

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT
300 Lakeside Drive, P. O. Box 12688, Oakland, CA 94604-2688
(510) 464-6000

PLANNING COMMITTEE

May 16, 2017

10:00 a.m.

COMMITTEE MEMBERS: Directors Raburn (Chairperson), Blalock (Vice Chairperson), Allen, and Josefowitz

Chairperson Raburn has called a meeting of the Planning Committee at 10:00 a.m. on Tuesday, May 16, 2017, in the BART Board Room, Kaiser Center 20th Street Mall – Third Floor, 344 – 20th Street, Oakland, California.

Members of the public may address the committee regarding any matter on this agenda. Please complete a “Request to Address the Board” form (available at the entrance to the Board Room) and hand it to the Secretary before the item is considered by the committee. If you wish to discuss a matter that is not on the agenda during a regular meeting, you may do so under Public Comment.

AGENDA

1. Call to Order.
 - a. Roll Call.
 - b. Pledge of Allegiance.
2. Lease Rider and Estoppel Agreements for Affordable Housing Projects.*
For information.
3. Public Comment.
4. New Business. (An opportunity for Committee Members to introduce potential matters for a future committee agenda)

Kenneth A. Duron
District Secretary

Please refrain from wearing scented products (perfume, cologne, after-shave, etc.) to this meeting, as there may be people in attendance susceptible to environmental illnesses.

BART provides service/accommodations upon request to persons with disabilities and individuals who are limited English proficient who wish to address BART Board matters. A request must be made within one and five days in advance of Board meetings, depending on the service requested. Please contact the Office of the District Secretary at (510) 464-6083 for information.



EXECUTIVE DECISION DOCUMENT

GENERAL MANAGER APPROVAL: <i>Robert M. Power</i> 10 MAY 2017		GENERAL MANAGER ACTION REQ'D: No		
DATE: 5/1/2017		BOARD INITIATED ITEM: No		
Originator/Prepared by: Abigail Thorne-Lyman Dept: Systems Development <i>Abigail Thorne-Lyman</i> Signature/Date: May 10 2017	General Counsel <i>[Signature]</i> 5/10/17 []	Controller/Treasurer <i>Chris Gan</i> 5/10/17 []	District Secretary []	BARC <i>[Signature]</i> 5.10.17 []

Authorization for General Manager (or her designee) to Execute State Required Lease Rider and Estoppel Agreements for Affordable Housing Projects

PURPOSE:

To obtain Board authorization for the General Manager to enter into State-required agreements in connection with current and future affordable housing projects.

DISCUSSION:

BART's Affordable Housing Policy, Transit-Oriented Development (TOD) Policy, and Transit-Oriented Development (TOD) Performance Targets were adopted by the Board of Directors in 2016. These policies require a minimum of 20% of units built on BART property at each station to be affordable, with a District-wide target of 35% of all units in BART's portfolio affordable, with a preference for low- and very-low income households and transit dependent populations.

Currently BART has completed four fully affordable housing projects and produced 764 units. Three of these projects (located at the MacArthur, South Hayward, and San Leandro Stations) were completed and occupied within the last year. One project, at the Castro Valley Station, was completed prior to 2005. Additionally the Board has approved lease option agreements for a project at the Coliseum station and a second phase project at the San Leandro Station. The developer of the second phase San Leandro project recently exercised its lease option, and the developer of the Coliseum project is expected to do so in the near future. In both cases, the developers intend to commence construction shortly.

As is typical for affordable housing production in California, BART's development partners

use multiple sources of financing to advance individual projects, including the Low Income Housing Tax Credit program, which is administered by the State Tax Credit Allocation Committee (TCAC), and the State's Multifamily Housing Program and Affordable Housing and Sustainable Communities program, which are administered by the Housing and Community Development Department (HCD). More than half of all subsidy to affordable projects in the Bay Area comes from these sources, with tax credits comprising the largest funding source for affordable housing.

The developers of the affordable housing projects at the MacArthur, Coliseum and San Leandro Stations have asked BART, as the landlord for these projects, to execute a Lease Rider and Estoppel Agreement ("Rider") with the respective projects' developer and TCAC. TCAC is requiring execution of the Riders as a precondition to providing federal Low Income Housing Tax Credits to affordable housing projects.

Additionally, staff understands that HCD will also require developers of affordable housing projects and the owners of the property on which those projects are constructed to execute agreements similar to the Rider. Staff has not, at this time, received a copy of an HCD agreement, however anticipates that any such agreement will be substantially similar to the TCAC Rider.

In order to receive these tax credits and funds, developers enter into agreements with the appropriate state entity. The agreements are generally intended to ensure that the projects remain affordable and comply with other requirements for the duration of the agreement. The Riders, and the anticipated HCD agreements are intended to protect the State's rights under those regulatory agreements, in part by requiring landlords to agree that the terms of the Riders (and the anticipated HCD agreements) will control over contradictory provisions contained in the lease agreements between the landlord and developer.

Although the General Manager and staff are typically authorized to execute lease option agreements and supporting documents and agreements when TOD projects are approved by the Board – as all of the aforementioned projects have been – the proposed TCAC Rider, and the anticipated HCD rider would, if executed by BART, materially change BART's rights, remedies and administrative burdens under the affected ground leases compared to what BART has agreed to in the past. The primary impacts of the Riders are as follows:

- A. Under the terms of the Rider, BART would be prohibited from mortgaging or transferring the leased property unless any mortgagor or transferee agreed to be subject to the terms of the Rider.
- B. BART would be required to undertake due diligence actions that it would not typically perform under a normal ground lease in order to represent and warrant the facts of agreements between the developer and state. These facts are not typically within BART's knowledge.
- C. The Rider effectively extends the period of time in which breaches of a lease must be

cured before BART can utilize its remedies for breach under the lease. Even when the time to cure has passed, BART may not declare a breach of the lease agreement without the State's consent.

- D. In some circumstances where a ground lease has been terminated by BART, BART would be obligated to enter into a new lease with an entity selected by the State or pursuant to a court order, even if the original lease was breached, and even after TCAC had been given notice of, and an opportunity to cure that breach.
- E. BART would be required to consent to certain transfers or assignments of the lease to a transferee selected by the State or, in the case of litigation to enforce the regulatory agreements between the State and the developers, pursuant to a court order. Typically, and except for certain standard enumerated exceptions, transfers and assignments of ground leases are subject to prior written approval by BART.

BART staff have attempted to negotiate with TCAC to modify these terms in the Rider, but have not been successful. In discussions with TCAC, BART staff were informed that TCAC views the Rider as a "living document" that may be subject to change over time. BART has not yet engaged in discussions with HCD, as it has not formally asked BART to review and enter into a rider and estoppel agreement or provided BART with the proposed form for such an agreement. BART staff are continuing to attempt to negotiate changes to the TCAC Rider.

Given developers' reliance on Low Income Housing Tax Credits and State funds to build affordable housing, choosing not to sign the Rider or a similar agreement required by HCD would limit future affordable housing projects on BART's property. This would effectively mean BART could not meet the BART adopted requirements and goals in its Affordable Housing and TOD policies.

If the Board accepts staff's recommendation and adopts the proposed motion, BART will likely be asked to execute agreements that would impact both existing and future ground leases connected to affordable housing projects.

FISCAL IMPACT:

If the motion is not approved, the developers of the Mural project at the MacArthur Station, and the Marea Alta project at the San Leandro Station would face severe financial consequences as they are expecting tax credits to subsidize a large share of the costs of development over the period of the ground lease. Tax credit funding is typically received after a project is occupied and is used to pay back construction loans, and both of these projects are nearly at this stage. The approved Coliseum Transit Village project would likely not be built without tax credits and state funds. The San Leandro Senior Housing project would be delayed and possibly not built. The fiscal impacts of these changes to completed and approved BART TOD projects are unknown, but it is likely that BART would experience some loss of revenues from ground lease and other financial agreements

associated with these projects.

ALTERNATIVES:

1. Do not authorize General Manager to execute rider and estoppel agreements required by the State in connection with affordable housing projects. However, without major subsidies from sources other than Tax Credits and HCD funds, this may render the TOD projects infeasible, and make it difficult to comply with the Affordable Housing and TOD Policy .
2. Authorize the General Manager to execute rider and estoppel agreements for all recent Board approved projects where the rider is required by the State - namely, the Mural Project at the MacArthur Station, the Marea Alta Project at the San Leandro Station, the Coliseum Transit Village Project at the Coliseum Station, and the San Leandro Senior Housing Project at the San Leandro Station - and consider rider and estoppel agreements on a case-by-case basis for future affordable housing Projects.

RECOMMENDATIONS:

Adopt the following Motion.

MOTION:

The General Manager or her designee is authorized to execute lease rider and estoppel agreements and similar agreements required by the State in connection with ground leases that include an affordable housing component.