proposed guidelines, however, FTA reserves the right not to approve a joint development project if it finds that the project does not generate a "meaningful amount of revenue."[71]

Whether land is sold or leased for fair market value or for a lesser amount is typically the subject of negotiations between the transit agency and the developer. Transit agencies interviewed indicated that when a project was required to include an affordable housing component (either as a result of transit agency policy or local ordinances), the fair market value would be reduced as a result, and the negotiated lease or sale price may be lower than it would have been without such a requirement. Federal joint development rules allow transit agencies to accept a discounted price in these circumstances, as long as the Board determines that it is "fair" and, as currently proposed, the FTA determines that it is "meaningful."



"Making Joint Development Work: The Transit Agency Perspective." Presented by Jillian Detweiler, Director of Real Estate, TriMet, February 14, 2012.

TriMet has required developers of its property to include a certain number of affordable residential units. Such a requirement is consistent with federal joint development guidelines, which do not limit transit agencies' ability to place requirements of this type on developers. As a result, developers see reduced value in the land and therefore will reduce the price they are willing to pay for it. TriMet has acknowledged this fact, and has justified the reduced prices to its Board of Directors by demonstrating the positive impact that locating affordable housing near its stations will have on ridership. TriMet quantifies this impact with a formula that takes into account the number of units in the

[70] *Federal Transit Administration Guidance on Joint Development,* Draft Circular, Chapter III, Page III-6, March 2013.
[71] *Federal Transit Administration Guidance on Joint Development*, Draft Circular, Chapter III, PageIII-6, March 2013.

development, the number of trips expected to be made by residents each day, the percent of those trips that are expected to be made on transit, and the number of days per year in which the units will be occupied. Once this data is collected, it is multiplied by the average fare, to generate an estimate of revenue that TriMet will receive from increased ridership stemming from the new development. An illustration of this is shown in the image above.

For the Patton Park Apartments, a joint development project which included 54 affordable units as well as ground-floor retail, this calculation projected that the net present value of fares TriMet would receive over the next 30 years was $430,919 (plus $176,634 from the retail portion of the project).[72] In order to assure the success of the development, TriMet was willing to write down the sale price of the land up to the amount that would be returned to the agency through future fares.

Requiring joint development to include affordable housing, apart from any local ordinances to that effect, appears to be the exception, not the rule. The advantage of this strategy for achieving affordable housing goals is that the transit agency can influence the location and amount of affordable housing being built at its stations through specific requirements within the joint development solicitation. Most transit agencies interviewed did not use this strategy, generally because those agencies feel that affordable housing requirements are solely within the purview of the jurisdictions they serve and not the responsibility of the transit agency, or because their local jurisdictions already have specific affordable housing requirements that would be encompassed within any joint development project.

In another example, the Washington Metropolitan Area Transit Authority (WMATA) is deferential to local jurisdictions' requirements for affordable housing in its joint development projects. WMATA's member jurisdictions each have different requirements, so thus far, WMATA's Board of Directors has not been able to adopt a uniform policy governing land discounts for affordable housing. WMATA uses an RFQ process,[73] so there is an extensive period of negotiation between the developer and the agency,

[72] TriMet compares the revenue impact of the project being proposed to the revenue impact of what the market would provide on its own. In the Patton Park case, the market, left alone, was not producing anything; that parcel had been home to an old motel for many years and the market was not moving to redevelop it.

[73] There are three basic methods that transit agencies (or departments) use to solicit proposals for joint development: Invitation to Bid (ITB), Request for Qualifications (RFQ), or Request for Proposals (RFP). The structure of each solicitation allows for a different interaction between the transit agency, the community, the city, and the developer. In an ITB process, the transit agency develops specific requirements for the project to comply with local design and zoning regulations. The proposed project will typically be vetted with community members and civic leaders prior to the ITB being issued. In an RFP process, the transit agency's solicitation establishes general guidelines for developing a particular parcel of land, and the developer proposes a specific project. In an RFQ process, the transit agency selects a developer based on capability and qualifications to complete a project. A RFQ is intended to select a capable developer who will negotiate a real estate deal that is beneficial to both parties. LACMTA uses an RFP process.

during which local affordable housing requirements, and their impacts on project economics, can be evaluated and discussed. The net impact on project economics of local affordable housing requirements will vary depending upon jurisdictional requirements as well as other factors that will affect the development. Ultimately, each project will be presented to the Board of Directors for review and action.

In the case of Bay Area Rapid Transit (BART), the transit agency has been willing to reduce lease payments for BART-owned land in exchange for a share of the performance of the development in the future. In this case, the agency justified the discounted lease rates by pointing to a future stream of profits stemming from the development. This technique is most useful for market-rate or mixed-income developments which are expected to return a profit.

3. Land Donation

Under federal joint development rules, it is theoretically possible for a transit agency to donate land if the transit agency can show that the fare revenue generated by the project will be large enough to provide the transit agency with a fair share of revenue from the project taking into consideration the lost revenue from the donation of the land (similar in concept to the TriMet example above). It is not clear whether any development project could generate enough fare revenue to create a "fair share of revenue" as determined by the transit agency Board, and a "meaningful amount of revenue" as determined by FTA, to satisfy the joint development requirements. There were no examples uncovered of transit agencies justifying a land donation based on future fare revenue.

However, a transit agency can contribute land in exchange for a future share of profits (similar to the BART example under "Land Discounts"). The Utah Transit Authority (UTA) received permission from FTA to contribute land to a Limited Liability Corporation, made up of UTA and a private developer for the sole purpose of developing the land. As a partner in the LLC, UTA would receive a share of the profits generated from the development. The benefit of this approach for UTA is that it provides risk protection by segregating the development project from UTA's other assets; in other words, if the project does not succeed, UTA's other assets would not be at risk. The land contributed by UTA was considered part of the equity stack for the project, which was important for receiving financing for the project.[74] Similar to the BART example, this technique is most useful for projects that are expected to produce a profit over time, in order to provide the transit agency with a fair share of revenue.

4. *Land Transfer*

Under federal surplus property disposition rules, typically a transit agency will be required to receive fair market value for property that has been deemed surplus. However, as discussed above, if the land is transferred to a local governmental authority and remains in public use for at least five years, FTA may

[74] Written Statement of Kathy Olson, Transit Oriented Developer, Utah Transit Authority, FTA/CTOD Joint Development Roundtable, April 27, 2011.

allow the transfer for less than fair market value, which can include transferring the land for free. This authority has rarely been used by transit agencies, and FTA staff could not recall any examples of this type of transfer within the last five years.[75] In addition, California law places additional requirements on the disposition of surplus property, with which LACMTA would have to comply. Nonetheless, this appears to be a promising strategy that deserves further exploration, as it could allow for additional production of affordable housing through coordination between LACMTA and another public agency.

Additional Strategies for Joint Development and Surplus Property Disposition to Encourage Residential and Mixed-Use Development

The interviews conducted with transit agencies across the country revealed additional strategies to support new development near transit in addition to land sale, discount, and donation. These strategies include 1) affordable housing policies, 2) flexible payment structures, and 3) strategic land acquisition for joint development purposes. Because these strategies were not extensively researched as part of this paper, they are presented here as illustrations of activities that may merit further exploration, including a review of additional state laws that may apply beyond those that were reviewed for this paper. As noted below, LACMTA has already engaged in some of these strategies to a certain extent, but may benefit from a review of the activities that peer agencies are engaged in.

1. Transit Agency Affordable Housing Policies

There is no federal, state, or local requirement mandating transit agencies to create a policy to support affordable housing. Still, in 2009, FRESC[76] and Enterprise completed a study showing that at least nine of the largest transit agencies had policies supporting affordable housing, including LACMTA.[77] While new research is needed on the current number of agencies with supportive policies, anecdotal information from interviews with transit agencies indicates that this number may be increasing. Among agencies interviewed, the Metropolitan Atlanta Rapid Transit Authority (MARTA) has the most aggressive policy for affordable housing. MARTA policy states that at least 20 percent of residential or mixed-use TOD projects must include affordable housing for workforce households, seniors with low, moderate, or fixed incomes, and persons with disabilities.[78] The policy is also supportive of local development goals that support affordable housing such as density bonuses, particularly for workforce housing. MARTA has not produced any units to date under this policy, due to market conditions and financial issues.

[75] Interview with Jayme Blakesley and Candace Key, Office of the Chief Counsel, Federal Transit Administration, February 19, 2013.
[76] FRESC is a nonprofit organization working primarily in the Denver region.
[77] Kniech, Robin and Pollack, Melinda, "Making Affordable Housing at Transit a Reality: Best Practices in Transit Agency Joint Development," 2009.
[78] Metropolitan Atlanta Rapid Transit Authority (MARTA), Transit-Oriented Development Guidelines. November 2010

Absent a policy within the transit agency itself, some agencies must comply with state, regional, or local affordable housing policies. For example, as mentioned in the previously submitted paper on "The Role of Transit Agencies and Metropolitan Planning Organizations in Supporting Transit-Oriented Development," the Massachusetts Bay Transportation Authority (MBTA) does not have its own policy on affordable housing, but works with developers and communities when appropriate to encourage development under State laws 40B and 40R, which require every community to ensure 10 percent of its overall housing stock is affordable. When the MBTA approaches a community about a joint development project, they enter into a discussion with that community about that community's desired uses for the subject property and works to create development guidelines for the property that may include the affordable housing requirements desired by the community. These guidelines are then incorporated into the MBTA's public bid document for the property. As a home rule state[79], the local municipalities in Massachusetts have a lot of power in negotiating the type of projects that get built near transit stations. Overall, when a property is offered by MBTA, the agency, although not required by law, practically speaking recognizes the wishes of a community for affordable housing.

In another example, the Charlotte Area Transportation System (CATS) complies with City policy that encourages affordable housing near transit. CATS operates bus and light rail service around the Charlotte metropolitan area, and is a department within the Charlotte city government. In addition, the City recently created a voluntary incentive-based inclusionary housing policy that would give financial and regulatory incentives such as density bonuses to developers if they include a minimum of 20 percent affordable housing in their multi-family developments. Incentives are also available in single-family districts. As a city department, CATS would have these incentives for affordable housing at their disposal.

Difference between policy and practice

As noted in "The Role of Transit Agencies and Metropolitan Planning Organizations in Supporting Transit-Oriented Development", there is a difference between affordable housing policy and practice. An affordable housing policy can be an important indicator of the transit agency's support for affordable housing, providing useful guidance to transit agency staff and developers about what the transit agency's Board of Directors expects from joint development projects. When a transit agency policy is specific about affordability requirements, it provides certainty for developers who are proposing projects for development on the transit agency's land, potentially reducing the need for time-consuming negotiations on the issue.

[79] Home rule refers to the power of a local city or county to set up its own system of governing and local ordinances without receiving a charter from the state which comes with certain requirements and limitations. The powers of government have been decentralized from the central form of government.

Still, lack of a policy supporting affordable housing does not mean that an agency is not implementing or supportive of affordable housing near transit stations. In fact, some of the most intensive efforts to support affordable housing have occurred in agencies without a direct policy, such as Miami-Dade Transit (MDT). Agency representatives at MDT state that getting the highest possible revenue from joint development projects is not always the driver, and they must constantly balance utility versus equity, as affordable housing near transit is a priority for them. Like CATS, MDT is a department of the County and therefore has a shared mission with other county departments to pursue affordable housing projects.

There can be several factors influencing the lack of a policy on the agency level, including lack of support from the transit agency board, lack of staff capacity or time to develop a policy, and a perceived lack of need for a policy. Transit agencies often leave affordable housing up to the discretion of the surrounding jurisdictions and participate or encourage development of affordable housing when needed. Alternatively, the existence of the policy does not indicate that an agency is producing units either, as in the case of MARTA. So while a policy can provide important guidance for the parties involved in a joint development, much work can still be done to support and implement affordable housing without a formalized policy.

2. Flexible Payment Structure

One strategy used by several agencies to facilitate joint development projects is flexible payment structures. One of the challenges many developers face when engaging in joint development is that the developer faces numerous upfront costs (such as design, permitting, and construction), while revenues do not begin to flow until several years later when the development is built and occupied. This timeline can present cash flow issues for both affordable and market-rate developers. To help address this issue and make projects "pencil out," transit agencies can structure the terms of the sale or lease of their property so that upfront costs are lower, or that lease or mortgage payments phase in over time. This technique has been used by MBTA in Boston, which has also proactively worked to keep pre-closing costs low for developers. LACMTA has explored various flexible payment structures in the past, including holding land without payment and taking lease payments over time or capitalized as part of financing. However, there are no stated policies or information on when LACMTA would use this kind of strategy for affordable housing projects.

Strategies related to lease or mortgage structures are useful for helping developers finance projects, both affordable and market-rate, and appear to be relatively common. Because they involve the payment structure, which is primarily outside the purview of the federal joint development guidelines, there should generally be limited federal review of this aspect of joint development projects.

3. Strategic Land Acquisition for Joint Development Purposes

Joint development guidelines specify that land acquisition for joint development is an eligible use of federal transit funds. In other words, a transit agency may purchase land specifically for the purpose of

joint development. Recent changes to the rules governing the federal New Starts program – the major source of federal funding for new transit projects – specify that joint development costs will not be factored into proposed projects' cost-effectiveness ratings, which will allow transit agencies pursuing a New Starts project to conduct joint development activities at the same time without adversely affecting their evaluation score. For the most part, the expectation is that joint development conducted as part of a New Starts project will consist of land acquisition around proposed station areas.

Several transit agencies have purchased land specifically with joint development in mind. In the mid-2000s, TriMet in Portland, Oregon purchased an old motel in an area in need of redevelopment along one of its light rail lines. Because construction of that light rail line had come in under budget, TriMet was able to use remaining funds from the federal grant to purchase the land. The agency purchased the land specifically for the purpose of having it developed into affordable residential units. TriMet's belief was that having affordable housing in this location would benefit not only the community but also the transit agency, by generating increased ridership, and required permanently affordable housing to be built on the site when it was offered for sale.[80]

Miami-Dade Transit, a division of Miami-Dade County in Florida, has also purchased land specifically for the purposes of joint development. Using a combination of FTA funds and local funding, Miami-Dade Transit purchased a ½-block parcel on which they are working with a developer to build a transit facility and affordable residential units. Because the transit agency owns the land, the developer of the affordable housing units does not have to pay property taxes on the land, only on the buildings. As part of Miami-Dade County government, Miami-Dade Transit's motivation for including affordable housing in its project was to help meet the needs of another county department, the Public Housing and Community Development Department. The 7th Avenue Transit Village is a mixed-use development that will include a bus transfer station with passenger information and ticketing, a driver rest area, and offices for transit staff, affordable senior housing, businesses, and a theater. The project is expected to open in 2015.

Strategic acquisition of land for joint development purposes allows a transit agency to take advantage of opportunities that arise to secure land that can later be developed. Both TriMet and Miami-Dade Transit were able to turn their land purchases into developments with an affordable housing component, due primarily to both agencies' focus on affordable housing (as discussed in an earlier section, TriMet imposes an affordable housing requirement in its land offerings, while Miami-Dade Transit was responding to County housing needs when it chose an affordable housing developer for the mixed-use project). Strategic land acquisition can be used to support either market-rate or affordable residential or mixed-use development.

[80] Livable Portland: Land Use and Transportation Initiatives, TriMet, Nov. 2010

OPPORTUNITIES TO STRENGTHEN LACMTA'S ROLE IN JOINT DEVELOPMENT

LACMTA has participated in joint development projects that have produced both market-rate and affordable units. In the past, financing from state grants and Community Redevelopment Agencies (CRA) has largely supported these projects. California's CRAs where dismantled in 2011, which will likely impact the ability of LACMTA to complete joint development projects with an affordable housing component in the future. Moving forward, if such projects are to continue at the rate at which they have proceeded in the past, joint development partners such as LACMTA, local jurisdictions, and nonprofit and philanthropic organizations will need to become more intentional about pursuing partnerships and opportunities for financing affordable housing near transit. Further, there may be specific barriers to using particular funding or financing mechanisms for affordable or mixed-income housing production as part of transit-oriented districts (such as holding periods) that are included in other evaluations conducted as part of the study of financing needs for residential development near transit.

As an agency, subject to its fair market value objective, LACMTA has been supportive of residential projects that "provide a range of housing types to meet the needs of a diversity of household incomes, sizes, and ages, particularly if such a diversity of housing is not currently provided within walking distance of the transit system."[81] Although such a policy exists at LACMTA, LACMTA does not require specific levels of affordable housing in its joint development projects, nor does the agency subsidize affordable housing. LACMTA relies mainly on the local jurisdictions to determine affordable housing requirements through negotiations with the developer. Final project terms must be approved by LACMTA's Board, which has not indicated support for discounting prices for LACMTA's land. Although, as mentioned earlier in this paper, LACMTA has the ability to sell or lease land at less than fair market value, the transit agency generally encourages disposition for fair market value.

The key points of federal and state law regarding LACMTA's involvement in joint development and land disposition are:

1. There is no federal requirement that a joint development project generate a specific amount of revenue or the highest potential revenue for the site.[82]

2. There is no federal requirement to charge the highest possible rent or market-rate rent on transit property used for joint development.[83]

[81] Los Angeles County Metropolitan Transportation Authority, Joint Development Policies and Procedures, Adopted October 2009. Retrieved from: http://www.metro.net/projects_studies/joint_development/images/JDP_polices-procedures.pdf

[82] *Transit Law's Impact on Local Joint Development: An Explanation of Real and Perceived Barriers to Affordable Housing*, issued by the Los Angeles Neighborhood Based CDC Coalition with support from the Local Initiatives Support Corporation. Draft paper, March 2013.

3. Under federal disposition rules, a transit agency can transfer land to a public agency for less than fair market value under certain conditions. Fair market value is legally defined while fair share of revenue is determined locally by the transit agency board.[84]

4. Under California law, there does not appear to be a requirement that surplus property be sold or leased for fair market value, except for limited circumstances when that property was purchased using gas tax funds or where it is already developed as residential property. In the case of a property purchased using gas tax funds, then land must be sold at fair market value – but if the land qualifies as "surplus residential property" and helps to mitigate against displacement (by preserving and expanding the supply of housing affordable to families of low and moderate income), then land can be sold at less than fair market value under certain conditions, though not less than the original acquisition price.

In sum, LACMTA's ability to engage in joint development is not limited by fair market value restrictions either at the federal or state level, except in the case of certain property that was purchased with state gas tax funds or already developed as residential property. Depending upon the source of funds used to purchase land owned by LACMTA and whether that land is still needed for a transit purpose (which must be reviewed parcel by parcel and can limit the flexibility of the transit agency), the following options to support affordable or mixed-income residential development appear most promising:

- *Discounting land through joint development.* While it is not necessary under federal guidelines to justify a discount dollar-for-dollar based on future increases in fare revenue, FTA has accepted the concept as one way to show that a transit agency is getting a fair return on the project.
- *Donating land in exchange for a share of future performance.* While outright donation of land is not permissible in joint development, it is possible to contribute land to a project upfront in exchange for a share of future revenues generated by the project.
- *Transfer of land to a public agency.* Federal law allows transfer of surplus land to a public agency for little or no compensation if the property will remain in public use for five years and the public benefits outweigh any federal interest in the land.
- *Adopting specific affordable housing requirements in agency policy and/or RFPs.* Specific affordable housing goals and requirements can ensure that affordable housing production is incorporated into development projects on transit-agency land and provides guidance to agency staff and developers on the expected outcome of development transactions.
- *Acquiring land for the purpose of joint development.* LACMTA has an opportunity as it acquires property for construction of its future transit lines to purchase nearby parcels that

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[83] *Transit Law's Impact on Local Joint Development: An Explanation of Real and Perceived Barriers to Affordable Housing*, issued by the Los Angeles Neighborhood Based CDC Coalition with support from the Local Initiatives Support Corporation. Draft paper, March 2013.

[84] The FTA's Draft Circular would also require FTA to determine whether the transit agency would receive a "meaningful" amount of revenue from the project.

can be developed in a transit-supportive way. Recent changes to federal New Starts rules are intended to encourage this type of prospective land acquisition.

We understand that LACMTA is already exploring ways to structure payment terms that will meet the needs of developers, a technique that also holds promise for enabling joint development projects to reach completion. Finally, pending finalization of the new federal joint development circular, LACMTA can explore possibilities for using agency-owned land as collateral for project financing.

Appendix A: Transit Agencies Interviewed

AGENCY	SELECT STRATEGIES	CONTACT
Bay Area Rapid Transit (BART)	Respects local affordable housing policies; includes city standards in solicitations; discounts land in exchange for a share of later performance profits; shared parking; subordination of BART in lease structure (on non-federal interest property)	Jeff Ordway, Development Manager
Charlotte Area Transit System (CATS)	As a city department can discount land in exchange for affordable housing units; city provides financial incentives for affordable housing	Tina Votaw, Transit-Oriented Development (TOD) Specialist
King County Metro Transit	Lease-Lease Back (with an option to buy); shared parking ***Future:*** Pending Washington state legislation to allow transit agencies to discount land (fair market value is currently required)	Gary Prince, Senior Project Management, Transit-Oriented Development
Los Angeles County Metropolitan Transportation Authority ("Metro")	Flexible approach to appraisals; structured lease payments (none yet for affordable housing projects); respects local affordable housing policy	Greg Angelo, Director of Real Property Management & Development
Metropolitan Atlanta Rapid Transit Authority (MARTA)	Twenty percent affordable housing requirement around stations; sold land for affordable housing through disposition ***Future:*** Implementation of 20 percent requirement; developer day; land banking around transit stations (through non-profit/private partnership)	Ted Tarantino, Manager, Joint Development
Massachusetts Bay Transportation	Invitation to Bid (ITB); phased and structured mortgage payments; low pre-	Lorna Mortiz, President and Fran Decoste,

Authority (MBTA)	closing payments	Transit Realty Associates (MBTA outsources TOD program and joint development functions)
Miami-Dade Transit (MDT)	Prioritize affordable housing through practice; partnership with local housing agencies for incentives; strategic acquisition of land for joint development	Albert Hernandez, Assistant Director and Engineering, Planning and Development and Froilan Baez, Acting Chief Right-Of-Way
Santa Clara Valley Transportation Authority (VTA)	Prefer to lease vs. sell	Jennifer Rocci, Senior Planner
TriMet, Portland	Affordable housing requirement in some joint development offerings; land discount	Jillian Detweiler, Director of Real Estate
Utah Transit Authority (UTA)	Property exchange; property donation to a shared-risk limited liability corporation	Christina Oliver, Department Manager, Transit-Oriented Development
Washington Metropolitan Area Transit Authority (WMATA)	May discount land in structuring an overall deal; deferential to local affordable housing policies; flexible lease structures	Nat Bottigheimer, former Assistant General Manager for Planning and Joint Development

Appendix B: Surplus Residential Property Under California Law

The Roberti Law Requires Disposition at Fair Market Value in Limited Circumstances, and in No Event Less Than Acquisition Price

California Government Code sections 54235-54238.7 outline public agencies' powers and duties regarding surplus residential property. Surplus residential property is property owned by a state agency that is surplus to that agency's needs and developed as single-family or multifamily housing.[85] Importantly, "[s]urplus residential properties . . . only include land and structures that, at the time of purchase by the state, the state had intended to remove the residences thereon and to use the land for state purposes."[86] The Roberti Law outlines complex procedural requirements prescribing how much agencies must receive when disposing of surplus residential property—typically an amount between the acquisition price and fair market value.[87] Generally, the Roberti Law helps ensure that former owners or current residents of a residential property that was once intended to be used for another state purpose (e.g. transportation), but was not actually used for such purpose, are afforded the opportunity to purchase the property at a reasonable price, and that housing-related entities are thereafter afforded the opportunity to purchase such properties at a reasonable price.

1. Single-Family Surplus Residential Property Occupied by Former Owner

If a surplus residential property is a single-family residence, and is occupied by a former owner of the property, it must be first offered to the former owner at fair market value.[88] The property may then be offered to any present occupants, subject to residency and income requirements.[89] The price for which a single-family surplus residential property is offered to present occupants must be "affordable," and must fall between the agency's original acquisition price and fair market value, unless the original acquisition price was greater than fair market value.[90] In no case may the property be offered to current occupants at greater than fair market value.[91]

2. Multifamily and Single-Family Surplus Residential Property Not Occupied by Owner

Multifamily surplus residential properties, and single-family properties not sold to their current occupants, must be offered to "housing-related private and public entities" at a "reasonable price, which is best suited to economically feasible use of the property as . . . housing at affordable rents and

[85] CAL. GOV'T CODE § 54236(d).
[86] *Id.*
[87] CAL. GOV'T CODE § 54237.
[88] CAL. GOV'T CODE § 54237(a)(1).
[89] CAL. GOV'T CODE § 54237(a).
[90] CAL. GOV'T CODE § 54237(b).
[91] *Id.*

affordable prices for persons and families of low or moderate income . . . ."[92] The Roberti Law does not define "housing-related private and public entities."[93]

Here, again, the price of the property shall not be less than the acquisition price, unless the acquisition price was greater than current fair market value. In no event can the price be greater than fair market value.[94] The Legislature reiterates that the price "shall be set at the level necessary to provide housing at affordable rents and affordable prices for present tenants and persons and families of low or moderate income."[95]

After a surplus residential property has been offered to the above-identified parties at "affordable" or "reasonable" prices pursuant to subsections A and B above, and if a transfer is not made, it shall then be sold at fair market value.[96] Even in these cases, priority is given to purchasers who are present occupants, and then to purchasers who will be owner-occupants.

[92] CAL. GOV'T CODE § 54237(d).
[93] Although no formal definition is set forth in the Roberti Law, a California Department of Transportation RFP form includes the following description of housing-related private and public entities: "Entities are described as follows: 1) The entity is a local, regional, or national nonprofit organization, a public agency, or a profit motivated organization. 2) The entity is capable of purchasing residential properties for the purpose of maintaining long term affordable housing and occupancy by households of low to moderate income. 3) The entity is financially capable of managing the housing and related facilities for the remaining useful life, either by itself or through a management agent." State of California Department of Transportation, Request for Proposal, Disposal of Excess Properties, *available at* http://www.dot.ca.gov/dist07/sale_properties/pas/docs/RFP_01_26_04.pdf.
[94] CAL. GOV'T CODE § 54237(d).
[95] *Id.*
[96] CAL. GOV'T CODE § 54237(e).