



SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

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VIA EMAIL AND U.S. MAIL

Subject: Comments of the Bay Area Rapid Transit District (BART) on Docket No. 2010-N-11, "Private Transfer Fee Covenants."

Dear Mr. Pollard:

In response to the Federal Housing Finance Agency (FHFA) call for comments issued August 16, 2010, we are pleased to submit the following comments. The FHFA proposes guidance to Fannie Mae, Freddie Mac, and Federal Home Loan Banks that would prohibit dealings in mortgages on properties with a transfer fee covenant. We request that the FHFA (1) not adopt the Proposed Guidance, or (2) revise it to allow for community benefits fees that are directly related to enhancing value of fee-paying properties. Our concern is that the Proposed Guidance is unnecessarily broad because it eliminates funding for important community benefits like neighborhood transit stations and transit-oriented development (TOD). If the Guidance is adopted, transit agencies like the San Francisco Bay Area Rapid Transit District (BART) risk losing the revenue necessary to sustain activities that directly enhance the value of fee-paying properties.

I. Community benefit transfer fees are critical to the success of transit-oriented developments.

BART is a rapid transit district established pursuant to California Public Utilities Code Sections 28500 et seq.. BART provides rapid transit service in San Francisco, Alameda, Contra Costa, and San Mateo Counties. BART owns and operates the train service that runs on a rail network of forty-three (underground or aerial) transit stations.

Since the 1980s, BART has pursued transit-oriented development (TOD) to promote use of public transit and to enhance the quality of life around its transit stations and hubs. TOD focuses on developing and maintaining attractive, mixed-use residential developments at or near BART transit stations. In 2005, BART adopted an updated TOD Policy to enable and encourage more TODs.

Transit benefit transfer fee covenants are critical to the feasibility of BART TODs and have been recorded for five upcoming residential developments in the BART service area: Fruitvale, San Leandro, MacArthur, Pleasant Hill, and West Dublin/Pleasanton. The covenants will affect more than 1,409 homes (affordable and for-sale) to be built around BART transit stations. Under these covenants, owners of TOD residential units will pay a transfer fee that goes towards maintaining and improving their neighborhood transit service, its station, and TOD improvements. The transfer fee percentage ranges from 1.5% to 2%; and, the covenant lasts for as long as the transit station operates near fee-paying homes.

Banning transit benefit fees would eliminate more than \$21 million in funding (net present value) necessary to maintain the nearby transit service and station and to develop further TOD improvements around the affected homes. The South Hayward BART Station TOD is one example of a future development that depends on transit benefit fees for its viability. Transit benefit fee financing will be used to develop vacant parking lots surrounding the BART station into a mixed-use neighborhood with new housing and retail services within walking distance of the station.

The Fruitvale BART Station TOD provides another example of the transit benefit fee's importance to TOD. The Fruitvale TOD includes 135,000 square feet of development (retail, library, office, childcare, medical clinic, and senior center), 47 units of housing, and extensive streetscape and pedestrian plaza improvements. Transit benefit fees play a critical role in the feasibility of additional 275 homes in this TOD. These additions are important enhancements to the overall value of the existing TOD. If the FHFA adopts its guidance, the Fruitvale TOD and Transit Station will likely lose more than \$4.3 million in funding from lost transit benefit fees.

II. **Unlike Private Transfer Fees, Community Transit Benefit Fees Maintain or Enhance Property Value For Fee-paying Homeowners.**

The Proposed Guidance fails to distinguish between community fees *proportional and related to* benefits that fee-paying homeowners enjoy and private fees *unrelated* to the fee-paying land. *Private* transfer fees are captured by unrelated third parties who fail to reinvest in the fee-paying community. Unlike private transfer fees, community fees pay for benefits enjoyed by fee-paying homeowners. Moreover, even if the homeowner may not personally use nearby transit stations or service, he nevertheless benefits. The value of his TOD property is enhanced by proximity to a well-maintained transit station and thoughtful TOD planning around that station.

Most surveys in transit literature demonstrate causality between property value enhancement and proximity to transit station. For example, in San Diego, one recent study found that light rail stations added more than 18% in resale value to neighboring condominiums.¹ Other recent

¹ *Land Value Impacts of Rail Transit Services in Los Angeles County*, by Robert Cervero and Michael Duncan, National Association of Realtors and the Urban Land Institute, June 2002; See also *Rail Transit's Added Value: Effects of Proximity to Light and Commuter Rail Transit on Commercial Land Values in Santa Clara*

studies have found that, unlike highway infrastructure, the negative impacts associated with proximity to transit stations (traffic, noise, etc.) are outweighed by the positive impacts.² In these cases, where transit proximity generates increased property value of up to 18%, a transfer fee of 2% is reasonable, proportionate, and fair.

Thus, instead of adopting a bright-line prohibition against fees in excess of 1%, the FHFA should require assurances that a fee is not disproportionate to the benefit enjoyed by fee-paying property owners.

III. Community Benefits Transfer Fees are Consistent with Settled Law.

Proportional, related transfer fee covenants are also consistent with settled law on property servitudes and restraints on alienation in most states. Under California property law, covenants or servitudes are enforceable where the covenant “relates to the use and maintenance of land” or where the covenant is “mutually beneficial” to both the fee-payor and the fee-payee.

Cal. Civ. Code §§ 1468 and 1354. Similarly, under common law encapsulated in the Restatements First and Third of Property, a covenant is legal where it imposes a reasonable or related fee. In the past century, courts have consistently upheld fees as related where they maintain neighborhood amenities like a clubhouse³ or a community beach⁴. Accordingly, fee covenants for the maintenance of such local amenities are settled law; the proposed Guidance should be drafted to be consistent with this authority.

IV. With Adequate Consumer Protection Measures, Community Benefit Transfer Fees Enhance Property Marketability.

We also suggest that disclosure requirements will adequately respond to consumer protection concerns expressed by the FHFA. The Agency can resolve these concerns by recommending mandatory transfer fee disclosure frameworks passed by states like California. In California, all sale transactions subject to a transfer fee covenant must follow strict disclosure requirements. *Cal. Civ. Code § 1098.5* A separate document must be recorded for the property where “Payment of Transfer Fee” is prominently featured. The document must contain the amount of the fee. If the fee is a percentage of the sales price, actual dollar cost examples of the fee for a home priced at \$250,000, \$500,000, and \$750,000 must be given. The purpose for which the funds from the

County, California, by Robert Cervero and Michael Duncan, Institute of Urban and Regional Development, June 2001)

² See Mineta Transportation Institute, “Literature Review,” *Effect of Suburban Transit-Oriented Development on Residential Property Values*, MTI Report 08-07 authored by Drs. Shishir Mathur and Christopher Ferrell, June 2009, p. 5.

³ *Anthony v. Brea Glenbrook Club*, 58 Cal.App.3d 506, 511-512 (Ca.App.4th 1976).

⁴ *Neponsit Property Owners Association v. Emigrant Industrial Savings Bank*, 278 N.Y. 248 (N.Y. 1948).

fee will be used as well as the entity receiving the funds must be clearly reported. Similarly, the FHFA Guidance could prohibit fees that lack adequate disclosure requirements.

The FHFA Proposed Guidance also expresses concerns with the consequence of fees on the marketability of property and the liquidity of mortgage-backed securities. However, this concern is misplaced with regard to community benefits or transit benefits fees. Unlike private transfer fees, community benefit transfer fees offer important assurances for the ongoing value of neighborhood amenities that private transfer fees do not. Maintaining property value has ongoing costs. Like other neighborhood amenities, transit service and TOD improvements require ongoing investment and upkeep to maintain their value to neighboring homes. The stations need to be kept clean, safe from crime, and well-lighted on a daily basis; aging pedestrian plazas and streetscapes need to be renovated; landscapes need to be maintained, and, efficient daily train or bus service needs to be operated.

If all homeowners pay a fee towards these maintenance and investment costs, every homeowner is assured that the community amenity's value will be maintained. Absent this assurance, homeowners lack important guarantees for the stability of neighborhood property value.

III. Conclusion

Accordingly, we urge the FHFA to revise its proposed guidance. Such a modification would eliminate abusive private transfer fees while preserving useful community benefits transfer fees.

Regards,



Dorothy W. Dugger
General Manager
San Francisco Bay Area Rapid Transit District

cc: FTA Administrator Peter Rogoff
FTA Deputy Administrator Therese McMillan