

March 26, 2012

**SUBMITTED TO ELECTRONIC DOCKET**

Administrator Peter Rogoff  
U.S. Department of Transportation  
1200 New Jersey Avenue SE.  
West Building, Room W12-140  
Washington, DC 20590

Re: Docket No. FTA–2010–0009  
RIN 2132–AB02  
Major Capital Investment Projects: Notice of Proposed Rulemaking  
Notice of Availability of Proposed New Starts/Small Starts Policy Guidance

The undersigned organizations appreciate the opportunity to comment on the proposed revisions to the New Starts/Small Starts Guidance<sup>1</sup> and Notice of Proposed Rulemaking for Major Capital Investment Projects.<sup>2</sup>

The proposed rulemaking makes significant changes to the criterion by which the funding applications for transportation projects will be evaluated. The undersigned groups strongly support the efforts of the Federal Transit Administration (“FTA”) to increase transportation equity, to more fairly weight the impact of transportation projects on those who are transportation dependent, and to more fully evaluate the environmental benefits of transit projects.

As Fair Housing advocates, the undersigned are particularly supportive of the addition of criteria to preserve existing affordable housing and increase development of new affordable housing in the immediate vicinity of a newly funded transit stop. By including support for affordable housing, the FTA explicitly recognizes the important relationship between transportation and housing. FTA funds in particular play a central role in urban development and in shaping housing patterns: how those funds are invested can determine whether open housing opportunities for protected classes are advanced, as required by the Fair Housing Act, or whether, instead, barriers to fair housing are created.

While we fully support the provisions to preserve and increase affordable housing, we believe the proposed guidance and evaluation criteria fall far short of providing for Fair Housing choice. We urge the FTA to require specific Fair Housing measures and direct applicants to take specific actions related to Fair Housing choice in order to compete for New Starts/Small Starts funding.. We appreciate FTA’s recent efforts to strengthen Title VI and EJ guidance. We urge FTA to more explicitly link the funding applications to compliance with Title VI, EJ, and the Fair

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<sup>1</sup> Notice of Availability of Proposed New Starts/Small Starts Policy Guidance, 77 Fed. Reg. 3838 (Jan. 25, 2012)

<sup>2</sup> Major Capital Investment Projects, 77 Fed. Reg. 3848 (Jan. 25, 2012)

Housing Act. We urge the FTA to explicitly condition funding on strongly protecting civil rights and furthering Fair Housing choice by including explicit and specific measures to show that the grantee is demonstrating significant results in meeting its civil rights obligations.

### **Fair Housing Obligations**

The Department of Transportation (“DOT”), like every other federal executive agency, has a statutory obligation under the Fair Housing Act to “administer [its] programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of [the Fair Housing Act] and [to] cooperate with the Secretary [of the Department of Housing and Urban Development (“HUD”)] to further such purposes.”<sup>3</sup> The dual purposes of this mandate, known as Affirmatively Furthering Fair Housing (“AFFH”), are to avoid segregation and discrimination in housing and to promote “truly integrated and balanced living patterns.”<sup>4</sup> To further these purposes and carry out the AFFH mandate, executive agencies must use their “grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”<sup>5</sup>

The AFFH mandate applies to DOT and each of its operating administrations, including FTA. DOT has partially implemented it in at least one area: the interagency Sustainable Communities Partnership Agreement administered by HUD, with DOT and the Environmental Protection Agency. Through the Partnership Agreement DOT has committed to better coordinate federal investments and to identify strategies that, among other things, “promote equitable, affordable housing” by “[e]xpand[ing] location and energy efficient housing choices for people of all ages, incomes, races and ethnicities to increase mobility and lower the combined cost of housing and transportation.”<sup>6</sup>

FTA further recognizes in its proposed Environmental Justice (EJ) Circular that “preserving affordable housing may be a key focus for EJ communities, and this preservation may be challenged when major capital investments are made in transportation access and facilities.”<sup>7</sup> FTA clearly recognizes that investments in transit-oriented development projects, including New Starts and other sources of funding, can lead to displacement of minority communities if affordable housing and other anti-displacement measures are not adequate. Conversely, transit investments in high-opportunity communities without affordable housing may exacerbate

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<sup>3</sup> 42 U.S.C. § 3608(d).

<sup>4</sup> *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale)). See also Executive Order 12892 (January 17, 1994) (“The head of each executive agency is responsible for ensuring that its programs and activities relating to housing and urban development are administered in a manner affirmatively to further the goal of fair housing as required by section 808 of the Act and for cooperating with the Secretary of Housing and Urban Development, who shall be responsible for exercising leadership in furthering the purposes of the Act. 2-203. In carrying out the responsibilities in this order, the head of each executive agency shall take appropriate steps to require that all persons or other entities who are applicants for, or participants in, or who are supervised or regulated under, agency programs and activities relating to housing and urban development shall comply with this order.”).

<sup>5</sup> *N.A.A.C.P. v. Secretary of HUD*, 817 F.2d 149, 155 (1st Cir. 1987).

<sup>6</sup> HUD, DOT, and EPA Sustainable Communities Partnership Agreement (June 16, 2009). Available at <http://www.epa.gov/smartgrowth/pdf/dot-hud-epa-partnership-agreement.pdf>.

<sup>7</sup> FTA Proposed Environmental Justice Circular (Sept. 27, 2011), p. 26.

longstanding segregation patterns and disproportionately benefit wealthier, white/majority group communities.

To meet the Fair Housing Act mandate, FTA must ensure that its funds are used to protect against such adverse impacts and to promote housing mobility and geographic access to opportunity for protected classes. Preservation of existing affordable housing is an important step, particularly in areas that are experiencing an influx of higher income households and potential displacement pressures. Planning to ensure that both adequate affordable housing and transit are available in high opportunity neighborhoods must also be required. An analysis of how an applicant will meet its obligations to further fair housing choice depending on the local housing market conditions should be explicitly required by the funding criteria, not merely in the reporting requirements.

### **Coordinating Housing and Transportation Funding**

The changes caused by transit investment are very complex and may be difficult to predict. A recent report by the Dukakis Center notes that “[T]ransit investment frequently changes the surrounding neighborhood. While patterns of neighborhood change vary, the most predominant pattern is one in which housing becomes more expensive, neighborhood residents become wealthier and vehicle ownership becomes more common. And in some of the newly transit-rich neighborhoods, the research reveals how a new transit station can set in motion a cycle of unintended consequences in which core transit users – such as renters and low-income households – are priced out in favor of higher-income, car-owning residents who are less likely to use public transit for commuting.”<sup>8</sup>

One common failure of transit planning is the failure – or refusal – to plan, to preserve or to provide housing at a rent or purchase price that is affordable to those who are most likely to use transit.<sup>9</sup> As a result, the loss of affordable housing may correspond to less transit use. We therefore strongly support the proposal to preserve and provide for affordable housing located within walking distance of new transit stops. FTA’s proposal is an important step to address this particular situation.

It is important to recognize, however, that increasing property values are not the only impact that may arise from transit investments. Transportation funding can also be a tool to create opportunities in higher income neighborhoods for lower income people and minority group members/residents of color to achieve economic mobility. To do so, it is necessary not only to preserve affordable housing in communities being transformed by transit investments, as proposed, but also to develop more affordable housing in communities that are already high opportunity communities. Similarly, FTA must ensure that high opportunity communities do not exclude transit even though they have sufficient density to support it. Affordable market rate housing opportunities that already exist in these communities can be opened up to the transit dependent, often with a few cost-effective changes to existing bus lines.

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<sup>8</sup> Stephanie Pollack, Barry Bluestone, Chase Billingham, *Maintaining Diversity in America’s Transit-Rich Neighborhoods: Tools for Equitable Neighborhood Change 1*, Dukakis Center For Urban and Regional Policy (Oct. 2010) available at <http://www.dukakiscenter.org/storage/TRNEquityFull.pdf> (visited Mar. 12, 2012).

<sup>9</sup> *Id.*

## **Transit and Housing For People With Disabilities**

We strongly applaud FTA's proposal to put greater weight on transit use by those who are transit dependent. We caution FTA not to construe this term to mean only that the family has no vehicle. Some families may have a vehicle, but that does not permit all family members to use it. In particular, people with disabilities or older people may not be able to use a vehicle even if another family member has one. Applicants should evaluate the demographic data for people with disabilities who may be transit users to determine the appropriate count.

Without adequate and accessible transportation, many people with disabilities remain completely isolated. Indeed, it is estimated that over half a million people with disabilities never leave their homes due to lack of adequate transportation.<sup>10</sup> We believe the equity provisions will improve the mobility of transit dependent people, including those with disabilities, permitting them to remain active and engaged.

People with disabilities will also benefit from the availability of housing in close proximity to a transit station. Any housing that is part of a transit investment proposal should be accessible to people with disabilities. FTA's land use, economic development and environmental factors favor dense housing, but that in itself does not guarantee the housing built will be available to many transit dependent people who have disabilities, including the growing population of older people who will, at some point, be forced to give up the keys. The FTA should ensure that the portion of newly constructed housing units in the immediate vicinity of transit investments meets the accessibility design and construction requirements of the Fair Housing Act. FTA should also ensure that the newly constructed housing units are designed to meet the needs of families with children. The FTA should give greater weight to proposals that exceed the minimum number of accessible and visitable units and that maximize the number of three bedroom family-sized units.

If any townhomes are part of the transit development plan, they should be required to meet the ICC-ANSI Type C unit requirements for visitable housing. Of course, to the extent that federal financial assistance helps fund housing development, the buildings must also meet Section 504 standards. Even in townhome developments, affordable housing providers have included "stacked units" which appear to be townhomes but which are actually 2, complete apartments, one above the other. The ground floor unit meets Section 504 access requirements.

We applaud FTA's position to require that access features be provided as part of any transit investment because they are required to comply with the requirements of the Americans with Disabilities Act ("ADA"). Compliance with access requirements that makes transit available to all users should not be considered an add-on feature – it must be integrated into the design of any transit project. FTA's position regarding compliance is therefore appreciated. We urge FTA to establish methods to monitor compliance with the ADA requirements and to evaluate the applicant's compliance throughout its transit system as an important measure of its eligibility for additional funding. For example, the jurisdiction should have a complete and up-to-date

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<sup>10</sup> Issue Brief, Transportation Difficulties Keep Over Half a Million Disabled at Home, Bureau of Transportation Statistics, U.S. Dept of Transp., (Ap. 2003).

transition plan, and should be able to show it has made steady progress in removing access barriers before it is awarded additional federal funds. Many jurisdictions have failed to remove access barriers, even when they repave roads, and have not updated their transition plans.

We also strongly support the proposal to remove the cost of betterments – items that improve the project and may increase the number of users but that are not directly necessary to provide the transit – from the cost consideration criteria. For example, transit dependent people or people with disabilities may need benches, shelters from the weather, or pedestrian bridges to ensure they can use the transit system. Sidewalks should be provided and complete street principals should be followed to ensure the safety of all pedestrians. We agree with FTA that the cost of such items should not be included in the cost effectiveness evaluation of the transit investment itself because they do not contribute to the cost of providing the transit. Excluding such costs helps ensure that the transit system will include elements to benefit the users intended but will not count against them for competitive criteria. It further ensures that jurisdictions that have adopted complete street principles will not be disadvantaged in the funding competition.

A further factor, which may fit under the “other factors” category, is that the failure to include certain types of pedestrian amenities, covered walkways, benches, sidewalks, or shelters may in fact exclude the very transit dependent users necessary to justify funding a particular project. People with disabilities and other transit dependent persons will be disparately impacted if such features are not provided, even if the features are not strictly required by ADA Access Guidelines or Section 504 of the Rehabilitation Act of 1973. We urge the FTA to ensure that projects funded provide adequate facilities and useable features to serve the transit dependent users, including people with disabilities.

### **Regional Assessments Should Be Made**

In order to obtain funds for new transportation projects of any size, FTA should require the Metropolitan Planning Organizations (MPOs) with jurisdiction over the applicant to analyze fair housing issues across the metropolitan region, including: segregation patterns; racially or ethnically concentrated areas of poverty; access to existing areas of high opportunity; major public investments that impact access to opportunity and demographic changes; access to and need for housing accessible to people with disabilities, and the strength of fair housing services and activities in the region.

An example of such an assessment is the Regional Fair Housing and Equity Assessment required by HUD of MPOs and other recipients of competitive Sustainable Communities Regional Planning Grant funds. Regional assessments are important because patterns of residential segregation and related harms usually extend beyond municipal boundaries, and can only be fully identified and addressed at the level of the metropolitan region. This requirement is based on the obligation under HUD rules of each jurisdiction that receives Community Development Block Grant funds to conduct an analysis of impediments to Fair Housing choice. Grant recipients are required to (1) conduct an analysis to identify impediments to fair housing choice in their jurisdiction, including barriers to integrated housing patterns and access to opportunity;

(2) take appropriate action to overcome the effects of the identified impediments; and (3) maintain records reflecting the analysis and actions taken in this regard.<sup>11</sup>

FTA's proposed Title VI and EJ guidance already require MPOs to conduct an assessment of the its regional transportation planning on communities of color and low-income communities. This framework can be used to require MPOs to analyze related fair housing and issues and applicants to describe in the application how the funding will meet their Fair Housing, Title VI, and EJ requirements. Adding guidance, scrutiny, and action to implement FTA's obligation to affirmatively further fair housing at the MPO level will strengthen FTA's tools for ensuring Title VI compliance in metropolitan planning and fund allocation. Further, a regional analysis can be used to ensure that individual projects that fall under those plans also promote Title VI, Fair Housing and EJ obligations.

The FTA funding process should also provide incentives for the coordination of fair housing and transportation funding. We support the proposal to evaluate land use policies, but urge the FTA to explicitly require that land use policies must affirmatively further fair housing. We also urge FTA to require that state and local policies relating to allocation of Low Income Housing Tax Credits and other housing funds ensure that housing in the immediate vicinity of transit is affordable to high transit users, but only if such allocations will not exacerbate segregation and concentrations of poverty. All transportation funding must affirmatively further fair housing. Therefore, projects that strongly demonstrate they will further fair housing, equity and environmental justice goals should receive a higher rating than those that merely maintain the status quo or that cannot demonstrate progress toward meeting their affirmative fair housing obligations.

In closing, we commend the FTA on its efforts to ensure that public funds are used to increase transportation equity. We hope you find our comments and suggestions helpful, and we are prepared to explain or elaborate on our concerns if necessary. Thank you for your consideration.

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<sup>11</sup> 24 C.F.R. §§ 91.225(a)(1), 91.325(a)(1); see also *United States ex rel. Anti-Discrimination Center of Metro N.Y., Inc. v. Westchester County*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009). In addition, Public Housing Agencies are statutorily required to affirmatively further fair housing. 42 U.S.C. § 1437c-1(b)(16).

Sincerely,

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