Transit Public-Private Partnerships: Legal Issues

DETAILS

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TRANSIT PUBLIC-PRIVATE PARTNERSHIPS: LEGAL ISSUES

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Larry W. Thomas, The Thomas Law Firm, Washington, DC. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

The nation's 6,000 plus transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their business. Some transit programs involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Also, much of the information that is needed by transit attorneys to address legal concerns is scattered and fragmented. Consequently, it would be helpful to the transit lawyer to have well-resourced and well-documented reports on specific legal topics available to the transit legal community.

The *Legal Research Digests* (LRDs) are developed to assist transit attorneys in dealing with the myriad of initiatives and problems associated with transit start-up and operations, as well as with day-to-day legal work. The LRDs address such issues as eminent domain, civil rights, constitutional rights, contracting, environmental concerns, labor, procurement, risk management, security, tort liability, and zoning. The transit legal research, when conducted through the TRB's legal studies process, either collects primary data that generally are not available elsewhere or performs analysis of existing literature.

Applications

Public-private partnerships (PPPs) provide an increasingly important project delivery alternative in a public agency's toolbox, as a way to implement and finance public projects. One attribute of PPPs is that they enable transit agencies to collaborate with private, for-profit entities to provide increased transit service. Partnering public and private entities share resources, risks, and rewards, and, in so doing, have the potential for allowing the public entity to leverage its funding and provide more transit service. Transit-related PPPs have the potential to involve complex concession agreements in which private entities may design, build, finance, operate, and maintain entire transit corridors or modalities for a transit agency. PPPs can also pose significant legal and practical challenges. Among issues that may arise are:

- *Risk issues.* For example, PPPs may involve a private entity serving as a concessionaire but retain fare-setting power with the public entity. Such arrangements can raise issues regarding revenue risk allocation.
- *Tax and financing issues*. To obtain financing and favorable tax treatment, the private entity may need to demonstrate ownership of the asset being developed by the PPP, yet the public entity needs to maintain continuing control of the project (among other reasons, to qualify for federal funds).
- *Federal and local legal issues.* PPPs currently involve several major exceptions to standard federal laws and regulations. In addition, local laws may restrict or impact PPPs. Care must be taken to ensure that the PPP framework complies with Federal Transit Administration requirements and other applicable legal provisions.
- *Insurance issues.* PPPs may involve complex insurance arrangements and project-specific policies.
- *Labor issues.* If a PPP includes a private entity performing transit operations or other related work, labor issues may need to be addressed by the partners.

This digest should be useful to transit lawyers, planners, and transit administrators as they assist with negotiating PPP agreements and arranging for implementation of PPP programs.

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TRANSIT PUBLIC-PRIVATE PARTNERSHIPS: LEGAL ISSUES

By Larry W. Thomas, The Thomas Law Firm, Washington, DC

I. INTRODUCTION

The concept of a public-private partnership (PPP) seems to have originated in the United States.[1] PPPs may design, build, finance, operate, and maintain transit facilities or entire transit corridors or modalities for a transit agency. Using the value of total PPPs as a guide, the transportation sector is the largest user of PPPs in the United States.[2] A PPP is not a partnership in the legal sense.[3] Rather, a PPP is a contractual arrangement between a public agency as sponsor and a private partner for the design and construction and possibly the financing, management, and operation of infrastructure, such as transit stations and rail corridors.[4] PPPs are "essentially a form of procurement"[5] in which a "public entity 'retains a substantial role'…and exerts control and oversight of the asset or infrastructure."[6] A PPP seeks to create "the most economically efficient and politically acceptable arrangements for coordinating public and private efforts to improve mobility and to apportion the costs and benefits among the many stakeholders."[7]

In a PPP the public authority specifies its requirements, leaving it to the private sector to construct a facility meeting the transit agency's specifications or "outputs."[8] PPPs make use of alternative contracting methods as well as innovative financing to take advantage of the private sector's expertise and possibly financial resources to construct transit projects.[9] Because of rising costs and ever scarcer funding for public transit, there is increasing interest in PPPs.[10] Nevertheless, the use of PPPs for public infrastructure projects remains controversial. Moreover, there may be "significant political and legal impediments" to a public agency's decision to engage in a PPP.[11]

A significant, recent development for PPPs and transit is that, in 2012, Congress enacted the Moving Ahead for Progress in the 21st Century Act (MAP-21).[12] Section 1301 of MAP-21 states that it is United States policy "to accelerate project delivery and reduce costs" for transit projects

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[1] E.R. YESCOMBE, PUBLIC-PRIVATE PARTNERSHIPS, PRINCIPLES OF POLICY AND FINANCE 2 (2007), hereinafter referred to as "Yescombe."

[2] POLICY, FINANCE & MANAGEMENT FOR PUBLIC-PRIVATE PARTNERSHIPS 200 (Akintola Akintoye & Matthias Beck eds., 2009), hereinafter referred to as "Akintoye & Beck." PPPs may be known by other names, such as a Cooperative Development Agreement (CDA) in Texas, Performance-Based Infrastructure (PBI) in California, State Asset Maximization (SAM) in New York, or Private Finance Initiative (PEFI) in Europe.

[3] YESCOMBE, *supra* note 1, at 3.

[4] R. Richard Geddes & Benjamin L. Wagner, Why Do U.S. States Adopt Public-Private Partnership Enabling Legislation?, at 2 (Dec. 2010), hereinafter referred to as "Geddes & Wagner," abstract available at http://www.human.cornell.edu/pam/people/upload/Why-Do-States-Adopt-PPP-Leg-Dec-2010.pdf.

[5] FEDERAL TRANSIT ADMINISTRATION, REPORT TO CONGRESS ON THE COSTS, BENEFITS, AND EFFICIENCIES OF PUBLIC-PRIVATE PARTNERSHIPS FOR FIXED GUIDEWAY CAPITAL PROJECTS 1, hereinafter referred to as "FTA Report to Congress on PPPs," available at http://www.fta.dot.gov/documents/Costs_Benefits_Efficiencies_of_Public-Private_Partnerships.pdf.

[6] Chasity H. O'Steen & John R. Jenkins, *Local Government Law Symposium: Article: We Built It, and They Came! Now What? Public-Private Partnerships in the Replacement Era*, 41 STETSON L. REV. 249, 256 (2012) (footnote omitted), hereinafter referred to as "Chasity H. O'Steen & John R. Jenkins."

[7] Public-Private Policy Partnerships 77 (Pauline V. Rosenau ed., 2000), hereinafter referred to as "Rosenau."

[8] YESCOMBE, *supra* note 1, at 4.

[9] Public-Private Partnerships: Innovative Contracting, Hearings Before the House of Representatives, Before the Subcommittee on Highways and Transit, House Committee on Transportation and Infrastructure, H.R. REP. NO. 110-24, at 3 (2007), hereinafter referred to as "H.R. REP. NO. 110-24, Hearings on PPPs."

[10] Nadine Fogarty, Nancy Eaton, Dena Belzer & Gloria Ohland, Capturing the Value of Transit, hereinafter referred to as "Capturing the Value of Transit," at 29, Center for Transit-Oriented Development (2008), available at http://www.reconnectingamerica.org/assets/Uploads/ctodvalcapture110508v2.pdf.

[11] EDWARD FISHMAN, MAJOR LEGAL ISSUES FOR HIGHWAY PUBLIC-PRIVATE PARTNERSHIPS 3 (Legal Research Digest No. 51, Transportation Research Board, 2009), hereinafter referred to as "FISHMAN," available at http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_lrd_51.pdf.

[12] Pub. L. No. 112-141, 126 Stat. 405 (2012).

in "an efficient and effective manner."[13] MAP-21 requires the Federal Transit Administration (FTA), for example, to streamline its approval process for FTA grants and to streamline its environmental review and approval process. MAP-21 "supports the development and revitalization of public transportation[] with an emphasis on encouraging cooperation between public transportation companies and private companies."[14]

The FTA is required to provide technical assistance when requested by project sponsors and grantees on best practices for using PPPs for alternative project delivery of fixed-guideway capital projects.[15] FTA must identify public transportation laws, regulations, or practices that impede the use of PPPs or that discourage private investment in transit capital projects.[16] As FTA observes, a new pilot program established by MAP-21 for expedited project delivery under 49 U.S.C. § 5309 may provide opportunities for PPPs.[17] Thus, MAP-21 encourages private participation in transit projects.[18]

On January 9, 2013, FTA published a final rule that sets forth "a new regulatory framework for FTA's evaluation and rating of major transit capital investments seeking funding under the discretionary 'New Starts' and 'Small Starts' programs" and invited comment "on revised proposed policy guidance that provides additional detail on the new measures and proposed methods for calculating the project justification and local financial commitment criteria specified in statute and this final rule."[19] In its proposed policy guidance, FTA pointed out that the final rule and proposed guidance "do not cover new items included in MAP-21 that have not yet been the subject of…rulemaking."[20] FTA issued its final policy guidance in August 2013.[21]

MAP-21 tasked the U.S. Department of Transportation (USDOT) and Federal Highway Administration (FHWA) to develop "standard public-private partnership transaction model contracts for the most popular types of public-private partnerships for the development, financing, construc-

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[13] MAP-21, Pub. L. No. 112-141 § 1301(a)(1)(A) and (B) (126 Stat. 527) (2012).

[14] Anita Estell & Christian Washington, *Special Transportation Report: The Moving Ahead for Progress in the 21st Century Act (MAP-21)*, at 3 (discussing MAP-21's amendment of 49 U.S.C. § 5301), hereinafter referred to as "Estell & Washington," available at http://www.polsinelli.com/~/media/Articles%20by%20Attorneys/Estell_Washington_July2012.

[15] MAP 21, § 20013(b), entitled Actions to Promote Better Coordination between Public and Private Sector Providers of Public Transportation, amended 49 U.S.C. § 5315(b) to provide that the Secretary shall

> 1) provide technical assistance to recipients of federal transit grant assistance, at the request of a recipient, on practices and methods to best utilize private providers of public transportation; and 2) educate recipients of federal transit grant assistance on laws and regulations under this chapter that impact private providers of public transportation.

See also FTA, Moving Ahead for Progress in the 21st Century Act (MAP-21), A Summary of Public Transportation Provisions, at 9 (Aug. 2012), hereinafter referred to as "FTA Summary of MAP-21," available at http://www.fta.dot.gov/documents/MAP21_essay_style_summary_v5_MASTER.pdf.

[16] FTA Summary of MAP-21, *supra* note 15, at 10.

[17] *Id*.

[18] FTA Summary of MAP-21, *supra* note 15, at 10.

[19] FTA, Major Capital Investment Projects; Notice of Availability of Proposed New Starts and Small Starts Policy Guidance; Final Rule and Proposed Rule, 78 Fed. Reg. 1992 (Jan. 9, 2013), hereinafter referred to as "Major Capital Investment Projects," available at http://www.gpo.gov/fdsys/pkg/FR-2013-01-09/pdf/2012-31540.pdf. *See* FTA, Proposed New Starts and Small Starts Policy Guidance (Jan. 9, 2013), hereinafter referred to as "Proposed New Starts and Small Starts Policy Guidance," available at http://www.fta.dot.gov/documents/NewStartsPolicyGuidance.pdf.

[20] FTA Proposed New Starts and Small Starts Policy Guidance, *supra* note 19, at 3. The changes made by MAP-21, for which there was no rulemaking as of January 2013, include "core capacity improvement program evaluation and rating process, the program of interrelated projects evaluation and rating process, the pilot program for expedited project delivery, and the process for an expedited technical capacity review for project sponsors that have recently and successfully completed at least one new fixed guideway or core capacity project." *Id*. Furthermore, FTA's rulemaking as of January 2013 has not addressed

> how the steps in the New and Small Starts process will be implemented by FTA because of changes made in MAP-21 to those steps that were not considered in the NPRM. …While the final rule includes the names of the steps in the New and Small Starts process as defined in MAP-21, further detail on how those steps will be implemented will be the subject of future interim policy guidance and rulemaking, after an opportunity for public comment is provided.

Id.

[21] U.S. Department of Transportation, Federal Transit Administration, New and Small Starts Evaluation and Rating Process, Final Policy Guidance (Aug. 2013), available at http://www.fta.dot.gov/documents/NS-SS_Final_PolicyGuidance_August_2013.pdf.

tion and operation of transportation facilities."[22] Thus, on January 9, 2013, FHWA invited the public to provide ideas and comments by May 31, 2013, on what should be included or excluded from model PPP partnership contracts.

A survey was used to determine whether in the past 10 years transit agencies have used PPPs for the purpose of acquiring, improving, constructing, developing, operating, maintaining, or financing infrastructure projects or used PPPs for transit-oriented development (TOD). The survey was not conducted for the purpose of an empirical study or analysis. Rather, the survey sought to gather information on transit agencies' PPP projects. The transit agencies' responses to the survey are discussed throughout this digest and in Appendix E.

The objectives of this digest are to identify and discuss legal issues that are presented by PPPs for transit projects. The next four sections of the digest are devoted to the rationale for using PPPs (Section II); the innovative contracting and financing approaches offered by PPPs (Section III); the structuring of PPPs (Section IV); and transfer of risks from the public to the private sector through PPPs (Section V).

The next two sections of the digest deal with a PPP's compliance with federal law and regulations (Section VI) and with legal barriers PPPs confront in some states (Section VII).

The next three sections discuss the funding of PPPs for transit projects, including the use of tax-exempt bonds, notes, and nonprofit corporations (Section VIII); federal and state credit facilities that are available to PPPs for transit projects, as well as sources of private equity or loans (Section IX); and how transit agencies use taxes dedicated to transit, assessment districts, and development impact fees to capture the value created by new or expanded transit service (Section X).

The final four sections of the digest discuss long-term leasing of transit facilities and other forms of leasing (Section XI); TOD and joint development of property in close proximity to transit facilities (Section XII); the three pilot projects selected by FTA to demonstrate the use of PPPs for transit capital improvements (Section XIII), and, finally, some of the literature relevant to PPPs and transit projects (Section XIV) and the conclusions (Section XV).

The digest's appendices analyze the structure and funding of 30 pending or completed transit PPPs in 17 states (Appendix A) and of the Canada Line in Vancouver (Appendix B). Appendix C includes copies of agreements and other documents provided by 59 transit agencies that responded to a survey conducted for the digest. Appendix D provides the survey questions; Appendix E, a summary of transit agency responses to the survey; and Appendix F, a list of the responding transit agencies.

II. ADVANTAGES OF PPPS TO PUBLIC TRANSIT AGENCIES

Assuming that the legal, regulatory, funding, and other issues discussed in the digest are overcome for a proposed particular transit project, the use of PPPs is advantageous for agencies.[23] By using one of the alternative methods of project delivery discussed in Section III, PPPs may be able to deliver a project more rapidly, more efficiently, and at a lower price. A design-build (DB) contract, for example, allows for greater flexibility in the design and delivery of a project than is permitted by the traditional design-bid-build method of procurement.[24] Proponents of PPPs maintain that PPPs use resources more efficiently because of "improved management and innovation in construction, maintenance, and operation"[25]; grant transit agencies greater access to private

[22] United States Department of Transportation, Federal Highway Administration, Public-Private Partnerships Public Meeting and Request for Comment, 78 Fed. Reg. (Jan. 9, 2013), available at http://www.gpo.gov/fdsys/pkg/FR-2013-01-09/html/2013-00219.htm.

[23] For a general resource that appears to be applicable to all transportation agencies considering a PPP, *see* FHWA, USER GUIDEBOOK ON IMPLEMENTING PUBLIC-PRIVATE PARTNERSHIPS FOR TRANSPORTATION INFRASTRUCTURE PROJECTS IN THE UNITED STATES 29 (2007) (stating that a successful PPP program requires "policies, procedures, documentation, and resources" that are necessary for a PPP project), hereinafter referred to as "FHWA User Guidebook on Implementing PPPs," available at http://www.fhwa.dot.gov/ipd/pdfs/ppp_user_guidebook_final_7-7-07.pdf.

[24] FHWA, Design-Build Effectiveness Study (2006) (stating that a DB contract "is an established process for developing major capital projects used by the private sector and the armed services, which may be less constrained by state or local regulations that limit opportunities for achieving its potential benefits"), available at http://www.fhwa.dot.gov/reports/designbuild/designbuild2.htm.

[25] WILLIAM J. MALLETT, CONGRESSIONAL RESEARCH SERVICE, PUBLIC-PRIVATE PARTNERSHIPS IN HIGHWAY AND TRANSIT INFRASTRUCTURE PROVISION 20–21 (July 9, 2008), hereinafter referred to as "MALLETT," available at http://cdm16255.contentdm.oclc.org/cdm/ref/collection/p266401coll4/id/3136.

sources of capital; produce a higher quality end product; result in a higher level of customer satisfaction; and generally permit transit agencies "to focus on their strengths."[26] Besides accelerating project delivery, PPPs take advantage of the private sector's expertise; attract and leverage public and private financial resources; and transfer risk and expense from the public sector to the private sector.[27]

Performance incentives may be included in a contract for a PPP to encourage the timely (or early) completion of a project within budget or the operation and maintenance of a facility to a transit agency's performance specifications.[28] A PPP may save money for larger projects because of "economies of scale."[29] PPPs may avoid cost overruns that occur because of "initial low bids from contractors being inflated by change orders."[30] On the other hand, because the cost of a "turnkey contract" may be higher at the outset, a public sponsor may find it necessary later to reduce the scope of a project.[31]

Transit agencies responding to the survey having experience with PPPs similarly reported that there are advantages in using PPPs:

- The design and construction phases are shorter, and there is more risk-sharing that benefits the sponsor of the transit project.[32]
- A PPP permits "sole sourcing" of architectural and engineering services for projects.[33]
- A PPP may be used for TOD or joint development to help pay for capital projects or defray operating expenses, as well as to increase ridership and the area tax base.[34]
- PPPs enable a transit agency to take advantage of "management efficiencies" offered by the private sector.[35]
- PPPs permit a transit agency to eliminate or reduce some ownership issues, costs, and risks for a project, yet still maintain significant control of a project's design and construction.[36]

For example, Southeastern Pennsylvania Transportation Authority (SEPTA) reported on two PPPs, one for the construction of an energy storage system and the other for the construction of a combined heat and power plant. SEPTA stated that for both PPPs, besides benefiting from a simplified procurement process (e.g., the vendor procuring the required equipment), SEPTA expects to benefit from energy savings with little or no upfront investment.[37]

Another example is a TOD project for Tri-County Metropolitan Transportation District of Oregon (TriMet), discussed in more detail in Appendix A, that allows TriMet to make greater utilization of property owned by the agency in a way that supports the transit district but transfers risk to a private developer.[38]

Some opponents of PPPs argue, however, that PPPs may be nothing more than "false partnerships" because "profits will be retained in the private sector, while major losses will be borne by the public sector."[39] Moreover, opponents point out, as discussed in Section VII, that PPPs confront significant legal and regulatory challenges in some states.[40] State competitive bidding may be an obstacle because of the "bundled character of public-private partnerships" presented by a single

[26] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 5.

[27] Richard Steinmann, FTA, Public-Private Partnerships and Transit (presentation) (Oct. 2007), hereinafter referred to as "Steinmann."

[28] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 46. *See also* LARRY W. THOMAS, CONTRACTUAL MEANS OF ACHIEVING HIGH-LEVEL PERFORMANCE IN TRANSIT CONTRACTS (Legal Research Digest No. 43, Transportation Research Board, 2013).

[29] YESCOMBE, *supra* note 1, at 20, 28.

[30] *Id*. at 19.

[31] *Id*.

[32] Response of Connecticut Department of Transportation, hereinafter referred to as "Conn. DOT Response."

[33] Response of Milford Transit District, hereinafter referred to as "Milford Transit District Response."

[34] Response of City of La Crosse Municipal Transit Utility, hereinafter referred to as "La Crosse Municipal Transit Utility Response."

[35] Response of New Jersey Transit, hereinafter referred to as "N.J. Transit Response."

[36] Response of Pioneer Valley Transit Authority (PVTA), hereinafter referred to as "PVTA Response."

[37] Response of Southeastern Pennsylvania Transportation Authority (SEPTA), hereinafter referred to as "SEPTA Response."

[38] Response of Tri-County Metropolitan Transportation District of Oregon, hereinafter referred to as "TriMet Response."

[39] MALLETT, *supra* note 25, at 21.

[40] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 53 (exhibit 34).

PPP contract.[41] There are issues concerning whether PPPs are sufficiently transparent and whether a PPP means the loss of control of planning or operational issues, such as the setting of transit fares.[42]

Transit agencies responding to the survey also observed that there are some inconveniences in using a PPP. A PPP may be a lengthy, complicated project,[43] there is a need for confidentiality during the selection and negotiation process,[44] and a transit agency has less control of a facility subject to a PPP.[45] Although TriMet states that there were no disadvantages in using a PPP for TOD, it stated that there are "excessive" insurance requirements for a PPP project currently in the design phase.[46]

Finally, regardless of the reasons for a PPP, there seems to be a consensus that a successful PPP requires political and public support; a process for the competitive selection of a proposal and the private partner; sufficient funding; a reliable source of future revenue; a proper allocation of the risks of a PPP between or among the partners; and a clear understanding of and compliance with federal, state, and local legal requirements, including land-use and environmental requirements.

III. METHODS OF ALTERNATIVE PROJECT DELIVERY FOR TRANSIT PROJECTS AND PPPS

A. A Policy Shift from Design-Bid-Build Procurement

Under the traditional method of contracting—the design-bid-build method—a public transit or other public authority decides on the "need for building a new facility" or the expansion of service; decides how to pay for the project; designs or contracts for the design of the project; solicits bids for the project's construction pursuant to the design and specifications; and on completion owns, operates, and maintains the facility.[47] Since 1990, however, when FHWA first allowed state DOTs to evaluate nontraditional contracting techniques, the DOT has encouraged greater use of alternative contracting.[48]

In 1991, the Intermodal Surface Transportation Efficiency Act (ISTEA) initiated a demonstration program for the use of DB and design-build-operate-maintain (DBOM) contracts in connection with FTA's New Starts program. FTA thereafter issued guidance on the use of DB and DBOM contracts for the New Starts program[49] and chose five projects to participate in a demonstration program.[50] The Transportation Equity Act for the

[41] Rosenau, *supra* note 7, at 105.

[42] *See* Mark Perlman & Julia Pulidindi, *Public-Private Partnerships for Transportation Projects* 4, NATIONAL LEAGUE OF CITIES, MUNICIPAL ACTION GUIDE (2012), hereinafter referred to as "Public-Private Partnerships for Transportation Projects."

[43] La Crosse Municipal Transit Utility Response.

[44] Conn. DOT Response.

[45] PVTA Response.

[46] Milford Transit District Response.

[47] MALLETT, *supra* note 25, at 5.

[48] Under FHWA's Special Experimental Project No. 14—Innovative Contracting (SEP-14) program, FHWA authorized four methods of alternative contracting: cost-plus-time bidding, lane rental arrangements, warranties, and design-build (DB) contracts. In 2002, the SEP-14 program became known for the use of the term "alternative contracting" rather than "innovative contracting." FHWA, Construction, Contract Administration, available at http://www.fhwa.dot.gov/programadmin/contracts/sep_a.cfm. However, the principal form of contracting tested by 38 states was the DB form. FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 66.

Later, FHWA's Special Experimental Project No. 15 (SEP-15) program focused on "project delivery in the areas of contracting, compliance with environmental regulations, right-of-way acquisition, and project finance." MALLETT, *supra* note 25, at 15. SEP-15 permitted the use of nontraditional contracting methods for federal-aid highway projects. H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at X. FHWA Innovative Program Delivery, available at http://www.fhwa.dot.gov/ipd/p3/tools_programs/sep15_procedures.htm.
States may request waivers of certain FHWA regulations and policies regarding a project; however, if a PPP seeks a waiver, the application must be channeled through the state DOT. *Id*. SEP-15 permitted "the testing of innovative approaches to finance, planning, environmental clearance, and right-of-way acquisition for designated projects." FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 68.

[49] FTA, Interim Guidance on Design-Build Project Delivery and the FFGA Process, at 16–17, hereinafter referred to as "FTA Interim Guidance on DB and FFGA Process," available at http://www.fta.dot.gov/legislation_law/12305_4191.html. *See* MALLETt, *supra* note 25, at 16–17.

[50] According to FTA the demonstration projects include the Los Angeles Union Station Intermodal Terminal, Baltimore Light Rail Transit (LRT) System Extensions, San Juan Tren Urbano, Bay Area Rapid Transit District San Francisco International Airport Extension, and New Jersey Hudson-Bergen LRT line. FTA Interim Guidance on DB and FFGA Process, *supra*

21st Century (TEA-21) clarified that turnkey projects "could include designing, building, operating, or maintaining a transit system or operable segments of a transit system."[51]

In 2005, Section 3011(c) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) authorized the Secretary of Transportation to establish a pilot program for the use of PPPs in new fixed-guideway capital projects, known as "Penta-P."[52] Section XIII discusses the three projects that were selected.

SAFETEA-LU also permitted regulations to be revised to allow transportation agencies to proceed with certain actions prior to the receipt of final approval under the National Environmental Policy Act (NEPA).[53] Under SAFETEA-LU, subject to compliance with all applicable federal requirements, DB contracting was permitted for any capital project financed through FTA programs.[54] SAFETEA-LU also authorized the inclusion of intercity bus and rail terminals for joint development.[55]

B. The Use of Alternative Methods of Project Delivery

1. Design-Build

Of the alternative methods of project delivery, the DB and DBOM procurements are the ones utilized most frequently by the transit sector.[56] The DB form also is the most common approach for highway projects.[57] Based on the number of projects, DBOM procurement is the second-largest category of PPP projects for transit agencies, but based on the total cost of the projects, the use of DB and DBOM contracts by transit agencies is approximately equal.[58] The use of concession contracts for PPPs, such as for toll roads, represents the second-largest category for highway projects.

Rather than providing design specifications on which contractors are solicited to bid, a transit agency in a DB procurement determines initially what it wants. The agency provides contractors with the agency's required performance specifications or outputs for a proposed project.[59] Whether a design-builder is a company or a team of companies, a design-builder is expected to develop the most effective means for meeting the transit agency's performance specifications.[60] A DB contract compels a contractor "to complete life-cycle-cost analyses of all design and construction options" and shifts "the risk of project quality to the private contractor."[61] A DB contract affords a contractor greater flexibility but imposes more responsibility for a project.[62] Some design-builders reportedly are willing to "guarantee" their work for a period of 5 years to as long as 20 years after delivery of a project.[63]

Some of the other attributes of a DB contract are:

- "[T]he design-builder…assumes the risk that the drawings and specifications are free from error."[64]
- A DB contract helps to control schedules and costs by combining the responsibilities for design and construction in one contract.[65]

note 49. FTA states that the projects "were selected because they represent various technologies, levels of investment, engineering complexity, financial arrangements, and management structures." *Id*.

[51] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at X.

[52] MALLETT, *supra* note 25, at 16–17.

[53] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at IX.

[54] *Id*. at X.

[55] Mallett, *supra* note 25, at 16.

[56] Nossaman LLP, FTA Announces Terms of the Public-Private Partnership Pilot Program to Encourage Private Investment in Transit Projects, at 2 (Jan. 31, 2007), hereinafter referred to as "FTA Public-Private 3P Program," available at http://www.nossaman.com/fta-announces-terms-publicprivate-partnership-pilot-program. *See* Public-Private Partnerships for Transportation Projects, *supra* note 42, at 2 (stating that the DB form of procurement is the most frequently used form of alternative contracting by public transit authorities).

[57] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 1.

[58] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 62. Of 12 major transit-related PPP projects discussed in the text, 8 were design-build projects, 3 were design-build-operate-maintain projects, and 1 was a design-build-finance-operate project. *See id*. (exhibit 40).

[59] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 19.

[60] FTA Report to Congress on PPPs, *supra* note 5, at 3.

[61] FISHMAN, *supra* note 11, at 5.

[62] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at VIII.

[63] FISHMAN, *supra* note 11, at 5.

[64] FTA Report to Congress on PPPs, *supra* note 5, at 3.

- When a contractor assumes the risk for the quality of a project (e.g., material and workmanship or performance guarantees), a public partner has less responsibility for inspections and testing during the construction of the facility.[66]
- Construction may begin before the details of a project are finalized.[67]
- The "private partner is responsible for timely project completion within the specified budget."[68]
- The private partner "assumes the risk of changes in labor and material costs, cost management, and efficient construction practices."[69]
- A DB approach may "result in cost savings, price certainty and time savings."[70]

It has been argued that DB contracts have some limitations. First, the method is not necessarily free of subjectivity even though a design-builder may be selected because of scoring "the highest on evaluation criteria."[71] Evaluators may have a tendency to consider only contractors with the most design-build experience. Second, net worth requirements may disqualify "most contractors from competing, regardless of their ability to deliver the project."[72] Third, the DB approach may "put too much emphasis on non-construction elements of a proposal," thus resulting in the exclusion of good but more expensive proposals.[73]

Numerous projects receiving grants from the FTA have relied on the DB type of procurement.[74] According to FTA, "there are two non-New Start fixed guideway projects with Federal interest that have been delivered using a DB approach," the Portland MAX Airport Extension and the AirTrain JFK.[75]

2. Design-Build-Operate-Maintain

The DBOM is the DB method with operate and maintain responsibilities included. The DBOM method is used for toll roads, transit facilities, airports, and other infrastructure projects.[76] The DBOM "may be used for new projects or to upgrade existing infrastructure" with contract terms "between fifteen to twenty-five years."[77] With DBOM procurements, a transit agency retains ownership of a project and may retain significant responsibility for oversight of the project. A DBOM contract incentivizes a contractor to deliver a "high quality project because the contractor is responsible for operating and maintaining the facility for a specified period of time after construction."[78] The transit partner may pay incentives or assess charges based on the private partner's performance or based on the condition of the DBOM facility.[79]

Examples of projects for which the DBOM method was selected for a PPP include the Denver Eagle P3 East and Gold Rail Line Projects; the Houston North and Southeast Corridor High Capacity Transit Extension Projects; and the earlier Hudson-Bergen Rail Transit Project (HBLR) in

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[65] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 25.

[66] FISHMAN, *supra* note 11, at 5.

[67] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at VIII.

[68] O'Steen & Jenkins, *supra* note 6, at 288.

[69] *Id*.

[70] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 3.

[71] *Id*. at 50.

[72] *Id*.

[73] *Id*.

[74] *See* discussion of pending and completed transit PPPs in App. A. *See also* FTA Report to Congress on PPPs, *supra* note 5, at 4 (*e.g*., the BART Extension to San Francisco International Airport; Denver Southeast Corridor T-Rex Project; Greenbush, Massachusetts, Commuter Rail; South Florida Commuter Rail Upgrades; Minneapolis Hiawatha Light Rail Transit Project; New Jersey Hudson-Bergen Light Rail Line; Oakland Airport Connector; Reno Transportation Rail Access Corridor; and the WMATA Largo Metrorail Extension).

[75] FTA Report to Congress on PPPs, *supra* note 5, at 4. The term "non-New Starts funding" is explained by the Government Accountability Office (GAO) in its report to congressional committees entitled *Public Transit Funding for New Starts and Small Starts Projects, October 2004 through June 2012*, at 10 (2012), available at http://www.gao.gov/assets/660/650030.pdf. The GAO report states that "[f]unds from other FTA programs provided about $185 million, or about 1 percent of total federal funding" for the period studied. *Id*. The report notes that

> [a] total of 9 of the 25 New Starts projects used non-New Starts FTA funding, either from the Urbanized Area Formula program, the Fixed Guideway Modernization formula program, or Buses and Bus Related Equipment and Facilities discretionary program. In addition, one project used a $280 million Transportation Infrastructure Finance and Innovation Act (TIFIA) loan to help finance the project.

Id. at 10–11.

[76] Public-Private Partnerships for Transportation Projects, *supra* note 42, at 2; Steinmann, *supra* note 27.

[77] O'Steen & Jenkins, *supra* note 6, at 274–75.

[78] FISHMAN, *supra* note 11, at 5.

[79] O'Steen & Jenkins, *supra* note 6, at 274–75.

New Jersey.[80] Three agencies responding to the survey selected DBOM contracting for their PPP projects.

C. Other Methods of Alternative Contracting

1. A+B Contracting

As described by one source, A+B Contracting, also referred to as cost-plus-time bidding, is a method of procurement that "selects the lowest bidder based on consideration of both (A) the proposed price for the contract bid items and (B) the value associated with the time needed by the contractor to complete the project."[81] One purpose of such contracting is to incentivize the "A+B contractor to 'minimize delivery time for high priority' projects."[82] With incentives for early completion and penalties for late completion the A+B contractor assumes the risk "of failing to meet project deadlines."[83]

One agency responding to the survey reported using the A+B method for a PPP project.[84]

2. Construction Management/General Contractor

With construction management/general contractor (CMGC) contracting, a public agency hires a contractor and a designer and "marries the two."[85] The approach permits the design of the project to proceed with construction expertise provided by an independent firm.[86]

> During the final stages of [the] design, the contracting agency may negotiate with the CMGC firm to obtain a price for construction. If successful, the CMGC then becomes the prime construction contractor. If the contracting agency is not able to agree on a reasonable price, it still has the option of proceeding with a traditional low-bid construction contract.[87]

In CMGC contracting, "the project owner retains full control of project design throughout the design process."[88] Although "common in the vertical building industry," the CMGC method is "relatively rare in the highway industry."[89] Nevertheless, four transit agencies responding to the survey reported having selected the CMGC approach for a PPP.[90]

3. Construction Manager at Risk

With construction manager at risk (CMR) contracting, there are separate contracts for the construction manager and the design contractor during the "initial phase" of a project "as the design work progresses."[91] The project therefore is underway prior to the parties' entry into a DB contract.[92]

The Miami Intermodal Center (MIC), a $2.0 billion project with the completion of the Miami Central Station expected in early 2014, is an example of the use of the CMR method.[93] The method was deemed to be "best suited" for the integration of the requirements of the Florida Department of Transportation (FDOT).[94] According to FDOT, the CMR approach is advantageous to the owner for a number of reasons. The CMR contract could "deliver the completed project within the project objective time frame" based entirely on qualifications, not "skewed by cost considerations."[95] CMR allowed FDOT to select a "stand-alone designer" based on FDOT's architectural and engineering qualification process and afforded FDOT the "widest latitude to select a blue chip contractor with a record of success."[96] FDOT was able to begin construction prior to design completion, centralize risk and responsibility under one contract, and guarantee completion of the project at the negotiated price.[97] The CMR approach has resulted in savings for FDOT while delivering a high quality project "through con-

[80] FTA Report to Congress on PPPs, *supra* note 5, at 13.

[81] FISHMAN, *supra* note 11, at 5.

[82] *Id*.

[83] *Id*. at 6.

[84] PVTA Response.

[85] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 21.

[86] *Id*. at 36.

[87] *Id*.

[88] FISHMAN, *supra* note 11, at 6.

[89] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 36.

[90] La Crosse Municipal Transit Utility Response; Milford Transit Authority Response; PVTA Response; and SEPTA Response.

[91] FISHMAN, *supra* note 11, at 6.

[92] *Id*.

[93] FHWA, Innovative Program Delivery, Project Profiles, available at http://www.fhwa.dot.gov/ipd/project_profiles/fl_miami_intermodal.htm. *See* Miami Intermodal Center (MIC), Welcome to the MIC, available at http://www.micdot.com/.

[94] MIC, Construction, available at http://www.micdot.com/construction.html.

[95] *Id.*

[96] *Id.*

[97] *Id.*

structability [and] value engineering" on a "fast tracked project delivery schedule."[98]

4. Operate-Maintain

A method that is getting more attention for use by transit agencies is the operate and maintain (OM) method of contracting.[99] One of the simplest forms of PPPs, a long-term OM contract may be used for new or existing infrastructure. As a result of changes to the federal income tax laws in 1997, discussed in Section XI.A, OM contracts have become more popular because the term of an OM contract may be as long as 20 years or even longer.[100] Sections XI.A and XI.C discuss some of the tax and contractual issues presented by long-term leasing arrangements.

5. Operations, Maintenance, and Management

Although public ownership and control are maintained under an operations, maintenance, and management (OMM) approach, the contract transfers all or a significant part of the management of a transit facility to a private party.[101]

6. Build-Own-Operate

With a build-own-operate (BOO) contract, a "private partner owns the facility and is assigned all operating revenue risk and any surplus revenues for the life of the facility."[102] However, BOO contracts are said to be unpopular in the United States. BOO contracts arguably are not in the public interest because of the public agency's loss of "control over how the asset is preserved or priced to the user."[103] With a BOO-type of arrangement, there is "not necessarily…a contractual obligation to transfer the facility back to the public sector upon expiration of the useful life of the asset."[104]

In sum, as illustrated by the discussion in Appendix A on 30 pending or completed transit PPPs, transit agencies primarily are using the DB, DBOM, and CMGC methods of project delivery. Of the agencies responding to the survey, four selected the CMGC approach;[105] three used a DBOM contract;[106] one chose A+B contracting;[107] one selected what it described as a design-build-operate-maintain-manage contract;[108] and one agency reported using a design-build-manage contract for a PPP.[109] Copies of some contracts and related documents provided by transit agencies are included in Appendix C.

D. Alternative Methods of Project Delivery that Include Financing

1. Design-Build-Finance-Operate

Alternative methods of project delivery may combine a transfer of responsibility to the private partner to arrange for or be involved in the financing of a project.[110] A design-build-finance-operate (DBFO) is also known as a design-construct-manage-finance (DCMF) or design-build-finance-maintain (DBFM) type of contract.[111] The primary use of a DBFO contract is for a new system with an average PPP term of 20 years or more with revenues generated by "direct user fees, payments from the public sponsor, or both."[112] Revenues from the operation of a facility are used "to repay the private financing and other financing" for its construction.[113] The contract may provide for "performance incentives and include provisions for such things as maximum rate of return, non-compete clauses, and maximum user fees."[114]

Although not a transit project, a design-build-finance-operate-maintain (DBFOM) contract is being used for the Port of Miami Tunnel Pro-

[98] *Id.*

[99] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 2.

[100] O'Steen & Jenkins, *supra* note 6, at 273.

[101] Advancing Professional Construction and Program Management Worldwide, *An Owner's Guide to Project Delivery Methods*, at 26 (2012), available at http://cmaanet.org/files/Owners%20Guide%20to%20Project%20Delivery%20Methods%20Final.pdf.

[102] FTA Report to Congress on PPPs, *supra* note 5, at 6.

[103] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 12.

[104] FISHMAN, *supra* note 11, at 7; YESCOMBE, *supra* note 1, at 12.

[105] La Crosse Municipal Transit Utility Response; Milford Transit Authority Response; PVTA Response; and SEPTA Response.

[106] Conn. DOT Response; N.J Transit Response; and Response of Stark Area Regional Transit Authority (SARTA), hereinafter referred to as "SARTA Response."

[107] PVTA Response.

[108] N.J. Transit Response.

[109] Response of SEPTA.

[110] FISHMAN, *supra* note 11, at 6.

[111] YESCOMBE, *supra* note 1, at 12.

[112] O'Steen & Jenkins, *supra* note 6, at 276.

[113] FISHMAN, *supra* note 11, at 6.

[114] O'Steen & Jenkins, *supra* note 6, at 276 (footnote omitted).

ject.[115] The project is being developed as a PPP with Miami Access Tunnel, LLC (MAT), which has two finance investors, Meridiam Infrastructure Finance, in which nine banks reportedly participated with 90 percent equity, and Bouygues Travaux Publics, with 10 percent equity. Additional funding was provided by FDOT and by Miami-Dade County.[116] The partnership was structured so as to transfer to the private parties a substantial part of the risks of construction, including cost overruns, and of the tunnels' cost of operation and maintenance.[117]

A DBFO structure was planned for BART's Oakland Airport Connector project in which a private consortium was "expected to finance half of the project's capital cost, with debt service to be repaid from fare revenue generated by the project's operation."[118] It appears, however, that BART ultimately selected a DB contract along with an OM contract for the system's technology.[119]

Finally, although other PPPs may do so as well, a PPP using a DBFO may issue private activity bonds, a topic discussed in Section VIII.B of the digest.[120]

2. Design-Build-Finance-Operate-Maintain

The DBFOM approach adds a financial component to the DBOM method of contracting and may permit "lifecycle cost savings" by undertaking a project prior to increased costs for a project.[121] Both the DBFO and DBFOM methods are used to attract private capital and to transfer financial risk to private interests. Revenues generated by the completed project, taxes, or other funds may be used to repay private investors.[122]

There have been more DBFOM projects in recent years "because of limits on the amount of tax-exempt bonds that can be issued by state entities" and because of the availability and use of the other financing techniques discussed in Sections VIII, IX, and X of the digest.[123] An example of PPP procurement using a DBFOM contract is the Denver Eagle P3 East Rail and Gold Rail Line projects. In June 2010, Denver Transit Partners was selected to design, build, finance, operate, and maintain the East Rail Line and other Eagle P3 elements under a 34-year concession contract.[124]

3. Design-Build-Finance-Operate-Maintain-Transfer

The design-build-finance-operate-maintain-transfer (DBFOMT) approach is not common in the United States but was an option considered for the Dulles Greenway project, a toll road in Virginia near the separate access highway to the Washington-Dulles International Airport. The Greenway was constructed pursuant to a DBFOM contract.[125]

4. Build-Operate-Transfer

The build-operate-transfer (BOT) method of procurement is "similar to the DBFO approach except that the contractor retains ownership of the facility after construction and during the operating and maintenance phase of the project."[126] As noted with a BOO type of contract, the facility that is constructed is not necessarily transferred to the public partner at the end of the useful life of the facility. One reason for a BOT type of procurement is that the contractor "accepts all reve-

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[115] FHWA, Innovative Program Delivery, Project Profiles, Port of Miami Tunnel (expected completion in 2014), hereinafter referred to as "Profile—Port of Miami Tunnel," available at http://www.fhwa.dot.gov/ipd/project_profiles/fl_port_miami_tunnel.htm.

[116] O'Steen & Jenkins, *supra* note 6, at 276.

[117] *Id.*

[118] FTA Report to Congress on PPPs, *supra* note 5, at 11.

[119] *See* § XIII.B of the digest.

[120] Steinmann, *supra* note 27.

[121] A May 2013 study "found little direct information about the use of [lifecycle cost analyses (LCCAs)] specifically for P3 projects" and concluded that "it is unclear whether consultants have a formal LCCA methodology for estimating such costs." Minnesota Department of Transportation, Transportation Research Synthesis, *The Use of Life-Cycle Cost Analysis to Evaluate Public-Private Partnerships*, at 1 (May 2013), available at http://www.dot.state.mn.us/research/TRS/2013/TRS1304.pdf.

[122] FTA Report to Congress on PPPs, *supra* note 5, at 6.

[123] FISHMAN, *supra* note 11, at 7; YESCOMBE, *supra* note 1, at 12 (stating that with a BOT contract the private sector is the owner during the term of the contract, after which time the public sector becomes the owner).

[124] *See* RTD, FasTracks: Gold Rail Line, available at http://www.rtd-denver.com/FF-GoldLRT.shtml, and RTD, FasTracks: East Rail Line, available at http://www.rtd-denver.com/FF-EastLRT.shtml.

[125] FHWA, Innovative Program Delivery, Project Profiles, Dulles Greenway, available at http://www.fhwa.dot.gov/ipd/project_profiles/va_dulles_greenway.htm.

[126] FISHMAN, *supra* note 11, at 7. The BOT is also known as the build-own-operate-transfer (BOOT); YESCOMBE, *supra* note 1, at 12.

nue risk and reward during the operating and maintenance phase of the project."[127]

5. Build-Transfer-Operate

With a build-transfer-operate (BTO) contract, the private sector owns the project during construction, after which time the public sector becomes the owner.[128] The BTO is also known as build-transfer-lease (BTL), build-lease-operate-transfer (BLOT), or build-lease-transfer (BLT).[129]

In responding to the survey for this digest, the Stark Area Regional Transit Authority (SARTA) in Ohio advised that it has used a DBFO form of procurement. SEPTA has used DBFO for "limited operations." Both the Connecticut DOT and SEPTA reported using a DBFOM form of contract for a PPP, but the Connecticut DOT stated that its DBFOM contract also permits a design-build-finance-operate-transfer (DBFOT) method of project delivery. TriMet explained that because it had transferred the property in question to the developer, TriMet used a DBFOM contract. Finally, the Pioneer Valley Transit Authority reported that it had used a design-build-lease method.

IV. STRUCTURING A PUBLIC-PRIVATE PARTNERSHIP FOR A TRANSIT PROJECT

A. Evaluating a Project for a PPP

From the outset of a PPP project a transit agency must "take control of the predevelopment process."[130] It is particularly important to structure a PPP correctly so that the transit agency obtains a PPP promising "long-term 'value for money' benefits."[131] Structuring a PPP to lower business risk as much as possible will make a project more attractive to a private partner and to private lenders and investors.[132] The most successful PPPs are likely to have a well-organized structure, a detailed business plan, a guaranteed revenue stream, and the support of stakeholders.[133] Although favorable state law is essential to a PPP (discussed in Section VII), also essential are well-drafted contractual terms, a satisfactory basis for revenue sharing, if applicable, and adequate funding.[134]

More particularly, the structuring of a successful PPP project begins by evaluating a project's technical and engineering aspects;[135] conducting due diligence to select the best private partner or partners;[136] developing the right legal framework; and determining how to finance the project, including creating "a debt and security structure acceptable to potential equity and debt investors."[137] When creating a transit PPP, "every deal structure must be customized."[138]

As for factors that transit agencies are considering before proceeding with a PPP, the agencies responding to the survey stated that they evaluate or consider the following:

- Whether a facility will be used for as long as what is determined to be the facility's useful life.[139]
- Price, past performance, customer service record, and other factors.[140]
- The time line for construction and penalties that will apply when the time line is not met.[141]
- Property value, the projected increase in ridership, and projected lease payments, if applicable.[142]

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[127] FISHMAN, *supra* note 11, at 7.

[128] YESCOMBE, *supra* note 1, at 12.

[129] *Id.*

[130] JOHN STAINBACK, PUBLIC/PRIVATE FINANCE AND DEVELOPMENT METHODOLOGY/DEAL STRUCTURING/DEVELOPER SOLICITATION 33 (2000), hereinafter referred to as "STAINBACK."

[131] PUBLIC-PRIVATE PARTNERSHIPS POLICY AND PRACTICE: A REFERENCE GUIDE 3 (H.K. Young ed., 2010), hereinafter referred to as "Young."

[132] Table Rock Capital, Generating Private Sector Financing, at 18 (July 2009), hereinafter referred to as "Generating Private Sector Financing."

[133] *See* WORLD BANK INSTITUTE, Public-Private Partnerships Version 1.0 Reference Guide, at 15–33 (2012), available at http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/WBIPPIAFPPP ReferenceGuidev11.0.pdf.

[134] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 1.

[135] Young, *supra* note 131, at 42.

[136] The National Council for Public-Private Partnerships, *For the Good of the People: Using Public-Private Partnerships to Meet America's Essential Needs*, at 17 (undated) (stating that there will be governments that "do not practice due diligence in their selection of private partners and end up choosing a partner who is not ideally compatible for the project in question"), available at http://www.ncppp.org/wp-content/uploads/2013/03/WPFortheGoodofthePeople.pdf.

[137] Young, *supra* note 131, at 45.

[138] STAINBACK, *supra* note 130, at 1.

[139] Milford Transit District Response.

[140] N.J. Transit Response.

[141] SARTA Response.

[142] TriMet Response.

Although SEPTA considers its return on investment, its "upfront cost outlay" is the primary factor.[143] However, SEPTA stated that it has not undertaken many PPPs.[144]

Transit agencies may use a Value for Money (VfM) approach to assess whether a PPP offers greater value than a design-bid-build procurement. The California Infrastructure Finance Act specifically allows a project sponsor to choose a private partner based on the best value rather than the lowest bid.[145] As explained by one source, "VfM is not based on just what is initially the cheapest, but takes account of the combination of risk transfer, whole-life cost and service provided by the Facility."[146] There must be a realistic evaluation of a project's requirements, costs, and potential revenues so that a decision may be made regarding the best means of procuring a capital project.[147]

VfM encourages the use of best business practices to accelerate a project and reduce its cost; seeks to reduce long-term costs by providing "higher-quality design, construction, and inspection up front"; and uses "life-cycle asset management to reduce the frequency and cost of preservation."[148] A key element of a VfM analysis is whether there are risks that may be transferred and whether a private entity may manage those risks better than the transit agency.[149] VfM may be used during all phases of a project and "refined as more information becomes available."[150]

A request for information (RFI), a request for qualifications (RFQ), and a request for proposals (RFP) may assist in structuring a project and reducing the time needed to negotiate a contract. The RFI provides a transit agency with feedback before it issues an RFP.[151] The RFQ permits a transit agency to learn about potential bidders and assists in narrowing the field.[152] SEPTA reported that an RFQ was used preceding entering into a CMGC contract with a private partner.

An FHWA report entitled *Value for Money State of the Practice* discusses the concepts and principles "which underlie the VfM methodologies of several states, including California, Florida, Georgia, Texas and Virginia."[153] The Commonwealth of Virginia's Office of Transportation Public Private Partnerships (PPTA Office), has published a "PPTA Value for Money Guidance," with information on how the PPTA Office assesses VfM "when procuring infrastructure projects" as PPTA candidates in comparison with "procuring the projects as public sector projects using traditional project delivery methods"; how the Office assesses "the VfM of selecting a particular structure for a PPTA project"; "the planning stages at which VfM should be assessed;" and a recommended "reporting framework for presenting the results of the VfM assessment."[154]

Transit agencies were asked whether in evaluating a prospective project for a PPP the agency undertakes a VfM of the project. Six agencies said that they undertake such an evaluation[155] and two agencies indicated that they do not,[156] but other

[143] SEPTA Response.

[144] *Id.*

[145] CAL. GOV'T CODE §§ 5956 *et seq*.; FTA Report to Congress on PPPs, *supra* note 5, at 42. *See* DAVID E. DOWALL & ROBIN RIED, A STRATEGY FOR INFRASTRUCTURE, THE CALIFORNIA INFRASTRUCTURE INITIATIVE (Access No. 32, 2008), available at http://metrostudies.berkeley.edu/pubs/reports/008_ACCESS_CAInfrastructure.pdf.

[146] YESCOMBE, *supra* note 1, at 18.

[147] Implementation of PPPs for Transit, *supra* note 24, at 14.

[148] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 41.

[149] YESCOMBE, *supra* note 1, at 18.

[150] Implementation of PPPs for Transit, *supra* note 24, at 14.

[151] *Id.* at 3.

[152] *Id.*

[153] FHWA, Value for Money State of the Practice, at 1 (2011), available at http://www.fhwa.dot.gov/ipd/pdfs/p3/vfm_state_of_the_practice.pdf.

[154] Commonwealth of Virginia, Office of Transportation Public Private Partnerships, *PPTA Value for Money Guidance*, at 1 (2011), available at http://www.virginiadot.org/office_of_transportation_public-private_partnerships/resources/VDOT%20VfM%20guidance%20document_final_20110404.pdf. *See also* Los Angeles County, Metropolitan Transportation Authority, Planning And Programming Committee, Public-Private Partnership Program (Oct. 14, 2009), available at http://media.metro.net/board/Items/2009/10_october/20091014P&PItem9.pdf (stating that certain projects are recommended for Board approval in order to move forward into comprehensive evaluation and development, including a value for money (VFM) analysis, and identifying one of the projects as the Wilshire Boulevard Bus Rapid Transitway).

[155] La Crosse Municipal Transit Utility Response; Conn. DOT Response; Milford Transit District Response; N.J. Transit Response; SEPTA Response; and TriMet Response.

[156] PVTA Response; SARTA Response.

agencies did not respond specifically to the question.

B. Key Legal Issues to Address in PPP Contracts

1. Legal Authority for a PPP

As discussed in Section VII, on state legislative provisions affecting PPPs, a transit agency should resolve at an early stage whether applicable state law permits the use of a PPP for a specific project. Indeed, state legislation may authorize, restrict, or even prohibit key elements of a proposed PPP. A transit agency will need to consider, for example:

- Whether state law permits the parties to provide the services in accordance with the structure and arrangements they plan to establish.
- The legal ability of the private sector to be involved in the development, financing, operation, or maintenance of publicly owned infrastructure.
- Any regulatory or other authority that other government entities have over transit facilities relating to the construction of facilities or extension of services, as well as over rights of access needed by a transit agency.
- Authority of the transit agency to regulate services and fares or to engage in revenue sharing.
- Whether under state law it is legal to transfer or whether there are restrictions on the transfer of responsibilities of a transit agency to other entities.
- The availability under state law of adequate procurement and selection procedures for the project.
- Whether there is sufficient legal authority and capacity for necessary borrowing by the state or local government or by the transit authority for a PPP.[157]

2. Contractual Issues and Provisions

Although a PPP has been described as an "umbrella concept that 'encompasses a wide range of contractual arrangements,'"[158] only a few agencies responding to the survey said that they had used PPP agreements in addition to those described in Section III. One agency reported having used a development agreement,[159] one had used an access and operations agreement,[160] and one agency also had used an agreement for the disposition and development of real property, a copy of which is included in Appendix C.[161]

Nevertheless, the contractual documents for a project may be extensive; for example, a TriMet project described in Appendix A required 85 agreements among the parties.[162] In addition to the exhibits attached to the digest, there are other sources of summaries and analyses of PPP agreements.[163] As for specific provisions, FHWA provides a template for agreements associated with PPP projects.[164] Section 20013 of MAP-21 directs the Secretary of Transportation, among other things, to identify the best practices for PPP models, to develop "standard PPP transaction model contracts," and to conduct financial assessments and benefits of a proposed transaction.[165]

Contracts for PPP projects commonly identify the type of procurement and include provisions on the term of the agreement; the details of the construction, operation, or maintenance of the project; the handling of changes in design standards or construction specifications during a project's development; procedures for the administration, oversight, and accountability of the project; leasing arrangements, if applicable; required types of insurance and amounts of coverage; a noncompete clause, if applicable;[166] performance

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[157] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 31.

[158] O'Steen & Jenkins, *supra* note 6, at 255 (footnote omitted).

[159] La Crosse Municipal Transit Utility Response.

[160] N.J. Transit Response.

[161] TriMet Response.

[162] TRIMET, LIVABLE PORTLAND LAND USE AND TRANSPORTATION INITIATIVES 88 (2010), hereinafter referred to as "TriMet Report on Transportation Initiatives," available at http://trimet.org/pdfs/publications/Livable-Portland.pdf.

[163] *See, e.g.*, FHWA, USER GUIDEBOOK ON IMPLEMENTING PUBLIC-PRIVATE PARTNERSHIPS FOR TRANSPORTATION INFRASTRUCTURE PROJECTS IN THE UNITED STATES, *supra* note 21.

[164] *See, e.g.,* FHWA Stewardship Agreement: Stewardship/Oversight Agreement for Design and Construction (2006), available at http://www.fhwa.dot.gov/federalaid/stewardship/agreements/tx.cfm; and FHWA, Innovative Project Delivery, Agreements, available at http://www.fhwa.dot.gov/ipd/p3/agreements/index.htm.

[165] Estell & Washington, *supra* note 14, at 37.

[166] Noncompete clauses are more likely to be found in contracts for toll roads. Noncompete clauses may take effect if a public partner constructs or improves another facility that competes with the one subject to the PPP. Such competition may cause a reduction in revenue for the private partner; thus, the public agency may be

standards; performance guarantees; incentive payments; liquidated damages; performance and payment bonds; the effect of changed conditions or uncontrollable circumstances on the contract; revenue sharing, if any; identification and transfer of risks to be assumed by the private partner; acquisition of land by purchase or condemnation, if applicable; restrictions on the use of land that is to be acquired or that is otherwise subject to the agreement; the ability to dispose of land and other property; accounting requirements and procedures; responsibility of the private partner for certain taxes and related issues; the handling of intellectual property, including the use of proprietary technology or the transfer of know-how; and the consequences when performance standards or other contractual obligations are not met.[167] As with any contract, the parties' agreement should address default, termination, liability, and the method of dispute resolution.[168]

It is suggested that an agreement should state whether a transit agency's approval is required of a capital improvement that is needed for the project to permit compliance with contractual obligations or with applicable law.[169] A transit agency may want to provide that, with respect to any loan for a project, the agency will share in any savings resulting from a refinancing.[170] One authority suggests that a PPP contract should state that the requirements of public law (e.g., accountability, transparency) apply to the agreement both to protect the public interest and to secure political or public support for a project.[171]

One issue for a transit agency to consider is whether it will be involved, and, if so, to what degree, in a project's design or construction. One source contends that it is quite "normal for the Public Authority to have a right to review and comment on the detailed designs," but that the agency should not be obligated to "sign off" on or approve of them.[172] Likewise, a PPP contract should provide that when a contract is completed for the construction of a facility, a transit agency's "acceptance" of the facility does not mean that the facility satisfies the requirements of the contract.[173]

With long-term agreements, there may be circumstances when the contract should authorize government intervention, that is, the exercise of "governmental prerogative," to protect the public interest.[174] Because an agency's intervention could result in an allegation of breach of contract, it may be advisable for a contract to provide that the transit agency may "periodically revisit" the terms of long-term agreements; for example, if a concessionaire fails to meet performance standards or if enumerated conditions or problems occur that necessitate revisions.[175]

Transit agencies responding to the survey also suggested provisions that PPP agreements should include. However, as New Jersey Transit's response observed, the legal issues are "highly dependent" on the facts related to the project. The agencies stated that a PPP contract should describe in detail the parties' responsibilities; include an allocation of costs; address public safety issues in connection with the site;[176] provide for an "accounting process" that demonstrates how the financial and investment requirements are being satisfied;[177] require compliance with all federal and state laws and regulations;[178] and provide for

required contractually to compensate the private partner (*e.g.*, a concessionaire). *See* Tax and Financing Aspects of Highway Public-Private Partnerships, on 110-1078, Hearings Before the Subcomm. on Energy, Natural Resources and Infrastructure, Comm. on Finance, S. REP. NO. 110-1078, at 15 (2008), hereinafter referred to as "Tax and Financing Aspects of Highway Public-Private Partnerships."

[167] O'Steen & Jenkins, *supra* note 6, at 288–89.

[168] *Id.* at 287–89, 290; MALLETT, *supra* note 25, at 21 (commenting on one state's "costly disputes" with private partners). *See* FISHMAN, *supra* note 11, at 37.

[169] O'Steen & Jenkins, *supra* note 6, at 289–90.

[170] U.S. GOV'T ACCOUNTABILITY OFFICE, PUBLIC TRANSPORTATION: FEDERAL PROJECT APPROVAL PROCESS REMAINS A BARRIER TO GREATER PRIVATE SECTOR ROLE AND DOT COULD ENHANCE EFFORTS TO ASSIST PROJECT SPONSORS 34 (GAO-10-19, 2009), hereinafter referred to as "Public Transportation: Federal Project Approval Process Remains a Barrier," available at http://www.gao.gov/new.items/d1019.pdf.

[171] Dominique Custos & John Reitz, *Administrative Law: Public Private Partnerships*, 58 AM. J. COMP. L. 555, 579–80 (2010), hereinafter referred to as "Custos & Reitz."

[172] YESCOMBE, *supra* note 1, at 89.

[173] *Id.* at 90.

[174] Custos & Reitz, *supra* note 171, at 575.

[175] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 33–34.

[176] Milford Transit District Response; PVTA Response.

[177] PVTA Response.

[178] La Crosse Municipal Transit Utility Response; TriMet Response.

transparency in environmental planning and mitigation.[179] SARTA, SEPTA, and TriMet emphasized the importance of liability insurance and the inclusion of appropriate remedies and penalties if a project is not completed on time.

C. Administration and Management of PPPs

Although there is some guidance on how a public agency should administer and manage a PPP project,[180] the "underlying culture" of an agency is said to be one of the most important factors.[181] PPPs should have appropriate "selection processes" and contracts to avoid losing the flexibility and "efficiency gains" that are possible with PPPs.[182] Other administrative and managerial matters important to PPPs are the selection of a qualified DB team for a contract having DB as a component;[183] the continuing need to assess whether the public is obtaining the best value with a PPP compared to the traditional, design-bid-build method of procurement;[184] and the creation of a government structure (e.g., project manager, staffing) to work exclusively with a PPP project.[185]

A PPP requires effective and continuous communication and coordination throughout a project's development, implementation, and operation;[186] policies, procedures, documentation, and resources to guide the project's development and management;[187] and periodic monitoring of and reporting on project performance in relation to the terms of the contract to assure the partners' accountability to each other and to the public.[188] A transit agency's oversight may include close scrutiny of a project's planning and its costs, as well as the approval of principal subcontractors to assure that a private partner will be able to meet its contractual obligations.

Although a transit agency in a PPP may transfer risk and responsibility to a private partner, sources note that a transit agency still may have responsibility for or be involved with applications for approvals, licenses, and permits; periodically review the development phase for compliance with end-user requirements; and perform other responsibilities as provided by the contract.[189] A sponsor will want to continue to monitor compliance after the completion of the development phase, conduct audits and issue reports as needed or required, continue to monitor finances, and identify and resolve problems or disputes as promptly as possible.[190]

As a number of commentators have emphasized, the administration and management of a PPP is "*very demanding*"; thus, a PPP typically requires an experienced management team and quite possibly a full-time project manager or director.[191] Commentators have also pointed out that a transit agency may want its contract to permit the appointment of specialists to monitor compliance with the contract and with land-use, environmental, or other requirements.[192] If a PPP project embraces operations and maintenance functions, additional procedures may be needed to monitor the project on an ongoing basis.[193] An operations manual may be needed.[194] For some projects, an external advisor may be necessary, such as a financial or technical advisor.[195]

Agencies responding to the survey described their methods for managing and administering a PPP. Three agencies had a project manager.[196] Although one agency's project included planning, engineering, and transit, the agency stated that the only outside services needed were legal ser-

[179] Conn. DOT Response.

[180] *See, e.g.,* FHWA User Guidebook on Implementing PPPs, *supra* note 23 (discussing statutory, regulatory, financial, and institutional issues associated with implementing and managing PPP projects).

[181] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 6.

[182] Rosenau, *supra* note 7, at 94; Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 21.

[183] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 90–91.

[184] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 39.

[185] Public-Private Partnerships for Transportation Projects, *supra* note 42, at 4.

[186] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 45.

[187] *Id.* at 29.

[188] *Id.* at 45.

[189] JEFFREY DELMON, PUBLIC-PRIVATE PARTNERSHIP PROJECTS IN INFRASTRUCTURE, AN ESSENTIAL GUIDE FOR POLICY MAKERS 156–57 (2011), hereinafter referred to as "DELMON."

[190] *Id.* at 157–58.

[191] YESCOMBE, *supra* note 1, at 75 (emphasis added); DELMON, *supra* note 189, at 159–60.

[192] DELMON, *supra* note 189, at 161.

[193] YESCOMBe, *supra* note 1, at 76.

[194] DELMON, *supra* note 189, at 159–60.

[195] YESCOMBE, *supra* note 1, at 91–5.

[196] Conn. DOT Response; Milford Transit District Response; PVTA Response; and TriMet Response.

vices for a development agreement.[197] The Connecticut DOT stated that it has used outside specialists, whereas New Jersey Transit stated that it manages its own PPP projects with the objective of providing good customer service with "less reliance on the taxpayer." TriMet stated that it relied on its own staff for engineering and legal support.

D. Acquisition of Property and Land-Use Issues

Although successful PPP projects may require the involvement of real estate developers, local governments, and citizens,[198] the private partner in a PPP is "usually an engineering firm," not a real estate developer.[199] The inclusion of real estate makes a project more complex in part because of the timing. Real estate development opportunities may not necessarily be available or be feasible when building a transit project.[200] It may be noted that TEA-21 authorized "the fair market value of land lawfully obtained by the state or local government to be applied to the non-federal share of project costs."[201] Some PPPs include long-term leasing of existing facilities without the need to acquire land.[202]

An example of the importance of development to a transit PPP is TriMet's MAX Red Line, a $125.8 million project, to Portland International Airport, "the first train-to-plane connection on the West Coast when it opened on September 10, 2001. It also was the first public/private light rail/real estate development project in the country."[203] Besides the use of tax increment financing (TIF) and other funding, discussed in Section X.B, it was possible to arrange $125 million in financing when the private partner (Bechtel) agreed to accept development rights to 120 acres at the entrance to the airport.[204]

As for right-of-way acquisition, MAP-21 amended 49 U.S.C § 5332 to provide that if an acquisition is permitted under federal law, a recipient of federal funds may receive assistance in acquiring right-of-way prior to "the completion of environmental reviews for any project that may use right-of-way."[205] The Secretary of Transportation may establish appropriate restrictions on an acquisition that the Secretary determines are necessary and appropriate.[206] However, right-of-way acquired under the section may not be developed in anticipation of the project until all required environmental reviews for the project have been completed.[207] MAP-21 also provides that the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 is applicable to FTA financial assistance for capital projects.[208]

When eminent domain is used to acquire property, post-*Kelo* reform legislation in some states may apply.[209] The laws in some states may impose restrictions on the taking of property for economic development. Moreover, under state law, a condemnor may have to pay compensation in excess of what is determined to be the amount of just compensation that ordinarily would have to be paid for the property.

Only two agencies responding to the survey stated that they had encountered any issues regarding the acquisition of real property or other land-use issues in connection with their PPP projects. In one instance a variance was required from the city because the need for zoning approval for parking had not been anticipated in the parties' joint development agreement.[210] Another agency had experienced some issues relating to zoning, to the relocation of tenants of a prior facility, and to encumbrances on the property.[211]

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[197] La Crosse Municipal Transit Utility Response.

[198] American Public Transportation Association, *Forming Partnerships to Promote Transit-Oriented Development and Joint Development*, at 1 (2009), hereinafter referred to as "Forming Partnerships to Promote TOD and Joint Development," available at http://www.apta.com/resources/standards/Documents/APTA%20SUDS-UD-RP-002-09.pdf.

[199] Capturing the Value of Transit, *supra* note 10, at 29.

[200] *Id*.

[201] Midwest Regional Rail Initiative Project Notebook, at 9-10 (June 2004), hereinafter referred to as "Midwest Regional Rail Initiative Project Notebook," available at http://michigan.gov/documents/mdot/MDOT_MWRRI_Project-Notebook-Final-2004_291983_7.pdf.

[202] STAINBACK, *supra* note 130, at 27.

[203] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 71.

[204] *Id.* at 71. *See* discussion of the MAX Red Line in App. A.

[205] Estell & Washington, *supra* note 14, at 42.

[206] *Id.*

[207] *Id.*

[208] *Id.* at 41.

[209] THE RAMIFICATIONS OF POST-*KELO* LEGISLATION ON STATE TRANSPORTATION PROJECTS (National Highway Cooperative Research Program, Legal Research Digest No. 56, Transportation Research Board, 2011).

[210] PVTA Response.

[211] TriMet Response.

E. Taxation

1. Tax Treatment of PPPs in General

Few, if any, PPPs for transit projects are "partnerships" in the legal or tax sense. A transit PPP itself, thus, has no special tax significance.[212] The organizers of a PPP typically avoid being a partnership for tax purposes because of adverse consequences, including possible limits on "deductions allocable to property used by governments and tax-exempt entities as well as differences in the tax depreciation rules for the assets."[213]

The tax consequences for a private partner in a PPP depend on the "facts and circumstances of each transaction" and the terms of the PPP contract.[214] Under federal tax law, a company's investment in a PPP is treated the same as a company's investment in any other business; nevertheless, "[a] private entity…must evaluate the federal tax implications" of a PPP and allocate any "up-front payment…among various rights…to determine the federal tax consequences."[215] As must any U.S. or non-U.S. taxpayer conducting a trade or business in the United States, a private party in a PPP has to report and pay tax on income earned from all sources. As do other taxpayers, a partner in a PPP has the usual deductions for business expenses incurred, including lease payments, the cost of repairs, interest on indebtedness, and depreciation on property owned by the entity.[216] As for property taxes, although legislation in Connecticut exempts eligible PPPs from property tax, generally a private entity in a PPP that is leasing a transit-owned facility would not qualify for an exemption for property taxes.[217]

[212] Tax and Financing Aspects of Highway Public-Private Partnerships, *supra* note 166, at 4.

[213] Joint Committee on Taxation, JCX-29-11, "Overview of Selected Tax Provisions Relating to the Financing of Infrastructure," at 23 (2011), hereinafter referred to as "Tax Provisions Relating to Financing of Infrastructure," available at https://www.jct.gov/publications.html?func=startdown&id=3789.

[214] *Id.* at 24. *See* Tax and Financing Aspects of Highway Public-Private Partnerships, *supra* note 166, at 4, 11, 16, and 25.

[215] FISHMAN, *supra* note 11, at 36.

[216] *Id.*

[217] CHH, *Connecticut—Multiple Taxes: Jobs Bill Creates New Credit, Encourages Investment* (Oct. 28, 2011), available at http://www.cchgroup.com/wordpress/index.php/tax-headlines/state-tax-headlines/connecticut-multiple-taxes-jobs-bill-creates-new-credit-encourages-investment/.

2. Tax Treatment of Long-Term Leasing of Transit Facilities

a. Flow-Through Entities.—An important issue for a private entity in a PPP concerns the tax treatment of long-term leases of transit facilities. The Senate Committee on Finance, when conducting hearings on the tax and financing aspects of PPPs for highways, considered the tax consequences of three kinds of transactions common to PPPs. First, a private partner in a PPP may purchase existing infrastructure owned by a public agency and lease it back to the public agency. Second, a private entity may enter into a long-term lease with a public agency in a PPP; for example, to operate and maintain a transit facility. Third, a private entity may enter into an agreement with a public agency; for example, for the collection of tolls or fees.[218]

It is the second transaction between a private entity and a public agency involving a long-term lease that allows a private party to receive a tax benefit that the average taxpayer does not receive. Certain private entities when leasing property qualify as a "flow-through entity" not subject to federal tax.[219]

> Certain business set-ups (*e.g.* S corporations and partnerships) are "flow-through entity" structures, simply meaning that the business income is not taxed at the corporate level, but instead flows through to the shareholders' income statements, avoiding double taxation. Foreign businesses that have invested in highway PPPs in the U.S. have largely been structured as flow-through entities.[220]

The flow-through feature that avoids double taxation makes PPPs attractive to private companies interested in leasing public assets such as transit facilities.[221] Nevertheless, the shareholders of a private entity (or the partners in a partnership) participating in a PPP with a transit company are subject to federal taxes on their distributive share of income earned from their company's (or partnership's) lease of publicly owned property subject to a PPP.

b. Constructive Ownership of Leased Facilities.—A private entity will want to ascertain whether the IRS will treat the private entity as the owner of the leased property or as the lessee of the property.[222] The duration of a long-term lease may be "exceedingly long" to enable a private lessee "to recover capital outlays on an accel-

[218] Tax and Financing Aspects of Highway Public-Private Partnerships, *supra* note 166, at 4.

[219] *Id.* at 10.

[220] *Id.*

[221] *Id.* at 2.

[222] *Id.*

erated schedule" and to take advantage of the tax code's 15-year cost recovery.[223] Because of the extended duration of such a lease, the IRS may consider the private lessee to be the constructive or *de facto* owner of the leased property. For example, because the service life of highways and streets is estimated to be 45 years, a private partner in a PPP project for a toll road would be regarded as the constructive owner if a lease exceeded 45 years.[224] As for a transit facility, the service life probably is "equated" with the service lives of railroad equipment, replacement track, and structures, which are, respectively, 28 years, 38 years, and 54 years.[225]

When a private-entity lessee is deemed to be the constructive owner, it is subject to different treatment under the Internal Revenue Code. By leasing "infrastructure assets for a period that clearly exceeds their expected economic life…firms can treat themselves as the tax owners of the infrastructure. As owners, they are then eligible to claim tax deductions for the depreciation on their investments, just as other asset owners do."[226] Although a private lessee is not "an outright purchaser" of an asset for tax purposes, a lessee becomes the constructive owner of the asset when the lessee has acquired "all the benefits and burdens of ownership" for a term exceeding the expected remaining useful life of the asset.[227]

3. Allocation of a Private Partner's Up-Front Contribution to a PPP

A private partner may make a payment to a transit agency in connection with the acquisition of a long-term lease or to acquire the right to develop transit-owned property. One issue is the federal tax treatment of any private up-front payment or contribution that may be part of the funding of a PPP. It appears that the parties should allocate the private partner's payment as provided in 26 U.S.C. § 1060(a)(1) and (2), which applies to acquisitions.

Section 1060 provides:

> In the case of any applicable asset acquisition, for purposes of determining both—
>
> (1) the transferee's basis in such assets, and
>
> (2) the gain or loss of the transferor with respect to such acquisition, the consideration received for such assets shall be allocated among such assets acquired in such acquisition in the same manner as amounts are allocated to assets under section 338 (b)(5). If in connection with an applicable asset acquisition, the transferee and transferor agree in writing as to the allocation of any consideration, or as to the fair market value of any of the assets, such agreement shall be binding on both the transferee and transferor unless the Secretary determines that such allocation (or fair market value) is not appropriate.[228]

As a report by the Joint Committee on Taxation explains with respect to an allocation of an up-front payment in connection with PPPs and highways:

> The large up-front payment made by the private party to the transaction is treated as paid to acquire different bundles of business assets. As a result, the parties must allocate the initial consideration to the following categories: (1) the acquisition of infrastructure assets, such as land improvements, computers, toll booths, and other property used to operate and maintain the highway; (2) a lease of the underlying land; and (3) the acquisition of intangible assets, such as a franchise and license for the right to collect tolls (along with any generally unstated goodwill or going concern value).[229]

The allocation rule in § 1060(a) could apply, for example, when a private partner lessee is treated for federal tax purposes as the constructive owner of a facility and is therefore entitled to depreciate the asset.

A private partner may recover the cost of its payment for property used in a trade or business to produce income by claiming an annual deduction for depreciation based on the cost of the asset as determined under the Modified Accelerated Cost Recovery System (MACRS).[230] However, if a transit agency used tax-exempt bonds to construct or acquire an asset that is leased to a private partner in a PPP, the depreciation would be calculated under the Alternative Depreciation System using a straight-line method that extends over a longer recovery period than depreciation calculated under the MACRS.[231]

Whether a private entity in a PPP will be treated as the constructive owner of leased property for federal tax purposes may influence the

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[223] *Id.*

[224] Tax Provisions Relating to Financing of Infrastructure, *supra* note 213, at 24 (*citing* BEA Depreciation Estimates, available at http://www.bea.gov/national/FA2004/Tablecandtext.pdf).

[225] Tax and Financing Aspects of Highway Public-Private Partnerships, *supra* note 166, at 4.

[226] *Id.*

[227] Tax Provisions Relating to Financing of Infrastructure, *supra* note 213, at 23.

[228] 26 U.S.C. § 160(a)(1) and (2).

[229] Tax Provisions Relating to Financing of Infrastructure, *supra* note 213, at 24 (2011).

[230] *Id.* at 25, n.58 (*citing* 26 U.S.C. § 168; Rev. Proc. 87-56, 1987-2 C.B. 674).

[231] *Id.* at 25–26, n.64 (*citing* Treas. Reg. § 1.168(i)-4(d)(2)(ii)(B)).

term of a lease of transit property.[232] Whether a private party wants to be treated as the constructive owner rather than as a lessee may depend on the percentage of the asset that is depreciable and on the depreciation schedule that applies to the asset, as well as on the entity's other tax circumstances. It may be noted that no agency responding to the survey reported being aware of any federal or other tax issues affecting a private partner's participation in a PPP.

Notwithstanding constructive ownership from a tax perspective, it may be noted that FTA's Grant Management Requirements (GMR) provide for the protection of the federal interest in any real and other property acquired with FTA funds. In FTA's Circular C 5010.D (November 1, 2008, revised August 27, 2012), Chapter IV ¶ 3(e)(1) states that a "grantee agrees to maintain continuing control of the use of project property and constructed improvements to the extent satisfactory to FTA" and that the grantee "will not execute any transfer of title, lease, lien, …or any other obligation pertaining to project property, that in any way would affect the continuing Federal interest in that project property, without written FTA approval." The GMR in Chapter IV ¶ (j) states that "[i]n all instances in which the grantee is a Lessor…, the grantee must obtain FTA's written concurrence…before leasing FTA funded assets to others." Chapter I ¶ 5(fff) of the GMR defines the term "remaining federal interest for real property" as "the greater of the Federal share of the fair market value of the property, or the straight line depreciated value of improvements plus the Federal share of the current appraised land value."

F. Bonding Requirements

Under the Federal Miller Act, general contractors on public works projects are required to provide performance and payment bonds.[233] A performance bond "must be in an amount the contracting officer considers adequate for the protection of the government."[234] A payment bond guarantees that a "contractor will pay subcontractors and vendors for labor and materials."[235] A payment bond must be for the "total amount payable under the contract, unless the contracting officer makes a written determination…that a payment bond in that amount is impractical."[236] FTA recognizes the need for more bonding flexibility for PPP projects. Not only is there limited availability in the bond market, but also bond requirements in high amounts limit the number of companies able to compete for larger projects. According to several sources, sureties may be unwilling to issue a bond for more than $250 million.

> [S]enior members of the surety industry have stated that there is currently no limitation on the amount of a bond that can be provided for a single project. However, it is clear that in the not-too distant past the surety market had an informal "cap" on how much of a penal sum any individual surety would provide for a single project, particularly on DB projects. While the amount of that "cap" was never directly ascertainable, it appears to have been in a range of $250 to $350 million. The reality of this bonding "cap" is reflected in several periodicals that have been issued to address the use of DB, turnkey, and PPP contracting methods in the transportation sector.…
>
> FTA has taken this particular surety issue seriously, as it has regularly consulted with the business community to reduce unnecessary bonding and has granted waiver requests by grantees of the 100 percent surety bond requirements.[237]

Nevertheless, the necessary bonding may be obtained by using multiple sureties and "the right contractor team."[238] As one article explains,

> [I]t should be noted that several owners have handled this situation by descoping large contracts into smaller packages. Strategic contract packaging is done not only on alternatively delivered projects, but also on conventional DBB projects. A prime example is how the New York City MTA handled its DBB process for three megaprojects procured during the mid-2000s.…[239]

FTA has stated that "state and federal law require performance bonding well beyond what is commercially feasible for project sponsors (or re-

[232] Tax and Financing Aspects of Highway Public-Private Partnerships, *supra* note 166, at 7.

[233] FTA Report to Congress on PPPs, *supra* note 5, at 29 (*citing* 40 U.S.C. § 313, *et seq*.) (noting that payment bonds serve as a substitute for subcontractors' and suppliers' mechanics liens).

[234] *Id.* (*citing* 40 U.S.C. § 3131(b)(1)).

[235] O'Steen & Jenkins, *supra* note 6, at 291 (stating that the parties "usually establish specified liability limits, which are typically a percentage of either contract value or capital installed").

[236] FTA Report to Congress on PPPs, *supra* note 5, at 29 (*citing* 40 U.S.C. § 3131(b)(2)).

[237] MICHAEL C. LOULAKIS, SHANNON J. BRIGLIA & LAUREN P. MCLAUGHLIN, LEGAL ISSUES INVOLVING SURETY FOR PUBLIC TRANSPORTATION PROJECTS 40–47 (Legal Research Digest 40, Transportation Research Board, 2013) (footnote omitted), hereinafter referred to as "Legal Research Digest 40."

[238] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 49.

[239] Legal Research Digest 40, *supra* note 237, at 41.

quired by private investors) and disregard the availability of other forms of security."[240] Flexibility may permit a private partner to furnish an alternative form of security such as a financial guarantee by a private patner's parent company.[241] Because the requirements for performance bonds increase costs, a "public partner should assess this issue on a cost-benefit basis."[242]

Although FTA requires performance bonds for 100 percent of the contract price,[243] there is a sliding scale for payment bonds based on the size of the contract, with payment bonds in the amount of $2.5 million required for all contracts of $5 million or more,[244] requirements that have been waived for "larger design-build and DBOM projects."[245] FTA Circular C 4220.1F on Third Party Contracting Requirements permits a grantee to seek FTA's approval of a grantee's bonding policy.[246]

Most states have "Little Miller Acts," similar to the Federal Miller Act, that require performance and payment bonds be obtained for the total amount of the contract.[247] State statutes offer little or no flexibility based on the scale of a PPP project or "structural differences" that exist between PPPs and traditional public procurement.[248] Small and mid-size construction companies have difficulty obtaining bonds needed to compete with large firms on DB projects or to back warranties that are required in the event of a firm's insolvency.[249]

Six agencies responding to the survey reported that for their PPP projects the contractor was required under federal or state law to provide performance and payment bonds for the full amount or value of the applicable contracts.[250] The San Diego Association of Governments (SANDAG) stated that neither bond was required for its particular project. SEPTA stated that for one of its PPP projects neither bond was required.

G. Insurance and PPP Projects

PPP projects may involve complex insurance arrangements and project-specific policies. A typical contractual provision for a PPP project is a requirement for minimum levels of certain kinds of insurance that must be obtained and maintained, such as for property and casualty risks, comprehensive general liability risks, workers' compensation, and automobile liability.[251] The sponsor of the Hiawatha Corridor Light Rail Transit (LRT) project used an owner-controlled insurance program (OCIP),[252] but according to the FTA one of the "drawbacks" of the OCIP was that contractors had limited incentive to resolve workers' compensation claims.[253]

Several agencies responding to the survey reported that the private partner assumed responsibility for the insurance coverage,[254] whereas two agencies said that the private partner had not had any responsibility for insurance.[255] New Jersey Transit provided a copy of its insurance and indemnity provisions.[256] Although the private partner did not assume the responsibility for insurance for the Milford Transit District's PPP, a

[240] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 85.

[241] *Id.* at 39, 46.

[242] O'Steen & Jenkins, *supra* note 6, at 291.

[243] FTA Report to Congress on PPPs, *supra* note 5, at 38–39, available at http://www.fta.dot.gov/legislation_law/12349_8641.html. *See* FTA Circular C 4220.1F, ch. IV, at IV-26 (Nov. 1, 2008; revision 3, Feb. 15, 2011), hereinafter referred to as "FTA Circular on Third Party Contracting Guidance, C4220.1F," available at http://www.fta.dot.gov/documents/FTA_Circular_4220.1F.pdf.

[244] FTA Circular on Third Party Contracting Guidance, C4220.1F, *supra* note 243, at IV-26.

[245] FTA Report to Congress on PPPs, *supra* note 5, at 29 (*citing, e.g.*, the $1.1 billion T-Rex Project in Colorado and the New Jersey Transit River Line).

[246] FTA Circular on Third Party Contracting Guidance, C4220.1F, *supra* note 243. *See* FTA Report to Congress on PPPs, *supra* note 5, at 38–39.

[247] FTA Report to Congress on PPPs, *supra* note 5, at 29 (*citing, e.g.*, ARIZ. REV. STAT. § 34-222; N.C. GEN. STAT. § 44A-26; OR. REV. STAT. § 279C.380; and VA. CODE § 2.2-4337).

[248] *Id.* at 29.

[249] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 46.

[250] La Crosse Municipal Transit Utility Response; Conn. DOT Response; Milford Transit District Response; N.J. Transit Response (also stating that no waiver was requested); PVTA Response.

[251] O'Steen & Jenkins, *supra* note 6, at 291.

[252] FTA Report to Congress on PPPs, *supra* note 5, at 16.

[253] *Id.*

[254] Conn. DOT Response; SEPTA Response (stating that coverage included liability, pollution, worker's compensation, and automobile insurance); SARTA Response; and TriMet Response.

[255] Response of San Diego Association of Governments (SANDAG), hereinafter referred to as "SANDAG Response"; Milford Transit District Response.

[256] *See* App. C, item 3.

$525,000 project currently in the design phase, the coverage includes $10 million for commercial general liability, $1 million for products/completed operations liability, $1 million for advertising injury, and $5 million for automobile liability. The City of La Crosse Municipal Transit Utility stated that there had been no problems in working with the private developer to procure insurance for a building and general liability (including directors' and officers' liability) coverage, and an umbrella policy. The Pioneer Valley Transit Authority's private partner assumed responsibility for insurance only for the building.[257]

Finally, although one agency noted the high cost of insurance for a project still in the design phase, no agency responding to the survey reported any particular issues or problems having to do with insurance because of the complexity of a PPP.

V. TRANSFER OF RISK BETWEEN A PUBLIC AND PRIVATE PARTNER

A. Risks Transferable to the Private Sector

PPPs may permit a transit agency to leverage its funding and provide more transit service by transferring some responsibilities and risks to a private party. The assumption is that the private sector may be the best party to assume the risks for managing "construction cost, project delivery timeframe, maintenance cost, latent defects and project quality risk factors."[258] In the United States, however, the sharing of the risks inherent in a transportation infrastructure project is a new concept for some transit agencies.[259] Legal and other impediments have slowed the implementation of PPP projects and alternative methods of project delivery "even on a pilot basis."[260]

PPPs differ from traditional construction contracts in their allocation of risk, duration, and financing.[261] Transit agencies using a DB approach still retain much responsibility for the risks associated with the PPP.[262] Risks assumed by the private sector under a DB contract typically include "the risk of compliance with the public sponsor's technical specifications" and the risk of the completion of the "facility at a fixed price and within a specific time frame."[263] However, a transit agency may transfer more risk for the design, financing, construction schedule, and performance of a project, as well as for operations and maintenance, to the private sector.[264] When a contractor provides an adequate warranty or when a contractor operates and maintains a facility, the contractor generally accepts "all quality risk."[265] Depending on the contract, a private partner may be accepting all or part of the risk of financing and the risk of ridership and revenue.[266] There may be risks that are too expensive or time-consuming for an agency to transfer to the private sector.[267] Examples include environmental compliance and approvals; permitting; acquisition by purchase or condemnation of property, including right-of-way; emergency services; and compliance with other statutory and regulatory requirements.[268] An agency also may want to retain responsibility for communicating with the legislature, members of the public, stakeholders, and other government agencies.

Long-term responsibilities for transit operations and maintenance may be transferred to the private sector, resulting in added value because of the potential for innovation in a project's design, construction, and management.[269] The design-builder for a Denver Regional Transportation District (RTD) light rail expansion project identified 198 design modifications that were incorporated into the project and that improved the project's overall quality while keeping the project within budget.[270] Performance measures (e.g., based on train capacity and frequency) rather than specific design details (e.g., type of train) are innovative approaches that may be conducive to a successful PPP for a transit agency.[271]

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[257] *See* Pioneer Valley Transit Authority, Joint Development Agreement, App. C, item 5, for details.

[258] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 57.

[259] *Id.* at 5.

[260] *Id.*

[261] Akintoye & Beck, *supra* note 2, at 199.

[262] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 5.

[263] FISHMAN, *supra* note 11, at 33.

[264] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 6.

[265] FISHMAN, *supra* note 11, at 33.

[266] *Id.*

[267] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 20.

[268] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 57; FISHMAN, *supra* note 11, at 32–33.

[269] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 17.

[270] *Id.*

[271] *Id.*

As discussed in Section XII, risks may be transferred to the private sector in connection with TOD and joint development.[272]

B. Revenue Sharing

One risk that public-private partners may share is the risk associated with the amount of revenue generated by a PPP.[273] However, because revenue sharing reduces income earned by a private partner, a private partner may be unwilling to make a large, up-front payment to a public partner to secure a long-term concession.[274] The DOT has stated that FTA policy that is based on its interpretation of the federal common grants rule is a "substantial obstacle" to revenue sharing for PPP projects.[275] FTA "generally requires that 'Program Income' such as fares, lease payments, or other revenues be used to reduce program costs, unless an alternative use was authorized by [the] regulations or specifically approved by FTA."[276]

A private partner in a PPP needs a predictable stream of income to meet its financial and other obligations and still make a profit; however, most transit projects do not generate sufficient revenues.[277] System revenues include fare box and non-fare box revenues, with the latter embracing fees earned from "advertising, air rights, naming rights, concessions, commercialization, parking, and outsourcing."[278] "Parking monetization" is attractive to private partners because of the ability to have a stable cash flow with the potential for increases in parking revenues as a result of improvements in technology, higher parking fees, and increased utilization of the space.[279]

Transit agencies may be reluctant to cede their control over fare-setting because of wanting to keep fare levels low to increase ridership and to make transit affordable for low-income patrons.[280] On the other hand, a private party may be reluctant to assume the risk for ridership and fare box revenue when the private party will not be in control of fares or the transit system.[281] For example, DBOM contractors who operate transit systems "want to be insulated from farebox risk."[282] As one source states, "[a]lthough the concept of using cash flows to repay the investors is simple, the actual negotiation and implementation of such an arrangement is fraught with controversy and complexity because of the extent of private-sector involvement in setting user fees."[283] One solution is to structure a PPP to limit risk by basing a portion of the transit agency's payment (e.g., availability payments discussed in Section V.C) to the private party on the number of riders or trips.[284]

Some of the transit agencies responding to the survey stated that they were sharing revenue with a private partner,[285] but others reported that their PPPs did not include revenue sharing.[286]

C. Availability Payments

The term "availability payment" may be defined as a transit agency's payment to a private partner for making a facility available to the public for the term of a PPP contract.[287] Availability payments are "an alternative, flexible way to allo-

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[272] FTA grantees may use FTA financial assistance for joint development activities that incorporate private investment or enhance economic development.

[273] FISHMAN, *supra* note 11, at 33.

[274] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 39.

[275] FTA Report to Congress on PPPs, *supra* note 5, at 39.

[276] *Id.*

[277] *See id.* at 11.

[278] Infrastructure Management Group, Inc., *Alternative Transit Funding Sources and Finance*, at 3 (Sept. 2009), hereinafter referred to as "Alternative Transit Funding Sources and Finance," available at http://www.ncppp.org/publications/TransitBoston_0909/Page_0909.pdf.

[279] *Id*. at 5.

[280] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 2, 19.

[281] *Id.* at 19.

[282] FTA Public-Private 3P Program, *supra* note 56, at 2.

[283] FISHMAN, *supra* note 11, at 34.

[284] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 20.

[285] N.J. Transit Response (regarding Weehawken Ferry Terminal project); PVTA Response; and SEPTA Response.

[286] La Crosse Municipal Transit Utility Response; N.J. Transit Response (regarding River Line Light Rail project); and Milford Transit District Response.

[287] AASHTO Center for Excellence in Project Finance, stating that

> availability payments are a means of compensating a private concessionaire for its responsibility to design, construct, operate, and/or maintain a tolled or non-tolled roadway for a set period of time. These payments are made by a public project sponsor (a state DOT or authority, for example) based on particular project milestones or facility performance standards.

Available at http://www.transportation-finance.org/funding_financing/financing/other_finance_mechanisms/availability_payments.aspx. *See* YESCOMBE, *supra* note 1, at 9.

cate project risk,"[288] as well as to compensate a private partner for capital or operating expenses.[289] Availability payments typically begin when construction is complete and a facility is operational to "smooth [the] upfront capital expense" over the life of an asset.[290] Availability payments may make it possible for a private partner to have a higher credit rating, thus improving its access to capital markets and private lenders.[291] If availability payments are authorized, a proposed PPP project may attract more investors and contractors.[292]

Availability payments may make it possible to have a PPP project that otherwise would not be built.[293] An availability payment structure may be used to reduce a project's risk profile, permit a transit agency to control user fees, and cap a public sponsor's total payment obligation.[294] The payments may include credits for "enhanced performance" or deductions for a failure to meet required performance standards.[295] Availability or performance-based payments may be used, for example, with DBOM and DBFOM forms of project delivery.[296] For example, if availability payments are to be made in connection with a DBFOM contract, a transit agency would pay the private partner a preestablished, maximum periodic payment.[297]

PPPs for projects partially funded by an availability payment structure include the Oakland Airport Connector and the Denver Eagle P3 East Rail and Gold Rail Lines.[298] In the responses to the survey, only SEPTA stated that it would agree to an availability payment structure for a PPP project.[299]

VI. COMPATIBILITY OF PPPS WITH FEDERAL LAW AND REGULATIONS

A. Compliance with FTA Requirements

When a project is paid for in part by federal funds, federal legislation may conflict with the flexible approach needed for a PPP for a transit project. DOT and other sources have stated that "[t]he success of PPPs can be facilitated or significantly constrained by the legal and regulatory environment in which they function,"[300] and that "[m]any of the policy measures interwoven with transportation legislation are counter to the profit motive of private investment."[301] The approval process, for example, for New Starts projects is not entirely compatible with the use of alternative methods of project delivery and PPPs. One reason is that "the process is sequential and phased with approvals granted separately and at certain decision points."[302] One reason for delays in approvals and funding is that the New Starts program "is closely aligned with the conventional design-bid-

[288] Implementation of PPPs for Transit, *supra* note 24, at 7.

[289] KPMG LLP, Availability Payment Mechanisms for Transit Projects, at 4 (2009), hereinafter referred to as "Availability Payment Mechanisms for Transit Projects," available at http://www.pwfinance.net/document/research_reports/10%20KPMG%20availabillity.%20pdf.

[290] Implementation of PPPs for Transit, *supra* note 24, at 8.

[291] Availability Payment Mechanisms for Transit Projects, *supra* note 289, at 11.

[292] *Id*.

[293] Implementation of PPPs for Transit, *supra* note 24, at 8.

[294] Availability Payment Mechanisms for Transit Projects, *supra* note 289, at 11 (e.g., 25–35 years rather than 50 or more years with full concession agreements).

[295] *Id*. at 4; Implementation of PPPs for Transit, *supra* note 24, at 8.

[296] Implementation of PPPs for Transit, *supra* note 24, at 12. *See id*. at 35-12 for chart indicating how availability payments may be used.

[297] Availability Payment Mechanisms for Transit Projects, *supra* note 289, at 4.

[298] *See* Alistair Sawers, Ernst & Young, Partnerships in Transportation Workshop, Transportation PPPs beyond Toll Roads (*citing* BART—Oakland Airport Connector, available at http://www.ncleg.net/document sites/committees/21stCenturyTransportation/Prioritization-Best%20Practices-Efficiency/References/Sawers.pdf. *See also* FasTracks: Eagle P3 Project (stating that RTD will make availability payments to the private partner for a 29-year period and will retain ownership of all assets), available at http://www.rtd-denver.com/FF-EagleP3.shtml.

[299] SEPTA Response (re: Wayne Junction Combined Heat and Power Plant project).

[300] FTA Report to Congress on PPPs, *supra* note 5, at 23. Issues that transit agencies must deal with involve the FTA process and procurement rules, preliminary engineering, final design, right-of-way acquisition, the contracting process, the timing of a PPP agreement in relation to environmental approvals, and the availability and timing of public and private funds. *Id*.

[301] Ellen M. Erhardt, *Caution Ahead: Changing Laws to Accommodate Public-Private Partnerships in Transportation*, 42 VAL. U.L. REV. 905, 934 (2008), hereinafter referred to as "Erhardt."

[302] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 22.

build approach."[303] There have been delays while project sponsors wait for federal approvals, delays that caused additional expense and loss of efficiency and quality.[304]

However, MAP-21 repealed or consolidated several FTA programs and provided for the streamlining, discussed below, of FTA's New Starts program,[305] but "[s]imilar to SAFETEA-LU, New Starts projects are defined as projects with a total capital cost of $250 million or greater or that are seeking $75 million or more in section 5309 funding."[306] As a result of MAP-21, Core Capacity Improvement projects are eligible for § 5309 funding.[307] Core capacity improvement projects are projects that expand capacity by at least 10 percent in existing fixed guideway transit corridors that are at or above capacity or that are expected to be at capacity within 5 years.[308] New Starts and Core Capacity Improvement projects receive construction funds through a Full Funding Grant Agreement (FFGA). The FFGA "defines the scope of the project and specifies the total multi-year federal commitment to the project."[309] Under 49 U.S.C. § 5309, the steps that must be completed in the process for New Starts and Core Capacity Improvement projects include project development, engineering, and construction.[310]

As noted, MAP-21 supports private participation in transit projects. A feature of MAP-21 is that technical assistance may be sought by project sponsors and grantees on the best practices and methods for PPPs and alternative methods of contracting.[311] MAP-21 requires FTA to identify public transportation laws that impede PPPs or private investment in capital projects for transit agencies.[312] FTA regulations must address such obstacles, while protecting the public interest, including public investment in PPPs and public transportation projects.[313] FTA is to provide guidance on promoting "greater transparency and public access" concerning PPPs and on how best to "document compliance by recipients of Federal assistance with the requirements regarding private enterprise participation in public transportation and planning and transportation improvement programs under sections 5303(i)(6), 5306(a) and 5307(c)."[314]

In regard to Small Starts, one source notes that "Small Starts is a special category of projects within the New Starts program" and that Small Starts "projects were offered a streamlined process and criteria under SAFETEA-LU that was removed under MAP-21."[315] However, according to FTA, MAP-21 has several significant provisions that may affect Small Starts. On the one hand, since MAP-21, Small Starts projects must have a total net capital cost of less than $250 million and seek a federal share of less than $75 million.[316] However, MAP-21 provided for a new pilot program for expedited project delivery for New Starts/Small Starts § 5309 projects "that may

[303] *Id*. at 23. FTA, however, permits "various procurement strategies, including bid/sealed bidding, competitive proposal/RFPs, and qualifications-based procurement where the preponderance of the work is [for] design professional services." *See* FTA Report to Congress on PPPs, *supra* note 5, at 33 (*citing* FTA Circular on Third Party Contracting Guidance, *supra* note 237, § 9). *See* most recent FTA Circular on Third Party Contracting Guidance, *supra* note 241. FTA "encourages agencies to use a 'best value' selection process for the selection of a 'turnkey' contractor, including incorporation of a negotiation phase in the procurement." *Id.* (*citing FTA Best Practices Procurement Manual* § 6.1.4).

[304] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 22. According to a study in 2007, project sponsors perceive that the process is unduly "intensive, lengthy, and burdensome." *Id*.

[305] FTA Summary of MAP-21, *supra* note 15.

[306] Notice of FTA Transit Program Changes, Authorized Funding Levels and Implementation of the Moving Ahead for Progress in the 21st Century Act (MAP-21) and FTA Fiscal Year 2013 Apportionments, Allocations, Program Information and Interim Guidance, hereinafter referred to as "FTA Notice of Program Changes—MAP-21," 77 Fed. Reg. 63,670 (Oct. 16, 2012), available at http://www.gpo.gov/fdsys/pkg/FR-2012-10-16/pdf/2012-25152.pdf at 63,673, 63,678.

[307] FTA Notice of Program Changes—MAP-21, *supra* note 306, at 63,672.

[308] *Id*.

[309] *Id*. at 63,687. Small Starts projects receive construction funds through a single year grant or an expedited grant agreement that defines the scope of the project and specifies the federal commitment to the project.

[310] *Id*. For Small Starts projects the steps in the process include project development and construction.

[311] FTA Summary of MAP-21, *supra* note 15, at 9.

[312] FTA Summary of MAP-21, *supra* note 15, at 10.

[313] *Id*.

[314] FTA Notice of Program Changes—MAP-21, *supra* note 306, at 63,678.

[315] Don Emerson, *What's New in New Starts: The MAP-21 Reforms*, available at http://efr.pbworld.com/publications/default.aspx?id=14.

[316] FTA, Fact Sheet: Fixed Guideway Capital Investment Grants ("New Starts") Section 5309, link to fact sheet available at http://www.fta.dot.gov/12347_5221.html.

provide opportunities for public-private partnerships."[317] Also,

> [u]nder certain conditions, MAP-21 allows for the use of 'warrants,' in other words, ways in which projects may qualify for automatic ratings on the project justification criteria. It also eliminates the operating efficiencies criterion and adds a congestion relief criterion. It requires FTA to evaluate the benefits of a Small Starts project against the Federal share of the project, rather than the total project cost when developing the project justification rating.[318]

Finally, FTA explains that "MAP-21…funds Small Starts projects through a single year grant or an expedited grant agreement."[319]

B. Streamlining

Prior to MAP-21, Section 3011(c) of SAFETEA-LU authorized the Secretary of Transportation to establish a pilot program for the purpose of demonstrating how the New Starts program could be streamlined to accommodate more private investment in projects using alternative methods of project delivery and innovative financing and how more risks associated with transit projects could be shared by the public and private sectors.[320] Projects selected for the pilot program were eligible for a "simplified and accelerated review process."[321]

Section 5309 as amended by MAP-21 may provide opportunities for PPPs.[322] MAP-21 streamlines the development of New Starts projects by:

- Eliminating the alternatives analysis requirement and relying instead on the alternatives reviewed during the metropolitan planning and environmental review processes, thereby eliminating the principal statutory requirement associated with Section 5339.[323]
- Reducing the number of steps in the process for projects pursuing capital investment program funding; for example, the process for New Starts and Core Capacity Improvement projects will have three steps, consisting of project development, engineering, and construction.
- Requiring FTA to develop "an expedited review process for determining the technical capacity of project sponsors to undertake the proposed project if they have recently and successfully completed at least one other new fixed-guideway or core capacity improvement project."[324]
- Directing the FTA to implement changes "to improve the efficiency of the New and Small Starts process and implement the new Core Capacity Improvement process through rule-making and future policy guidance, which will be developed through a notice and comment process."[325]

The Secretary, in determining whether a project has sufficient local support and "evidence of stable and dependable financing," is to consider whether there are "private contributions to the project, including cost-effective project delivery, management or transfer of project risks, expedited project schedule, financial partnering, and other public-private partnership strategies."[326]

Only one agency responding to the survey, TriMet, stated that it had encountered any issues or problems (e.g., delays in approvals, additional expense) that have affected the agency's use of PPPs because of the FTA's approval process for grants under the New Starts or other FTA funding programs. TriMet reported that there had been some issues regarding what the agency referred to as "FTA concurrence" and the "cost of staff time."

C. Streamlining and Environmental Review

The impact of the environmental review process on the viability of a proposed PPP project must be considered.[327] Under regulations issued by the Council on Environmental Quality (CEQ), certain activities prior to the completion of the NEPA process are not allowed, such as acquiring right-of-way, proceeding to final design, or applying for an FFGA, until the issuance of a record of decision (ROD) and entry into final design. The reason is that prior actions may prejudice a decision by favoring one alternative over another.[328]

FTA has provided guidance on the timing of procurements relative to the environmental proc-

[317] FTA Summary of MAP-21, *supra* note 15, at 8.

[318] *Id*. at 7–8.

[319] *Id*. at 8.

[320] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 9; H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at XI.

[321] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 9.

[322] FTA Summary of MAP-21, *supra* note 15, at 10.

[323] *Id*. at 7; FTA Notice of Program Changes–MAP-21, *supra* note 306, at 63,672.

[324] FTA Summary of MAP-21, *supra* note 15, at 7.

[325] FTA Notice of Program Changes–MAP-21, *supra* note 306, at 63,672.

[326] Estell & Washington, *supra* note 14, at 19.

[327] FTA Report to Congress on PPPs, *supra* note 5, at 33.

[328] *Id*. at 34.

ess.[329] FTA's Interim Guidance allows agencies to proceed with the prequalification of proposers, "but in general does not permit an RFP to be issued until a ROD or Finding of No Significant Impact (FONSI) has been issued by FTA. Exceptions to this rule have been granted on a case-by-case basis."[330] MAP-21 allows a new fixed-guideway capital project under § 5309 to "advance to the engineering phase upon completion of NEPA requirements, as demonstrated by a [ROD] with respect to the project," a FONSI, "or a determination that the project is categorically excluded," subject to certain other required determinations that must be made by the Secretary.[331]

In Section 1301(c) of MAP-21, Congress provided that surface transportation projects are to be expedited by substantially reducing the average length of the environmental review process and, among other provisions, stated that "project sponsors shall not be prohibited from carrying out preconstruction project development activities concurrently with the environmental review process."[332] MAP-21 made changes to the environmental review process that are intended to accelerate the process for major projects and expanded the list of projects that are eligible for categorical exclusions.[333] However, FTA is not allowed "to waive any provision of Federal law, including labor protections or NEPA."[334]

MAP-21 creates a "project development phase" for the completion of environmental reviews. As for activities during the development phase, an applicant, concurrently with the analysis required by NEPA, is to develop sufficient information to allow the Secretary to make findings of project justification, policies, and land-use patterns that promote public transportation and local financial commitment.[335]

It may be noted that no agency responding to the survey identified a particular issue or problem that it had encountered for a PPP because of the FTA's process for environmental review and approval.

D. Compliance with Other Federal Laws

When transit agencies receive federal funding for a PPP project, there are other federal laws that apply.[336]

1. Buy America Requirements

A federal law that affects PPP projects is the Buy America Act.[337] With some exceptions, when funds are provided by FTA for the purchase of materials or equipment, the items must be produced in the United States. The Act may result in a PPP paying higher prices.[338]

Since the enactment of MAP-21, procurements with FTA funds continue to be subject to the Buy America provision in 49 U.S.C. § 5323(j) and the section's implementing regulations.[339] Requests for waivers are subject to an "elevated level of scrutiny by FTA."[340] As a result of MAP-21's amendment of § 5323(j), FTA must give notice on DOT's Web site of FTA determinations of waivers, publish them in the *Federal Register*, and submit an annual report to Congress on waivers granted during the prior year.[341]

2. Civil Rights

The civil rights laws apply to PPP projects funded by the FTA. As of August 28, 2012, FTA revised its Title VI Circular (4702.1B) concerning the requirements that FTA grantees and recipients must meet.[342] FTA provides guidance on when grantees must upload their updated Title VI program into TEAM-Web. The failure of a grantee to submit an acceptable Title VI program will jeopardize the grantee's ability to receive federal funds or grants.[343]

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[329] *See* FTA Interim Guidance on DB and FFGA Process, *supra* note 49.

[330] FTA Report to Congress on PPPs, *supra* note 5, at 34.

[331] Estell & Washington, *supra* note 14, at 17 (*citing* 29 U.S.C. § 5309).

[332] MAP-21, § 1301(c)(4)(B)(iii).

[333] FTA Notice of Program Changes–MAP-21, *supra* note 306, at 63,677.

[334] *Id*. at 63,678.

[335] FTA Summary of MAP-21, *supra* note 15, at 7. *See* similar provision in § 5309, as amended by MAP-21, relating to core capacity improvement projects.

[336] *See* FISHMAN, *supra* note 11, at 20–25 (discussing principal issues based on federal law).

[337] *See* 49 U.S.C. § 5323(j).

[338] FTA Report to Congress on PPPs, *supra* note 5, at 40 (*citing* 49 U.S.C. § 5323 (j)).

[339] *See* 49 U.S.C. § 5323; 49 C.F.R. pt. 661.

[340] FTA Notice of Program Changes–MAP-21, *supra* note 306, at 63,678.

[341] *Id*.

[342] Title VI Requirements and Guidelines for Federal Transit Administration Recipients, available at http://www.fta.dot.gov/legislation_law/12349_14792.html.

[343] FTA Notice of Program Changes–MAP-21, *supra* note 306, at 63,703.

Section 20023(b) of MAP-21, amending § 5332, provides that the Government Accountability Office (GAO) shall evaluate the progress and effectiveness of the FTA in assisting recipients to comply with § 5332(b). The evaluation is to include a review of "discrimination complaints, reports, and other relevant information collected or prepared by the FTA or recipients of assistance from the FTA."[344] The evaluation is to include as well a review of the FTA process for resolving "discrimination complaints filed by members of the public."[345]

3. Davis-Bacon Act

Under the Davis-Bacon Act,[346] prevailing wages must be paid for work on construction projects that are financed by an FTA loan or grant.[347] The Act requires additional recordkeeping and auditing. MAP-21 did not make substantive changes regarding labor standards.[348]

Minimum wages are determined by the Department of Labor (DOL) and are "based on the prevailing wages for the corresponding classes of laborers and mechanics employed on similar projects in the city, town, village, or other civil subdivision of the state" where the work is performed.[349] The DOL directs federal contracting officers to the Wage Determinations OnLine Program (www.wdol.gov) to obtain prevailing wage determinations.[350] Although the Secretary of Labor has the final word for wage determinations, wage determinations are calculated by the Branch of Construction Wage Determinations that consists of 12 analysts assigned to as many as 6 states, territories, or construction activities.[351] The DOL encourages contractors, unions, trade associations, and others to submit wage data voluntarily to provide the DOL with additional information when making wage determinations.[352] However, the term "prevailing" "has been interpreted as the mean, median, or modal wage for an area."[353] The DOL statutes, regulations, and legislative history do not define the term. Private bidders do not have standing to contest the DOL's wage determinations, because the Act does not provide successful bidders any assurances that the minimum wage rate will be the prevailing wage rate.[354]

The Davis-Bacon Act is criticized for increasing construction costs substantially.[355] It has been argued that the prevailing wage rate is inaccurate and that it is much higher than the market wage rate.[356] One reason that the prevailing wage is

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[344] Estell & Washington, *supra* note 14, at 53.

[345] *Id*.

[346] The Act was formerly codified at 40 U.S.C. § 276a, *et seq.*, but is presently codified at 40 U.S.C. § 3141, *et seq*.

[347] 40 U.S.C. § 276a, *et seq.*; FTA Report to Congress on PPPs, *supra* note 5, at 40.

[348] Estell & Washington, *supra* note 14, at 54.

[349] *See* U.S. Dep't of Labor, The Davis-Bacon Act, 40 U.S.C. § 276a (rate of wages for laborers and mechanics).

[350] U.S. Dep't of Labor, Davis Bacon and Related Acts, Wage and Hour Div., available at http://www.dol.gov/whd/govcontracts/dbra.htm; Wage Determinations Online.Gov, available at http://www.wdol.gov/.

[351] 40 U.S.C. § 3142(b) (2013); U.S. Dep't of Labor, Branch of Construction Wage Determinations, Wage and Hour Div., available at http://www.dol.gov/whd/govcontracts/stateassignments.htm (last updated Aug. 20, 2013).

[352] *See* Julia Vitullo-Martin, The Complex Worlds of New York Prevailing Wage (June 2012), at 10

> Employers on federal prevailing wage jobs must submit weekly payroll information to the contracting agency. Certified statements must include the name, address, and Social Security number of each employee; each employee's work classifications; hourly rates of pay, including rates of contributions or costs anticipated for fringe benefits or their cash equivalents; daily and weekly numbers of hours worked; deductions made; actual wages paid; and, if applicable, detailed information regarding fringe benefit programs and apprenticeship or trainee programs.

Hereinafter referred to as "Vitullo-Martin," available at http://www.arch.columbia.edu/files/gsapp/imceshared/tct2003/PrevailingWage.pdf.

[353] Glenn Sweatt & Brian Cruz, *Rights and Remedies Under the Davis-Bacon Act: Analysis of Recent Proposals for Reform* 44, PROCUREMENT LAWYER 3, 6 (2008).

[354] United States v. Binghamton Constr. Co., 347 U.S. 171, 177–78, 74 S. Ct. 438, 442, 98 L. Ed. 594 (1954).

[355] Vitullo-Martin, *supra* note 352, at 5:

> Imposing prevailing wages on affordable housing, the CHPC [Citizens Housing & Planning Council] concluded, would increase the cost of labor substantially, without improving construction quality, while making it even more difficult for small and minority-owned subcontractors to compete with larger, established firms to build affordable housing projects. CHPC's main conclusion was that imposing prevailing wages on the affordable housing industry would reduce both the supply and the affordability of subsidized housing.

Martha Norby Fraundorf, John P. Farrell & Robert Mason, *The Effect of the Davis-Bacon Act on Construction Costs in Rural Areas*, REV. ECON. & STAT. 142 (1984) (providing a quantitative analysis of the effect the Davis-Bacon Act has on construction costs and concluding that the Act has raised construction costs in rural areas).

[356] Gerald Mayer, The Davis-Bacon Act and Changes in Prevailing Wage Rates, 2000 to 2008, Econ. Legislation, available at http://economic-legislation.blogspot.

more than the market rate is because union wages, among other wage sources and information, are used to calculate the prevailing wage and 25 percent of the prevailing wages provided by DOL are based entirely on union wage rates.[357] Finally, some states have enacted "little Bacon Acts" to cover state and local construction projects. There is evidence of a decline in wage rates in those states that have repealed their little Bacon Acts.[358]

4. Section 13(c) Protective Labor Arrangements

Certain provisions of the federal labor laws apply to any activity a private party performs under contract for a transit agency when the costs will be reimbursed by federal funds.[359] One objective is to protect current employees from reductions in personnel.[360] If the affected employees are union members, "the bargaining process…normally governs employee rights for continued employment as well as for seniority recognition, accrued benefits disposition, pay and other benefit issues."[361]

When federal funding is involved, 49 U.S.C. § 5333(b), still referred to as Section 13(c), requires that public transportation agencies protect existing labor agreements, i.e., by the use of "protective arrangements" that must be certified by the DOL and that must be in effect before FTA funds may be released to a mass transit provider.[362] When Section 13(c) applies, transit agencies must protect employees' rights to collective bargaining; preserve their rights, privileges, and benefits under existing collective bargaining agreements; maintain paid training or retraining programs; assure employees of continued employment and priority of reemployment in the event of layoffs; and protect employees "against a worsening of their positions related to employment."[363]

Only a few reported cases were located for the past 5 years involving Section 13(c).[364] Of those cases only the case of *Mancuso v. City of Durham* in 2013 relates to a dispute that is relevant to PPPs.[365] In *Mancuso*, in June 2010, the city of Durham entered into an agreement with Triangle Transit Authority (TTA) that provided for TTA to assume the management and operation of the Durham Area Transit Authority. Mancuso was employed by the city of Durham as a transit administrator from March 1997 to October 2011. He remained an employee of the city but was "on loan" to TTA from October 1, 2010, to September 30, 2011. Mancuso complained that his Section 13(c) rights were violated "when he was placed in a temporary position with duties that were not comparable to the duties of his prior position."[366] The court remanded the matter to the trial court for findings on whether the parties were bound by an arbitration clause in the union contract with the city of Durham. If the trial court holds that there is an enforceable agreement to arbitrate, the trial court must determine whether the plaintiff's claim comes within the "substantive scope" of the agreement.[367] If so, an arbitrator will decide the merits of Mancuso's complaint, not the court.[368]

5. Veterans Preference

MAP-21 includes a veterans' preference for employment on transit construction projects.[369] As amended by MAP-21, under § 5325, recipients and subrecipients of federal financial assistance for a

com/2012/04/davis-bacon-act-and-changes-in.html (Apr. 24, 2012).

[357] *See The Davis-Bacon Act: Protecting and Enhancing American Community and Workforce Standards*, *Bldg. Constr. Trade Dept. AFL-CIO*, at 6 (Jan. 2009), hereinafter referred to as "Protecting and Enhancing American Community and Workforce Standards," available at http://www.ibew725.org/ImageUploads/File/Davis-Bacon_BT_Study.pdf.

[358] Protecting and Enhancing American Community and Workforce Standards*, supra* note 357, at 8.

[359] FTA Report to Congress on PPPs, *supra* note 5, at 41.

[360] O'Steen & Jenkins, *supra* note 6, at 294.

[361] *Id*.

[362] *See* U.S. Dep't of Labor, Office of Labor-Management Standards, available at http://www.dol.gov/olms/regs/compliance/QandA.htm.

[363] FTA Report to Congress on PPPs, *supra* note 5, at 40.

[364] City of Colo. Springs v. Solis, 589 F.3d 1121 (10th Cir. 2009); City of Colo. Springs v. Chao, 587 F. Supp. 2d 1185 (10th Cir. 2008) (referring to purchase of two buses to be used in the operation of Colorado Springs's Mountain Metropolitan Transit service); Mancuso v. City of Durham, 741 S.E.2d 926 (N.C. LEXIS App. 2013) (unreported); DART v. Amalgamated Transit Union Local No. 1338, 273 S.W.3d 659 (Tex. 2008); Utah Transit Auth. v. Local 382 of the Amalgamated Transit Union, 2012 UT 75, 289 P.3d 582 (2012); Mid-Ohio Valley Transit Auth. v. Amalgamated Transit Union Local 1742, 2013 W. Va. LEXIS 513 (W.Va. 2013).

[365] Mancuso v. City of Durham, 741 S.E.2d 926, 2013 N.C. App. LEXIS 427 (2013) (unreported).

[366] *Id*. at 2.

[367] *Id*. at 7.

[368] *Id*.

[369] FTA Summary of MAP-21, *supra* note 15, at 10.

project are to ensure that contractors extend a hiring preference to the extent practicable to veterans (as defined in 5 U.S.C. § 2108) who have the requisite skills and abilities to perform the construction work required under the contract. The statute is not to be "understood, construed or enforced in any manner that would require an employer to give a preference to any veteran over any equally qualified applicant who is a member of any racial or ethnic minority, [a] female, an individual with a disability, or a former employee."[370]

6. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

Section 5323, as amended by MAP-21, provides that the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 shall apply to financial assistance for capital projects.[371]

VII. PPPS AND COMPLIANCE WITH STATE LAWS

A. State Enabling Legislation for PPPs

This digest is not intended to be a review of state and local laws affecting the use of PPPs; nevertheless, one of the "key prerequisites" for a PPP is a state enabling law that authorizes the use of a PPP in the manner envisioned by prospective public and private partners for a project.[372] The digest includes a brief discussion of state enabling legislation for PPPs and alerts readers to some of the possible obstacles to PPPs in some states.

First and foremost, a PPP for the delivery of a facility or a service is a contract between a transit agency and the private sector.[373] The parties to a PPP must consider the legal capacity of the PPP under state law; the ability under applicable state law for a public transit agency to transfer its responsibilities in whole or in part by contract to a private party; and whether the private sector may be involved in developing, financing, or operating a transit facility. Furthermore, although PPPs are based on innovative contracting and a value approach, in most states, public transit and other "government agencies must segment their procurements and award contracts on the basis of the 'lowest responsible price.'"[374]

Although state enabling legislation is essential for PPPs, the laws currently differ concerning whether and to what extent they permit the kind of PPP, project, contract, or financing envisioned by the partners.[375] Whether existing laws provide explicit authority for a PPP project is important, because governments generally do not have "implicit powers."[376] Many public transit agencies still lack the legal capacity under state law to use PPPs as an alternative to traditional approaches to public procurement.[377] In contrast, Virginia's Public-Private Transportation Act of 1995 is "frequently cited as a model for other jurisdictions" interested in the use of PPPs.[378]

The threshold question thus is "whether there exists sufficient legal authority and flexibility to use alternative PPP approaches to deliver surface transportation projects."[379] There has been some progress with respect to state authorization of the use of PPPs. As of 2007, 42 states, the District of Columbia, Puerto Rico, and the Virgin Islands already had authorized transportation agencies to use the DB form of contracting,[380] but only 15 states had made "extensive use of the DB approach to expedite projects and control costs."[381] Moreover, the states that tend to use alternative, innovative approaches to project delivery are states with enabling legislation for PPPs and experience with DB procurement for transportation projects that also are participating actively in the Value Pricing Pilot Program.[382]

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[370] Estell & Washington, *supra* note 14, at 45.

[371] *Id*. at 41.

[372] Geddes & Wagner, *supra* note 4, at 2.

[373] *See* FHWA, Innovative Project Delivery, FAQs, available at http://www.fhwa.dot.gov/ipd/p3/faqs/#1.

[374] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 85 (citation omitted).

[375] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 5–6.

[376] David L. Winstead, Raising Capital to Finance Public Transit and Intermodal Projects, at 21, hereinafter referred to as "Winstead," available at http://www.docstoc.com/docs/48669541/Raising-Capital-to-Finance-Public-Transit-Intermodal-Projects.

[377] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 34 and B-5 (summary of statutory authority for state transportation PPP projects).

[378] Akintoye & Beck, *supra* note 2, at 200.

[379] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 31.

[380] *Id*. at 25.

[381] *Id*.

[382] *Id*. at 28. *See* FTA, Transit Research Update–December 2008, at 7 (discussing Value Pricing Pilot Program: Lessons Learned), download available at http://www.google.com/search?q=Value+Pricing+Pilot+Program+and+FTA&rls=com.microsoft:en-us:IE-

FHWA's Office of Innovative Program Delivery provides an online overview of state PPP legislation.[383] The DOT has identified 28 key elements in state legislation of particular importance to PPPs for transit agencies.[384] Among other things, state legislation should allow a transit agency to develop criteria that will result in the selection of the best developer and provide a framework that ensures "the integrity of the process [while] leaving the details of the process to…the sponsoring transit agency."[385]

Legislative provisions that are significant for transit agencies and PPPs include provisions that authorize the bundling of design, financing, construction, operation, and maintenance responsibilities to the extent desired in one procurement contract; to enter into multiyear contracts and leases;[386] and to solicit proposals from the private sector for projects, as well as to accept unsolicited private proposals. For example, Caltrans and regional transportation agencies may "enter into comprehensive development lease agreements…with private or public entities to procure design, construction, and other development and related services for various types of transportation projects."[387] In Florida, the state "may receive or solicit proposals and…enter into agreements with private entities, or consortia thereof, for the building, operation, ownership, or financing of transportation facilities."[388] The Florida statute deals with various aspects of PPPs, including the use of innovative financing,[389] as well as other issues that PPP agreements must address.[390]

Some state statutes authorize qualifications-based procurement, such as two-stage "best value" procurements, and permit the use of criteria that will allow for the selection of a developer best able to provide the greatest value to a transit agency. Such statutes may allow negotiations to proceed with a private partner during the early planning stages of a project and the use of alternative forms of financial security.[391] Some state laws permit prequalification/short-listing; performance-based payments, availability payments, on-time incentives; and the aggregation of federal, state, and local funds with private funds.[392] Finally, enabling legislation may authorize or encourage TOD or joint development and even permit investment by foreign entities.[393]

FTA recommends that public transit agencies that are considering the use of PPPs review their applicable state laws to determine whether additional procurement and contracting authority is needed.[394] Provided that there is adequate legal authority for the use of PPPs, one source concludes that the outlook in the United States is "very bright" for the use of PPPs for surface transportation projects.[395]

B. Barriers to PPPs in State Legislation

Although at least 23 states and Puerto Rico have some form of enabling legislation allowing the use of PPPs for transportation projects,[396] the "single most significant barrier" to PPPs continues to be the absence of adequate enabling legislation at the state level.[397] Some of the state stat-

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[383] FHWA, State P3 Legislation, available at http://www.fhwa.dot.gov/ipd/p3/state_legislation/.

[384] Erhardt, *supra* note 301, at 936 (*citing* USDOT-FHWA, PPP Legislation). *See* FTA Report to Congress on PPPs, *supra* note 5, at 26.

[385] FTA Report to Congress on PPPs, *supra* note 5, at 28.

[386] Kathryn Pett, Statutory and Regulatory Requirements: A National Perspective (July 2009) (unnumbered) (*see* text under caption "authority to enter PPP contract"), hereinafter referred to as "Pett." *See* FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 32.

[387] Nancy C. Smith & Isidro A. Jiménez, *California Public Contracting Laws: Design-Build Authority for Transportation Projects*, at 5 (2011) (*citing* CAL. STS. & HIGH. CODE § 143) (interior quotation marks omitted), available at https://sacramento.apwa.net/chapters/sacramento/documents/DesignBuildHandouts_October2011.pdf.

[388] O'Steen & Jenkins, *supra* note 6, at 267 (*citing* FLA. STAT. §§ 334.01, 334.30(1) (interior quotation marks omitted).

[389] *Id*. (*citing* FLA. STAT. § 334.30(8)).

[390] *Id*. (*citing* FLA. STAT. § 334.30(9), (12)).

[391] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 32.

[392] Pett, *supra* note 386 (unnumbered) (*see* text under caption "additional procurement issues").

[393] *Id*. *See* FHWA User Guidebook on Implementing PPPs, *supra* note 23, exhibit 20, for a list of statutorily-based legal issues that are associated with transportation PPPs.

[394] FTA Report to Congress on PPPs, *supra* note 5, at 42.

[395] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 69.

[396] *Id*. at 28; FISHMAN, *supra* note 11, at 1; Public-Private Partnerships for Transportation Projects, *supra* note 42, at 3.

[397] Geddes & Wagner, *supra* note 4, at 7.

utes are "ineffective vehicles for public-private partnerships given provisions that create risk and uncertainty."[398] Some state laws impose significant restrictions on the ability of partners to engage in effective PPP arrangements, such as prohibiting the use of certain types of contracts.

Some state statutes prohibit or restrict the use of DB contracts, revenue sharing, innovative financing methods, or the use of performance-based contracts.[399] State competitive bidding laws also may be a barrier to DB-type contracting. State competitive bidding laws generally require that a contract be awarded to the lowest responsible bidder, thus preventing "a combined price plus qualifications procurement."[400] Other types of contracts common to PPP projects may be prohibited in some states for use in public procurement.[401] Although many states authorize DB contracts to some extent, they may not authorize long-term leases or permit innovative financing arrangements.

There is considerable variety in the states' approach to the use of PPPs. Some states may authorize PPPs only for a small number of specific projects (e.g., LAX/Palmdale); authorize their use by particular agencies (e.g., Louisiana Transportation Authority, Los Angeles Metro, Maryland Transportation Authority); or permit their use by multiple agencies (e.g., California, Delaware, Nevada, Virginia, and Washington).[402]

Other possible impediments under state law to the use of PPPs include state bonding requirements for public contracts.[403] State franchise laws may preclude private operation of a public transit agency.[404] Conflict of interest laws may prohibit a firm that handled a project's design from entering into a construction contract for the project.[405] State law may require the award of separate contracts to "trade contractors," thus precluding a single contract with a contractor who selects the contractors.[406] In some states, contractors may be required "to identify major subcontractors" at the time of the bidding.[407] Such requirements may be difficult to meet for a PPP project for which the prime contractor has not completed the design phase.[408]

Thus, the enabling statutes must be consulted to determine whether the involvement of the private sector is permitted or feasible for a project's funding or delivery, asset management, risk management, or value capture.[409] In contrast, FTA policy provides for "significant flexibility in its procurement requirements to accommodate design-build and design-build-operate-maintain contracting."[410]

In response to the survey, the Connecticut DOT advised that its state's legislation had been amended to allow for private participation in transit projects. New Jersey Transit stated that New Jersey law also encourages the use of PPPs by allowing the agency to enter into DBFOM contracts. SEPTA explained that "Pennsylvania's Guaranteed Energy Saving Act permits public entities to participate in PPPs by eliminating the need to meet the requirements of the State Separation Act."[411] The latter act "requires the use of multiple prime contractors when public entities undertake capital projects."[412] However, TriMet observed that "changes in Oregon condemnation laws potentially restrict [the] ability to acquire property to be used in a PPP."[413]

VIII. STRUCTURING THE FINANCING FOR TRANSIT PPPS

A. Introduction

The long-term implications of the use of PPPs and the financing of transportation infrastructure "are not widely understood."[414] However, the term "innovative financing" includes a wide array of types of financing that may engage private par-

[398] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 34.

[399] FISHMAN, *supra* note 11, at 25.

[400] Pett, *supra* note 386 (unnumbered) (*see* text under caption "obstacle: competitive bidding laws").

[401] *E.g.,* DBOM, DBFO, and DBFOM projects.

[402] Pett, *supra* note 386 (unnumbered) (*see* text under caption "where to look for legislative precedent"); FISHMAN, *supra* note 11, at 25–26.

[403] Public-Private Partnerships for Transportation Projects, *supra* note 42, at 3; FTA Report to Congress on PPPs, *supra* note 5, at 32.

[404] *Id*.

[405] Pett, *supra* note 386 (unnumbered) (*see* text under caption "obstacle: organizational conflicts of interest").

[406] *Id*.

[407] *Id*.

[408] *Id*.

[409] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 6.

[410] FTA Report to Congress on PPPs, *supra* note 5, at 24.

[411] SEPTA Response.

[412] *Id*.

[413] TriMet Response.

[414] Geddes & Wagner, *supra* note 4, at 12.

ticipation, such as private activity bonds, bonds issued by qualified 63-20 nonprofit corporations, long-term leasing of transit facilities, and cross-border leasing.[415]

The primary objectives of the financial structuring of a PPP are to utilize fully all sources of public funds, including tax revenue and grants from federal, state, and local sources, as well as credit enhancement techniques; to secure private sources of capital and noncapital financing; to use financing methods to decrease costs and enhance cash flow; and to utilize transit-owned real estate and other assets productively that are underutilized.[416]

Although financing for PPPs in the United States has been described as quite "fragmented," the United States has been described also as "a virtual PPP laboratory."[417] There are several methods for financing PPP infrastructure projects that embrace participation by the private sector.[418] PPPs for transit projects continue to require, however, a "high degree of government financial assistance."[419]

B. Private Activity Bonds

1. Nonqualified Private Activity Bonds

Under Section 103 of the Internal Revenue Code there are two types of private activity bonds, nonqualified and qualified. However, only the income received by taxpayers from *qualified* private activity bonds, discussed below in Section VIII.B.2, is exempt from federal income tax under the Internal Revenue Code.

As discussed in a report prepared for the Senate Committee on Finance, an issue of bonds must meet two private business use tests to be private activity bonds:

> [A] bond is a private activity bond if it is part of an issue in which both:
>
> 1. More than 10 percent of the proceeds of the issue (including use of the bond-financed property) are to be used in the trade or business of any person other than a governmental unit ("private business use test"); and
>
> 2. More than 10 percent of the payment of principal or interest on the issue is, directly or indirectly, secured by (a) property used or to be used for a private business use or (b) to be derived from payments in respect of property, or borrowed money, used or to be used for a private business use ("private payment test").[420]

In its section on tax-exempt governmental bonds and private business tests, a Senate Finance Committee report states that "[t]he 10 percent private business test is reduced to five percent in the case of private business uses (and payments with respect to such uses) that are unrelated to any governmental use being financed by the issue."[421] A 5 percent rule applies to an issue by a Section 501(c)(3) organization.[422] Another source states that "[i]f 5% percent or more of the bond debt service is derived from private business use or is secured by privately used property, the bonds will not qualify."[423] Thus, for a government bond under these circumstances, only 5 percent may be truly unrelated to the governmental purpose.

2. Qualified Private Activity Bonds

Qualified private activity bonds "are tax-exempt bonds issued to provide financing for specified privately used facilities."[424] An issue of exempt facility bonds is one type of private activity bonds. However, there are annual state limitations on the aggregate volume of most qualified private activity bonds.[425]

> To qualify as an exempt facility bond, 95 percent of the net proceeds must be used to finance an eligible facility. Business facilities eligible for this financing include transportation (airports, ports, local *mass commuting*,

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[415] Mary A. Collins, Report on Innovative Financing Techniques for Transit Agencies, at 2 (Undated), hereinafter referred to as "Collins," available at http://www.orrick.com/Events-and-Publications/Documents/198.pdf (discussing innovative financing tools); FISHMAN, *supra* note 11, at 7–9; Alternative Transit Funding Sources and Finance, *supra* note 278, at 3.

[416] STAINBACK, *supra* note 130, at 71–73 (author refers to the foregoing as the Stainback Five-Part Finance and Development Approach).

[417] Akintoye & Beck, *supra* note 2, at 200 (some quotation marks omitted). *See* Collins, *supra* note 415, at 58.

[418] *Id*. at 199.

[419] *Id*. at 202.

[420] Tax Provisions Relating to Financing of Infrastructure, *supra* note 213, at 29.

[421] *Id*. n.75.

[422] *See* IRC § 145(a)(1), (a)(2)(A) and (B) for details.

[423] Debra Kawecki & Marvin Friedlander, *501(c)(3) BONDS—A Mini-Text*, at 299 (reprinted from Continuing Professional Education Exempt Organizations, Technical Instruction Program (1993)), hereinafter referred to as "Kawecki & Friedlander," available at http://www.irs.gov/pub/irs-tege/part2h02.pdf.

[424] Tax Provisions Relating to Financing of Infrastructure, *supra* note 213, at 30 (footnotes omitted) (emphasis supplied).

[425] *Id*. at 31 (*citing* REV. PROC. 2010-40 § 3.09).

> high-speed intercity rail facilities, and qualified highway or surface freight transfer facilities).[426] (emphasis added)

The net proceeds of an issue of exempt facility bonds must be to finance mass commuting facilities "owned by a governmental unit."[427] The term "mass commuting facilities" includes real property and all improvements and personal property used in the facility (e.g., machinery, equipment, furniture) serving the general public that is commuting on a day-to-day basis,[428] but the term does not include mass commuting vehicles.[429]

As provided in the regulations, "[a]n exempt facility includes any land, building, or other property functionally related and subordinate to such facility. Property is not functionally related and subordinate to a facility if it is not of a character and size commensurate with the character and size of such facility."[430]

As of January 1, 2012, private activity bonds had been issued, for example, for the Denver RTD Eagle P3 Project ($397,835); the CenterPoint Intermodal Center ($150,000 and $75,000) in Joliet, Illinois;[431] and for the Capital Beltway high occupancy toll (HOT) Lanes ($589,000) and the I-95 high occupancy vehicle (HOV)/HOT project ($252,648), both in Virginia. As of that date, there had been an allocation of private activity bonds, including one for CenterPoint Intermodal Center ($1,086,000) in Joliet and one for the CenterPoint Intermodal Center ($475,000) in Kansas City, Missouri.[432] Nevertheless, at times the use of private activity bonds may be limited because of a lack of demand for BBB-rated financings or if there are other circumstances affecting the credit markets.[433]

C. Fare Box Revenue Bonds

TEA-21 authorized the use of fare box revenues and federal-aid grant funds as security for the issuance of revenue bonds. Revenue bonds may be "backed by fare box revenues if the level of State and local funding committed to transit for the three years following the bond issue [is] higher than the funds…committed in the three years prior to the bond issue."[434] However, fare box revenue may not constitute adequate security for the issuance of Fare Box Revenue Bonds.[435] Furthermore, unless the regulations allow or the FTA approves of an alternate use, program income (e.g., fares or lease payments) is to be used to reduce program costs. For transit PPPs, because of insufficient fare box revenue, it is likely that public funding will be needed "to leverage the private investment and/or utilization of other sources of public revenue to pay down the project's debt."[436]

As discussed previously, FTA policy may pose a problem for PPPs when a transit agency proposes to remit fare box or related income to a private partner.[437] One exception appears to be for HOV lanes that are converted to HOT lanes as they "may be classified as fixed guideway miles for FTA's funding formulas."[438] FTA has

> authorized the use of Program Income from HOT lane tolls to be used to: (a) service debt, (b) provide a reasonable return on private investment, and (c) pay costs of operations and maintenance. In addition, if the operating entity annually certifies that the facility is being properly operated and maintained and that the items identified in (a), (b) and (c) above are being paid, Program Income may be used for any other purpose relating to the project.[439]

Depending on the state, however, there may be an issue whether a transit agency is authorized to issue fare box revenue bonds.[440] Nevertheless, transit agencies that have issued fare box revenue bonds include Bay Area Rapid Transit (BART) in San Francisco, the Chicago Regional Transit Authority (RTA), Metropolitan Atlanta Rapid Transit Authority (MARTA) in Atlanta, the Metropolitan Transportation Authority (MTA) in Los Angeles, the MTA in New York City, and the Port Authority of New York and New Jersey.[441]

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[426] *Id*. at 30 (footnotes omitted).

[427] 26 U.S.C. § 142(b)(1)(A).

[428] Treas. Reg. § 1.103-8(e)(2)(d)(iv), available at http://www.gpo.gov/fdsys/pkg/CFR-2012-title26-vol2/pdf/CFR-2012-title26-vol2-sec1-103-8.pdf.

[429] Rev. Rul. 88-51, 1982-1 CB 74.

[430] Treas. Reg. § 1.103-8(a)(3).

[431] FHWA Office of Innovative Program Delivery: Innovative Finance, available at http://www.fhwa.dot.gov/ipd/finance/tools_programs/federal_debt_financing/private_activity_bonds/index.htm.

[432] *Id*.

[433] Tom Rousakis, Goldman, Sachs & Co., Financing Transit PPPs, at 9 (Sept. 2009) (unpub.).

[434] FTA, Revenue Bonds, hereinafter referred to as "FTA-Revenue Bonds," available at http://www.fta.dot.gov/grants/12309_106.html.

[435] Collins, *supra* note 415, at 45.

[436] FTA Report to Congress on PPPs, *supra* note 5, at 11; Collins, *supra* note 415, at 44. For discussion of the structure of fare box revenue transactions, *see id*.

[437] FTA Report to Congress on PPPs, *supra* note 5, at 39.

[438] *Id*.

[439] *Id*.

[440] Collins, *supra* note 415, at 45.

[441] FTA-Revenue Bonds, *supra* note 434.

D. Grant Anticipation Notes

Another form of revenue bond is a Grant Anticipation Revenue Vehicle (GARVEE) for a highway project or a Grant Anticipation Note (GAN) for a transit project.[442] Transit agencies use GANs as a source of short-term financing during the implementation of a project by borrowing against their future federal-aid funds allocated by formula under 49 U.S.C. § 5307 or by project under 49 U.S.C. § 5309.[443] Formula funds represent two-thirds of federal aid for transit; discretionary funds allocated by Congress account for the remaining third of federal-aid funding for transit.[444] GANs are referred to as notes, because federal transit formula funds may be anticipated only on a short-term basis and the funds "are subject to the annual Congressional appropriation process."[445] The credit risks for a GAN backed by a discretionary FFGA may be higher than for a GAN backed by formula funding.[446]

As with GARVEEs used for highway projects, a transit agency may issue GANs secured by a pledge of federal-aid assistance to obtain up-front capital and thereafter pay the GANs over time as the agency receives federal funds.[447] A GAN also may be used for the local matching funds for a transit project.[448] The principal and interest on GANs are eligible to be repaid with FTA capital funding.[449] Unlike federal-aid highway funding, federal transit funding usually is provided to transit agencies or to local government units rather than to the states.[450]

Although FTA reports that there are GANs with longer maturities, one source states the maturity of a GAN may be for less than 1 year up to a maturity of 2 or 3 years,[451] and that if a GAN is issued in the second year of a 5-year authorization, the term should not exceed 4 years.[452] Because tax-exempt bonds may not be guaranteed directly or indirectly by the federal government (e.g., an FFGA), additional security for the issuance of a GAN may be necessary to "enhance" its credit rating.[453] The shorter maturities of GANs usually mean that they are "issued at a rate that is approximately one percent less than that for general obligation bonds."[454]

FTA reports that as of 2008 over $3.2 billion in GANs had been issued in principal amounts from $18 million to $450 million for terms of 3 to as many as 15 years.[455] Examples of their use include the Alaska Railroad in 2006 for $78.4 million to purchase rail assets; the BART Airport Extension in 2001 for $385 million; the Chicago Ravenswood Line in 2003 for $128 million; the Chicago Transit Authority for $250 million in 2004 to purchase rail rolling stock; the Massachusetts Bay Transportation Authority (MBTA) in Boston in 2004 for $77.8 million for compressed natural gas buses; and the New Jersey HBLR line in 2000 for $248 million.[456]

E. Certificates of Participation

Another means of leveraging federal funding for a transit project is by the issuance of tax-exempt bonds known as Certificates of Participation (COP).[457] COPs represent an investor's participation in the payments made pursuant to an underlying obligation, such as a lease or sales

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[442] *Id*.

[443] Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-13.

[444] FTA, Revenue Bonds (discussing Transit Grant Anticipation Notes), hereinafter referred to as "Transit Grant Anticipation Notes," available at http://www.fta.dot.gov/printer_friendly/12863.html. *See also* AASHTO, Transit Grant Anticipation Notes, available at http://www.transportation-finance.org/funding_financing/financing/bonding_debt_instruments/municipal_public_bond_issues/gans.aspx.

[445] FHWA, Innovative Program Delivery, Tools & Programs: Federal Debt Financing Tools, "Grant Anticipation Revenue Vehicles (GARVEEs)," available at http://www.fhwa.dot.gov/ipd/finance/tools_programs/federal_debt_financing/garvees/.

[446] Transit Grant Anticipation Notes, *supra* note 444.

[447] *Id*.

[448] FTA-Revenue Bonds, *supra* note 434.

[449] *Id*.

[450] Transit Grant Anticipation Notes, *supra* note 444.

[451] Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-13.

[452] *Id*.

[453] *Id*.

[454] *Id*.

[455] Elizabeth Martin, FTA, Innovative Financing: Meeting the Needs for Capital (May 2008), available at http://www.fta.dot.gov/documents/Day_1_-_IId_-_Innovative_Finance_-_Martin.pdf.

[456] *Id*.

[457] AASHTO Center for Excellence in Project Finance, Certificates of Participation, hereinafter referred to as "AASHTO—Certificates of Participation," available at http://www.transportation-finance.org/funding_financing/financing/bonding_debt_instruments/certificates_of_participation.aspx .

agreement.[458] COPs may be used to finance the purchase of transit equipment or facilities for transit projects. COPs are "sold as securities to investors in both private placements and public offerings."[459]

Under the regulations, a capital lease is any transaction by which an entity that receives FTA financial assistance "acquires the right to use a capital asset without obtaining full ownership regardless of the tax status of the transaction."[460] Under 49 C.F.R. Part 639, although COPs typically have been used by transit agencies to acquire buses, potentially any capital asset may be leased rather than built or purchased.[461] A "capital asset means facilities or equipment with a useful life of at least one year" that is eligible for federal financial assistance under § 5307.[462] The term "facilities" mean real property, including land, improvements, and fixtures, whereas the term "equipment" means nonexpendable personal property.[463]

Section 639.11(a)(1)–(3) is controlling and provides that a lease may qualify for capital assistance when the lease satisfies three criteria:

- The capital asset to be acquired by lease is otherwise eligible for capital assistance.
- There is or will be no existing federal interest in the capital asset as of the date the lease will take effect (unless as determined pursuant to § 639.13(b)). As for the second criterion, § 639.13(b) states that "[a] recipient may request FTA to determine the eligibility of a certain financial arrangement if the recipient believes it might not meet the requirements of this part." Section 639.13(c) also states that FTA has the "right to disapprove any arrangements" when it has not been "demonstrated that the recipient will have control over the asset" and that "FTA may require the recipient to submit its cost-effectiveness comparison for review."
- The lease of the capital asset is more cost-effective than the purchase or construction of the asset. As for the third criterion, § 639.21 sets forth what is needed for a determination that a lease is more cost-effective.

Section 639.13 describes the eligible type of leases. Although FTA will advise whether a specific leasing transaction qualifies,[464] the regulations provide that in general "[a]ny leasing arrangement, the terms of which provide for the recipient's use of a capital asset, potentially is eligible as a capital project under Chapter 53 of Title 49 of the United States Code, regardless of the classification of the leasing arrangement for tax purposes."[465] Even leases that were in existence prior to November 14, 1991, "may be eligible for capital assistance for costs incurred after approval of such a lease by FTA under this part."[466]

Transit agencies may enter into a contract for a transit facility or may order vehicles such as buses.

- The assets are owned by the provider and leased to a transit agency at terms that are sufficient for the repayment of the holders of the COPs.[467]
- The rental payments made by the government entity approximate the full rental value of the property and equal the principal and interest represented by the COPs.[468]
- When a COP is used to acquire or construct a facility, the "interest with respect to the COP will need to be capitalized until the acquisition or construction of the property is complete."[469]

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[458] FTA—Certificates of Participation ("Section 9") Funds, at 1, hereinafter referred to as "FTA—Certificates of Participation," available at http://www.transportation-finance.org/pdf/funding_financing/financing/mechanisms/bonding_debt_instruments/transitcop_details.pdf.

[459] Collins, *supra* note 415, at 4.

[460] 49 C.F.R. § 639.7.

[461] TRANSTECH MANAGEMENT, INC. & PA CONSULTING, INC., FINANCING CAPITAL INVESTMENT: A PRIMER FOR THE TRANSIT PRACTITIONER 69 (Transportation Cooperative Research Program Report No. 89, Transportation Research Board, 2003), hereinafter referred to as FINANCING CAPITAL INVESTMENT: A PRIMER FOR THE TRANSIT PRACTITIONER, available at http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rpt_89a.pdf.

[462] 49 C.F.R. § 639.7.

[463] *Id.* § 639.7.

[464] *Id.* § 639.13(b).

[465] *Id*. § 639.13(a).

[466] *Id*. § 639.13(d) and (d)(1)-(3) (providing that three conditions must be satisfied:

> The lease is otherwise eligible under this part; (2) The recipient can demonstrate that the lease, when entered into, was more cost effective than purchase or construction; and (3) The procurement of the asset by lease was in accordance with Federal requirements that applied at the time the procurement took place.

[467] AASHTO—Certificates of Participation, *supra* note 457.

[468] FTA—Certificates of Participation, *supra* note 458, at 2.

[469] *Id*. at 1.

• FTA's guidance on capital leases states that capital leases may not be for longer than the useful life of the asset nor for less than 75 percent of the useful life of the leased asset.[470]

• The government entity's lease payments are assigned to a trustee who acts on behalf of the holders of the COPs.[471]

Federal law and FTA regulations allow transit agencies to receive federal funds and use COPs for long-term financing of capital facilities and equipment.[472] As a result of Section 308 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURRA), FTA funding under 49 U.S.C. § 5307, the urbanized area formula grants provision, also referred to as § 9 funds, may be used for leases of facilities and equipment at an 80 percent matching level.[473] Lease financing may be an attractive way to avoid paying a higher price for an asset or to obtain better prices by making "larger, one-time purchases."[474]

The elements a transit agency must meet to have a qualifying capital lease are:

• The capital asset to be acquired by lease must otherwise be eligible for capital assistance.

• There must be or "will be no existing Federal interest in the capital asset as of the date the lease will take effect unless as determined" under the regulations.[475]

The regulations state that "[a] recipient may choose to receive capital assistance for a capital lease approved in a single grant, under which lease payments may be drawn down periodically for the life of the lease, or in increments that are obligated by FTA periodically."[476] In the latter instance, a recipient must certify to the FTA that it has the financial capacity to meet its obligations if federal funds are unavailable for capital assistance in later years.[477]

Lease payments, including interest, are capital expenses that are eligible for reimbursement under 49 U.S.C. § 5307 when leasing is shown to be more cost effective than purchasing the equipment or constructing the facilities required by a transit agency.[478] A transit agency may issue COPs for the "full value of the project, including both the federal and local share of costs."[479] As stated, on the termination of the lease, the COP "is retired" and the ownership of the equipment or facilities "reverts to the state or issuing authority."[480]

In most jurisdictions, COPs may be used by "governmental entities to finance capital projects without technically issuing long-term debt" that otherwise would require voter approval.[481] Capital leases have been held not to constitute a "debt" because a government lessee in a lease-back arrangement is not required to pay for the entire term of the lease but only to pay each year that the leased "property is available for use during such year."[482] However, in some jurisdictions, there may be an issue regarding whether the use of COPs without voter approval is permitted for constitutional or statutory reasons.[483]

Because COPs involve additional risk and are generally considered less creditworthy than general obligation bonds, issuers of COPs may have to pay a higher interest rate to investors who purchase them.[484] Moreover, because FTA funding is subject to congressional appropriation each year, "there is no guarantee that sufficient funds will always be available to pay the full 80 percent match of lease payments. Thus rating agencies and capital market participants do not treat section 9 funds as a guarantee."[485] The security of COPs may be enhanced by bond insurance, letters of credit, or other guarantees to make the COPs more attractive to investors.[486] AASHTO observes that although transit agencies may not pledge formula grant funds "formally" as security, transit

[470] FTA, Capital Leasing, available at http://www.fta.dot.gov/grants/12865.html.

[471] FTA—Certificates of Participation, *supra* note 458, at 2.

[472] Collins, *supra* note 415, at 3, 5.

[473] *Id*. at 5.

[474] *Id*. at 5.

[475] 49 C.F.R. § 639.11(a).

[476] *Id*. § 639.15(a) and (b).

[477] *Id*. § 639.15(b)(1).

[478] *Id*. § 639.11(a).

[479] Financing Capital Investment: A Primer for the Transit Practitioner, *supra* note 461, at 68.

[480] Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-14.

[481] Collins, *supra* note 415, at 3.

[482] *Id*. at 3.

[483] *Id*. at 5.

[484] *Id*. at 4.

[485] *Id*. at 5; Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-14.

[486] Collins, *supra* note 415, at 4.

agencies may "promise the use" of such future funds to enhance creditworthiness.[487]

F. 63-20 Nonprofit Corporations

State and local governments may use "established conduit issuers" or create not-for-profit corporations to raise money through the issuance of tax-exempt bonds for a project.[488] (Conduit revenue bonds are also known as private activity bonds.[489]) Qualifying nonprofit corporations issuing tax-exempt bonds on behalf of a public transit agency permit "most of the benefits of private development" to be retained.[490] Section 103 of the Internal Revenue Code allows only states or political subdivisions to issue bonds that pay holders dividends that are excluded from taxation for federal income tax purposes. The IRS regulations provide that "[o]bligations issued by or on behalf of any State or local governmental unit by constituted authorities empowered to issue such obligations are the obligations of such a unit."[491] The cost of debt is lower for tax-exempt bonds because the federal income tax exclusion in effect subsidizes the bonds' cost by making them attractive even though they pay a lower rate.[492]

PPPs have used nonprofit corporations to facilitate the development of transportation projects, including transit projects "financed with tax-exempt bonds."[493] The nonprofit corporation is created with various powers, including the powers to acquire and develop sites "through contracts with private contractors," to arrange for public or private financing, and to contract with another party to operate the facility upon completion.[494] Such nonprofit corporations may qualify to issue tax-exempt bonds as long as the company satisfies the requirements of the Internal Revenue Code.

As FHWA describes 63-20 nonprofit public benefit corporations,

> [p]ublic sector agencies in the United States may finance capital projects by issuing tax-exempt debt…. Using this type of debt keeps interest costs low and generates attractive opportunities for both private and corporate investors. One method of reducing the borrowing costs to the private partner is to issue debt through a nonprofit public benefit corporation pursuant to Internal Revenue Service (IRS) Rule 63-20 and Revenue Proclamation 82-26. *The nonprofit corporation is able to issue tax-exempt debt on behalf of private project developers*.
>
> In general, to facilitate the financing needs of a third party, state and local governments can issue tax-exempt revenue bonds either through established conduit issuers or creation of nonprofit corporations pursuant to IRS Revenue Ruling 63-20. While governments normally prefer to utilize an established entity for conduit issues, such as a state finance authority, IRS Revenue Ruling 63-20 provides a viable alternative and has been used to finance several highway and transit projects around the country.[495]

IRS Revenue Ruling 1963-20 referred to by FHWA applies to obligations issued on behalf of a political subdivision by a 63-20 nonprofit corporation, the income from which is excludable under federal income tax law.[496] Under the ruling, obligations are issued "on behalf" of a political subdivision as long as the 63-20 nonprofit corporation satisfies the following requirements:

> (1) the corporation must engage in activities which are essentially public in nature;
>
> (2) the corporation must be one which is not organized for profit (except to the extent of retiring indebtedness);
>
> (3) the corporate income must not inure to any private person;
>
> (4) the state or a political subdivision thereof must have a beneficial interest in the corporation while the indebtedness remains outstanding and it must obtain full legal title to the property of the corporation with respect to

[487] AASHTO Center for Excellence in Project Finance, Certificates of Participation, available at http://www.transportation-finance.org/funding_financing/financing/bonding_debt_instruments/certificates_of_participation.aspx.

[488] Akintoye & Beck, *supra* note 2, at 202.

[489] Kawecki & Friedlander, *supra* note 423, at 264 (stating that "[u]nder the Tax Reform Act of 1986[] historically government bonds are treated differently than conduit revenue bonds").

[490] O'Steen & Jenkins, *supra* note 6, at 285 (*quoting* Karen J. Hedlund, *The Role of 63-20 Nonprofit Corporations in Public/Private Infrastructure Financings*, 113 PUB. WORKS FIN. 20 (1997) (quotation marks omitted)).

[491] 26 C.F.R. § 1.103-1(b).

[492] Akintoye & Beck, *supra* note 2, at 202.

[493] *Id*. (listing examples of projects). *See* Nossaman LLP, The Use of "63-20" Nonprofit Corporations in Infrastructure Facility Development (May 1, 2001) (unnumbered), hereinafter referred to as "Nossaman," available at http://www.nossaman.com/the-use-6320-nonprofit-corporations-infrastructure-facility.

[494] Nossaman, *supra* note 493 (unnumbered) (*see* text under caption "powers and operation of a nonprofit corporation").

[495] FHWA, Innovative Program Delivery, P3 Defined, 63-20 Nonprofit Public Benefit Corporation, available at http://www.fhwa.dot.gov/ipd/p3/defined/dbfo_6320.htm (emphasis supplied).

[496] If the obligations are issued by a nonprofit corporation for the purpose of stimulating industrial development within a political subdivision of a state, the obligations may meet the test established under Revenue Ruling 1963-20.

> which the indebtedness was incurred upon the retirement of such indebtedness; and
>
> (5) the corporation must have been approved by the state or a political subdivision thereof, either of which must also have approved the specific obligations issued by the corporation.[497]

One of the important tests that a 63-20 nonprofit corporation must meet is that the government agency must have "a beneficial interest in the corporation while the indebtedness remains outstanding." A governmental unit may acquire a beneficial interest by:

> (1) using 95% of the facility, or (2) having the right to pay off the obligations and acquire the facility at any time. In addition, the governmental unit must acquire the property when the obligations are paid off. In order to satisfy the beneficial interest requirement, an organization must have a close tie to the government.[498]
>
> ....
>
> Only a governmental unit or a corporation tightly controlled by a governmental unit can issue bonds that will be treated as tax exempt by IRC 103.[499]

As stated, a nonprofit corporation must have a "close tie" to or be "tightly controlled" by the governmental agency.[500] To maintain sufficient control, in addition to other contractual provisions, the government entity may have the right to appoint members of the board of directors or have its own representatives serve on the board.[501]

Another reason to maintain control is that a 63-20 corporation "has no long-term equity interest in the project."[502] Nevertheless, a nonprofit issuer of tax-exempt bonds may own a facility financed with tax-exempt bonds under Revenue Ruling 63-20 until the retirement of the bonds, when the facility must become the property of the government agency.[503] As one source explains, the ruling requires that "the state or a political subdivision thereof must have a beneficial interest in the corporation while the indebtedness remains outstanding and it must obtain full legal title to the property of the corporation with respect to which the indebtedness was incurred upon the retirement of such indebtedness."[504]

Transit assets that are funded by federal grants also must continue to be used for transit service for the life of the asset.[505]

As noted, the governmental unit must approve both the nonprofit corporation and the specific obligations to be issued by the corporation.[506] In accordance with Revenue Procedure 82-26, the IRS on request will issue an advance ruling on whether a nonprofit corporation's issuance of obligations will qualify.[507]

The availability of the use of 63-20 nonprofit corporations for the issuance of tax-exempt bonds applies to a wide range of projects, including transportation projects. The government agency must have a specific need; there must be a nonprofit corporation for the issuance of tax-exempt bonds to facilitate the financing, construction, operation and/or management of the project; and there must be a contractor to build the facility.[508]

IX. CREDIT FACILITIES AVAILABLE THROUGH THE TRANSPORTATION INFRASTRUCTURE FINANCING INNOVATION ACT, STATE INFRASTRUCTURE BANKS, AND OTHER SOURCES

A. Transportation Infrastructure Financing Innovation Act

The Transportation Infrastructure Financing Innovation Act (TIFIA) authorizes the USDOT to provide credit assistance in the form of secured (direct) loans, loan guarantees, and standby lines of credit for eligible surface transportation projects of regional or national significance. TIFIA funds, therefore, are "loans and must be repaid."[509]

In 2012, MAP-21 made significant changes to the structure and terms and conditions of

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[497] Internal Revenue Service Ruling 1963-20, available at http://www.charitableplanning.com/document/675768.

[498] Kawecki & Friedlander, *supra* note 423, at 268.

[499] *Id*. at 269.

[500] *Id*. at 268, 269; Revenue Ruling 63-20.

[501] Nossaman, *supra* note 493 (unnumbered) (*see* text under caption "issues for governmental unit: contract v. liability").

[502] *Id*.

[503] *Id*.

[504] AASHTO Center for Excellence in Project Finance, Non-Profit 63-20 Corporations, available at http://www.transportation-finance.org/funding_financing/legislation_regulations/state_local_legislation/63_20_non_profit_financing.aspx.

[505] Collins, *supra* note 415, at 17.

[506] Rev. Proc. 82-26, 1982-1 C.B. 476.

[507] Kawecki & Friedlander, *supra* note 423, at 269 (discussing Rev. Proc. 82-26, 1982-1 C.B. 476).

[508] Jim Miara, *Leveraging Models: the 63-20 Process* (Mar. 1, 2010), available at http://urbanland.uli.org/Articles/2010/MarApr/Miara.

[509] Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-5.

TIFIA.[510] TIFIA continues to be a source of credit assistance for surface transportation projects, such as transit projects, intercity passenger bus or rail facilities, and vehicles and facilities for intermodal interchange or transfer.[511] TIFIA finances development-phase activities, construction costs, and necessary financing costs.[512] Under TIFIA, projects secured by the same revenue stream may be considered eligible.[513] MAP-21 increased the authorized amount of credit assistance, changed the maximum potential for TIFIA credit from 33 to 49 percent of the total cost of development, introduced a new rolling application process, and authorized the use of tolls and user fees as sources for repayment of TIFIA's forms of credit assistance.[514]

In regard to guidance on TIFIA since MAP-21, a USDOT/FHWA Web site, updated as of September 12, 2013, advises that "the TIFIA letter of interest process has been adjusted to reflect changes authorized in MAP-21."[515] USDOT states that the department "will review TIFIA letters of interest to assess project eligibility, creditworthiness, and its inclusion in the TIP and STIP," and that "[r]eview of the project's creditworthiness will include a Departmental request for an indicative rating on the TIFIA loan and the financial plan for the project."[516] Furthermore, the department advised that "[p]ending a successful outcome to this process and a determination that the project meets all statutory eligibility requirements, the project sponsor will be permitted to submit an application for TIFIA credit assistance."[517]

On July 16, 2012, a USDOT notice of funding availability and request for comments regarding TIFIA credit assistance advised that the "notice outlines the process that project sponsors must follow in seeking TIFIA credit assistance" and that USDOT is publishing the notice "to give project sponsors an opportunity to submit Letters of Interest for the newly authorized funding as soon as possible."[518] Moreover, although the notice provides guidance on "how DOT will implement some of the changes made by MAP–21…it does not provide comprehensive guidance about how DOT will implement all of the changes made by MAP–21" that would become effective on October 1, 2012. The notice explained that:

> The TIFIA regulations (49 CFR part 80), which provide specific guidance on the program requirements, were last updated in 2001, and have not been updated to reflect changes enacted in SAFETEA–LU and MAP–21. Because such existing rules have not been updated, MAP–21 should be the basis for up-to-date guidance. The primary document that the TIFIA program has used in recent years to provide supplemental program guidance has been a "Program Guide" published on the TIFIA Web site. DOT expects to update the TIFIA Program Guide on the TIFIA Web site to reflect changes made by MAP–21.[519]

For additional guidance, USDOT encourages applicants to check the TIFIA program Web site regularly for updated programmatic and application information.[520]

To qualify for TIFIA credit assistance under § 602(a)(5)(A) a project must have eligible project costs that are reasonably anticipated to equal or exceed the lesser of $50,000,000 or $25,000,000 for a rural infrastructure project and "33 1/3 percent of the amount of Federal highway assistance funds apportioned for the most recently completed fiscal year to the State in which the project is located."[521]

An eligible project for TIFIA assistance is any surface transportation project that is eligible for federal assistance under Title 23 or Chapter 53 of Title 49 of the United States Code; a project for intercity passenger bus or rail facilities and vehicles; or a project composed of related highway, surface transportation, transit, rail, or intermodal capital improvements otherwise eligible for assistance that meets the "eligible project cost thresh-

[510] U.S. DOT, Notice of Funding Ability and Request for Comments, Letters of Interest for Credit Assistance under the Transportation Infrastructure Finance and Innovation Act (TIFIA) Program, 77 Fed. Reg. 45411 (July 31, 2012), hereinafter referred to as "Letters of Interest for Credit Assistance under the TIFIA Program," available at http://www.fhwa.dot.gov/ipd/pdfs/tifia/fy2013_tifia_nofa_073112.pdf.

[511] FHWA, MAP-21—Moving Ahead for Progress in the 21st Century, TIFIA Questions & Answers, hereinafter referred to as "TIFIA Questions & Answers," available at http://www.fhwa.dot.gov/map21/qandas/qatifia.cfm.

[512] *Id*.

[513] *Id*.

[514] Letters of Interest for Credit Assistance under the TIFIA Program, *supra* note 510, at 45413.

[515] TIFIA Questions & Answers, *supra* note 511.

[516] *Id*.

[517] *Id*.

[518] Letters of Interest for Credit Assistance under the TIFIA Program, *supra* note 510, at 45411.

[519] *Id*. at 45414.

[520] *Id*.

[521] 23 U.S.C. § 602(a)(5)(A)(i) and (ii).

old under § 602."[522] Eligible projects receive assistance as long as funds are available, and if funds are exhausted, eligible projects may receive funding in the succeeding year when funding is available again.

Eligible costs include substantially everything paid by or on account of an obligor for a project, such as the costs of the development phase;[523] construction, reconstruction, rehabilitation, and replacement;[524] acquisition of real property (including land relating to the project and improvements to land);[525] environmental mitigation;[526] construction contingencies;[527] acquisition of equipment;[528] capitalization of interest necessary to meet market requirements;[529] reasonably required reserve funds;[530] expenses for the issuance of capital;[531] and other carrying charges during construction.[532]

TIFIA authorizes USDOT to provide credit assistance in the form of secured (direct) loans, loan guarantees, and standby lines of credit for eligible surface transportation projects of regional or national significance.[533] MAP–21 authorized $750 million in funding for fiscal year (FY) 2013 and $1 billion in funding for FY 2014. It is estimated, however, that each dollar authorized for TIFIA leverages approximately $10 in lending capacity.[534] Thus, the authorized budget authorization for FY 2013 and FY 2014 may support approximately $6.9 billion in lending capacity for FY 2013 and $9.2 billion for FY 2014.[535]

An applicant for credit assistance under TIFIA may be a state, local government, public authority, PPP, or any other legal entity undertaking a project authorized by the Secretary of Transportation.[536] A project must meet the planning and programming requirements of §§ 134 and 135 of Title 23.[537] The Secretary must determine, *inter alia*, not only that financial assistance for a project will foster, if applicable, partnerships that attract public and private investment for the project but will also enable a project to proceed at an earlier date, as well as reduce the level of federal grant assistance for the project.[538] Moreover, project sponsors "should provide quantitative or qualitative information about the public benefits that their projects will achieve."[539]

When there is a request for credit assistance, USDOT must determine that the project is creditworthy,[540] which includes having the required investment grade rating.[541] As described by USDOT,

> [p]rior to execution of a TIFIA credit instrument, the senior debt obligations for each project receiving TIFIA credit assistance must obtain investment grade ratings from at least two nationally recognized rating agencies, and the TIFIA debt obligations must obtain ratings from at least two nationally recognized rating agencies, unless the total amount of the debt is less than $75 million, in which case only one investment grade rating is required for the

[522] *Id*. § 601(a)(1) and (a)(8). *See also* FTA, TIFIA Program Guide, at 2, available at http://www.fhwa.dot.gov/ipd/tifia/, hereinafter referred to as "TIFIA Program Guide." *See* Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-6.

[523] *E.g*., planning, feasibility analysis, revenue forecasting, environmental review, permitting, preliminary engineering and design work, and other preconstruction activities.

[524] 23 U.S.C. § 601(a)(1)(B).

[525] *Id*.

[526] *Id*.

[527] *Id*.

[528] *Id*.

[529] 23 U.S.C. § 601(a)(1)(C).

[530] *Id*.

[531] *Id*.

[532] *Id*.

[533] FTA, Transportation Infrastructure Finance and Innovation Act (TIFIA) Program, hereinafter referred to as "FTA–TIFIA Program," available at http://www.fta.dot.gov/grants/12861.html. *See also* Akintoye & Beck, *supra* note 2, at 204; Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 6.

[534] TIFIA Questions & Answers, *supra* note 511.

[535] Letters of Interest for Credit Assistance under the TIFIA Program, *supra* note 510, at 45412.

[536] 23 U.S.C. § 602(a)(4). *See also* Mallett, *supra* note 25, at 14 (discussing modifications to TIFIA by SAFETEA-LU).

[537] 23 U.S.C. § 602(a)(3); Letters of Interest for Credit Assistance under the TIFIA Program, *supra* note 510, at 45413. *See also* Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-6.

[538] 23 U.S.C. § 602(a)(9)(A)-(C).

[539] Letters of Interest for Credit Assistance under the TIFIA Program, *supra* note 510, at 45413 (stating that "[e]xamples of public benefits include objectives specified in Section 101 and 49 U.S.C. 101(a) and 5301, other DOT grant or credit assistance programs, relevant Federal, state, or local transportation laws or plans, and other public benefits that can be achieved through transportation investments").

[540] *Id*. "DOT will also utilize a report and recommendation from an independent financial advisor and any other information it needs to determine a project's creditworthiness." *Id*.

[541] 23 U.S.C. § 602(a)(2)(iii).

senior debt obligations and one rating for the TIFIA debt obligations.[542]

It is important to note that no TIFIA funding will be "obligated" if a project has not received an environmental categorical exclusion, a FONSI, or a ROD under NEPA.[543] Title VI of the Civil Rights Act of 1964 and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 also are applicable to the TIFIA program.[544]

As noted, secured loans are one of the forms of credit assistance authorized by TIFIA. The Secretary of Transportation may enter into agreements with one or more obligors to make secured loans to finance the eligible costs of a project selected under § 602 of TIFIA.[545] TIFIA's funding also may be used to refinance existing federal credit instruments for rural infrastructure projects or to refinance other long-term obligations or federal credit instruments "if the refinancing provides additional funding capacity for the completion, enhancement, or expansion of any project" selected or otherwise eligible under § 602.[546]

A secured loan provided under TIFIA must be payable in whole or in part from tolls, user fees, or payments owing to the obligor pursuant to a PPP or from other dedicated sources of revenue that also secure the project's senior obligations.[547] The proceeds of a secured TIFIA loan may be used for any nonfederal share of project costs under Title 23 or Chapter 53 of Title 49 if the loan is repayable from nonfederal funds.[548] The total federal assistance provided on a project receiving a TIFIA loan may not exceed 80 percent of the total project cost.[549] All repayments of principal and interest on a direct loan are to commence not later than 5 years after the end of the period of availability specified in subsection (b)(6) and conclude with full repayment 25 years after the stated period of availability,[550] but there are other provisions that permit a deferral of payments.[551]

The second type of credit assistance that TIFIA authorizes is a loan guarantee instead of a secured loan pursuant to which the Federal Government guarantees a borrower's repayments to a nonfederal lender.[552]

Third, TIFIA authorizes the Secretary to enter into agreements to make available to one or more obligors lines of credit "in the form of direct loans to be made by the Secretary at future dates on the occurrence of certain events" for a project selected under § 602.[553] The line of credit may be drawn upon to pay debt service for financing the eligible costs of a project, to pay the costs of extraordinary repair and replacement, to pay the expenses of operation and maintenance, and to pay the costs arising out of unexpected federal or state environmental restrictions.[554] TIFIA lines of credit may assist projects to attain an investment grade bond rating and secure bond insurance by providing a secondary source of capital for the first 10 years following the completion of a project.[555]

The total amount of a line of credit may not exceed 33 percent of the reasonably anticipated eligible costs of the project.[556] Furthermore, a project that receives a line of credit under § 604 may "not receive a secured loan or loan guarantee under section 603 in an amount that, combined with the amount of the line of credit, exceeds 49 percent of eligible project costs."[557] As with a secured loan, a line of credit made available under TIFIA is to be paid in whole or in part from tolls, user fees, payments owing to the obligor under a PPP, or other dedicated sources of revenue that also secure the project's senior obligations.[558] The statute provides that the full amount of a line of credit provided under the section is to be available during the 10-year period beginning on the date of the substantial completion of the project.[559]

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[542] Letters of Interest for Credit Assistance under the TIFIA Program, *supra* note 510, at 45414.

[543] 23 U.S.C. § 602(c)(2).

[544] *Id.* § 602(c)(1)(A) and (C).

[545] *Id.* § 603(a)(1)(A).

[546] *Id.* § 603(a)(1)(D)(i)-(ii). For limitations on refinancing of interim construction financing, *see* § 603(A)(2). *See also* Akintoye & Beck, *supra* note 2, at 204.

[547] *Id.* § 603(b)(3)(A)(I)-(IV).

[548] *Id.* § 603(b)(8).

[549] *Id.* § 603(b)(9).

[550] *Id.* § 603(c)(2).

[551] *Id.* § 603(c)(3). *See also* TIFIA Program Guide, *supra* note 522, at 2.

[552] *Id.* § 603(e). *See also* TIFIA Program Guide, *supra* note 522, at 2.

[553] *Id.* § 604(a)(1).

[554] *Id.* § 604(a)(2). *See also* Winstead, *supra* note 376, at 14.

[555] Financing Capital Investment: A Primer for the Transit Practitioner, *supra* note 461, at 45.

[556] 23 U.S.C. § 604(b)(2).

[557] *Id.* § 604(b)(10).

[558] *Id.* § 604(b)(5).

[559] *Id*. § 604(b)(6).

Two TIFIA loans were obtained for the Miami Intermodal Center, the first for $269 million (June 2000) and the second for $170 million (April 2005; later increased by $100 million in August 2007). In July 2006, the Florida DOT prepaid the first loan and replaced it with one obtained through the State Transportation Trust Fund because the terms were more favorable.[560]

Between 1999 and 2012, TIFIA provided $1.23 billion in credit assistance for transit projects, including credit assistance for the Denver Union Station Project Authority, a public-private development; the Reno Transportation Rail Access Corridor (ReTRAC); the Staten Island Ferries and Ferry Terminal Project; the Tren Urbano Rapid Rail Project in Puerto Rico; the Transbay Transit Center in San Francisco; and the Washington Metropolitan Area Transit Authority (WMATA) Capital Improvement Program.[561]

However, as of May 2013, for the Dulles Metrorail Silver Line that will be operated by WMATA, there is a recommended preliminary TIFIA allocation of $1,979,610,270 for a project that is expected to cost $5,998,819,000.[562]

B. State Infrastructure Banks

Section 350 of the National Highway System Designation Act of 1995 created a pilot program for up to 10 participating states to establish a State Infrastructure Bank (SIB). A SIB is "a type of revolving infrastructure investment fund that can offer loans and credit assistance to public and private sponsors of certain highway construction, transit or rail projects," the effect of which is to expand the capacity of investment for transportation.[563]

Under the program, FTA and FHWA initially signed cooperative agreements with nine states for the purpose of making loans and providing other assistance to eligible public and private entities.[564] In 1991, ISTEA "authorized states to provide loans or other forms of credit enhancements utilizing federal funds a state has received," a program that was continued under TEA-21.[565] SAFETEA-LU expanded the SIB program to all states and territories. Projects must be consistent, to the maximum extent feasible, with comprehensive plans of local metropolitan planning organizations and local governments and conform to state law.[566] As of 2012, 39 states had created SIBs, 21 states had established transit accounts, and 8 states had completed transit-oriented loans.[567]

SIBs may include a state-funded account that is capitalized by state money and bond proceeds that may make loans for capital costs.[568] At least five states, Florida, Georgia, Kansas, Ohio, and Virginia, have established banks or accounts within their SIBs that are capitalized solely with state funds.[569]

A SIB permits a state to use as its "initial capital" its federal-aid highway and FTA allocations, as well as nonfederal funds, "to provide loans and other financing arrangements."[570] Thus, federal funds can be used as "seed capital" or equity, and other nonfederal funds may be transferred directly to the bank.[571] The sources of capital for revolving loan funds include "dedicated taxes and user fees, government grants, legislative appropriations, bond proceeds, loan repayments, interest earned from loan operations, and interest on cash balances."[572]

As stated, a SIB is a revolving loan and credit enhancement program. SIBs in some states have

[560] MIC, Fact Sheet, *Transportation Infrastructure Finance and Innovation Act* (updated May 2008), available at http://www.micdot.com/news_room/MIC_kit/3_TIFIA_Fac_Sheet.pdf.

[561] For details, *see* FTA–TIFIA Program, *supra* note 533. *See* App. A for discussion of ReTRAC.

[562] *See* Fairfax County (Virginia) Board of Supervisors, Transportation Committee, Dulles Metrorail Silver Line: Status Report and Transportation Infrastructure Finance and Innovation Act (TIFIA) Funding Update (May 7, 2013), available at http://www.slideshare.net/fairfaxcounty/1-dulles-metrorail-silver-line-project-and-funding-update-bo-s-trans-comm-5-7-13-final-dmb.

[563] Knowledge Center, State Infrastructure Banks (July 5, 2011), hereinafter referred to as "State Infrastructure Banks," available at http://knowledgecenter.csg.org/kc/content/state-infrastructure-banks.

[564] Collins, *supra* note 415, at 54.

[565] Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-9.

[566] Florida DOT, State Infrastructure Bank, hereinafter referred to as "Florida DOT-SIB," available at http://www.dot.state.fl.us/officeofcomptroller/PFO/sib.shtm.

[567] FTA, State Infrastructure Banks (SIBs), hereinafter referred to as "FTA-SIBs," available at http://www.fta.dot.gov/grants/12862.html.

[568] Florida DOT-SIB, *supra* note 566.

[569] State Infrastructure Banks, *supra* note 563.

[570] Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-9.

[571] *Id*.

[572] *Id.*

two separate accounts that may be used to leverage funds. SIBs enhance the feasibility of projects by providing loans and other credit assistance to public or private entities having projects that are eligible for assistance under federal and state law.[573] Because a SIB is a revolving fund—lending funds for projects while receiving loan repayments—it is able to finance more projects. Consequently, SIB funds may be "turned into much larger credit lines, multiplying transportation investment capacity."[574]

As one source explains, "a leveraged loan fund increases its available resources by using the loan repayment stream and/or the initial capital base as collateral for a bond issue," funds that "[t]he state leverages…by placing the capital into a reserve fund and then issues bonds against the fund, potentially tripling the amount of money it is able to lend."[575] Thus, a SIB may "leverage its initial capitalization by providing loan assistance, by using loan repayments as dedicated revenue to sell bonds in the bond market and by providing additional loan assistance with the proceeds of the bond."[576]

SIB funds may be utilized in a variety of ways to assist in the financing and development of transit projects. A SIB may lend to public and private applicants and projects for any "revenue-generating facility."[577] A SIB may lend to states or to transit operators.[578] A SIB may

> provide credit enhancements, serve as a capital reserve for bond or debt financing, subsidize interest rates, issue letters of credit, finance purchase and lease agreements, provide debt financing security, or provide other forms of financial assistance for the construction of projects qualified under the federal-aid highway program and transit capital projects.[579]

A SIB may provide simple or leveraged loans and increase the size of the fund through principal and interest payments.[580] The SIB, not the United States Treasury, receives interest and lease payments.[581] Credit provided by a SIB may be used so that projects may begin before the transit agency receives grant money.[582] Financing provided by a SIB may be used to "round-out" the financial plan for a project. Credit provided by a SIB may lower the overall cost of debt for a project by providing loans at a lower rate, by guaranteeing loans, or by paying the premiums for bond insurance.[583] A SIB may use "funds to guarantee bonds issued by cities, counties, public-private partnerships and other entities…. Loan guarantees can be particularly beneficial in reducing interest rates on projects in states with cities, counties and special districts that have limited financial capacity."[584]

Although a SIB may provide credit assistance in several ways, loans provided by a SIB are the most popular source of assistance.[585] For example, in Florida three loans from the SIB helped fund the PPP for the Miami Intermodal Center project.[586] SIBs are a "flexible source of financing" and a way to secure more capital for a transit project.[587]

C. Bank Financing

Another form of private financing is the use of commercial loans for private partners or concessionaires via commercial banks or the capital markets. A project's assets or revenues may be required as security for a loan.[588] A "club" of lenders may be needed for a large infrastructure project.[589] According to FHWA, large financial companies in the United States are competing with major international financial companies for the financing of PPPs for the transportation sector.[590] Although not a transit project, a PPP for the Port

[573] Florida DOT-SIB, *supra* note 566.

[574] State Infrastructure Banks, *supra* note 563.

[575] Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-9.

[576] State Infrastructure Banks, *supra* note 563.

[577] Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-9.

[578] Collins, *supra* note 415, at 54.

[579] Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-9.

[580] *Id.*

[581] Collins, *supra* note 415, at 54.

[582] FTA-SIBs, *supra* note 567.

[583] *Id.*

[584] State Infrastructure Banks, *supra* note 563.

[585] *Id.*

[586] *See* App. A.

[587] Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-10 (noting that "[i]n a turnkey or build-operate-transfer (BOT) project, the project company could receive a loan for a portion of the cost of the project and repay the loan through revenues generated by land development, lease payments, payments from operating agreements, or fare revenues").

[588] Winstead, *supra* note 376, at 15.

[589] Availability Payment Mechanisms for Transit Projects, *supra* note 289, at 12.

[590] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 68.

of Miami Tunnel reportedly is financed partly by a group of banks.[591]

D. Private Funding

As recently as 2009, no New Starts program using one of two alternative project delivery methods had obtained any private financing.[592] MAP-21 requires FTA to document private enterprise participation in public transportation and improvement programs under 49 U.S.C. §§ 5303(i)(6), 5306(a), and 5307(c).

Private equity investment may make it more likely that a project will be able to proceed as planned. The private sector may be willing to assume risks that other sources of funding are unable or unwilling to do.[593] For example, for the Portland MAX Airport Extension, Bechtel Enterprises paid $28.2 million in advance in exchange for the rights to develop a 120-acre parcel adjacent to the airport. Moreover, in providing 23 percent of the project's capital, Bechtel's contribution reduced the amount of the public contribution needed for the project.[594]

The inclusion of private investment may serve to lower the overall high cost of capital for a project. "This combining of equity and debt capital is not done in the public ownership model where all debt capital structure is utilized. The benefit of leverage is that the more debt that is utilized the lower the overall cost of capital."[595]

Another benefit of private investment is that "at risk" investors are likely to monitor or "discipline" a project,[596] insist on adequate security for a project, demand that a project have "current income and low volatility,"[597] and require financial penalties for default.[598] A private investor may be unable to meet its own financial obligations if certain "milestones" for the project or scheduled payments, respectively, are not met or made.

Attracting private capital, which may have been borrowed, may be difficult.

> Private partners want to ensure that a project can provide a reasonable return on invested capital, whether debt or equity, net of design and construction, operation and maintenance, reserved for coverage funds, tax cost, and any sharing of revenues proceeds for the project. Therefore the results of private financial analyses for PPP projects focus on the internal rate of return (IRR) on invested capital and/or the net present value (NPV) of the net proceeds from the project over the term of the contract.[599]

Equity holders have the lowest priority and do not receive distributions unless a "company" has a profit.[600] However, transit operations typically are "revenue negative."[601] To attract private equity, there are certain "equity investment drivers," such as a predictable and reliable stream of future cash flows (e.g., comparatively stable fare box revenue), as well as a demonstrated value for money.[602] For transit PPPs, one form of equity investment driver may be periodic payments by a transit agency (e.g., availability payments discussed in Section V.C) to subsidize a project to attract private, long-term equity.[603] For the Oakland Airport Connector project, for instance, BART retained most of the risk for ridership and fare revenue. BART agreed, however, to make a monthly payment to the private partner for operation and maintenance. Part of the payment was "tied to project fare revenues" to incentivize the consortium to establish and maintain a facility that would be "attractive to riders."[604]

Even assuming that there is available, significant, private funding for investment in public infrastructure, it is estimated that only a small percentage of such funding is likely to be devoted to the transit sector.[605] Most transit agencies responding to the survey had not funded or financed a PPP with bank financing or private investment financing. However, the City of La Crosse Municipal Transit Utility reported using private investment and financing, as did the Pioneer Valley Transit Authority, the latter in the amount of $1 million. SEPTA stated that for one project, in ad-

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[591] Project Profile—Port of Miami Tunnel, *supra* note 115.

[592] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 1.

[593] Availability Payment Mechanisms for Transit Projects, *supra* note 289, at 12.

[594] FTA Report to Congress on PPPs, *supra* note 5, at 11.

[595] MALLETT, *supra* note 25, at 1.

[596] Rosenau, *supra* note 7, at 100.

[597] Generating Private Sector Financing, *supra* note 132, at 3.

[598] Rosenau, *supra* note 7, at 100.

[599] FHWA User Guidebook on Implementing PPPs, *supra* note 23, at 39.

[600] DELMON, *supra* note 189, at 66–67.

[601] FTA Public-Private 3P Program, *supra* note 56, at 2.

[602] Generating Private Sector Financing, *supra* note 132, at 10.

[603] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 83.

[604] FTA Report to Congress on PPPs, *supra* note 5, at 16.

[605] MALLETT, *supra* note 25, at 1.

dition to a state grant and SEPTA funds, the agency did rely on an unspecified amount of private funding.

X. THE USE OF VALUE CAPTURE METHODS

A. Capturing Value Created by Transit

Public transit typically results in a value premium that is reflected in higher property values because of proximity to transit stations and resulting changes in construction, density, and zoning.[606] There are several methods for capturing the value added by transit facilities, such as TIF, special assessment districts, and development impact fees. The funding provided by value capture may help pay for capital projects or defray operational expenses.[607] The use of value capture depends not only on access to transit but also on favorable political and economic conditions for development.[608]

B. Tax Increment Financing

State legislation may authorize the use of TIF to dedicate revenue from real estate taxes that exceeds a base year to financing the construction of new infrastructure or improvements to facilities or otherwise to expanding transit service.[609] TIF may be used for TOD and joint development (see Section XII.E), to assemble parcels of land, for environmental clean up, or "to directly subsidize private development."[610] The TIF concept varies from state to state, but the method is intended to tax the additional increase in property values within a designated area or district benefiting from a nearby transit project.[611]

TIF revenues may be used on a "pay as you go basis" or serve to secure money borrowed for a project.[612] Because a transit authority may not have the authority to establish a TIF district, TIF "has been used in a number of U.S. cities to fund transit-related projects."[613] TIFs may be more acceptable politically than special assessment districts, discussed below, because instead of imposing a new tax on property owners, a TIF redirects existing or future revenue from real property taxes.[614]

Virtually every state authorizes TIF financing.[615] Chicago has at least 129 TIF districts covering 30 percent of the city's land.[616] In 2005, Pennsylvania authorized the use of TIF and Transit Revitalization Investment Districts (TRID) to promote TOD, economic development, real estate development, and transportation improvements.[617] The Dulles Silver line, which will connect Washington, DC, Washington-Dulles International Airport, and other locations in Virginia, is using a DB approach to project delivery partially funded by a TIF district supported by local area businesses in Virginia.[618]

C. Special Assessment Districts

Another method to capture the value resulting from accessibility to transit is to create a special assessment district. Such a district permits a special tax or fee to be assessed on new development within the district that will benefit from an extension of transit service to the area.[619]

> Assessment districts may be used to finance both the capital cost of transit construction and ongoing operating costs. When used to fund transit facilities, a "tiered" assessment rate is common, reflecting the greater benefits expected to accrue to properties closer to transit facilities and the lesser benefits expected to accrue to those further away…. Owner-occupied residential properties are frequently exempted from the assessment because it would be overly burdensome for homeowners, and consequently

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[606] Capturing the Value of Transit, *supra* note 10, at 1, 7.

[607] *Id.* at 1.

[608] *Id.* at 18–19.

[609] PFM Group, Transit Alternate Funding Options Study 12–13 (May 31, 2011), hereinafter referred to as "Transit Alternate Funding Options Study," available at http://www.votran.org/AlternateFundingStudy_Final.pdf; Capturing the Value of Transit, *supra* note 10, at 21.

[610] Capturing the Value of Transit, *supra* note 10, at 24.

[611] *Id.*

[612] Forming Partnerships to Promote TOD and Joint Development, *supra* note 198, at 13.

[613] Capturing the Value of Transit, *supra* note 10, at 24.

[614] *Id.*

[615] *Id.*

[616] *Id.*

[617] *Id.* at 26. The Pennsylvania "TRID legislation allows transit agencies to work cooperatively with local jurisdictions to create [TIF] districts around transit stops." TRID supports the planning and implementing of TOD projects and allows for value capture strategies by transit agencies. "The transit agency may acquire property within a TRID for the purpose of real estate development or joint development." *Id*.

[618] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 13.

[619] Capturing the Value of Transit, *supra* note 10, at 21.

> the assessment district would be unlikely to garner the requisite number of votes to be implemented.[620]

Although a local authority may choose to levy a tax only on commercial property in a district, usually a majority of the voters in a district must approve the establishment of a special assessment district.[621]

Another approach is a Transportation Improvement District (TID), which may be created to levy a special real estate tax on all existing and new land uses in a district for the purpose of financing transit improvements.[622] The tax revenues generated by a TID also may be used to secure debt issued to finance infrastructure for transit.[623] TIDs, which are authorized in Virginia, usually require the approval of a majority of the electorate in a proposed district.[624] However, it is difficult to create an assessment or improvement district that involves multiple jurisdictions.[625]

D. Development Impact Fees

Transit agencies and local jurisdictions may cooperate to obtain funding for transit by assessing development impact fees. Impact fees are being used locally in at least 28 states "to support capital and operating needs."[626] For example, in 1981, San Francisco used a Transit Impact Development fee to offset the cost of additional service to the downtown area, a fee that was later expanded to apply to more commercial uses and to development city-wide.[627]

Another method is referred to as a Transit Oriented Concurrency (TOC) system. Local authorities may

> define what constitutes an adequate level of service as well as measure whether the service needs of a new development exceed existing capacity and any scheduled improvements in the capital improvements program for that period. If adequate capacity is not available, then the developer must provide the necessary facility or service improvements to proceed, or provide a monetary contribution toward such improvements, or wait until government provides the necessary improvements.[628]

Some cities and counties in Florida have used a TOC "to help pay for transit improvements and operations."[629] After needed transit improvements are identified by a Transit Development Plan, "[t]he total cost of the improvements is charged as a fee on all new development. The costs are allocated to individual projects using a formula based on expected trip generation."[630]

Impact fees are "only likely to be successful in an area with a strong real estate market and a significant amount of new development."[631] Development impact fees may be more acceptable to property owners than other value capture methods.[632] Developers also may be more amenable to impact fees as a value capture strategy if, as a result of development or redevelopment, the developers will obtain favorable changes in zoning or other benefits.[633]

Most agencies having experience with PPPs that responded to the survey have not funded or financed a PPP with TIF, a special assessment district, or development impact fees. However, the City of La Crosse Municipal Transit Utility used TIF to finance $10 million of the cost of a PPP project.

XI. PPPS AND LONG-TERM LEASING

A. Long-Term Leasing of Facilities

There are several forms of long-term leasing. First, a transit agency may lease an existing facility and receive an up-front payment and thereafter receive lease payments while transferring risks associated with the facility to a concessionaire. Several transit agencies responding to the

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[620] *Id.* at 22.

[621] *Id.* at 21, 23; Alternative Transit Funding Sources and Finance, *supra* note 278, at 9.

[622] Transit Alternate Funding Options Study, *supra* note 609, at 13, 21 (*citing, e.g.*, Fairfax and Loudoun Counties in Virginia and the WMATA extension of Metrorail to Washington-Dulles International Airport).

[623] *Id.*

[624] *Id.* at 20.

[625] Capturing the Value of Transit, *supra* note 10, at 22.

[626] Transit Alternate Funding Options Study, *supra* note 609, at 19 (*citing* Broward County, Florida (Transit Concurrency Fee), and San Francisco (Transit Impact Development Fee)).

[627] Capturing the Value of Transit, *supra* note 10, at 30.

[628] *See, e.g.,* CENTER FOR URBAN TRANSPORTATION RESEARCH, UNIVERSITY OF SOUTH FLORIDA, TRANSPORTATION CONCURRENCY REQUIREMENTS AND BEST PRACTICES: GUIDELINES FOR DEVELOPING AND MAINTAINING AN EFFECTIVE TRANSPORTATION CONCURRENCY MANAGEMENT SYSTEM 1 (2006), available at http://www.cutr.usf.edu/pdf/TCBP%20Final%20Report.pdf.

[629] Capturing the Value of Transit, *supra* note 10, at 30.

[630] *Id.*

[631] *Id.*

[632] *Id.* at 31.

[633] *Id.* at 32.

survey have entered into a long-term lease for the operation and maintenance of an infrastructure project.[634]

A second form of long-term leasing is a lease-purchase agreement in which a private partner finances and builds infrastructure that the private partner leases to the public authority.[635] The public authority becomes the owner of the facility at the end of the term or purchases the facility before the end of the term for the amount of the remaining lease payments.[636]

A third form of long-term leasing is a sale-leaseback agreement. A public authority first sells a facility to a private entity. The private entity then leases the same facility to the public authority that continues to operate it.[637] Sale-leaseback agreements have been used to limit a public authority's liability.[638] Long-term leasing may be beneficial to a public authority because it obtains an up-front payment in connection with an existing facility while transferring the risks associated with the facility to a concessionaire.[639] Although a concessionaire usually assumes the "financial, operational, and other risks" of a project or facility, the concessionaire also has the "ability to implement private-sector efficiencies and technology."[640] A prime example of long-term leasing is a concession agreement for the lease of an existing facility for which an average term of the lease is from 10 to 20 years but may be for as long as 99 years.[641] Usually for a lump sum amount, a private partner or concessionaire acquires the right to manage a facility and collect revenues that the facility will generate over the life of the contract.[642] Although exceptionally long leases are needed "to recover capital outlays on an accelerated schedule,"[643] a private partner will want to consider the tax consequences of a long-term lease, as discussed in Section IV.E. A transit agency will want a lease structured so that the lease does not result in a private, business use of public property that the transit agency financed with tax-exempt debt. A "[p]rivate business use can arise by ownership, actual or beneficial use of property [under] a lease, a management or incentive payment contract, or [under] certain other arrangements."[644] Deals must be structured properly; otherwise "the existing tax-exempt status of debt previously issued for a system, or issued to finance any future capital needs of a system" may be lost.[645]

Revenue Procedure 97-13 authorizes the use of a "qualified management contract" (QMC) to maintain the bonds' existing tax-exempt status.[646] QMCs for operations and maintenance now may have terms of 20 years or more.[647]

> In general, the contract must provide for reasonable compensation for services rendered with no "compensation based, in whole or in part, on a share of net profits from the operation of the facility." In particular, longer-term contracts may provide that the public partner will not pay compensation for services to the private partner for any year of the contract if such payment, or any portion of the payment, would result in (1) less than eighty percent of the private partner's compensation for services for such year of the contract being based on a periodic fixed fee, or (2) any portion of the private partner's compensation being based on net profit. Thus, up to twenty percent of the private partner's compensation can be variable. Costs paid directly to third parties and costs that the private partner passes through to the public partner for reimbursement are disregarded in the fixed-fee and variable-fee ratio. Compliance with these rules allows project debt

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[634] La Crosse Municipal Transit Utility Response; Milford Transit District Response (*see* App. C, item 4); N.J. Transit Response (regarding 32-year lease for the Weehawken Ferry Terminal project); PVTA Response; SEPTA Response (regarding 5-year lease for one project and an anticipated 20-year lease for the second project); and SARTA Response. At the time of the survey the Connecticut DOT had not determined whether a lease would be used in connection with the Stamford TOD project.

[635] O'Steen & Jenkins, *supra* note 6, at 277.

[636] *Id.* at 277–78.

[637] *Id.* at 278.

[638] *Id.*

[639] FISHMAN, *supra* note 11, at 7.

[640] *Id.*

[641] O'Steen & Jenkins, *supra* note 6, at 277 (*citing* the $3.8-billion Indiana Toll Road PPP and the $1.8-billion Chicago Skyway PPP as examples); FISHMAN, *supra* note 11, at 7.

[642] *Id.*

[643] Tax and Financing Aspects of Highway Public-Private Partnerships, *supra* note 166, at 2.

[644] Rev. Proc. 97–13, available at http://www.unclefed.com/Tax-Bulls/1997/Rp97-13.pdf; O'Steen & Jenkins, *supra* note 6, at 294–95 (*citing* Rev. Proc. 97-13, 1997 – C.B. 632 § 2.01(3)).

[645] O'Steen & Jenkins, *supra* note 6, at 294 (*citing* Rev. Proc. 97-13, 1997-1 C.B. 632 § 2.01(1)). *See* Collins, *supra* note 415, at 2 (stating that "[t]ax-exempt financing…places limits on private use of projects funded with tax-exempt funds").

[646] O'Steen & Jenkins, *supra* note 6, at 294 (*citing* Rev. Proc. 97-13, 1997-1 C.B. 632).

[647] *Id.*

to be considered a governmental obligation, and therefore tax-exempt.[648]

It has been argued that long-term leasing of public property may fail to provide adequate protection for the public interest.[649] For example, a lease with a long duration significantly reduces a transit agency's control and thus may have an impact on the overall transit system.[650]

B. Leasing of Rolling Stock and Other Equipment

1. Benefits of Using Leasing

A lease/purchase agreement may be used for the acquisition of rolling stock.[651] When leasing buses and other equipment, a transit agency may receive a benefit ranging from 4 or 5 percent to 10 percent or more of the value of the leased asset,[652] avoid having to pay a higher price later, and benefit from economy of scale by buying more equipment at one time.[653]

Two funding options are the use of cross-border leasing or the use of COPs (the latter discussed in Section VIII.E).[654]

> Off-shore or cross-border leasing is a mechanism by which the state purchases rolling stock, such as railcars, then simultaneously sells them to a non-U.S. investor who would be allowed to take investment tax credits or tax depreciation write-offs on the value of the equipment. The investor in turn leases them back to the state, and the tax benefits are shared with the state through reduced leased costs. The foreign investor pays the state an up-front consideration usually ranging from five to ten percent of the cost or value of the vehicles. The balance of the proceeds is deposited in a trust account to prepay or decease the lease payments.[655]

Cross-border leasing is said to be "ideal" for railcars and may be used for buses.[656] New Jersey Transit has used lease/purchase agreements in connection with one of its PPP projects.[657]

2. Effect of IRS Rulings and Congressional Legislation on SILOs and LILOs

"Sale-in–lease-out" (SILO) and "lease-in-lease-out" (LILO) transactions involve at least two parties. The first party is the tax-exempt entity that is the ultimate user of the equipment. The second party is the U.S. taxpaying investor that leases the equipment to the tax-exempt entity. The investor benefits because it is able to claim tax exemptions for the lease payments in the case of LILOs or the depreciation value in the case of SILOs.[658] Although a tax-exempt entity receives no tax benefits from LILO or SILO transactions because it is not subject to federal income tax, it still benefits.[659] A tax-exempt entity benefits by using the leased equipment and generating an income of 4 to 8 percent of the transaction's value, the fee the tax-exempt entity receives for participating in the transaction.[660] According to Chase Bank, an investor, the tax-exempt entity also benefits by obtaining capital from the initial sale to the lessor in the case of a SILO.[661] The investor may pass along its tax benefits to the tax-exempt entity in the form of lower rent payments. Accord-

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[648] *Id.* at 294–95 (*citing* Rev. Proc. 97-13, 1997-1 C.B 632 §§ 2.01(3), 2.01(6), 5.03(2); Treas. Reg. § 1.141-3(b)(4)(i) (2001)).

[649] FISHMAN, *supra* note 11, at 7.

[650] MALLETT, *supra* note 25, at 25.

[651] For guidance, *see* KEVIN M. SHEYS & ROBERT L. GUNTER, REQUIREMENTS THAT IMPACT THE ACQUISITION OF CAPITAL-INTENSIVE LONG-LEAD ITEMS, RIGHTS OF WAY, AND LAND FOR TRANSIT 4 (Legal Research Digest, Transportation Research Board, 1996) (discussing major obstacles that arise most often in long-lead acquisitions of buses, rail cars, and other rolling stock), available at http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_lrd_06.pdf.

[652] Collins, *supra* note 415, at 37.

[653] *Id.* at 5.

[654] Midwest Regional Rail Initiative Project Notebook, *supra* note 201, at 9-14.

[655] *Id.*

[656] *Id.*

[657] N.J. Transit Response (*e.g.*, ticket vending machines for its Weehawken Ferry Terminal project for which the contractor is making the lease payments).

[658] Maxim Shvedov, *CRS Report for Congress, Tax Implications of SILOs, GTEs, and Other Leasing Transactions with Tax-Exempt Entities*, at text accompanying footnotes 35 to 36 (2004), hereinafter referred to as "Shvedov," available at http://congressionalresearch.com/RL32479/document.php?study=Tax+Implications+of+SILOs+QTEs+and+Other+Leasing+Transactions+with+Tex-Exempt+Entities.

[659] Robert W. Wood & Steven E. Hollingworth, *SILOs and LILOs Demystified*, TAX NOTES, at 197 (Oct. 11, 2010), hereinafter referred to as "Wood & Hollingworth," available at http://www.woodllp.com/Publications/Articles/pdf/SILOs_and_LILOs_Demystified.pdf.

[660] Robert W. Wood, *What Wells Fargo Brings to the SILO/LILO Debate*, TAX NOTES, at 1390-1 (June 27, 2011), available at http://woodllp.com/Publications/Articles/pdf/What_Wells_Fargo.pdf.

[661] Andrew Landers, Transforming Equipment into Cash through Sale/Leaseback (2013), available at https://www.chase.com/commercial-bank/executive-connect/finance-heavy-equipment.

ing to the Equipment Leasing and Financing Association (ELFA), the equipment leased in SILO or LILO transactions varies from commercial aircraft and vessels to railcars.[662] In SILO transactions, the subleases usually range from 12- to 20-year terms.[663]

The term "LILO" generally refers to a transaction in which property is leased to a U.S. taxpaying investor pursuant to a head lease for a period that is less than the property's useful life and then "leased back" to a foreign or domestic tax-exempt entity, the lessor in the head lease.[664] As for the sublease, the term is for a period less than the term of the head lease; at the end of the sublease, the tax-exempt entity may exercise an option to purchase the remainder of the investor's interest in the head lease; and if the option is not exercised, the investor may "(1) compel the tax-exempt entity to renew the sublease; (2) take possession of the asset; or (3) enter into a replacement sublease with a third party."[665] The IRS has stated that LILO transactions have been used to finance leases of "subway cars and lines, locomotive, municipal buildings, passenger railway systems, ferryboats, airplanes, power plants, and sewage treatment plants."[666]

Similar to a LILO, a SILO is a transaction in which the term of the head lease extends beyond the useful life of the property or the head lease amounts to a sale of the property to the investor. At the end of the sublease, if the tax-exempt entity does not purchase the asset, the investor "may (1) compel the lessee to arrange for a service contract for the asset for a predetermined term or (2) take possession of the asset."[667]

In LILO and SILO transactions, a tax-exempt entity is able to use the payment made by the investor under the head lease to pay its lease payments. Therefore, the tax-exempt entity is able to use the leased property without incurring any additional fees. The tax-exempt entity often uses the remainder of the head lease payment to buy back the property at the end of lease.[668]

In *Wells Fargo v. United States* there are several examples of SILO transactions.[669] In 2002, Wells Fargo claimed taxed benefits from its involvement in 26 SILO transactions. Seventeen of the transactions were between Wells Fargo and

[662] Deborah Brady & Paul Ingram, A Leveraged Leasing Primer, Financial Watch (May 2006), available at http://www.elfaonline.org/cvweb_elfa/Product_Downloads/E06MAYBRADY.PDF. ELFA members also finance the leasing of medical technology and equipment and IT equipment and software. *See* Equipment Leasing and Finance Association, Requests for Clarifying Guidance under Section 7701(o) (Nov. 19, 2010), available at http://www.elfaonline.org/Advocacy/Fed/PDFs/Issues/CESLetter111910.pdf#search="silo".

[663] Shvedov, *supra* note 658, at text accompanying footnotes 35 to 36.

[664] Michelle M. Henkel, *"Strike Two" for the IRS on LILOs: Revenue Ruling 2002-69*, 16 J. TAX'N F. INST. 12, n.2 (2003).

[665] John Hancock Life Ins. Co. (U.S.A.) v. Comm'r, 141 T.C. 1, 5, and 6, Docket Nos. 6404-09, 7083-10, 7084-10 (Aug. 5, 2013).

[666] IRS, Appeals Settlement Guideline All Industries Losses Claimed and Income to be Reported from Lease In/Lease Out Transactions, available at http://www.irs.gov/pub/irs-utl/lilo_asg_redacted.pdf. For example, in BB&T Corp. v. United States, 523 F.3d 461, 465 (4th Cir. N.C. 2008), BB&T Corp., a financial services company, entered into a LILO transaction with Sodra Cell AB, a Swedish wood pulp manufacturer pursuant to which BB&T leased pulp manufacturing equipment to Sodra. The court in BB&T Corp. denied BB&T's tax benefits from its transaction as it failed to show any business or regulatory realities. The court held that the substance of the transaction was a financing arrangement and not a genuine lease and sublease because of the circular payments and BB&T's lack of control over the equipment. BB&T never acquired a genuine leasehold interest and did not incur a genuine indebtedness. In another LILO transaction, Consol. Edison Co. of N.Y. v. United States, 703 F.3d 1367, 1369–70 (Fed. Cir. 2013), ConEd leased a gas-fired, combined cycle cogeneration plant to N.V. Electriciteitsbedrijf Zuid-Holland. The Federal Circuit Court denied ConEd's claims for tax benefits in the LILO transaction with the Dutch utility company. Because the Dutch company was reasonably likely to exercise the purchase option, ConEd did not have the genuine leasehold interest that is required for an entity legally to obtain rent deductions under the tax code. The court also held that ConEd was not entitled to interest deductions because it did not incur a genuine indebtedness.

[667] *John Hancock Life Ins. Co. (U.S.A.)*, 141 T.C. at 6. The tax court held that the LILO transactions were financial arrangements and not genuine leases because the transactions resembled loans; thus, John Hancock was not entitled to rent deductions. As for the SILO transactions in the case, the court held that John Hancock was not entitled to depreciation deductions because the transactions were financing arrangements. Finally, the court held that John Hancock was not entitled to deduct for interest payments because it only acquired a future interest in the assets, not a current interest.

[668] Shvedov, *supra* note 658, at text accompanying footnotes 32 to 33.

[669] Wells Fargo v. United States, 91 Fed. Cl. 35, 36–37 (Fed. Cl. 2010).

domestic transit authorities, including the California DOT and WMATA. Wells Fargo leased railcars, locomotives, and buses to the transit authorities using the SILO transactions, and it leased telecommunications equipment to Belgacom Mobile.[670]

The court in *Wells Fargo* held that Wells Fargo was not the owner of the equipment at issue in the SILO transactions because Wells Fargo never obtained any of the benefits or burdens of ownership of the equipment and therefore was not entitled to deductions for depreciation. Wells Fargo was not entitled to deductions for interest paid because it did not incur any genuine indebtedness due to the circular nature of the payments. The court also held that the transactions had no economic substance because there was no economic benefit aside from the tax deductions.

In 1999, in Revenue Ruling 99-14, the IRS ruled that investors in LILO transactions were no longer permitted to obtain tax deductions for lease income and interest payments because LILOs lacked economic substance due to a lack of pretax economic benefit.[671] As a result of the 1999 ruling, SILO transactions became preferred.[672] Revenue Ruling 2002-69 modified and superseded the 1999 ruling on LILO transactions. In the 2002 ruling, the IRS determined that an investor may not deduct rent and interest paid in connection with a LILO transaction because not only did the transaction lack economic substance, but its substance did not support its form.[673] The substance of the transaction indicated a financing transaction, although the transaction took the form of a leasing transaction.[674] The IRS described the payment and banking arrangements as "reciprocal and circular obligations that offset one another," because the lending banks, investor, and tax-exempt entity face low risks of nonpayment during the first sublease term.[675] The IRS was guided by federal court decisions. The IRS ruled that the substance rather than the form of the transaction determines how the transaction would be treated for tax purposes.[676] As the Supreme Court has held, when two separate transactions result in offsetting obligations, the court may modify the transactions and join them in a single transaction.[677] In applying those principles to LILO transactions, the IRS stated that the interests conveyed under the head lease and sublease are the same; they are offsetting obligations.

Section 162(a)(3) of the Internal Revenue Code permits a deduction for rentals and other payments required to be made as a condition to the continued use or possession for purposes of the trade or business of property; however, the investor is not entitled to a deduction for rent because it does not have a leasehold interest in the property.[678] The investor's retained interest is substantially the same as the interest it conveyed to a tax-exempt entity; therefore, only a future interest is conveyed to the tax-exempt entity.[679] The investor may not deduct for interest on the loans acquired to make the initial payment in the head lease, because it never obtains possession of the funds lent by the bank. The funds are lent to the investor merely for the purpose of making the head lease payment. Because the same funds, although characterized as rent payments, are used by a tax-exempt entity to repay the loan, the IRS

[670] *Id.* at 37.

[671] Wood & Hollingworth, *supra* note 659, at 200.

[672] *Id*.

[673] Rev. Rul. 2002-69, 2002-2 C.B. 760.

[674] *Id*.

[675] *Id*.

[676] *Id*. *See* Gregory v. Helvering, 293 U.S. 465, 55 S. Ct. 266, 79 L. Ed. 596 (1935) and Frank Lyon Co. v. United States, 435 U.S. 561, 573, 98 S. Ct. 1291, 55 L. Ed. 2d 550 (1978). In *Gregory*, the petitioner created a company to transfer shares of another company to herself through a newly created company that was immediately dissolved after the transfer. The court held that the reorganization of the shares was invalid because the petitioner did it only to increase her tax deductions and the reorganization had no business purpose. In *Frank Lyon Co.*, the Court held that the lease-in-lease-out transaction between Frank Lyon Company and Worthern Bank and Trust Company was a valid leasing transaction with economic substance. The Court held that Lyon's capital was invested in the building and Frank Lyon Co. was entitled to deduct for depreciation. Additionally, the transaction was not created merely to benefit from the tax laws but also was created to enable Worthen to obtain a new building, a acquisition that it could not make with an alternative mortgage because of regulatory restrictions.

[677] *See* Frank Lyon Co. v. United States, 435 U.S. 561, 573 (1978); Rev. Rul. 2002-69, 2002-2 C.B. 760.

[678] *Id*. 26 U.S.C. § 162(a)(3) provides that

> (a) [i]n general [t]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including…(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

[679] *See* Frank Lyon Co. v. United States, 435 U.S. 561, 573 (1978); Rev. Rul. 2002-69, 2002-2 C.B. 760.

has ruled that such a transaction lacks economic substance.[680]

The IRS maintains a list of abusive transactions and included LILOs and SILOs on the list in 2002 and 2005, respectively.[681] On August 6, 2008, the Commissioner of the IRS released a statement that the IRS would offer settlements to companies using LILOs and SILOs in improper tax returns.[682] Since Revenue Ruling 2002-69, several investors have appealed IRS decisions that denied them tax benefits derived from SILO or LILO transactions. It appears that investors did not prevail on their appeals.[683] As a further attack on the use of SILOs and LILOs, in the American Jobs Creation Act of 2004, Congress amended the tax code by adding § 470, which limits tax deductions for property used by tax-exempt entities.[684] However, § 470 does not apply to certain leases that meet four requirements set forth in § 470(d).[685]

As a result of Revenue Ruling 2002-69 and the amendment of the tax code in 2004, it is said that public transportation agencies have suffered because investors are denied tax benefits associated with the interest and rent payments derived from the transactions. However, as explained by the American Public Transportation Association (APTA), the financial crisis that began in approximately 2007 provided an opportunity for investors to recover their profits. Many of the agreements required the holder of the securities to maintain a AAA credit rating, but many credit ratings fell, and tax-exempt entities were required to replace the holder of the securities within 60 days. During those 60 days, the investor could declare the tax-exempt entity in default and obtain "stipulated loss values."[686]

At present, according to an article in *Railway Age*, recent leases of rolling stock by banks to railroad companies are rarely for terms longer than 12 years; in fact, most are for terms of 7 to 10 years.[687] Many of the leases include an option to buy the equipment at the end of the lease.

C. Contractual Issues and Leasing

Private entities participating in a venture should have an agreement that describes their legal relationship and sets forth their rights and obligations.[688] Depending on what is being leased, the terms of a lease may deal with the condition of the property being leased; the required condition of the property at the end of the lease;[689] restrictions on the use of the property while it is leased; performance standards to be met during the term of the agreement; operation and maintenance requirements; liquidated damages in the event of a breach or default; incentive payments that are

[680] *Id*.

[681] U.S. Internal Revenue Service, Recognized Abusive and Listed Transactions (updated Sept. 3, 2013), available at http://www.irs.gov/Businesses/Corporations/Listed-Transactions---LB&I-Tier-I-Issues#17.

[682] U.S. Internal Revenue Service, IRS Commissioner's Remarks Regarding LILO/SILO Settlement Initiative (Aug. 6, 2008), available at http://www.irs.gov/Businesses/IRS-Commissioner%E2%80%99s-Remarks-Regarding-LILO-SILO-Settlement-Initiative---August-6,-2008.

[683] *John Hancock Life Ins. Co. (U.S.A.)*, 141 T.C. at 34 (*citing* Altria Grp., Inc. v. United States, 658 F.2d 276 (2d Cir. 2011); BB & T Corp. v. United States, 523 F.3d 461 (4th Cir. 2008); Wells Fargo & Co. v. United States, 641 F.3d 1319 (Fed. Cir. 2011); and Consol. Edison Co. of N.Y., Inc. & Subs. v. United States, 703 F.3d 1367 (Fed. Cir. 2013)).

[684] American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418, § 848. *See* Sidley Austin Brown & Wood LLP, The American Jobs Creation Act of 2004–Leases to Tax-Exempt Entities (Nov. 2004), available at http://www.sidley.com/files/News/1be3fdea-ca39-41a1-892e-7005a86d2270/Presentation/NewsAttachment/58abc401-d248-46af-b4f5-76e3320c4b74/Tax-AJC-TaxExempt.pdf.

[685] 26 U.S.C. § 470(d). First, for the duration of the lease, a tax-exempt entity is not permitted to have more than the allowable amount of funds, which is defined as "an amount equal to 20 percent of the lessor's adjusted basis in the property at the time the lease is entered into." *Id*. § 470 (d)(1)(c)(i). Second, the investor must make an investment of at least 20 percent of the property at the time of the lease and maintain the investment throughout the lease, and the fair market value of the property at the end of the lease must be at least 20 percent of its initial value. *Id*. § 470(d)(2). Third, the tax-exempt entity must not bear more than a minimal risk of loss. *Id*. § 470(d)(3). Finally, in leases for property with more than 7 years of class life that include options to purchase at the end of the lease, the purchase price must be at fair market value. *Id*. § 470(d)(4).

[686] *See* American Public Transportation Association, Transit Agencies Face Catch-22 in Fiscal Meltdown, Passenger Transport (Nov. 3, 2008), available at http://passengertransport.apta.com/aptapt/issues/2008-11-03/1.html.

[687] Anthony Kruglingski, *2012 Guide to Equipment Leasing*, RAILWAY AGE (June 19, 2012), available at http://www.railwayage.com/index.php/finance-leasing/2012-guide-to-equipment-leasing.html.

[688] DELMON, *supra* note 189, at 151.

[689] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 34.

payable when a lessee meets or exceeds standards; the ultimate disposition or transfer of the leased property on the termination of the lease; and a right or option to purchase the property either during or at the end of the lease.[690]

An important question for a private partner or investor is whether the lease is a lease for federal income tax purposes. Depending on the term of the lease, as discussed in Section IV.E.2.b, a lease in substance may be a sales contract. Whether the lessee is a constructive owner "depends on whether the benefits and burdens of ownership of the subject property have been transferred."[691]

> If the agreement conveys possession of the property to the taxpayer for substantially all of the remaining economic life of the property in exchange for a lump-sum payment that approximates the price for which the property could be purchased, the agreement should be treated for federal income tax purposes as a transfer of beneficial ownership of the property even though the agreement prohibits the transfer of legal title to the taxpayer.[692]

Whenever long-term leasing is to be used in structuring a PPP, all parties may want to take advantage of "sophisticated lawyering" to assess the tax implications and other risks of an agreement.[693]

XII. PPPS AND TRANSIT-ORIENTED DEVELOPMENT AND JOINT DEVELOPMENT

A. Defining Transit-Oriented Development and Joint Development

The terms "TOD" and "joint development" generally refer to development that supports transit.[694] PPPs are being used for TOD and joint development in proximity to a new or existing transit facility. Thus, many transit agencies "are partnering with the private sector in order to promote real estate development in and around transit facilities."[695] It should be noted that, in 2011, the Transportation Research Board published a study on legal issues involving TOD and joint development that includes case studies.[696]

APTA defines TOD as development "initiated by a transit agency that has some level of FTA investment in the land or infrastructure that is physically and/or functionally related to the TOD," whereas "[j]oint development can refer to a broader set of public-private real estate development partnerships."[697] In contrast to TOD, for which a transit station is usually a "given,"[698] joint development generally means real estate development near transit, usually on publicly owned land.[699]

FTA defines joint development "to include commercial and residential development; pedestrian and bicycle access to a public transportation facility; construction, renovation, and improvement of intercity bus and intercity rail stations and terminals; and renovation and improvement of historic transportation facilities."[700]

A TOD or joint development may involve "development of a larger project that incorporates both transit facilities and private development" or may serve another development purpose.[701] Both types of development may be used to improve a transit facility, increase ridership, and generate revenue.[702] PPPs may be used to "monetize" excess or under-performing government-owned property.[703]

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[690] DELMON, *supra* note 189, at 116–23.

[691] Tax and Financing Aspects of Highway Public-Private Partnerships, *supra* note 166, at 27 (*citing* Rev. Rul. 55-541, 1955-2 C.B. 19).

[692] *Id.*

[693] Collins, *supra* note 415, at 58.

[694] Forming Partnerships to Promote TOD and Joint Development, *supra* note 198, at 1.

[695] FTA Report to Congress on PPPs, *supra* note 5, at 2.

[696] JOHN L. RENNE, KEITH BARTHOLOMEW & PATRICK WONTOR, TRANSIT-ORIENTED AND JOINT DEVELOPMENT: CASE STUDIES AND LEGAL ISSUES (Legal Research Digest No. 36, Transportation Research Board, 2011).

[697] Forming Partnerships to Promote TOD and Joint Development, *supra* note 198.

[698] *Id*. at 12.

[699] Capturing the Value of Transit, *supra* note 10, at 26.

[700] *Id.* According to FTA a joint development must meet certain criteria:

> The public transportation improvement must (i) Enhance economic development or incorporate private investment; (ii)(a) Enhance the effectiveness of a public transportation project and relate physically or functionally to that public transportation project, or (b) establish new or enhanced coordination between public transportation and other transportation; and (iii) provide a fair share of revenue for public transportation that will be used for public transportation.

Id. (*quoting* 72 Fed. Reg. 5788, 5790 (Feb. 7, 2007)).

[701] Capturing the Value of Transit, *supra* note 10, at 26.

[702] Collins, *supra* note 415, at 14; Forming Partnerships to Promote TOD and Joint Development, *supra* note 198, at 5.

[703] STAINBACK, *supra* note 130, at 21.

APTA has published practice guides for transit agencies partnering with businesses and communities to promote TOD and joint development.[704] Successful partnerships for TOD and joint development need leadership, written agreements, public involvement, effective communication, sufficient staff resources, and effective implementation.[705] A development project may require a multidisciplinary team that includes specialists in real estate, planning, engineering, finance, and operations.[706]

B. Federal Law Supporting TOD and Joint Development

TOD and joint development are not "discrete programs" of the DOT; however, FTA grantees may use FTA financial assistance for TOD and joint development activities.[707] Federal legal support exists in a "mix" of congressional enactments, executive orders, and FTA policies.[708] Federal transit law in 49 U.S.C. § 5301, *et seq*., references TOD. If a proposed TOD involves federal participation, land, or facilities, the FTA must be consulted and has to approve the transfer of the asset and any development agreement.[709]

The FTA's Innovative Financing Initiative (IFI) of May 9, 1995, provides "explicit support for joint development using section 3 and section 9 funding," as well as funding under other programs.[710] Under the IFI, the FTA "may provide § 5309 (formerly § 3) and § 5336 (formerly § 9) capital grants for enhancements to transit stations, park-and-ride lots, transfer points incorporating community service and customer service facilities…, safety elements, sidewalks skyways and access roadways, and other transit related improvements."[711] Although a local match of 20 percent is required for all IFI grants, "assets previously acquired with FTA funds may be used for…joint development purposes."[712]

FTA's definition of a capital project in § 5302(a)(1)(G) makes certain joint development activities eligible for funding under federal transit law.[713] SAFETEA-LU amended the definition of capital project to permit "FTA to issue public transportation grants 'for the construction, renovation, and improvement of intercity bus and intercity rail stations and terminals.'"[714] Section 1117 of SAFETEA-LU made TOD and capital projects eligible for federal funding and gave "priority consideration to state and local preservation of development plans, including transit-oriented development plans."[715]

When evaluating New Starts projects, FTA considers existing land use, transit supportive plans and policies, corridor policies that support transit, the management of growth, zoning regulations near transit stations, and tools to implement land-use policies.[716] Planning for development during system planning or the Alternatives Analysis/Draft Environmental Impact Statement process may enhance an applicant's land-use rating and its submission for funding for a New Starts project.[717]

MAP-21 establishes a new discretionary pilot program for grants for TOD planning in corridors with new rail, bus rapid transit, or core capacity projects and authorizes $10 million for FY 2013 and $10 million for FY 2014. The grants are to "assist in financing comprehensive planning associated with an eligible project."[718] An eligible project includes a new fixed guideway capital project or core capacity improvement project as defined in 49 U.S.C. § 5309 for capital investment grants and New Starts.[719] The pilot program emphasizes the enhancement of "economic development, ridership"; facilitation of "multimodal connectivity and accessibility"; an increase in "access to transit hubs for pedestrian and bicycle traffic"; enablement of "mixed-use development"; identification of

[704] Forming Partnerships to Promote TOD and Joint Development, *supra* note 198, at 1.

[705] *Id.* at 2–3.

[706] *Id.* at 3.

[707] FTA, TOD in Statute and Regulation and Joint Development, at 1, hereinafter referred to as "FTA-TOD-Joint Development," available at http://www.fta.dot.gov/12347_6935.html.

[708] Collins, *supra* note 415, at 15.

[709] Forming Partnerships to Promote TOD and Joint Development, *supra* note 198, at 6.

[710] Collins, *supra* note 415, at 16.

[711] *Id.*

[712] *Id.* (*quoting* FTA Innovative Financing Handbook (undated)).

[713] FTA-TOD-Joint Development, *supra* note 707, at 1.

[714] *Id.*

[715] *Id.*

[716] *Id.*

[717] Forming Partnerships to Promote TOD and Joint Development, *supra* note 198, at 1, 4.

[718] FTA Summary of MAP-21, *supra* note 15, at 4 n.2.

[719] *Id*.

related "infrastructure needs"; and inclusion of "private sector participation."[720]

When a transit agency is considering TOD or joint development, it is important to be familiar with FTA's Grant Management Guidelines;[721] FTA's Joint Development Guidelines, including a 2013 proposed circular on FTA Guidance on Joint Development;[722] and NEPA and state environmental requirements, as well as applicable state and federal procurement rules.[723] A 2004 Transit Cooperative Research Program report discusses public involvement and the "visioning process" that facilitates the realization of TOD and joint development projects, and also includes case studies.[724] Finally, the Center for Transit-Oriented Development, a national nonprofit organization created by SAFETEA-LU, is dedicated to providing information on best practices and other support for market-based TOD.[725]

C. TOD and Joint Development Agreements

Written agreements for TOD and joint development should set forth the partners' "aims and purposes" and their obligations, expectations, means of communication, and timeframe, and even include a schedule for follow-up meetings.[726] As discussed in Section IV, a transit agency will want to evaluate the "legal framework" that applies to the agency, as well as the risks and opportunities inherent in TOD and joint development.[727] A final agreement for a TOD or joint development may be preceded by a preliminary agreement, such as an exclusive dealings agreement, a nonbinding letter of intent, or a memorandum of understanding (MOU).[728] Preliminary agreements may be used to clarify the parties' objectives and, of course, to affirm their intention to negotiate and conclude a final agreement.[729]

A Master Development Agreement (MDA) may be used to provide a team with access to multiple sites along a transit corridor (to avoid issuing multiple RFPs to find developers), to promote "larger scale" projects, and to be more responsive to market conditions.[730]

A joint development agreement may provide for cost-sharing or revenue sharing.

> Cost-sharing agreements usually involve cooperation to pay for infrastructure that helps to integrate transit with surrounding development. Revenue-sharing agreements distribute the revenues that result from development among joint development partners. Examples of revenue-sharing agreements include ground lease revenues, air rights payments, or in some cases direct participation in rents or other revenues from development.[731]

Some transit agencies have issued guidelines that are applicable to TOD and joint development. In 1994, New Jersey Transit issued TOD guidelines entitled *Planning for Transit Friendly Land Use: A Handbook for New Jersey Communities*.[732] In 2005, BART adopted a "policy document" for its TOD program, one feature of which is an access policy that "guides planning for replacement parking and other access strategies."[733] WMATA, an agency particularly experienced in joint development, has adopted a new set of comprehensive guidelines for its joint development program.[734] WMATA revised its policies in 2008 so that its

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[720] Estell & Washington, *supra* note 14, at 9.

[721] FTA, Grant Management Guidelines, available at http://www.fta.dot.gov/legislation_law/12349_4114.html.

[722] FTA 2013 (Proposed) Circular, Guidance on Joint Development, available at http://www.fta.dot.gov/documents/2013-03-07_Proposed_Joint_Development_Circular_(FINAL)_(2).pdf.

[723] Forming Partnerships to Promote TOD and Joint Development, *supra* note 198, at 6.

[724] Forming Partnerships to Promote TOD and Joint Development, *supra* note 198, at 4, 9–12, 14–15.

[725] FTA-TOD-Joint Development, *supra* note 707, at 1. CTOD is to

> develop standards and definitions for transit-oriented development adjacent to public transportation facilities; system planning guidance, performance criteria, and modeling techniques for metropolitan planning agencies and public transportation agencies to maximize ridership through land use planning and adjacent development; and research support and technical assistance to public transportation agencies, metropolitan planning agencies, and other persons regarding transit-oriented development.

Id.

[726] *Id.* at 3.

[727] *Id.*

[728] The terms of a Letter of Intent or MOU could provide, however, that the terms are binding.

[729] Forming Partnerships to Promote TOD and Joint Development, *supra* note 198, at 6.

[730] Capturing the Value of Transit, *supra* note 10, at 28.

[731] *Id.* at 26.

[732] Available at https://www.som.com/project/new-jersey-transit-planning-transit-friendly-land-use-handbook-new-jersey-communities.

[733] Forming Partnerships to Promote TOD and Joint Development, *supra* note 198, at 15.

[734] *Id.* at 6 (*see id*. at 64 for a summary of the WMATA's goals).

program would be more responsive to "development opportunities and market conditions."[735]

D. The Use of TIF and Special Assessment Districts for TOD

TIF is one source of public funding because TOD and joint development projects often result in added tax revenue generated by a development.[736] Some states (e.g., Maine, Maryland, Pennsylvania, and Texas) have specific provisions authorizing the use of TIF for TOD.[737] However, some form of interim financing may be needed because of the "timing gap" between construction of a transit facility and an increase thereafter in developed properties and an increase generally in property values and tax revenue.[738]

Examples of TIF and special assessments being used to fund TODs include the Denver Southeast Corridor T-Rex project, costing $879 million with TOD estimated at $4.25 billion, of which $1 billion was estimated at the Broadway Station alone;[739] the Fruitvale Village project in Oakland, the funding for which consists of $4.0 million in TIF; and the Mockingbird Station in Dallas with TIF supporting 5 percent of the expansion cost.[740] TIF for TOD was or is being used also for the Elmhurst Station in Chicago and the Grossmont Trolley Station in La Mesa (San Diego).[741]

E. TOD and Affordable Housing

On January 9, 2013, FTA gave notice of proposed policy guidance to sponsors of New Starts and Small Starts projects.[742] The proposed guidance describes the "particular measures" that FTA intends to apply when evaluating projects seeking New Starts and Small Starts funding.[743] The proposed guidance accompanies the final rule published on the same date on the evaluation criteria and rating process established by MAP-21 for New and Small Starts.[744]

Among FTA's criteria for evaluating and rating a proposed project are the effects of a project on economic development and land use.[745] FTA will evaluate plans consistent with existing practice but will examine them also on the basis of their preservation of or increase in the supply of affordable housing units in a transit corridor.[746] Among the means for maintaining or increasing affordable housing are low-income housing tax credits (LIHTC), as well as TIF and other value-capture strategies.

Section XII.F discusses three federal tax credits that may be important to a PPP for a transit project and a private partner selected for its proposal that also preserves or increases affordable housing units. A 2009 report by the GAO on affordable housing in TOD and joint development states that federal tax credits are being used to encourage development of affordable housing units near transit facilities.[747] The states administer Federal LIHTCs and provide them to developers pursuant to state Qualified Allocation Plans (QAP).[748] Although "[t]here is no statutory requirement that a state incorporate proximity to transit into its QAP,"[749] some states award "incentive points" to a developer if a development project is within a certain distance of public transit or is within or part of a TOD or joint development.[750] The points are

[735] Capturing the Value of Transit, *supra* note 10, at 27.

[736] Forming Partnerships to Promote TOD and Joint Development, *supra* note 198, at 13. *See* U.S. Environmental Protection Agency, Infrastructure Financing Options for Transit-Oriented Development (Jan. 2013), (noting their use for corridors and stations in Stamford, Connecticut, Atlanta, and Dallas), available at http://www.epa.gov/smartgrowth/pdf/2013-0122-TOD-infrastructure-financing-report.pdf.

[737] Jim Erkel, Minnesota Center for Environmental Advocacy, Tax Increment Financing for Transit-Oriented Development, at 9, hereinafter referred to as "Erkel," available at http://www.tctod.org/pdf/TIFforTOD.pdf.

[738] Alternative Transit Funding Sources and Finance, *supra* note 278, at 12.

[739] Erkel, *supra* note 737.

[740] *See* App. A.

[741] Erkel, *supra* note 737, at 8.

[742] Proposed New Starts and Small Starts Policy Guidance, *supra* note 19, at 2038.

[743] *Id*.

[744] FTA, Major Capital Investment Projects (final rule setting "a new regulatory framework for FTA's evaluation and rating of major transit capital investments seeking funding under the discretionary 'New Starts' and 'Small Starts' programs"), *supra* note 19, 78 Fed. Reg. 1992 (Jan. 9, 2013), available at http://www.gpo.gov/fdsys/pkg/FR-2013-01-09/pdf/2012-31540.pdf.

[745] *Id*. at 1992–93.

[746] *See, e.g.*, *id*. at 2025.

[747] GAO, *Affordable Housing In Transit-Oriented Development, Key Practices Could Enhance Recent Collaboration Efforts Between DOT-FTA and HUD*, at 22 (Sept. 2009), available at http://www.gao.gov/new.items/d09871.pdf.

[748] *Id*.

[749] *Id*.

[750] *Id*.

an incentive for developers to propose projects that will earn additional points because of a project's "proximity to transit."[751]

In some instances, Department of Housing and Urban Development (HUD) programs, including project-based Section 8 funding and the Housing Choice Voucher Program, have been used to support affordable housing in TODs.[752] Although in 2005 FTA and HUD began to collaborate on the promotion of affordable housing in TODs, the GAO states that their "recommendations and strategies" have had "little impact" on the supply of affordable housing in TODs.[753]

F. Low Income and Other Tax Credits for TOD

One source declares that PPPs are a "premier example" of the use of LIHTCs.[754] In any case, three federal tax credits may be available to private partners in transit PPPs to preserve or increase the supply of affordable housing near transit facilities, the first being the LIHTC.

1. Low-Income Housing Tax Credit

The LIHTC, established by the Tax Reform Act of 1986, "facilitate[s] the creation of affordable housing for eligible Americans by providing tax credits to private sector developers of qualified projects."[755] The LIHTC program is authorized by Internal Revenue Code Section 42 and sponsored by the Treasury Department.

2. Rehabilitation Tax Credit

The Rehabilitation Tax Credit (RTC) provides incentives for the rehabilitation and reconstruction of certified historic structures.[756]

This incentive offers a credit against total federal taxes owed, which is taken for the year in which the renovated building is put into service. The qualified rehabilitation credit is equal to 20 percent of renovation or construction costs, with pre-1936 buildings in nonresidential income-producing use qualifying for a 10 percent credit. The credit is well suited to complement brownfield developments, and property tax abatements and low interest loans are the most commonly used companion incentives.[757]

Qualifying lessees under the Internal Revenue Code may be able to claim the RTC as well.[758]

3. New Markets Tax Credit

A third tax credit of interest is the New Markets Tax Credit (NMTC). The primary users of the NMTC are groups referred to as "Community Development Entities" (CDEs) that must be certified by the Treasury Department's Community Development Financial Institutions Fund.[759] CDEs may be nonprofit or for-profit companies that "serve as intermediaries between the Treasury Department, investors and businesses in the targeted communities."[760] Under the program, an investor may claim a tax credit that is taken over a 7-year period and that is worth 39 percent of an investor's investment in a CDE.[761] However, taxes on capital gains or profits may reduce the value of the tax credit to 26 percent.[762]

There is a "leverage" feature to the NMTC that permits CDEs to raise capital for investment in distressed areas without federal tax liability.[763] In

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[751] *Id*. at 23.

[752] *Id*. at 25.

[753] *Id*. at 34, 38.

[754] Enterprise Community Partners, Inc., Issue Background: Low-Income Housing Tax Credit (July 20, 2012), available at http://www.enterprisecommunity.com/low-income-housing-tax-credits-policy.

[755] Kenneth Weissenberg & Aninda Dhar, The Metropolitan Corporate Counsel, Real Estate Investments Made Sweeter by Tax Credits (Apr. 5, 2010), hereinafter referred to as "Real Estate Investments Tax Credits," available at http://www.metrocorpcounsel.com/articles/12388/real-estate-investments-made-sweeter-tax-credits.

[756] *Id*.

[757] Council of Development Finance Agencies, Federal Historic Preservation Tax Incentive Program, available at http://www.cdfa.net/cdfa/cdfaweb.nsf/ordredirect.html?open&id=historicpresfactsheet.html. A rehabilitation project must satisfy all 10 standards set forth in the Secretary of the Interior's guidance for rehabilitation projects.

[758] Real Estate Investments Tax Credits, *supra* note 755. *See also* IRS, Rehabilitation Tax Credit–Real Estate Tax Tips, available at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Rehabilitation-Tax-Credit-Real-Estate-Tax-Tips.

[759] Real Estate Investments Tax Credits, *supra* note 755. *See* U.S. Department of the Treasury, Community Development Financial Institutions Fund, New Markets Tax Credit Program, at 9, hereinafter referred to as "New Markets Tax Credit Program," available at http://www.cdfifund.gov/what_we_do/programs_id.asp?programid=5.

[760] Real Estate Investments Tax Credits, *supra* note 755.

[761] *Id*.

[762] New Markets Tax Credit Program, *supra* note 759, at 9.

[763] *Id*. at 10.

fact, in 2012, 94 percent of qualified equity investments took advantage of the leverage feature.[764]

G. Transit Agency Experience with TOD and Joint Development

Transit agencies, including BART, WMATA, and MARTA, have promoted TOD and joint development to increase ridership and generate revenues. Nevertheless, according to one report, some "high-profile" projects for transit agencies have had "mixed results" because of the complexity in developing them.[765]

As described in Appendix A, pending or completed transit projects having TOD as a component include the Grossmont Trolley Station, Fruitvale Village, Transbay Transit Center, and West Dublin Station in California; the Stamford TOD in Connecticut; the Miami Intermodal Center; the MBTA Orange Line Station and Holyoke Multimodal Center in Massachusetts; the TriMet MAX Red Line and Patten Park projects in Oregon; and the City of La Crosse Municipal Transit Utility project in Wisconsin.

Finally, PPPs are not just for large urban area projects. Small transit systems in the New England states, most having PPP legislation, use PPPs for TOD for transit stations, construction of new parking facilities, rehabilitation, construction of intermodal hubs, and expansion of service.[766]

XIII. SAFETEA-LU'S PILOT PROGRAM FOR PPPS

A. Introduction

In 2005, SAFETEA-LU authorized FTA to select up to three pilot or demonstration projects under FTA's New Starts program.[767] The pilot program "invited project sponsors to experiment with alternative system procurement in order to identify more effective ways of bundling new transit capacity."[768] Although the pilot projects would be evaluated according to the criteria for the Starts program, the evaluation would be "adjusted" for the projects' "demonstration value."[769]

FTA selected three projects: the Oakland Airport Connector (OAC), Denver Eagle P3 East and Gold Light Rail Lines (Eagle P3 Project), and the Houston North and Southeast Corridor High Capacity Transit Extension Projects (Houston Projects). The pilot program sought "to encourage more private risk-taking and investment in fixed guideway transit projects than is found in typical design-build and DBOM procurements."[770] To expedite the projects, FTA offered the sponsors some relief from its usual requirements: it provided "Letters of No Prejudice earlier than traditionally allowed in the New Starts process to Houston Metro" and granted "a waiver from federal performance bonding requirements" to BART's OAC, something that FTA is said not to have done previously for any nonpilot project.[771]

B. Oakland Airport Connector ($493.10 Million)

The OAC project, costing approximately $493 million, relies on technology known as an Automated Guideway Transit (AGT) that permits vehicles to operate within their own guideways without a vehicle operator.[772] A DB contract was selected for the project, but an OM contract was chosen for the AGT technology. BART's solicitation of proposals for private financing of the OAC was based in part on the use of fare box revenues.[773] However, the resulting project was a "collaborative partnership" of BART, the FTA, Alameda County Transportation Improvement Authority (ACTIA), Alameda County Congestion Management Agency, Metropolitan Transportation Commission (MTC), Caltrans, California Transportation Commission, City of Oakland, and the Port of Oakland (Table 1).[774] The OAC is expected to be in service in 2014.

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[764] *Id*.

[765] Capturing the Value of Transit, *supra* note 10, at 27.

[766] Implementation of PPPs for Transit, *supra* note 24, at 1.

[767] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at XI.

[768] *Id*. at 4.

[769] *Id*. at XI.

[770] FTA Public-Private 3P Program, *supra* note 56.

[771] Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 25–26. GAO has described the projects and obtained copies of the development and concession agreements and other documentation related to the financial structure of the projects. *Id*. at 3.

[772] BART, Oakland Airport Connector, hereinafter referred to as "BART–Oakland Airport Connector," available at http://bart.gov/about/projects/oac/index.aspx#anchor9.

[773] FTA Public-Private 3P Program, *supra* note 56, at 2.

[774] BART–Oakland Airport Connector, *supra* note 772.

Table 1.[775] Sources of Funding for the Oakland Airport Connector.

Federal	
Federal Transit Administration—Small Starts	$25.0 million
Total Federal	$25.0 million
State	
STIP	$20.7 million
CMIA/RTIP Funding Exchange	$10.0 million
SHOPP/RTIP Funding Exchange	$10.0 million
MTC/State-Local Partnership Program (SLPP) Prop 1B	$20.0 million
PTMISEA (Prop 1B)	$12.8 million
PTMISEA (Prop 1B FY 2008/2009)	$5.4 million
Total State	**$78.9 million**
Local	
Regional Measure 2 (2004 Bridge Toll)	$115.2 million
Port of Oakland	$29.3 million
ACTIA Measure B	$89.1 million
Regional Measure 1 (1988 Bridge Toll)	$31.0 million
BART SFO Reserve Account	$10.0 million
Total Local	**$274.5 million**
Subtotal agency/ public grant funding	$378.4 million
Debt draws	$105.7 million
Total Sources of Funds	**$493.10 million**

C. Denver Eagle P3 East and Gold Light Rail Lines ($2.056.1 Billion)

In 2007, FTA selected the Eagle P3 project as a Penta-P project. The Eagle P3 venture is part of the Denver RTD's $7 billion, 12-year program to expand commuter and light rail and bus rapid transit service. In September 2009, the RTD released an RFP that sought a private partner to design, build, finance, operate, and maintain the East Rail and Gold Rail Lines.[776] In June 2010, the RTD selected Denver Transit Partners (DTP) for a DBFOM contract at a cost of $1.64 billion for the East Rail Line that includes a 34-year concession.

RTD will set and retain all assets and revenues generated from transit fares, advertising, and parking. The concession period will last 34 years, with a 5-year design/build period and 29 years of operation and maintenance. In return, RTD will make availability payments monthly to DTP based on availability and performance of the Eagle P3. In total, RTD will pay DTP $5.5 billion in service payments over 29 years in exchange for operating and maintaining the rail lines.[777]

In August 2011, the Eagle P3 project received an FFGA from the FTA in the amount of $1,030.45 million.[778] Because RTD is managing the two lines as a single project, there is one FFGA for the Eagle P3.

[775] *Id*.

[776] Chrissy Mancini Nichols, Metropolitan Planning Council, PPP Profiles: EagleP3 (Apr. 2011), available at http://www.metroplanning.org/news-events/article/6139.

[777] *Id*.

[778] RTD, Facts and Figures, FasTracks East Light Rail Line, available at http://www.rtd-denver.com/FF-EastLRT.shtml.

Table 2.[779] Sources of Funding for the Denver Eagle P3 Project (as of August 2011).

Federal	
Section 5209 New Starts	$1,030.45 million
FHWA Flexible Funds (CMAQ)	$62.10 million
Local	
Bond Proceeds	$48.24 million
Sales & Use Tax	$374.25 million
Concessionaire Financing–Private Equity and Debt	$487.81 million
Contributions from the City of Aurora, City & County of Denver, Adams County, Jefferson County, City of Arvada, City of Wheat Ridge	$40.30 million
TOTAL	**$2,056.1 million**

The expected cost of the Eagle P3, expected to be completed in 2016, is $300 million below RTD's estimate that was obtained prior to the PPP.[780]

D. Houston North and Southeast Corridor High Capacity Transit Extension Projects

FTA also selected the Houston projects, both New Start projects, for the pilot program.[781] A "Facility Provider," composed of a team of engineering, construction, construction management, and vehicle manufacturing firms, was to complete the design and expedite the construction of the Houston projects. The Facility Provider also would be responsible for operating and maintaining the lines.

As indicated in FTA's 2012 annual report on funding recommendations for FY 2013, the projected cost for the North Corridor is $756,008,000 and for the Southeast Corridor is $822,919,000.[782] Federal funds in the amount of $100 million for each project are recommended for FY 2013 for the Houston projects.

XIV. LITERATURE REVIEW ON PPPS FOR TRANSIT PROJECTS

Three reports on PPPs are significant, including a book by Akintola Akintoye and Matthias Beck on *Policy, Finance & Management for Public-Private Partnerships*, published in 2009.[783] One chapter addresses PPP financing in the United States, including 63-20 public benefit corporations, TIFIA, bonds, and other methods, while another chapter illustrates "financial modeling" of PPP projects.

A second resource is *Public-Private Policy Partnerships*, edited by Pauline Vaillancourt Rosenau and published in 2000, which includes a chapter on policy-level partnerships and project-based partnerships for transportation and discusses the structuring of private-public infrastructure partnerships.[784]

A report by Mary A. Collins entitled *Innovative Financing Techniques for Transit Agencies* discusses COPs, the structure of a joint development transaction, cross-border leasing, fare box revenue bonds, and SIBs, as well as "U.S. leasehold interest transactions."[785]

Other publications of interest include one by the U.S. Environmental Protection Agency (EPA), *Infrastructure Financing Options for Transit-Oriented Development*, published in January 2013, which also explains the financial aspects of PPPs for transit projects and TOD, including direct fees, debt, credit assistance, equity, value capture, grants, and other funding, as well as some "emerging tools" for funding PPPs for transit. The EPA report includes case studies on the use of special assessment districts (Gallaudet University Metrorail Station and Stamford, Connecticut); federal loans, grants, and credit enhancements (Denver Union Station); joint development (West Dublin BART Station); corridor TIFs (Atlanta Beltline); multistation TIFs (Dallas TOD/TIF District); and others.[786]

Another report is one published in 2010 by the National Conference of State Legislatures, *Public-Private Partnerships for Transportation, A Toolkit*

[779] PPP Profiles: Eagle P3, *supra* note 776.

[780] *Id*.

[781] STEINMANN, *supra* note 27 (unnumbered).

[782] FTA, ANNUAL REPORT ON FUNDING RECOMMENDATIONS FOR FISCAL YEAR 2013 (2012), available at http://www.fta.dot.gov/documents/FY13_Annual_Report_main_text_1_30_12.pdf.

[783] Akintoye & Beck, *supra* note 2.

[784] Rosenau, *supra* note 7.

[785] Collins, *supra* note 415.

[786] U.S. Environmental Protection Agency, Infrastructure Financing Options for Transit-Oriented Development (Jan. 2013), available at http://www.epa.gov/smartgrowth/pdf/2013-0122-TOD-infrastructure-financing-report.pdf.

for Legislators.[787] The report discusses the potential benefits of, as well as concerns regarding, the use of PPPs and the respective federal and state roles in PPP projects. The appendices include one on state PPP-enabling statutes for transportation projects and another on state DB-enabling statutes for transportation projects, both as of October 2010.

Case studies on highway PPPs are included in a 2010 report by Qingbin Cui and Jay K. Lindly entitled *Evaluation of Public Private Partnership Proposals*. The publication discusses the evaluation process for PPPs, legal issues presented by PPPs, and laws affecting the financing of PPPs.[788]

Although all projects listed on the Web site are not necessarily PPP projects, current information on planned light rail systems and projects under construction is provided on line by *The Transport Politic*.[789]

In regard to books and reports on international projects, the World Bank's Public Private Infrastructure Advisory Facility published a report in 2010, *Private Sector Participation in Light Rail–Light Metro Transit Initiatives*.[790]

XV. CONCLUSION

PPPs are not partnerships in the customary legal or tax sense but are contractual relationships between public agencies and private partners. Transit agencies are using PPPs to engage in alternative ways to deliver an infrastructure project and in innovative financing for their capital projects. It is too soon to know whether MAP-21 will increase the use of PPPs for transit. However, because of MAP-21, FTA is to take steps to streamline its approval process for FTA grants, streamline its environmental review and approval process, and reduce legal impediments confronted by PPPs for transit.

Although this digest discusses myriad forms of alternative contracting and innovating financing, the DB, DBOM, and DBFOM approaches are the ones used most frequently by transit agencies for PPPs. However, transit agencies responding to the survey also selected the CMGC approach, A+B contracting, and other variations of DB contracts that include either management or maintenance responsibility.

The evaluation of a PPP and the selection of a private partner are critical to the success of a PPP. Important to the process for establishing and using a PPP are a transit agency's control of the predevelopment process, exercise of due diligence, performance of VfM or similar analysis, and use of RFIs, RFQs, and RFPs to find the most responsive and qualified developer candidates.

A PPP is a vehicle for transit agencies to transfer risks to the private sector; however, it appears that transit agencies tend to retain responsibility for certain matters, such as for permitting and environmental compliance. Although the digest discusses PPPs and potential land-use, environmental, taxation, bonding, and insurance issues, transit agencies' responses to the survey, as well as other research conducted for the digest, did not disclose any specific problems that transit agencies are encountering with PPPs. In several instances a private partner had assumed responsibility for the insurance. As for bonds, although FTA has some flexibility to approve of a grantee's policy regarding performance and payment bonds, state law, nevertheless, may require that performance and payment bonds be issued for the full value of the contract.

Funding a PPP for a transit project is made more difficult because transit operations usually are revenue-negative. Consequently, the digest discusses a wide range of credit programs and instruments that are available to and have been used by transit agencies for PPPs. The sources of credit include bonds (private activity bonds, revenue bonds, COPs); notes (GANs); and the use of 63-20 nonprofit corporations for the issuance of bonds.

Credit facilities exist at the federal and state level and have been shown to be important to the viability of a PPP for transit, including larger scale PPPs. Particularly significant in light of amendments by MAP-21 is the Federal TIFIA credit facility that may be used to fund a transit capital project. Likewise, SIBs also are important and provide credit and credit enhancements to transit agencies to support infrastructure projects.

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[787] National Conference of State Legislatures, Public-Private Partnerships for Transportation, A Toolkit for Legislators (Oct. 2010), available at http://www.ncsl.org/documents/transportation/ppptoolkit.pdf.

[788] Qingbin Cui & Jay K. Lindly, University Transportation Center for Alabama, Evaluation of Public Private Partnership Proposals (June 2010).

[789] The Transport Politic, Planned Light Rail Systems, available at http://www.thetransportpolitic.com/under-consideration/planned-light-rail-systems/.

[790] The World Bank, Public Private Infrastructure Advisory Facility, Private Sector Participation in Light Rail-Light Metro Transit Initiatives (2010), available at http://www.ppiaf.org/sites/ppiaf.org/files/publication/PSP-LightRail-CMandri-Perrott.pdf.

TOD and joint development are supported by federal law and policy and are important to PPPs for transit agencies. FTA is encouraging transit agencies and developers for development projects to preserve or increase the supply of affordable housing in areas close to transit. Federal tax credits that are available to private partners in PPPs may facilitate the federal policy of affordable housing near mass transit. Transit agencies are making successful use of TIF for PPPs, including for TOD and joint development, as well as of other sources of revenue from special assessment districts and development impact fees.

An important feature of some PPPs is long-term leasing through which, for example, a transit agency may transfer risk to the private sector. A private partner may benefit from the federal income tax laws depending on the term and other provisions of a long-term lease.

The 30 PPPs analyzed in Appendix A, including FTA's three demonstration projects, demonstrate the viability of PPPs for transit projects in the United States. Similarly, Appendix B explains the structure, funding, and success of the Canada Line in Vancouver. Appendix C includes copies of contracts and other documents provided by transit agencies in response to the survey for the digest.

APPENDIX A—ANALYSIS OF THE STRUCTURE AND FUNDING OF PENDING AND COMPLETED TRANSIT PPPS

1. California

A. Grossmont Trolley Station ($100 million)

The Grossmont Trolley Station is a $100 million PPP in which the City of La Mesa, the Metropolitan Transit System, SANDAG, and Fairfield Residential Development are participating to create a "pedestrian-friendly regional transit center" with residential and commercial properties.[791] Construction began in December 2012.[792] Funding for the project includes a $2 million SANDAG Smart Growth grant and $2.7 million from the SANDAG Capital Improvement Project. Several other TODs have been completed in La Mesa, a city with a population of less than 60,000.[793]

B. Fruitvale Village ($66.5 million)

An example of TIF for TOD is the PPP for Fruitvale Village in Oakland, California, for which $4.0 million of the funding is being provided by TIF. The PPP was funded as shown in Table 3:[794]

Table 3. Sources of Funding for the Fruitvale Village PPP.[795]

(A) Equity/Grants (Buildings/Plazas)	**$26.0 million**
FTA	$5.7 million
City of Oakland pre-paid leases	$7.4 million
City of Oakland Pass-Through-Grants	$5.3 million
Tax Increment Financing	$4.0 million
Foundations	$2.3 million
Unity Council/FDV Equity	$1.3 million
(B) Debt (Buildings/Plazas)	**$28.0 million**
501(c)(3) Bonds	$19.8 million
City of Oakland, HUD 108/EDI	$3.3 million
Citibank	$1.4 million
City of Oakland Home	$0.7 million
Unity Council loan	$1.8 million

[791] Elevator/Bridge Structure under Construction at the Grossmont Trolley Station, available at http://www.cityoflamesa.com/DocumentCenter/Home/View/2361.

[792] Suzanne Strassburger, *La Mesa Cultivates Smart Growth, Affordable Housing, Pedestrians and Trolleys Blend*, SAN DIEGO SOURCE (Feb. 15, 2013), available at http://www.sddt.com/reports/article.cfm?RID=472&SourceCode=20070215crf.

[793] *Id*.

[794] Erkel, *supra* note 737, at 6.

[795] *Id*.

(C) Equity/Debt (BART Parking Structure)	**$12.5 million**
FTA	$7.6 million grant
Alameda County (ACTIA)	$4.1 million
Unity Council loan to BART	$0.8 million
TOTAL	**$66.5 million**

C. Oakland Airport Connector

See discussion of the Oakland Airport Connector, a FTA Penta-P project, in Section XIII.B of the digest.

D. Transbay Transit Center and Caltrain Downtown Rail Extension Program ($4.185 billion)

The Transbay Transit Center and Caltrain Downtown Rail Extension Program, a $4.185 billion project, with phase I costing $1.592 billion, "is a visionary transportation and housing project that transforms downtown San Francisco and the San Francisco Bay Area's regional transportation system by creating a 'Grand Central Station of the West' in the heart of a new transit-friendly neighborhood."[796] The Transbay Transit Center replaces the former terminal at First and Mission streets in San Francisco.[797] The project has been hailed as "an example of harnessing the power of public-private partnerships to build and improve infrastructure in the state."[798] The new regional transit hub will connect AC Transit, BART, Caltrain, Golden Gate Transit, Greyhound, Muni, SamTrans, WestCAT Lynx, Amtrak, Paratransit, and future high-speed rail from San Francisco to Los Angeles/Anaheim, thus linking eight California counties.[799] Among other features, the Transbay Transit Center will have a 5.4-acre park on the roof.[800]

The project is being developed in two phases, with Phase 1 including the Transit Center building and the below-grade rail levels and Phase 2 including the Caltrain Downtown Extension Program. The Transbay Transit Center is headed by the Transbay Joint Powers Authority, whose purpose is to design, build, operate, and maintain the new center and its associated facilities.[801]

[796] Transbay Transit Center, Program Overview, available at http://transbaycenter.org/project/program-overview; Metropolitan Transportation Commission, Transbay Terminal, hereinafter referred to as "Transbay Transit Center, Program Overview," available at http://www.mtc.ca.gov/projects/transbay/.

[797] *Id*.

[798] San Francisco Building & Construction Trades Council, Transbay Transit Center Breaks Ground, available at http://www.sfbuildingtradescouncil.org/content/view/292/111/.

[799] Transbay Transit Center, Program Overview, *supra* note 796.

[800] *Id*.

[801] *See* Transbay Transit Center, available at http://transbaycenter.org/tjpa/about-the-tjpa.

Table 4**.** Sources of Funding for the Transbay Transit Center[802] (Phase 1).

Local	
San Francisco Proposition K sales tax	$97.8 million
San Mateo County Measure A sales tax	$7.3 million
AC Transit capital contribution	$38.5 million
Other local	$7.6 million
Regional	
Regional Measure 1 (RM-1) Bay Area toll bridge revenue:	$54.4 million
Regional Measure 2 (RM-2) Bay Area toll bridge revenue	$142 million
AB 1171 (Bay Area toll bridge seismic retrofitting legislation)	$150 million
State	
State funding	$28.3 million
Land sales	$429.5 million
Federal	
TEA-21 earmark	$8.8 million
SAFETEA-LU earmarks	$53.8 million
TIFIA loan	$171 million
FRA rail relocation	$3 million
ARRA High Speed Intercity Passenger Rail	$400 million
TOTAL	**$1,592 million**

D. West Dublin/Pleasanton Station

BART's West Dublin/Pleasanton Station opened in February 2011, a "first of its kind endeavor by BART." The PPP project is a beneficiary of the California Infrastructure Finance Act.[803] The Act "stipulates that securing a private sector partner through competitive negotiations will enable the public sector to have fee-producing infrastructure designed and built without adhering to public contract code bidding processes."[804]

2. Colorado

A. Denver Southeast Corridor T-Rex Project ($879 million)

Denver's Southeast Corridor T-Rex project, built at a cost of $1.67 billion, of which $879 million was for transit, was a major reconstruction between 2001 and 2006 of Denver's I-25/I-225 corridor and an expansion of Denver's RTD light rail system using a "DB/Best Value" form of contracting. The contracting method saved an estimated 22 months of construction.[805] The T-Rex project was the first "design-build contract to incorporate major highway and transit elements into the same project."[806]

[802] *Id*.

[803] CAL. GOV'T CODE § 5956, *et seq*.

[804] BART TOD Memorandum, App. C, item 9, at 1. *See also id*., item 10.

[805] AASHTO Center for Excellence in Project Finance, Transportation Expansion–T-Rex, hereinafter referred to as "AASHTO–Transportation Expansion–T-Rex," available at http://www.transportation-finance.org/projects/t_rex.aspx.

[806] *Id.*

Funding for the highways consisted of GARVEEs in the amount of $600 million (backed by future federal-aid receipts) and sales and use taxes amounting to $195 million.[807]

Table 5. Sources of Funding for the Denver Southeast Corridor T-Rex Project.[808]

FTA New Starts Full Funding Grant Agreement	$525 million
Sales and Use Tax Revenue bonds	$324 million
Local matching funds	$30 million (passenger fares)
Total	**$879 million**

B. Denver Eagle P3 East Rail and Gold Light Rail Lines

See discussion in Section XIV.B of the digest.

3. Connecticut

A. Stamford TOD ($40 million)

The Connecticut DOT reported that the Stamford TOD project is being initiated.[809] The date of the project and the identity of the private partner are to be determined, but there is a state commitment of $40 million for the project. Connecticut is seeking "private proposals to re-develop state-owned properties near the transit hub, as well as demolish an existing…parking garage and provide 1,000 new spaces within 1/4 mile of the station."[810] The RFP states that the private partner would be committed to a 3-year contract with two 3-year renewable terms at the state's discretion.[811]

In April 2012 Connecticut issued a combined RFQ and request for conceptual proposal, a copy of which is included in Appendix C, to private entities for the TOD.[812]

B. Westfield Shoppingtown, Inc. ($525,000)

The Milford Transit District in Milford, Connecticut advised that the Westfield Shoppingtown, Inc., a $525,000 project, is "currently in design," and a private partner will be responsible for maintenance, trash collection, snow removal, utilities, and security.

4. Florida—Miami Intermodal Center ($2 billion)

The Miami Intermodal Center (MIC), a $2 billion project, is being constructed pursuant to a CMR contract, discussed in Section II.C.3 of the digest.[813] The project includes a rental car center, the Miami Central

[807] *Id*.

[808] *Id*.

[809] Conn. DOT Response.

[810] *Id*.; *see* Steven Higashide, Stamford Project Must Prioritize TOD, Improvements for All Commuters, News and Opinion from the Tri-State Transportation Campaign (Oct. 4, 2012), available at http://blog.tstc.org/2012/10/04/stamford-project-must-prioritize-tod-improvements-for-all-commuters/.

[811] Conn. DOT Response.

[812] State of Connecticut, Connecticut Department of Transportation, "Request for Qualifications and Conceptual Proposals for the Transit-Oriented Development of the Stamford Parking Garage" (Apr. 30, 2012), available at http://www.ct.gov/dot/lib/dot/documents/dcommunications/press_release/Stamford_RFQCP_22812Final.pdf.

[813] FHWA, Innovative Program Delivery, Miami Intermodal Project Profile, available at http://www.fhwa.dot.gov/

Station, roadway improvements, MIA Mover guideway foundations, and the MIC station.[814] In addition, the TOD opportunities may include "up to 1.4 million square feet of mixed-use development…in conjunction with the Miami Central Station" parts of which FDOT may lease or sell to a private developer or a public agency.[815] Although portions of the project have been completed, the MIC's scheduled completion is for early 2014.[816]

In addition to two TIFIA loans, the MIC project is funded by various state and local sources of funding from Miami-Dade County/Miami-Dade Aviation Department (MDAD); the Miami-Dade Expressway Authority; three Florida SIB loans; and private sector fees and charges, as well as transportation funding prioritized by the metropolitan planning organization.[817] The private sector fees and charges consist of customer facility charges paid by rental car customers; contingent rent to be paid by rental car companies, if necessary; and lease revenues on MIC property already acquired. As of March 2013, FDOT had spent over $1 billion on the project.[818]

5. Illinois—Chicago Region Environmental and Transportation Efficiency Program ($3.2 billion)

The Chicago Region Environmental and Transportation Efficiency Program (CREATE) is "a first-of-its-kind public/private partnership between the State of Illinois, City of Chicago, American Association of Railroads (BNSF, CN, CP, CSX, Norfolk Southern, UP), National Railroad Passenger Corp (Amtrak), and the Commuter Rail Division of the RTA (Metra)."[819] The total estimated cost for the CREATE partners is $3.2 billion.[820] CREATE is "the first state-local-private partnership aimed at solving an infrastructure problem" on such a large scale.[821]

CREATE has 21 projects that will benefit Metra commuter service, for example, on five Metra routes by decreasing delays and making service more reliable by reducing "conflict points" with freight trains.[822] Some funding has been committed, including $86 million provided by SAFETEA-LU and $100 million in 2010 from DOT as part of the Transportation Investment Generating Economy Recovery (TIGER) program, a dis-

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ipd/project_profiles/fl_miami_intermodal.htm.

[814] MIC, Construction, available at http://www.micdot.com/construction.html.

[815] MIC, Joint Development, available at http://www.micdot.com/joint_development.html.

[816] MIC, Welcome to the MIC, available at http://www.micdot.com/.

[817] MIC, Finance, available at http://www.micdot.com/financing.html.

[818] *Id*.

Of that, nearly $335 million was for Right of Way acquisition, utilities relocation, and environmental remediation of approximately 141 acres. In addition, FDOT contributed over $100 million towards the MIA Mover, the balance of which was the county's contribution to the MIC Program funded under the Miami-Dade Aviation Department's (MDAD) Capital Improvement Program (CIP).

[819] Chicago Region Environmental and Transportation Efficiency Program (CREATE), What is CREATE?, available at http://www.aurora-il.org/documents/cnrailway/docs_meeting/Call%20to%20Action%20CREATE%20Exhibit.pdf.

[820] Jacki Murdock, University of California-Los Angeles, Evolution and Financing of the Chicago Region Environmental and Transportation Efficiency Program, at 16, hereinafter referred to as "Evolution and Financing of CREATE," available at http://jackimurdock.files.wordpress.com/2013/03/create.pdf.

[821] Public-Private Partnerships for Transportation Projects, *supra* note 42, at 4–5.

[822] Chicago Region Environmental and Transportation Efficiency Program, Passenger Rail Benefits, available at http://www.createprogram.org/factsheets/pass_benefits.pdf.

cretionary program under the American Recovery and Reinvestment Act of 2009 (ARRA).[823] As of 2010, contributions toward the funding of the project also included $100 million from the railroads, $30 million from the City of Chicago, and $100 million from the State of Illinois.[824]

6. Massachusetts

A. Greenbush Commuter Rail

PPP legislation in Massachusetts authorizes the use of PPPs to leverage non-core assets.[825] One example of a PPP in Massachusetts is the DB contract for the Greenbush Commuter Rail project that was completed in October 2007.[826]

B. MBTA Orange Line Station ($29,229,184)

In October 2011, the MBTA awarded a contract for $29,229,184 for the construction of the new MBTA Orange Line Station in connection with the Assembly Square redevelopment site. The PPP's funding is provided by state and federal agencies and the developer Federal Realty Investment Trust. Construction began in August 2012.[827]

C. Holyoke Multimodal Center ($10.467 million)

The Pioneer Valley Transit Authority (PVTA) in Springfield, Massachusetts, reported that its Holyoke Multimodal Transportation Center (HMTC) Project was a joint development project with educational office, classroom space, and a café that was undertaken with a private partner that will have continued responsibility for operating the facility and leasing it to tenants, including the PVTA.[828]

The HMTC site was formerly a vacant firehouse (constructed in 1913) and a parking lot. The PPP consisted of the PVTA, the city of Holyoke, Holyoke Community College, and the private developer. The HMTC opened in September 2010.[829]

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[823] Evolution and Financing of CREATE, *supra* note 820, at 18–19.

[824] *Id*. at 19.

[825] Implementation of PPPs for Transit, *supra* note 24, at 2.

[826] Massachusetts Bay Transportation Authority, Greenbush Commuter Rail Before-and-After Study, available at http://www.ctps.org/drupal/greenbush_before_after.

[827] Massachusetts Bay Transportation Authority, T Projects, Assembly Station, available at http://www.mbta.com/about_the_mbta/t_projects/default.asp?id=22873.

[828] PVTA Response.

[829] Land & Community Revitalization, Brownfields Success in New England–Holyoke Transportation Center (Aug. 2011), available at http://www.epa.gov/region1/brownfields/success/11/Holyoke.pdf.

Table 6. Sources of Funding for Holyoke Multimodal Center.[830]

Federal Transit Administration Grant	$4,500,000
Massachusetts Transportation Funds	$2,900,000
Holyoke Intermodal Facility, LLC	$1,500,000
Department of Housing and Urban Development (HUD) Grant	$550,000
MassDEP Leaking Underground Storage Tank (LUST) Grant	$315,000
HUD Economic Development Initiative (EDI) Grant	$277,220
City of Holyoke (donation of building)	$230,000
EPA Brownfields Assessment Grants	$195,182
TOTAL	**$10,467,402**

7. Minnesota—Hiawatha Light Rail Transit Project ($715.3 million)

The Minneapolis Hiawatha Light Rail Transit Project, costing $715.3 million, which opened in December 2004, involved "an innovative mix of design-build and design-bid-build procurements."[831] The project was built with two DB contracts: one for light rail vehicles and the other for rail, signal, and communication equipment, except that a design-bid-build procurement was used for two 7,400-ft airport tunnels.

Table 7. Sources of Funding for the Hiawatha Light Rail Transit Project.[832]

Federal Grants	
FTA Section 5309 New Starts	$334.3 million
Federal Transit Capital Grant	$39.9 million
Federal Surface Transportation Program and Congestion Mitigation Air Quality	$49.8 million
State Grants	
State of Minnesota	$100.0 million
Minnesota Department of Transportation	$20.1 million
Local Grants	
Hennepin County	$84.2 million
Metropolitan Airports Commission Federal, State, and Local grants	$87.0 million
TOTAL	**$715.3 million**

[830] *Id*.

[831] FHWA, Project Profiles, Hiawatha Light Rail Transit, available at http://www.fhwa.dot.gov/ipd/project_profiles/mn_hiawatha.htm.

[832] *Id*.

8. Nevada

A. Las Vegas Monorail Project ($650 million)

The Las Vegas Monorail, a 4-mi fixed-guideway system, was made possible because of a 1997 Nevada law authorizing a private company to own, operate, and charge a fare as a public monorail system.[833] The monorail, a $650 million PPP, is "the only urban rail transit project since the 1920s with a significant portion of the financing based on projected fare box revenues."[834] In addition to contributions from area resorts and hotels served by the monorail, the PPP was financed with tax-exempt revenue bonds issued through the State of Nevada and with tax-exempt revenue bonds, backed by fares and advertising, issued by Salomon Smith Barney and the Nevada Department of Business and Industry.[835] Las Vegas Monorail Company now owns and operates the monorail. The company receives no public subsidies and is the only privately owned public transportation system in the United States.[836]

B. Reno Transportation Rail Access Corridor ($279.9 million)

ReTRAC, a $279.9 million DB project completed in 2006, was sponsored by the city of Reno and the Union Pacific Railroad to "depress[] a 2.25-mile downtown stretch of the rail corridor into a 1.75-mile-long, 54-foot-wide by 33-foot-deep trench…."[837] By eliminating 10 at-grade crossings, the "project resolved numerous environmental, public health, and safety issues" while creating 120 acres of developable real estate.[838]

Table 8. Sources of Funding for the Reno Transportation Rail Access Corridor.[839]

City of Reno bond issues	$111.5 million (backed by hotel room and sales taxes)
TIFIA loan	$50.5 million (backed by hotel room and sales taxes)
Union Pacific Railroad	$17 million
Federal grants	$21.3 million
Cash, interest earnings, and other income	$79.6 million
TOTAL	**$279.9 million**

[833] FHWA, Office of Innovative Program Delivery, Project Profiles, Las Vegas Monorail Profile, hereinafter referred to as "Las Vegas Monorail Profile," available at http://www.fhwa.dot.gov/ipd/project_profiles/nv_lasvegas_monorail.htm.

[834] FTA Public-Private 3P Program, *supra* note 56, at 2.

[835] Las Vegas Monorail Profile, *supra* note 833; Public Transportation: Federal Project Approval Process Remains a Barrier, *supra* note 170, at 11.

[836] Las Vegas Monorail Profile, *supra* note 820. *See also* Cam C. Walker, The Las Vegas Monorail, an Innovative Solution for Public Transportation Problems Within the Resort Corridor (University of Nevada, Las Vegas, 1999), available at http://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1212&context=thesesdissertations.

[837] FHWA, Office of Innovative Program Delivery, Project Profiles, Reno Transportation Rail Access Corridor, available at http://www.fhwa.dot.gov/ipd/project_profiles/nv_retrac.htm.

[838] *Id*.

[839] *Id*.

9. New Jersey

A. Hudson-Bergen Light Rail Line

The first Minimal Operable Segment (MOS-1) of the HBLR, a PPP and DBOM-type of procurement, was delivered to the New Jersey Transit Corporation by Washington Group International.[840] The HBLR (MOS-1) was the first public transit project in the United States to use a DBOM contract for project delivery.[841] It is estimated that the alternative method of procurement "saved 30% over the more traditional design-bid-build procurement method, a saving of about $345 million."[842] The DBOM method was selected also because it would save an estimated 8 years compared to traditional public procurement.[843]

The MOS-1 cost $992 million, funded 61 percent by an FFGA with FTA; MOS-2 cost $1.2 billion, funded 41 percent by FTA. The project was funded also by GANs (backed by passenger fares) and by the State Transportation Trust Fund (motor fuel tax receipts).[844] At a cost of approximately $2 billion, the HBLR, one of the largest public works projects in New Jersey, has been a "catalyst for both residential and commercial development."[845]

B. Weehawken Ferry Terminal ($44 million)

The Weehawken Ferry Terminal, which opened May 2006, was a $44 million project for which the private partner, New York Waterway, is responsible for leasing and maintaining the terminal.

10. New York—JFK Air Train

The JFK Air Train is an 8.1-mi people mover in New York City connecting the city with JFK International Airport. The project was delivered pursuant to a DBOM contract that was financed by a Passenger Facility Charge approved by the Federal Aviation Administration.[846]

11. Ohio—Compressed Natural Gas Facility Project ($1.6 million)

In May 2012, SARTA unveiled Northern Ohio's first public compressed natural gas fueling facility,[847] a $1.6 million project for which the private partner has continued responsibility for its maintenance.[848]

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[840] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 83.

[841] New Jersey Transit, System Expansion Projects, Hudson-Bergen Light Rail, available at http://www.njtransit.com/tm/tm_servlet.srv?hdnPageAction=Project001To.

[842] MALLETT, *supra* note 25, at 21.

[843] AASHTO Center for Excellence in Project Finance, Hudson-Bergen Light Rail, available at http://www.transportation-finance.org/projects/hudson_bergen_lrt.aspx.

[844] *Id*.

[845] Dwayne C. Sampson, Developing Sustainable Transportation Systems (2009), Conference of Minority Transportation Officials, New York Chapter, Arusha, Tanzia, Aug. 2009.

[846] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 84. *See* Developing Sustainable Transportation Systems, *supra* note 832.

[847] SARTA Unveils NEO's First Public CNG Station (May 14, 2012), available at http://www.sartaonline.com/sarta-unveils-northern-ohio-s-first-public-cng-sta.

[848] SARTA Response.

12. Oregon

A. TriMet's MAX Red Line ($125.8 million)

TriMet's MAX Red Line to Portland International Airport, a $125.8 million project, was a unique PPP that began in 1997 when Bechtel Enterprises submitted a "proposal to design and build a MAX extension to the airport under an innovative public/private partnership…."[849] Bechtel agreed to contribute about a quarter of the project's funding in return for development rights to a 120-acre, mixed-use, commercial site owned by the Port of Portland near the entrance to the airport.[850] In furtherance of the PPP, three public agencies and Bechtel entered into 85 agreements.[851] Bechtel later sold its interest to Trammel Crow.[852]

According to TriMet, because there were no federal or state funds for the project, what made the MAX Red Line project possible and successful was the connection between transit and land use.[853] The MAX Red Line opened in September 2011.

Table 9. Sources of Funding for TriMet MAX Red Line.[854]

TriMet	$45.5 million
Port of Portland	$28.3 million
Bechtel	$28.2 million
City of Portland	$23.8 million
TOTAL	**$125.8 million**

B. Patten Park TOD ($15.45 million)

TriMet's $15.5 million PPP in 2008 for Patten Park was a mixed-use commercial and residential TOD. REACH Community Development, the private partner, owns and operates the project. The TOD project required permanently affordable housing units as part of the redevelopment of a motel in proximity to TriMet's Interstate Max (Yellow Line) light rail project. The funding for the project included LIHTCs (discussed in Section XII.F.1), a grant of $4 million from the Portland Development Commission (PDC), a grant from Metro, and an FTA-approved discounting of the sales price of the land, along with HUD Section 8 financing for housing units.[855]

There are several interesting aspects of TriMet's ability to initiate TODs. First, TriMet is a beneficiary of legislation enacted in 1995 by the Oregon State Legislature that authorized local jurisdictions to adopt a property tax abatement program for TOD that "reduc[ed] operating costs through a 10-year tax exemption

[849] TriMet Report on Transportation Initiatives, *supra* note 162, at 88.
[850] *Id*.
[851] *Id*.
[852] *Id*. at 6.
[853] H.R. REP. NO. 110-24, Hearings on PPPs, *supra* note 9, at 71.
[854] TriMet Report on Transportation Initiatives, *supra* note 162, at 88.
[855] *Id*. at 93.

on the improvement value of a property. Property owners continue to pay taxes on the land value during the exemption period."[856]

Second, "Federal Metropolitan Transportation Improvement Program (MTIP) funds are allocated to TriMet, which in turn provides its general funds to Metro. This relieves the TOD Implementation Program from the responsibility of meeting federal requirements."[857]

Third, "Metro offers financial incentives to offset the higher costs of compact development by purchasing TOD easements from developers and, in some cases, acquiring and selling land near transit at a reduced cost."[858]

Table 10. Sources of Funding for the Patten Park PPP.[859]

PDC—Interstate Urban Renewal District (TIF)	$4,467,500
Tax-exempt bonds—residential	$2,796,000
Tax-exempt bonds—Non-Oregon Affordable Housing Tax Credit (OAHTC)	$495,546
Enterprise LIHTC equity	$3,215,000
System development waivers	$322,661
Metro TOD	$3,650,000
Weatherization	$116,400
TriMet	$192,500
Business energy tax credits	$25,000
Deferred developer fee	$170,000
TOTAL	**$15,450,607**

13. Pennsylvania

A. Wayside Energy Storage System ($2,200,000)

SEPTA reported on two PPPs. One PPP was for SEPTA's Wayside Energy Storage System, a $2,200,000 project that included a unique combination of advanced energy storage and software technologies to recover excess train braking energy at a substation and store the energy for later use. SEPTA reports that any excess energy may be sold through the wholesale and regulatory markets. The private partner serves as an intermediary between the local electric utility company and SEPTA.[860]

B. Combined Heat and Power Plant

A second PPP project is still in the proposal stage, but a private partner will be selected to design, build, own, operate, finance, and maintain a combined heat and power plant on SEPTA's property. The private en-

[856] *Id*. at 6.

[857] *Id*. at 13.

[858] *Id*. Also, "Metro's role as a financial partner in TOD projects can leverage other public support; local and state agencies have helped to spur development by reducing entitlement risk, expediting permitting, authorizing tax abatements, making related public improvements and providing project financing." *Id*.

[859] TriMet Response.

[860] SEPTA Response.

tity will finance the plant and sell electric power and heat to SEPTA under a long-term energy service agreement.[861]

14. Texas

A. Cotton Belt Corridor

In May 2009 the Dallas Area Rapid Transit (DART) and the Fort Worth Transportation Authority began a search for qualified partners for a DBFOM project for "a cross regional passenger rail service utilizing the Cotton Belt Corridor, with the aim of starting on or about 2013."[862]

In 2010, the Regional Transportation Council/North Central Texas Council of Governments issued an RFP for an innovative financing initiative for the corridor.[863] Phase 1 of the financing initiative is for the purpose of recommending a funding strategy. Phase 2 is for a financing plan for the project.[864] However, the response to DART's request was that potential private partners needed a "more detailed project definition."[865] Also, an "environmental clearance" was needed to advance the project.[866]

B. Houston North and Southeast Corridor High Capacity Transit Extension Projects

See the discussion of the Houston Projects, also chosen for FTA's pilot program, in Section XIII.D of the report.

C. Mockingbird Pedestrian Bridge

Construction began in June 2013 on DART's $7.5 million Mockingbird Pedestrian Bridge.[867] According to one source, the majority of the funding was provided under "an old air quality program for projects that would reduce the region's air quality problems."[868]

15. Utah—Utah Transit Authority—2013 TOD Program

In 2013, the Utah Transit Authority solicited qualified developers capable of comprehensive development of TOD sites along UTA's public transit system. Developer-candidates were expected to "have the capacity and demonstrated experience to handle all aspects of the development process including, planning, design, structuring of financings, permitting, construction, sales and leasing, and ongoing management."[869]

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[861] *Id*.

[862] Dallas Area Rapid Transit (DART), Request for Information Dallas Area Rapid Transit/Fort Worth Transportation Authority Cotton Belt Rail Line Public Private Partnership, available at http://www.dart.org/CottonBeltPPP/.

[863] *Id*.

[864] DART, Cotton Belt Regional Rail Corridor, available at http://www.dart.org/about/expansion/cottonbelt.asp.

[865] *Id*.

[866] *Id*.

[867] Joe Simnacher, Groundbreaking Tuesday on Mockingbird Pedestrian Bridge at Katy Trail, DALLAS NEWS, June 17, 2013, available at http://www.dallasnews.com/news/metro/20130617-groundbreaking-tuesday-on-mockingbird-pedestrian-bridge-at-katy-trail.ece.

[868] *Id*.

[869] Utah Transit Authority, Request for Qualifications and Site Proposals ("RFQ&P") for Pursuit of Joint Development on Transit Oriented Development ("TOD") Sites (2013), available at http://www.rideuta.com/uploads/RFQP_UT13-016GL_ad_(2).pdf.

16. Virginia/Washington, DC—Metropolitan Area Transit Authority—Dulles Metrorail Silver Line ($5,998,819,000)

The Metropolitan Washington Airports Authority (MWAA) is constructing the Dulles Metrorail Silver Line that will connect Washington, DC, to points in Virginia, including Tysons Corner, the Washington-Dulles International Airport, and Reston. As each of two phases of the project is completed, WMATA will own and operate the line.[870] Phase 1 is being constructed pursuant to a DB contract with substantial completion expected in 2014. In May 2009, MWAA approved a plan for Phase 2 for which the authority will use a competitively bid DB contract.[871]

The MWAA received a $900 million grant under FTA's New Starts program that included $77.3 million in ARRA funds. The cost of Phase 1 is $3.1 billion.[872] To finance the major portion of both phases, MWAA has taken over the responsibility for the operation of and the revenue from the Dulles Toll Road.[873]

Table 11. Sources of Funding for the Dulles Metrorail Silver Line ($5,998,819,000).[874]

FUNDING PARTNER	% SHARE TOTAL PROJECT ESTIMATE (TPE)–BASELINE	$ SHARE TPE–BASELINE	OTHER–GARAGES	FUNDING PARTNER TOTAL (TPE–BASELINE + GARAGES)
Dulles Toll Road (includes $900 million from FTA New Starts (16.1%), $275 million from Commonwealth of Virginia)	75%	$4,262,763,750		$4,262,763,750
Fairfax County	16.1%	$915,073,285	146,721,000	1,061,794,285
Loudoun County	4.8%	272,816,880	168,413,000	441,229,880
Aviation Funds	4.1%	233,031,085		233,031,085
TOTAL	**100.0%**	**$5,683,685,000**	**$315,134,000**	**$5,998,819,000**

[870] FTA, ANNUAL REPORT ON FUNDING RECOMMENDATIONS, FISCAL YEAR 2013, at 13 (2012), available at http://www.fta.dot.gov/documents/FY13_Annual_Report_main_text_1_30_12.pdf.

[871] Airports Authority Board Selects Design-Build Delivery System for Phase 2 of Dulles Corridor Metrorail Project, available at http://www.dullesmetro.com/pdfs/Phase2FactSheetDesignBuild1May2009.pdf.

[872] FTA, Office of Inspector General, Audit Report, Actions Needed to Improve FTA's Oversight of the Dulles Corridor Metrorail Project's Phase 1 (July 26, 2012), available at http://www.oig.dot.gov/sites/dot/files/FTA's%20Oversight%20Dulles%20Metrorail%20Phase%201%5EJuly%2026,%202012.pdf.

[873] *Id*. at 5.

[874] Transportation Committee, Fairfax County Board of Supervisors, Dulles Metrorail Silver Line: Status Report and Transportation Infrastructure Finance and Innovation Act (TIFIA) Funding Update (May 7, 2013) available at

17. Wisconsin—Grand River Station ($30 million)

The City of La Crosse Municipal Transit Utility reported that in 2010 it had used a PPP for the Grand River Station, a $30-million joint development project that included transit, housing, parking, and commercial space. The private partner was Gorman & Company, which has continued responsibility for the leasing, operation, and maintenance of the station.[875]

http://www.slideshare.net/fairfaxcounty/1-dulles-metrorail-silver-line-project-and-funding-update-bo-s-trans-comm-5-7-13-final-dmb.

[875] La Crosse Municipal Transit Utility Response.

APPENDIX B—STRUCTURE AND FUNDING OF THE CANADA LINE IN VANCOUVER

A Canadian PPP is of interest because of its multiple sponsors, organization, approach to project delivery, sources of private equity and debt financing, and success. The Canada Line, previously known as the Richmond-Airport-Vancouver (RAV) Rapid Transit Line is a 19.5-km rapid transit line that connects Vancouver, the city of Richmond, and the Vancouver International Airport.[876] The line, which opened in August 2009, cost approximately $2.05 billion and is now part of the SkyTrain network.

The project had five sponsors or funding agencies: the South Coast British Columbia Transportation Authority (TransLink), the Vancouver International Airport Authority, the government of British Columbia, the government of Canada, the city of Vancouver, and several other public sponsors, as well as private stakeholders. Based on a report prepared by Price Waterhouse Coopers, it was believed that the PPP would be able to attract private equity and debt financing for the project.[877] SNC-Lavalin, Inc., delivered the engineering, procurement, and construction contract through a series of joint ventures formed by its affiliate SNC-Lavalin Contractors Pacific, Inc. (SLCP).

The private partner was selected through a four-step competitive process: a request for expressions of interest, an RFP, a best and final offer, and the financial close and contract award.[878] The partner selected by the Canada Line Rapid Transit, Inc. (CLCO) was SNC-Lavalin/Serco. In March 2005, TransLink entered into a concession agreement with InTransitBC, the "newly created private-sector joint venture that emerged from the SNC-Lavalin/Serco consortium."[879] Thus, InTransitBC became the joint venture company that "contracted to design, build, partially finance, operate and maintain the Canada Line."[880] The joint venture was comprised of SNC-Lavalin, the British Columbia Investment Management Corporation, and the Caisse de dépôt et placement du Québec.[881]

The draft concession agreement did not define "how the system was to be designed. Instead, it primarily specified the performance that the completed system was required to achieve."[882] In July 2005, TransLink, CLCO, and InTransitBC entered into a concession agreement for the design, construction, partial financing, operation, and maintenance of the Canada Line.[883] Some features of the concession agreement are that InTransitBC operates and maintains the line for a 30-year period,[884] TransLink makes performance

[876] The Canadian Council for Public-Private Partnerships, 2009 National Award Case Studies, at 13 (June 2010), hereinafter referred to as the "Canada Line Case Study."

[877] *Id*. at 20.

[878] *Id*. at 23.

[879] *Id*. at 26.

[880] *Id*.

[881] *Id*.

[882] *Id*. at 29.

[883] *Id*. at 28.

[884] *Id*. at 26.

"payments based on availability, quality of service and achievement of ridership forecasts,"[885] and the line returns to the public sector at the conclusion of the concession period.[886] InTransit BC also entered into a design and construction contract with SNC-Lavalin, Inc.[887] After completion in August 2009, CLCO's responsibility for management of the concession agreement was assigned to TransLink.

Of the $2.05 billion needed to fund the project, there were $1.33 billion in public contributions and $720 million of private funding or about 35.12 percent.[888] In regard to the private financing, there were two components: equity and debt. InTransitBC secured $120 million in equity through the placement of limited partnership units.[889] A group of banks provided long-term debt financing in the amount of $600 million.[890] Most of the risk for the project was transferred to the private sector, but the "public sector retained most of the ridership risk, even though a part was passed on to the private partner."[891]

A final report on the project stated that the PPP approach for the Canada Line "is expected to cost $92 million less on a net-present-value basis in 2003 dollars."[892]

[885] *Id*.
[886] Id. at 29.
[887] *Id*.
[888] *Id*. at 30.
[889] *Id*. at 31.
[890] *Id*. at 31, 34.
[891] *Id*. at 34.
[892] *Id*. at 37.

APPENDIX C—DOCUMENTS PROVIDED BY TRANSIT AGENCIES RESPONDING TO THE SURVEY

DOCUMENT NUMBER	DOCUMENT NAME
1: Page 81	City of La Crosse Municipal Transit—Summary of Development Agreement—Grand River Station
2: Page 85	City of La Crosse Municipal Transit Utility—FTA—Notice—Certification of Compliance
3: Page 96	New Jersey Transit—Selected Contract Provisions—Insurance and Indemnity
4: Page 104	Milford Transit District—License Agreement
5: Page 117	Pioneer Valley Transit Authority—Holyoke Multimodal Transportation Center—Joint Development Agreement (JDA)
6: Page 157	Pioneer Valley Transit Authority—Holyoke Multimodal Transportation Center—JDA—EXHIBITS
7: Page 163	Pioneer Valley Transit Authority—Holyoke Multimodal Transportation Center—Lease Agreement
8: Page 233	Stark Area Regional Transit Authority—Compressed Natural Gas Vehicle Fueling Station and CNG Sales Agreement
9: Page 251	Tri-County Metropolitan Transportation District of Oregon—Agreement for Disposition and Development of Real Property

SUMMARY OF DEVELOPMENT AGREEMENT

Grand River Station Project

The following is a brief summary of particular terms of the draft Development Agreement (the "Agreement"), dated June 16, 2008, between the City, the Redevelopment Authority and various entities affiliated with Gorman & Company, Inc. For ease of reading, any of these Gorman affiliates is referred to in this summary as "Gorman." References to specific sections and exhibits are included if the reader wants to look at those provisions in greater detail. Capitalized terms are either defined in this Summary or have the definitions given in Section 1.1 of the Agreement.

1. The City will design and build a six story (plus penthouse) mixed-use building to include:

- Passenger Station and Waiting Platform (the "Passenger Station")
- Bus Staging and Loading area (the "Loading Area")
- New Alleyway (the "Alleyway")
- Retail Center of approximately 15,000 square feet (shell only - no tenant improvements) ("Retail Shell")
- Lobby for upper floors (the "Lobby")
- Structured Parking stalls (the "Structured Parking")
- Housing (shell only - no interior housing unit improvements, floors 2, 4, 5, 6 & penthouse) (the "Housing Shell")
- Penthouse space for mechanical and (shell only) common use spaces
- LIHTC Community Area of approximately 4,500 square feet

See Exhibit B.

The Passenger Station, Loading Area, Alleyway, Retail Shell, Lobby, Structured Parking, Housing Shell, LIHTC Community Area and Penthouse are collectively referred to herein as the "Project".

The Project shall be developed as a condominium. Each component of the condominium shall constitute at least one separate unit in the condominium. *See* Exhibit N.

The City's construction work, subject to unavoidable delays and the City's acceptance of bids in July 2008, is to be done by September 7, 2009. There is an absolute deadline for completion of the City's construction of December 31, 2009. Even unavoidable delays do not change this deadline. If this deadline is

not met, Gorman's obligations are terminated and the City must return the Purchase Price described below (plus 8% interest) to Gorman.

2. Gorman agrees to purchase the Housing Shell as units of a condominium and to develop it into two housing components as follows: (i) a 72 unit rental component containing 59 apartment units developed utilizing housing tax credits ("LIHTC Unit") and approximately 13 market rate apartment units and (ii) For-Sale Units containing approximately 15 condominium units for sale to the public .

3. In accordance with the Agreement and the Purchase Option dated January 18, 2008, Gorman will purchase the Housing Shell as condominium units for a Purchase Price of $2,450,000 on or before September 30, 2008. Reflecting that the building will not be fully constructed, Gorman will pay this amount in 12 equal monthly installments. The City will receive as additional payment a "Contingent Fee" for the LIHTC Unit and For-Sale Units as follows:

A. The "LIHTC Contingent Fee" shall be (i) any savings in the aggregate from the actual hard construction costs shown in the Developer Pro Forma for the LIHTC Unit, and (ii) an amount equal to 65% of any amounts distributable to Gorman upon the sale of the LIHTC Unit based, in general, on the purchase price paid by the buyer of the LIHTC Unit less all outstanding indebtedness, all closing costs associated with the sale, and all amounts payable to the equity investor in the LIHTC Unit. The "Maximum LIHTC Contingent Fee" shall be an amount equal to 82.15% of the Excess Housing Shell Cost. *See* Section 4.2(a)(3).

B. The For-Sale Units Contingent Fee or "Homes Contingent Fee" is based on the following: Gorman is projected to sell For-Sale Units for an average per unit price of $160,080 (excluding buyer upgrades) or a total of $2,401,200 for all 15 For-Sale Units. After completion of construction and sale of all For-Sale Units, Gorman's records will be audited and final costs and sales proceeds will be determined. In the event the For-Sale Total Sales exceed the For-Sale Total Costs, then Gorman will pay to the City, as the "Homes Contingent Fee," 60% of such excess. In addition, any savings in the aggregate from the actual hard construction costs shown in the Developer Pro Forma for the For-Sale Units will be paid to the City. In no event, however, shall the Homes Contingent Fee exceed the Maximum Homes Contingent Fee. The "Maximum Homes Contingent Fee" shall be in an amount equal to 17.85% of the Excess Housing Shell Cost. *See* Section 4.2(a)(4).

4. Gorman agrees to act as the master tenant for the City for the Retail Shell portion of the Project and shall enter into a Master Lease with the City for the Retail Shell. *See* Section 5.1 and Exhibit J. Gorman agrees to pay rent under the Master Lease to the City at the rate of $5.00/square foot plus an annual escalator, for the gross leasable area of approximately 15,000 square feet, which includes approximately 9,500 square feet of retail space and 4,500 square feet of

LIHTC Community Area. The annual escalator will be equal to any annual increase in subleases Gorman grants for the Retail Component. Under the Master Lease, Gorman agrees to market the retail space, negotiate and execute subleases with subtenants, complete any and all build-out improvements necessary to move the subtenant into the space. Gorman agrees to collect rent, taxes and CAM (Common Area Maintenance) charges from the tenants of the Retail Component. Gorman agrees to pay annually an amount equal to the real estate taxes which would otherwise be due and payable on the Retail Shell through a PILOT (Payment in Lieu of Taxes) directly to the City. *See* Exhibit K.

5. Gorman agrees to lease the Structured Parking (with a maximum of 93 parking stalls) from the City for a term of 99 years. This term is similar to a ground lease and will allow Gorman to provide parking for the housing while not causing a conflict with the Federal Transit Administration funding partially used for the parking costs. The rights to these stalls will start at $35 per month per stall and will escalate annually, at the City's option, at an amount equal to any increase Gorman imposes on the users of the stalls or any rate increase the City applies to other municipal parking structures. Gorman will be responsible for maintenance and repair of the Structured Parking.

6. Gorman and the City agree to create a condominium unit owners association for the purpose of managing and maintaining the common areas of the Project and agree to pay their pro rata share of the common area costs. *See* Exhibit N.

7. Gorman acknowledges that the City is constructing the Project in reliance on Gorman's obligations under the Agreement and, therefore, provides security to the City to ensure Gorman's performance. Gorman & Company, Inc. directly guarantees that the affiliates purchasing the LIHTC Unit and the For Sale Units will make the monthly installments on the Purchase Price. Gorman will grant to the City at Closing mortgages on the LIHTC Unit and the For Sale Units until the Purchase Price is paid in full. The City will subordinate its interests in those mortgages to Gorman's construction lender. Gorman also guarantees the performance of all obligations of its affiliates related to the Structured Parking and the Retail Component. *See* Section 4.2(c) and Exhibit G.

8. The Construction Schedule is as follows:

Task	Completion
Final Approval for Gorman Agreements with City • Developers Agreement • Master Lease Agreement • Condo Documents	June 2008
Award and Start Construction of City Project	July 2008
Closing on Housing Shell with Gorman	September 2008

Substantial Completion of City Project — September 7, 2009
Gorman Completes Build Out of Housing Units — September 30, 2010

Summary Prepared by:

Jay R. Lindgren
Dorsey & Whitney LLP
(612) 492-6875
lindgren.jay@dorsey.com

June 25, 2008

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION V
Illinois, Indiana,
Michigan, Minnesota,
Ohio, Wisconsin

200 West Adams Street
Suite 320
Chicago, IL 60606-5253
312-353-2789
312-886-0351 (fax)

April 24, 2008

Mr. Rod Clark
Director
Wisconsin Department of Transportation
Bureau of Transit, Local Roads, Rails and Harbors
4802 Sheboygan Ave.
P. O. Box 7913
Madison, Wisconsin 53707-7913

RE: Grand River Station- City of La Crosse, WI

Dear Mr. Alley:

This letter is in response to the Wisconsin Department of Transportation's (WisDOT) various submittals, and most recent electronic submittal dated April 8, 2008, related to the above referenced Joint Development Project (JDP). Your documents were developed in accordance with guidance published by the Federal Transit Administration (FTA) at 72 Federal Register 5788 (2007) and involves the purchase of federally assisted real property for purposes of private/public development.

In accordance with this guidance, WisDOT has submitted for approval a Certification of Compliance. FTA has reviewed the Certification of Compliance provided by WisDOT and finds that the certification demonstrates compliance with 49 U.S.C. 5302(a)(1)(G) and 49 C.F.R. Part 18 in accordance with FTA directives. Furthermore the proposed transaction achieves a fair return for the use of the federally assisted parcel of land; that the construction of the JDP includes the design and construction of the transit improvements as contemplated by the Development Agreement; that WisDOT will have continuing control and access to those improvements for transit purposes; and that the implementation of this JDP will encourage transit ridership.

Therefore, FTA concurs with your proposal to proceed with the execution of the Real Estate Purchase Agreement and the Grand River Station Joint Development Project as requested.

If you have any questions, please do not hesitate to contact Nancy-Ellen Zusman, or Dominick J. Gatto at 312-353-2789.

Sincerely,

Marisol Simón

Marisol Simón
Regional Administrator

cc: John Alley: WisDOT
Keith Carlson: City of La Crosse

Certificate of Compliance

Effective as of the date hereof, the undersigned hereby certifies and covenants to the Federal Transit Administration ("FTA") as follows:

1. ***Title.*** Subject to the obligations and conditions set forth in 49 CFR 18.31, as amended, title to real property acquired under a grant or subgrant for FTA, the **Grand River Station** (the "Project"), shall vest in the undersigned or subgrantee thereof (collectively or individually, as the case may be, the "Grantee").

2. ***Use.*** Except as otherwise provided by Federal statutes, real property shall only be used for the originally authorized purposes (which may include Joint Development purposes that generate program income, both during and after the award period and used to support public transportation activities) as long as needed for such purposes, and that the Grantee shall not dispose of or encumber its title or other interests.

3. ***Disposition.*** When real property acquired with funds provided by FTA for the Project is no longer needed for the purpose originally authorized by FTA, the Grantee shall request disposition instructions from FTA and shall agree that, unless otherwise authorized by FTA, such disposition shall be made in accordance with applicable law, including without limitation 49 U.S.C. 5334(h) and 49 CFR 18.31.

4. ***Federal Interest.*** The Federal Government retains a Federal interest in any real property, equipment, and supplies financed with Federal assistance ("Project Property") until, and to the extent that, the Federal Government relinquishes its Federal interest in such Project Property.

5. ***Incidental Use.*** Any incidental use of Project Property, as determined by FTA, shall not exceed that permitted under applicable Federal laws, regulations, and directives, including the requirements of FTA's Master Agreement.

6. ***Encumbrance of Project Property.*** The Grantee covenants to FTA as follows:

   a. *Written Transactions.* The Grantee agrees that it will not execute any transfer of title to the Project Property or enter into an instrument legally binding on the Grantee that would encumber Federal Interest in the Project Property.

   b. *Oral Transactions.* The Grantee agrees that it will not obligate itself in any manner to any third party with respect to Project Property.

7. ***Notice to Joint Development Partner.*** The undersigned has delivered to the Joint Development Partner a duly executed copy of this certificate, dated as of the date hereof, receipt of which has been acknowledged by the Joint Development Partner in writing to the undersigned on or before the date of execution of the Joint Development Agreement.

8. ***Other Actions.*** The Grantee (a) Agrees that it will not take any action that encumbers the Federal Interest in the Project Property and (b) hereby affirms that each of its representations and warranties set forth in the Master Agreement is true and correct in all material respects as of the date hereof. The Grantee agrees that nothing herein shall supersede, amend, modify or otherwise affect the provisions, terms or conditions set forth in the Master Agreement.

9. ***Definitions.***

   a. "FTA" shall have the meaning provided in the preamble of this certificate.

   b. "Grantee" shall have the meaning provided in section (1) of this certificate.

   c. "Joint Development" shall mean a capital project as defined by 49 U.S.C. 5302(a)(1)(G) that is eligible for funding pursuant to the terms and conditions set forth in [insert new Joint Development circular number].

   d. "Joint Development Partner" shall mean the entity with which the Project Sponsor has partnered, through a Joint Development Agreement, to construct a joint development improvement pursuant to 49 U.S.C. 5302(a)(1)(G).

   e. "Master Agreement" shall mean that certain Master Agreement by and between FTA and the Grantee, as authorized by 49 U.S.C. 53, Title 23, United States Code (Highways), the National Capital Transportation Act of 1969, as amended, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, the Transportation Equity Act for the 21st Century, as amended, or other Federal laws that FTA administers, as the same may be lawfully revised, superseded or supplemented from time to time.

   f. "Project" shall have the meaning provided in section (1) of this certificate.

   g. "Project Property" shall have the meaning provided in section (4) of this certificate.

10. ***No Estoppel.*** The undersigned agrees that acceptance of this Certificate of Compliance by FTA shall not estop the federal government from initiating or conducting, and shall not be used as a defense to any investigation, audit or inquiry by the Federal government following approval by FTA of the project.

AFFIRMATION OF APPLICANT

Name of Applicant: City of La Crosse

Name and Relationship of Authorized Representative:

Mark Johnsrud, Mayor

BY SIGNING BELOW, on behalf of the Applicant, I declare that the Applicant has duly authorized me to make these certifications and assurances and bind the Applicant. The Applicant agrees to comply with all Federal statutes, regulations, executive orders, and directives regarding this certification.

The Applicant affirms the truthfulness and accuracy of the certifications and assurances it has made in the statements submitted herein.

In signing this document, I declare that the foregoing certifications and assurances, and any other statements made by me on behalf of the Applicant are true and correct.

Signature: _____ Date: 2-25-08

Name: MAYOR MARK JOHNSRUD
Authorized Representative of Applicant

AFFIRMATION OF APPLICANT'S ATTORNEY

For (Name of Applicant): City of La Crosse

As the undersigned Attorney for the above named Applicant, I hereby affirm to the Applicant that it has authority under State law and local ordinances to make and comply with the certifications and assurances as indicated herein. I further affirm that, in my opinion, the certifications and assurances have been legally made and constitute legal and binding obligations on the Applicant.

I further affirm that, to the best of my knowledge, there is no legislation or litigation pending or imminent that might adversely affect the validity of these certifications and assurances.

Signature: _____ Date: 2-26-08

Name: STEPHEN F MATTY
Attorney for Applicant

FTA Joint Development Eligibility Criteria from Federal Register Notice of February 7, 2007: As Applied to the La Crosse Grand River Station Project

An eligible Joint Development Project is one that:

1. a. Enhances urban economic development

The Grand River Station is a mixed-use transit oriented development. The project includes a mix of uses consistent with downtown redevelopment plans and will be an anchor for the neighborhood and economic redevelopment. In addition to the multi-modal transit facility the uses include both affordable and market rate apartments, possible future market rate condominiums, and retail space. The development features live-work space, space designed to allow residents to work from home and contribute to the community's economic diversity and development.

OR

1. b. Incorporates private investment

The $32.9 million project budget for the Grand River Station includes over $21.5 million of equity contributed by Gorman, along with local and federal funding. Gorman will lease the retail and parking portions, with revenues paying for operation and maintenance of the facility, along with payments to a City of La Crosse controlled sinking fund designed to offset future capital improvements or, at the end of the agreement, become available to La Crosse for use consistent with the initial requirements of federal state and local funding requirements.

AND

2. Enhances the effectiveness of a public transportation project

The Grand River Station construction project significantly enhances public transportation in downtown La Crosse by creating a single focal point where local public transit service, intercity bus services, a downtown trolley circulator, and local cab and paratransit service can all interconnect. The availability of passenger waiting areas, amenities and services, ticketing and route information all improve the travel experience for all passengers and simplify immediate transfers from transit to intercity bus. This creates a level of intermodal transportation service and effectiveness that has never existed in La Crosse. Currently, more than one million bus passengers annually use the La Crosse MTU, with that number growing as ridership increases and bus services are added.

Seven La Crosse MTU routes will serve the Station over 30 times each weekday, with the first bus arriving at 5:10 am and the last bus departing at 9:40 pm weekdays. Peak period headways are 30 minutes. Weekend and evening service is slightly reduced. Passengers use the station to wait for La Crosse MTU buses.

A new 8 bay bus way will provide safer, more convenient access to the station for MTU paratransit passengers, making it easier for them to make use of intermodal transit services. New driveways and staging areas make arriving and departing taxicab access to the station easier and safer, enhancing the connectivity between taxis and intercity bus.

There are 2 daily intercity bus arrivals and departures. The City of La Crosse Municipal Transit Utility currently provides Federal 5311 operating funds to assist with the intercity bus service between La Crosse and Madison.

Also part of the project will be significant pedestrian enhancements in the area around the station, particularly on the Jay Street corridor leading west to 2nd Street toward the riverfront and the La Crosse Center. The increased attractiveness of the area and improved wayfinding signage is expected to significantly increase pedestrian activity between the station, the riverfront, and the La Crosse Center.

Clearly, the Grand River Station will be the hub for the network of transportation options for La Crosse, and the growth in passenger activity can spark redevelopment of the entire neighborhood surrounding the facility. This can be expected to increase public transportation ridership to the Station and to new destinations that develop in future years in the immediate vicinity.

AND

3. a. Is Physically Related

The transportation facility that serves multiple public transportation modes and services is located in the facility. City of La Crosse ownership ensures that the facility will continue to serve passengers in perpetuity.

OR

3. b. Functionally Related to a public transportation project.

OR

3.c. Establishes new or enhanced coordination between public transportation and other transportation.

See response to #2.

AND

4. Provides a fair share of revenue that will be used for public transportation

The direct public return on investments in Grand River Station consist of the following parts:

a. Gorman agrees to act as the master tenant for the City for the Retail Shell portion of the Project and shall enter into a master lease with the City for the Retail Shell. Gorman agrees to pay rent under the Master Lease to the City at the rate of $5.00/SF plus an annual escalator, for the gross leasable area of approximately 15,000 SF, which includes approximately 9,500 SF of retail space and 4,500 SF of Community/Office Area dedicated to the Gorman Development. The annual escalator will be equal to any annual increase, if any, in subleases Gorman grants for the Retail Shell and Community/Office Area. Under the Master Lease, Gorman agrees to market the retail space, negotiate and execute triple net (NNN) subleases with subtenants, complete any and all build-out improvements necessary to move the subtenant into the space. Gorman agrees to collect rent, taxes and CAM (Common Area Maintenance) charges from the tenants of the Retail Shell. Gorman agrees to pay annually an amount equal to the real estate taxes which would otherwise be due and payable on the Retail Shell through a PILOT (Payment in Lieu of Taxes) directly to the City.

b. Gorman agrees to lease the Structured Parking (with a maximum of 94 parking stalls) from the City for either housing or retail parking. The rights to these stalls will start at $35 per month per stall and may escalate annually, at the City's option, at an amount equal to any increase Gorman imposes on the users of the stalls.

c. Gorman and the City agree to create a Common Interest Community (CIC) for the purpose of managing and maintaining the common areas of the Project and agree to pay their pro rata share of the common area costs. Common areas of the Project are generally defined as the sidewalks surrounding the entire Project, private streets, lights and private utilities directly servicing the Project, exterior building walls, windows and finishes of the Project (excluding the Passenger Station), main floor lobby area, elevator, all stairs, parking access ramp and parking stalls on the third floor of the Project, fire suppression system, all primary mechanical and electrical systems.

e. Members of the CIC including Gorman, City, Condo Association, and Retail Association will make the payments outlined above to a dedicated account controlled by the Transit Utility that can only be used for future transit maintenance and capital projects at the facility. Payments that accrue to this account will clearly be re-invested in public transportation in the future.

f. City agrees to utilize all revenue as Program Income as defined by FTA in the Joint Development Guidelines.

"Continuing control" of the facility is assured by the fact that the City of La Crosse retains ownership of the land and building.

AND

5. "Reasonable share of costs" should be borne by lessees.

See response to #4.

Joint Development Checklist

I. PROJECT DESCRIPTION		
Project Sponsor: City of La Crosse, Wisconsin	**Date Submitted:** January 25, 2008	**FTA Project Number (if known):** (Not known at this time)
Project Title: Grand River Station		
Project Location (Include City and Street Address): Corner of 3rd Street and Jay Street in La Crosse, WI		
Name of Project Contact: Mr. Keith Carlson, MTU General Manager	**Phone:** 608-789-7350	**E-mail Address (if available):** carlsonk@cityoflacrosse.org

Type of Project:

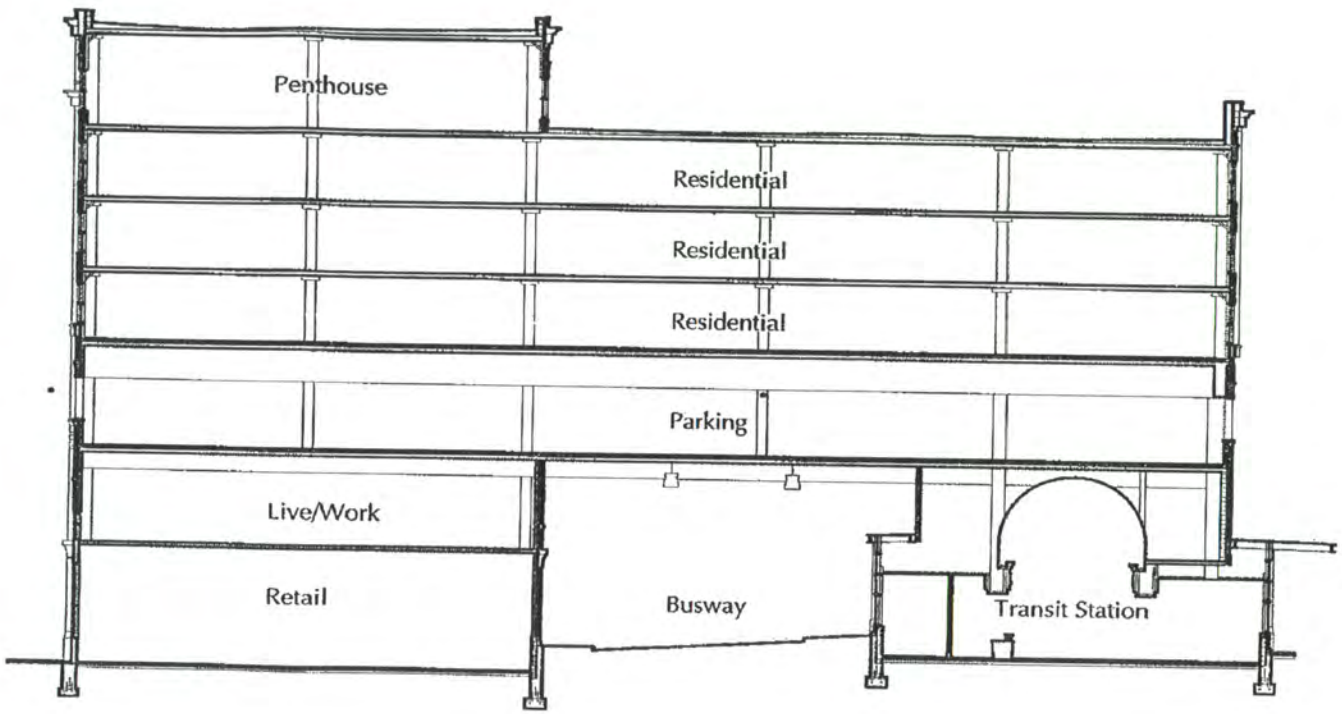
- [x] Commercial Development
- [ ] Residential Development
- [ ] Pedestrian or Bicycle access to public transportation facility
- [ ] Construction, renovation, or improvement of intercity bus or intercity rail station or terminal
- [ ] Renovation or improvement of historic transportation facility
- [x] Other

Description of Project:
Grand River Station is a bus transit hub in downtown La Crosse that includes retail, parking, affordable rental housing and owner occupied condominium housing, and live-work artist studio housing. FTA Funding is being requested for the transit center and associated site improvements, the retail center (warm-shell only), and the parking. All housing unit costs will be paid for by the private sector.

II. MATERIALS SUBMITTED
[x] Joint Development Checklist
[ ] Joint Development Checklist
[ ] Certification of Compliance or
[ ] Alternative Certification (with written explanation)

III. APPLICATION OF STATUTORY CRITERIA	
Requirement	**Description**
Economic Link (check (1) or (2)): [ ] (1) Enhances economic development or [x] (2) Incorporates private investments	The Transit center will provide the opportunity for $21,000,000 in additional private sector investment in Downtown La Crosse
Public Transportation Benefit (check (3), (4) or (5)): [x] (3) Enhances the effectiveness of a public transportation project and [x] (4) Relates physically or functionally **or** [ ] (5) Establishes New or Enhanced Coordination Between Public Transportation and other Transportation	New transit hub will take current on-street pulse timed-transfer operations and place then in a new covered and weather protected environment for a safer and more secure bus operation. Associated retail uses will add benefit to the transit rider by providing convenient access to day-to-day services such as postage center, dry cleaners, convenience store, restaurants and possibly social service offices. Parking will be used for transit, retail, housing. All associated uses will generate Program Income for the La Crosse MTU.
Revenue for Public Transportation (check (6)): [x] (6) Provides a Fair Share Revenue for Public Transportation that will be used for public transportation	Currently, the City is in negotiations with the Gorman Companies to let a Master Lease Agreement that guarantees the City a Fair Share of rent returns on both retail and parking stalls.
Reasonable Share of Costs (check (7) if applicable):	The City is creating a Common Interest Community to

☑ (7) Occupants to pay a reasonable share of the costs of the facility through rental payments and other means	oversee management and allocation of common area maintenance of the entire facility. Each entity (MTU, Gorman Retail, Gorman Housing and the Condo Association) will pay their Fair Share of on-going operations and maintenance costs of the facility.



Penthouse - NO Federal Funds

Residential Levels - NO Federal Funds

Parking Level - FTA / City Funds

Live/Work Housing - NO Federal Funds

1st Floor Retail Shell - FTA / City funds

Transit Station - FTA / City Funds

Busway - FTA / Ciyt Funds

Grand River Station - Construction Funding Allocations

Jul-10

CONTRACT

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SECTION 39
INSURANCE

Section 39.01. Ferry Operator, at no cost to NJT, from the Commencement Date and until the Expiration Date, shall maintain or cause to be maintained, the following insurance:

(a) A Marine Protection and Indemnity (including Pollution Liability) policy, to a limit of liability in an amount no less than twenty million dollars ($20,000,000), per occurrence, combined single limit, insuring against claims, suits, demands or judgments by reason of personal injury, including death, property damage and excess collision liability arising out of the negligent management or navigation of any vessel or vessels owned by, or chartered by, Ferry Operator. The policy will include a Full 4/4ths Running Down and Collision clause, and a Mis-Directed Arrows clause for the benefit of NJT.

(b) A Commercial General Liability Insurance policy, including without limitation coverage for certain liabilities assumed under a contract or agreement for claims arising out of the operations, use and occupancy of the Demised Premises by the Ferry Operator and/or in connection with this Ferry Service Agreement, with a combined single limit for insurance against claims for bodily injury and property damage in an amount not less than five million dollars ($5,000,000) per occurrence/twenty million dollars ($20,000,000) annual aggregate. This insurance shall include coverage for acts of terrorism if such coverage is commercially available.

(c) Hull and Machinery Coverage providing coverage for claims arising out of personal injury, including bodily injury or death, or other third party liability, or property damage resulting from the use of ferry vessels used for operations conducted under, or in connection with, the Ferry Service and/or this Ferry Service Agreement. Coverage shall be no less broad than conditions set forth in the American Institute Hull Clauses (6/22/77) (except that collision coverage shall be provided for under the insurance required to be carried pursuant to paragraph (a) of this Section 39.01). Coverage shall be written for a combined single limit per occurrence for bodily injury and property damage of not less than the replacement value of the vessel.

(d) Statutory Worker's Compensation Insurance, United States Longshoremen's and Harbor Worker's Compensation

Insurance, Employer's Liability Insurance and protection for liability arising under the Jones Act and under General Maritime Law, for all persons employed in connection with the operations of the Ferry Operator, in an amount not less than one million dollars ($1,000,000), or as may be otherwise required by statute.

(e) Automobile Liability providing coverage for claims arising out of personal injury, including bodily injury and death, or property damage resulting from vehicles owned, hired, operated, maintained or used by Ferry Operator, whether commercial or private passenger vehicles, in connection with its operations under this Ferry Service Agreement. Coverage shall be written for a combined single limit per occurrence for bodily injury and property damage of not less than one million dollars ($1,000,000) per occurrence, two million dollars ($2,000,000) aggregate per policy year. If buses are used to transport passengers in conjunction with this Ferry Service, then coverage shall be written for a combined single limit per occurrence for bodily injury and property damage of not less than twenty million dollars ($20,000,000).

(f) Such other insurance, in such amounts as from time to time reasonably may be required by NJT, to be carried by Ferry Operator against such other insurable hazards as at the time are commonly insured against in the case of ferry service operations.

Section 39.02. All policies of insurance required by this Article shall contain the terms and conditions of policies and endorsements available for such risks. Should other different or additional types of insurance or clauses thereafter become available, Ferry Operator agrees to furnish such new policies on demand of NJT. Ferry Operator further agrees to execute and deliver any additional instruments and to do, or cause to be done, all acts and things that may be requested by NJT to properly and fully insure NJT against all damage and loss as herein provided for and to effectuate and carry out the intents and purposes of this Ferry Service Agreement.

All of the limits of insurance required pursuant to Section 39.01 shall be subject to review by NJT and, in connection therewith, Ferry Operator shall carry, or cause to be carried, such additional amounts as NJT may reasonably require. NJT shall have the right, from time to time, to approve the amount of any loss deductible contained in any insurance policy required pursuant to Section 39.01, which approval NJT shall not

unreasonably withhold. The obligations of Ferry Operator hereunder shall survive termination of this Ferry Service Agreement.

Section 39.03. In addition to terms and conditions in Sections 39.01 and 39.02, the following terms and conditions shall apply, and shall be written into all policies of insurance required by this Ferry Service Agreement:

(i) The policies shall not be canceled, terminated, or modified unless thirty (30) days prior written notice is sent by registered mail to the Ferry Operator and NJT.

(ii) The presence of inspectors, employees, or agents of NJT on the Demised Premises or on vessels, pursuant to this Ferry Service Agreement, shall not invalidate any policy of insurance.

(iii) No act or omission of the Ferry Operator shall affect or limit the obligation of the insurance company to pay the amount of any loss sustained to NJT.

SECTION 40
INDEMNITY

Section 40.01. Ferry Operator, at its sole cost and expense, will indemnify, defend and save harmless the United States Department of Transportation, the State of New Jersey, NJT, its subsidiaries, Port Imperial South, L.L.C., their agents, officials, officers, members, contractors, principals, tenants, successors, heirs, assigns, and employees (the "Indemnified Parties") from and against any and all claims, liability, loss, cost, expense, judgment, damage, fine, violation, government order or other penalty brought against or imposed upon the Indemnified Parties, including attorney's fees and expenses incurred in connection therewith, regardless of Ferry Operator's fault, and whether foreseen or unforeseen, including, but not limited to, claims of negligence, for personal injury, including death, or property damage arising (1) directly or indirectly out of or in connection with Ferry Operator's use of the Demised Premises, or (2) as a consequence, directly or indirectly, of any breach or non-performance by Ferry Operator of its obligations under this Agreement, or any act or failure to act of the Ferry Operator in connection with Ferry Operator's performance or non-performance of such obligations for the use of the Demised Premises. NJT will give prompt notice, including copies of all papers and other process

LICENSE AGREEMENT

THIS LICENSE AGREEMENT (the "Agreement"), is made and entered into as of January 1, 2011 (the "**Effective Date**") by and between THE CONNECTICUT POST LIMITED PARTNERSHIP, a Connecticut limited partnership ("**Grantor**"), with its principal place of business at 11601 Wilshire Blvd., 11th Floor, Los Angeles, California 90025 and the MILFORD TRANSIT DISTRICT ("**MTD**"), a quasi municipal entity pursuant to Connecticut Statute Section 103a, having an address of 259 Research Drive, Milford, Connecticut.

RECITALS

1. WHEREAS, the Grantor is the owner of the real property located at 1201 Boston Post Road, in the City of Milford, County of New Haven, State of Connecticut (the "**Property**") where it operates an existing retail shopping center commonly known as "Westfield Connecticut Post."

2. WHEREAS, MTD owns and operates a public bus system which services the City of Milford and the surrounding region including, but not limited to, the Property.

3. WHEREAS, MTD currently maintains and operates a bus stop ("**Existing Bus Stop**") on the Property in the location identified on Exhibit A attached hereto ("**Bus Stop Plan**") which is also used by the Norwalk Transit District, the Greater Bridgeport Transit Authority and the New Haven Division of CT Transit (collectively "**Other Area Operators**").

4. WHEREAS, the parties hereby acknowledge that the Existing Bus Stop is an important asset for the Grantor, the City of Milford, MTD and the Other Area Operators. The parties also acknowledge however that, the long term highest and best use for both the Grantor and the City of Milford for the portion of the Property where the Existing Bus Stop is located is for commercial retail use.

5. WHEREAS, the parties desire to remove the Existing Bus Stop and locate a new bus stop in the location identified on Exhibit B ("**Proposed Bus Stop**").

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements hereinafter set forth, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Grantor and the MTD do hereby covenant and agree as follows:

1. Licenses; Term.

A. Subject to the terms and conditions contained herein and solely for the purposes hereinafter set forth, the Grantor hereby grants to MTD a non-exclusive license to use that portion of the Property identified on Exhibit B as the Proposed Bus Stop solely for the purpose of constructing, operating, maintaining, and repairing the Proposed Bus Stop (the "**License**"). The License shall also include a non-exclusive right of ingress and egress through and upon the Property to and from East Town Road and the Proposed Bus Stop which shall permit MTD and

the Other Area Operators ingress and egress to the Proposed Bus Stop; provided however that buses may be temporarily rerouted through the Property in emergency situations as deemed appropriate by the Grantor and MTD. The bus route is described on the site plan attached hereto as Exhibit B. Any changes to the bus route shall be previously approved by Grantor.

B. The term of the License shall commence on the Effective Date and shall expire on the date that is the twentieth (20th) anniversary of the Effective Date.

C. The Grantor also hereby grants to MTD a non-exclusive license to complete those improvements of the existing pedestrian pathway between the Proposed Bus Stop and the pedestrian walkway surrounding the primary mall building complex, as depicted on the Bus Stop Plan. Any improvements to be located on the Property shall be previously approved by Grantor.

D. Limitations.

(i) With the exception of MTD vehicle(s) and Other Area Operator vehicle(s) awaiting a transit bus so as to accommodate a change in bus drivers, or MTD vehicles parked as a part of conducting MTD Bus Stop related business, which shall not exceed six (6) vehicles at any given time, the license granted herein is expressly limited to the bus service set forth on the bus schedule attached hereto as Exhibit C (**"Bus Schedule"**). Any change in the Bus Schedule shall be approved by the Grantor in writing which approval shall not be unreasonably withheld.

(ii) The unloading and loading of the MTD buses shall be limited to the Proposed Bus Stop, and no other area on the Property shall be used for such purpose.

(iii) MTD shall coordinate all bus schedules so as to ensure that, to the extent feasible, buses do not remain at the Proposed Bus Stop in excess of fifteen (15) minutes at any given time while unloading and loading passengers.

(iv) Buses are prohibited from utilizing for ingress or egress any entrance to the Property located on Boston Post Road except in emergency situations as agreed upon by Grantor and MTD.

2. Construction; Security.

A. MTD shall cause the removal of the Existing Bus Stop and shall construct and install the Proposed Bus Stop on or prior to , The design and specifications of the Proposed Bus Stop shall be previously approved by Grantor. All work undertaken by MTD or its contractors, subcontractors and other agents in connection with the construction of the Proposed Bus Stop and the removal of the Existing Bus Stop shall be subject to the terms and provisions of this Agreement and shall be undertaken and completed in a good and workmanlike manner by qualified personnel and contractors. MTD shall warrant to Grantor that the construction work will conform with the requirements of this Agreement and all applicable laws

and regulations. Any and all access to the Property shall be coordinated with Grantor's employees prior to such access and Grantor shall have the right to accompany MTD and its contractors.

B. Upon completion of all installation and construction work in connection with the Proposed Bus Stop, MTD shall deliver to Grantor a written statement certified as accurate by a duly authorized officer of MTD and shall include all the hard costs incurred by Lessee in connection with the design, construction and installation of the equipment and improvements related to the Proposed Bus Stop and reasonable back-up documentation evidencing in detail the expenses and costs incurred by MTD (collectively, the **"Installation Costs"**). As of the Effective Date, the Installation Costs are estimated to equal $425,000.

C. Grantor shall have no responsibility to provide security, supervision or protection against any loss that may be sustained by MTD or its personnel, contractors, or subcontractors. Any security required by MTD must be provided by MTD at MTD's expense and utilizing a security company approved by Grantor's representative.

3. Maintenance / Indemnity / Insurance/ Release.

A. With the exception of routine trash removal, cleaning, maintenance and graffiti removal of the Proposed Bus Stop shelter(s) and bench(es) MTD shall perform any and all maintenance, repair, painting and replacement, of any portion of the Proposed Bus Stop, including the shelter(s) and bench(es), and associated landscaping and lighting, all in accordance with Grantor's standards. Grantor shall provide electricity in the parking areas surrounding the Proposed Bus Stop in its normal course of business and any additional electricity required by MTD for the operation of the Proposed Bus Stop shall be provided for by the Grantor in accordance with the Bus Schedule. MTD shall also paint, repair and replace the bus shelter(s) and bench (es), including related amenities thereto, consistent with the standards required by Grantor. MTD shall perform all of its maintenance and repair obligations promptly and in a reasonable manner and in compliance with all applicable laws, regulations, and statutes, including the Americans with Disabilities Act. In the event MTD fails to perform such maintenance, painting, repair or replacement, the Grantor shall give MTD written notice stating in particularity the manner in which MTD has failed to perform such obligation(s). If MTD fails to commence to perform or to perform such painting, repair or replacement within five (5) business days after receipt of the Grantor's notice, and fails to use best efforts to complete such work as soon as practicable, then the Grantor shall have the right to perform such repair on the MTD's behalf, and the MTD shall pay the actual costs thereof, after MTD's receipt of an invoice therefore, to the address indicated herein.

B. MTD shall indemnify, defend and hold harmless the Grantor and its affiliates, partners, agents, representatives, subsidiaries and employees, from and against all loss, claims, liability, cost or expense including attorneys' fees arising from or as the result of bodily injury,

death, and property damage occurring upon, in or about the Property (collectively, "Claims") arising out of, inter alia,:

(v) Any acts or omissions by MTD's officials, officers, contractors, subcontractors, employees and agents; or
(vi) MTD's construction, painting, repair, replacement, operation, use and/or repair of the bus shelter(s), benches, kiosks and amenities related thereto, including, but not limited to, the installation, use, maintenance, operation, existence, and/or removal of the Existing Bus Stop and the Proposed Bus Stop or otherwise caused by MTD or any of its affiliates, members, employees, contractors, subcontractors, agents and representatives; or
(vii) MTD's officials, officers, contractors, subcontractors, employees and agents use of the Existing Bus Stop, the Proposed Bus Stop and/or any common areas within the Property.

The foregoing indemnity by MTD shall survive the expiration or termination of this Agreement as to any Claims arising out of an event occurring prior to the expiration or termination of this Agreement.

C. MTD shall acquire, maintain and keep in effect, or cause to be acquired, maintained and kept in effect, during the duration of this Agreement the following insurance policies:

(i) Commercial general public liability insurance, including bodily injury and property damage liability, with limits of not less than Ten Million Dollars ($10,000,000) each occurrence and in the aggregate, which Commercial General Liability policy shall include products/completed operations liability coverage with a separate aggregate limit of not less than $1,000,000 and personal and advertising injury coverage with a separate limit of not less than $1,000,000, and contractual liability coverage. MTD may maintain a deductible, not to exceed Five Hundred Thousand Dollars ($500,000.00), with respect to the insurance required to be carried by MTD pursuant to this Subsection 3.C.1, provided, however, MTD shall be responsible for the payment of any deductible or self-insured retention amounts and the defense and indemnity obligations set forth in this Agreement in the event that an insurer does not participate in the defense and/or indemnity of a claim tendered by Grantor pending exhaustion of a deductible or self-retention amount, it being the intent of the parties that Grantor shall be fully insured from the first dollar of any claimed loss.
(ii) Automobile liability insurance in the amount of Five Million Dollars ($5,000,000.00) per occurrence for bodily injury and for property damage combined.
(viii) Statutory Worker's Compensation insurance as required by the laws of the state in which the Property is located.

(ix) Property insurance for damage or loss to MTD's assets including tools, equipment, supplies and temporary structures required for operating the Proposed Bus Stop.
(x) Employer's liability in the amount of $1,000,000 each accident, $1,000,000 each employee, $1,000,000 policy aggregate by disease.

D. Except for Workers Compensation, the insurance policies required herein shall name, by endorsement the following parties as additional insureds: "The Connecticut Post Limited Partnership, Westfield America Limited Partnership, Westfield, LLC, Westfield America, Inc. and any and all of their respective parents, partners, subsidiaries, affiliates, employees, agents, officers and representatives, together with any mortgagee from time to time of Grantor's interest, are named as an additional insured, as their interests may appear". The Commercial General Liability policy shall contain a provision that such policy shall be primary and any policies carried by any of the additional insured parties shall be excess and non-contributing. Additionally, the insurance policies must contain a waiver by the insurer of any right to subrogation and to the extent that MTD's insurance company pursues recovery against Grantor, MTD agrees to completely reimburse Grantor for any such losses.

E. The insurance policies required herein shall provide that the required coverages will not be canceled or materially reduced except by written notice to Grantor given at least thirty (30) days prior to the effective date of such cancellation or reduction. In the event the coverage evidenced by any of the certificate(s) is canceled or reduced, MTD shall procure new insurance policies, and shall furnish to Grantor before the effective date of such cancellation, certificates, and/or endorsements as set forth hereinabove, conforming to the above requirements.

F. MTD's insurance carriers shall recognize that the coverage afforded the additional insureds also applies to any limited or general partner(s) comprising the same. Said policies of insurance shall include the following language:

"... Insurance afforded to the additional insured(s) is primary and non-contributing with any other insurance as may be maintained by the additional insured(s). ...".

G. Prior to the utilization of the Proposed Bus Stop by MTD, MTD shall furnish satisfactory proof by certificate that the required insurance and endorsements has been procured and that Grantor and Manager have been named as additional insureds as respects all insurance policies required by this Section 2.C.

H. Notwithstanding anything to the contrary, the insurance required by Section 3.C. may be carried under any plan of self-insurance on the condition that MTD has and maintains adequate reserves or assets for the risks so self-insured against.

I. Unless otherwise prohibited by law, MTD, on behalf of itself and anyone claiming through MTD (including, but not limited to, its employees), hereby releases, and forever discharges Grantee and its affiliates, partners, officers, agents, representatives and employees from any and all damages, losses, claims, demands, liabilities, obligations, actions and causes whatsoever, whether known or unknown, whether liability be direct or indirect, liquidated or unliquidated, whether absolute or contingent, foreseen or unforeseen, suspected or unsuspected, anticipated or unanticipated, disclosed or undisclosed, and whether or not heretofore asserted, upon or by reason or as a result of the use of or access to the Property, so long as such loss or damage is not caused by the gross negligence or willful misconduct of any of Grantee or its affiliates, partners, officers, agents, representatives and employees.

4. No Park And Ride. Nothing in this Agreement is intended to permit nor create a park and ride facility at the Property. MTD shall use its best efforts and shall cooperate with the Grantor in preventing the common areas of the Property adjacent to the Proposed Bus Stop and the Existing Bus Stop from being used as a park and ride facility by the patrons of MTD and Other Area Operators.

5. Advertising Displays, Marketing and Vending. Grantor shall retain the exclusive right to construct, operate and maintain within the Proposed Bus Stop (i) static, electronic or illuminated advertising and marketing displays, (ii) Property marketing materials, and (iii) vending machines, and (iv) any other structures in Grantor's reasonable discretion. MTD shall retain the right to display within the area where the Proposed Bus Stop is located transit related materials including transfer information and bus route maps, as deemed appropriate by the MTD's Transportation Director. Any such material shall be previously approved by Grantor.

6. Approvals. Any approval required herein shall not be unreasonably withheld or delayed. No approval shall be deemed given unless in writing and signed by the party whose approval is required.

7. Termination. This Agreement and the licenses granted herein shall terminate and be of no further effect upon expiration of the Term of this Agreement ("**Expiration Date**"), unless earlier terminated, modified or extended pursuant to the provisions of this Agreement or mutual consent of the parties. This Agreement may be terminated earlier than the Expiration Date only by:

(i) Cessation of use of the Proposed Bus Stop for more than six (6) continuous months by MTD after written notice of termination from the

Grantor to MTD of such apparent cessation and providing MTD the opportunity to reactivate MTD's use of the Proposed Bus Stop within thirty (30) days after Grantor sends notice of its intent to terminate; or

(ii) A breach of this Agreement by MTD which is not cured within twenty (20) days after receipt of written notice of such breach from the Grantor.

(iii) Grantor shall have the right to require MTD to relocate the Proposed Bus Stop to another site on the Property that is agreeable to both parties and the cost of such relocation shall be borne by Grantor. The new site must provide for amenities that are equal to the site where the Proposed Bus Stop is located. If the parties cannot agree on an alternate site or it is not feasible to provide another site or equal amenities, Grantor shall have the right to terminate this Agreement; provided, however, Grantor shall pay MTD a termination fee equal to the amortized value of the Installation Costs based on the remaining useful life of the facility.

8. Liens. MTD shall not suffer or permit any liens against the Property resulting from the activities of the Proposed Bus Stop and/or MTD.

9. Effect Upon Subsequent Parties. This Agreement and the obligations set forth herein shall be binding upon and inure to the benefit of the successors, assigns, heirs and legal representatives of the parties hereto.

10. Notices.

Any notice, demand, request, consent, approval, designation, or other communication ("notice") which any party is required or desires to give or make or communicate to any other party shall be in writing and shall be given or made or communicated by United States Postal Service (USPS) certified mail, return receipt requested, address as follows:

A. Milford Transit District
259 Research Drive
Milford, CT 06460
Telephone: 203-874-4507
Attention: Executive Director

B. Grantor: Westfield, LLC
11601 Wilshire Boulevard, 11th Floor
Los Angeles, California
90025-1748
Telephone: (310) 478-4456
Attention: Legal Department

With a copy to: Mall Manager
Westfield Connecticut Post Mall
1201 Boston Post Road
Milford, CT 06460

Each party may designate a different address by notice similarly at anytime during the Term. Any notice so sent shall be deemed to have been given, made or communicated, as the case may be, on the date the same was deposited in the USPS mail as certified mail, return receipt requested, with postage thereon fully prepaid.

11. Interpretation.

The parties hereby acknowledge:

A. This Agreement represents the negotiated terms, covenants, conditions and obligations of the parties; and

B. The party responsible for drafting any such term, covenant, condition or obligation shall not be prejudiced by any presumption, canon of construction, implication or rule requiring construction/interpretation against the party responsible for the same.

12. Counterparts.

This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, and all such counterparts shall constitute one and the same instrument. The signature of a party to any counterpart may be removed and attached to any other counterpart. Any counterpart to which is attached the signatures of all parties hereto shall constitute an original of this Agreement.

13. Attorney Fees.

If any action at law or in equity is commenced to enforce or interpret the terms of this Agreement, then the prevailing party shall be entitled to recover reasonable attorney's fees (including allocated costs for in-house attorney's fees as the court may adjudge reasonable), costs and necessary disbursements incurred therein by the prevailing party, including, without limitation, any such fees, costs or disbursements incurred on any appeal from such action or proceeding in addition to any other relief to which such party may be entitled.

14. Governing Laws And Scope Of Agreement.

This Agreement shall be governed pursuant to the laws of the State of Connecticut. This Agreement constitutes the entire agreement between the parties regarding its subject matter. If any provision or portion of a provision is held by a court to be invalid, void or unenforceable, then the remaining provisions and portions thereof shall nevertheless continue in full force and effect.

15. No Partnership.

Nothing contained in this Agreement or any acts of the parties hereto shall be deemed or construed to create the relationship of principal and agent, or a partnership, joint venture or any association between the parties.

16. Not A Public Dedication.

Nothing herein contained shall be deemed to be a gift or dedication of any portion of the Property to the general public or for the general public or for any public purpose whatsoever, it being the intention of the parties hereto that this Agreement shall be strictly limited to and for the purposes herein expressed and strictly for the benefit of the parties hereto. Notwithstanding anything to the contrary, the Grantor shall have the right to place along, under, across and over the Proposed Bus Stop electric light and power lines, water lines, sewer lines, gas lines, cable lines and other utilities provided such installations do not unreasonably interfere with the Proposed Bus Stop, and such installations meet all applicable regulations.

17. Assignment.

The License and this Agreement may not be assigned or otherwise transferred or encumbered by MTD, nor may any portion of the premises where the Existing Bus Stop or the Proposed Bus Stop be subleased or sublicensed by MTD, without Grantor's prior written approval, which Grantor may withhold in its sole and absolute discretion.

IN WITNESS WHEREOF, this Agreement shall become fully excuted as of the Effective Date.

GRANTOR

THE CONNECTICUT POST LIMITED PARTNERSHIP, a Connecticut limited partnership

By: Connecticut Post Mall LLC, a Delaware limited liability company, its general partner

By: Westfield America Limited Partnership, a Delaware limited partnership, its sole member

By: Westfield U.S. Holdings, LLC, a Delaware limited liability company, its general partner

By: _____
Name: _____
Title: General Manager

MILFORD TRANSIT DISTRICT

By: _____
Name: Anthony Piselli, Sr.
Title: Chairman of the Board
Date: 8/14/12 ~~2011~~ 2012

Approved As To Form:

By: _____
Name:
Title:
Date: _____, 2011

By: _____
Name:
Title:
Date: _____, 2011

JM/abn

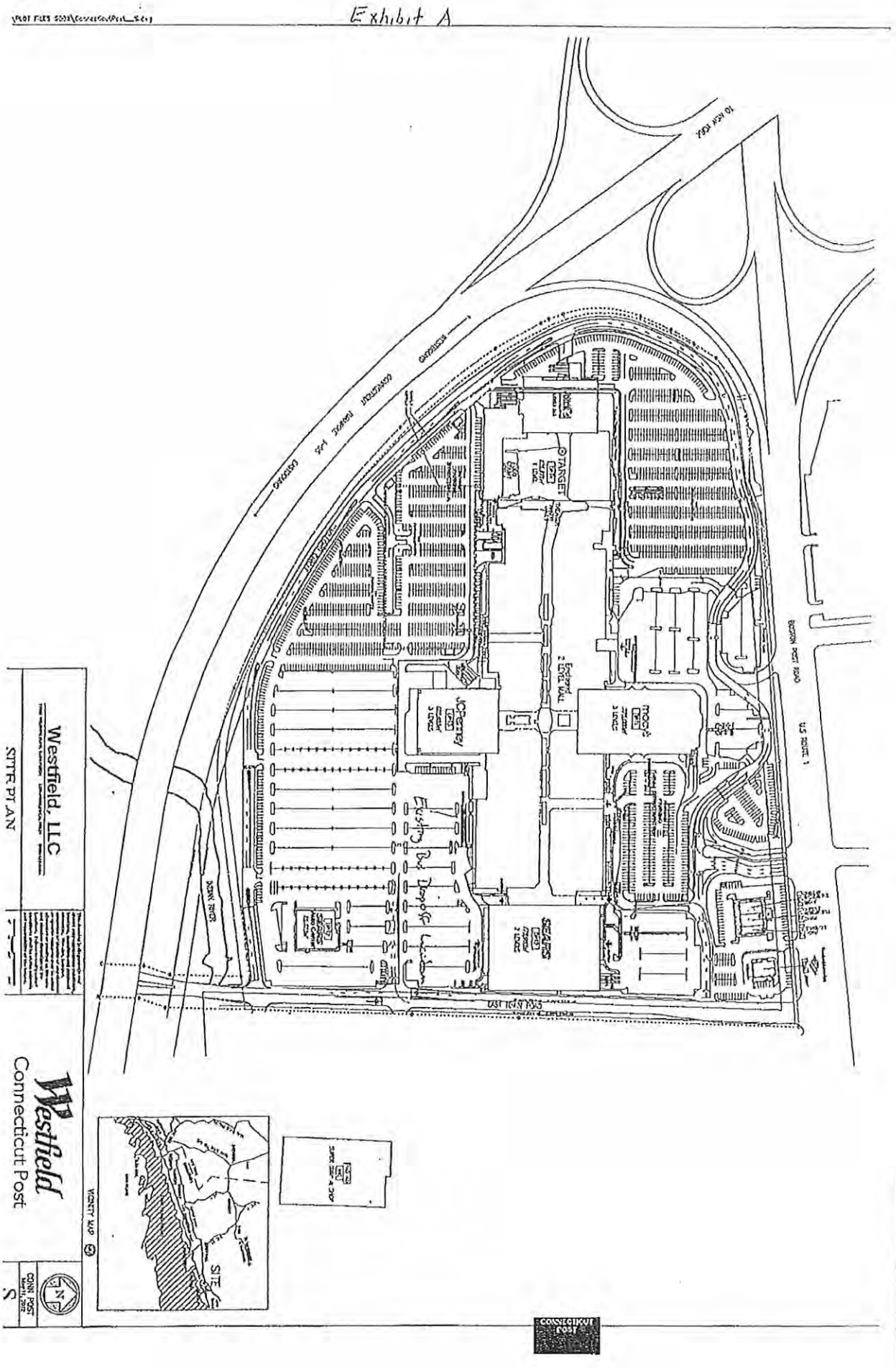
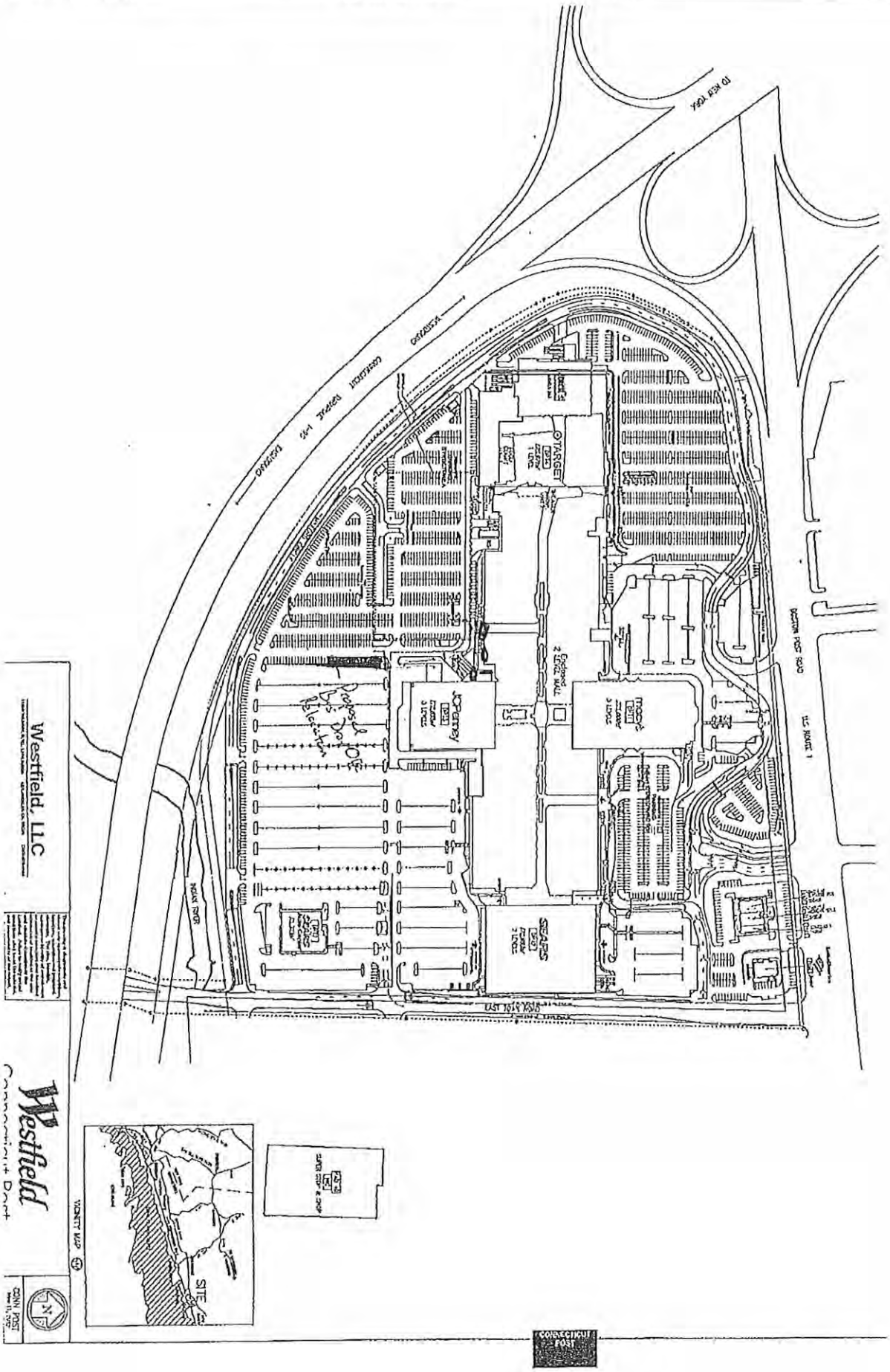


Exhibit B



Milford Transit District/Westfield Connecticut Post
Bus Stop Nonexclusive License Agreement Extension
Draft as of May 15, 2012
Page 13

EXHIBIT "C"

BUS SCHEDULE

JOINT DEVELOPMENT AGREEMENT
for the
HOLYOKE MULTIMODAL TRANSPORTATION CENTER
among the
PIONEER VALLEY TRANSIT AUTHORITY,
CITY OF HOLYOKE and HOLYOKE INTERMODAL FACILITY, LLC

THIS Joint Development Agreement ("Agreement") is made this 30th day of July, 2007, by and among **PIONEER VALLEY TRANSIT AUTHORITY**, a body politic and corporate, and a political subdivision of the Commonwealth of Massachusetts, established pursuant to the provisions of Chapter 161B of the General Laws of Massachusetts, with a usual address of 2808 Main Street, Springfield, Massachusetts 01107, hereinafter referred to as the "PVTA," the **CITY OF HOLYOKE**, a municipal corporation, with principal offices at 536 Dwight Street, Holyoke, Massachusetts, hereinafter referred to as the "City," and **HOLYOKE INTERMODAL FACILITY, LLC,** a Massachusetts limited liability company, with a usual place of business at 1776 Main Street, Springfield, Massachusetts, hereinafter referred to as the "Developer."

Preliminary Statement

A. The Joint Development shall consist in part of the conveyance by the City to the Developer of a parcel of land, including a building formerly used by the City as the central fire station (the "Fire Station Parcel"), the Developer's renovation and improvement of the Fire Station Parcel, and its conversion into the Holyoke Multimodal Transportation Center (the "HMTC") located on the ground floor of the building, and privately-owned commercial retail and office space on the balance of the ground floor and the three upper floors. The HMTC portion of the Project shall be leased to the PVTA and operated by the PVTA for transit purposes. In addition, the City, acting by and through the PVTA pursuant to a Memorandum of Understanding

to be executed, shall design, construct, own and operate a multi-level parking facility (the "Parking Facility") to be located on City-owned land adjacent to the Fire Station Parcel (the "Parking Parcel"), including within the Parking Facility on the ground level bus berthing bays to serve the transit needs of the PVTA and intercity bus operations of Peter Pan Bus Lines, Inc. and others. The design of the Parking Facility shall provide for direct access between the HMTC and the bus berthing bays, as well as direct access between the public parking areas and the HMTC building. Together, the foregoing improvements shall be referred to as the "Project." The renovations to the Fire Station Parcel and the construction of the Parking Facility as provided herein shall be individually referred to as the "Fire Station Improvements" and "Parking Improvements" and collectively as the "Improvements", as the context requires.

B. The City owns property at 206 Maple Street in Holyoke, MA, consisting of the Fire Station Parcel and an adjoining parcel of land, the Parking Parcel, collectively the "Project Area".

The development of the Project Area pursuant to this Joint Development Agreement is in the public interest based on the following:

- Because of prevailing economic conditions in the vicinity; only through a public-private partnership is it likely that the Project Area can be revitalized.
- Holyoke transit services currently run with no centralized hub where passengers can make convenient connections. In fact, eight bus routes of the PVTA stop in the vicinity of the Project Area, which is the PVTA's second most heavily used location in the City. Currently, this location offers no significant shelter and no services.
- Currently there is no centralized hub where Holyoke transit lines meet intercity bus services provided by Peter Pan Bus Lines, Inc.

- Currently, adult education facilities and Head Start facilities in Holyoke are located in areas which have limited transit service and people interested in utilizing such community services would benefit from improved access to public transportation.

C. The multimodal transportation facility contemplated by this Agreement would:

- Involve a public-private partnership in the development of the Project Area;
- Create a centralized transit hub with needed amenities;
- Provide a centralized hub for connecting transit with intercity bus services; and
- Provide adult education and Head Start services in a location accessible to those most in need of such services.

D. The Developer was organized for the purpose of promoting, facilitating, coordinating, participating in and carrying out development of the Fire Station Parcel in coordination with the development of the Parking Parcel by the PVTA and the City, and for continued ownership of the Fire Station Parcel Improvements.

E. The Parties to this Agreement acknowledge that substantial funding for the development of this Project is being provided by the United States Department of Transportation, Federal Transit Administration (the "FTA"), pursuant to the 2003 FTA Master Agreement which is incorporated herein by reference, and by the Massachusetts Executive Office of Transportation and Public Works (the "EOTPW"), pursuant to a Grant Agreement which is also incorporated herein by reference. The Parties further acknowledge that the PVTA shall be the Grantee of the FTA and the EOTPW for the public funding to be employed in the development of the Project. To the extent Federal and/or state funds are designated for the performance of any activities to be carried out by the City or the Developer under this Agreement, the City and the Developer shall

act in the capacity of subgrantees under the terms and conditions of each funding entity's grant agreements. This Agreement shall at all times be construed and performed so as to enable the PVTA to fulfill its statutory and contractual obligations to the FTA and EOTPW as the Grantee, and to provide for the PVTA's ongoing control of that portion of the Project known as the HMTC so as to ensure that it is used for transportation and transportation-related purposes consistent with the requirements of FTA, and in particular with the "Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law," as adopted on February 7, 2007, 72 FR *5788* ("FTA Guidance") which is incorporated herein by reference. It is further contemplated by the Parties to this Agreement that the office space to be constructed on the second, third and fourth floors of the former fire station building shall be leased to Holyoke Community College, a Massachusetts public institution of higher education, with principal offices at 303 Homestead Avenue, Holyoke, MA ("HCC") to be used as a central location for adult literacy programs, and to Holyoke-Chicopee-Springfield Head Start, Inc., a Massachusetts not-for-profit corporation with principal offices at 30 Madison Avenue, Springfield, MA ("Head Start") for the provision of daycare services to the community. Costs associated with the accommodation of both of the foregoing community services are recognized as eligible for funding under a joint development pursuant to the FTA Guidance. This Agreement sets forth the actions that both the public and private parties to this Agreement (the "Parties") are required to take in furtherance of the development of the Project which includes, without limitation, the following:

(a) The PVTA, through an open and competitive process in compliance with its procurement procedures, selected the Developer to undertake the Project. Following the developer selection process, the City, through its City Council, authorized the Mayor to convey the Fire Station Parcel to the Developer for One Dollar ($1.00).

(b) As set forth in Section 5.2, below, The Developer shall perform any and all additional necessary environmental remediation so that the use of the Fire Station Parcel shall comply with all Environmental Laws. The City shall perform all necessary environmental remediation so that the use of the Parking Parcel shall comply with all Environmental Laws.

(c) The City shall work cooperatively with the Developer to obtain approval of a fifteen year tax increment financing arrangement (the "TIF Agreement") which will result in the Developer paying no real estate taxes on the Fire Station Parcel in the first year and thereafter paying an average of $20,000 per year.

(d) The City shall retain ownership of the Parking Parcel and, in cooperation with the PVTA, shall develop the Parking Improvements at no cost to Developer, who, except for the Administrative Services to be provided with respect to the development of the Project, shall have no obligation whatsoever with respect to the Parking Parcel or the Parking Improvements. The Parking Improvements to be constructed will also include the removal of the bus shelters located across Maple Street from the Fire Station building adjacent to Veterans Park, which structures serve the current transit operations of the PVTA in the Project area. In addition, the Project will include the repair and restoration of the public sidewalk adjacent to the bus shelters and Veterans Park. The City acknowledges that the Parking Improvements are being constructed as an integral part of the HMTC development and that funding for this purpose is being provided by the FTA and the Commonwealth through the PVTA in order to provide for the safe off-street loading and unloading of transit, paratransit and intercity bus passengers, for safe access and egress from the HMTC for buses and private vehicles, and to provide parking for transit, paratransit and intercity bus users (the "Bus Berthing and Transit-related Parking Area"). In consideration of the funding provided through the PVTA for the development of the Parking Parcel, the City agrees to provide

the PVTA an easement allowing for the use of the Parking Parcel for the above- described purposes. The easement shall provide for no less than thirteen (13) dedicated parking spaces in the Parking Facility for the use of transit, paratransit and intercity bus customers, such spaces to be clearly marked by the City with appropriate signage indicating the dedicated use.

(e) Forthwith after the signing of a construction contract by the Developer and receipt of joint written notice from the Developer and the PVTA, the City shall convey the Fire Station Parcel to the Developer, subject to a record interest running with the land for the benefit of the PVTA providing for the perpetual preservation of transit uses at the Fire Station Parcel. The deed to the Developer shall also include a reverter to the City in the event the Developer abandons the Project for any reason prior to the completion of construction of the Fire Station Improvements.

(f) The City, acting through the PVTA, shall select a designer for the Parking Improvements in accordance with Massachusetts General Laws Chapter 7, Section 38A ½ - 38O (the "Designer Selection Law"), and enter into a design contract. The Designer Selection Committee convened by the PVTA shall include a representative of Developer. The Parking Improvements consist of: A multi-level structure providing for direct access from Maple Street for buses, paratransit vehicles and private automobiles. The ground level shall consist of a bus terminal providing approximately seven bus berths for the loading and unloading of passengers. Above the bus terminal, the structure shall provide for two levels of public parking with a total of approximately eighty (80) parking spaces. Of the eighty parking spaces, thirteen (13) spaces will be transit-related and will be provided on both the bus terminal level and the second floor as needed. The remaining sixty-seven (67) parking spaces not related to transit use will be located on the second and third floors and will be available for public parking, including parking for non-

transit related occupants of the Fire Station building. Direct access from the Parking Facility to the HMTC shall be provided on the bus terminal level and on at least one of the upper parking levels. Said design contract shall require that the design of the Parking Improvements be consistent with the Fire Station Improvements as determined by the Design Review Committee which is described in Paragraph 6.1, below. The design contract shall include the provisions of Federal law deemed applicable to Joint Development projects as defined in the FTA Guidance, and all applicable contract provisions required by the FTA for federally-assisted transit projects.

(g) Upon approval from the Design Review Committee, receipt of approval of the necessary EOTPW and FTA funding and receipt of leases between the Developer and the HCC and the Developer and Head Start, respectively, the PVTA, on behalf of the City, shall publicly bid the construction of the Parking Improvements in accordance with Massachusetts General Laws Chapter 149, §§ 44A-44M and all other applicable provision of the Massachusetts General Laws, and shall enter into a construction contract. The PVTA shall include in all construction contracts and subcontracts of any tier, the provisions of Federal law deemed applicable to Joint Development projects as defined in the FTA Guidance and all applicable contract provisions required by the FTA for federally-assisted transit projects.

(h) The Fire Station Improvements shall be designed by a professional selected by the Developer in accordance with FTA requirements and the Designer Selection Law, including, to the extent applicable, consistency with the Secretary of the Interior's Standards for the Treatment of Historic Properties as indicated in the Project's "Finding of No Significant Impact" expressed in a letter from the FTA Regional Director to the Administrator of the PVTA dated August 13, 2004, a copy of which is attached as Exhibit A. The Designer Selection Committee convened by the Developer shall include a representative of the PVTA. The design of the Fire

Station Improvements to be funded with FTA grant funds shall be generally consistent with the "Preliminary Design Report for the Holyoke Multimodal Transportation Center" prepared for the PVTA and dated June, 2003 a copy of which is incorporated herein as Exhibit B, unless otherwise approved by the Design Review Committee subject to Section 6.2 below. Prior to the solicitation of bids for the construction of the Fire Station Improvements, the Developer shall provide the PVTA with written notice of the commitment of the private funding, indicating the source and amount of all such funding. The construction of the Fire Station Improvements shall be in accordance with Massachusetts Public Bidding Law and the Massachusetts Prevailing Wage Law. The solicitation of bids for the construction of the Fire Station Improvements shall include notice of project funding provided by the FTA and shall also include the provisions of Federal law deemed applicable to Joint Development projects as defined in the FTA Guidance and all applicable contract provisions required by the FTA for federally-assisted transit projects. The Developer, upon receipt of PVTA notice of availability of the necessary public funding, execution of the Leases with HCC and Head Start and availability of necessary private financing, shall enter into a construction contract with the selected General Contractor. The Developer shall include, or cause to be included, in all construction contracts and subcontracts of any tier, the provisions of Federal law deemed applicable to Joint Development projects as defined in the FTA Guidance and all applicable contract provisions required by the FTA for federally-assisted transit projects.

F. The estimated costs of the implementation of the joint development plan by the Developer and the City/PVTA, respectively, including the construction of the Project Improvements are set forth on Exhibit C which also sets forth the sources and uses of funds to cover such costs. FTA and EOTPW funding available for the design and construction of the Fire

Station Improvements shall be allocated first to the renovation of the Fire Station building shell and to the build-out of the HMTC as indicated in Exhibit B and consistent with the Project Budget in Exhibit C, including a reasonable construction contingency for such purposes. Eligible non-transit costs, specifically the build-out of the Head Start space, may be constructed with FTA funding to the extent that any such funds remain uncommitted for the primary building improvements and transit-related elements of the Project. In the absence of sufficient FTA funding for such purpose, the Developer shall fund such costs. In the event that FTA funding is utilized for the build-out of any leased space on the second, third or fourth floors of the Fire Station building originally to be occupied by an entity providing eligible community services, such space shall continue to be leased for community services for the useful life of the Improvements so financed, unless otherwise authorized by the FTA. FTA funding for the Parking Improvements shall be expended solely for such purpose, and shall not be otherwise allocated or transferred to other aspects of the Project without the prior written approval of the FTA.

G. Upon completion of the Project Improvements:

(a) The City shall continue to own and operate solely at its cost the Parking Parcel and Parking Improvements, either directly or through any operations contract for City parking facilities as may exist from time to time during the useful life of the Parking Improvements, including the provision of security for the Parking Facility to the same extent as is provided for other City parking facilities. The City shall be responsible for the future maintenance of the Parking Improvements, including specifically the removal of snow and ice from the access and egress driveways and bus berths included in the Parking Improvements so as to allow for the safe operation of the transit and intercity bus operations of the HMTC and the parking related thereto.

Developer shall have no obligation whatsoever with respect to the Parking Parcel and Parking Improvements. The PVTA shall exercise control over the Bus Berthing and Transit-related Parking Area pursuant to the easement provided by the City.

(b) The Developer shall continue to own the Fire Station Parcel and Fire Station Improvements. The Developer shall lease the upper floors of the Fire Station Unit to the HCC and to Head Start, upon the terms set forth in Exhibit D, attached to this Agreement which is incorporated herein, and to commercial tenants on the nontransit-related areas of the ground floor. The area leased to the PVTA, to consist of approximately three thousand (3,000) square feet on the ground floor, shall be known as the Holyoke Multimodal Transportation Center (HMTC), and shall be maintained by the PVTA thereafter as a hub for regional transit operations. The said lease shall be in substantially the form attached hereto as Exhibit E. In furtherance of the multimodal character of the HMTC, the PVTA shall also accommodate within the bus berthing area, one bus bay dedicated for the use of Peter Pan Bus Lines, Inc. and other such carriers as authorized by PVTA to support intercity bus operations. The lease to the PVTA shall include provisions governing the operations, management and maintenance of the HMTC, including without limitation an allocation of costs related to the performance of all tasks and services related thereto to be provided by the Developer.

(c) The uses of the Project Improvements eligible for funding under the FTA Guidance as cited above or similar eligible uses shall continue in perpetuity unless and until the PVTA waives this requirement in writing, subject to the prior approval of the FTA as may be required from time to time. If FTA funds are used for the construction of all or a part of the build-out of leasehold improvements for eligible community services, including the Head Start space, the cost of such leasehold improvements shall be depreciated over the useful life of the

improvements as determined by the FTA pursuant to Section 19 of the Master Agreement incorporated herein. In the event that Head Start vacates the leased space prior to the full depreciation of such FTA funded costs, and the space is leased thereafter for any purpose which does not qualify as an eligible community service, the Developer shall comply with the provisions of the Master Agreement, Section 19, g, Disposition of Project Property.

H. The Parties believe that the development of the Project pursuant to this Agreement and the fulfillment generally of the purposes of this Agreement are in the vital and best interests of the health, safety, morals and welfare of City residents, and in accord with the public purposes and provisions of the applicable Federal, state and local laws, regulations and other requirements under which the Project is being undertaken and is being assisted. Specifically, but not in limitation of the foregoing, the PVTA Advisory Board has determined that the terms of this Agreement, including the PVTA share of Net Operating Income and estimated increased revenues from public transportation, are commercially reasonable and fair to the PVTA, and that all such revenues shall be used by the PVTA to support transit operations. It is anticipated that the PVTA will receive additional revenue through added passenger traffic. That added passenger traffic will flow from three sources: the hubbing of all of the transit services at the transportation center; the location of the adult education and Head Start facilities at the transportation center; and the hubbing of intercity bus service with transit services at the transit center.

I. In connection with its sale of tickets for transit operations, the PVTA shall also sell tickets for the intercity bus operations of Peter Pan Bus Lines, Inc. originating at the HMTC. This service will be provided by the PVTA at no cost during the regular hours of operation of the PVTA's ticketing services, and for the sole benefit and convenience of Peter Pan Bus Lines Inc., provided that the PVTA continues to maintain a manned facility for the sale of transit tickets at

the HMTC. Prior to the sale of such tickets, the Developer shall provide the PVTA with a written agreement executed by an authorized officer of Peter Pan Bus Lines, Inc. indemnifying, defending and holding the PVTA harmless from and against any claims, actions, causes of action, demands, costs and expenses, including attorneys fees, related to personal injury, including death, or property damage arising out of the negligent or willful misconduct of Peter Pan Bus Lines, Inc., its officers, agents and employees in the operation of any of its intercity buses for which the PVTA sold tickets.

The PVTA has determined that all of these factors provide a fair share of revenue for PVTA.

Finally, the Developer and the PVTA hereby agree that all parties occupying space in the Fire Station Unit shall pay a pro rata share of the operating and maintenance costs of the building through rents or by other means. PVTA shall pay its share of building operating expenses, exclusive of any liability for real or personal property taxes, betterments and special assessments assessed against the Fire Station parcel, as provided in G.L. c. 161B, §13.

In furtherance of the foregoing and in consideration of the mutual promises contained herein, the Parties agree as follows:

ARTICLE 1

CERTAIN DEFINITIONS

For purposes of this Agreement, unless the context shall otherwise require or indicate, the terms set forth below shall be defined as follows:

1.1 "Effective Date" of this Agreement shall mean the date on which the Agreement is fully executed by all Parties as stated in the introductory paragraph above, and is approved by the FTA as provided in the FTA Guidance and the EOTPW.

1.2 "Environmental Laws" shall mean and include, without limitation, any and all Federal, state and local laws, regulations, codes, statutes, rules, decrees, licenses, permits, approvals or authorizations, ordinances, decisions, orders, statutes, standards, guidelines or requirements of any Governmental Authority relating to pollution or the environment, including without limitation laws and regulations relating to discharges, releases, migration, generation, storage, handling, disposal, transportation, use, a treatment, manufacturing, processing or threatened releases of any Hazardous Substances, all as the same have been and may be from time to time amended, and all regulations adopted and publications promulgated pursuant to or under any such statute, rule, law or ordinance and all requirements regarding petroleum storage tanks.

1.3 "Environmental Tests" shall mean all tests required to ascertain the environmental suitability of the Fire Station Parcel and the Parking Parcel with respect to Hazardous Substances, as hereinafter defined, which exist on, below or above the surface of the Leased Premises or any land contiguous thereto.

1.4 "Government Approvals" shall mean collectively:

(a) "Building Approvals", which means any and all permits, licenses, certificates, approvals, variance or waivers of any Federal, state, county, municipal or other governmental authority or quasigovernmental authority (including public or private utility suppliers), agencies, boards or offices having jurisdiction over the Project Area and/or the Project, duly issued in accordance with applicable governing laws, statutes, codes, rules and regulations required or advisable to permit construction of the Project Area Improvements, with all such approvals in form and substance reasonably satisfactory to the Parties to this Agreement, including without limitation construction, building and use permits, building signs, monument

sign and directional sign permits and utilities connection approvals, allocations and capacities; and

(b) "Land Use Approvals", which means any and all permits, licenses, certificates, approvals, variance or waivers of any Federal, state, county, municipal or other governmental or quasigovernmental authorities, agencies, boards or offices having jurisdiction over the Project Area.

(c) "Governmental Authorities" shall mean any Federal, state, county, municipal, local governmental or quasi-governmental agency, body, entity, court, administrative agency, bureau, department, board, commission, authority, institution (including without limitation those with jurisdiction over housing, fire, health, safety, labor, building, planning and zoning) or any other instrumentalities of the United States, any state or political subdivision thereof, or any other authority having jurisdiction over the subject matter in question.

1.5 "Hazardous Substances" shall mean "hazardous material" and "petroleum product", as defined in ass. General Law Chapter 21E.

1.6 "Laws" shall mean any and all applicable statutes, laws, regulations, rules and ordinances.

1.7 "Master Schedule" shall mean the schedule which is attached hereto as Exhibit F and made a part hereof, which sets forth the overall schedule for the performance by the Parties of their respective obligations pursuant to this Agreement in connection with the development of the Project Area.

1.8 "Net Operating Income" shall mean total gross rents collected in connection with the occupancy of the Fire Station Improvements less all operating expenses and reserves prior to payment of income taxes, depreciation and amortization of debt.

1.9 "Project" shall mean the construction of the Parking Improvements and the Fire Station Improvements as herein described.

1.10 "Zoning ordinance" shall mean the Zoning Ordinance of the City, as currently in effect and as amended from time to time.

ARTICLE 2

TERM

2.1 Overall Term. The term of this Agreement shall commence upon the Effective Date of the Agreement and, unless terminated according to the terms hereof, shall expire sixty (60) days following the date of final completion of the construction of the Project Improvements as determined by the PVTA, and to the extent required by Federal or state law or funding requirements of the FTA or EOTPW, as determined by said agency(ies).

ARTICLE 3

REDEVELOPMENT ACTIVITIES GENERALLY

3.1 Master Schedule. The Parties acknowledge and agree that the Master Schedule (Exhibit F) sets forth the various dates by which the Parties are required to perform certain obligations set forth in this Agreement in accordance with the terms of this Agreement and in furtherance of the overall goal of the development of the Project. The Parties agree that they shall each use their best efforts to perform all of their respective obligations pursuant to this Agreement within the time frames set forth on the Master Schedule, subject to the provisions of Paragraph 11.5 below relating to force majeure. The Parties agree that any party may propose an amendment to the Master Schedule by submitting any such proposal in writing to the other Parties together with the reason or reasons for requesting an amendment, and the Parties receiving any such request for a proposed amendment to the Master Schedule shall have a period of thirty (30) days from the date of receipt of any such request to respond in writing to the request

for a proposed amendment to the Master Schedule. The failure of a Party receiving any such request to object to any such request within such thirty (30) day period shall constitute such Party's approval of the requested change to the Master Schedule and the Master Schedule shall automatically be amended without further action.

3.2 Requirement for Effective Coordination of All Development Activities. The Parties acknowledge that the successful development of the Project Area in accordance with the provisions of this Agreement and applicable laws will require the Parties to work cooperatively and harmoniously for the purpose of coordinating the public and private components of the overall Project in order to achieve the efficient, timely, coordinated completion of the Project and the construction and installation of all of the Project Improvements. The Developer, City and the PVTA therefore agree to work cooperatively in furtherance of the overall goal of the development of the Project Area. In connection therewith, PVTA designates Sandra Sheehan as the PVTA Project Manager with primary responsibility for the Project; the City designates Kathleen Anderson as the individual acting on behalf of the City with primary responsibility for the Project; the Developer designates Michael Crowley as the individual acting on behalf of the Developer with primary responsibility for the Project (collectively, the "Project Coordinators"). The Parties agree that each shall seek input from the other party prior to changing its Project Coordinators, but no Party shall have the right to control the selection of another Party's appointee.

3.3 Provision of Administrative Services by Developer. The Parties agree that, in furtherance of the overall goal of the development of the Project Area, the Developer shall provide certain administrative services. The parties recognize that such services have value and are essential to the Project. The parties agree to use best efforts to negotiate and execute a

supplemental agreement providing for a reasonable fixed administrative fee based on specific services provided by the Developer, such as project management of the designer and contractor(s) activities, review and submission of invoices for payment by PVTA, etc.

ARTICLE 4

COMPLIANCE WITH FUNDING REQUIREMENTS

4.1 Financial Contribution of the Developer.

(a) The Developer agrees to contribute a significant amount of equity (the "Private Financial Contribution") toward the cost of the Project which shall not be less than $1,000,000 as indicated as the "Local Share" in Exhibit C, with such amount applied toward the payment of the costs of the Project that satisfy any applicable governmental funding requirements. The Private Financial Contribution is expected to consist of equity, rent concessions to HCC on account of grant funds made available by HCC to pay part of the cost of the Fire Station Improvements, the value of administrative services which shall be reinvested in the Project and, private financing arranged by the Developer to the extent required to meet its Private Financial Contribution obligation. The Developer agrees to use its best efforts to raise its Private Financial Contribution in time to permit the construction contract for the construction of the Fire Station Improvements to be bid publicly by the date set forth on the Master Schedule. Prior to the solicitation of bids for the construction of the Fire Station Improvements, the Developer shall provide the PVTA with written notice of the commitment of the private funding, indicating the source and amount of all such funding.

(b) The Private Financial Contribution shall be disbursed to pay for the cost of the Fire Station Improvements or other appropriate Project costs as and when such costs are actually incurred.

4.2 Accounting for Development Costs Funded by Public Agencies. The Parties acknowledge that the Project funding provided by the FTA and the EOTPW will be provided to the PVTA as a draw-down account against which the PVTA shall submit periodic invoices in arrears for payment. In order to ensure that each submission for periodic payments for design and construction services can be processed and approved in a timely fashion, the Developer shall maintain project contract and accounting records in such detail as to provide for the clear identification of all costs to be funded by the public financial contributions, in compliance with Federal and state contract administration requirements.

ARTICLE 5

ACQUISITION OF PROJECT AREA AND PREPARATION FOR DEVELOPMENT

5.1 Acquisition. The City shall enter into a Purchase and Sale Agreement with the Developer for the Fire Station Parcel (the "Sale Agreement") within a timeframe consistent with the Master Schedule.

5.2 Hazardous Substances. The City represents to the Developer that the City has performed such Environmental Tests as are necessary to determine generally the nature and extent of the Hazardous Substances that are present in the Project Area, and has taken certain remedial and response actions required by Environmental Laws with respect to such Hazardous Substances. The City has arranged for further Environmental Tests and shall provide the Developer with the results or report in accordance with the Master Schedule. The Developer agrees that to the extent remedial and response actions already taken are not sufficient to allow the uses of the Project Area set forth in this Agreement in accordance with Environmental Laws, the Developer shall, at its sole cost and expense and in consultation with the PVTA and the City, carry out the remedial and response actions required by Environmental Laws. The Parties

recognize the budget for such actions is limited to $20,000. If this amount is exceeded, and if the Developer lacks the necessary funds, the City may adjust the tax increment financing arrangement with the Developer to equitably recognize the Developer's cost. In the Alternative, the Developer may terminate this Agreement. The remedial and response actions shall be carried out in accordance with the Master Schedule, in accordance with all applicable Environmental Laws, and all other applicable Laws, in a manner that does not interfere with the construction and installation of the Project Improvements. Nothing contained herein shall be deemed to limit the rights of the City to recover against any potentially responsible third parties.

5.3 Acquisition of Government Approvals. The Parties agree that the City shall be responsible for obtaining all necessary Government Approvals with respect to the Parking Improvements, including without limitation all Building Approvals and all Land Use Approvals and the Developer shall be responsible for obtaining all necessary Government Approvals with respect to the Fire Station Improvements, including without limitation all Building Approvals and all Land Use Approvals. The Parties agree to work cooperatively with each other in connection with the acquisition of all such Government Approvals.

ARTICLE 6

DESIGN AND CONSTRUCTION OF PROJECT

6.1 PVTA Share of Design Cost of Fire Station Improvements. Design of the space in the Fire Station building to be occupied by the PVTA as the HMTC shall be subject to the approval of the PVTA prior to the Developer's final approval of the design documents. The estimated construction costs for all publicly funded improvements shall be consistent with the public sources and uses of funds as set out in Exhibit C. The final allocation of FTA funding to the Fire Station Improvements, including specifically mechanical systems serving the building,

shall be subject to FTA review and final determination of eligible costs. Where certain Improvements may serve the combined interests of the HMTC and the other tenants within the building, the FTA reserves the right to determine the proportion of such costs eligible for FTA funding on a pro rata basis. The PVTA shall pay for the design cost associated with the fit out of the HMTC space it will occupy, as provided in the approved Project Budget. The Developer shall ensure that the design documents and construction cost estimates prepared by the designer of the Fire Station Improvements clearly identify and distinguish between those aspects of the Project that are to be funded with public funds and those to be funded with private funding. The Developer shall cause all publicly funded aspects of the Project design to comply with applicable Federal requirements.

6.2 Design Review Committee. The Parties shall form a Design Review Committee which, based on construction documents ready for use in public bidding, shall coordinate and approve the final design of the Parking Improvements and the final design of the Fire Station Improvements. The Design Review Committee will review and comment on 50% construction documents and shall review and approve final construction documents. The Design Review Committee shall consist of two representatives of the Developer, one representative of the PVTA and one representative of the City. Decisions of the Design Review Committee shall be by majority vote, except that approval of the final design for the Fire Station building envelope, mechanical systems and transit-related improvements generally consistent with Exhibit B and funded with public moneys provided by the FTA or EOTPW shall require the affirmative vote of the PVTA.

6.3 Design Standards. The Parking Improvements and the Fire Station Improvements shall conform in all respects with the applicable provisions of the Zoning Ordinance, all other

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applicable Laws, building codes, transit industry standards and the provisions of this Agreement (collectively, the "Design Standards").

6.4 Changes Following Approval of Construction Documents. Any change order involving portions of the Project to be funded by the FTA or EOTPW, whether or not requiring additional financial contribution from PVTA over the original contract cost, shall require the prior written approval of the PVTA, and of the FTA where required by the Grant Agreement, which approval shall not be unreasonably withheld or delayed.

6.5 In resolving an issue which may arise in the Design Review Committee, the paramount consideration shall be maintaining the financial feasibility of the Project, consistent with the conditions of any funding agreement between the PVTA and the FTA or EOTPW.

ARTICLE 7

EARLY TERMINATION

7.1 Early Termination Rights. The Parties agree that in addition to the specific rights of termination set forth in Article 9 of this Agreement, the PVTA and the Developer shall each have the following termination rights (the "Early Termination Rights"):

(a) PVTA's Early Termination Rights. The PVTA shall be entitled to terminate this Agreement by delivering written notice of termination upon the occurrence of any of the following:

(i) If the Developer, without fault by any of the other Parties, fails to obtain commitments for the Private Financial Contribution in accordance with the Master Schedule;

(ii) If the Governmental Funding is not committed in accordance with the Master Schedule;

(iii) If the Developer fails to authorize the commencement of construction of the Fire Station Improvements in accordance with the Master Schedule without fault by any of the other Parties; and

(iv) If the Developer fails to complete the construction of the Fire Station Improvements in accordance with the Master Schedule without fault by any of the other Parties.

(b) If there is a default by the Developer after the Fire Station Parcel had been conveyed by the City, it shall revert to the City as provided in the deed. If the Developer defaults, this Agreement shall be terminated, and the Developer shall assign to the City or the PVTA all of the Developer's interest in contracts related to the Project.

(c) Developer's Early Termination Rights. The Developer shall be entitled to terminate this Agreement by delivering written notice of termination upon the occurrence of any of the following:

(i) If the City fails to convey the Fire Station Parcel in acceptable environmental condition in accordance with the Master Schedule.

(ii) If the Governmental Funding is not committed in accordance with the Master Schedule.

In the event that the failure that results in the possible exercise of the Early Termination Rights has not been cured within thirty (30) days after the delivery of written notice, the Party that desires to exercise the Early Termination Rights shall be entitled to exercise the Early Termination Rights without further notice to the other Parties and without any further opportunity to cure any such failure. The Parties further agree that the events which entitle either the PVTA or the Developer to exercise the Early Termination Rights shall not constitute Events of Default for purposes of Article 9 below and that no Party shall be entitled to damages in connection with the exercise of the Early Termination Rights. The foregoing notwithstanding, if this Agreement is terminated for any reason other than the sole fault of the Developer, the PVTA shall reimburse the Developer for documented reasonable expenses incurred in furtherance of the Project after the date of the Agreement and before its termination, to the extent permitted by the Federal and state funding agencies.

ARTICLE 8

CONSTRUCTION OF PROJECT IMPROVEMENTS

8.1 Conditions to Execution of Construction Contract and Commencement of Construction. The City, PVTA and the Developer agree that they shall each proceed to execute or authorize construction contracts or design-build contracts providing for the construction of those portions of the Project Improvements for which they are responsible after the satisfaction of each of the following conditions:

(a) The Design Review Committee has approved the construction documents;

(b) The City has conveyed the property;

(c) All Governmental Funding is in place and available for expenditure by the grantee and subgrantee as provided in this Agreement;

(d) HCC and Head Start have executed leases with the Developer;

(e) The Developer has provided the PVTA satisfactory evidence of the commitment(s) of the full amount of the Private Financial Contribution in all forms in the amount of $1 Million Dollars, and such Contribution is available to be applied toward the Improvements as described in Exhibit C.

(f) Any applicable public procurement or bidding requirements have been complied with to the satisfaction of the PVTA.

(g) All Government Approvals have been obtained.

(h) The PVTA and the City shall provide written notice to the Developer as soon as possible upon the satisfaction of any of the above-referenced conditions within their respective control. The Developer shall compile a complete list of all conditions, noting the date on which the condition is satisfied and the Party providing the foregoing notice. The final list

evidencing the satisfaction of all of the above conditions shall be circulated among the Parties for final sign-off prior to the execution or authorization of execution of the construction contracts by any Party for those portions of the Project Improvements for which they are responsible.

The Parties agree that they shall each execute or authorize the execution of construction contracts as provided herein within seven (7) days following the satisfaction of the conditions set forth in this Paragraph 8.1.

8.2 Construction Covenants. The PVTA and the Developer acknowledge and agree that all construction work performed with respect to the Improvements shall be at prevailing wages determined in accordance with applicable state and Federal law, including the provisions of the Davis-Bacon Act, as set out in the Federally Required Contract Clauses in Exhibit H. All construction performed by or on behalf of either of them shall be done in a good and workmanlike manner by general contractors of recognized skill, integrity and competence (the "General Contractors") and no General Contractor or subcontractor at any tier shall be suspended of debarred from participation in a public construction project under either Federal or state law. All construction shall be in compliance with approved construction documents, this Agreement, all Government Approvals, the requirements of all governmental authorities and all applicable Laws. All construction shall be at the sole cost and expense of the Party that contracted the General Contractor (the "Contracting Party"). The Contracting Party shall promptly pay all bills for materials and services furnished in connection with the construction. The Contracting Party shall require its General Contractor to post a payment and performance bond or bonds in an amount at least equal to the cost of construction of the Project that is the subject of such General contractor's construction contract. If required by any Mortgagee, the Contracting Party agrees that such Mortgagee may be named the primary beneficiary or obligee of such bond or bonds,

with the Contracting Party listed as an alternate beneficiary or dual obligee. In the absence of such requirement, the Contracting Party shall be named the principal and be primary on such bond or bonds.

8.3 Indemnification. The Developer shall indemnify and hold the PVTA and the City, their officials, agents and employees harmless from any claims for damages to property or injury to persons, including death, resulting from the construction of the Fire Station Improvements, except to the extent that such claim or claims arise out of the negligent, willful or intentional acts of the indemnified Parties. The Developer shall cause a similar indemnification and hold harmless obligation to be included in each and every contract or subcontract awarded for the design and construction of the Fire Station Improvements, including the PVTA and the City as additional indemnified parties. The City and/or the PVTA shall cause a similar indemnification and hold harmless obligation to be included in each and every contract or subcontract awarded for the design and construction of the Parking Parcel Improvements, including the Developer as an additional indemnified party.

8.4 Insurance. The Developer shall maintain and cause any designer, contractor or subcontractor of whatever tier under contract with it for the Project to maintain workers compensation insurance as required under the laws of the Commonwealth of Massachusetts. In addition, the Developer shall maintain or cause any designer, contractor or subcontractor of whatever tier under contract with it for the Project to maintain commercial general liability, professional liability (architects, engineers or any licensed professional for which such insurance is available), broad form boiler and machinery liability, builder's risk and umbrella excess liability insurance policies, and shall deliver to the PVTA certificates of insurance evidencing such insurance coverage on or prior to the date on which the Fire Station Parcel is conveyed to it

by the City. The cost of such insurance shall be paid by the Developer, provided that the incremental cost of any increase or modification of such insurance required by the PVTA during the term of this Agreement shall be paid by PVTA. The PVTA shall be named an additional insured on all liability policies, except for workers' compensation and professional liability coverage. In the event any policy provided hereunder requires a policy endorsement to establish the status of the PVTA as an additional insured, the Developer shall provide, in addition to a Certificate of Insurance, evidence of the existence of such endorsement. (See Exhibit I)

ARTICLE 9

REVENUE SHARING

9.1 Annual Revenue Sharing. In recognition of the PVTA's status as grantee of significant FTA and EOTPW funding for the Project and the PVTA's active involvement in and contribution to achieving the completion of the Project, as part of the overall "Return to Transit" contemplated in the FTA Guidance, the PVTA shall receive annually ten percent (10%) of Net Operating Income as defined in Section 1.8, above, from the Project (the "Annual NOI Payment"). The Annual NOI Payment shall be payable in arrears within ninety (90) days after the end of each calendar year.

9.2 Financial Records. The Developer shall maintain detailed, accurate and complete financial records of all its activities relating to the Fire Station Improvements, consistent with the requirements of FT A and EOTPW, for a period of seven (7) years from the date of final payment, unless there is an audit of the Project by Federal or state agencies, in which case records shall be maintained until the issuance of the final finding of the audit. Other Parties to this Agreement shall have the right to review such records at reasonable times upon reasonable prior notice for the purpose of confirming the Net Operating Income. All such records shall be available to

inspection by any governmental entity having jurisdiction over the project, or contributing financial support to the project, at reasonable time and upon reasonable prior notice.

9.3 Revenue Sharing Upon Sale. In the event of a sale of the Fire Station Improvements by the Developer, the Developer shall pay to the PVTA as the final portion of the overall "return to transit" Net Sale Proceeds as shown on Exhibit G. Payment under this Section 9.3 shall be made at the time of closing.

9.4 Continuing Obligations under Article 9. The Parties agree that the terms of this Article 9 concerning the "Return to Transit" shall survive the termination of this Agreement, and shall be binding upon any successor to the Developer.

ARTICLE 10

DEFAULT AND REMEDIES

10.1 Events of Default. The following events shall be deemed to be "Events of Default" under this Agreement:

(a) Failure to comply with any term, provision or covenant of this Agreement, and to cure such failure within sixty (60) days after written notice thereof, provided that if such default cannot reasonably be cured within sixty (60) days, then the defaulting Party shall have an additional reasonable period of time within which to cure such default so long as the defaulting Party begins to cure the default within the sixty (60) day period and thereafter continues diligently to prosecute such cure to completion;

(b) Becoming insolvent, or making a transfer in fraud of creditors or making an assignment for the benefit of creditors;

(c) Filing a petition under any section or chapter of the bankruptcy laws of the United States, or under any similar law or statute of the United States or any state thereof, being adjudged bankrupt or insolvent; or

(d) Having a receiver or trustee appointed for all or substantially all of a Party's assets.

10.2 Remedies. Upon the occurrence of any Event of Default, the non-defaulting Parties shall have the option to pursue one or more of the following remedies without any notice or demand whatsoever:

(a) Terminate this Agreement;

(b) Pursue any other remedy available at law or equity.

ARTICLE 11

MISCELLANEOUS PROVISIONS

11.1 Covenants. The Parties represent, warrant, covenant and agree that the execution and delivery of this Agreement and the performance by each of its obligations hereunder (i) have been duly authorized by all necessary Parties; (ii) will not conflict with, or result in a breach of provisions of any law, regulation, order, judgment, writ, injunction or decree of any court or governmental authority; and (iii) will not result in a breach of the terms or covenants of any agreement or instrument to which it is a party or by which it is bound and which would have a material adverse effect on the transactions contemplated hereby.

11.2 Assignment. The rights and obligations of the Parties under this Agreement may not be assigned without the prior written consent of all the other Parties.

11.3 Notices. All notices, requests or other communications sent or required to be sent under this Agreement shall be made by certified mail, return receipt requested and delivered to the Parties as follows:

Union Station Intermodal Transportation Center

Sources of Funds

updated 9-12-08

Description of Source	Totals	FTA	EOTPW Match	EOTPW Bond	Expended	Refunded	Balance
Federal/State Matching:							
5309 and High Priority Project Fund Contracts:							
FY 97							
FTA 5309 Grant 03-0214 - Grant Closed	930,465	744,372	186,093	0	930,465		0
FY 99							
FTA 5309 Grant 03-0216-02 - Grant Closed	2,772,275	2,217,820	554,455	0	2,772,275		0
FY 01							
FTA 5309 Grant 03-0239-01 -Grant Closed	2,151,905	1,721,524	430,381	0	2,151,905		0
HPP Grant 90-X343-01 - Grant Open	9,695,015	7,756,012	1,939,003	0	10,820,790	2,464,000	1,338,225
FY 02							
FTA 5309 Grant 03-0267 - Grant Open	1,900,000	1,520,000	380,000	0	0		1,900,000
Sub-Total Contracts:	17,449,660	13,959,728	3,489,932	0	16,675,435		3,238,225
5309 and High Priority Project Fund Earmarks:							
FY 02							
FTA 5309 Earmark	3,050,145	2,440,116	610,029	0	0		3,050,145
FY 03							
FTA 5309 Earmark	7,377,590	5,902,072	1,475,518	0	0		7,377,590
HPP Earmark	5,681,475	4,545,180	1,136,295	0	0		5,681,475
FY 04							
FTA 5309 Earmark	5,461,164	4,368,931	1,092,233	0	0		5,461,164
FY 05							
FTA 5309 Earmark	8,131,354	6,505,083	1,626,271	0	0		8,131,354
Sub-Total Earmarks:	29,701,728	23,761,382	5,940,346	0	0		29,701,728
Other Sources:							
State Transportation Bond Earmarks:							
1997 Bond Bill							
Earmark	6,250,000	0	0	6,250,000	0		6,250,000
Advanced	3,750,000	0	0	3,750,000	171,287		3,578,713
2002 Bond Bill	1,000,000	0	0	1,000,000	0		1,000,000
A& F Off-Street Parking Program:							
Off-Street Parking Grant (1994/1997 Bond Bills):	7,699,875	0	0	7,699,875	0		7,699,875
Totals	**65,851,263**	**37,721,110**	**9,430,278**	**18,699,875**	**16,675,435**		**51,468,540**

NOTES:

1. **FTA/EOTPW Expenditures FY 97-01** - Expenditures as noted.
2. **FY 02, 03, 04 and 05 Federal 5309 Earmarks** - Expire on 9/30/08.
3. **1997 Transportation Bond Earmark** - Language revised in 2000 requiring full $10 million to be paid to PVTA by 12/31/00. $3,750,000 was disbursed as part of $4,282,800 in state funding for use as urban renewal plan deposit. These funds were not expended and are in a PVTA account.
4. **2002 Transportation Bond Earmark -** No expiration date on earmark.
5. **Off-Street Parking Funds** - Grant agreement was executed in 2002 and will expire 6/30/09.
6. **Other Sources/State Transp. Bond Earmark** - $171,287 includes $150,937.64 in SRA on-going maint. exp. for Union Station and $20,349.72 in PVTA project legal and mgt. services costs

(a) If intended for the Developer:

Robert Schwarz
Peter Pan Bus Lines
1776 Main Street
Springfield, MA 01103

With a copy to:

Michael F. Crowley
Crowley & Associates
101 State Street, Suite 400
Springfield, MA 01103

and with a copy to:

Peter H. Barry, Esquire
Bulkley, Richardson and Gelinas
1500 Main Street, Suite 2700
Springfield, MA 01115

If intended for the PVTA:

Ms. Mary MacInnes
Administrator
Pioneer Valley Transit Authority
2808 Main Street
Springfield, MA 01107

With a copy to:

Anne-Marie M. Hyland, Esq.
Kopelman and Paige, P.C.
101 Arch Street, 12th Floor
Boston, MA 02108

If intended for the City:

The Hon. Michael J. Sullivan
Mayor
City of Holyoke
Municipal Building
536 Dwight Street
Holyoke, MA 01040

With a copy to:

Karen Betournay, Esq.
City Solicitor
City of Holyoke
Municipal Building
536 Dwight Street
Holyoke, MA 01040

Notwithstanding any provision in this Agreement to the contrary, a change in address may be effected by a certified letter sent by either party to the other.

11.4 Estoppel Certificate. Each Party shall, from time to time during the term of this Agreement as requested by another Party, or the other Party's lenders or purchasers, execute and deliver to the Party making any such request a written declaration in recordable form:

(i) ratifying this Agreement;

(ii) expressing the commencement and termination dates thereof;

(iii) certifying that this Agreement is in full force and effect and has not been assigned, modified, supplemented or amended (except by such writings as shall be stated);

(iv) certifying that all conditions under this Agreement to be performed have been satisfied or specifying with particularity those conditions have not been performed;

(v) certifying that there are no defenses or offsets against the enforcement of this Agreement, or stating those claimed; and

(vi) stating and certifying such other matters as such Party may reasonably request.

11.5 Force Majeure.

(a) If any Party is rendered unable, wholly or in part, by force majeure to carry out its obligations under this Agreement, that Party shall give to the other Parties prompt written notice of the force majeure with reasonably full particulars concerning it; thereupon, the obligations of the Party giving the notice, so far as they are affected by the force majeure, shall be

suspended, during, but no longer than, the continuance of the force majeure. The affected Party shall use all possible diligence to remove the force majeure as quickly as possible.

(b) The requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts, or other labor difficulty by the Party involved, contrary to its wishes; how all such difficulties shall be handled shall be entirely with the discretion of the Party concerned.

(c) The term "force majeure" as used herein shall mean an act of God, strike, lockout or other industrial disturbance, act of the public enemy, war, terrorist attack, blockade, riot, lightning, fire, storm, flood, explosion, governmental restraint, unavailability of equipment, product or labor or any other cause, whether of the kind specifically enumerated above or otherwise, which is not reasonably within the control of the party claiming suspension.

11.6 No Partnership. The Parties are not and shall not be considered joint venturers nor partners and neither shall have power to bind or obligate the other except as set forth herein.

11.7 Severability. If any provision of this Agreement or the application thereof to any person or circumstances, shall, to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such provision to persons whose circumstances are other than those to which it is held invalid or unenforceable, shall not be affected thereby.

11.8 Entire Agreement. This Agreement, the documents incorporated herein and the Exhibits and Attachments hereto, set forth the entire agreement between the Parties. Any prior conversations or writings are merged herein and hereby extinguished. No subsequent amendment to this Agreement shall be binding unless produced in writing and signed by the Parties.

11.9 Waiver. Failure to insist upon the strict performance of any provision of this Agreement or to exercise any option or any rules or regulations herein contained shall not be construed as a waiver for the future of any such provision, rule or option.

11.10 Successors and Assigns. Except as otherwise expressly provided, all provisions herein shall be binding upon and shall inure to the benefit of the Parties, their representatives, successors and assigns.

11.11 Dispute Resolution and Mediation. Except as otherwise provided in this Agreement, any claim, dispute or controversy arising from the interpretation or performance of this Agreement shall be submitted first to mediation, and the Parties agree to proceed in good faith to attempt through mediation to resolve any such claim, dispute or controversy. Mediation shall proceed as provided in the Rules for Mediation of the American Arbitration Association. Any such nonbinding mediation shall be conducted in Springfield, Massachusetts, by a mediator reasonably acceptable to the Parties. The cost of any such mediation shall be borne equally by the Parties. All statements of any nature made in connection with the nonbinding mediation shall be confidential and will be inadmissible in any subsequent court or other proceeding. In the event that the Parties are unable to resolve any such claim, dispute or controversy through mediation, it may be submitted to litigation as provide herein.

11.12 Captions. The captions, numbers and index appearing herein are inserted only as a matter of convenience and are not intended to define, limit, construe or describe the scope or intent of any Article, nor in any way affect this Agreement.

11.13 Gender. All terms and words used in this Agreement, regardless of the number and gender in which they are used, shall be deemed and construed to include any other number, singular or plural, and other gender, masculine, feminine or neuter, as the context or sense of this

Agreement or any paragraph or clause herein may require, the same as if such words had been fully and properly written in the number and gender.

11.14 Counterparts. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original, but such counterparts together shall constitute but one and the same instrument.

11.15 Time is of the Essence. The Parties acknowledge that, in the performance of any covenants or obligations under this Agreement, TIME IS OF THE ESSENCE.

11.16 Governing Law. This Agreement shall be construed, and the rights and obligations of the Parties hereunder shall be governed by the laws of the Commonwealth of Massachusetts. All actions whether sounding in contract or tort, relating to the validity, construction, interpretation, and enforcement of this Agreement shall be institute and litigated in the Superior Court Department of the Trial Court, Hampden County, Massachusetts, unless requirements of jurisdiction or venue require resort to a different forum, however, in no case may resort be had to a court outside the Commonwealth of Massachusetts.

11.17 Requirements of the Federal Transit Administration. Notwithstanding any provision in this Agreement to the contrary, no Party hereto shall enter into any agreement or contract or take any action that contravenes or is inconsistent with the Standard Contract Clauses of the PVTA attached hereto as Exhibit H and incorporated herein by this reference.

End of Agreement Except for Signature Pages and Exhibits

SIGNED as a sealed instrument as of the date first written above.

PIONEER VALLEY TRANSIT AUTHORITY

By _____
Its Administrator

CITY OF HOLOKE

By _____
Its Mayor

Approved as to Form:

By _____
City Solicitor, City of Holyoke

HOLYOKE INTERMODAL, LLC

By _____
Its Manager

Joint Development Checklist

I. PROJECT DESCRIPTION		
Project Sponsor: Pioneer Valley Transit Authority	**Dated Submitted:**	**FTA project Number (if known):** MA-03-259
Project Title: Holyoke Multimodal Transportation Center (HMTC)		
Project Location (Include City and Street Address): 206 Maple Street, Holyoke, Massachusetts		
Name of Project Contact: Mary L. MacInnes, PVTA Administrator	**Phone:** (413) 732-6248	**E-mail Address (if available):** mmacinnes@pvta.com
Type of Project: ____ Commercial development ____ Residential development ____ Pedestrian or bicycle access to public transportation facility __X__ Construction, renovation, or improvement of intercity bus or intercity rail station or terminal ____ Renovation or improvement of historic transportation facility ____ Other		
Description of Project: Public-private development of a former municipal fire station into a transportation terminal for public transit and intercity bus operations, together with commercial office space to be occupied by entities providing community services – adult literacy programs of the Holyoke Community College and day care operations of the regional Head Start program. The City of Holyoke will also construct a multi-level public parking facility which will include an off-street bus berthing area for transit and intercity bus operations.		

II. MATERIALS SUBMITTED
__X__ Joint Development Checklist
__X__ Joint Development Agreement
__X__ Certification of Compliance **or**
____ Alternative Certification (with written explanation)

III. APPLICATION OF STATUTORY CRITERIA	
Requirement	**Description**
Economic Link (check (1) or (2)): ____ (1) Enhances economic development **or** __X__ (2) Incorporates private investment	The private developer will provide additional funds for the completion of the redevelopment of the commercial office space to be provided on the upper floors of the renovated building.
Public Transportation Benefit (check (3) & (4), or (5)): __X__ (3) Enhances the effectiveness of a public transportation project **and** ____ (4) Relates physically or functionally **or** __X__ (5) Establishes New or Enhanced Coordination Between Public Transportation and other Transportation	The HMTC will provide an indoor terminal with passenger information and ticket sales where previously only a sidewalk shelter was available to transit users; in addition, users of the literacy programs and day care services who are transit dependent will have direct access to transit services operated from the HMTC the building. The HMTC will provide a terminal for intercity buses operated by Peter Pan Bus Lines, and will allow for the on-site interface of intercity bus operations with PVTA regional transit operations.
Revenue for Public Transportation (check (6)): __X__ (6) Provides a Fair Share of Revenue for Public Transportation that will Be Used for Public Transportation	PVTA will occupy the HMTC space on a rent-free basis and will receive 10% of the net operating revenues derived from the rental of the private commercial space as long as the HMTC occupies a portion of the building.
Reasonable Share of Costs (check (7) if applicable): __X__ (7) Occupants to pay a reasonable share of the costs of the facility through rental payments and other means	All private tenants will pay rent and a proportionate share of the common area maintenance charges to defray the overall operating costs of the building.

321817/PVTA/00004

FEDERAL TRANSIT ADMINISTRATION

HOLYOKE MULTIMODAL TRANSPORTATION CENTER

JOINT DEVELOPMENT AGREEMENT

CERTIFICATE OF COMPLIANCE

Certificate of Compliance

Effective as of the date hereof, the undersigned hereby certifies and covenants to the Federal Transit Administration ("FTA") as follows:

1. *Title.* Subject to the obligations and conditions set forth in 49 CFR 18.31, as amended, title to real property acquired under a grant or subgrant for FTA Project Number MA-03-0259 Holyoke Multimodal Transportation Center, (the "Project") , shall vest in the undersigned or subgrantee thereof (collectively or individually, as the case may be, the "Grantee").

2. *Use.* Except as otherwise provided by Federal statutes, real property shall only be used for the originally authorized purposes (which may include Joint Development purposes that generate program income, both during and after the award period and used to support public transportation activities) as long as needed for such purposes, and that the Grantee shall not dispose of or encumber its title or other interests.

3. *Disposition.* When real property acquired with funds provided by FTA for the Project is no longer needed for the purpose originally authorized by FTA, the Grantee shall request disposition instructions from FTA and shall agree that, unless otherwise authorized by FTA, such disposition shall be made in accordance with applicable law, including without limitation 49 U.S.C. 5334(h) and 49 CFR 18.31.

4. *Federal Interest.* The Federal Government retains a Federal interest in any real property, equipment, and supplies financed with Federal assistance ("Project Property") until, and to the extent that, the Federal Government relinquishes its Federal interest in such Project Property.

5. *Incidental Use.* Any incidental use of Project Property, as determined by FTA, shall not exceed that permitted under applicable Federal laws, regulations, and directives, including the requirements of FTA's Master Agreement.

6. *Encumbrance of Project Property.* The Grantee covenants to FTA as follows:

   a. *Written Transactions.* The Grantee agrees that it will not execute any transfer of title to the Project Property or enter into an instrument legally binding on the Grantee that would encumber Federal Interest in the Project Property.

b. *Oral Transactions.* The Grantee agrees that it will not obligate itself in any manner to any third party with respect to Project Property.

7. *Notice to Joint Development Partner.* The undersigned has delivered to the Joint Development Partner a duly executed copy of this certificate, dated as of the date hereof, receipt of which has been acknowledged by the Joint Development Partner in writing to the undersigned on or before the date of execution of the Joint Development Agreement.

8. *Other Actions.* The Grantee (a) Agrees that it will not take any action that encumbers the Federal Interest in the Project Property and (b) hereby affirms that each of its representations and warranties set forth in the Master Agreement is true and correct in all material respects as of the date hereof. The Grantee agrees that nothing herein shall supersede, amend, modify or otherwise affect the provisions, terms or conditions set forth in the Master Agreement.

9. *Definitions.*

a. "FTA" shall have the meaning provided in the preamble of this certificate.

b. "Grantee" shall have the meaning provided in section (1) of this certificate.

c. "Joint Development" shall mean a capital project as defined by 49 U.S.C. 5302(a)(1)(G) that is eligible for funding pursuant to the terms and conditions set forth in [insert new Joint Development circular number].

d. "Joint Development Partner" shall mean the entity with which the Project Sponsor has partnered, through a Joint Development Agreement, to construct a joint development improvement pursuant to 49 U.S.C. 5302(a)(1)(G).

e. "Master Agreement" shall mean that certain Master Agreement by and between FTA and the Grantee, as authorized by 49 U.S.C. 53, Title 23, United States Code (Highways), the National Capital Transportation Act of 1969, as amended, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, the Transportation Equity Act for the 21st Century, as amended, or other Federal laws that FTA administers, as the same my be lawfully revised, superseded or supplemented from time to time.

f. "Project" shall have the meaning provided in section (1) of this certificate.

g. "Project Property" shall have the meaning provided in section (4) of this certificate.

10. *No Estoppel.* The undersigned agrees that acceptance of this Certificate of Compliance by FTA shall not estop the Federal government from initiating or conducting, and shall not be used as a defense to any investigation, audit or inquiry by the Federal government following approval by FTA of the project.

Executed on behalf of the **Pioneer Valley Transit Authority**

By: Its Administrator

Mary MacInnes

A copy of the forgoing Certificate of Compliance has been provided to me as a Joint Development Partner in the Holyoke Multimodal Transportation Center Project, and receipt thereof is hereby acknowledged.

Holyoke Intermodal Facility, LLC

Signature

PETER A. PICKNELLY
Type or Print Name

MANAGER
Title

City of Holyoke, Massachusetts

By: Its Mayor

Michael J. Sullivan

321469/PVTA/0004

CERTIFICATION OF AUTHORIZED VOTE

I hereby certify that at the June 27, 2007 meeting of the Advisory Board of the Pioneer Valley Transit Authority, the Advisory Board, upon reasonable review of the proposed Joint Development Agreement for the Holyoke Multimodal Transportation Center, unanimously found that (i) the terms and conditions of the Joint Development Agreement, including the return to transit provide for therein, are commercially reasonable and fair to the PVTA, and (ii) that such revenues will be used for the provision of public transportation. The Advisory Board further voted to authorize Administrator Mary L. MacInnes to execute, on behalf of the Pioneer Valley Transit Authority, the Joint Development Agreement for the Holyoke Multimodal Transportation Center among the Pioneer Valley Transit Authority, City of Holyoke and Holyoke Intermodal Facility, LLC.

Dated: July 30, 2007

Anne Awad

Anne Awad, Clerk of the
Advisory Board of the Pioneer
Valley Transit Authority

COMMONWEALTH OF MASSACHUSETTS

County of Hampden, ss.

On this 30th day of July, 2007, before me, the undersigned Notary Public, personally appeared Anne Awad, who proved to me through satisfactory evidence of identification, which were ☐ personal knowledge ☐ Massachusetts driver's license, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose, as Clerk of the Advisory Board of the Pioneer Valley Transit Authority.

Toni Lee Reno

Notary Public
My Commission Expires:

Toni Lee Reno
Notary Public
My Comm. exp. 2-20-09

JOINT DEVELOPMENT AGREEMENT
among
PIONEER VALLEY TRANSIT AUTHORITY,
CITY OF HOLYOKE and HOLYOKE INTERMODAL FACILITY, LLC

EXHIBIT LIST

A	August 13, 2004 Holyoke Multimodal Transportation Center Environmental Assessment/Finding of No Significant Impact
B	Preliminary Design Report for the Holyoke Multimodal Transportation Center, June, 2003
C	Estimated Costs
D	Sample Lease
E	PVTA Lease
F	Master Schedule
G	Net Sale Proceeds
H	Standard Contract Clauses of the PVTA
I	Insurance Requirements

U.S. Department
of Transportation
**Federal Transit
Administration**

REGION I
Connecticut, Maine,
Massachusetts,
New Hampshire,
Rhode Island, Vermont

Volpe Center
55 Broadway Suite 920
Cambridge, MA 02142-1093
617-494-2055
617-494-2865 (fax)

Mr. Gary A. Shepard
Administrator
Pioneer Valley Transit Authority
2808 Main Street
Springfield, MA 01107

AUG 13 2004

Re: **Holyoke Multimodal Transportation Center Environmental Assessment
Finding of No Significant Impact**

Dear Mr. Shepard:

Based upon a review of the environmental documentation, the Federal Transit Administration (FTA) has issued a Finding of No Significant Impact (FONSI) for the Holyoke Multimodal Transportation Center project.

Please be advised that in accordance with 23 CFR 771.121, the Pioneer Valley Transit Authority (PVTA) is required to transmit a notice of availability of this FONSI to all affected Federal, state and local governmental entities. In addition, under Section 106 of the National Historic Preservation Act, the FTA has determined that this project will have no adverse effect on historic resources.

As indicated in the environmental documentation, PVTA intends to convey the improved facility to a private entity. Please be aware, FTA's primary interest is that the grant recipient retain satisfactory continuing control of project property and that it be kept in mass transit service for its useful life in accordance with the terms and conditions of the grant agreement or, if not, that the FTA be reimbursed in an amount equal to the Federal portion of the property. Also, as previously mentioned, FTA will only participate in mass transit related parking.

Also, please be aware, prior to submitting an application in support of this project, PVTA is required to submit a Title VI fixed facility impact analysis to Region I's Civil Rights Officer.

Please let me know if you have any questions regarding this matter. The FTA looks forward to continuing to work with the PVTA on this important transit improvement.

Sincerely,

Mary Beth Mello

for Richard H. Doyle
Regional Administrator

Attachment

FEDERAL TRANSIT ADMINISTRATION
REGION I

Finding of No Significant Impact

Project: Holyoke Multimodal Transportation Center

Applicant: Pioneer Valley Transit Authority

Project Location: Holyoke, Massachusetts

Purpose and Need

The Pioneer Valley Transit Authority (PVTA) currently has a primary transfer/pulse center located at Veterans Park across from the existing Central Fire Station on Maple Street in Holyoke, Massachusetts. Approximately 170 PVTA buses serving seven routes stop at Veteran Park each weekday. This stop is located at curbside and does not provide a shelter or any passenger amenities thus lessening the quality of service, safety and security of riders and acts as a disincentive to transportation patrons and potential new riders.

Alternatives Considered

In order to address the need for improved transit service in Holyoke a feasibility study was conducted that examined the basic transportation and operations analysis for a transportation center in Downtown Holyoke. The feasibility study documented the current transportation services, surrounding land uses, intermodal connections and projected transit passengers. Based upon the analysis conducted the Central Fire Station building was identified to meet the need to provide an improved transit facility conveniently located near the current pulse center at Veterans Park. Utilizing the Central Fire Station as the Holyoke Multimodal Transportation Center (HMTC) eliminates the need to modify traffic circulation patterns or change the existing bus routes.

The No Build Alternative was determined not to meet the goals of improving rider safety, security, comfort or convenience of transit passenger.

Proposed Project

The renovation of the Central Fire Station into a multimodal transportation center will provide a safe, comfortable and convenient environment for the public needing transportation services in Holyoke. The proposed HMTC will serve as a nexus for all local surface transportation modes within Downtown Holyoke. The primary use will be the local PVTA transit services but the HMTC will also serve paratransit, intercity, taxis, bicycle and pedestrians. The PVTA space will be located on the first floor of the building and include information center, ticket counter, traveler kiosk, waiting area, PVTA office/work areas, lounge area for drivers and staff and passenger amenities. In addition, on the existing parking lot site a parking structure will be constructed to serve HMTC customers and users of the proposed private development spaces. The proposed parking structure will consist of seven bus berths, five paratransit spaces, three PVTA employee parking spaces, five intercity parking spaces and approximately 67 additional spaces for private development uses. There will be a two-level, steel bridge to provide direct connection between the parking and building.

Agency Coordination and Public Opportunity to Comment

The PVTA has been coordinating this project with the City of Holyoke. The project was officially introduced to the City on September 18, 2002 at the Mayor's monthly meeting of the Downtown Business Association. A public meeting was held in coordination with the City to solicit comments from the general public. The public comment period on the Environmental Assessment concluded on July 12, 2004. No comments were received and no requests were made to hold a public hearing.

FTA served as the lead agency under NEPA for the project. The PVTA prepared an Environmental Assessment (EA) in compliance with NEPA, 42 U.S.C. 4321 et. seq. and with FTA's regulations, 23 CFR Part 771. The EA analyzes and describes the project's potential significant impacts.

After reviewing the EA and supporting documents and public comments, the FTA finds under 23 CFR 771.121 that the proposed project will have no significant adverse impacts on the environment. The record provides sufficient evidence and analysis for determining that an Environmental Impact Statement is not required.

Section 106 Compliance

Section 106 of the National Historic Preservation Act requires the review of Federally assisted projects for impacts to districts, sites, buildings, structures and objects listed in, or eligible for inclusion in the National Register of Historic Places. Federal agencies must coordinate with the State Historic Preservation Officer and potentially affected Tribes to make this determination. The Advisory Council on Historic Preservation has established procedures for the protection of historic and cultural properties in, or eligible for the National Register (36 CFR Part 800).

The Holyoke Multimodal Transportation Center (HMTC) will be located at the Holyoke Central Fire Station and is located across the street from Veterans Park. The Central Fire Station is included in the Massachusetts Historic Commission's (MHC) Inventory of Historic and Archaeological Assets of the Commonwealth and is eligible for the National Register of Historic Places. The Park, as well as the adjacent area to its northeast, was recommended for inclusion in a Veterans Park National Register Historic District.

The first floor of the Fire Station will be renovated to accommodate the HMTC which will include information center, ticket counter, passenger waiting area, office and work area for PVTA, lounge area for drivers and staff and passenger amenities. The upper levels will be available for private development. Changes to the exterior of the HMTC will be minor in nature and sensitive to the existing historic fabric of the structure.

The existing parking lot site will be utilized to construct a parking structure. The buses will be relocated from their current curbside berths at Veterans Park to the grade level of the parking structure. Upper levels of the parking structure will be available for private development parking. A two-level steel bridge will be constructed to allow convenient access between the garage and the office floors. There are no historic trims, finishes or moldings at the proposed connection locations. In order to minimize impact to the existing building, new door openings onto the bridge shall be created at existing window openings. All work will be done according to the Secretary of the Interior's Standards for the Treatment of Historic Properties.

The proposed work adjacent to Veterans Park will be limited to removal of bus shelters and sidewalk repairs. No work will be conducted within the park.

On January 29, 2004, The MHC concurred with FTA's determination that the proposed project will have "no adverse effect" on historic properties.

Section 4(f) Findings

Section 4(f) of the Department of Transportation Act of 1966, codified as 49 U.S.C. 303, declares a national policy that a special effort should be made to preserve the natural beauty of the countryside, public park and recreational lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation may not approve the use of land from a significant publicly owned public park, recreation area, or wildlife and waterfowl refuge, or any significant historic site unless a determination is made that there is no feasible and prudent alternative, and that all possible planning has been done to minimize harm to the property resulting from such use (23 CFR 771.135).. The PVTA prepared a Section 4(f) evaluation to analyze alternatives to the proposed action and to ensure that all possible planning has been undertaken to minimize harm to the historic resources. The Department of Interior by letter dated June 1, 2004 concurs with FTA's determination that there are no feasible or prudent alternatives to the proposed project.

Approved: Mary Beth Mello Date: 8/13/04

Richard H. Doyle
Regional Administrator
for FTA, Region I

Concur: Margaret E. Foley Date: 8/12/04

Margaret E. Foley
Regional Counsel

JOINT DEVELOPMENT AGREEMENT

for the

HOLYOKE MULTIMODAL TRANSPORTATOIN CENTER

AMENDMENT NO. 1

The Joint Development Agreement ("JDA") dated July 30, 2007, among the Pioneer Valley Transit Authority (the "PVTA"), the City of Holyoke (the "City") and the Holyoke Intermodal Facility, LLC, (the "Developer"), for the development of the Holyoke Multimodal Transportation Center (hereinafter, the "Project") is hereby amended this 1st day of March, 2010, to reflect changes in the development concept and allocation of the Project's public funding sources as further described below. The PVTA, the City and the Developer are hereinafter referred to collectively as the "Project Partners".

1. The original Project concept for the design and construction of the Holyoke Multimodal Transportation Center called for the redevelopment of the former City Fire Station at 206 Maple Street (the "Fire Station Improvements") to include the Holyoke Multimodal Transportation Center (the "HMTC") on the ground floor and privately-owned commercial retail and office space on the balance of the ground floor and three upper floors. The upper floors are to be occupied by Holyoke-Chicopee-Springfield Head Start, Inc. and Holyoke Community College's adult literacy programs, both uses considered community services eligible for funding under joint development pursuant to the FTA "Guidance on Eligibility of Joint Development Improvements under Federal Transit Law" (the "FTA Guidance"). The Project concept also included the design and construction, by the City, of a public parking garage on the adjacent City-owned parcel consisting of an at-grade bus berthing area with seven bus bays, and a public parking garage on two levels over the bus berthing area (the "Parking Improvements").

2. Pursuant to the paragraph A(f) of the Preliminary Statement of the JDA, the City, acting through the PVTA under a Memorandum of Understanding between the two parties, solicited a project designer, completed design of the Parking Improvements consistent with the Project's Preliminary Design Report dated June 2003 and incorporated into the JDA as Exhibit B. An Invitation for Bids ("IFB") for construction of the Parking Improvements (referred to as "Phase IIA" of the Project) was issued on May 13, 2009 and eight (8) bids were received on June 24, 2009. The lowest responsible and eligible bid submitted in response to the IFB was $3,762,000, approximately 35% over budget for the Parking Improvements (the bid summary sheet is attached as Exhibit A). All bids were rejected.

3. Subsequent to rejection of all bids, the City and PVTA developed a revised Project scope for Phase IIA, including a revised design concept for the Parking Improvements. The revised concept plan eliminates the proposed two-level parking garage, but retains the seven bay bus berthing area and includes a new covered canopy to be constructed over the bus berthing area (hereafter referred to as the "Bus Berthing Improvements"). A copy

of the revised concept plan is attached hereto as Exhibit B. Further details of the revised concept plan and construction costs for the Bus Berthing Improvements are set out in a letter dated September 17, 2009 from John M. Burke, PVTA Manager of Capital Projects, to Mathew P. Keamy, Director, Office of Program Management and Oversight, Federal Transit Administration (hereafter "FTA"), a copy of which is attached as Exhibit C.

4. The revised Project scope for the Phase IIA Bus Berthing Improvements and estimated construction cost thereof will result in savings over the original Project budget for the Parking Improvements.

5. Given the anticipated savings resulting from the revised Phase IIA Bus Berthing Improvements, and in light of the construction bid of the lowest responsive and eligible bidder on the Fire Station Improvements (referred to as "Phase II" of the Project), the Projects Partners have revised the original Project budget to reflect budget balancing by Project Phase, to reallocate funding from the original Parking Improvements budget to transit-related and grant eligible items of the Phase II Fire Station Improvements, and to provide an adequate contingency for Phase II construction. In compliance with paragraph F of the Preliminary Statement of the JDA, the Project Partners sought approval from the FTA of the revised budget and reallocation of Project funds between the various line items of the original Project budget. Further explanation of the reallocation of funds is set out in Exhibit C. The revised budget, dated September 17, 2009, is attached hereto as Exhibit D.

6. In connection with the reallocation of Project funding, the Developer provided the PVTA with satisfactory documentation of the expenditure or commitment of its private contribution of at least $1,000,000 to overall Project costs as required by paragraph 4.1(a) and Article 8 of the JDA. A summary of said contribution in included in Exhibit C.

7. In light of the information provided by PVTA to the FTA in Exhibits C and D, the FTA advised PVTA that it had no objection to PVTA authorizing the Developer to proceed with the award of the construction contract for Phase II as outlined in Exhibit C. FTA further advised that a formal grant amendment was not needed for the proposed budget changes and reallocation of funds. FTA confirmed approval of the changes in project scope and budget in a letter of October 13, 2009 from the Regional Administrator addressed to Mary MacInnes, PVTA Administrator, a copy of which is attached hereto as Exhibit E.

8. In light of the above referenced changes in Project scope, and the Developer's award of the Phase II Fire Station Improvements construction contract on September 25, 2009, the revised Project Schedule anticipates the start of construction of Phase II during the first week of October, 2009 with completion by July 31, 2010. Design of the Phase IIA Bus Berthing Improvements is expected to begin on or about November 1, 2009, with construction bids solicited in mid-January, 2010. Construction of Phase IIA is expected to begin on or about April 1, 2010, with completion by July 31, 2010.

9. Responsibility for oversight of the development of the Fire Station Improvements and Bus Berthing Improvements (formerly identified as the Parking Improvements) shall remain the same as in the original JDA.

10. All terms and conditions of the JDA not expressly modified by the terms of this Amendment shall remain the same.

Signed as a sealed instrument as of the date first written above.

PIONEER VALLEY TRANSIT AUTHORITY

By _____
Mary L. MacInnes, its Administrator

CITY OF HOLYOKE

By _____
Its Mayor

Approved as to Form:

By _____
City Solicitor, City of Holyoke

HOLYOKE INTERMODAL FACILITY, LLC

By _____
Its Manager

384852v.3/PVTA/0004

EXHIBIT A - BID SUMMARY SHEET

GC Bid - IFB09-004 Holyoke Multimodal Garage & Bus Ports

Company Name	Certification And Acknowledgement Of Required Federal Contract Clauses	Public Contractor Debarment Certificate	1271539	Certificate Of Authority	Certificate Of Tax Compliance	Certification Of Non-Collusion	Certification Of Restrictions On Lobbying	Certification Of Eligibility To Bid Or Propo	Acknowledgement of Addenda 1-10	Bid Guarantee 5%	Bid Amount (Item #1) 00400-5
Western Builders	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	$4,000,000.00
Aquadro & Cerruti	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	$4,178,000.00
Martin's Construction Company	Y	Y	Y	Y	Y	Y	Y	Y	N	N	$4,105,564.00
Kronerberger & Sons Restoration, Inc.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	$4,178,000.00
D.A. Sullivan & Sons, Inc.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	$3,998,000.00
W.J. Mountford Co.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	$4,038,000.00
KBE Building	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	$4,053,989.00
Fontain Brothers	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	$3,762,000.00

EXHIBIT B – Phase IIA Revised Project Concept

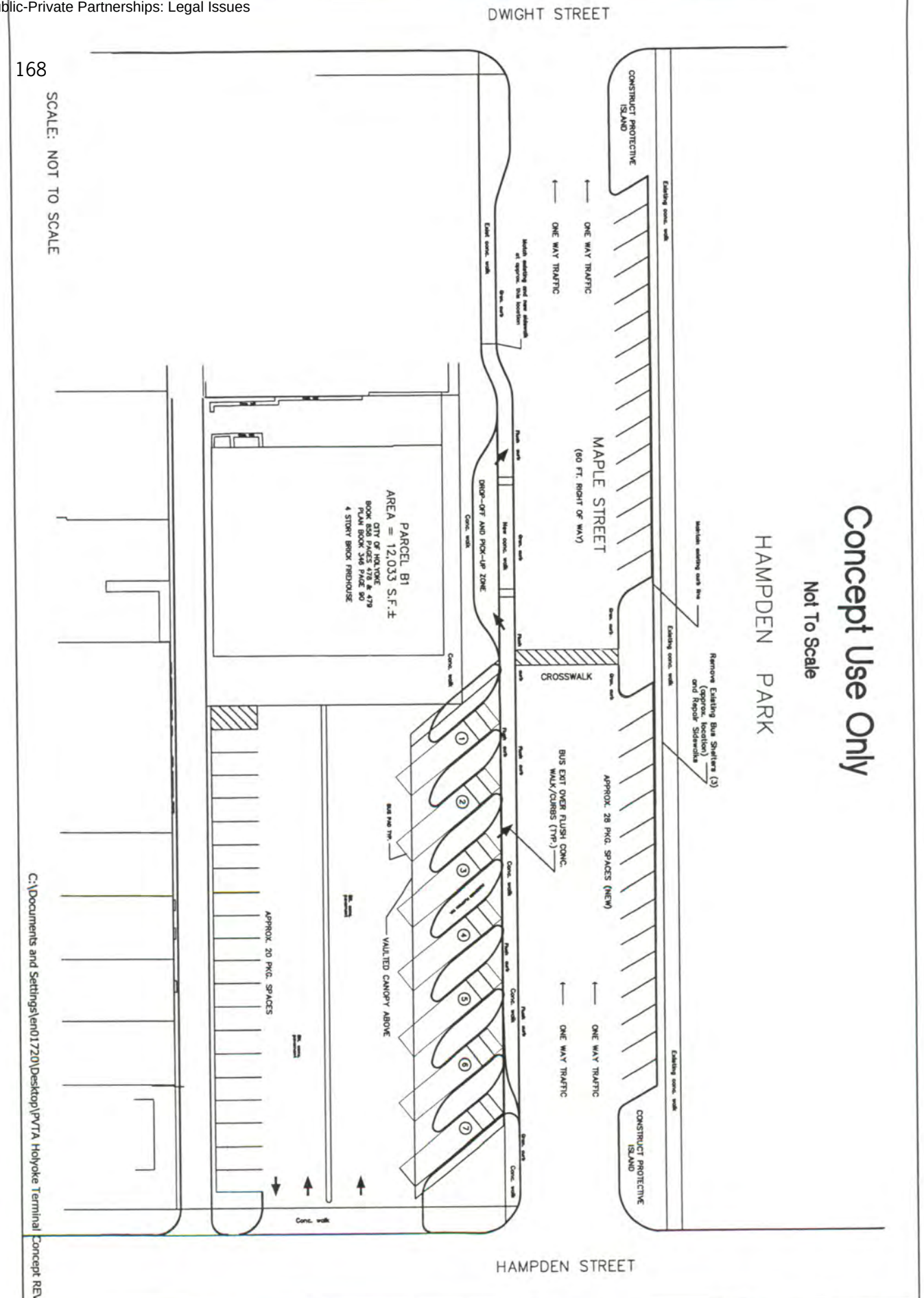


EXHIBIT C – PVTA 9/17/09 Letter to FTA – Revised Project Scope, Budget and Schedule

PVTA

September 17, 2009

Mathew P. Keamy, P.E., Director
Office of Program Management and Oversight
Federal Transit Administration – Region 1
55 Broadway, 9th Floor
Cambridge, MA 02142

SUBJECT: Holyoke Multi-Modal Transportation Center (HMTC)

Dear Mr. Keamy:

On September 15, 2009, the authorized representatives of the PVTA, City of Holyoke and Holyoke Intermodal Facility, LLC, whose organizations comprise the project partnership defined by the Joint Development Agreement (JDA) executed on July 30, 2007, voted unanimously to amend the HMTC project scope and budget contingent on the requirements set forth by the JDA. As you know, this amendment was necessary because the scope of the Phase IIA Bus Berth/Parking Garage portion of the project was scaled-back following its June bid, which came in approximately 35% over budget.

The PVTA now plans to amend the JDA and project grants to reflect the approved scope, budget and schedule changes, and to authorize the Holyoke Intermodal Facility, LLC to award construction of the Phase II Firehouse Renovation. Unless you have objection, our intent is to authorize the award on Tuesday, September 22nd. A summary of the project scope, budget and schedule changes are provided below.

Revised Phase IIA Concept Plan

The revised Phase IIA Concept Plan (see attached) eliminates the proposed parking garage but retains the seven bus berths from the original design and includes the construction of a new covered canopy system. Twenty (20) surface parking spaces are proposed for the lot bordering the public alley. Buses and passenger vehicles will be separated in the lot by a raised curbed median. A drop-off/pick-up zone for HMTC patrons will be provided at the building's main entrance on Maple Street. The lot will be widened slightly to provide adequate circulation for buses and passenger vehicles, which will require modification of the concrete islands at the corner of Hampden Street and Maple Street. A continuous sidewalk will be provided along the entire frontage of the HMTC (flush in front of the bus berths).

As in the original project, the existing bus shelters on Maple Street adjacent to Hampden Park will be removed and the sidewalk repaired. The existing curb line on the park side of Maple Street will be maintained and the City intends to add approximately thirty (30) angled parking spaces where the buses currently load. A mid-block island and crosswalk to the HMTC will be constructed to provide safe pedestrian access to the facility from the park side.

Transit-Related Parking – Five (5) of the twenty (20) parking spaces proposed in the parking lot will be dedicated for PVTA use with the remaining fifteen (15) available on a first-come-first-served basis. Because these fifteen spaces will not be dedicated solely for transit use and because they will be operated by the City who may derive revenue from their metered use, they will be constructed without the use of FTA funds. The same applies to the angled parking spaces on Maple Street.

Section 106 Compliance – the National Environmental Policy Act (NEPA) issued a Finding of No Significant Impact (FONSI) for the original HMTC project. We maintain that the revised Phase IIA Concept Plan should have no impact on this finding because the elements of the original Phase IIA portion of the project that physically connected to the historic firehouse building have now been eliminated (parking garage and walkway/bridge).

Revised Construction Cost – The probable construction cost for the revised Phase IIA improvements of $2,105,000, which was prepared by Lozano, Baskin & Associates and the PVTA, is significant lower than the original Phase IIA budget of $2,815,625. However, an estimated $160,000 of additional design, engineering and administration costs will result from the scaled-back Phase IIA portion of the project.

The savings from the scaled-back Phase IIA portion of the project will allow for a transfer of grant funds to eligible non-funded activities in the Phase II Renovation of the Firehouse.

Phase II Firehouse Renovation

Western Builders is the apparent lowest responsive and responsible bidder for the Phase II Renovation of the Firehouse. However, the project was not awarded back in May when it was bid, due to the Phase IIA bid overage. Western Builders has agreed to hold their bid price to-date but is now seeking a decision on moving forward. Their $3,327,697 base bid is broken down by funding activity as provided below[1].

Funding Activity	Est. Cost
PVTA Fit Up	$ 373,242
Headstart Fit Up	$ 376,600
HCC Fit Up	$ 711,643
Building Shell/Sysems	$1,652,212
Slab Repairs	$ 214,000
Total Cost:	$3,327,697

[1] Funding allocation formula for mechanical systems based on the respective square footage of individual tenant space - prepared by Reinhardt Associates and reviewed for use by PVTA.

Three Alternates that were not included in the base bid are provided below.

Alt. #1: Higher Quality Windows	($ 28,703) credit
Alt. #2: Clean/Seal Ext. Masonry	$ 38,843
Alt. #3 Ext. Site Landscape/Playground	$ 33,793

Revised Overall Project Budget and Schedule

Revised Budget vs. JDA Budget - Two state and federal grant funding spreadsheets are attached – the first shows the original JDA budget and the second shows the revised project budget as approved by the project's partners on 9/15/09. The revised project budget reflects the costs of revised Phase IIA as well as costs to complete the Phase II Firehouse Renovation, based on Western Builder's bid prices.

The reallocation of funds in the revised budget reflects the overall need for budget balancing by project phase. For example, the Project Planning/Implementation budget was increased from $948,150 to $1,133,746 to account for additional design, engineering and administration costs associated with the revised project. The "Building Shell and System" budget for the Firehouse Renovation (Phase I and II) was increased because the costs are projected to be somewhat higher ($2,216,757) than estimated in the original JDA budget ($2,160,000). The "PVTA Space Fit Up" budget was increased from $330,000 to $373,242 based on the estimated costs included in the Phase II bid.

Grant funding toward transit-related and grant eligible items were also increased including the "Head Start Fit Up" and the "HCC build-out", which were increased $56,600 and $161,643, respectively. Additionally, $224,152 in grant funding was allocated to provide adequate contingency for Phase II construction, where no grant funding was provided in the JDA. Finally, grant funding was allocated to Alternative #2 and #3 listed above and the credit for Alt. #1 will be taken with the bid award.

Required Developer Contribution - In keeping with article 8, Section 8.1 (f) of the JDA, the Holyoke Intermodal Facility, LLC has provided the PVTA satisfactory evidence[2] that they have already exceeded their required commitment of the $1 Million Dollar Private Financial Contribution to the project. A summary breakdown of the developer's investment to date is as follows:

Item	Amount
Holyoke Community College (HUD) Grant	$ 550,000[3]
First Floor Commercial Space Construction	$ 181,500 (programmed)
Legal Fees	$ 161,778
Architectural Design – Phase II	$ 239, 276
Eligible Expenses (accounting, appraisals, permits, etc.)	$ 43,253
Total Commitment	$1,175,807

[2] Back up invoices and letters of commitment on file with PVTA.
[3] In return for the grant, the HCC has been given a rent reduction of $55,000/year for ten years totaling $550,000.

It is important to note that in this accounting, the developer has not requested credit for $228,000 in expenses allowed by Section 4.1 and Exhibit C of the JDA that include a development service credit for $25,000; a developer's financial consultant credit of $25,000; a developer's real estate consultant fee of $78,000; and a developer's G&A credit of $100,000.

Revised Project Schedule – the revised project schedule anticipates that the Phase II construction can be awarded next week which would allow for an October 8th start and completion by July 31, 2010. Phase IIA design is currently out to bid with an expected start date of November 1, 2009. It is expected that Phase IIA construction will be bid in mid-January, construction would begin April 1, 2010 and be completed by July 31, 2010.

Next Steps

The next steps for PVTA is to amend the JDA and grants to reflect the approved scope, budget and schedule changes, and to authorize the Holyoke Intermodal Facility, LLC to award construction of the Phase II Firehouse Renovation. As stated earlier, we intend to authorize the LLC to proceed with the construction award on September 22nd to prevent a costly rebidding of the project, further delays and a potentially higher bid price. Please let me know if you have any objections. I would be pleased to meet with you, answer any questions you may have or provide any additional information you may require. Thank you.

Sincerely,

John M. Burke, P.E.
Manager of Capital Projects

Cc: Mary MacInnes, PVTA Administrator
Tom Walbridge, PVTA CFO

EXHIBIT D – Revised HMTC Project Budget (Grant Funds Only) dated 9/17/09

PIONEER VALLEY TRANSIT AUTHORITY
HOLYOKE ITC BUDGET & FUNDING (PVTA ONLY)
Updated 9-17-2009

Funding Source Budget	928,150		2,165,625		2,000,000	1,500,000	750,000	
Funding Source	FTA Grant X259-00	EOT Match 12/31/2009	FTA Grant MA-04-0020-00	EOT Match 12/31/2009	FTA Grant (100% 115) MA-15-X007-00	EOT $1.5M TB Contract 12/31/2009	EOT Contract (100%) 12/31/2009	Total
Activity								
Project Planning/Implementation Services								
Sub-Total	742,520	185,630				205,596		1,133,746
Transit Center and Related Improvements								
Construction Costs - Phase I								
Asbestos Removal / Slab Repairs							536,000	536,000
Building Stabilization/Oil tank removal			16,000	4,000				20,000
Building Shell and System						564,545		564,545
Sub-Total			16,000	4,000		564,545	536,000	1,120,545
Transit Center and Related Improvements								
Construction Costs - Phase II								
Asbestos Removal / Slab Repairs							214,000	214,000
Building Stabilization/Oil tank removal					1,278,970	373,242		1,652,212
Building Shell and System					373,242			373,242
PVTA space Fit Up					320,000	56,600		376,600
Head Start Program Space Fit Up						161,643		161,643
HCC Build-out								
Commercial Space Fit Up								
Building Contingency			104,500	26,125	27,788	65,739		224,152
Bus Berths/Garage (incl External Site Impvmts)			1,612,000	403,000				2,015,000
Clean/Seal Exterior Masonry (Alt A)						38,842		38,842
External Site Landscaping/Playground (Alt B)						33,793		33,793
Sub-Total			1,716,500	429,125	2,000,000	729,859	214,000	5,089,484
Total - Program	742,520	185,630	1,732,500	433,125	2,000,000	1,500,000	750,000	7,343,775

EXHIBIT E – FTA Letter of Concurrence dated 10/13/09

LEASE AGREEMENT

This Lease Agreement is made as of this 23rd day of January, 2009 (the "Execution Date"), by and between HOLYOKE INTERMODAL FACILITY, LLC, a limited liability company organized and existing under the laws of the Commonwealth of Massachusetts, having its principal office and place of business at 1776 Main Street, Springfield, Massachusetts 01103 (hereinafter referred to as the "Lessor"), and PIONEER VALLEY TRANSIT AUTHORITY, a body politic and corporate and a subdivision of the Commonwealth of Massachusetts, established pursuant to Chapter 161B of the General Laws of Massachusetts, with a usual address of 2808 Main Street, Springfield, Massachusetts 01040 (hereinafter referred to as the "Lessee").

Preliminary Statement

WHEREAS, Lessor owns a certain parcel of land with a building thereon located at 206 Maple Street, Holyoke, Massachusetts, which is more particularly described in a Deed recorded in the Hampden County Registry of Deeds, Book 17616, Page 67 (the "Property"), a copy of which Deed is attached hereto as Exhibit A;

WHEREAS, pursuant to a Joint Development Agreement between Lessor, Lessee, and the City of Holyoke the building on the Property (the "Building") has been renovated to contain a multimodal transportation center, known as the Holyoke Multimodal Transportation Center ("HMTC"), on a portion of the first floor of the Building, with the remainder of the first floor of the Building and the three upper floors to be used as commercial retail and office space (the "Project");

WHEREAS, the United States Department of Transportation, Federal Transit Administration (the "FTA") and the Massachusetts Executive Office of Transportation and Public Works (the "EOTPW") provided substantial funding for the Project, with Lessee acting as the Grantee of such funds (the "Funding");

WHEREAS, the Funding is contingent on Lessee having ongoing control of the HMTC to ensure that it is used for transportation and transportation-related purposes consistent with the requirements of FTA, and in particular with the "Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law," as adopted on February 7, 2007, 72 FR 5788; and

WHEREAS, Lessor and Lessee intend to establish such ongoing use and control of the HMTC by entering into a long-term agreement pursuant to which Lessor will lease to Lessee, and Lessee will lease from Lessor, a portion of the Property.

Agreement

NOW, THEREFORE, in consideration of the parties' mutual undertakings set forth herein, the parties hereto agree as follows:

1. Lease of the Premises; Term.

1.1. Lease of Premises. Lessor, in consideration of the Funding and the terms, covenants, conditions and agreements set forth herein to be kept and performed by Lessee, does hereby agree to demise and let unto Lessee and Lessee does hereby agree to hire and take from Lessor, a portion of the first floor of the Building, containing 3,000 square feet, more or less, and shown as "PVTA Tenant Area: 2692 ± Net S.F." on the sketch plan attached hereto as Exhibit B and incorporated herein (which portion is referred to herein as the "Premises"), together with the appurtenant right to use, in common with others, the common areas of the Building, including, without limitation, the stairways, elevators, corridors and walkways, and all driveways, parking areas and roadways serving the Property, to have and to hold the Premises unto Lessee, its successors and permitted assigns, upon and subject to all of the terms, covenants, conditions, conditional limitations and agreements herein contained.

1.2. Permitted Use. Lessee shall use and occupy the Premises as a multimodal transportation center or for other transit purposes, in full compliance with all federal, state and local regulations (the "Permitted Use").

1.3. Initial Term. The term of this Lease shall commence on the date on which a final Certificate of Occupancy is issued for the Premises (herein the "Commencement Date"), and expire on the last date of the fiftieth (50th) year following the Commencement Date (the "Initial Term"), unless extended as provided herein or terminated sooner pursuant to any of the conditional limitations or other provisions hereof. For purposes hereof, the term "Lease Year" means a period of one (1) year commencing on the Commencement Date or the annual anniversary date thereof. The terms of Sections 5 and 10.3 of this Lease shall take effect as of the Commencement Date.

1.4. Extension Periods. Lessee shall have the option, to be exercised in its sole discretion, to extend the term of this Lease Agreement for separate and successive extension periods of fifty (50) lease years each (each such period being hereinafter called an "Extension Period"), commencing upon the day after the expiration date of the Initial Term or an Extension Period, as the case may be. If Lessee elects to exercise any one or more of said options, it shall do so by giving notice of such election to Lessor at any time during the Initial Term of this Lease Agreement (including Extension Periods) on or before the date which is one (1) year prior to the Extension Period for which such election is exercised. Such Extension Period(s) shall be on the same terms and conditions as set forth herein. The Initial Term and, if exercised, the Extension Period(s), are referred to, collectively, as the "Term."

2. Title to the Premises. The Premises shall be let by Lessor unto Lessee free and clear of any and all liens, leases, mortgages, pledges, security interests, conditional sale agreements, charges, claims, options, and other encumbrances of any kind or nature whatsoever (collectively, the "Encumbrances"), except the following (collectively, the "Permitted Encumbrances"):

(a) Zoning Laws: The provisions of all applicable zoning laws;

(b) Taxes: The liens of current real estate and personal property taxes not delinquent; and

(c) Other Existing Encumbrances: The other existing Encumbrances set forth on Exhibit C, attached hereto and incorporated herein by reference, provided that, if the Property is encumbered by a mortgage, lien or security interest placed on the Property or the Premises by the Lessor as of said execution date, within fourteen (14) days of the execution of this Lease by the Lessee, the Lessor shall deliver to Lessee a Subordination, Nondisturbance and Attornment Agreement substantially in the same form as the agreement attached hereto as Exhibit D (the "SNDA"), as set forth more particularly in Section 14.1 below.

3. Rent. Pursuant to the terms and provisions of the Joint Development Agreement, the Lessee shall pay to the Lessor, in advance, rent for the Premises, on the first day of each Lease Year ("Rent") in the amount of One and 00/100 ($1.00) Dollar for each Lease Year of the Term. The Lessor and the Lessee agree that this Rent is commercially reasonable in light of the Funding that is to be provided to the Lessee in support of the HMTC. Notwithstanding the foregoing, Lessee shall have the obligation to pay for utilities and Lessee's Proportionate Share of CAM Charges, as set forth below.

4. Utilities. Beginning as of the Commencement Date, Lessee shall pay all use and consumption charges and service fees and the like for all separately metered public utilities used upon or furnished to the Premises during the Term hereof, including without limitation, charges for water and sewer, electricity and telephone services. If any such utilities used upon or furnished to the Premises are not separately metered or assessed, Lessee agrees to pay Lessor, upon submission of a statement for same, the charges for such utilities.

5. Common Area Maintenance Charges.

5.1. Lessee's Proportionate Share. Lessee shall pay to the Lessor the Lessee's Proportionate Share of Lessee's Common Area Maintenance ("CAM") Charges (defined below) for the operation and maintenance of the Building and the Property. For purposes of this Lease Agreement, "Lessee's Proportionate Share" shall mean a fraction, the numerator of which is the total square footage of the Premises, and the denominator of which is the total square footage of the Building.

5.2. Estimated CAM Charges. Lessee's Proportionate Share of the CAM Charges shall be paid in monthly installments, in the amount estimated from time to time by Lessor, on the first day of each and every calendar month, in advance. Lessor shall make a good faith estimate of the CAM Charges due by Lessee for each Lease Year, and Lessee shall pay to Lessor, beginning on the Commencement Date and on the first day of each calendar month thereafter, an amount equal to one-twelfth of the estimated CAM Charges for such Lease Year. From time to time Lessor may reasonably re-estimate the CAM Charges to be due by Lessee and deliver a copy of the re-estimate to Lessee. Thereafter, the monthly installments of CAM Charges shall be appropriately adjusted in accordance with the new estimations so that, by the end of the Lease Year in question, Lessee shall have paid all of the Lessee's Proportionate Share of the CAM Charges for such Lease Year as reasonably estimated by Lessor. Any amounts paid based on such an estimate shall be subject to adjustment as herein provided when actual CAM Charges are available for each Lease Year, as set forth in Section 5.5 below.

5.3. CAM Charges. The term "CAM Charges" shall mean all reasonable costs and expenses (subject to the limitations set forth below) that Lessor incurs in connection with the operation and maintenance of those portions of the Property that are not included in the Premises and are for the common use and benefit of all the lessees of the Building, determined in accordance with generally accepted accounting principles ("GAAP") consistently applied, including, but not limited to, the following costs: (a) all expenses incurred by Lessor or its agents that are related to employment of handymen, mechanics, electricians, plumbers, guards, cleaners and other personnel (including amounts incurred for wages, salaries, benefits and management fees), for services in connection with the operation of the Property; provided, however, that the costs of employing personnel who work less than full-time in connection with the operation of the Property shall be equitably adjusted, (b) all supplies and materials used in the operation and maintenance of the Property; (c) costs for improvements made to the Building which, although capital in nature, reduce the normal operating costs of the Building, as well as capital improvements made in order to comply with any law (including amendments to existing laws) promulgated by any governmental authority after the Commencement Date, in both cases as amortized over the useful economic life of such improvements as determined by Lessor in accordance with GAAP (with only the annual amortized portion of such costs being included in CAM Charges in any calendar year); (d) cost of electricity, steam, water, sewer and other utilities required for the operation of the Building, except the cost of utilities directly paid by Lessee and those reimbursable to Lessor by the Building's lessees; (e) insurance expenses; (f) repairs, replacements, and general maintenance of the Property; and (g) service or maintenance contracts with independent contractors for the operation and maintenance of the Property (including, without limitation, any alarm service, window cleaning, HVAC, elevator, life safety systems, trash removal, snow and ice removal, landscaping, and management company).

5.4. Exclusions from CAM Charges. Notwithstanding any other provision of this Lease, CAM Charges shall not include costs for (i) capital improvements made to the Building, other than capital improvements described in Section 5.3(c) and except for items which are generally considered maintenance and repair items; (ii) repair, general maintenance and other expenses paid by proceeds of insurance or by Lessee, the Building lessees or other third parties; (iii) interest, amortization of principal or other payments on loans to Lessor; (iv) depreciation; (v) leasing commissions; (vi) legal expenses; (vii) renovating or otherwise improving space for occupants of the Building or vacant space in the Building; (viii) taxes, assessments, betterments, and any other governmental charges attributable to the Property (or its operation), including penalties and interest thereon, or attributable to the personal property of Lessor or the Building lessees, it being recognized that Lessee is exempt from all the foregoing, (ix) federal, state, or local income taxes imposed on or measured by the income of Lessor from the operation of the Building; (x) rent and other sums due under any ground lease affecting any interest in the Property; (xi) costs of repairs necessary to cure latent defects in the construction of the Building; (xii) expenses incurred to bring the Property into compliance with laws existing as of the Commencement Date, including without limitation the Americans With Disabilities Act and the regulations and standards thereunder; (xiii) Lessor's general overhead not directly related to the management or operations of the Property; (xiv) expenses arising out of a breach or violation of law, lease or other obligation by Lessor or its agents, employees or contractors, including fines, penalties, and attorneys' fees; (xv) expenses to the extent caused by the negligence or willful misconduct of Lessor or its agents, employees, representatives, contractors or invitees; (xvi) costs or expenses for which Lessor is entitled to reimbursement from any source; (xvii) costs or

expenses in connection with services or other benefits provided to one or more lessees of the Building but which are not available to all lessees of the Building; (xviii) costs and expenses incurred in connection with the leasing of any space in the Building, including without limitation, space planning fees, and marketing, promotional, and advertising costs; (xix) damages and repairs attributable to condemnation, fire or other casualty; (xx) charitable or political contributions; (xxi) any cost or expense related to the testing for, remediation, removal, transportation or storage of Hazardous Materials from the Property (which Hazardous Materials shall include, but not be limited to, gasoline of all types and all substances defined as "hazardous substances", "toxic substances", "oil" or "hazardous wastes" in any federal, state or applicable local statute now or hereinafter enacted concerning Hazardous Materials, or in any regulation adopted or publication promulgated pursuant to said statutes); (xxii) any CAM Charges attributable to the security of the Building (as Lessee shall be responsible for the security of the Premises) or to janitorial service to the Building (as Lessee shall be responsible for providing janitorial service to the Premises), and (xxiii) interest, penalties, or other costs arising out of Lessor's failure to make timely payments of its obligations.

5.5. Annual Adjustments. No later than ninety (90) days after each anniversary of the Commencement Date, Lessor shall furnish to Lessee a statement in reasonable detail setting forth the actual total CAM Charges for the past Lease Year (the "CAM Statement"). If the CAM Statement reveals that Lessee paid more for the estimated CAM Charges than the actual CAM Charges would have required for the year for which such Statement was prepared, then Lessor shall, at Lessee's option, credit or reimburse Lessee for such excess within thirty (30) days; likewise, if Lessee paid less than the actual CAM Charges due, then Lessee shall pay Lessor such deficiency within thirty (30) days after receiving written notice from Lessor of the amount of such deficiency.

5.6. Lessee's Audit Rights. Lessor shall permit Lessee, at Lessee's sole cost and expense, to audit any of Lessor's invoices and statements relating to CAM Charges for a Lease Year. If Lessee objects to Lessor's accounting of any CAM Charges, Lessee shall, on or before the date that is ninety (90) calendar days following review of the applicable CAM Statement, notify Lessor that Lessee disputes the correctness of such accounting and specify the particular line items in which the accounting claims to be incorrect. If any such audit shows that the amount of CAM Charges stated on the CAM Statement for any Lease Year was overstated by more than two percent (2%), then, Lessor shall pay to Lessee the reasonable cost of its audit and investigation. If the parties dispute the amount of CAM Charges and the dispute is not settled within two (2) months thereafter, either party may submit the dispute to arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. The decision of the arbitrator shall be final and binding on Lessor and Lessee and judgment thereon may be entered in any court of competent jurisdiction. Lessee shall keep confidential (shall cause any third party consultant assisting Lessee with any such audit to keep confidential) all information obtained during the audit process including any settlement or arbitration awards made, except that Lessee shall be permitted to divulge such information (i) when necessary in connection with the trial of any action, proceeding or arbitration between Lessor and Lessee, (ii) pursuant to a subpoena duly and validly served upon Lessee, or (iii) as required by law.

5.7. Interest and Penalties. Lessee shall pay all interest and penalties imposed upon the late payment by Lessee of any utility bills or CAM Charges on the Premises.

5.8. Lessor's Cure Rights. If Lessee shall fail to pay any utility bill or Lessee's Proportionate Share of the CAM Charges on or before the last day upon which the same may be paid without incurring any interest or penalties for the late payment thereof, Lessor may, after giving a forty-give (45) day notice and demand to the Lessee and upon Lessee's failure to pay the same within said forty-five (45) day period, pay the same with all interest and penalties lawfully imposed upon the late payment thereof, and the amounts so paid by the Lessor shall thereupon be and become immediately due and payable by Lessee to Lessor hereunder. If the Lessor elects to pay said utility bill or CAM Charges as set forth herein, then interest shall accrue on the amount paid at the rate of one and one-half percent (1.5%) per month until the Lessee has paid the Lessor the total amount due, plus all accrued interest.

5.9. Lessee's Right to Contest. Lessee, at its own cost and expense, may, if it so desires, contest the validity or amount of any utility bill, betterment or other CAM Charges imposed on the Premises, in which event, if permitted by applicable law, Lessee may defer the payment thereof for such period as such contest shall be prosecuted actively and shall be pending undetermined; provided, however, that no provision hereof shall be construed to allow such charge to remain unpaid for such length of time as shall permit the Premises, or the lien thereon created by such item to be contested, to be sold by federal, state, county or municipal authority for the nonpayment thereof. Lessor agrees to cooperate with Lessee if Lessee decides to contest the validity or amount of any such bill or charge, which shall include executing any documents or pleadings reasonably required in connection with said proceedings.

5.10. Net Lease. This is an absolute net lease and, except as provided in Paragraph 6 herein, Lessor shall not be required to provide any services or do any act or thing with respect to the Premises and the CAM Charges shall be paid to Lessor without any claim on the part of Lessee for diminution, setoff or abatement, and nothing shall suspend, abate or reduce any rent to be paid hereunder, except as otherwise specifically provided herein.

6. Lessor's Services. Lessor shall furnish to Lessee (and the cost thereof shall be included in CAM Charges, except to the extent that any exclusions to the definition of CAM Charges may apply or the same are separately metered) the following (referred to as "Lessor's Services"): (i) heat and air conditioning as appropriate, at such temperatures and in such amounts as are standard for comparable facilities; (ii) trash removal for ordinary waste; (iii) snow and ice removal and landscaping; (iv) replacement of all necessary light bulbs, tubes and ballasts required to maintain a light level throughout the Premises adequate for Lessee's business operations, as reasonably determined by Lessee and paid for by Lessee, (v) common area access and lighting as necessary to permit use of the Premises and walkways at all times during Lessee's regular business hours, (vi) such repainting as is necessary to maintain the Building in first-class condition, and (vii) life safety systems and equipment for the Building and the Premises in accordance with all applicable laws, rules and regulations.

7. Maintenance, Repair and Replacement.

7.1. Lessee's Maintenance Obligations. Lessee shall at all times during the Term hereof, at its own cost and expense, clean and maintain the Premises and keep the Premises in the same condition that the Premises are in as of the Commencement Date, and in such condition as may be required by law and by the terms of the insurance policies furnished pursuant to the terms of this Lease Agreement (but excluding damage due to ordinary wear and tear, fire or other

casualty, and damage to the extent that it is caused by the negligence or willful misconduct of Lessor or its agents, employees, representatives or invitees), specifically including, but not limited to, the replacement of any tangibles which may be required by law or regulations or which may have become worn or obsolete. All such repairs or replacements shall be performed by duly licensed contractors and in a manner reasonably acceptable to Lessor.

7.2. Lessor's Maintenance Obligations. Notwithstanding the provisions of Section 6.1, Lessor shall be responsible for maintaining and keeping in good order and repair the structural elements of the Building, which shall only include the foundation, roof, floor, exterior and structural walls. In addition, Lessor shall be responsible for any necessary maintenance, repair and replacement of the Building's HVAC system, electrical system, plumbing system, life safety and mechanical systems. This responsibility does not include fixtures within the Premises which are Lessee's responsibility. Further, Lessor shall also maintain the common areas and facilities of the Building and the Property in good, clean and safe order, condition and repair, and consistent with prudent building maintenance and management, and be responsible for the removal of snow and ice from the Property. Lessor shall not be required to make such repairs necessitated by the negligence of the Lessee, its agents, employees, servants, or contractors unless said repairs are fully covered by insurance.

7.3. Compliance with Law. Lessee shall at all times during the Term hereof, at its own cost and expense, substantially perform and comply with all laws, rules, orders, ordinances, regulations and requirements, now or hereafter enacted or promulgated, of every government or municipality having jurisdiction over the Premises, relating to the use of the Premises or the franchises and privileges connected therewith, including all licensure, life-safety code and all other child welfare rules and regulations. Notwithstanding the foregoing, Lessor, and not Lessee, shall be responsible for compliance with those building code regulations, and other such laws and regulations concerning the structure or layout of the Building and/or the Premises, including, without limitation, the applicable portions of the Americans With Disabilities Act (separately and collectively, "Building Codes"). The cost to Lessor of such compliance shall be reimbursable to Lessor through CAM Charges, but only to the extent set forth in Section 5 of this Lease Agreement. However, Lessee, and not Lessor, shall be responsible for compliance with those Building Codes that do not relate to the Building or Premises generally, but rather, relate to, or of consequence only because of, Lessee's particular use of the Premises.

7.4. Lessee's Right to Challenge. Lessee shall have the right to contest by appropriate legal proceedings, without cost or expense to Lessor, the validity of any law, rule, order, ordinance, regulation or requirement of the nature referred to above. Lessee may postpone compliance with such law, rule, order, ordinance, regulation or requirement until the final determination of such proceedings so long as such postponement of compliance will not subject Lessor to any criminal prosecution. Lessor agrees to cooperate with Lessee if Lessee decides to contest, by appropriate legal proceedings, the validity of any law, rule, order, ordinance, regulation or requirement of the nature referred to above, which shall include executing any documents or pleadings reasonably required in connection with said proceedings.

8. Alterations. Lessee shall not make any alterations or additions to the Premises without Lessor's prior written approval, which approval may not be unreasonably withheld, conditioned or delayed by Lessor. If Lessee does make alterations or improvements to the Premises, said alterations or improvements, if affixed or incorporated into the Premises in such manner that

their removal will cause material damage to the Premises or the Property, shall become a part of the Premises.

9. Hazardous Materials.

9.1. Definition. "Hazardous Materials" means, collectively, any oil, animal wastes, medical waste, blood, biohazardous materials, hazardous waste, hazardous materials, hazardous substances, pollutants or contaminants, petroleum or petroleum products, radioactive materials, asbestos in any form or condition, or any pollutant or contaminant or hazardous, dangerous or toxic chemicals, materials or substances within the meaning of any applicable federal, state or local law, regulation, ordinance or requirement relating to or imposing liability or standards of conduct concerning any such substances or materials on account of their biological, chemical, radioactive, hazardous or toxic nature, all as now in effect or hereafter from time to time enacted or amended. For purposes of this Lease, "Environmental Laws" means all laws, rules, orders and regulations of federal, state, county, and municipal authorities, concerning any Hazardous Materials whatsoever.

9.2. Lessee's Obligations. Lessee shall indemnify Lessor, to the extent permitted by law, against any and all liabilities, costs, damages, loss and other expenses, including reasonable attorneys' fees, that may be imposed upon, incurred by, or asserted against Lessor by third parties (including reasonable attorneys' fees in connection therewith) as a result of any release or threatened release of Hazardous Materials or any failure to comply with the Environmental Laws to the extent the same is caused by Lessee or its agents, employees, contractors, or representatives. The provisions of this Section shall survive the termination or expiration of this Lease. If Lessor shall have to sue Lessee to enforce this indemnity and if Lessor prevails in such suit, then Lessee shall reimburse Lessor for its reasonable attorneys' fees in bringing such action.

9.3. Lessor's Obligations. Lessor shall indemnify Lessee, to the extent permitted by law, against any and all liabilities, costs, damages, loss and other expenses, including reasonable attorneys' fees, that may be imposed upon, incurred by, or asserted against Lessee by third parties (including reasonable attorneys' fees in connection therewith) as a result of any release or threatened release of Hazardous Materials or any failure to comply with the Environmental Laws to the extent the same is caused by Lessor or its agents, employees, contractors, or representatives. The provisions of this Section shall survive the termination or expiration of this Lease. If Lessee shall have to sue Lessor to enforce this indemnity and if Lessee prevails in such suit, then Lessor shall reimburse Lessee for its reasonable attorneys' fees in bringing such action.

9.4. Extent of Obligations. The indemnifications of this Section specifically include reasonable costs, expenses and fees incurred in connection with any investigation of Property conditions or any clean-up, remedial, removal or restoration work required by any governmental authority. The provisions of this Section will survive the expiration or termination of this Agreement.

10. Indemnification; Liability Insurance.

10.1. Lessee's Indemnification Obligations. Lessee agrees, to the extent permitted by law, to defend, indemnify and hold forever harmless Lessor, its employees, officers, directors, managers and agents and their successors and assigns from and against any and all loss, cost,

claims, liabilities, damage and expense (including reasonable attorneys' fees) on account of damage to property, accident or injury (and/or death) to persons or the property of any persons directly or indirectly caused in whole or in part by any act, omission or negligence of Lessee or its agents, employees, contractors, and representatives related to the use, misuse or occupancy of the Premises and areas appurtenant thereto or in connection with any work or act done or omitted on the Premises and appurtenant areas or by reason of any omission to fully perform and observe the terms of this Lease or applicable law except when the claim arose because of the negligence or willful misconduct of Lessor or its agents, employees, contractors and/or subcontractors, representatives, or invitees.

10.2. Lessor's Indemnification Obligations. Lessor agrees to defend, indemnify and hold forever harmless Lessee, its employees, officers, directors, managers and agents and its successors and assigns from and against any and all loss, cost, claims, liabilities, damage and expense (including reasonable attorneys' fees) on account of damage to property, accident or injury (and/or death) to persons or the property of any persons directly or indirectly caused in whole or in part by any act, omission or negligence of Lessor or its agents, employees, contractors and/or subcontractors, representatives and invitees related to the use, misuse or condition of the the Property, including the Premises and the Building, or in connection with any work or act done or omitted on the Premises, the Building, or the Property or by reason of any omission to fully perform and observe the terms of this Lease or applicable law except when the claim arose because of the negligence or willful misconduct of Lessee or its agents, employees, contractors, or representatives.

10.3. Lessee's Insurance. At all times during the Term hereof, Lessee shall, at its own cost and expense, obtain and keep in force a comprehensive general public liability insurance policy naming Lessor and Lessee as insured parties, insuring against accident or disaster in or about the Premises with limits not less than One Million Dollars ($1,000,000) combined single limit for bodily injury (including death), and One Million Dollars ($1,000,000) for property damage. Certificates evidencing all such policies of insurance shall be delivered to Lessor, naming Lessor as additional insured, prior to the Commencement Date and at least ten (10) days prior to each policy expiration date.

10.4. Lessor's Insurance. At all times during the Term hereof, Lessor shall, at its own cost and expense, keep the Building insured against loss or damage by fire and such other insurance risks, casualties and hazards as are insured against by owners of comparable premises in an amount equal to one hundred percent (100%) of the full replacement cost of the Building. All insurance to be furnished by Lessor under this Paragraph shall be by policies which shall name as insureds Lessor and Lessee as their interests may appear.

11. Fire and other Casualty.

11.1. Repair Estimate. If the Building or the Premises shall be damaged or destroyed by fire or other casualty (a "Casualty"), then Lessor shall, within thirty (30) days from the date of such Casualty, deliver to Lessee a good faith written and certified estimate (the "Damage Notice") of the time needed to repair the damage caused by such Casualty.

11.2. Lessee's Rights. If (i) a substantial portion of the Premises or the Building is damaged by Casualty such that it materially interferes with the Lessee's ability to conduct its

business in the Premises in a manner reasonably comparable to that conducted immediately before such Casualty and Lessor reasonably estimates that the damage caused thereby cannot be repaired within one hundred eighty (180) days (such damage is referred to hereinafter as "Substantial Damage"), or (ii) Lessor does not deliver the Damage Notice within the time specified above (provided, however, that Lessor shall have an extra five (5) days cure period after receipt of notice from Lesseee of the failure of the Damage Notice to be delivered), then Lessee may terminate this Lease by delivering written notice to Lessor of its election to terminate within sixty (60) days after the Damage Notice (i) has been delivered to Lessee, or (ii) should have been delivered to Lessee after application of the above-described cure period. If Lessee does not so timely terminate this Lease, then (subject to Lessor's right to terminate under Section 11.3 below) Lessor shall repair the Building or the Premises, as the case may be, as provided below, and the CAM Charges for the portion of the Premises rendered unusable for the Permitted Use by the damage shall be abated from the date of damage until the completion of the repair, unless Lessee's wilful misconduct caused such damage, in which case, Lessee shall continue to pay Lessee's Proportionate Share of the CAM Charges without abatement.

11.3. Lessor's Rights. Subject to the provisions of Section 11.5 below, if a Casualty causes Substantial Damage to the Premises or the Building, then, provided that all other leases similarly affected are also terminated, Lessor may terminate this Lease by giving written notice of its election to terminate within sixty (60) days after the Damage Notice has been delivered to Lessee, and CAM Charges shall be abated as of the date of the Casualty.

11.4. Repair Obligation. If neither party elects to terminate this Lease following a Casualty, or in the case there is no Substantial Damage to the Premises or the Building but only partial damage, then Lessor shall proceed with reasonable diligence to carry out any necessary demolition and to restore, repair, replace and rebuild the Building, the Premises, and other improvements or tangibles constructed by Lessor to substantially the same condition as they existed immediately before such Casualty. Provided that said Casualty damaged the Premises, such rebuilding or restoration shall be in accordance with plans and specifications submitted by Lessor to Lessee and subject to Lessee's approval and shall further be carried out by duly licensed contractors. However, Lessor shall not be required to repair or replace any of the equipment, fixtures, and other improvements which may have been placed by, or at the request of, Lessee or other occupants in the Building. If Lessor fails to complete the repair of the Casualty damage the time period set forth in the Damage Notice, plus an additional grace period of 10% of such time period, then Lessee shall have the right to terminate this Lease upon written notice to Lessor, such right expiring upon the complete repair of the Casualty Damage as set forth herein. Except for insurance proceeds paid to Lessee for Lessee's personal property or for Lessee to locate and pay for temporary substitute accommodations while the Premises are being repaired or restored, any insurance proceeds paid by reason of such damage or destruction shall be paid to Lessor to repair or restore the Premises.

11.5. Joint Development Agreement. Nothwithstanding anything herein to the contrary, this Lease shall not terminate in the event of a Casualty if Lessor is required to rebuild the Premises under the terms of the Joint Development Agreement for the Holyoke Multimodal Transporation Center, dated July 30, 2007, entered in by and among Lessor, Lessee, and the City of Holyoke, including, without limitation, the 2003 FTA Master Agreement incorporated therein.

12. Condemnation.

12.1. Entire Condemnation. If at any time during the Term hereof all of the Building or the Premises shall be taken in the exercise of the power of eminent domain by any sovereign, municipality or other public or private authority (a "Taking"), then this Lease shall terminate on the date of said Taking by such authority.

12.2. Partial Condemnation – Lessee's Rights. If any part of the Property, the Building or the Premises is subject to a Taking and such Taking will prevent Lessee from conducting its business in the Premises in a manner reasonably comparable to that conducted immediately before such taking for a period of more than one hundred eighty (180) days, then Lessee may terminate this Lease as of the date of such Taking by giving written notice to Lessor within sixty (60) days after the Taking, and CAM Charges shall be apportioned as of the date of such Taking. If Lessee does not terminate this Lease, then CAM Charges shall be abated as to that portion of the Premises rendered unusable for the Permitted Uses by the Taking.

12.3. Partial Taking - Lessor 's Rights. If a substantial portion of the Property, the Building or the Premises becomes subject to a Taking, then Lessor may terminate this Lease by delivering written notice thereof to Lessee within sixty (60) days after such Taking, and CAM Charges shall be apportioned as of the date of such Taking; provided, however, that Lessor may not terminate this Lease unless all other leases in the Building are also terminated. If Lessor does not so terminate this Lease, and if Lessee does not terminate pursuant to Section 12.2, then this Lease will continue, but if any portion of the Premises has been rendered unusable for the Permitted Use by such Taking then CAM Charges shall abate as provided in the last sentence of Section 12.2. If this Lease does not terminate, then Lessor shall use reasonable efforts to make any reasonable modifications to the the Building or the Premises that would minimize any material interference to the Permitted Use that the Taking may have caused; provided, however, that Lessor shall not be obligated to perform such work if a mortgagee holding a mortgage on the Property takes a substantial portion of the condemnation award, or if the "damages" portion of the condemnation award is not sufficient to cover the cost of such work, and in any event, the cost of such work, to the extent not reimbursed by the condemnation award of other third party source, shall be included in "CAM Charges."

12.4. Award. Nothing herein shall prevent Lessor or Lessee from asserting their respective claims to damages and other awards as their interests appeared immediately prior to such damage, taking, or diminution.

13. Assignment and. Subletting. Lessee shall not assign this Lease Agreement or any interest herein, or make any sublease of all or any part of the Premises, without Lessor's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed, and any such attempted assignment or subletting without such prior written consent shall be void unless it is determined that Lessor's withholding, conditioning or delaying was unreasonable.

14. Subordination to Mortgages, Liens or Security Interests.

14.1. Lessor's Covenant. Lessor covenants that, if the Property is encumbered by an institutional or other mortgage, lien, security interest or other instrument in the nature of a mortgage placed on the Property or the Premises by the Lessor as of the date of the execution of

this Lease by the Lessee, the Lessor shall within fourteen (14) days of said execution date deliver to Lessee a Subordination, Nondisturbance and Attornment Agreement substantially in the same form as the SNDA attached hereto, signed by each person or entity holding such a mortgage, lien, security interest or other instrument in the nature of a mortgage on Premises or the Property, in which said holder agrees that, if said mortgagee or lien holder becomes the owner of the Premises by foreclosure sale or deed given in lieu of foreclosure or other proceeding, the lien holder shall recognize this Lease, not disturb Lessee's use and possession of the Premises, and shall not enlarge Lessee's obligations or abridge its rights hereunder.

14.2. Lessee's Covenant. Lessee covenants and agrees that (a) Lessee shall subordinate this Lease to the mortgage, lien, or other security interest in the nature of a mortgage now or hereafter placed on the Property or the Premises by the Lessor; and (b) the Lease shall be subordinate to any such mortgage, lien or other security interest now or hereafter placed on the Property, and to each advance made or hereafter to be made under any such mortgage, and to all renewals, modifications, consolidations, replacements and extensions thereof and all substitutions therefor; and agrees that if said lien holder becomes the owner of the Premises by foreclosure sale or deed given in lieu of foreclosure or other proceeding, the Lessee shall attorn to and recognize any such mortgagee, lien holder, successor thereto or assignee thereof, becoming such owner, for all purposes, in place and instead of the Lessor; provided that, in each case, such mortgagee or lien holder executes and delivers to Lessee a Subordination, Nondisturbance and Attornment Agreement substantially in the same form as the SNDA attached hereto.

14.3. Estoppel Certificates. Provided that Lessee has received a signed SNDA, as provided above, Lessee shall, within ten (10) business days of any request therefor, promptly execute and deliver such written instruments as Lessor shall deem necessary to show the subordination of this Lease to said mortgages or other such instruments in the nature of a mortgage, acknowledging the commencement and termination dates of this Lease, that this Lease is in full force and effect (if the same be true), that there are no uncured defaults or specifying such defaults if any are claimed (or, if there is an uncured default, specifying such default), that this Lease has not been modified (or if it has, stating such modifications), the date though which Rent and other charges have been paid, and providing any other pertinent information as to which the requesting party might reasonably require.

15. Default; Termination Rights.

15.1. Lessee's Default. If any of the following occurs, Lessee shall be in default under the terms and provisions of this Lease, and Lessor may terminate this Lease in accordance with Section 15.2 and require Lessee to vacate and surrender possession of the Premises.

(a) The failure of Lessee to pay when due any rent, utilities, CAM Charges or other sum of money that Lessee is obligated to pay hereunder; or

(b) The failure of Lessee to perform or observe any of the other terms, covenants, conditions or agreements required to be performed or observed by Lessee hereunder;or

(c) The filing by Lessee of a voluntary petition, or the filing against Lessee of an involuntary petition, in bankruptcy or insolvency or adjudication of bankruptcy or insolvency of Lessee, or the filing by Lessee of any petition or answer seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution,

or similar relief under the present or any future federal bankruptcy act, or any other present or future applicable federal, state, or other statute or law, or the assignment by Lessee for the benefit of creditors, or appointment of a Trustee, receiver, or liquidator of all or any part of the assets of Lessee, and within one hundred twenty (120) days after the commencement of any such proceeding against Lessee, such proceeding shall not have been dismissed, or if, within one hundred twenty (120) days after the appointment of any trustee, receiver, or liquidator of Lessee or of all or any part of Lessee's property, without the consent or acquiescence of Lessee, such appointment shall not have been vacated or otherwise discharged, or if any execution or attachment shall be issued against Lessee or any of Lessee's property pursuant to which the Premises shall be taken or occupied or attempted to be taken or occupied.

15.2. Lessee's Cure Rights. Lessor shall not have the right to terminate this Lease unless Lessor shall have first given Lesee written notification specifying such default and Lessee shall have failed to cure the same within forty-five (45) days after Lessee receives such notice, or if the default is of such a nature that a cure cannot reasonably be completed within the forty-five 45 day period, if Lessee shall have failed to commence such cure within the forty-five (45) day period and thereafter pursue it diligently to completion, provided, however, that in the case of a monetary breach, Lessor may terminate this Lease if Lessor shall have given Lessee written notification specifying such default and Lessee shall have failed to cure the same within forty-five (45) days after the date Lessee receives such notification.

15.3. Default Due to Bankruptcy. Notwithstanding the provisions of Section 15.2 above, Lessor shall not have the right to terminate this Lease Agreement in an event of default under Section 15.1(c) of this Lease Agreement if no application is made in any proceedings for a reformation or recasting of this Lease, or for any change in any of the provisions of this Lease, and if the trustee, receiver, or similar custodian of Lessee's property, shall duly perform all of the terms of this Lease.

15.4. Lessor's Cure Rights. It is understood and agreed by the parties that Lessor, as the owner of the Premises, has the right to protect the Premises from damage and deterioration due to lack of diligence by Lessee. In recognition thereof, if Lessee fails to perform or comply with any of the terms or provisions contained in this Lease to be performed or complied with by Lessee, other than a failure to pay any CAM Charges or other sum required to be paid by Lessee hereunder, and if Lessee fails, after written notification from Lessor, to cure such default within the permitted period, Lessor may, at its option, enter the Premises and effect the cure. Such entering shall not cause or constitute a termination or cancellation of this Lease. Lessor shall have the right to do all things reasonably necessary to accomplish the work required. The reasonable cost and expense of such work shall be payable to Lessor by Lessee on demand.

15.5. Transit Uses. Lessor expressly acknowledges and agrees that at no time and in no event shall Lessor use the Premises or allow the Premises to be used for other than transit-related uses without the prior written approval of the FTA, the EOTPW, and such other federal or state bodies or officials having jursidiction over the same.

15.6. Lessor's Default. If Lessor shall fail in the performance or observance of any agreement or condition in this Lease contained on its part to be performed, or observed, and if the

default is not cured within forty-five (45) days from the date on which Lessee sends Lessor written notice specifying the default (or, if the default is of such a nature that it cannot reasonably be cured within said forty-five (45) day period, or if Lessor, having commenced the cure within said forty-five (45) day period thereafter fails to diligently prosecute the same to completion), Lessee may, at its option, without waiving any claim for damages for breach of agreement or any other remedy available to Lessee, at any time thereafter cure such default for the account of Lessor and any amount paid or any contractual liability incurred by Lessee in so doing shall be deemed paid or incurred for the account of Lessor and Lessor shall reimburse Lessee therefor and save Lessee harmless therefrom. Provided, however, that Lessee may cure any such default as aforesaid prior to the expiration of said waiting period, without notice to Lessor if an emergency situation exists, or after notice to Lessor, if the curing of such default prior to the expiration of said waiting period is reasonably necessary to protect the Premises or Lessee's interest therein or to prevent injury or damage to persons or property. If Lessor shall fail to reimburse Lessee upon demand for any amount paid or liability incurred for the account of Lessor hereunder, said amount or liability may be deducted by Lessee from the next or any succeeding payments of CAM Charges due hereunder; provided, however, that should said amount or the liability therefor be disputed by Lessor, Lessor may contest its liability or the amount thereof, through arbitration or through a declaratory judgment action and Lessor shall bear the cost of filing fees therefor.

16. Quiet Enjoyment. Lessor covenants that at all times during the Term hereof, so long as Lessee is not in default hereunder, Lessee's quiet enjoyment of the Premises or any part thereof shall not be disturbed by any act of Lessor, or by anyone acting by, through or under Lessor, except in respect of the Permitted Encumbrances.

17. Lessor's Right of Entry. Lessor and its authorized representatives, agents and employees shall have the right from time to time, at Lessor's option, and upon reasonable prior notice to Lessee so as to not interrupt the conduct of its business, to enter and pass through the Premises during business hours, to examine the same but this shall not obligate Lessor to make any such entry or examination.

18. Estoppel Certificates. Each party shall at any time and from time to time during the Term hereof, within ten (10) days after request by the other party, execute, acknowledge and deliver to the other party or to any prospective purchaser, assignee or mortgagee designated by the other party, a certificate stating (i) that this Lease Agreement is unmodified and in force and effect (or, if there have been any modifications, that this Lease Agreement is in force and effect as modified and identifying the modification agreements); (ii) whether or not there is any existing default by Lessee in the payment of any CAM Charges or any other sum of money hereunder, and whether or not there is any other existing default by either party with respect to which a notice of default has been served, and, if there is any such default, specifying the nature and extent thereof, and (iii) whether or not there are any setoffs, defenses or counterclaims against enforcement of the obligations to be performed hereunder existing in favor of the party executing such certificate.

19. Surrender; Obligations Upon Expiration or Termination. Lessee shall, on the last day of the Term hereof or upon any earlier termination hereof, surrender and deliver up the Premises into the possession and use of Lessor, without fraud or delay and in good order, condition and repair, ordinary wear and tear, damage from a Casualty, and damage caused by Lessor or its agents, employees, representatives, contractors or invitees excepted, free and clear of all lettings and occupancies and free and clear of all encumbrances other than those existing on the date

hereof and those, if any, created by Lessor without any payment or allowance whatever by Lessor.

20. No Waiver. No failure on the part of either party at any time to require the performance by the other party of any term hereof shall be taken or held to be a waiver of such term or in any way affect such party's right to enforce such term, and no waiver on the part of either party of any term hereof shall be taken or held to be a waiver of any other term hereof or the breach thereof.

21. Signs. Lessee shall not affix any advertising material or signs to any exterior portion of the Facility or elsewhere on the Premises without first obtaining the Lessor's written consent, which consent shall not be unreasonably withheld, conditioned or delayed.

22. Time is of the Essence. The parties acknowledge and agree that time is of the essence of this Lease Agreement and this applies to all acts identified herein, whenever any act is required to be done at a certain time, or within a prescribed period of time.

23. Zoning and Good Title. Lessor warrants and represents, upon which warranty and representation Lessee has relied in the execution of this Lease Agreement, that Lessor is the owner of the Premises, in fee simple absolute, free and clear of all encumbrances, except for the easements, covenants and restrictions of record as of the date of this Lease Agreement and other Permitted Encumbrances. Such exception(s) shall not impede or interfere with the quiet use and enjoyment of the Premises by Lessee. Lessor further warrants and covenants that this Lease Agreement shall not be subordinate to any Permitted Encumbrance or to any other encumbrance except as set forth in Paragraph 14 hereof; that Lessor has full right and lawful authority to execute this Lease Agreement for the Term, in the manner, and upon the conditions and provisions herein contained; that there is no legal impediment to the use of the Premises as set out herein; that the Premises are not subject to any easements, restrictions, zoning ordinances or similar governmental regulations which prevent their use as set out herein; that the Premises presently are zoned for the use contemplated herein and throughout the Term of this Lease Agreement may continue to be so used therefor by virtue of said zoning, under the doctrine of "non-conforming use," or valid and binding decision of appropriate authority, except, however, that said representation and warranty by Lessor shall not be applicable in the event that Lessee's act or omission shall invalidate the application of said zoning, the doctrine of "non-conforming use" of the valid and binding decision of the appropriate authority. Lessor shall furnish, without expense to Lessee, upon execution of this Lease Agreement, a title report covering the Premises showing the condition of title.

24. Binding Arbitration. In the event that a dispute should arise between the Lessor and Lessee with respect to any provision of this Lease Agreement, such dispute shall be submitted to binding arbitration in accordance with the Massachusetts Uniform Arbitration Act, as from time to time amended.

25. No Broker. The parties represent to each other that they have not dealt with any real estate agent or broker with respect to this transaction. If any agent or broker is entitled to a commission as a result of this transaction said agent or broker shall be paid by the party with whom the agent or broker dealt and the party breaching this representation shall indemnify and hold the other party harmless from any claims as a result of such breach.

26. Severability. The invalidity or unenforceability of any particular provision hereof shall not affect the other provisions, and this Lease Agreement shall be construed in all respects as if such invalid or unenforceable provision had not been contained herein.

27. Benefit. This Lease Agreement shall inure to the benefit of and be binding upon the parties and their respective legal representatives, successors and assigns. The provisions hereof are solely for the benefit of the parties and their respective legal representatives, successors and assigns, and shall not be deemed or construed to create any right for the benefit of any other person.

28. Construction. Whenever a singular word is used herein, it shall also include the plural wherever required by the context, and vice versa. The terms and conditions hereof represent the results of bargaining and negotiations between the parties, each of which has been represented by counsel of its selection, and neither of which has acted under duress or compulsion, whether legal, economic or otherwise, and represent the results of a combined draftsmanship effort. Consequently, the terms and conditions hereof shall be interpreted and construed in accordance with their usual and customary meanings, and the parties hereby expressly waive and disclaim, in connection with the interpretation and construction hereof, any rule of law or procedure requiring otherwise, specifically including but not limited to, any rule of law to the effect that ambiguous or conflicting terms or conditions contained here in shall be interpreted or construed against the party whose counsel prepared this Lease Agreement or any earlier draft hereof.

29. Entire Agreement; Written Modifications. This Lease Agreement contains the entire integrated understanding between the parties with respect to the subject matter hereof; all representations, promises, and prior or contemporaneous understandings, between the parties with respect to the subject matter hereof are expressed in this Lease Agreement; and any other understandings between the parties with respect to the subject matter hereof are hereby canceled. This Lease Agreement shall not be amended, modified or supplemented without the written agreement of the parties at the time of such amendment, modification or supplement.

30. Governing Law. This Lease Agreement shall be governed by and subject to the laws of the Commonwealth of Massachusetts.

31. Captions. The captions herein are for convenience and identification purposes only, are not an integral part hereof, and are not to be considered in the interpretation of any part hereof.

32. Notices. All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given if sent by certified or registered mail, return receipt requested, postage prepaid, addressed as follows:

To Lessor:
Holyoke Intermodal Facility, LLC
1776 Main Street
P.O. Box 1776
Springfield, MA 01102-1776

With a copy to:
Peter H. Barry, Esq.
Bulkley, Richardson and Gelinas, LLP
1500 Main Street, Suite 2700
Springfield, MA 01115-5507

To Lessee: Pioneer Valley Transit Authority
2808 Main Street
Springfield, MA 01107

With a copy to: Anne-Marie Hyland, Esq.
Kopelman & Paige, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

or to such other address as shall be furnished in writing by either party to the other party.

33. Costs of Enforcement. If any action is instituted in connection with any controversy arising out of this Lease Agreement, the prevailing party shall be entitled to recover, in addition to costs, such sum as the court may adjudge reasonable as attorneys fees in such action and on any appeal from any Judgment or decree entered therein.

34. Notice of Lease. At the request of Lessee, Lessor promptly shall execute and deliver a Notice of Lease, in form and substance acceptable to Lessee in its sole discretion, which Notice will contain the information required by statute as well as such additional information as Lessee and/or Lessor may choose. Lessee or Lessor, at its option and expense, may record such Notice of Lease or a copy of this Lease with the Hampden County Registry of Deeds.

IN WITNESS WHEREOF, the parties have executed this Lease Agreement as of the day and year first above written.

HOLYOKE INTERMODAL FACILITY, LLC

By: _____
Name: Peter A. Pickerelly
Title: Manager

PIONEER VALLEY TRANSIT AUTHORITY

By: _____
Name: Mary McInnes
Title: Administrator

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

On this 22nd day of January, 2009, before me, the undersigned Notary Public, personally appeared Mary MacInnes, and proved to me through satisfactory evidence of identification, which was personal knowledge, to be the person whose name is signed on the preceding document, and acknowledged to me that he signed it voluntarily for its stated purpose as Administrator of Pioneer Valley Transit Authority

_____
(Official Signature and Seal of Notary)
Filomena Depergola
My commission expires: 9/6/13

365380/PVTA/0004

514617v2

Bk 17616 Pg67 #3621
01-23-2009 @ 03:24p

EXHIBIT A

AFFECTED PREMISES:
206 MAPLE STREET
HOLYOKE, MA 01040

MASSACHUSETTS RELEASE DEED

CITY OF HOLYOKE (the "Grantor"),

a municipal corporation duly established under the laws of the Commonwealth of Massachusetts and having its usual place of business at City Hall, Dwight Street, Holyoke, Hampden County, Massachusetts for consideration paid, and in full consideration of One and 00/100 dollar ($1.00) paid, RELEASES to Holyoke Intermodal Facility, LLC (the "Grantee"), a Massachusetts limited liability company, with a usual place of business at 1776 Main Street, Springfield, Massachusetts;

All its right, title and interest in and to the land and building in said Holyoke, Hampden County, Massachusetts, bounded and described as follows:

Beginning at a point of the southeasterly sideline of Maple Street at the northerly corner of land now or formerly of Peter J. Sullivan and Raymond E. Narey, and running thence;

N49°-29'-50"E, along the southeasterly sideline of Maple Street, 120.33 feet to a point, thence;

S40°-29'-53"E, along Parcel A1, shown on a Plan of Land recorded in Hampden County Registry of Deeds Plan 346, Page 90,100.00 feet to a point, thence;

S49°-29'-50"W, along a 14' wide alleyway, 120.33 feet to a drill hole, thence;

N40°-29'-53"W, along land now or formerly of Peter J. Sullivan and Raymond E. Narey, 100.00 feet to the point of beginning.

Containing an area of 12,033 square feet, more or less.

Being the same premise described as "Parcel B1" on a plan entitled "Plan of Land in Holyoke Massachusetts Surveyed for City of Holyoke," Scale 1" = 20', Date: August 17, 2004, prepared by Heritage Surveys, Inc. recorded in the Hampden County Registry of Deeds Book of Plans 346, Page 90 on June 19, 2007 (the "Plan").

Together with a perpetual right and easement over so much of the Grantor's land encroached upon by a 16" retaining wall located on the common boundary between

"Parcel B1," the premises conveyed hereby, and "Parcel A1," other land of the Grantor, as shown on the Plan.

The premises are conveyed subject to and together with the conditions, restrictions and reservations of record pertaining to the 14' wide alley abutting the southerly boundary line of the granted premises.

The premises are conveyed with the understanding that they will be improved in accordance with the terms and provisions of a Joint Development Agreement dated July 30, 2007 ("Agreement") between the Pioneer Valley Transit Authority, the City of Holyoke, and Holyoke Intermodal Facility, LLC. In the event that the Grantee herein abandons its development obligations as set forth in the Agreement, title to the premises shall revert to the Grantor. An affidavit recorded in the Hampden County Registry of Deeds by the Grantor attesting to the abandonment by the Grantee of its development obligations shall be sufficient to cause the title to the premises to revert to the Grantor. Notwithstanding the foregoing, this right of reverter shall terminate if the Grantee records an affidavit of completion in said Registry, together with an original or copy of the Certificate of Occupancy issued by the City of Holyoke for the premises, evidencing the completion of the improvements in accordance with the terms of the Agreement.

Subject to a restriction set forth in said Agreement for the benefit of the Pioneer Valley Transit Authority that a portion of the premises, to be known as the Holyoke Multimodal Transportation Center, shall be used in perpetuity for public transportation purposes. The Grantee, by its acceptance of this deed, agrees to subject the premises to this restriction by recording a Declaration of Restriction immediately hereafter, the terms of which are hereby incorporated by reference.

Massachusetts General Laws, Chapter 44, section 63A has been complied with.

Massachusetts General Laws, Chapter 60, section 77B has been complied with.

Being a portion of the same premises conveyed to the City of Holyoke by deeds of Joseph W. Prew dated April 16, 1913 recorded in the Hampden County Registry of Deeds in Book 858 Page 477; Caroline Prew dated April 16, 1913 recorded in Book 858, Page 478 and Rose V. O'Connell dated April 16, 1913 recorded in Book 858, Page 479.

In witness whereof, the said CITY OF HOLYOKE has caused its corporate seal to be hereto affixed and these presents to be signed, acknowledged and delivered in its name and behalf by Michael J. Sullivan its Mayor hereto duly authorized, this 2nd day of December in the year two thousand eight.

Signed and sealed in presence of

Witness

CITY OF HOLYOKE

By: _____
Michael J. Sullivan, Mayor

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss

On this 2nd day of Dec 2008, before me, the undersigned notary public, personally appeared Michael J. Sullivan, the duly sworn Mayor of the City of Holyoke, proved to me through satisfactory evidence of identification, which was personal knowledge of identity of the individual by the Notary Public, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.

TRICIA E. SEDELOW NOTARY PUBLIC COMM. EXPIRES MARCH 1, 2013 COMMONWEALTH OF MASSACHUSETTS

Tricia E. Sedelow
Notary Public

My Commission expires: Mar 1, 2013

The undersigned Grantee, Holyoke Intermodal Facility, LLC hereby accepts delivery of this deed subject to the foregoing terms and conditions.

Holyoke Intermodal Facility

By: _____
Peter A. Picknelly, Manager

720614

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss

On this 23rd day of January 2009, before me, the undersigned notary public, personally appeared Peter A. Picknelly, proved to me through satisfactory evidence of identification, which was personal knowledge, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose as Manager of Holyoke Intermodal Facility, LLC.

Daniel M. Rothschild

Notary Public

My Commission expires:

DANIEL M. ROTHSCHILD
NOTARY PUBLIC
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires Feb. 13, 2015

DONALD E. ASHE, REGISTER
HAMPDEN COUNTY REGISTRY OF DEEDS

720614

EXHIBIT B

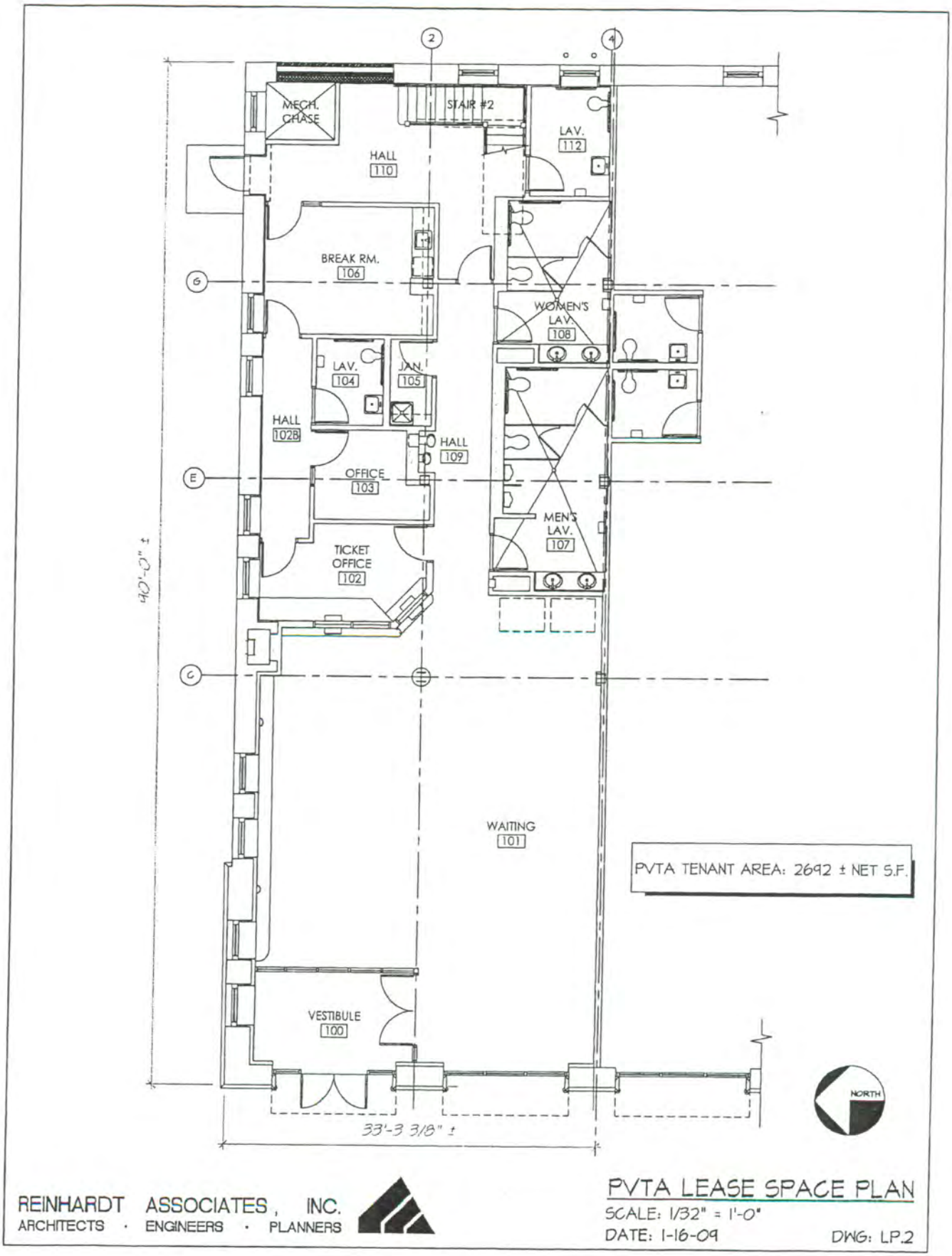


EXHIBIT C

ENCUMBRANCES

1. Declaration of Restriction made by the Holyoke Intermodal Facility, LLC dated January 21, 2009 and recorded in the Hampden County Registry of Deeds in Book 17616, Page 88.
2. Right of reverter set forth in a deed of the City of Holyoke to Holyoke Intermodal Facility, LLC, said deed dated December 2, 2008 and recorded in the Hampden County Registry of Deeds in Book 17616, Page 67.
3. Subject to alley restrictions set forth in a deed of the City of Holyoke to Holyoke Intermodal Facility, LLC, said deed dated December 2, 2008 and recorded in the Hampden County Registry of Deeds in Book 17616, Page 67.

EXHIBIT D

SUBORDINATION, ATTORNMENT AND NON-DISTURBANCE AGREEMENT

This AGREEMENT, dated this _____ day of _____, 20____, is by and between PIONEER VALLEY TRANSIT AUTHORITY, a body politic and corporate and a subdivision of the Commonwealth of Massachusetts, established pursuant to Chapter 161B of the General Laws of Massachusetts, with a usual address of 2808 Main Street, Springfield, Massachusetts 01040 ("Lessee") and _____, having an address of _____ ("Mortgagee").

Recitals

WHEREAS, Lessee is the "Lessee" under and by virtue of a certain lease executed between said Lessee and Holyoke Intermodal Facility, LLC, a limited liability company organized and existing under the laws of the Commonwealth of Massachusetts, having its principal office and place of business at 1776 Main Street, Springfield, Massachusetts 01103 ("Lessor"), covering a portion of the premises located at 206 Maple Street, Holyoke, Massachusetts , as more particularly described in a Lease Agreement between Lessor and Lessee dated _____, 2009 (with all amendments thereto heretofore or hereafter entered into, the "Lease"), and incorporated herein by reference; and

WHEREAS, Mortgagee is making a loan (the "Loan") to Lessor which is to be secured, in part, by the lien of a Mortgage upon the premises described therein which shall include the Leased Premises as described under the Lease, executed and delivered by Lessor to Mortgagee (hereinafter called the "Mortgage"); and

WHEREAS, as a precondition to the making of the Loan, Mortgagee requires Lessor to obtain Lessee's execution of this Agreement and Lessee is agreeable to executing this Agreement whereby Mortgagee shall recognize Lessee's rights under the Lease and Lessee will attorn to a purchaser at a foreclosure of such Mortgage, if any, if Mortgagee and such purchaser recognizes Lessee's rights under the Lease, all upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the covenants hereinafter contained, and other good and valuable consideration, the receipt and Sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

Agreement

1. The Lease and all terms thereof, are and shall be subject and subordinate to the lien of the Mortgage in so far as such Mortgage encumbers the real property of which the Leased Premises form a part and to all renewals, modifications, consolidations, replacements and extensions thereof, to the full extent of the principal sum secured thereby and interest thereon, except as herein noted.

2. In the event it should become necessary to foreclose the Mortgage, Mortgagee thereunder will not join Lessee under the Lease in summary or foreclosure proceedings so long as Lessee is not in default under any of the terms, covenants, or conditions of the Lease beyond

any applicable cure period.

3. In the event that Mortgagee shall, in accordance with the foregoing foreclosure or upon sale of the Leased Premises pursuant to the mortgagee's power of sale or transfer of the Leased Premises by deed in lieu of foreclosure, succeed to the interest of Lessor under the Lease, provided there exist no defaults or events of default by the Lessee under the Lease beyond any applicable cure period, Mortgagee agrees not to disturb or otherwise interfere with Lessee's possession of the Leased Premises for the unexpired term of the Lease and the Lease shall continue in full force and effect as a direct Lease and agreement between the succeeding owner of the premises and Lessee upon and subject to all the terms, covenants and conditions of the Lease and Lessee shall remain in possession of the Premises in accordance with the terms and provisions of the Lease, and in such event:

(a) Lessee shall be bound to such new owner under all of the terms, covenants and provisions of the Lease for the remainder of the term thereof including the extension periods, if Lessee elects or has elected to exercise its options to extend the term) and Lessee hereby agrees to attorn to such new owner and to recognize such new owner as Lessor under the Lease;

(b) Such new owner shall be bound to Lessee under all of the terms, covenants and provisions of the Lease for the remainder of the term thereof (including but not limited to its rights under Section 15.6 and to the extension periods, if Lessee elects or has elected to exercise its options to extend the term), which terms, covenants and provisions such new owner hereby agrees to assume and perform; provided, however, that such new owner shall not be:

(i) liable for any act or omission of any prior lessor (including Lessor) unless such act or omission continues from and after the date upon which the new owner succeeds to the interest of such prior lessor (it being further agreed that (a) offsets under the Lease that were properly deducted by Lessee prior to the date upon which the new owner succeeds to the interest of such prior lessor shall not be subject to challenge, and (b) Lessee shall be entitled to recover any recoupment and/or set-off from any such new owner pursuant to Section 15.6 of the Lease any amount that Lessee was entitled to, but had not, as of the date of such change of ownership, recovered by recoupment and/or set-off or otherwise from any such prior lessor); or

(ii) obligated to cure any defaults of any prior lessor which occurred prior to such new owner's succession to the interest of Lessor, unless such default continues from and after the date upon which the new owner succeeds to the interest of such prior lessor.

4. Prior to terminating the Lease on account of a default by Lessor thereunder, Lessee agrees to notify Mortgagee of such default and give Mortgagee the opportunity to cure such default within thirty (30) days of Mortgagee's receipt of such notice (or if such default cannot reasonably be cured within such thirty (30) day period, Mortgagee shall have such longer time as may be necessary to effect such a cure provided Mortgagee commences said cure within

such thirty (30) day period and diligently pursues such cure to conclusion.

5. This Agreement may not be amended or terminated orally and shall be binding upon and inure to the benefits of the respective heirs, personal representatives, successors and assigns of the parties hereto, and all covenants, conditions and agreements herein contained shall be construed as running with the land.

6. Mortgagee hereby acknowledges and agrees that all of the trade fixtures, furniture, and equipment whether owned or leased by Lessee or any sublessee (hereinafter called the "Lessee's Equipment") installed in or on the Leased Premises, regardless of the manner or mode of attachment, shall be and remain the property of Lessee. In no event (including a default under the Lease or Mortgage) shall Mortgagee have any liens, rights or claims in Lessee's Equipment whether or not all or any part thereof shall be deemed fixtures; and Mortgagee expressly waives all rights of levy, distraint, or execution with respect to said trade fixtures, furniture, and equipment. Mortgagee agrees to execute and deliver to Lessee, within ten (10) days after request therefor, any document reasonably required by Lessee in order to evidence the foregoing.

7. This Agreement shall be governed by and construed in accordance with laws of the Commonwealth of Massachusetts.

IN WITNESS WHEREOF, the parties hereto have signed and sealed these presents the day and year above written above.

PIONEER VALLEY TRANSIT AUTHORITY

By: _____
Name:
Title:

MORTGAGEE:

By: _____
Name:
Title:

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

On this _____ day of _____, 2009, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is signed on the preceding document, and acknowledged to me that he/she signed it voluntarily for its stated purpose as _____ of _____.

_____
Notary Public
My Commission Expires:

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

On this _____ day of _____, 20_____, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is signed on the preceding document, and acknowledged to me that he/she signed it voluntarily for its stated purpose on behalf of the Pioneer Valley Transit Authority.

_____
Notary Public
My Commission Expires:

365439/PVTA/0004

LEASE AGREEMENT

This Lease Agreement is made as of this 23rd day of January, 2009 (the "Execution Date"), by and between HOLYOKE INTERMODAL FACILITY, LLC, a limited liability company organized and existing under the laws of the Commonwealth of Massachusetts, having its principal office and place of business at 1776 Main Street, Springfield, Massachusetts 01103 (hereinafter referred to as the "Lessor"), and PIONEER VALLEY TRANSIT AUTHORITY, a body politic and corporate and a subdivision of the Commonwealth of Massachusetts, established pursuant to Chapter 161B of the General Laws of Massachusetts, with a usual address of 2808 Main Street, Springfield, Massachusetts 01040 (hereinafter referred to as the "Lessee").

Preliminary Statement

WHEREAS, Lessor owns a certain parcel of land with a building thereon located at 206 Maple Street, Holyoke, Massachusetts, which is more particularly described in a Deed recorded in the Hampden County Registry of Deeds, Book 17616, Page 67 (the "Property"), a copy of which Deed is attached hereto as Exhibit A;

WHEREAS, pursuant to a Joint Development Agreement between Lessor, Lessee, and the City of Holyoke the building on the Property (the "Building") has been renovated to contain a multimodal transportation center, known as the Holyoke Multimodal Transportation Center ("HMTC"), on a portion of the first floor of the Building, with the remainder of the first floor of the Building and the three upper floors to be used as commercial retail and office space (the "Project");

WHEREAS, the United States Department of Transportation, Federal Transit Administration (the "FTA") and the Massachusetts Executive Office of Transportation and Public Works (the "EOTPW") provided substantial funding for the Project, with Lessee acting as the Grantee of such funds (the "Funding");

WHEREAS, the Funding is contingent on Lessee having ongoing control of the HMTC to ensure that it is used for transportation and transportation-related purposes consistent with the requirements of FTA, and in particular with the "Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law," as adopted on February 7, 2007, 72 FR 5788; and

WHEREAS, Lessor and Lessee intend to establish such ongoing use and control of the HMTC by entering into a long-term agreement pursuant to which Lessor will lease to Lessee, and Lessee will lease from Lessor, a portion of the Property.

Agreement

NOW, THEREFORE, in consideration of the parties' mutual undertakings set forth herein, the parties hereto agree as follows:

1. Lease of the Premises; Term.

1.1. Lease of Premises. Lessor, in consideration of the Funding and the terms, covenants, conditions and agreements set forth herein to be kept and performed by Lessee, does hereby agree to demise and let unto Lessee and Lessee does hereby agree to hire and take from Lessor, a portion of the first floor of the Building, containing 3,000 square feet, more or less, and shown as "PVTA Tenant Area: 2692 ± Net S.F." on the sketch plan attached hereto as Exhibit B and incorporated herein (which portion is referred to herein as the "Premises"), together with the appurtenant right to use, in common with others, the common areas of the Building, including, without limitation, the stairways, elevators, corridors and walkways, and all driveways, parking areas and roadways serving the Property, to have and to hold the Premises unto Lessee, its successors and permitted assigns, upon and subject to all of the terms, covenants, conditions, conditional limitations and agreements herein contained.

1.2. Permitted Use. Lessee shall use and occupy the Premises as a multimodal transportation center or for other transit purposes, in full compliance with all federal, state and local regulations (the "Permitted Use").

1.3. Initial Term. The term of this Lease shall commence on the date on which a final Certificate of Occupancy is issued for the Premises (herein the "Commencement Date"), and expire on the last date of the fiftieth (50th) year following the Commencement Date (the "Initial Term"), unless extended as provided herein or terminated sooner pursuant to any of the conditional limitations or other provisions hereof. For purposes hereof, the term "Lease Year" means a period of one (1) year commencing on the Commencement Date or the annual anniversary date thereof. The terms of Sections 5 and 10.3 of this Lease shall take effect as of the Commencement Date.

1.4. Extension Periods. Lessee shall have the option, to be exercised in its sole discretion, to extend the term of this Lease Agreement for separate and successive extension periods of fifty (50) lease years each (each such period being hereinafter called an "Extension Period"), commencing upon the day after the expiration date of the Initial Term or an Extension Period, as the case may be. If Lessee elects to exercise any one or more of said options, it shall do so by giving notice of such election to Lessor at any time during the Initial Term of this Lease Agreement (including Extension Periods) on or before the date which is one (1) year prior to the Extension Period for which such election is exercised. Such Extension Period(s) shall be on the same terms and conditions as set forth herein. The Initial Term and, if exercised, the Extension Period(s), are referred to, collectively, as the "Term."

2. Title to the Premises. The Premises shall be let by Lessor unto Lessee free and clear of any and all liens, leases, mortgages, pledges, security interests, conditional sale agreements, charges, claims, options, and other encumbrances of any kind or nature whatsoever (collectively, the "Encumbrances"), except the following (collectively, the "Permitted Encumbrances"):

(a) Zoning Laws: The provisions of all applicable zoning laws;

(b) Taxes: The liens of current real estate and personal property taxes not delinquent; and

(c) Other Existing Encumbrances: The other existing Encumbrances set forth on Exhibit C, attached hereto and incorporated herein by reference, provided that, if the Property is encumbered by a mortgage, lien or security interest placed on the Property or the Premises by the Lessor as of said execution date, within fourteen (14) days of the execution of this Lease by the Lessee, the Lessor shall deliver to Lessee a Subordination, Nondisturbance and Attornment Agreement substantially in the same form as the agreement attached hereto as Exhibit D (the "SNDA"), as set forth more particularly in Section 14.1 below.

3. Rent. Pursuant to the terms and provisions of the Joint Development Agreement, the Lessee shall pay to the Lessor, in advance, rent for the Premises, on the first day of each Lease Year ("Rent") in the amount of One and 00/100 ($1.00) Dollar for each Lease Year of the Term. The Lessor and the Lessee agree that this Rent is commercially reasonable in light of the Funding that is to be provided to the Lessee in support of the HMTC. Notwithstanding the foregoing, Lessee shall have the obligation to pay for utilities and Lessee's Proportionate Share of CAM Charges, as set forth below.

4. Utilities. Beginning as of the Commencement Date, Lessee shall pay all use and consumption charges and service fees and the like for all separately metered public utilities used upon or furnished to the Premises during the Term hereof, including without limitation, charges for water and sewer, electricity and telephone services. If any such utilities used upon or furnished to the Premises are not separately metered or assessed, Lessee agrees to pay Lessor, upon submission of a statement for same, the charges for such utilities.

5. Common Area Maintenance Charges.

5.1. Lessee's Proportionate Share. Lessee shall pay to the Lessor the Lessee's Proportionate Share of Lessee's Common Area Maintenance ("CAM") Charges (defined below) for the operation and maintenance of the Building and the Property. For purposes of this Lease Agreement, "Lessee's Proportionate Share" shall mean a fraction, the numerator of which is the total square footage of the Premises, and the denominator of which is the total square footage of the Building.

5.2. Estimated CAM Charges. Lessee's Proportionate Share of the CAM Charges shall be paid in monthly installments, in the amount estimated from time to time by Lessor, on the first day of each and every calendar month, in advance. Lessor shall make a good faith estimate of the CAM Charges due by Lessee for each Lease Year, and Lessee shall pay to Lessor, beginning on the Commencement Date and on the first day of each calendar month thereafter, an amount equal to one-twelfth of the estimated CAM Charges for such Lease Year. From time to time Lessor may reasonably re-estimate the CAM Charges to be due by Lessee and deliver a copy of the re-estimate to Lessee. Thereafter, the monthly installments of CAM Charges shall be appropriately adjusted in accordance with the new estimations so that, by the end of the Lease Year in question, Lessee shall have paid all of the Lessee's Proportionate Share of the CAM Charges for such Lease Year as reasonably estimated by Lessor. Any amounts paid based on such an estimate shall be subject to adjustment as herein provided when actual CAM Charges are available for each Lease Year, as set forth in Section 5.5 below.

5.3. CAM Charges. The term "CAM Charges" shall mean all reasonable costs and expenses (subject to the limitations set forth below) that Lessor incurs in connection with the operation and maintenance of those portions of the Property that are not included in the Premises and are for the common use and benefit of all the lessees of the Building, determined in accordance with generally accepted accounting principles ("GAAP") consistently applied, including, but not limited to, the following costs: (a) all expenses incurred by Lessor or its agents that are related to employment of handymen, mechanics, electricians, plumbers, guards, cleaners and other personnel (including amounts incurred for wages, salaries, benefits and management fees), for services in connection with the operation of the Property; provided, however, that the costs of employing personnel who work less than full-time in connection with the operation of the Property shall be equitably adjusted, (b) all supplies and materials used in the operation and maintenance of the Property; (c) costs for improvements made to the Building which, although capital in nature, reduce the normal operating costs of the Building, as well as capital improvements made in order to comply with any law (including amendments to existing laws) promulgated by any governmental authority after the Commencement Date, in both cases as amortized over the useful economic life of such improvements as determined by Lessor in accordance with GAAP (with only the annual amortized portion of such costs being included in CAM Charges in any calendar year); (d) cost of electricity, steam, water, sewer and other utilities required for the operation of the Building, except the cost of utilities directly paid by Lessee and those reimbursable to Lessor by the Building's lessees; (e) insurance expenses; (f) repairs, replacements, and general maintenance of the Property; and (g) service or maintenance contracts with independent contractors for the operation and maintenance of the Property (including, without limitation, any alarm service, window cleaning, HVAC, elevator, life safety systems, trash removal, snow and ice removal, landscaping, and management company).

5.4. Exclusions from CAM Charges. Notwithstanding any other provision of this Lease, CAM Charges shall not include costs for (i) capital improvements made to the Building, other than capital improvements described in Section 5.3(c) and except for items which are generally considered maintenance and repair items; (ii) repair, general maintenance and other expenses paid by proceeds of insurance or by Lessee, the Building lessees or other third parties; (iii) interest, amortization of principal or other payments on loans to Lessor; (iv) depreciation; (v) leasing commissions; (vi) legal expenses; (vii) renovating or otherwise improving space for occupants of the Building or vacant space in the Building; (viii) taxes, assessments, betterments, and any other governmental charges attributable to the Property (or its operation), including penalties and interest thereon, or attributable to the personal property of Lessor or the Building lessees, it being recognized that Lessee is exempt from all the foregoing, (ix) federal, state, or local income taxes imposed on or measured by the income of Lessor from the operation of the Building; (x) rent and other sums due under any ground lease affecting any interest in the Property; (xi) costs of repairs necessary to cure latent defects in the construction of the Building; (xii) expenses incurred to bring the Property into compliance with laws existing as of the Commencement Date, including without limitation the Americans With Disabilities Act and the regulations and standards thereunder; (xiii) Lessor's general overhead not directly related to the management or operations of the Property; (xiv) expenses arising out of a breach or violation of law, lease or other obligation by Lessor or its agents, employees or contractors, including fines, penalties, and attorneys' fees; (xv) expenses to the extent caused by the negligence or willful misconduct of Lessor or its agents, employees, representatives, contractors or invitees; (xvi) costs or expenses for which Lessor is entitled to reimbursement from any source; (xvii) costs or

expenses in connection with services or other benefits provided to one or more lessees of the Building but which are not available to all lessees of the Building; (xviii) costs and expenses incurred in connection with the leasing of any space in the Building, including without limitation, space planning fees, and marketing, promotional, and advertising costs; (xix) damages and repairs attributable to condemnation, fire or other casualty; (xx) charitable or political contributions; (xxi) any cost or expense related to the testing for, remediation, removal, transportation or storage of Hazardous Materials from the Property (which Hazardous Materials shall include, but not be limited to, gasoline of all types and all substances defined as "hazardous substances", "toxic substances", "oil" or "hazardous wastes" in any federal, state or applicable local statute now or hereinafter enacted concerning Hazardous Materials, or in any regulation adopted or publication promulgated pursuant to said statutes); (xxii) any CAM Charges attributable to the security of the Building (as Lessee shall be responsible for the security of the Premises) or to janitorial service to the Building (as Lessee shall be responsible for providing janitorial service to the Premises), and (xxiii) interest, penalties, or other costs arising out of Lessor's failure to make timely payments of its obligations.

5.5. Annual Adjustments. No later than ninety (90) days after each anniversary of the Commencement Date, Lessor shall furnish to Lessee a statement in reasonable detail setting forth the actual total CAM Charges for the past Lease Year (the "CAM Statement"). If the CAM Statement reveals that Lessee paid more for the estimated CAM Charges than the actual CAM Charges would have required for the year for which such Statement was prepared, then Lessor shall, at Lessee's option, credit or reimburse Lessee for such excess within thirty (30) days; likewise, if Lessee paid less than the actual CAM Charges due, then Lessee shall pay Lessor such deficiency within thirty (30) days after receiving written notice from Lessor of the amount of such deficiency.

5.6. Lessee's Audit Rights. Lessor shall permit Lessee, at Lessee's sole cost and expense, to audit any of Lessor's invoices and statements relating to CAM Charges for a Lease Year. If Lessee objects to Lessor's accounting of any CAM Charges, Lessee shall, on or before the date that is ninety (90) calendar days following review of the applicable CAM Statement, notify Lessor that Lessee disputes the correctness of such accounting and specify the particular line items in which the accounting claims to be incorrect. If any such audit shows that the amount of CAM Charges stated on the CAM Statement for any Lease Year was overstated by more than two percent (2%), then, Lessor shall pay to Lessee the reasonable cost of its audit and investigation. If the parties dispute the amount of CAM Charges and the dispute is not settled within two (2) months thereafter, either party may submit the dispute to arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. The decision of the arbitrator shall be final and binding on Lessor and Lessee and judgment thereon may be entered in any court of competent jurisdiction. Lessee shall keep confidential (shall cause any third party consultant assisting Lessee with any such audit to keep confidential) all information obtained during the audit process including any settlement or arbitration awards made, except that Lessee shall be permitted to divulge such information (i) when necessary in connection with the trial of any action, proceeding or arbitration between Lessor and Lessee, (ii) pursuant to a subpoena duly and validly served upon Lessee, or (iii) as required by law.

5.7. Interest and Penalties. Lessee shall pay all interest and penalties imposed upon the late payment by Lessee of any utility bills or CAM Charges on the Premises.

5.8. Lessor's Cure Rights. If Lessee shall fail to pay any utility bill or Lessee's Proportionate Share of the CAM Charges on or before the last day upon which the same may be paid without incurring any interest or penalties for the late payment thereof, Lessor may, after giving a forty-give (45) day notice and demand to the Lessee and upon Lessee's failure to pay the same within said forty-five (45) day period, pay the same with all interest and penalties lawfully imposed upon the late payment thereof, and the amounts so paid by the Lessor shall thereupon be and become immediately due and payable by Lessee to Lessor hereunder. If the Lessor elects to pay said utility bill or CAM Charges as set forth herein, then interest shall accrue on the amount paid at the rate of one and one-half percent (1.5%) per month until the Lessee has paid the Lessor the total amount due, plus all accrued interest.

5.9. Lessee's Right to Contest. Lessee, at its own cost and expense, may, if it so desires, contest the validity or amount of any utility bill, betterment or other CAM Charges imposed on the Premises, in which event, if permitted by applicable law, Lessee may defer the payment thereof for such period as such contest shall be prosecuted actively and shall be pending undetermined; provided, however, that no provision hereof shall be construed to allow such charge to remain unpaid for such length of time as shall permit the Premises, or the lien thereon created by such item to be contested, to be sold by federal, state, county or municipal authority for the nonpayment thereof. Lessor agrees to cooperate with Lessee if Lessee decides to contest the validity or amount of any such bill or charge, which shall include executing any documents or pleadings reasonably required in connection with said proceedings.

5.10. Net Lease. This is an absolute net lease and, except as provided in Paragraph 6 herein, Lessor shall not be required to provide any services or do any act or thing with respect to the Premises and the CAM Charges shall be paid to Lessor without any claim on the part of Lessee for diminution, setoff or abatement, and nothing shall suspend, abate or reduce any rent to be paid hereunder, except as otherwise specifically provided herein.

6. Lessor's Services. Lessor shall furnish to Lessee (and the cost thereof shall be included in CAM Charges, except to the extent that any exclusions to the definition of CAM Charges may apply or the same are separately metered) the following (referred to as "Lessor's Services"): (i) heat and air conditioning as appropriate, at such temperatures and in such amounts as are standard for comparable facilities; (ii) trash removal for ordinary waste; (iii) snow and ice removal and landscaping; (iv) replacement of all necessary light bulbs, tubes and ballasts required to maintain a light level throughout the Premises adequate for Lessee's business operations, as reasonably determined by Lessee and paid for by Lessee, (v) common area access and lighting as necessary to permit use of the Premises and walkways at all times during Lessee's regular business hours, (vi) such repainting as is necessary to maintain the Building in first-class condition, and (vii) life safety systems and equipment for the Building and the Premises in accordance with all applicable laws, rules and regulations.

7. Maintenance, Repair and Replacement.

7.1. Lessee's Maintenance Obligations. Lessee shall at all times during the Term hereof, at its own cost and expense, clean and maintain the Premises and keep the Premises in the same condition that the Premises are in as of the Commencement Date, and in such condition as may be required by law and by the terms of the insurance policies furnished pursuant to the terms of this Lease Agreement (but excluding damage due to ordinary wear and tear, fire or other

casualty, and damage to the extent that it is caused by the negligence or willful misconduct of Lessor or its agents, employees, representatives or invitees), specifically including, but not limited to, the replacement of any tangibles which may be required by law or regulations or which may have become worn or obsolete. All such repairs or replacements shall be performed by duly licensed contractors and in a manner reasonably acceptable to Lessor.

7.2. Lessor's Maintenance Obligations. Notwithstanding the provisions of Section 6.1, Lessor shall be responsible for maintaining and keeping in good order and repair the structural elements of the Building, which shall only include the foundation, roof, floor, exterior and structural walls. In addition, Lessor shall be responsible for any necessary maintenance, repair and replacement of the Building's HVAC system, electrical system, plumbing system, life safety and mechanical systems. This responsibility does not include fixtures within the Premises which are Lessee's responsibility. Further, Lessor shall also maintain the common areas and facilities of the Building and the Property in good, clean and safe order, condition and repair, and consistent with prudent building maintenance and management, and be responsible for the removal of snow and ice from the Property. Lessor shall not be required to make such repairs necessitated by the negligence of the Lessee, its agents, employees, servants, or contractors unless said repairs are fully covered by insurance.

7.3. Compliance with Law. Lessee shall at all times during the Term hereof, at its own cost and expense, substantially perform and comply with all laws, rules, orders, ordinances, regulations and requirements, now or hereafter enacted or promulgated, of every government or municipality having jurisdiction over the Premises, relating to the use of the Premises or the franchises and privileges connected therewith, including all licensure, life-safety code and all other child welfare rules and regulations. Notwithstanding the foregoing, Lessor, and not Lessee, shall be responsible for compliance with those building code regulations, and other such laws and regulations concerning the structure or layout of the Building and/or the Premises, including, without limitation, the applicable portions of the Americans With Disabilities Act (separately and collectively, "Building Codes"). The cost to Lessor of such compliance shall be reimbursable to Lessor through CAM Charges, but only to the extent set forth in Section 5 of this Lease Agreement. However, Lessee, and not Lessor, shall be responsible for compliance with those Building Codes that do not relate to the Building or Premises generally, but rather, relate to, or of consequence only because of, Lessee's particular use of the Premises.

7.4. Lessee's Right to Challenge. Lessee shall have the right to contest by appropriate legal proceedings, without cost or expense to Lessor, the validity of any law, rule, order, ordinance, regulation or requirement of the nature referred to above. Lessee may postpone compliance with such law, rule, order, ordinance, regulation or requirement until the final determination of such proceedings so long as such postponement of compliance will not subject Lessor to any criminal prosecution. Lessor agrees to cooperate with Lessee if Lessee decides to contest, by appropriate legal proceedings, the validity of any law, rule, order, ordinance, regulation or requirement of the nature referred to above, which shall include executing any documents or pleadings reasonably required in connection with said proceedings.

8. Alterations. Lessee shall not make any alterations or additions to the Premises without Lessor's prior written approval, which approval may not be unreasonably withheld, conditioned or delayed by Lessor. If Lessee does make alterations or improvements to the Premises, said alterations or improvements, if affixed or incorporated into the Premises in such manner that

their removal will cause material damage to the Premises or the Property, shall become a part of the Premises.

9. Hazardous Materials.

9.1. Definition. "Hazardous Materials" means, collectively, any oil, animal wastes, medical waste, blood, biohazardous materials, hazardous waste, hazardous materials, hazardous substances, pollutants or contaminants, petroleum or petroleum products, radioactive materials, asbestos in any form or condition, or any pollutant or contaminant or hazardous, dangerous or toxic chemicals, materials or substances within the meaning of any applicable federal, state or local law, regulation, ordinance or requirement relating to or imposing liability or standards of conduct concerning any such substances or materials on account of their biological, chemical, radioactive, hazardous or toxic nature, all as now in effect or hereafter from time to time enacted or amended. For purposes of this Lease, "Environmental Laws" means all laws, rules, orders and regulations of federal, state, county, and municipal authorities, concerning any Hazardous Materials whatsoever.

9.2. Lessee's Obligations. Lessee shall indemnify Lessor, to the extent permitted by law, against any and all liabilities, costs, damages, loss and other expenses, including reasonable attorneys' fees, that may be imposed upon, incurred by, or asserted against Lessor by third parties (including reasonable attorneys' fees in connection therewith) as a result of any release or threatened release of Hazardous Materials or any failure to comply with the Environmental Laws to the extent the same is caused by Lessee or its agents, employees, contractors, or representatives. The provisions of this Section shall survive the termination or expiration of this Lease. If Lessor shall have to sue Lessee to enforce this indemnity and if Lessor prevails in such suit, then Lessee shall reimburse Lessor for its reasonable attorneys' fees in bringing such action.

9.3. Lessor's Obligations. Lessor shall indemnify Lessee, to the extent permitted by law, against any and all liabilities, costs, damages, loss and other expenses, including reasonable attorneys' fees, that may be imposed upon, incurred by, or asserted against Lessee by third parties (including reasonable attorneys' fees in connection therewith) as a result of any release or threatened release of Hazardous Materials or any failure to comply with the Environmental Laws to the extent the same is caused by Lessor or its agents, employees, contractors, or representatives. The provisions of this Section shall survive the termination or expiration of this Lease. If Lessee shall have to sue Lessor to enforce this indemnity and if Lessee prevails in such suit, then Lessor shall reimburse Lessee for its reasonable attorneys' fees in bringing such action.

9.4. Extent of Obligations. The indemnifications of this Section specifically include reasonable costs, expenses and fees incurred in connection with any investigation of Property conditions or any clean-up, remedial, removal or restoration work required by any governmental authority. The provisions of this Section will survive the expiration or termination of this Agreement.

10. Indemnification; Liability Insurance.

10.1. Lessee's Indemnification Obligations. Lessee agrees, to the extent permitted by law, to defend, indemnify and hold forever harmless Lessor, its employees, officers, directors, managers and agents and their successors and assigns from and against any and all loss, cost,

claims, liabilities, damage and expense (including reasonable attorneys' fees) on account of damage to property, accident or injury (and/or death) to persons or the property of any persons directly or indirectly caused in whole or in part by any act, omission or negligence of Lessee or its agents, employees, contractors, and representatives related to the use, misuse or occupancy of the Premises and areas appurtenant thereto or in connection with any work or act done or omitted on the Premises and appurtenant areas or by reason of any omission to fully perform and observe the terms of this Lease or applicable law except when the claim arose because of the negligence or willful misconduct of Lessor or its agents, employees, contractors and/or subcontractors, representatives, or invitees.

10.2. Lessor's Indemnification Obligations. Lessor agrees to defend, indemnify and hold forever harmless Lessee, its employees, officers, directors, managers and agents and its successors and assigns from and against any and all loss, cost, claims, liabilities, damage and expense (including reasonable attorneys' fees) on account of damage to property, accident or injury (and/or death) to persons or the property of any persons directly or indirectly caused in whole or in part by any act, omission or negligence of Lessor or its agents, employees, contractors and/or subcontractors, representatives and invitees related to the use, misuse or condition of the the Property, including the Premises and the Building, or in connection with any work or act done or omitted on the Premises, the Building, or the Property or by reason of any omission to fully perform and observe the terms of this Lease or applicable law except when the claim arose because of the negligence or willful misconduct of Lessee or its agents, employees, contractors, or representatives.

10.3. Lessee's Insurance. At all times during the Term hereof, Lessee shall, at its own cost and expense, obtain and keep in force a comprehensive general public liability insurance policy naming Lessor and Lessee as insured parties, insuring against accident or disaster in or about the Premises with limits not less than One Million Dollars ($1,000,000) combined single limit for bodily injury (including death), and One Million Dollars ($1,000,000) for property damage. Certificates evidencing all such policies of insurance shall be delivered to Lessor, naming Lessor as additional insured, prior to the Commencement Date and at least ten (10) days prior to each policy expiration date.

10.4. Lessor's Insurance. At all times during the Term hereof, Lessor shall, at its own cost and expense, keep the Building insured against loss or damage by fire and such other insurance risks, casualties and hazards as are insured against by owners of comparable premises in an amount equal to one hundred percent (100%) of the full replacement cost of the Building. All insurance to be furnished by Lessor under this Paragraph shall be by policies which shall name as insureds Lessor and Lessee as their interests may appear.

11. Fire and other Casualty.

11.1. Repair Estimate. If the Building or the Premises shall be damaged or destroyed by fire or other casualty (a "Casualty"), then Lessor shall, within thirty (30) days from the date of such Casualty, deliver to Lessee a good faith written and certified estimate (the "Damage Notice") of the time needed to repair the damage caused by such Casualty.

11.2. Lessee's Rights. If (i) a substantial portion of the Premises or the Building is damaged by Casualty such that it materially interferes with the Lessee's ability to conduct its

business in the Premises in a manner reasonably comparable to that conducted immediately before such Casualty and Lessor reasonably estimates that the damage caused thereby cannot be repaired within one hundred eighty (180) days (such damage is referred to hereinafter as "Substantial Damage"), or (ii) Lessor does not deliver the Damage Notice within the time specified above (provided, however, that Lessor shall have an extra five (5) days cure period after receipt of notice from Lesseee of the failure of the Damage Notice to be delivered), then Lessee may terminate this Lease by delivering written notice to Lessor of its election to terminate within sixty (60) days after the Damage Notice (i) has been delivered to Lessee, or (ii) should have been delivered to Lessee after application of the above-described cure period. If Lessee does not so timely terminate this Lease, then (subject to Lessor's right to terminate under Section 11.3 below) Lessor shall repair the Building or the Premises, as the case may be, as provided below, and the CAM Charges for the portion of the Premises rendered unusable for the Permitted Use by the damage shall be abated from the date of damage until the completion of the repair, unless Lessee's wilful misconduct caused such damage, in which case, Lessee shall continue to pay Lessee's Proportionate Share of the CAM Charges without abatement.

11.3. Lessor's Rights. Subject to the provisions of Section 11.5 below, if a Casualty causes Substantial Damage to the Premises or the Building, then, provided that all other leases similarly affected are also terminated, Lessor may terminate this Lease by giving written notice of its election to terminate within sixty (60) days after the Damage Notice has been delivered to Lessee, and CAM Charges shall be abated as of the date of the Casualty.

11.4. Repair Obligation. If neither party elects to terminate this Lease following a Casualty, or in the case there is no Substantial Damage to the Premises or the Building but only partial damage, then Lessor shall proceed with reasonable diligence to carry out any necessary demolition and to restore, repair, replace and rebuild the Building, the Premises, and other improvements or tangibles constructed by Lessor to substantially the same condition as they existed immediately before such Casualty. Provided that said Casualty damaged the Premises, such rebuilding or restoration shall be in accordance with plans and specifications submitted by Lessor to Lessee and subject to Lessee's approval and shall further be carried out by duly licensed contractors. However, Lessor shall not be required to repair or replace any of the equipment, fixtures, and other improvements which may have been placed by, or at the request of, Lessee or other occupants in the Building. If Lessor fails to complete the repair of the Casualty damage the time period set forth in the Damage Notice, plus an additional grace period of 10% of such time period, then Lessee shall have the right to terminate this Lease upon written notice to Lessor, such right expiring upon the complete repair of the Casualty Damage as set forth herein. Except for insurance proceeds paid to Lessee for Lessee's personal property or for Lessee to locate and pay for temporary substitute accommodations while the Premises are being repaired or restored, any insurance proceeds paid by reason of such damage or destruction shall be paid to Lessor to repair or restore the Premises.

11.5. Joint Development Agreement. Nothwithstanding anything herein to the contrary, this Lease shall not terminate in the event of a Casualty if Lessor is required to rebuild the Premises under the terms of the Joint Development Agreement for the Holyoke Multimodal Transporation Center, dated July 30, 2007, entered in by and among Lessor, Lessee, and the City of Holyoke, including, without limitation, the 2003 FTA Master Agreement incorporated therein.

12. Condemnation.

12.1. Entire Condemnation. If at any time during the Term hereof all of the Building or the Premises shall be taken in the exercise of the power of eminent domain by any sovereign, municipality or other public or private authority (a "Taking"), then this Lease shall terminate on the date of said Taking by such authority.

12.2. Partial Condemnation – Lessee's Rights. If any part of the Property, the Building or the Premises is subject to a Taking and such Taking will prevent Lessee from conducting its business in the Premises in a manner reasonably comparable to that conducted immediately before such taking for a period of more than one hundred eighty (180) days, then Lessee may terminate this Lease as of the date of such Taking by giving written notice to Lessor within sixty (60) days after the Taking, and CAM Charges shall be apportioned as of the date of such Taking. If Lessee does not terminate this Lease, then CAM Charges shall be abated as to that portion of the Premises rendered unusable for the Permitted Uses by the Taking.

12.3. Partial Taking - Lessor 's Rights. If a substantial portion of the Property, the Building or the Premises becomes subject to a Taking, then Lessor may terminate this Lease by delivering written notice thereof to Lessee within sixty (60) days after such Taking, and CAM Charges shall be apportioned as of the date of such Taking; provided, however, that Lessor may not terminate this Lease unless all other leases in the Building are also terminated. If Lessor does not so terminate this Lease, and if Lessee does not terminate pursuant to Section 12.2, then this Lease will continue, but if any portion of the Premises has been rendered unusable for the Permitted Use by such Taking then CAM Charges shall abate as provided in the last sentence of Section 12.2. If this Lease does not terminate, then Lessor shall use reasonable efforts to make any reasonable modifications to the the Building or the Premises that would minimize any material interference to the Permitted Use that the Taking may have caused; provided, however, that Lessor shall not be obligated to perform such work if a mortgagee holding a mortgage on the Property takes a substantial portion of the condemnation award, or if the "damages" portion of the condemnation award is not sufficient to cover the cost of such work, and in any event, the cost of such work, to the extent not reimbursed by the condemnation award of other third party source, shall be included in "CAM Charges."

12.4. Award. Nothing herein shall prevent Lessor or Lessee from asserting their respective claims to damages and other awards as their interests appeared immediately prior to such damage, taking, or diminution.

13. Assignment and. Subletting. Lessee shall not assign this Lease Agreement or any interest herein, or make any sublease of all or any part of the Premises, without Lessor's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed, and any such attempted assignment or subletting without such prior written consent shall be void unless it is determined that Lessor's withholding, conditioning or delaying was unreasonable.

14. Subordination to Mortgages, Liens or Security Interests.

14.1. Lessor's Covenant. Lessor covenants that, if the Property is encumbered by an institutional or other mortgage, lien, security interest or other instrument in the nature of a mortgage placed on the Property or the Premises by the Lessor as of the date of the execution of

this Lease by the Lessee, the Lessor shall within fourteen (14) days of said execution date deliver to Lessee a Subordination, Nondisturbance and Attornment Agreement substantially in the same form as the SNDA attached hereto, signed by each person or entity holding such a mortgage, lien, security interest or other instrument in the nature of a mortgage on Premises or the Property, in which said holder agrees that, if said mortgagee or lien holder becomes the owner of the Premises by foreclosure sale or deed given in lieu of foreclosure or other proceeding, the lien holder shall recognize this Lease, not disturb Lessee's use and possession of the Premises, and shall not enlarge Lessee's obligations or abridge its rights hereunder.

14.2. Lessee's Covenant. Lessee covenants and agrees that (a) Lessee shall subordinate this Lease to the mortgage, lien; or other security interest in the nature of a mortgage now or hereafter placed on the Property or the Premises by the Lessor; and (b) the Lease shall be subordinate to any such mortgage, lien or other security interest now or hereafter placed on the Property, and to each advance made or hereafter to be made under any such mortgage, and to all renewals, modifications, consolidations, replacements and extensions thereof and all substitutions therefor; and agrees that if said lien holder becomes the owner of the Premises by foreclosure sale or deed given in lieu of foreclosure or other proceeding, the Lessee shall attorn to and recognize any such mortgagee, lien holder, successor thereto or assignee thereof, becoming such owner, for all purposes, in place and instead of the Lessor; provided that, in each case, such mortgagee or lien holder executes and delivers to Lessee a Subordination, Nondisturbance and Attornment Agreement substantially in the same form as the SNDA attached hereto.

14.3. Estoppel Certificates. Provided that Lessee has received a signed SNDA, as provided above, Lessee shall, within ten (10) business days of any request therefor, promptly execute and deliver such written instruments as Lessor shall deem necessary to show the subordination of this Lease to said mortgages or other such instruments in the nature of a mortgage, acknowledging the commencement and termination dates of this Lease, that this Lease is in full force and effect (if the same be true), that there are no uncured defaults or specifying such defaults if any are claimed (or, if there is an uncured default, specifying such default), that this Lease has not been modified (or if it has, stating such modifications), the date though which Rent and other charges have been paid, and providing any other pertinent information as to which the requesting party might reasonably require.

15. Default; Termination Rights.

15.1. Lessee's Default. If any of the following occurs, Lessee shall be in default under the terms and provisions of this Lease, and Lessor may terminate this Lease in accordance with Section 15.2 and require Lessee to vacate and surrender possession of the Premises.

(a) The failure of Lessee to pay when due any rent, utilities, CAM Charges or other sum of money that Lessee is obligated to pay hereunder; or

(b) The failure of Lessee to perform or observe any of the other terms, covenants, conditions or agreements required to be performed or observed by Lessee hereunder;or

(c) The filing by Lessee of a voluntary petition, or the filing against Lessee of an involuntary petition, in bankruptcy or insolvency or adjudication of bankruptcy or insolvency of Lessee, or the filing by Lessee of any petition or answer seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution,

or similar relief under the present or any future federal bankruptcy act, or any other present or future applicable federal, state, or other statute or law, or the assignment by Lessee for the benefit of creditors, or appointment of a Trustee, receiver, or liquidator of all or any part of the assets of Lessee, and within one hundred twenty (120) days after the commencement of any such proceeding against Lessee, such proceeding shall not have been dismissed, or if, within one hundred twenty (120) days after the appointment of any trustee, receiver, or liquidator of Lessee or of all or any part of Lessee's property, without the consent or acquiescence of Lessee, such appointment shall not have been vacated or otherwise discharged, or if any execution or attachment shall be issued against Lessee or any of Lessee's property pursuant to which the Premises shall be taken or occupied or attempted to be taken or occupied.

15.2. Lessee's Cure Rights. Lessor shall not have the right to terminate this Lease unless Lessor shall have first given Lesee written notification specifying such default and Lessee shall have failed to cure the same within forty-five (45) days after Lessee receives such notice, or if the default is of such a nature that a cure cannot reasonably be completed within the forty-five 45 day period, if Lessee shall have failed to commence such cure within the forty-five (45) day period and thereafter pursue it diligently to completion, provided, however, that in the case of a monetary breach, Lessor may terminate this Lease if Lessor shall have given Lessee written notification specifying such default and Lessee shall have failed to cure the same within forty-five (45) days after the date Lessee receives such notification.

15.3. Default Due to Bankruptcy. Notwithstanding the provisions of Section 15.2 above, Lessor shall not have the right to terminate this Lease Agreement in an event of default under Section 15.1(c) of this Lease Agreement if no application is made in any proceedings for a reformation or recasting of this Lease, or for any change in any of the provisions of this Lease, and if the trustee, receiver, or similar custodian of Lessee's property, shall duly perform all of the terms of this Lease.

15.4. Lessor's Cure Rights. It is understood and agreed by the parties that Lessor, as the owner of the Premises, has the right to protect the Premises from damage and deterioration due to lack of diligence by Lessee. In recognition thereof, if Lessee fails to perform or comply with any of the terms or provisions contained in this Lease to be performed or complied with by Lessee, other than a failure to pay any CAM Charges or other sum required to be paid by Lessee hereunder, and if Lessee fails, after written notification from Lessor, to cure such default within the permitted period, Lessor may, at its option, enter the Premises and effect the cure. Such entering shall not cause or constitute a termination or cancellation of this Lease. Lessor shall have the right to do all things reasonably necessary to accomplish the work required. The reasonable cost and expense of such work shall be payable to Lessor by Lessee on demand.

15.5. Transit Uses. Lessor expressly acknowledges and agrees that at no time and in no event shall Lessor use the Premises or allow the Premises to be used for other than transit-related uses without the prior written approval of the FTA, the EOTPW, and such other federal or state bodies or officials having jursidiction over the same.

15.6. Lessor's Default. If Lessor shall fail in the performance or observance of any agreement or condition in this Lease contained on its part to be performed, or observed, and if the

default is not cured within forty-five (45) days from the date on which Lessee sends Lessor written notice specifying the default (or, if the default is of such a nature that it cannot reasonably be cured within said forty-five (45) day period, or if Lessor, having commenced the cure within said forty-five (45) day period thereafter fails to diligently prosecute the same to completion), Lessee may, at its option, without waiving any claim for damages for breach of agreement or any other remedy available to Lessee, at any time thereafter cure such default for the account of Lessor and any amount paid or any contractual liability incurred by Lessee in so doing shall be deemed paid or incurred for the account of Lessor and Lessor shall reimburse Lessee therefor and save Lessee harmless therefrom. Provided, however, that Lessee may cure any such default as aforesaid prior to the expiration of said waiting period, without notice to Lessor if an emergency situation exists, or after notice to Lessor, if the curing of such default prior to the expiration of said waiting period is reasonably necessary to protect the Premises or Lessee's interest therein or to prevent injury or damage to persons or property. If Lessor shall fail to reimburse Lessee upon demand for any amount paid or liability incurred for the account of Lessor hereunder, said amount or liability may be deducted by Lessee from the next or any succeeding payments of CAM Charges due hereunder; provided, however, that should said amount or the liability therefor be disputed by Lessor, Lessor may contest its liability or the amount thereof, through arbitration or through a declaratory judgment action and Lessor shall bear the cost of filing fees therefor.

16. Quiet Enjoyment. Lessor covenants that at all times during the Term hereof, so long as Lessee is not in default hereunder, Lessee's quiet enjoyment of the Premises or any part thereof shall not be disturbed by any act of Lessor, or by anyone acting by, through or under Lessor, except in respect of the Permitted Encumbrances.

17. Lessor's Right of Entry. Lessor and its authorized representatives, agents and employees shall have the right from time to time, at Lessor's option, and upon reasonable prior notice to Lessee so as to not interrupt the conduct of its business, to enter and pass through the Premises during business hours, to examine the same but this shall not obligate Lessor to make any such entry or examination.

18. Estoppel Certificates. Each party shall at any time and from time to time during the Term hereof, within ten (10) days after request by the other party, execute, acknowledge and deliver to the other party or to any prospective purchaser, assignee or mortgagee designated by the other party, a certificate stating (i) that this Lease Agreement is unmodified and in force and effect (or, if there have been any modifications, that this Lease Agreement is in force and effect as modified and identifying the modification agreements); (ii) whether or not there is any existing default by Lessee in the payment of any CAM Charges or any other sum of money hereunder, and whether or not there is any other existing default by either party with respect to which a notice of default has been served, and, if there is any such default, specifying the nature and extent thereof, and (iii) whether or not there are any setoffs, defenses or counterclaims against enforcement of the obligations to be performed hereunder existing in favor of the party executing such certificate.

19. Surrender; Obligations Upon Expiration or Termination. Lessee shall, on the last day of the Term hereof or upon any earlier termination hereof, surrender and deliver up the Premises into the possession and use of Lessor, without fraud or delay and in good order, condition and repair, ordinary wear and tear, damage from a Casualty, and damage caused by Lessor or its agents, employees, representatives, contractors or invitees excepted, free and clear of all lettings and occupancies and free and clear of all encumbrances other than those existing on the date

hereof and those, if any, created by Lessor without any payment or allowance whatever by Lessor.

20. No Waiver. No failure on the part of either party at any time to require the performance by the other party of any term hereof shall be taken or held to be a waiver of such term or in any way affect such party's right to enforce such term, and no waiver on the part of either party of any term hereof shall be taken or held to be a waiver of any other term hereof or the breach thereof.

21. Signs. Lessee shall not affix any advertising material or signs to any exterior portion of the Facility or elsewhere on the Premises without first obtaining the Lessor's written consent, which consent shall not be unreasonably withheld, conditioned or delayed.

22. Time is of the Essence. The parties acknowledge and agree that time is of the essence of this Lease Agreement and this applies to all acts identified herein, whenever any act is required to be done at a certain time, or within a prescribed period of time.

23. Zoning and Good Title. Lessor warrants and represents, upon which warranty and representation Lessee has relied in the execution of this Lease Agreement, that Lessor is the owner of the Premises, in fee simple absolute, free and clear of all encumbrances, except for the easements, covenants and restrictions of record as of the date of this Lease Agreement and other Permitted Encumbrances. Such exception(s) shall not impede or interfere with the quiet use and enjoyment of the Premises by Lessee. Lessor further warrants and covenants that this Lease Agreement shall not be subordinate to any Permitted Encumbrance or to any other encumbrance except as set forth in Paragraph 14 hereof; that Lessor has full right and lawful authority to execute this Lease Agreement for the Term, in the manner, and upon the conditions and provisions herein contained; that there is no legal impediment to the use of the Premises as set out herein; that the Premises are not subject to any easements, restrictions, zoning ordinances or similar governmental regulations which prevent their use as set out herein; that the Premises presently are zoned for the use contemplated herein and throughout the Term of this Lease Agreement may continue to be so used therefor by virtue of said zoning, under the doctrine of "non-conforming use," or valid and binding decision of appropriate authority, except, however, that said representation and warranty by Lessor shall not be applicable in the event that Lessee's act or omission shall invalidate the application of said zoning, the doctrine of "non-conforming use" of the valid and binding decision of the appropriate authority. Lessor shall furnish, without expense to Lessee, upon execution of this Lease Agreement, a title report covering the Premises showing the condition of title.

24. Binding Arbitration. In the event that a dispute should arise between the Lessor and Lessee with respect to any provision of this Lease Agreement, such dispute shall be submitted to binding arbitration in accordance with the Massachusetts Uniform Arbitration Act, as from time to time amended.

25. No Broker. The parties represent to each other that they have not dealt with any real estate agent or broker with respect to this transaction. If any agent or broker is entitled to a commission as a result of this transaction said agent or broker shall be paid by the party with whom the agent or broker dealt and the party breaching this representation shall indemnify and hold the other party harmless from any claims as a result of such breach.

26. Severability. The invalidity or unenforceability of any particular provision hereof shall not affect the other provisions, and this Lease Agreement shall be construed in all respects as if such invalid or unenforceable provision had not been contained herein.

27. Benefit. This Lease Agreement shall inure to the benefit of and be binding upon the parties and their respective legal representatives, successors and assigns. The provisions hereof are solely for the benefit of the parties and their respective legal representatives, successors and assigns, and shall not be deemed or construed to create any right for the benefit of any other person.

28. Construction. Whenever a singular word is used herein, it shall also include the plural wherever required by the context, and vice versa. The terms and conditions hereof represent the results of bargaining and negotiations between the parties, each of which has been represented by counsel of its selection, and neither of which has acted under duress or compulsion, whether legal, economic or otherwise, and represent the results of a combined draftsmanship effort. Consequently, the terms and conditions hereof shall be interpreted and construed in accordance with their usual and customary meanings, and the parties hereby expressly waive and disclaim, in connection with the interpretation and construction hereof, any rule of law or procedure requiring otherwise, specifically including but not limited to, any rule of law to the effect that ambiguous or conflicting terms or conditions contained here in shall be interpreted or construed against the party whose counsel prepared this Lease Agreement or any earlier draft hereof.

29. Entire Agreement; Written Modifications. This Lease Agreement contains the entire integrated understanding between the parties with respect to the subject matter hereof; all representations, promises, and prior or contemporaneous understandings, between the parties with respect to the subject matter hereof are expressed in this Lease Agreement; and any other understandings between the parties with respect to the subject matter hereof are hereby canceled. This Lease Agreement shall not be amended, modified or supplemented without the written agreement of the parties at the time of such amendment, modification or supplement.

30. Governing Law. This Lease Agreement shall be governed by and subject to the laws of the Commonwealth of Massachusetts.

31. Captions. The captions herein are for convenience and identification purposes only, are not an integral part hereof, and are not to be considered in the interpretation of any part hereof.

32. Notices. All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given if sent by certified or registered mail, return receipt requested, postage prepaid, addressed as follows:

To Lessor:
Holyoke Intermodal Facility, LLC
1776 Main Street
P.O. Box 1776
Springfield, MA 01102-1776

With a copy to:
Peter H. Barry, Esq.
Bulkley, Richardson and Gelinas, LLP
1500 Main Street, Suite 2700
Springfield, MA 01115-5507

To Lessee: Pioneer Valley Transit Authority
2808 Main Street
Springfield, MA 01107

With a copy to: Anne-Marie Hyland, Esq.
Kopelman & Paige, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

or to such other address as shall be furnished in writing by either party to the other party.

33. Costs of Enforcement. If any action is instituted in connection with any controversy arising out of this Lease Agreement, the prevailing party shall be entitled to recover, in addition to costs, such sum as the court may adjudge reasonable as attorneys fees in such action and on any appeal from any Judgment or decree entered therein.

34. Notice of Lease. At the request of Lessee, Lessor promptly shall execute and deliver a Notice of Lease, in form and substance acceptable to Lessee in its sole discretion, which Notice will contain the information required by statute as well as such additional information as Lessee and/or Lessor may choose. Lessee or Lessor, at its option and expense, may record such Notice of Lease or a copy of this Lease with the Hampden County Registry of Deeds.

IN WITNESS WHEREOF, the parties have executed this Lease Agreement as of the day and year first above written.

HOLYOKE INTERMODAL FACILITY, LLC

By: _____
Name: Peter A. Pickerelly
Title: Manager

PIONEER VALLEY TRANSIT AUTHORITY

By: _____
Name: Mary McInnes
Title: Administrator

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

On this 22nd day of January, 2009, before me, the undersigned Notary Public, personally appeared Mary MacInnes, and proved to me through satisfactory evidence of identification, which was personal knowledge, to be the person whose name is signed on the preceding document, and acknowledged to me that he signed it voluntarily for its stated purpose as Administrator of Pioneer Valley Transit Authority

_____
(Official Signature and Seal of Notary)
Filomena Depergola
My commission expires: 9/6/13

365380/PVTA/0004

514617v2

Bk 17616 Pg67 #3621
01-23-2009 @ 03:24p

EXHIBIT A

AFFECTED PREMISES:
206 MAPLE STREET
HOLYOKE, MA 01040

MASSACHUSETTS RELEASE DEED

CITY OF HOLYOKE (the "Grantor"),

a municipal corporation duly established under the laws of the Commonwealth of Massachusetts and having its usual place of business at City Hall, Dwight Street, Holyoke, Hampden County, Massachusetts for consideration paid, and in full consideration of One and 00/100 dollar ($1.00) paid, RELEASES to Holyoke Intermodal Facility, LLC (the "Grantee"), a Massachusetts limited liability company, with a usual place of business at 1776 Main Street, Springfield, Massachusetts;

All its right, title and interest in and to the land and building in said Holyoke, Hampden County, Massachusetts, bounded and described as follows:

Beginning at a point of the southeasterly sideline of Maple Street at the northerly corner of land now or formerly of Peter J. Sullivan and Raymond E. Narey, and running thence;

N49°-29'-50"E, along the southeasterly sideline of Maple Street, 120.33 feet to a point, thence;

S40°-29'-53"E, along Parcel A1, shown on a Plan of Land recorded in Hampden County Registry of Deeds Plan 346, Page 90,100.00 feet to a point, thence;

S49°-29'-50"W, along a 14' wide alleyway, 120.33 feet to a drill hole, thence;

N40°-29'-53"W, along land now or formerly of Peter J. Sullivan and Raymond E. Narey, 100.00 feet to the point of beginning.

Containing an area of 12,033 square feet, more or less.

Being the same premise described as "Parcel B1" on a plan entitled "Plan of Land in Holyoke Massachusetts Surveyed for City of Holyoke," Scale 1" = 20', Date: August 17, 2004, prepared by Heritage Surveys, Inc. recorded in the Hampden County Registry of Deeds Book of Plans 346, Page 90 on June 19, 2007 (the "Plan").

Together with a perpetual right and easement over so much of the Grantor's land encroached upon by a 16" retaining wall located on the common boundary between

"Parcel B1," the premises conveyed hereby, and "Parcel A1," other land of the Grantor, as shown on the Plan.

The premises are conveyed subject to and together with the conditions, restrictions and reservations of record pertaining to the 14' wide alley abutting the southerly boundary line of the granted premises.

The premises are conveyed with the understanding that they will be improved in accordance with the terms and provisions of a Joint Development Agreement dated July 30, 2007 ("Agreement") between the Pioneer Valley Transit Authority, the City of Holyoke, and Holyoke Intermodal Facility, LLC. In the event that the Grantee herein abandons its development obligations as set forth in the Agreement, title to the premises shall revert to the Grantor. An affidavit recorded in the Hampden County Registry of Deeds by the Grantor attesting to the abandonment by the Grantee of its development obligations shall be sufficient to cause the title to the premises to revert to the Grantor. Notwithstanding the foregoing, this right of reverter shall terminate if the Grantee records an affidavit of completion in said Registry, together with an original or copy of the Certificate of Occupancy issued by the City of Holyoke for the premises, evidencing the completion of the improvements in accordance with the terms of the Agreement.

Subject to a restriction set forth in said Agreement for the benefit of the Pioneer Valley Transit Authority that a portion of the premises, to be known as the Holyoke Multimodal Transportation Center, shall be used in perpetuity for public transportation purposes. The Grantee, by its acceptance of this deed, agrees to subject the premises to this restriction by recording a Declaration of Restriction immediately hereafter, the terms of which are hereby incorporated by reference.

Massachusetts General Laws, Chapter 44, section 63A has been complied with.

Massachusetts General Laws, Chapter 60, section 77B has been complied with.

Being a portion of the same premises conveyed to the City of Holyoke by deeds of Joseph W. Prew dated April 16, 1913 recorded in the Hampden County Registry of Deeds in Book 858 Page 477; Caroline Prew dated April 16, 1913 recorded in Book 858, Page 478 and Rose V. O'Connell dated April 16, 1913 recorded in Book 858, Page 479.

In witness whereof, the said CITY OF HOLYOKE has caused its corporate seal to be hereto affixed and these presents to be signed, acknowledged and delivered in its name and behalf by Michael J. Sullivan its Mayor hereto duly authorized, this 2nd day of December in the year two thousand eight.

Signed and sealed in presence of

Witness

CITY OF HOLYOKE

By: _____
Michael J. Sullivan, Mayor

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss

On this 2nd day of Dec 2008, before me, the undersigned notary public, personally appeared Michael J. Sullivan, the duly sworn Mayor of the City of Holyoke, proved to me through satisfactory evidence of identification, which was personal knowledge of identity of the individual by the Notary Public, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.

TRICIA E. SEDELOW NOTARY PUBLIC COMM. EXPIRES MARCH 1, 2013 COMMONWEALTH OF MASSACHUSETTS

Tricia E. Sedelow
Notary Public

My Commission expires: Mar 1, 2013

The undersigned Grantee, Holyoke Intermodal Facility, LLC hereby accepts delivery of this deed subject to the foregoing terms and conditions.

Holyoke Intermodal Facility

By: _____
Peter A. Picknelly, Manager

720614

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss

On this 23rd day of January 2009, before me, the undersigned notary public, personally appeared Peter A. Picknelly, proved to me through satisfactory evidence of identification, which was personal knowledge, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose as Manager of Holyoke Intermodal Facility, LLC.

Daniel M. Rothschild

Notary Public

My Commission expires:

DANIEL M. ROTHSCHILD
NOTARY PUBLIC
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires Feb. 13, 2015

DONALD E. ASHE, REGISTER
HAMPDEN COUNTY REGISTRY OF DEEDS

720614

EXHIBIT B

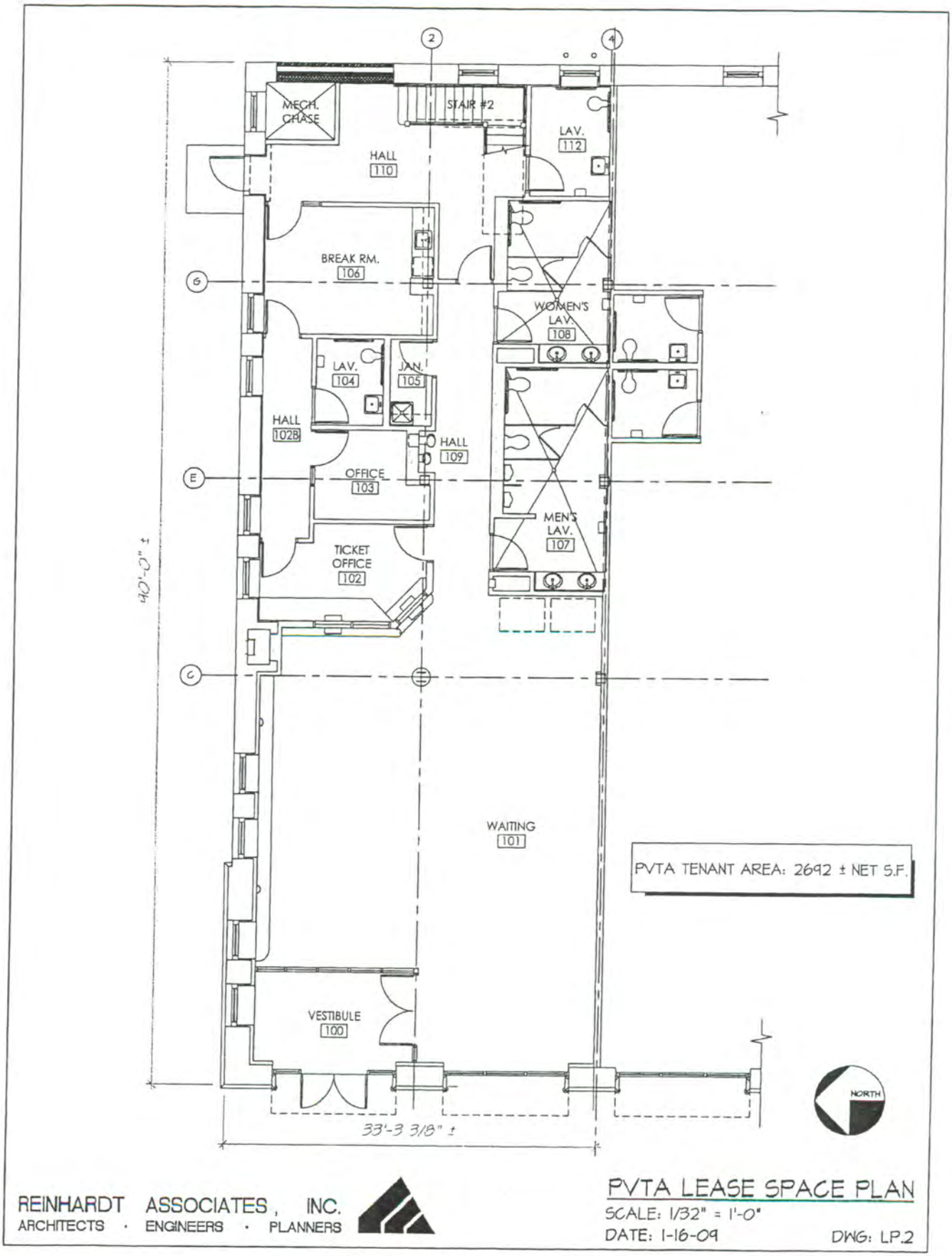


EXHIBIT C

ENCUMBRANCES

1. Declaration of Restriction made by the Holyoke Intermodal Facility, LLC dated January 21, 2009 and recorded in the Hampden County Registry of Deeds in Book 17616, Page 88.
2. Right of reverter set forth in a deed of the City of Holyoke to Holyoke Intermodal Facility, LLC, said deed dated December 2, 2008 and recorded in the Hampden County Registry of Deeds in Book 17616, Page 67.
3. Subject to alley restrictions set forth in a deed of the City of Holyoke to Holyoke Intermodal Facility, LLC, said deed dated December 2, 2008 and recorded in the Hampden County Registry of Deeds in Book 17616, Page 67.

EXHIBIT D

SUBORDINATION, ATTORNMENT AND NON-DISTURBANCE AGREEMENT

This AGREEMENT, dated this _____ day of _____, 20____, is by and between PIONEER VALLEY TRANSIT AUTHORITY, a body politic and corporate and a subdivision of the Commonwealth of Massachusetts, established pursuant to Chapter 161B of the General Laws of Massachusetts, with a usual address of 2808 Main Street, Springfield, Massachusetts 01040 ("Lessee") and _____, having an address of _____ ("Mortgagee").

Recitals

WHEREAS, Lessee is the "Lessee" under and by virtue of a certain lease executed between said Lessee and Holyoke Intermodal Facility, LLC, a limited liability company organized and existing under the laws of the Commonwealth of Massachusetts, having its principal office and place of business at 1776 Main Street, Springfield, Massachusetts 01103 ("Lessor"), covering a portion of the premises located at 206 Maple Street, Holyoke, Massachusetts , as more particularly described in a Lease Agreement between Lessor and Lessee dated _____, 2009 (with all amendments thereto heretofore or hereafter entered into, the "Lease"), and incorporated herein by reference; and

WHEREAS, Mortgagee is making a loan (the "Loan") to Lessor which is to be secured, in part, by the lien of a Mortgage upon the premises described therein which shall include the Leased Premises as described under the Lease, executed and delivered by Lessor to Mortgagee (hereinafter called the "Mortgage"); and

WHEREAS, as a precondition to the making of the Loan, Mortgagee requires Lessor to obtain Lessee's execution of this Agreement and Lessee is agreeable to executing this Agreement whereby Mortgagee shall recognize Lessee's rights under the Lease and Lessee will attorn to a purchaser at a foreclosure of such Mortgage, if any, if Mortgagee and such purchaser recognizes Lessee's rights under the Lease, all upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the covenants hereinafter contained, and other good and valuable consideration, the receipt and Sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

Agreement

1. The Lease and all terms thereof, are and shall be subject and subordinate to the lien of the Mortgage in so far as such Mortgage encumbers the real property of which the Leased Premises form a part and to all renewals, modifications, consolidations, replacements and extensions thereof, to the full extent of the principal sum secured thereby and interest thereon, except as herein noted.

2. In the event it should become necessary to foreclose the Mortgage, Mortgagee thereunder will not join Lessee under the Lease in summary or foreclosure proceedings so long as Lessee is not in default under any of the terms, covenants, or conditions of the Lease beyond

any applicable cure period.

3. In the event that Mortgagee shall, in accordance with the foregoing foreclosure or upon sale of the Leased Premises pursuant to the mortgagee's power of sale or transfer of the Leased Premises by deed in lieu of foreclosure, succeed to the interest of Lessor under the Lease, provided there exist no defaults or events of default by the Lessee under the Lease beyond any applicable cure period, Mortgagee agrees not to disturb or otherwise interfere with Lessee's possession of the Leased Premises for the unexpired term of the Lease and the Lease shall continue in full force and effect as a direct Lease and agreement between the succeeding owner of the premises and Lessee upon and subject to all the terms, covenants and conditions of the Lease and Lessee shall remain in possession of the Premises in accordance with the terms and provisions of the Lease, and in such event:

(a) Lessee shall be bound to such new owner under all of the terms, covenants and provisions of the Lease for the remainder of the term thereof including the extension periods, if Lessee elects or has elected to exercise its options to extend the term) and Lessee hereby agrees to attorn to such new owner and to recognize such new owner as Lessor under the Lease;

(b) Such new owner shall be bound to Lessee under all of the terms, covenants and provisions of the Lease for the remainder of the term thereof (including but not limited to its rights under Section 15.6 and to the extension periods, if Lessee elects or has elected to exercise its options to extend the term), which terms, covenants and provisions such new owner hereby agrees to assume and perform; provided, however, that such new owner shall not be:

(i) liable for any act or omission of any prior lessor (including Lessor) unless such act or omission continues from and after the date upon which the new owner succeeds to the interest of such prior lessor (it being further agreed that (a) offsets under the Lease that were properly deducted by Lessee prior to the date upon which the new owner succeeds to the interest of such prior lessor shall not be subject to challenge, and (b) Lessee shall be entitled to recover any recoupment and/or set-off from any such new owner pursuant to Section 15.6 of the Lease any amount that Lessee was entitled to, but had not, as of the date of such change of ownership, recovered by recoupment and/or set-off or otherwise from any such prior lessor); or

(ii) obligated to cure any defaults of any prior lessor which occurred prior to such new owner's succession to the interest of Lessor, unless such default continues from and after the date upon which the new owner succeeds to the interest of such prior lessor.

4. Prior to terminating the Lease on account of a default by Lessor thereunder, Lessee agrees to notify Mortgagee of such default and give Mortgagee the opportunity to cure such default within thirty (30) days of Mortgagee's receipt of such notice (or if such default cannot reasonably be cured within such thirty (30) day period, Mortgagee shall have such longer time as may be necessary to effect such a cure provided Mortgagee commences said cure within

such thirty (30) day period and diligently pursues such cure to conclusion.

5. This Agreement may not be amended or terminated orally and shall be binding upon and inure to the benefits of the respective heirs, personal representatives, successors and assigns of the parties hereto, and all covenants, conditions and agreements herein contained shall be construed as running with the land.

6. Mortgagee hereby acknowledges and agrees that all of the trade fixtures, furniture, and equipment whether owned or leased by Lessee or any sublessee (hereinafter called the "Lessee's Equipment") installed in or on the Leased Premises, regardless of the manner or mode of attachment, shall be and remain the property of Lessee. In no event (including a default under the Lease or Mortgage) shall Mortgagee have any liens, rights or claims in Lessee's Equipment whether or not all or any part thereof shall be deemed fixtures; and Mortgagee expressly waives all rights of levy, distraint, or execution with respect to said trade fixtures, furniture, and equipment. Mortgagee agrees to execute and deliver to Lessee, within ten (10) days after request therefor, any document reasonably required by Lessee in order to evidence the foregoing.

7. This Agreement shall be governed by and construed in accordance with laws of the Commonwealth of Massachusetts.

IN WITNESS WHEREOF, the parties hereto have signed and sealed these presents the day and year above written above.

PIONEER VALLEY TRANSIT AUTHORITY

By: _____
Name:
Title:

MORTGAGEE:

By: _____
Name:
Title:

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

On this _____ day of _____, 2009, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is signed on the preceding document, and acknowledged to me that he/she signed it voluntarily for its stated purpose as _____ of _____.

_____
Notary Public
My Commission Expires:

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

On this _____ day of _____, 20_____, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is signed on the preceding document, and acknowledged to me that he/she signed it voluntarily for its stated purpose on behalf of the Pioneer Valley Transit Authority.

_____
Notary Public
My Commission Expires:

COMPRESSED NATURAL GAS VEHICLE FUELING STATION AND CNG SALES AGREEMENT

This Agreement (the "Agreement") is made and entered into as of July 31, 2011 by and between Stark Area Regional Transit Authority, a Transit Agency ("SARTA") located in Canton, Ohio and CLEAN ENERGY, a California corporation ("CE"). SARTA and CE are sometimes referred to in this Agreement individually as a "Party" or jointly as "Parties".

In consideration of the mutual promises, covenants, and agreements herein contained, the sufficiency of which is hereby agreed to by the Parties, the Parties hereto agree as follows:

ARTICLE 1
SCOPE OF AGREEMENT AND DEFINITIONS

1.1 Intent. This Agreement expresses the terms and conditions pursuant to which SARTA authorizes CE to design, construct, retail fuel to Third Party Users (hereinafter defined), and maintain a compressed natural gas fueling station on property owned by SARTA located at 1600 Gateway Blvd SE, Canton, OH 44707 for SARTA's use and other authorized users. This Agreement includes certain mandatory requirements under federal and Ohio law which are included with this Agreement as Exhibit VI which is hereby incorporated herein, all references to the Agreement shall include all exhibits hereto.

1.2 Definitions. As used in this Agreement, the following terms and expressions shall have the indicated meanings:

"Agreement" means this document and any and all exhibits attached hereto.

"CE" means Clean Energy acting by and through its employees, officers, affiliates, subcontractors and authorized agents.

"SARTA" means Stark Area Regional Transit Authority, acting by and through its employees, officers and authorized agents.

"CNG" means pipeline quality natural gas, compressed for vehicle use.

"CNG Vehicle(s)" means motor vehicles powered by internal combustion engines using CNG as a primary fuel.

"Gasoline Gallon Equivalent" means 124,800 BTU/gallon. Also referred to as a GGE.

"Party" or "Parties" means CE and SARTA, in their respective capacities as parties to this Agreement.

"Premises" means that portion of the real property owned by SARTA and located at 1600 Gateway Blvd SE, Canton, OH 44707 upon which the Station will be constructed and operated as more fully described in Exhibit I.

"Station" means the facility for refueling CNG Vehicles designed, constructed, operated and maintained by CE as more fully described in Exhibit II.

"Therm" means 100,000 British Thermal Units.

"Third Party Users" means CNG vehicles owned and/or operated by entities other than SARTA.

ARTICLE 2
RESPONSIBILITIES OF CE

2.1 Station. CE shall design, construct, retail to Third Party Users, and maintain the Station on the Premises, and shall be responsible for obtaining, all permits relating to the design, construction, operation and maintenance of the Station. The Station shall be located on the Premises as shown in Exhibit I. All work by CE hereunder for which a license is required will be performed by contractors and/or individuals who are licensed to perform such work. The Station will also include a dispenser designed for public access (the "Public Dispenser") as shown in Exhibit I. The Parties agree that the portion of the real property with the Public Dispenser is Two Percent (2.0%) (hereinafter "CE's Share") of the Premises. SARTA covenants to use commercially reasonable efforts to cooperate with CE in obtaining all permits necessary for the Station to be operational by December 20, 2011.

2.2 Natural Gas Service to SARTA. SARTA shall be solely responsible for the procurement of natural gas for the Station.

2.3 CNG Service to Third-Party Users. CE shall retail CNG from the Station to fuel third party vehicles and will bill the Third-Party Users at a price determined by CE in its sole and absolute discretion (the "Retail Rate"). CE shall also use commercially reasonable efforts to negotiate mutually agreeable fuel price agreements with Stark County non-profit and governmental entities interested in fueling their fleets at the Station.

2.4 Maintenance. CE shall maintain the Station in accordance with the following requirements:

2.4.1 Routine Maintenance.

(a) CE shall provide scheduled, routine maintenance service for the term of this Agreement and shall repair, or replace, any defective parts or equipment, all in accordance with Exhibit V and all to keep the equipment in good working order during the term hereof.

(b) In accordance with Exhibit III, SARTA shall pay to CE an operations and maintenance fee (the "O&M Fee") for the services to be provided under

this Section. CE shall also perform other necessary maintenance or repairs, including emergency repairs, and training as set forth in this Article 2 at its expense as part of the O&M Fee, in order to keep the Station operating.

(c) The Parties agree that CE will bill CE's then-existing labor and material rates for services not included in Exhibit V or this Article 2, such services to be paid by SARTA in addition to the O&M Fee. Exhibit III reflects CE's rates for these additional services effective at the time of execution of this Agreement, but the Parties agree and acknowledge that these rates are subject to change during the Term.

(d) Any maintenance or repair costs incurred due to damage, abuse or neglect by SARTA's personnel shall be considered additional services and billed to SARTA at CE's then-existing rates.

(e) With the exception of a Force Majeure condition causing damage or destruction to the Station (in which case Paragraph 8.5 below shall apply) and the utilities and taxes which are the responsibility of SARTA pursuant to Article 3 below, CE shall however bear all costs related to the Public Dispenser and related infrastructure, including any damage caused by any users other than SARTA, including any Third Party Users.

2.4.2 Scheduling. CE and SARTA shall mutually agree on times for maintenance services that require the Station to be out of operation for more than four (4) hours and such scheduling shall be completed at such times so as to provide minimal interference with SARTA bus and vehicle operations and normal schedule.

2.4.3 Service Calls. CE shall be available to provide emergency repair service on a 24-hour, 7-day per week basis, and will provide an emergency contact telephone number to SARTA. In the event of an emergency at the Station, CE shall respond as soon as is commercially reasonable following notification by SARTA, and will restore the operation of the Station as soon as is commercially reasonable.

2.5 Training. CE shall offer reasonable training programs to educate SARTA's personnel as to the procedures for the safe and efficient use of the Station, including, without limitation, procedures relating to safe vehicle fueling, troubleshooting and appropriate emergency procedures.

2.6 Compliance with Law. In performing the obligations under this Agreement, CE shall comply with all applicable federal, state and local laws, regulations, ordinances and rulings, including (but not limited to) those pertaining to health, safety, employment and environmental matters.

2.7 CE's Costs. Except as explicitly specified in this Article 2 and in Exhibit III, or as may be separately agreed to in an authorized writing by SARTA and CE, CE shall not charge SARTA for other costs incurred in providing the services described in this Article.

2.8 Subsurface Due Diligence. Prior to conducting any subsurface exploration, CE shall use commercially reasonable efforts to make inquiry to determine any subsurface

obstructions or structures such as utility lines or wires, cables, piping, tanks, vaults, etc (including contacting the Ohio Public Utilities Commission call before you dig hotline 1-800 OUPS) on the Premises. Concurrently with the execution of this Agreement SARTA has provided CE with that certain Environmental Site Assessment – Phase 1 5.81 Acres – 1600 Gateway Blvd. SE for Stark Area Regional Transit Authority located in the City of Canton, OL 306 & 307, Stark County, Ohio dated July 2011 and prepared by Hammontree and Associates., LTD (referred to herein as the "Report"), such Report attached hereto as Exhibit VII. In addition to the Report, SARTA shall use commercially reasonable efforts to provide CE with documents, plans, as builts or other records in its possession (but not those otherwise publicly available) indicating the location of any underground structures on the Premise. If after completing its subsurface exploration, CE determines that the condition of the Premises is not acceptable for commencement of the work hereunder and completion of the Station, CE or SARTA may terminate this Agreement upon written notice of termination to the other Party and thereafter neither party shall have any further liability hereunder (except to the extent Paragraph 4.3 below applies). Notwithstanding anything herein to the contrary, CE shall not be legally or financially responsible for the removal of any subsurface structures or any repair of any damage to subsurface structures, except to the extent such damage is caused by CE's negligent or willful actions or omissions.

2.9 CE's General Representation and Warranties.

CE represents and warrants to SARTA that, while this Agreement remains in force:

(a) all charges have been and will be calculated in a manner that gives full credit for all discounts agreed with, or available to SARTA, pursuant to the terms of this Agreement;

(b) it has, and will have, full authority:

(i) to execute this Agreement; and

(ii) to provide the services and equipment that it agrees to provide under this Agreement according to the terms set forth in this Agreement;

(c) it is a corporation duly organized and in good standing under the laws of its jurisdiction of organization;

(d) the execution of this Agreement is not in contravention or conflict with any term or provision of its articles of incorporation or bylaws or any agreement or instrument to which it is a party;

(e) this Agreement is legally valid, binding and enforceable against CE;

(f) it will, and will cause its personnel to comply with all applicable laws, rules and regulations governing the performance of each of their respective obligations under this Agreement and shall maintain, and cause to be maintained in good standing any

requisite licenses, registrations, approvals and exemptions required for it or its personnel to perform its respective obligations under their Agreement;

(g) any products, materials or equipment provided will comply with the specifications and any description of materials provided by CE and will meet any performance criteria set out or referred to in the specifications;

(h) it will perform and comply with (and will ensure that all its personnel will comply with) its obligations under this Agreement in a timely fashion consistent with standard practices in the industry (time is of the essence for all of CE's obligations hereunder);

(i) it will ensure that, where SARTA is reliant on the expertise of the CE or any CE personnel in providing professional advice (including recommendations as to which materials, equipment or products should be used, implemented, modified or replaced), such advice will be given in an impartial, informed and independent manner and in the best interests of SARTA;

(j) it will ensure that the services are performed with due diligence, reasonable skill and care and in accordance with best industry practice at all times;

(k) it and all CE personnel will comply; and ensure that the products and services comply; with all applicable laws and other governmental, statutory and/or regulatory requirements and guidance which may from time to time be applicable to the products and to the provision of the installation and related Services to SARTA, including (without limitation) all applicable regulations regarding Ohio or federal department of transportation or local rules and regulations regarding fuel and safety requirements, all Occupational Safety and Health Administration regulations and related site safety guidelines, and site work permitting requirements and all environmental regulations;

(l) it will not, and will ensure that that any of its personnel will not, do anything (by act or omission) which might invalidate any warranty in respect of any materials, equipment or products provided;

(m) there is no material threatened or pending legal proceeding or government action to which it is a party or to which any of its property is subject, which could materially and adversely affect its ability to enter into this Agreement and/or perform all of its obligations hereunder;

(n) it will ensure that all CE personnel, agents and contractors will, when allowed the use of any SARTA's site or equipment, comply with the applicable site security, system usage and other policies and procedures in force from time to time and identified in writing by SARTA to CE and/or posted in plain view at the SARTA sites;

(o) it will ensure that the CE personnel will at all times behave in a courteous, professional and appropriate manner and that no CE personnel will act or make any

statement or otherwise behave in any manner that is reasonably likely to result in any prejudice to SARTA (including to its reputation);

(p) it will ensure that the CE personnel have appropriate experience, qualifications and expertise;

(q) it will ensure that all equipment, materials and products furnished hereunder shall be new, in good condition and of good workmanship, free from any defect or any lien or encumbrance, merchantable, fit for their intended purposes or any other purpose specifically made known in writing to CE by SARTA, match all specifications contained in the Agreement prior to implementation, and at all times shall be in compliance with all applicable laws and regulations and will be produced by persons with adequate training and expertise;

(r) it will ensure that all subcontractors and sub-sub-contractors and all material-men and others providing work or materials for the project are timely paid, and that no such party places or attempts to place any lien on the project property or any funds used in connection therewith;

(s) it will ensure that the equipment, materials and products provided will not infringe on any patent, license or other intellectual property; and

(t) it will ensure that no activity performed by CE under this Agreement shall void any manufacturer warranties on any equipment, materials and/or products furnished hereunder.

CE shall fully and effectively indemnify and keep indemnified SARTA from and against, and agrees to pay on demand, any and all losses, liabilities, damages and expenses (including legal fees on a full indemnity basis) incurred by or awarded against SARTA as a result of any breach of the warranties, representations and/or undertakings in this Agreement. Without prejudice to the foregoing or to any other rights or remedies of SARTA, in the event of breach of any warranty, representation or undertaking, CE undertakes promptly to remedy the breach (or the circumstances giving rise to the breach) without charge.

In addition (and without prejudice) to all other rights under this Agreement, SARTA may suspend this Agreement for any period and/or terminate this Agreement on written notice if it learns information giving it a factual basis to conclude that CE has breached the warranties, representations and undertakings given in this Agreement, provided that prior to any suspension or termination in accordance with the foregoing, SARTA agrees to give CE a minimum of fifteen (15) days written notice and an opportunity to cure (and where it is not commercially reasonable for CE to fully effect a cure within the fifteen (15) day period, it shall be sufficient for CE to commence implementation of the cure within such fifteen (15) day period and thereafter proceed diligently to cure the breach).

The representations and warranties of Contractor set forth in this Agreement shall survive the termination hereof.

ARTICLE 3
SARTA'S RESPONSIBILITIES

3.1 Maintenance of Premises. SARTA shall maintain the Premises and the real property in the vicinity of the Station in a clean, safe, and commercially reasonable condition suitable for CNG vehicle refueling use, including the ingress to, and egress from, the Station.

3.2 INTENTIONALLY DELTED.

3.3 Refueling Vehicles. SARTA employees shall refuel its CNG Vehicles and SARTA shall alone be responsible for the acts of such employees. SARTA will use commercially reasonable efforts to have its employees attend the appropriate training and supervision session to be provided by CE for SARTA employees in accordance with Paragraph 2.5 above.

3.4 Utilities. SARTA shall pay any connection or installation fees associated with installing utility service at the Station, including gas, electricity, and telephone lines, and shall provide a separate meter for electricity to the Public Dispenser. In addition, SARTA shall be responsible for payment of all utility service charges for utility service consumed at the Station during the Term (to the extent not separately metered for the Public Dispenser, in which case CE shall pay the utility provider directly) including, without limitation, electricity, water, waste disposal, refuse collection and other utility-type services furnished to CE or the Station. As to gas utility only, CE shall provide to SARTA full reimbursement for gas retailed by CE to Third Party Users, as provided in paragraph 6.3 below. In connection with the work under the Agreement, CE shall coordinate all of its activities through SARTA's designated construction manager.

3.5 Compliance with Law. In performing its obligations under this Agreement, SARTA shall comply with all applicable federal, state and local laws, regulations, ordinances and rulings, including, but not limited to, those pertaining to health, safety, employment and environmental matters.

3.6 Payment of CE Billings. SARTA shall pay each undisputed invoice submitted by CE within twenty (20) days following receipt of the invoice by SARTA. If SARTA disputes in whole or in part any invoice submitted by CE, SARTA shall provide written notice to CE within the same 20 day timeframe as set forth above for payment. For purposes of this section, receipt shall be defined as the actual receipt by SARTA of the invoice. Any payments not made when due shall accrue interest on the unpaid amount at a rate of 12% per annum (provided CE provides notice to SARTA that it has not received payment and if SARTA pays within 5 business days of such notice, no interest will be due), and if charged shall be calculated from the date payment is due to and including the date payment is received by CE, provided, however, that the foregoing interest charge

shall not apply until the second (2nd) past due payment by SARTA in each calendar year during the Term of this Agreement if, and only if, the first (1st) past due payment is in fact received by CE within thirty (30) days following receipt of the applicable invoice by SARTA.

3.7 SARTA's Costs. Except as explicitly specified in this Article, or as may be separately agreed to in an authorized writing by SARTA and CE, SARTA shall not charge CE for the materials or labor utilized in providing the services provided in this Article. To the extent SARTA does not qualify for an exemption, SARTA shall be responsible for all taxes (including, without limitation, any real property taxes and assessments unless paid by CE pursuant to Paragraph 6.4 below) relating to the Premises, as well as any and all maintenance and repair costs, as contemplated in this Article.

ARTICLE 4
LICENSE TO USE PREMISES

4.1 Permitted Use. To enable CE to fulfill its obligations set forth herein, SARTA hereby licenses and permits CE to use the Premises solely in fulfillment of its obligations under this Agreement and grants the right of ingress to and egress from the Premises to CE, CE's employees, agents, servants, customers, vendors, suppliers, patrons and invitees solely for the purposes contemplated hereby in accordance with the terms and conditions of this Agreement. SARTA shall not, and shall not permit others to, levy any rent, charge, lien or encumbrance not expressly provided for in this Agreement against CE for the use of the Premises or the Station. Notwithstanding the above however SARTA shall have no liability to CE in the event that any governmental organization, including the Stark County Auditor's office, elects to separately tax the area of the Premises used for the Station and related equipment, but the Parties agree that in such event, CE's obligation is limited to the provisions of Paragraph 6.4 below.

4.2 Clear Title. SARTA is, and shall remain during the term of this Agreement, the owner or lessee of the Premises, and subject to the provisions in section 4.1 above, shall not allow any lien or encumbrance affecting the Station or CE's performance hereunder. SARTA shall be the owner of the Station, and its parts and equipment.

4.3 Pre-Existing Conditions. The Premises shall be clear of pre-existing underground hazards or soil contaminants that would impact the construction of the Station. For ninety (90) days following the Effective Date, CE, its agents, consultants and contractors shall have the right to enter upon the Premises at all reasonable times and upon reasonable prior notice to SARTA, at its own cost, to inspect the Premises and conduct such surveys, tests and/or studies, including but not limited to new Phase I or Phase II Environmental Site Assessments and reviewing the Report, as CE deems desirable. If during or at the conclusion of such ninety (90) day testing period, CE determines, in its sole discretion, that the site is unsuitable for CE's intended use, CE may, without further obligation or penalty, terminate this Agreement by written notice to SARTA. The Parties agree that CE shall have no financial or legal responsibility or liability for any pre-existing conditions, hazardous substances that have migrated onto the Premises or the underground storage tanks on the Premises. If at any time during the Term it is determined that underground hazards, soil contaminants or soil conditions exist that either (a) require removal, replacement, and

disposal of soils, materials or the underground storage tanks, (b) require remediation, or (c) require unanticipated soil or foundation preparation work, and such conditions were either (i) caused by the underground storage tanks on the Premises and/or (ii) not brought onto the Premises by CE, its agents, contractors, representatives, or invitees, such conditions including, without limitation, pre-existing hazardous substances, hazardous substances that migrate onto the Premises and any condition referenced in the Report (including, without limitation, the underground storage tanks on the Premises), SARTA shall be financially and legally responsible for such remediation, removal, replacement preparation work, and/or disposal. If SARTA does not commence, within thirty (30) days after discovery of any such pre-existing underground hazard or soil contaminant or soil condition, and thereafter to diligently prosecute to completion the correction of such condition, CE may, without further obligation or penalty, terminate this Agreement by written notice to SARTA and thereafter the Parties will not have any further liability hereunder. This Section 4.3 shall survive termination of this Agreement.

ARTICLE 5
TERM AND TERMINATION

5.1 Term. The initial term of this Agreement shall commence on the date of this Agreement (the "Effective Date") and end on the tenth (10th) anniversary of the date SARTA first dispenses CNG at the Station (the "Commencement Date"). CE shall notify SARTA of the Commencement Date in writing. This Agreement shall automatically terminate unless SARTA gives written notice of the renewal to CE and CE accepts at least six (6) months prior to such renewal date in which case it will renew under the same terms and conditions, except that each renewal term shall be for five (5) years. The initial term and any renewal terms are referred to herein as the "Term."

5.2 Termination. Notwithstanding the above, upon a material breach of this Agreement, either Party shall have the right to terminate this Agreement, for cause, upon fifteen (15) days written notice and opportunity to cure to the other Party, provided, however, that where it is not commercially reasonable to fully effect a cure to the other Party within the fifteen (15) day period set forth above, the Party in breach shall not be deemed to be in default of the Agreement and subject to termination for cause where it commences implementation of the cure within such fifteen (15) day period and thereafter proceeds diligently to cure the breach. In addition, notwithstanding Paragraph 5.1, this Agreement shall terminate upon (a) CE's exercise of its right to terminate this Agreement set forth in Paragraphs 2.8 and 4.3; or (b) SARTA's exercise of its right to terminate this Agreement set forth in Paragraph 2.9.

ARTICLE 6
PURCHASE OF STATION AND CE'S AND THIRD PARTIES' USE OF PUBLIC DISPENSER

6.1 Station Purchase. CE shall build the Station as described in Exhibit II to provide a turn-key fueling facility for SARTA and SARTA shall pay for the Station construction in accordance with the payment schedule described in Exhibit IV. SARTA will be responsible to pay for the total Station cost: $1,607,039 (less the grant funding $575,000) totaling: $1,032039 to CE. Of

that total, $614,000 shall not be federal dollars. SARTA will also be responsible to pay for the locally outsourced labor and materials as stated in Exhibit IV.

6.2 Use of Station by Non-SARTA Vehicles. During the Term, CE will use commercially reasonable efforts to market the Station to Third Party Users and sell CNG fuel from the Public Dispenser to the Third Party Users at the Retail Rate, provided however that CE shall not use the SARTA name, logo, image or otherwise refer to SARTA in any advertising or communications without the prior written consent of SARTA (not to be unreasonably withheld, delayed or conditioned).

6.3 Royalty. For all GGEs of CNG sold to Third Party Users from the Station's Public Dispenser, CE shall pay SARTA a royalty payment in the amount of $0.05 per GGE, plus the current monthly commodity price of natural gas paid by SARTA for the commodity including fully allocated utility costs connected therewith. Royalty payments relating to this Article shall be made by CE within thirty (30) days following the end of each calendar quarter.

6.4 Real Property Taxes. Upon CE's receipt of supporting documentation from the assessing authority, CE shall reimburse SARTA (within thirty (30) days of demand) from time to time for any and all increases and/or imposition of a new real estate tax assessed against the Premises which would not have occurred but for the construction of the Public Dispenser on the Premises. SARTA shall notify CE in writing of any such real property taxes, and SARTA shall further provide CE with specific documentation reasonably acceptable to CE from the taxing authority. For the avoidance of doubt, CE shall not be responsible for any real property taxes which would be applicable to the Premises irrespective of the construction, existence or operation of the Public Dispenser, and in any event CE shall only be responsible for the portion of the taxes equivalent to CE's Share (unless the portion of the real property with the Public Dispenser is separately assessed, in which case CE shall pay 100%). If SARTA shall obtain a refund or rebate of any taxes to which CE contributes, SARTA shall refund to CE its proportionate share thereof. CE shall not be responsible for interest or penalties imposed due to SARTA failing to timely pay the tax bills. Any tax year shall be prorated to reflect the Term of this Agreement.

ARTICLE 7
EXCISE, SALES AND USE TAXES

CE is currently required to, or may be required in the future to, collect and remit certain federal, state and local taxes, including fuel use taxes, on CNG sold at the Station, subject to certain exemptions. SARTA shall be responsible for all such applicable excise, sales and use taxes related to its purchases of CNG under this Agreement. If SARTA qualifies for an exemption from one or all of these taxes, SARTA shall furnish to CE appropriate certification authorizing non-payment of the applicable tax or taxes. If SARTA fails to maintain its exemption status, or for any other reason SARTA's exemption becomes invalid without notifying CE thereof, SARTA shall timely pay to CE or the appropriate taxing authority all taxes, penalties and interest on any nonpayments and underpayments of such taxes.

ARTICLE 8
INDEMNIFICATION AND LIMITATION OF LIABILITY

8.1 Except to the extent that liabilities arise from CE's or its officers, directors, employees, agents, contractors or subcontractors' (the "CE Indemnity Parties") negligence or willful misconduct, SARTA agrees to indemnify, defend and hold harmless CE and its officers, directors, agents and employees from any and all third party claims alleging (i) personal injury to or death of any person or persons caused by SARTA or its employees or (ii) damage to or loss of use of property caused by SARTA or its employees or (iii) any pre-existing contamination of the Premises or otherwise related to the presence of underground storage tanks on the Premises. Notwithstanding the above however, the maximum amount of recovery against SARTA by the CE Indemnity Parties under (i) and (ii) only of this indemnification section Paragraph 8.1 shall not exceed the amount of SARTA'S applicable insurance coverage, which in no event shall be less than the minimum amounts set forth in Article 9 of this Agreement.

8.2 Except to the extent that liabilities arise from SARTA's or its employees, agents, contractors or subcontractors' negligence or willful misconduct, CE agrees to indemnify, defend and hold harmless SARTA and its officers, directors, agents and employees from any and all third party claims alleging injury to or death of any person or persons or damage to or loss of use of property, from whatever cause, occurring during the Term related in any way to the construction, use, operation or maintenance of the Station by CE (except for any aspect of Station operation attributable to SARTA or its employees or agents), negligence or willful misconduct by CE or its employees or agents or material breaches of this Agreement by CE.

8.3 Indemnification Procedure. In the event any action is commenced or claim is made or threatened against an indemnified party, hereunder ("Indemnitee") as to which the other party ("Indemnitor") is obligated to indemnify Indemnitee or hold it harmless, Indemnitee shall promptly notify Indemnitor of such event and Indemnitor shall assume the defense of, and may settle, that part of any such claim or action commenced or made against Indemnitee which relates to Indemnitor's indemnification and Indemnitor may take such other steps as may be necessary to protect itself. Indemnitor shall not be liable to Indemnitee on account of any settlement of any such claim or litigation affected without Indemnitor's consent. The right of Indemnitor to assume the defense of any action shall be limited to that part of the action commenced against Indemnitee which relates to Indemnitor's obligation of indemnification and holding harmless.

8.4 Neither Party shall have any liability to the other Party for special, consequential, or incidental damages, under this Agreement.

8.5 Dispute Resolution Procedures. In the event a dispute arises between the Parties related to this Agreement, the following process shall be followed:

(a) Each Party will designate a senior executive ("Designated Representative") to represent it in connection with any dispute that may arise between the Parties (a "Party Dispute"). The designations shall be as described elsewhere herein. Subsequent changes in a Party's Designated

Representative shall be in writing and communicated in the same manner.

(b) In the event that a Party Dispute should arise, the Designated Representatives will meet, with their attorneys, if they so agree, within five (5) business days after written request by any Party to any other Party (the "Dispute Notice") in an effort to resolve the Party Dispute.

(c) If the Designated Representatives are unable to resolve the Party Dispute within twenty (20) business days following their first meeting, the Party Dispute will be submitted to non-binding mediation in Canton, Ohio before a mediator made available to the Parties through Stark County Court of Common Pleas.

(d) In the event that the mediation process fails to result in a resolution of the Party Dispute within forty-five (45) days following receipt of the Dispute Notice, the Parties may take any action they may deem necessary to protect their interests subject to the requirements of Section 11.6.

8.6 Force Majeure. In the event that either party is prevented from performing its duties and obligations pursuant to this Agreement by circumstances beyond its control, including, without limitation, fires, floods, labor disputes, equipment failure, the interruption of utility services, the cessation of providing necessary products or services to CE by any supplier to CE, war, acts of terrorism, or Acts of God (hereinafter referred to as "Force Majeure"), then such party shall be excused from performance hereunder during the period of such disability ("Force Majeure Period"). If such party claims Force Majeure, such party shall notify the other party within 24 hours after it learns of the existence of a Force Majeure condition, and will also provide the other party with an estimate, if one can be reasonably made, of the anticipated Force Majeure Period. The party claiming the Force Majeure will also notify the other party within 24 hours after the Force Majeure condition has terminated. The party claiming the Force Majeure shall agree to use commercially reasonable efforts to correct whatever events or circumstance cause the Force Majeure event. In the event any Force Majeure condition causes damage or destruction to the Station (including, without limitation, the Public Dispenser) after the completion of the Station and acceptance of the completed Station in writing by SARTA, CE shall, upon SARTA's request, repair any such damage and rebuild the Station and shall bill SARTA for such replacement parts and labor at CE's current labor rates.

ARTICLE 9
INSURANCE

CE shall procure at its expense, and maintain in full force and effect during the term of this Agreement, including any renewals, the insurance set forth in pages 1 and 2 of Exhibit VI.

SARTA shall procure at its expense, and maintain in full force and effect during the term of this Agreement, including any renewals, with insurance carriers rated at least A- VII or Better in A.M. Best's Insurance Report and admitted to do business in the state where the Station is located, the following primary insurance or self-insurance in at least the minimum amounts specified. Such insurance shall be endorsed to require at least thirty (30) days' written notice to CE of cancellation.

(a) Comprehensive Commercial General Liability Insurance, with a combined single limit of not less than $10,000,000. Excess liability or umbrella liability coverage may be used to evidence or provide limits in addition to primary limits of no less than $1,000,000 on the commercial general liability policy.

(b) Comprehensive Commercial Automobile Liability Insurance, including owned, non-owned and hired automobiles covering bodily injury and property damage, to a combined single limit of $1,000,000.

(c) Workers Compensation and Employers Liability

(i) Workers compensation in compliance with applicable state and federal laws.

(ii) Employers liability with a limit of not less than $1,000,000.

The requirements for carrying the foregoing insurance shall not derogate from the provisions of indemnification as set forth in this Agreement.

SARTA shall send certificates of insurance evidencing such coverage within thirty (30) days after the date of this Agreement to:

Clean Energy
3020 Old Ranch Parkway
Suite 400
Seal Beach, California 90740
Attn: Ms. Barbara Johnson
Fax: (562) 493-4532
Email: bjohnson@cleanenergyfuels.com

CE shall send certificates of insurance evidencing such coverage within thirty (30) days after the date of this Agreement to:

Stark Area Regional Transit Authority
1600 Gateway Blvd SE
Canton, OH 44707
Attn: Kirt Conrad, CEO
Fax: (330) 454-5476

ARTICLE 10
DESIGNATED REPRESENTATIVES AND NOTICES

10.1 Representatives. Each Party hereby designates the following as its representative (and its "Designated Representative" for dispute resolution purposes) for the administration of this Agreement:

CE: Peter J. Grace
3020 Old Ranch Parkway
Suite 400
Seal Beach, CA 90740
Telephone: (562) 493-2804
Fax: (562) 493-4532

SARTA: Kirt Conrad
1600 Gateway Blvd SE
Canton, OH 44707
Telephone: (330) 458-1047
Fax: (330) 454-5476

10.2 Notices. Except for SARTA's request for service calls, which may be made by telephone, notices pertaining to this Agreement shall be in writing and shall be transmitted either by personal delivery, facsimile, or by overnight delivery carrier and shall be deemed to be delivered up receipt. The addresses set forth below shall be the addresses used for notice purposes unless written notice of a change of address is given:

CE: Clean Energy
3020 Old Ranch Parkway
Suite 400
Seal Beach, CA 90740
Attn: Mr. Peter J. Grace
Fax: (562) 493-4532

SARTA: Stark Area Regional Transit Authority
1600 Gateway Blvd SE
Canton, OH 44707
Attn: Kirt Conrad, CEO
Fax: (330) 454-5476

ARTICLE 11
MISCELLANEOUS

11.1 Assignment. Neither Party shall have the right to assign its rights or obligations hereunder without obtaining the prior written consent of the other Party (which consent shall not be unreasonably withheld), and any attempted assignment without such prior written consent shall be void; provided that such consent shall not be necessary in the context of an

acquisition of either Party by asset sale, merger, change in control or operation of law (in which case the Party seeking assignment agrees to give written notice to the other Party). Permitted assigns and successors in interest shall have the benefit of, and shall be bound by, all terms and conditions of this Agreement. Notwithstanding anything contained herein to the contrary, either Party may assign this Agreement to such Party's parent corporation, with notice to the other Party but without the consent of the other Party.

11.2 Headings. The headings in this Agreement are for convenience and reference only, and shall not affect the interpretation of this Agreement.

11.3 No Joint Venture. CE shall perform its duties herein as an independent contractor. Nothing contained herein shall be considered to create the relationship of employer and employee, partnership, joint venture or other association between the Parties, except as principal and independent contractor agent.

11.4 Waiver. No waiver by either Party of any one or more defaults by the other Party in the performance of any provisions of this Agreement shall operate or be construed as a waiver of any other default or defaults, whether of a like or different character. No waiver or modification of this Agreement shall occur as the result of any course of performance or usage of trade.

11.5 Severability. If any provision of this Agreement or the application thereof to any person or circumstances shall to any extent be held in any proceeding to be invalid or unenforceable, the remainder of this Agreement shall be valid and enforceable to the fullest extent permitted by law, but only if, and to the extent, such enforcement would not materially and adversely alter the Parties' essential objectives as expressed herein.

11.6 Governing Law, Forum and Venue. This Agreement shall be subject to and construed in accordance with the laws of the State of Ohio with the courts of that State having jurisdiction to resolve all disputes which may arise under or which relate to this Agreement. Any and all claims or actions arising out of or relating to this Agreement shall be filed in and heard by the state or federal courts with jurisdiction to hear such suits located in Canton, or Stark County, Ohio, and each Party hereby consents to the jurisdiction of such courts and irrevocably waives any objections thereto, including, without limitation, objections on the basis of improper venue or forum non conveniens.

11.7 Counterparts and Facsimile Execution. This Agreement may be executed in any number of counterparts, each of which, when so executed and delivered, shall be deemed an original, and all of which taken together shall constitute one and the same agreement. Delivery of an executed counterpart of this Agreement by facsimile shall be equally as effective as delivery of a manually executed counterpart. Any Party hereto delivering an executed counterpart of this Agreement by facsimile shall also deliver a manually executed counterpart, but the failure to do so shall not affect the validity, enforceability or binding effect of the counterpart executed and delivered by facsimile.

11.8 Attorney's Fees. If any action at law or equity is commenced concerning this Agreement or to enforce its terms, the prevailing Party in such matter shall be entitled to the payment of reasonable attorneys' fees and costs as determined by the Court, in addition to any other relief which may be awarded to that Party.

11.9 Additional Documents. The Parties agree to execute and to deliver to each other any and all other additional documents and to take any additional steps reasonably necessary to complete, to document and to carry out the business transaction contemplated by this Agreement.

11.10 Negotiated Transaction. The drafting and negotiation of this Agreement has been participated in by all of the Parties. For all purposes, this Agreement shall be deemed to have been drafted jointly by each of the Parties.

11.11 Representation regarding Authority to Sign Agreement. Each of the representatives of the Parties signing this Agreement warrants and represents to the other that he, she or it has the actual authority to sign this Agreement on behalf of the Party for whom he, she or it is purporting to represent.

11.12 Entire Agreement. This Agreement and its exhibits contain the entire agreement between the Parties and it supersedes any prior written or oral agreements between the Parties concerning the subject matter of this Agreement. There are no representations, agreements, or understandings between the Parties relating to the subject matter of this Agreement which are not fully expressed within this Agreement and its exhibits.

11.13 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the respective heirs, successors, assigns, affiliates and personal representatives of the Parties.

11.14 Modification. This Agreement shall not be modified, amended, or changed except in a writing signed by each of the Parties affected by such modification, amendment or change.

11.15 Further Assurances. All of the Parties to this Agreement agree to perform any and all further acts as are reasonably necessary to carry out the provisions of this Agreement.

[The remainder of this page has intentionally been left blank.]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be signed by their duly authorized representatives, effective as of the date first set forth above.

CLEAN ENERGY

By: _____

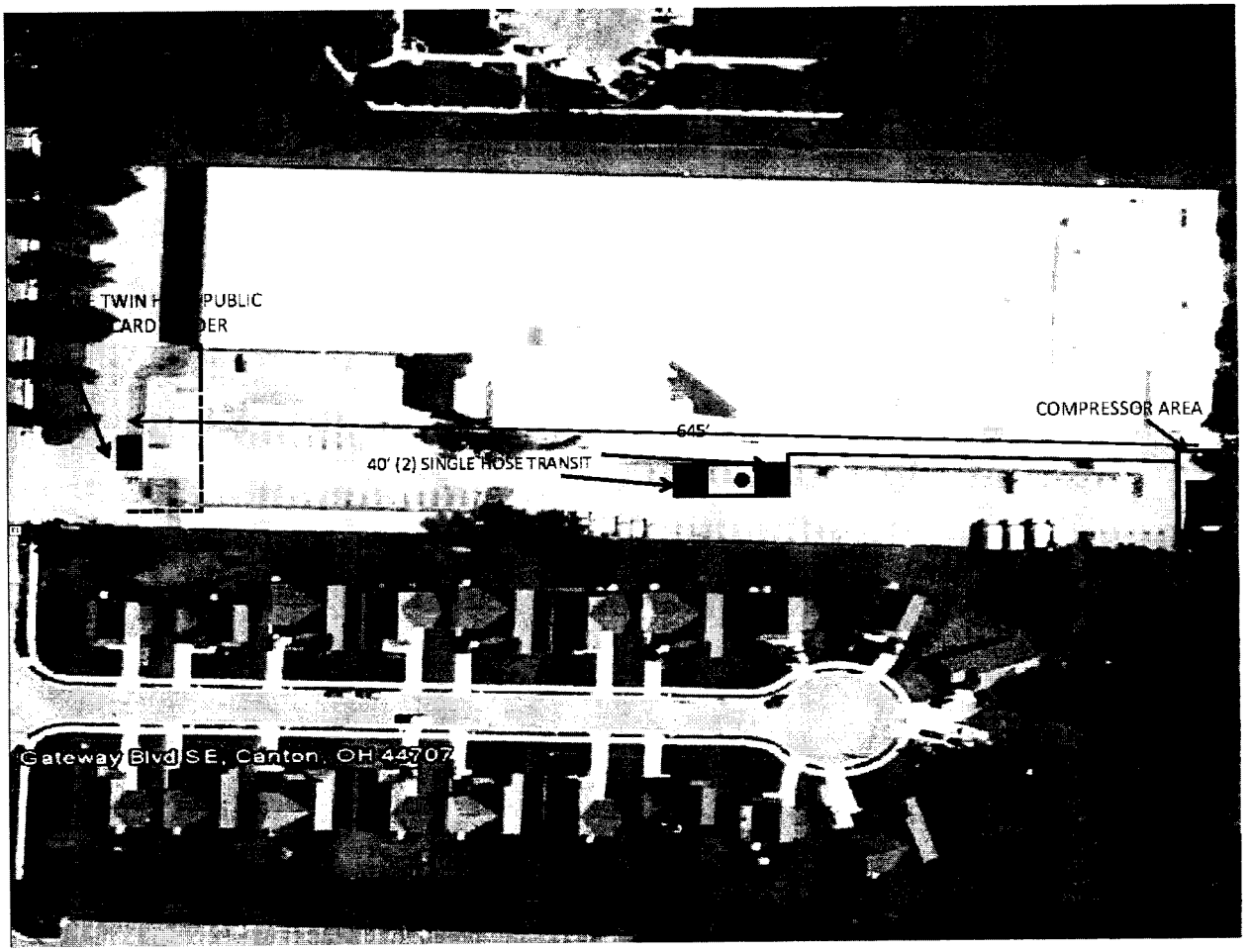
Peter J. Grace,
Senior Vice President, Sales & Finance

STARK AREA REGIONAL TRANSIT AUTHORITY

By: _____

CAROLE A. KUCZYNSKI
[Printed Name and Title]
DIRECTOR, FINANCE & ADMINISTRATION

Exhibit I
The Premises and Station Location



AGREEMENT FOR DISPOSITION AND DEVELOPMENT OF REAL PROPERTY

LOCATED AT 5204 AND 5226 NORTH INTERSTATE AVENUE IN THE CITY OF PORTLAND, COUNTY OF MULTNOMAH, STATE OF OREGON

BETWEEN

REACH COMMUNITY DEVELOPMENT, INC. AND THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET)

TABLE OF CONTENTS

AGREEMENT FOR DISPOSITION AND DEVELOPMENT OF REAL PROPERTY

THIS AGREEMENT FOR DISPOSITION AND DEVELOPMENT OF REAL PROPERTY ("Agreement") is made as of Oct 25, 2007, by and between the **TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON**, an Oregon mass transit district ("**TriMet**" or "**the District**"), and **REACH Community Development, Inc.**, an Oregon non-profit corporation ("**Developer**"). TriMet and Developer are referred to jointly in this Agreement as "Parties" and individually as a "Party."

RECITALS

1. Pursuant to ORS Chapter 267, TriMet has authority to acquire, possess and dispose of real property for the purpose of providing or operating a mass transit system and aiding the objects of the District, and to take such action as may be necessary or convenient for the proper exercise of the powers granted to TriMet.

2. In September 2005, TriMet purchased with Federal Transit Administration grant funds a 24,000 square foot property at 5204 & 5226 N. Interstate Avenue ("Property") with the intention to offer the Property for joint development.

3. In March 2006, TriMet solicited development teams to present qualifications for joint development of the Property. TriMet selected REACH Community Development as the most qualified team and entered exclusive negotiations with REACH.

4. As a result of the exclusive negotiations process, Developer now proposes to construct and operate 54 units of affordable housing with a minimum of 3,000 square feet of ground floor retail on the Property (the "Project").

5. By entering into this Agreement, Developer desires to commit itself, subject to the satisfaction of certain contingencies provided for herein, to acquire and develop the Property in accordance with the terms of this Agreement in order to construct the Project.

6. TriMet finds that redevelopment of the Property in accordance with Developer's proposal is consistent with TriMet's Real Property Management and Development Policy, will foster the prudent use of mass transit facilities, will promote the health, safety and welfare of the metropolitan area residents, and is in accord with the public purposes and provisions of applicable law and requirements.

7. TriMet, in consideration of the commitments made by Developer in this Agreement, desires to convey the Property to Developer in accordance with Developer's proposal and the terms of this Agreement.

8. Developer's construction and operation of the Project on the Property in accordance with the terms of this Agreement, including without limitation the Scope of Development and Schedule of Performance, is a material inducement to TriMet's conveyance of the Property to Developer.

9. The Parties are now prepared to enter into this Agreement, pursuant to which Developer will undertake acquisition of the Property, and the construction and operation of the Project thereon, in accordance with the terms and conditions set forth below.

AGREEMENT

This Agreement shall incorporate by this reference the Recitals, the Definitions and all Exhibits hereto. The Parties, in consideration of the agreements set forth herein and for other valuable consideration, the receipt and adequacy of which are hereby acknowledged, agree as follows:

DEFINITIONS

The following terms have the designated meanings in this Agreement:

1. "**Affordable Housing**" means housing where rents are set according to 30 percent of 50 percent of the area median income (except for units with Section 8 rent subsidies, wherein the "contract rents" are federally subsidized and the tenants pays no more than 35% of their income for rent), adjusted for household size, and where tenancy is generally restricted to households with incomes below 50 percent of the area median income, adjusted for household size.

2. "**Agreement**" means this Disposition and Development Agreement and all attached Exhibits.

3. "**Certificate of Completion**" means a certificate that will be issued by TriMet to Developer pursuant to Section 3.11 of this Agreement, subsequent to issuance of the architect's certificate of substantial completion and the City's issuance of a certificate of occupancy for the Project, indicating TriMet's material acceptance of the construction of the Project.

4. **"City"** means the City of Portland, Oregon and its constituent bureaus and agencies.

5. "**Closing Date**" means the date on which the Deed from TriMet to Developer is recorded.

6. **"Construction Plans and Specifications"** means the detailed plans submitted to the City of Portland in order to obtain all necessary permits for the Project, including:
   - Site plans showing all structures upon the Property together with all connections to existing or proposed utilities, roads, sidewalks and alleys;
   - Landscaping plan;
   - Elevations of the buildings depicting the site lines and the specific configuration and relationship of design elements of the building exteriors, which describe the aesthetic and technical aspects, including materials, of the building exteriors;
   - Detailed engineering and architectural plans for the Project showing the utility, access and structural support components, with all proposed connections to existing and proposed utilities and services and the landscape plan based on current code requirements;
   - A calculation of gross building areas, the number of residential units by unit type, the amount of commercial space, the floor-to-area ratio of the project, and the number of parking spaces;
   - An exterior finish schedule;

- Location and dimensions for exterior signage and graphics;
- Exterior lighting plan; and
- Location and treatment of servicing requirements, trash collection, loading docks and related functional areas.

7. "**Conveyance**" means the transfer of fee simple title to the Property by TriMet to Developer.

8. "**Deed**" means the form of Bargain and Sale Deed conveying fee simple title to the Property to Developer subject to TriMet's right of re-entry to the Property substantially in the form attached to this Agreement as Exhibit B.

9. "**Design Review Drawings**" shall mean the plans submitted to the City for Design Review in accordance with Title 33 of the Code of the City of Portland, including but not limited to:
   - Site plans showing all structures upon the Property together with all connections to existing or proposed utilities, roads, sidewalks and alleys;
   - A general landscaping concept plan;
   - Elevations of the buildings to determine the site lines and the specific configuration and relationship of design elements of the building exteriors, which describe the aesthetic and technical aspects, including materials, of the building exteriors;
   - A calculation of gross building areas, floor areas, height ratios and open spaces;
   - A preliminary Exterior Finish Schedule;
   - Proposed location and dimensions for exterior signage and graphics;
   - Exterior lighting plan; and
   - A description of servicing requirements, trash collection locations, loading docks and related functional areas.

10. "**Developer**" means REACH Community Development, Inc., an Oregon non-profit corporation.

11. "**Effective Date**" means the date that all Parties have executed this Agreement.

12. "**Environmental Laws**" means all federal, state and local laws, ordinances, rules and regulations pertaining to the protection or regulation of the environment that apply to the Project, including without limitation, Chapter 466 of the Oregon Revised Statutes, Chapter 341 of the Oregon Administrative Rules, RCRA (defined herein), CERCLA (defined herein), the Safe Drinking Water Act, the Clean Air Act, the Clean Water Act, and the Toxic Substances Control Act.

13. "**Environmental Reports**" means the *Phase I Environmental Assessment* dated May 4, 2004 prepared by Environmental Health Management, Inc. on behalf of TriMet.

14. "**Escrow Agent**" means First American Title Insurance Company, 200 SW Market Street, Suite 250, Portland, Oregon 97201.

15. **"Final Termination Date"** means the date by which all conditions precedent must be satisfied, waived or otherwise resolved, as further described in Section 1.6.5, below...

16. "**Hazardous Substances**" means any pollutant, dangerous substance, toxic substance, asbestos, petroleum, petroleum product, hazardous waste, hazardous materials or hazardous substances as defined in or regulated by Chapter 466 of the Oregon Revised Statutes, the Resource Conservation Recovery Act, as amended, 42 USC Section 6901, et seq. ("RCRA"), the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 USC Section 9601, et seq. ("CERCLA"), or any other Environmental Law.

17. "**Investor**" means the owner of any equity contributed to the Property, or any portion thereof, other than Developer.

18. "**Joint Development**" means development that conforms with the requirements of 49 U.S.C. 53(03)(a)(1)(G) and as amended by Section 2003(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) and as further described in Notice of Final Agency Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law, Federal Register, Vol. 72, No. 25, Wednesday, February 7, 2007.

19. "**Mortgage**" means a mortgage or deed of trust against the Property, or any portion thereof, recorded in the real property records of Multnomah County, Oregon.

20. "**Mortgagee**" means the holder of any Mortgage affecting or encumbering any portion of the Property, together with any successor or assignee of such holder. The term "Mortgagee" shall include any Mortgagee as owner of the Property or any part thereof as a result of foreclosure proceedings, or action in lieu thereof, or any insurer or guarantor of any obligation or condition secured by a mortgage but shall not include (a) any other party who thereafter obtains title to the Property or such part from or through a Mortgagee or (b) any other purchaser at foreclosure sale other than a Mortgagee.

21. "**Notice**" means any summons, citation, order, claim, litigation, investigation, proceeding, judgment, letter or other communication, written or oral, issued by the Oregon Department of Environmental Quality ("DEQ"), the United States Environmental Protection Agency, TriMet, and other federal, state or local authority or any other government having jurisdiction with respect to the Property.

22. "**Property**" means the real property located at 5204 & 5226 N. Interstate Avenue, City of Portland, Multnomah County, and State of Oregon, more fully described on Exhibit A, attached hereto.

23. "**Project**" generally means the building and other improvements to be newly constructed by Developer on the Property, including residential space, commercial space, parking, landscaping and other improvements, substantially in accordance with the Scope of Development attached hereto as Exhibit E, with such changes as Developer and TriMet may, from time to time, mutually agree upon.

24. "**Project Budget**" means the summary financial analysis for the Project attached hereto as Exhibit C. Exhibit C represents the sources and uses of funds and project costs as of the Effective Date. Exhibit C may be amended as Project financing proceeds.

25. "**Purchase Price**" means the price Developer shall pay to TriMet for the Property to be conveyed by TriMet to Developer pursuant to Section 1.3.

26. "**Release**" means releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, disposing or dumping.

27. "**Schedule of Performance**" means the document describing the schedule by which construction and development will be completed by Developer and attached hereto as Exhibit D.

28. "**Scope of Development**" means the description of the improvements to be built comprising the Project, attached hereto and incorporated herein as Exhibit E.

29. "**TriMet**" means the Tri-County Metropolitan Transportation District of Oregon, a mass transit district of the State of Oregon, exercising governmental functions and powers and organized and existing pursuant to ORS Chapter 267. As used in this Agreement, TriMet includes an assignee or successor to TriMet's rights, powers, duties and responsibilities.

1. GENERAL TERMS OF CONVEYANCE.

1.1 Conveyance by Deed.

1.1.1 Deed. Subject to the terms, covenants and conditions of this Agreement, at Closing, TriMet will convey the Property by Bargain & Sale Deed, in the form attached as Exhibit B, to Developer.

1.1.2 Closing. The conveyance of the Property to Developer shall occur in an escrow closing at the office of the Escrow Agent not later than the deadline for Closing set forth in the Schedule of Performance. At Closing, Developer shall accept such conveyance and pay the Purchase Price to TriMet in the manner as set forth in Section 1.3.

1.2 Conveyance of Property. Upon satisfaction of the Conditions Precedent to Conveyance provided in Section 1.6 hereof and upon payment by Developer to TriMet of the Purchase Price, TriMet will convey the Property to Developer by Deed. TriMet shall deliver possession of the Property to Developer concurrently with the conveyance of title. Developer shall accept title and possession on or before the dates established therefore in the Schedule of Performance.

1.3 Purchase Price. The total Purchase Price for the Property is three hundred thousand and no/100 Dollars ($300,000.00).

1.4 Title Review.

1.4.1 TriMet will provide Developer with a preliminary title report on the Property within twenty (20) days of the execution of this Agreement. Developer will have twenty (20) days following the date of its receipt of the preliminary title report within which to request any additional materials it may need from TriMet to review the title to the Property. Within ten (10) days of any such request, TriMet will provide any additional materials within its control. Developer will have thirty (30) days after receiving the preliminary title report (and any requested additional materials) to notify

TriMet in writing if Developer objects to any item contained therein. Those items to which Developer does not object will be deemed "Permitted Exceptions." If Developer objects to any item, then TriMet shall have twenty (20) days after receiving Developer's written objection to notify Developer in writing of its intention to remove or not remove the exceptions to which Developer objects prior to Closing. If TriMet refuses to remove any such exception, Developer shall have ten (10) days within which to terminate this Agreement in writing. If Developer does not terminate the Agreement, the exceptions that Developer originally objected to will be deemed "Permitted Exceptions." If TriMet does not give its response to Developer's objections within the twenty (20) day time period, Developer shall have twenty (20) days within which to terminate this Agreement by written notice to TriMet.

1.4.2 Developer may obtain an update to the title report at anytime prior to the Closing. Developer shall promptly give to TriMet a copy of any updated title report. Developer may object to TriMet in writing of any exceptions (which are not Permitted Exceptions) to title that appear on the updated title report as a result of TriMet's actions or inactions. Within ten (10) days of Developer's written notice to TriMet described in the preceding sentence, TriMet shall notify Developer in writing of its intention to remove or not remove the objected to exceptions to title prior to Closing. If TriMet refuses to remove any such objected to exceptions, Developer may terminate this Agreement with no recourse to TriMet or may proceed to Closing subject to same. Any exceptions that Developer accepts at Closing are the "Final Permitted Exceptions".

1.5 Title Insurance, Survey, Property Taxes and Closing Costs.

1.5.1 Within thirty days after closing, TriMet, at its expense, shall provide Developer with a standard coverage Owner's Policy of Title Insurance, issued by Escrow Agent, in the amount of the Purchase Price, free and clear of encumbrances, except Final Permitted Exceptions. Developer, at its option and its sole expense, may elect to obtain extended coverage under such policy of title insurance and TriMet agrees to execute any affidavits or other documents required by the Escrow Agent to enable Developer to obtain such coverage.

1.5.2 Developer may obtain a Survey at its own expense.

1.5.3 Real property taxes and assessments for the current year (if any) will be prorated as of the date of delivery of the Deed to Developer. Developer will pay all real property taxes and assessments assessed and levied against the Property allocable to the period from and after Closing.

1.5.4 TriMet and Developer shall equally share the escrow fees charged by Escrow Agent and the costs for recording a Memorandum of this Agreement. Developer shall pay for the costs of recording the Deed and any other documents required to be recorded. All other Closing costs, if any, shall be allocated in accordance with the customary practice in Multnomah County.

1.6 Conditions Precedent to Conveyance. Developer and TriMet are not obligated to complete the Conveyance unless the following conditions are satisfied to the benefited Party's reasonable satisfaction. The Party benefited by a particular condition shall not unreasonably withhold, condition or delay acknowledgment that a condition has been satisfied.

1.6.1 To the Satisfaction of both TriMet and Developer:

1.6.1.1 Developer shall have secured all land use and design review approvals for the Project required by the City of Portland and no appeal of any required approval or permit shall have been filed, and the time for any such appeal shall have expired. If an appeal has been filed, it shall have been finally resolved.

1.6.1.2 The City of Portland shall be prepared to issue building permits that are required to commence construction of the Project, subject only to Developer's ownership of the Property.

1.6.1.3 Developer shall have entered into a binding contract with a construction contractor approved by TriMet for the construction of the Project, consistent with the Construction Plans and Specifications.

1.6.1.4 Developer shall have provided to TriMet a Project Budget.

1.6.1.5 Developer shall have provided to TriMet a final construction budget, which includes land costs, and hard and soft costs necessary to construct the Project, and the construction budget shall be in substantial conformance with the Project Budget.

1.6.1.6 At least ten (10) business days prior to the scheduled date of Closing, Developer shall have provided to TriMet evidence of construction and permanent financing commitments necessary and sufficient to complete construction of the Project, and that closing of Developer's construction financing shall occur concurrently with conveyance of the Property.

1.6.1.7 Developer shall have demonstrated to TriMet the financial feasibility of the Project and Developer's financial capacity to complete the Project consistent with the Project Budget, by providing to TriMet copies of commitment letters or letters of intent acceptable to TriMet and Developer, from construction and permanent financing sources and Investors.

1.6.1.8 The Parties shall have agreed to the final form of the Deed and any documents necessary to close the financing or consummate this transaction as contemplated in this Agreement.

1.6.1.9 There shall be no litigation pending that prevents TriMet or Developer from performing their respective obligations under this Agreement.

1.6.1.10 Neither Party shall be in default under any material term or condition of this Agreement, including the completion of each task shown on the Schedule of Performance to be completed as of Closing.

1.6.1.11 TriMet shall have received the approval of its Board of Directors for the disposition of the Property within the time frame for obtaining such approval set forth in the Schedule of Performance.

1.61.12 TriMet shall have ensured there are no tenants or residents on the property, and if relocation of tenants or residents is required shall comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

1.6.1.13 TriMet shall have received the concurrence of the Federal Transit Administration for the disposition of the Property within the time frame for obtaining such approval set forth in the Schedule of Performance.

1.6.1.14 TriMet shall have approved of any assignment of the interest of Developer (if requested by Developer) in accordance with Section 5 of this Agreement.

1.6.2 To Developer's Satisfaction:

1.6.2.1 Developer shall have reviewed and approved the results of its due diligence investigation of Project feasibility including, without limitation, survey, title, geotechnical, environmental, land use, parking and financing.

1.6.2.2 Developer shall have determined that TriMet holds title to the Property subject only to the Final Permitted Exceptions and shall have accepted or waived exception to title to the Property.

1.6.2.3 Escrow Agent shall have issued to Developer a binding commitment satisfactory to Developer to issue to Developer a Standard Form Owner's Title Insurance Policy covering the Property in an amount not less than the Purchase Price, subject only to (a) the Final Permitted Exceptions and (b) satisfactory to Developer and any lender identified by Developer, to issue a Lender's Extended Title Insurance Policy in the amount of the funding to be provided by Lender to Developer.

1.6.2.4 TriMet's representations and warranties stated in Section 1.7 herein shall be true and correct as of the Closing Date.

1.6.3 To TriMet's Satisfaction:

1.6.3.1 The Construction Plans and Specifications relating to the Project shall have been approved by TriMet pursuant to Section 3.3 herein.

1.6.3.2 Developer shall have provided TriMet with a copy of its Articles of Incorporation to confirm that Developer is an entity duly organized and existing in the state of Oregon. Developer will have provided TriMet with reasonable proof that it has full authority to enter into and perform its obligation under this Agreement.

1.6.3.3 Developer shall have submitted to TriMet a request for conveyance of the Property.

1.6.3.4 Developer shall have paid the Purchase Price required for conveyance of the Property as provided in this Agreement.

1.6.3.5 Developer shall not be in default under any material term or condition of this Agreement and there shall be no event that with the passage of time would constitute a material default by Developer under this Agreement.

1.6.3.6 Developer's representations and warranties stated in Section 1.8 herein shall be true and correct as of the Closing date.

1.6.4 Elections upon Non-Occurrence of Conditions. Except as provided below, if any condition in Section 1.6.1, 1.6.2 or 1.6.3 is not fulfilled to the satisfaction of the benefited Party or Parties on the date scheduled for Closing, then such benefited Party or Parties may elect to:

1.6.4.1 Terminate this Agreement by providing written notice of intent to terminate to the other Party which termination shall be effective immediately upon the other Party's receipt of such notice; or

1.6.4.2 Waive in writing the benefit of that condition precedent to its obligation to perform under this Agreement, and proceed in accordance with the terms hereof; or

1.6.4.3 Extend the Final Termination Date by which the other Party must satisfy the applicable condition, if the other Party can satisfy the condition and if the other Party agrees in writing to the extension.

1.6.5 Final Termination Date. If all of the conditions precedent under Sections 1.6.1, 1.6.2 and 1.6.3 (except those conditions that cannot be satisfied, waived or resolved prior to Closing) have not been satisfied, waived or otherwise resolved pursuant to this Agreement by June 30, 2008, then this Agreement shall automatically terminate ("Final Termination Date").

1.6.6 Effect of Termination for Failure of Conditions Precedent. If the Agreement is terminated for failure of satisfaction of the conditions precedent, and such failure is not the result of a breach of this Agreement by either Party, then the obligations of the Parties to each other under this Agreement shall terminate. In the case of termination pursuant to this Section 1.6.6, Developer shall have no liability for the environmental condition of the Property, except that Developer shall be responsible for any degradation of the environmental condition of the Property caused by Developer's, or its contractors' or agents' activities on the Property prior to Closing.

1.7 TriMet Representations and Warranties. TriMet's representations and warranties under this Agreement are limited to the following: TriMet represents that:

1.7.1 To the best of TriMet's knowledge, except as has been disclosed to Developer in the Environmental Reports there has been no generation, manufacture, refinement, transportation, treatment, storage, handling, disposal, transfer, release or production of Hazardous Substances, or other dangerous or toxic substances or solid wastes on the Property, except in compliance with Environmental Laws currently in effect, and TriMet has not received notice of the release of any Hazardous Substances on the Property.

1.7.2 TriMet has full power and authority to enter into and perform this Agreement in accordance with its terms, and TriMet has taken all requisite action in connection with the execution of this Agreement and the transactions contemplated hereby.

1.7.3 TriMet is not a "foreign person" within the meaning of Section 1445(f) (3) of the Internal Revenue Code of 1986, as amended.

1.7.4 To the best of TriMet's knowledge, there is no litigation, action, suit, or any condemnation, environmental, zoning, or other government proceeding pending or threatened, which may affect the Property, TriMet's ability to perform its obligations under this Agreement, or Developer's ability to develop the Project.

1.7.5 To the best of TriMet's knowledge, and except as disclosed in writing to Developer, the Property is in compliance with all applicable laws, rules, regulations, ordinances and other governmental requirements ("Laws").

1.7.6 TriMet has not received or given any notice stating that the Property is in violation of any Laws; to TriMet's knowledge utility connections are available to the Property.

1.7.7 No representation, warranty or statement of TriMet in this Agreement or any of the exhibits attached contains any untrue statement of a material fact or omits a material fact necessary to make the statements of facts contained herein not misleading.

1.7.8 As of the date hereof, there are no material defaults by TriMet under this Agreement or events that with the passage of time would constitute a material default of TriMet under this Agreement.

1.8 Developer Representations and Warranties. Developer's representations and warranties under this Agreement are limited to the following: Developer represents that:

1.8.1 Developer has full power and authority to enter into and perform this Agreement in accordance with its terms, and Developer has taken all requisite action in connection with the execution of this Agreement and the transactions contemplated hereby.

1.8.2 No representation, warranty or statement of Developer in this Agreement or any of the exhibits attached contains any untrue statement of a material fact or omits a material fact necessary to make the statements of facts contained herein not misleading.

1.8.3 As of the date hereof there are no material defaults by Developer under this Agreement or events that with the passage of time would constitute a material default of Developer under this Agreement.

1.8.4 Developer enters into this Agreement without reliance upon any verbal representation of any kind by TriMet, its employees, agents or consultants regarding any aspect of the Property, the Project, its feasibility, financing or compliance with any governmental regulation.

2. OFFSITE IMPROVEMENTS, UTILITIES AND ENVIRONMENTAL ABATEMENT.

2.1 Offsite Improvements. Developer shall be required to bear costs for offsite transportation improvements in connection with the Project. Developer shall bear the costs of required improvements to the public right of way adjacent to the Property, such as sidewalks, curb cuts and landscaping.

2.2 Demolition of Structure. By mutual agreement, the parties may elect for TriMet to cause the hotel structure and parking lot currently on the Property to be demolished. In the event the parties elect to do so, TriMet shall solicit bids from three from contractors acceptable to Developer for the demolition work, and shall submit the scope of work and bids to Developer for review and approval, prior to executing a demolition contract. All approved costs incurred by TriMet during the demolition process shall be reimbursed by Developer at Closing.

2.3 Removal and Abatement of Underground Storage Tank. By mutual agreement, TriMet may cause the existing underground storage tank to be removed and environmental abatement activities to be performed. In the event the parties elect to do so, TriMet shall solicit three bids from contractors acceptable to Developer for the environmental abatement work, and shall submit the scope of work and the bids to Developer for review and approval prior to executing an environmental abatement contract. All approved costs incurred by TriMet during the tank removal and abatement shall be reimbursed by Developer at Closing.

2.4 Utility Service. Developer shall pay any costs of installation, connection, or the upgrade of utilities necessary to serve the Property. Developer shall pay all costs of bringing new utilities to serve the Property from the street to the Property.

2.5 Subsurface, Surface and Building Conditions; AS IS. Except as expressly warranted in this Agreement, the Property shall be conveyed from TriMet to Developer in "AS IS" condition, and Developer acknowledges that it is purchasing the Property in reliance on Developer's own investigation of the environmental, physical and legal condition of the Property, and that Developer is assuming the risk that adverse physical, economic, legal and environmental conditions may not have been revealed by its investigation. TriMet makes no warranties or representations as to the boundaries of the Property or the suitability of the soil conditions or any other conditions of the Property or structures thereon for any improvements to be constructed by the Developer, and Developer warrants that it has not relied on any representations or warranties, if any, made by TriMet as to the boundaries of the Property, environmental condition of the land, the or the suitability of the soil conditions or any of the conditions of the Property for any improvements to be constructed by the Developer. Developer agrees that TriMet will not be liable for any loss, cost or damage which may be caused or incurred by Developer by reason of any such conditions of the Property except in the event TriMet retracts its representation to Developer as set forth in Section 1.7.1.

3. DEVELOPMENT

3.1 Use of the Property. Developer covenants and agrees for itself, its successors, its assigns and every successor-in-interest to the Property or any part thereof, that during construction and thereafter, Developer and such successors and assignees will devote the Property to use as Joint Development consistent with the Scope of Development, which use will continue for a period of at least thirty (30) years commencing with the date of issuance of the Certificate of Completion.

3.2 Project Financing. Developer will obtain all financing necessary to complete the Project that, without limitation, will include financing necessary to acquire the Property from TriMet and to construct the Project upon the Property.

3.3 Plans, Drawings and TriMet Review.

3.3.1 Developer will diligently pursue all work necessary to construct the Project. Developer and TriMet will cooperate to complete the following described design review process in the spirit of an open and collaborative effort. Developer and TriMet have agreed to the Scope of Development in Exhibit E identifying the components of the Project that is the basis for entering into this Agreement. Developer shall prepare Design Review Drawings and Construction Plans and Specifications and submit to them to TriMet for review and approval in accordance with the Schedule of Performance. TriMet and Developer will communicate and consult informally as frequently as is necessary to ensure that TriMet can promptly consider any documents submitted by Developer for TriMet review. Design Review Drawings will be approved by TriMet prior to Developer submitting its application to the City for any building permit. The Construction Plans and Specifications will be approved by TriMet prior to their submittal to the City for building permit approval. TriMet will not unreasonably withhold its approval of Design Review Drawings or Construction Plans and Specifications for the Project, which, in TriMet's opinion, conforms with the approved Scope of Development.

3.3.2 Scope of TriMet Review. TriMet's rights of review and approval/rejection of drawings will be limited to an evaluation of their compliance with the following elements:

3.3.2.1 Design Review Drawings. Elements depicted in the Design Review Drawings shall be in a sufficient level of detail to permit an evaluation and confirmation of their conformity with the approved Scope of Development.

3.3.2.2 Construction Plans and Specifications. Elements depicted in the Final Construction Plans and Specifications shall be in a sufficient level of detail to permit an evaluation of their conformity and to confirm their conformity with the approved Design Review Drawings.

3.3.3 Changes in Approved Drawings. If Developer wants to substantially change any drawings or plans after approval by TriMet and/or the City, Developer shall submit the proposed changes to TriMet for approval. A substantial change shall mean any change that would have a material impact on the function, appearance or cost of the Project. Developer acknowledges that it may be required to secure separate City approval of such changes. Any separate City approvals shall be sought after TriMet has approved the changes. TriMet shall assist Developer throughout any City or TriMet Design Rreview process of the appropriate bureaus or agencies within the City, but TriMet does not represent or warrant that its assistance will guarantee approval.

3.3.4 TriMet Reviewing Persons. The TriMet Project Manager will coordinate TriMet internal design staff to assist in review of the Project design, as necessary.

3.3.5 Community Input. TriMet and the Developer will coordinate on any outreach efforts and provide opportunities for community input throughout the Project.

3.4 Diligent Completion. Subject to the terms and conditions of this Agreement, Developer covenants to diligently complete the Project in substantial conformance with the Construction Plans and Specifications and to comply with the Schedule of Performance (Exhibit D) subject to events beyond its control limited to those described at Section 9.9 hereof. Developer shall

provide TriMet with written progress reports every eight (8) weeks during development and construction of the Project, until TriMet issues a Certificate of Completion.

3.5 Inspection and Property Access.

3.5.1 Before Conveyance of Property. TriMet shall permit Developer and Developer's agents to enter upon the Property for investigatory purposes pursuant to the terms of a written standard TriMet form of Permit of Entry to be issued in TriMet's discretion. Without limitation, the Permit of Entry will require Developer to restore the Property to that condition necessary to accommodate continued use for its current purpose. Developer shall indemnify and hold TriMet and the City, and their respective officers, agents and employees, harmless against any and all damages, claims, losses, liabilities and expenses, including, without limitation, reasonable legal, accounting, consulting, engineering and other expenses which may be imposed on or incurred by TriMet or the City or their respective successors or assigns, or asserted against TriMet or the City or their respective successors or assigns, by any other party or parties, arising out of any activity of Developer, its agents, employees or contractors performed and conducted on the Property pursuant to this Agreement.

3.5.2 After Conveyance of Property. After conveyance of the Property to Developer and during construction of the Project, and until a Certificate of Completion is issued, Developer's work shall, upon 24 hours prior notice, be accessible at all reasonable times for inspection by representatives of TriMet. TriMet's representatives shall, at Developer's option, be accompanied by Developer's representative. TriMet shall not interfere with the work occurring on the Property. By exercising any rights of access under this Section, TriMet shall have no responsibility to enforce any labor or safety-related work rules or conditions.

3.6 Safety Matters; Indemnification; Insurance.

3.6.1 Safety. Developer shall take all safety measures necessary to protect its employees, TriMet's employees, agents, contractors, subcontractors, licensees and invitees, and the personal property and improvements of each from injury or damage caused by or resulting from the performance of its construction.

3.6.2 Liability Claims. From and after conveyance of the Property or any portion thereof and until TriMet issues a Certificate of Completion in accordance with this Agreement, Developer will indemnify and hold TriMet, the City, and their respective officers, agents, consultants, advisors and employees, harmless from (1) all damages to the Property, or any portion thereof, (2) injuries to or death of any person or persons, including employees or agents of TriMet or the City; and/or (3) any and all claims, demands, or workers' compensation claims, to the extent that any such damages, injuries, deaths, claims and/or demands under clause (1), (2) and/or (3) above result from the negligent or wrongful acts or omissions of Developer, its employees, agents, contractors or subcontractors in connection with the construction or development of the Project; provided, however, that Developer shall not indemnify TriMet or the City to the extent that such damage or injury is caused by the negligent or wrongful acts or omissions of TriMet, the City or their respective officers, agents or employees. TriMet and the City will provide prompt notice to Developer of any claim to be asserted against Developer under this indemnification provision.

3.6.3 Indemnity from Liens. Developer shall indemnify, defend and hold TriMet harmless from and against all mechanic's, materialmen's and laborer's liens and all costs, expenses and

liabilities arising from construction performed by or at the request of Developer or Developer's contractors(s) or agent(s).

3.6.4 Insurance.

3.6.4.1 Prior to conveyance of the Property by TriMet, Developer will obtain at its sole cost and maintain for the period ending on the date when a Certificate of Completion is issued in accordance with this Agreement, a policy or policies of general liability insurance, reasonably satisfactory to legal counsel for TriMet, naming TriMet and the City, and each of their officers, agents and employees as additional insureds. Developer shall furnish acceptable certificates of insurance to TriMet. Such policy or policies shall provide coverage not less than provided in the standard form commercial general liability insurance policy against liability with respect to claims and suits for damages or injuries to persons or property arising from or related to operations of Developer, its officers, agents or employees; coverage shall be provided on a current basis for both bodily injury and property damage in the sum of not less than One Million Dollars ($1,000,000) combined single limit or its equivalent and with a deductible not in excess of Fifty Thousand Dollars ($50,000) per occurrence. Said policy or policies must also contain a provision that no termination, cancellation, or change of coverage of insureds (so as to no longer comply with the requirements hereof) will be effective until after thirty (30) days' notice thereof has been given in writing to TriMet. Developer will give to TriMet prompt and timely notice of claim made or suit instituted arising out of Developer's operations hereunder.

3.6.4.2 Coverage provided hereunder by Developer must be primary insurance and not contributing with any insurance maintained by TriMet or the City, and the policy must contain such an endorsement. Developer shall furnish TriMet with a Certificate of Insurance evidencing such coverage prior to commencing construction of the Project.

3.7 Liens. If any statutory lien shall be perfected during the term of this Agreement against any portion of the Property or Project by reason of labor, services or materials supplied to or at the request of Developer or pursuant to any construction on the Project, Developer shall, within thirty (30) days after the perfection of the lien, do whatever is necessary and proper (including posting a bond or a cash deposit and taking such further action required by the Oregon Construction Lien Law), so that the Property and the Project shall thereafter be entirely free of the lien. Alternatively, Developer may elect to leave the lien of record and to contest its validity, amount or applicability by appropriate legal proceedings, but only if Developer shall, within the thirty (30) day period following the perfection of the lien, furnish a bond or an indemnity against such lien in an amount and form satisfactory to induce the title insurance company which insured title to the Project to insure over such lien or to reissue or update its existing policy, binder or commitment without showing any title exception by reason of such lien; provided, further, that in such event (i) Developer shall indemnify and save harmless TriMet from all loss, damage, liability, expense or claim whatsoever (including attorney fees and other costs of defending against the foregoing) resulting from the assertion of any such lien and (ii) in the event such legal proceedings shall be finally concluded (so that no further appeal may be taken) adversely to Developer, Developer shall within ten (10) business days thereafter cause the lien to be discharged of record.

3.8 City and Other Governmental Permits. Before commencement of construction or development of any buildings, structures or other works or improvements on the Property, Developer

shall, at its own expense, secure or cause to be secured any and all land use and other permits which may be required by the City or any other governmental agency affected by such construction, development or work. TriMet will provide reasonable assistance to Developer in securing such permits.

3.9 Local, State and Federal Laws. Developer shall carry out construction of the Project in compliance with all applicable local, state, and federal laws.

3.10 Taxes and Assessments. Developer shall pay, prior to delinquency, all real estate taxes and assessments properly assessed and levied on the Property after conveyance by TriMet. Developer shall defend and hold harmless TriMet, its successors and assigns against any liability or claim with respect to real estate taxes or assessments in connection with the Property accruing after TriMet's conveyance. Nothing herein shall prohibit or limit Developer from contesting or challenging the validity or amounts of any real property tax. Developer may contest or challenge the validity or amount of any such tax provided such challenge or contest is taken in accordance with applicable law and within a reasonable time.

3.11 Certificate of Completion.

3.11.1 When Developer is Entitled to Certificate of Completion. Upon substantial completion (as defined below) of the Project, TriMet will furnish Developer with a Certificate of Completion for the Project, substantially in the form attached hereto as Exhibit F. The Project will be deemed to be substantially complete when (i) TriMet reasonably determines that the Project is complete according to the Construction Plans and Specifications, except for punch list items which do not materially affect the use of the Project for the purposes intended under this Agreement and (ii) the City has issued a temporary or permanent Certificate(s) of Occupancy or its equivalent with respect to the Project.

3.11.2 Meaning and Effect of the Certificate of Completion. The Certificate of Completion will represent TriMet's conclusive determination that Developer has satisfactorily completed the construction required by this Agreement, and will so state. It shall provide for termination of construction obligations under this Agreement and limitation of remedies of TriMet as expressly provided for therein. The Certificate of Completion will not constitute evidence of compliance with or satisfaction of any obligation of Developer to any holder of any Mortgage, or any insurer of Mortgage securing money loans to financing improvements or any part thereof, nor will it constitute a certificate of occupancy or evidence thereof under the building permit or City codes. After issuance of the Certificate of Completion, neither TriMet nor any other person will have the rights, remedies or controls with respect to the Property covered by the Certificate of Completion that it would otherwise have had or been entitled to exercise under this Agreement; provided, however, that the indemnities set forth in Section 3.6 and the Developer obligations set forth in Section 7 below shall survive issuance and recordation of the Certificate of Completion.

3.11.3 Form of Certificate of Completion; Procedure Where TriMet Refuses to Issue. A Certificate of Completion shall be in a form that can be recorded in the real property records of Multnomah County. If TriMet refuses or fails to provide a Certificate of Completion in accordance with this Section, then TriMet, within fifteen (15) days after written request by Developer for such Certificate of Completion, shall provide Developer with a written statement indicating in detail in what

respects Developer has failed to complete the Project in accordance with the provisions of this Agreement or is otherwise in default and what measures or acts Developer must take or perform to obtain such Certificate of Completion. Upon receipt of such detailed statement from TriMet, Developer shall either (a) complete the improvements and/or cure the alleged default in a manner responsive to the stated reasons for disapproval or (b) submit to a non-binding mediation process. The mediator for such process shall be selected by mutual agreement of the parties, but in the absence of such agreement each party shall select a temporary mediator and those mediators shall jointly select the permanent mediator. All costs of mediation shall be borne equally by the parties. In the event the dispute is not resolved at mediation, both parties are free to pursue any other remedies available. TriMet's failure to furnish Developer with a detailed written statement under this section within such fifteen (15) day period shall be deemed TriMet's approval of Developer's request for the Certificate of Completion. TriMet will not unreasonably withhold, condition or delay the Certificate of Completion.

3.11.4 Recording of Certificate of Completion. Developer shall promptly record the Certificate of Completion in the Multnomah County Recorder's Office. After recordation of the Certificate of Completion, any party then owning or thereafter purchasing, leasing or otherwise acquiring any interest in the Property will not (because of such ownership, purchase, lease or acquisition), incur any obligation or liability under this Agreement with respect to the Property except as otherwise provided this Agreement.

4. INDEMNITY AFTER CONVEYANCE.

4.1 Environmental Indemnification.

4.1.1 Developer shall comply with all Environmental Laws with respect to construction of the Project, its business and the operation of the Project from and after the date of Conveyance. Developer shall defend, indemnify and hold harmless TriMet, its successors and assigns, against any and all damages, claims, losses, liabilities and expenses, including, without limitation, reasonable legal, accounting, consulting, engineering and other expenses which may be imposed on or incurred by TriMet, its successors or assigns, or asserted against TriMet, its successors or assigns, by any other party or parties, including, without limitation, a governmental entity, arising out of or in connection with any violation of Environmental Laws by Developer except to the extent caused by the negligence of TriMet or the falsity of the representation and warranty set forth in Section 1.7.1.

4.1.2 Developer shall be responsible for managing and disposing appropriately of all Hazardous Substances that are required to be removed as part of Developer's construction activities, and from and after issuance of the Certificate of Completion, whether such Hazardous Substances are located within the boundaries of the Property, in public right-of-way, or otherwise. However, in the event the parties elect for TriMet to cause the demolition of the hotel structure and parking lot and/or remove the underground storage tank pursuant to Sections 2.2 or 2.3, TriMet's contractor will be responsible for managing and disposing appropriately of all Hazardous Substances that are to be removed as part of such contractor's scope of work. Developer shall pay all removal and disposal costs for any Hazardous Substances. Developer shall be solely responsible for any increase in the costs of construction or development of the Project resulting from existing environmental conditions on the Property. Developer shall defend, indemnify and hold harmless TriMet, its successors and assigns against any and all damages, claims, losses, liabilities and expenses, including, without limitation, reasonable legal, accounting, consulting, engineering and other expenses which may be imposed on or

incurred by TriMet, its successors or assigns, or asserted against TriMet, its successors or assigns, by any other party or parties, including, without limitation, a governmental entity, arising out of or in connection with Developer's management or disposition of Hazardous Substances as required by this paragraph.

4.1.3 The indemnities set forth in this Section 4.1 shall survive both Closing and the issuance of the Certificate of Completion in perpetuity, but shall not limit any rights of contribution that the parties may have against others under applicable laws or agreement. The indemnities are intended only as an allocation of responsibility between the parties to this Agreement.

5. ASSIGNMENT PROVISIONS.

5.1 No Assignment.

5.1.1 Because it is a mass transit district with authority to acquire, possess and dispose of real property, TriMet is uniquely benefited by completion of the Project. Developer is uniquely qualified to construct and manage the Project. Subject to Section 1.8, this Section 5.1 shall apply to transfers that become effective prior to the issuance by TriMet of a Certificate of Completion. Except as provided in Section 5.2, Developer shall not partially or wholly dispose of or agree to dispose of Developer's interest in this Agreement without the prior written approval of TriMet to be granted in TriMet's sole discretion. TriMet may require as absolute conditions to such approval that:

5.1.1.1 The transfer is not in violation of other provisions of this Agreement; and

5.1.1.2 Any proposed transferee shall have qualifications and financial responsibility equal to or superior to those of Developer; and

5.1.1.3 The transfer will not cause a material delay in the completion of the Project and will not change the character of the Project.

5.1.2 This prohibition will not apply to any of the following: (1) any contract for sale or lease of individual units or commercial space entered into prior to the issuance of a Certificate of Completion, provided such units or commercial space may not be conveyed or occupancy permitted prior to the issuance of the Certificate of Completion; and (2) sale of the Property at foreclosure (or a conveyance of the Property in lieu of foreclosure) pursuant to foreclosure thereof by a lender.

5.1.3 The provisions of this Agreement (including, without limitation, this Section) will not prevent the granting of easements, licenses or permits to facilitate the development of the Property.

5.1.4 Developer shall not be relieved of its obligations under this Agreement by reason of such permitted transfer unless expressly agreed to in writing by TriMet.

5.2 Approved Pre-Completion Transfers. Notwithstanding Section 5.1 above, and provided that Developer provides TriMet with copies of all agreements related to a proposed transfer at least thirty (30) days prior to the effective date of the proposed transfer, and provides to TriMet any other information reasonably requested by TriMet to determine that such proposed transfer complies

with the requirements of this Agreement as set forth in subsections 5.2.1, 5.2.2 and 5.2.3 below, TriMet hereby consents to:

5.2.1 Any Mortgage(s) which Developer may cause to attach to the Property for the purpose of securing loans of funds to be used for financing the acquisition of the Property, construction of the Project thereon, or any other expenditures necessary and appropriate to develop the Property under this Agreement; and

5.2.2 Any transfer to a partnership, limited liability company or joint venture in which the Developer retains an ownership interest greater than 51% or operational control either directly or through an affiliated entity, so long as TriMet has received evidence reasonably acceptable to TriMet that such transfer does not result in the speculation in the value of the Property as reasonably determined by TriMet, and the assignee has agreed in writing to assume the obligations of Developer under this Agreement relating to the period from and after the effective date of the assignment. In the event of such transfer, Developer shall be released from responsibility to TriMet for post-transfer Developer obligations under this Agreement.

5.3 Transfers After Completion; Surviving Obligations. Subject to transferee's assumption of all Developer obligations remaining under this Agreement after TriMet's issuance of a Certificate of Completion for the Project, Developer may transfer its interest or portions of its interest in the Property without restriction, consent or approval by TriMet, provided, however, that if Developer elects to sell the Property within the five years following TriMet's issuance of the Certificate of Completion, Developer shall notify TriMet of its intent to transfer all or a part of its interest in the Property including the proposed terms thereof no later than 120 days prior to the date of such proposed transfer.

6. ASSISTANCE BY TRIMET. TriMet will assist Developer in obtaining the approvals necessary to commence construction and complete the Project as proposed in this Agreement. The Parties understand and agree that TriMet cannot guarantee such approvals, but TriMet shall use reasonable efforts in working with the City and any other parties necessary to accomplish the Project.

7. COMMUNITY BENEFIT OBLIGATIONS.

7.1 Transportation Demand Management Program. Developer shall adopt a Transportation Demand Management Program acceptable to TriMet to encourage residents to use mass transit. The Transportation Demand Management Program shall require Developer to provide annual reports to TriMet describing Program elements and documenting outcomes of these efforts. On or before the date of Closing, Developer shall name a Transportation Demand Management Coordinator who will be the contact for TriMet in these matters.

7.2 Development Restrictions. Developer covenants that for a period of at least thirty (30) years commencing with the date of issuance of the Certificate of Completion, the Property shall be held, developed, sold and conveyed subject to the following development restrictions:

7.2.1 Meets the requirements of Joint Development;

7.2.2 Provides Affordable Housing;

Developer shall keep records of housing affordability and tenant eligibility as required by State and Federal agencies. Such records shall be made available to TriMet upon request.

8. PERMITTED MORTGAGES.

8.1 Mortgagee Protection Provisions.

8.1.1 Effect of Revesting on Mortgages. Any reversion and revesting of the Property or any portion thereof in TriMet pursuant to this Agreement shall always be subject to and limited by, and shall not defeat, render invalid, or limit in any way, any lien, Mortgage, or security interest approved by TriMet and authorized by this Agreement.

8.1.2 Mortgagee Not Obligated To Construct. Notwithstanding any of the provisions of this Agreement, except those which are covenants running with the Property, a Mortgagee or its designee for purposes of acquiring title at foreclosure shall in no way be obligated by the provisions of this Agreement to construct or complete the improvements to the Property or to guarantee such construction or completion; provided, however, that nothing in this Agreement shall be deemed or construed to permit or authorize any such Mortgagee, or any owner of the Property or any part thereof whose title thereto is acquired by foreclosure, trustee sale or otherwise, to devote the Property or any part thereof to any uses, or to construct any improvements thereon, other than those uses or improvements provided or permitted in this Agreement.

8.1.3 Copy of Notice of Default to Mortgagee. If TriMet delivers any notice or demand to Developer with respect to any breach of or default by Developer in its obligations or covenants under this Agreement, TriMet shall at the same time send a copy of such notice or demand to each Mortgagee and Investor approved by TriMet at the last address of such holder shown in the records of TriMet.

8.1.4 Mortgagee's Options to Cure Defaults. After any default in or breach of this Agreement by Developer where Developer fails to cure or remedy said default or breach, then each Mortgagee and Investor may, at its option, cure or remedy such breach or default within thirty (30) days after passage of the latest date for Developer's cure of the default, and if permitted by its loan documents, add the cost thereof to the Mortgage debt and the lien of its Mortgage. If the breach or default is with respect to construction of the improvements, nothing contained in this Agreement shall be deemed to prohibit such Mortgagee, either before or after foreclosure or action in lieu thereof, from undertaking or continuing the construction or completion of the improvements, provided that the Mortgagee notifies TriMet in writing of its intention to complete the Project according to the approved Final Construction Plans and Specifications and expressly assumes Developer's obligations to TriMet by written agreement reasonably satisfactory to TriMet. Any Mortgagee who properly completes the Project shall be entitled to issuance of a Certificate of Completion, upon written request made to TriMet following the procedures set forth in Section 3.11 above.

8.1.5 Failure of Holder to Complete Improvements. In any case where, 180 days after default by Developer in completion of construction of improvements under this Agreement and notice from TriMet to the applicable Mortgagee or Investor pursuant to Section 8.1.3 above, the holder of any Mortgage has not exercised the option to construct afforded in Section 8.1.4, or has exercised

such option but failed to proceed diligently with construction, TriMet may purchase the Mortgage by making payment to the Mortgagee in the sum of all outstanding principal, interest and other sums secured by the Mortgage. If the ownership of the Property has vested in the holder, TriMet, if it so desires, will be entitled to a conveyance from the holder to TriMet upon payment to the holder of an amount equal to the sum of the following: (a) the unpaid Mortgage debt at the time title became vested in the holder (less all appropriate credits, including those resulting from collection, application of rentals and other income received during foreclosure proceedings); (b) all expenses with respect to foreclosure or deed in lieu of foreclosure; (c) the net expenses, if any (exclusive of general overhead), incurred by the holder as a direct result of the subsequent management of the Property or part thereof; (d) the costs of any improvements made by such holder; and (e) an amount equivalent to the interest that would have accrued on the aggregate of such amounts had all such amounts become part of the Mortgage debt and such debt has continued in existence to the date of payment to TriMet.

8.1.6 Right of TriMet to Cure Mortgage Default. In the event of a Mortgage default or breach by Developer prior to the completion of the construction of the Project and the failure of the holder of any Mortgage to exercise its option to construct pursuant to Section 8.1.4 above, TriMet may cure the default prior to completion of foreclosure. In such event, Developer will reimburse TriMet for all reasonable and proper costs and expenses incurred by TriMet in curing such default. TriMet will also be entitled to a lien upon the Property to the extent of such costs and disbursements. Any such lien will be subject to the construction-financing Mortgage.

8.1.7 Right of TriMet to Satisfy Other Liens on the Site After Title Passes. At any time between conveyance of title and issuance of a Certificate of Completion, if Developer has received written notice from TriMet that there exist liens or encumbrances on the Property which are not permitted under this Agreement, and if Developer has failed after a reasonable time to challenge, cure, adequately bond against, or otherwise satisfy such liens or encumbrances, TriMet may, but has no obligation to, satisfy such liens or encumbrances; provided, however, that nothing in this Agreement requires Developer to pay or make provision for the payment of any tax, assessment, lien or charge so long as Developer in good faith contests the validity or amount thereof, and so long as such delay in payment does not subject the Property to forfeiture or sale. In the event TriMet satisfies any such lien or encumbrance, Developer will reimburse TriMet in the amount of the payment by TriMet plus interest in the amount of ten (10) percent per annum. Any such payment by TriMet will not remedy Developer's default under this Agreement for failure to satisfy such lien or encumbrance.

8.1.8 Amendments Requested by Mortgagee. TriMet shall execute amendments to this Agreement or separate agreements to the extent reasonably requested by a Mortgagee or investor proposing to make a loan or investment to Developer secured by a security interest in all or any part of the Property and/or the Project, provided that such proposed amendments or other agreements do not materially and adversely affect the rights of TriMet or its interest in the Property.

9. DEFAULT; REMEDIES.

9.1 Default and Cure.

9.1.1 Default by Developer. A default shall occur if, after all conditions precedent to Closing have been met or waived, Developer breaches any material provision of this Agreement, whether by action or inaction, and such breach continues and is not remedied within thirty (30) days

after Developer receives written notice from TriMet specifying the breach. Failure of conditions precedent shall not constitute a default but any such failure shall be subject to Sections 1.6.4 above. In the case of a breach which cannot with due diligence be cured within a period of thirty (30) days, a default shall occur without further notice from TriMet if Developer does not commence the cure of the breach within thirty (30) days after Developer receives written notice from TriMet and thereafter diligently prosecute to completion such cure.

9.1.1.1 A default also shall occur if Developer makes any assignment for the benefit of creditors, or is adjudicated as bankrupt, or has a receiver, trustee or creditor's committee appointed over it that is not removed within one hundred eighty (180) days after appointment.

9.1.1.2 A default shall occur, and TriMet shall be irreparably harmed by such default, if Developer or its assignee constructs or operates any portion of the Project in a manner materially inconsistent with TriMet-approved plans. Developer shall not be in default hereunder for failure to pay any tax, assessment, lien or other charge if Developer in good faith is contesting the same and, if necessary to avoid foreclosure, has furnished an appropriate bond or other undertaking to assure payment in the event Developer's contest is unsuccessful.

9.1.1.3 A default shall occur if Developer breaches any material provision of this Agreement including, without limitation, Developer's failure to adhere to the Schedule of Performance for any element of the Schedule of Performance, subject to events beyond its control as described in Section 9.9, whether by action or inaction, and such breach continues and is not remedied within thirty (30) days after Developer receives written notice from TriMet specifying the breach or, in the case of a breach which cannot with due diligence be cured within a period of thirty (30) days, if Developer shall not within such thirty (30) day period commence the cure of the breach and thereafter diligently prosecute to completion such cure.

9.1.2 Default by TriMet. A default shall occur if TriMet breaches any material provision of this Agreement including, without limitation, TriMet's failure to adhere to the Schedule of Performance for any element of the Schedule of Performance which is in the control of TriMet, whether by action or inaction, and such breach continues and is not remedied within thirty (30) days after TriMet receives written notice from Developer specifying the breach or, in the case of a breach which cannot with due diligence be cured within a period of thirty (30) days, if TriMet shall not within such thirty (30) day period commence the cure of the breach and thereafter diligently prosecute to completion such cure.

9.2 TriMet's Pre-Conveyance Remedies. If Developer defaults in any material term of this Agreement before any of the Property is conveyed to Developer, TriMet may, at its option: (i) terminate this Agreement by written notice to Developer, without waiving any cause of action TriMet may have against Developer; and (ii) specifically enforce the obligations of Developer under this Agreement; and (iii) seek monetary damages against Developer. If TriMet terminates this Agreement as provided in this Section 9.2, then Developer shall deliver to TriMet within thirty (30) days after such termination, copies of all Project market research, design documents, engineering documents, pro formas and financial projections prepared for Developer by unrelated third parties, and which Developer is authorized to release; and design and construction contracts may be used by TriMet in any manner that TriMet deems appropriate with the consent of any party having approval rights thereunder.

9.3 Restoration. If, prior to acquiring the Property, Developer performs any construction activities on the Property and Developer fails to acquire the Property, Developer agrees to restore the Property to substantially the condition that existed prior to the time that Developer performed any activities thereon or other condition that TriMet has approved.

9.4 TriMet's Post-Conveyance Remedies.

9.4.1 Failure to Complete Construction. If, within eighteen months of the closing of construction financing, Developer fails to obtain the required Certificate of Completion because of Developer's failure to take the actions required under Section 3.11 hereof, then TriMet shall have the following remedies, which remedies shall be exclusive of any other granted to TriMet:

9.4.1.1 Subject to the rights of Mortgagees and other parties holding interests in the Project, the right to re-enter and take possession of the Property and the Project, and to terminate (and revest in TriMet) the estate conveyed by the Deed for the Property, and to terminate Developer's right to develop the Project, and to provide TriMet with the right to resell the Property pursuant to Section 9.5 hereof, it being the intent of this provision together with other provisions of this Agreement that the conveyance of the Property to Developer shall be made upon, and that the Deed to the Property shall provide for, a condition subsequent to the effect that in the event of default by Developer to remedy, end or abrogate such default, within the period and in the manner stated, then TriMet, at its option, may, upon sixty (60) days written notice (hereinafter "Notice of Termination") to Developer and the Escrow Agent, declare a termination in favor of TriMet of the title, and of all the rights, title and interest in the Property conveyed to Developer and any assigns or successors in interest shall be reconveyed to by Quitclaim Deed, pursuant to the Escrow Instructions in Exhibit G.

9.4.1.2 Developer shall provide TriMet with any work product produced by any third parties for Developer.

9.5 TriMet Resale. If title to the Property shall revest in TriMet in accordance with the provisions of Section 9.4 of this Agreement, TriMet may, at its option, bring the improvements to a state of completion deemed by TriMet as reasonably necessary to protect them from the elements or other dangers, and shall, pursuant to its responsibilities under Oregon Revised Statutes Chapter 457, use its best efforts consistent with prudent business practices and generally in accordance with the terms of this Agreement to resell at a reasonable price, the Property (subject to such mortgage liens and leasehold interests as hereinbefore set forth) as soon and in such a manner as TriMet shall find feasible and consistent with the objectives of such laws, to a qualified and responsible party or parties (as determined by TriMet in its sole discretion) who will assume the obligation of making or completing the improvements or such other improvements in their stead as shall be satisfactory to TriMet. Upon such resale, the proceeds thereof shall be applied as follows:

9.5.1 TriMet Reimbursement. First, to TriMet on its own behalf to reimburse TriMet for all costs and expenses reasonably incurred by it including, but not limited to: professional fees and salaries of personnel in connection with the recapture, management and resale of the Property and/or Project; any payments made or necessary to be made to discharge any encumbrances or liens existing on the Property at the time of revesting of title thereto in TriMet or to discharge or prevent from attaching or being made; any subsequent encumbrances or liens due to obligations, defaults, or acts of Developer, its successors or transferees; any expenditures made or obligations incurred with

respect to the making or completion of Developer's improvements or any portion thereof on the Property; any amounts owed to the City as lease or license fees, and any amounts otherwise owing TriMet by Developer and its successor or transferee;

9.5.2 Developer Reimbursement. Second, to reimburse Developer, its successor or transferee, up to the amount equal to the sum of (a) the Purchase Price and (b) the TriMet-approved development costs incurred by it in making any of the improvements on the Property or part thereof, less (c) any gains or income withdrawn or made as to the Project; and

9.5.3 Balance to TriMet. Third, any balance remaining after any reimbursements shall be retained by TriMet.

9.6 Developer's Pre-Conveyance Remedies. If TriMet fails to perform any obligation under this Agreement, Developer may, at its option: (i) terminate this Agreement by written notice to TriMet without waiving any cause of action Developer may have against TriMet; (ii) specifically enforce the obligations of TriMet under this Agreement; and (iii) seek monetary damages against TriMet.

9.7 Developer's Post-Conveyance Remedies. In the event of TriMet's material default after TriMet conveys the Property to Developer, Developer may specifically enforce the obligations of TriMet under this Agreement, and seek monetary damages against TriMet.

9.8 Nonexclusive Remedies. The rights and remedies provided by this Agreement shall not be deemed exclusive, except where otherwise indicated, and shall be in addition to any and all rights otherwise available at law or in equity. The exercise by either Party of one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other such remedies for the same default or of any of its remedies for any other default by the other Party, including, without limitation, the right to compel specific performance. Any limitation of remedies set forth herein should not limit or affect the obligations of a Party under any contractual indemnities set forth herein.

9.9 Force Majeure.

9.9.1 Neither a Party nor Party's successor in interest shall be considered in breach of or in default with respect to any obligation created hereunder or progress in respect thereto if the delay in performance of such obligations (the "Unavoidable Delay") arises from acts of God, acts of the public enemy, fires, acts of the government, acts of the other Party, floods, earthquake, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or wrongful acts of owners or occupants of property adjoining the Property, provided that the aforesaid causes were not foreseeable were beyond Developer's control and did not result from the fault or negligence of the Developer, and provided further that the Developer has taken reasonable precautions to prevent further delays owing to such causes.

9.9.2 It is the purpose and intent of this provision that, in the event of the occurrence of any such Unavoidable Delay, the time or times for performance of the obligations of TriMet or Developer, as the case may be, shall be extended for the period of the Unavoidable Delay; provided, however, that the Party seeking the benefit of this Section shall, within ten (10) days after the Party becomes aware of the causes of any such Unavoidable Delay, notify the other Party in writing of the cause or causes of the delay and the estimated time of correction.

10. MISCELLANEOUS PROVISIONS.

10.1 TriMet Project Manager. For the purposes of managing the implementation of the provisions of this Agreement on behalf of TriMet, the Executive Director of TriMet's Capital Projects and Facilities Division shall designate a Project Manager. Upon the initial execution of this Agreement, the TriMet Project Manager shall be Jillian Detweiler.

10.2 Discrimination. Developer covenants, for itself and its successor and assigns, that during the term of this Agreement and construction of the Project, it will not discriminate against any employee or applicant for employment on account of race, color, creed, religion, age, gender, sex, sexual orientation, marital status, national origin, ancestry or disability, and shall comply with the applicable requirements of 49 CFR Parts 26.7, 27.7, 27.9(b) and 37. Developer further covenants, for itself and its successors and assigns, that it will not discriminate against or segregate any person or group of persons in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property on account of race, color, creed, religion, age, gender, sex, sexual orientation, marital status, national origin, ancestry or disability, nor will Developer itself or any person claiming under or through it, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, or others in connection with the Property. The foregoing covenant will run with the land.

10.3 Conflicts of Interest and Debarment and Suspension. Developer covenants, for itself and its successor and assigns, that during the term of this Agreement and construction of the Project, it will comply with Section 3(a) and (b) of the Federal Transit Administration Master Agreement dated October 1, 2007, related to conflicts of interest and debarment and suspension.

10.4 Effect of Covenants. The covenants established in this Agreement and the Deed will, without regard to technical classification and designation, be binding on and for the benefit of TriMet, the City, Developer and Developer's successors and assigns, and any successors-in-interest to the Property or any part thereof. After issuance of the Certificate of Completion pursuant to Section 3.11, all of the terms, covenants, agreements and conditions set forth in this Agreement will cease and terminate, except for those terms, covenants and use limitations that, by their terms, are expressly intended to survive after the Certificate of Completion is issued.

10.5 Public Communication. The Parties agree that all public communications concerning the Project, e.g., press releases or information provided to the press and all substantive discussions with public agencies having jurisdiction over the Property or the Project, will be undertaken jointly by TriMet and Developer and shall be subject to the prior approval of each of TriMet and Developer.

10.6 Notice.

10.6.1 Any notice or communication under this Agreement by either Party to the other shall be deemed given and delivered (a) forty-eight (48) hours after being dispatched by registered or certified U.S. mail; postage prepaid, return receipt requested, or (b) when received if personally delivered, and:

10.6.2 In the case of a notice or communication to Developer, addressed as follows:

REACH Community Development, Inc.
Attn: Michelle Haynes, Housing Development Manager
1135 SE Salmon St.
Portland, OR 97214
Phone: (503) 231-0672
Facsimile: (503) 236-3429
E-mail: mhaynes@reachcdc.org
with a copy to:

Schwabe, Williamson and Wyatt
Attn: Roy Lambert, Attorney
PacWest Center
1211 SW Fifth Avenue, Ste 1900
Portland, OR 97204

10.6.3 In the case of a notice or communication to TriMet, addressed as follows:

Tri-County Metropolitan Transportation District of Oregon
Attn: Jillian Detweiler
710 NE Holladay Street
Portland, Oregon 97232
Phone: (503) 962-2292
Facsimile: (503) 962-2281
E-mail: detweilj@trimet.org
with a copy to:

Tri-County Metropolitan Transportation District of Oregon
Attn: Lance Erz, Assistant General Counsel
710 NE Holladay Street
Portland, Oregon 97232

or addressed in such other way in respect to either Party as that Party may, from time to time, designate in writing dispatched as provided in this Section. Notice given in any other manner shall be effective upon receipt by the Party for whom the same is intended.

10.7 Equal Employment Opportunity. Developer must comply with all applicable provisions of Federal or state statutes and regulations and City ordinances concerning equal employment opportunities for persons engaged in the Project.

10.8 Merger. None of the provisions of this Agreement are intended to or shall be merged by reason of any Deed transferring title to the Property from TriMet to Developer or any successor in interest, and any such Deed shall not be deemed to affect or impair the provisions and covenants of this Agreement, but shall be deemed made pursuant to this Agreement.

10.9 Headings; Interpretation of Agreement. Titles of the Sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions. Both parties having had the opportunity to consult with an attorney regarding this Agreement, the parties agree to waive the principle of contract interpretation that an ambiguity will be construed against the party that drafted the ambiguous provision.

10.10 Waivers. No waiver made by either Party with respect to the performance, or manner or time thereof, of any obligation of the other Party or any condition inuring to its benefit under this Agreement shall be considered a waiver of any other rights of the Party making the waiver. No waiver by TriMet or Developer of any provision of this Agreement or any breach thereof shall be of any force or effect unless in writing; and no such waiver shall be construed to be a continuing waiver.

10.11 Attorney Fees. If a suit, action, or other proceeding of any nature whatsoever, including, without limitation, any proceeding under U.S. Bankruptcy Code, is instituted to interpret or enforce any provision of this Agreement, or with respect to any dispute relating to this Agreement, including, without limitation, any action in which a declaration of rights is sought or an action for rescission, the prevailing Party shall be entitled to recover from the losing Party its reasonable attorney, paralegal, accountant, and other expert fees and all other fees, costs and expenses actually incurred and reasonably necessary in connection therewith, as determined by the judge at trial or on any appeal or review, in addition to all other amounts provided by law. This provision shall cover costs and attorney fees related to or with respect to proceedings in Federal Bankruptcy Courts, including those related to issues unique to bankruptcy law.

10.12 Choice of Law. This Agreement shall be governed by Oregon law, without resort to any jurisdiction's conflicts of law principles, rules or doctrines.

10.13 Time of Essence. Time is of the essence of this Agreement. All obligations of TriMet and Developer to each other are due at the time specified by the Agreement, as the same may be extended by mutual agreement of the parties in writing.

10.14 Calculation of Time. All periods of time referred to herein shall include Saturdays, Sundays, and legal holidays in the State of Oregon, except that if the last day of any period falls on any Saturday, Sunday or legal holiday, the period shall be extended to include the next day which is not a Saturday, Sunday or legal holiday.

10.15 Construction. In construing this Agreement, singular pronouns shall be taken to mean and include the plural and the masculine pronoun shall be taken to mean and include the feminine and the neuter, as the context may require.

10.16 Legal Purpose. Developer agrees that it shall construct the Project in compliance with all applicable laws and regulations and shall use the Project solely for lawful purposes.

10.17 Severability; Survivability. If any clause, sentence or any other portion of the terms and conditions of this Agreement becomes illegal, null or void for any reason, the remaining portions will remain in full force and effect to the fullest extent permitted by law. All provisions concerning indemnity survive the termination of this Agreement for any cause.

10.18 Entire Agreement. This Agreement and the exhibits and attachments hereto are the entire agreement between the Parties. There is no other oral or written agreement between the Parties with regard to this subject matter. There are no oral or written representations made by either Party, implied or express, other than those contained in this Agreement.

10.19 Amendments and Modifications. Any modifications to this Agreement shall be made in writing and executed by all Parties.

10.20 Successors and Assigns. Subject to the provisions of Section 5, the benefits conferred by this Agreement, and the obligations assumed thereunder, shall inure to the benefit of and bind the successors and assigns of the Parties.

10.21 Place of Enforcement. Any action or suit to enforce or construe any provision of this Agreement by any Party shall be brought in the Circuit Court of the State of Oregon for Multnomah County, or the United States District Court for the District of Oregon in Portland, Oregon. The parties agree to submit to the jurisdiction of these courts.

10.22 No Partnership. Nothing contained in this Agreement or any acts of the Parties hereby shall be deemed or construed by the Parties, or by any third person, to create the relationship of principal and agent, or of partnership, or of joint venture, or any association between any of the Parties.

10.23 Non-Waiver of Government Rights. Subject to the terms and conditions of this Agreement, by making this Agreement and delivery of the Deed, TriMet is specifically not obligating itself, the City, or any other agency with respect to any discretionary action relating to development or operation of the improvements to be constructed on the Property, including but not limited to condemnation, rezoning, variances, environmental clearances or any other governmental approvals which are or may be required, except as expressly set forth herein.

10.24 Approvals. Where this Agreement requires the approval of TriMet, TriMet will approve or disapprove within ten (10) business days after receipt of the material to be approved, except where a longer or shorter time period is specifically provided to the contrary, and except construction change orders which will be processed according to the applicable loan documents. Failure by TriMet to approve or disapprove within said period of time shall be deemed approval. Any disapproval shall state in writing the reasons for such disapproval. Approvals will not be unreasonably withheld, except where rights of approval are expressly reserved to TriMet's sole discretion in this Agreement

10.25 Approval by TriMet. Whenever consent or approval by TriMet is required under the terms of this Agreement, all such consents or approvals shall be given in writing from the Executive Director of Capital Projects, unless specifically noted.

10.26 Compliance with Federal Laws. The parties agree to comply with the terms of Internal Revenue Code Section 1445 and the Interstate Land Sales Full Disclosure Act. TriMet is not a "foreign person" as that term is used in Internal Revenue Code Section 1445 and TriMet agrees to furnish Developer with any necessary documentation to that effect. Developer agrees to furnish TriMet at its request with any necessary documentation in order to exempt sale of the Site from the provisions of the Interstate Land Sales Full Disclosure Act.

10.27 Recording of Memorandum of Agreement; Amended Memorandum of Agreement. TriMet shall record a Memorandum of this Agreement within ten (10) days following the Effective Date. The form of the Memorandum of Agreement is attached as Exhibit J to this Agreement. When TriMet issues to Developer a Certificate of Completion or if the Agreement is terminated, the Parties shall cooperate to promptly record an Amended Memorandum of Agreement to reflect the surviving covenants of this Agreement.

10.28 ZONING AND LAND USE STATUTORY DISCLAIMER.

THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS THAT, IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND THAT LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 IN ALL ZONES. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 197.352. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES, THE EXISTENCE OF FIRE PROTECTION FOR STRUCTURES AND THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 197.352. [ORS 93.040(2)]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date above written.

TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, an Oregon mass transit district

By: _____
Neil McFarlane, Executive Director

APPROVED AS TO FORM:

_____
Lance Erz, Assistant General Counsel

REACH COMMUNITY DEVELOPMENT, INC., an Oregon non-profit, corporation

By: _____
Dee Walsh, Executive Director

APPROVED AS TO FORM:

_____
Name Dee Walsh
Title Executive Director

EXHIBIT A
PROPERTY LEGAL DESCRIPTION

Parcel I:
Lots 1 and 2, EXCEPT the West 20 feet thereof; and the West 20 feet of Lot 7, EXCEPT the North 10 feet thereof; and the West 20 feet of Lot 8, Block 36, M. PATTON'S SECOND ADDITION TO ALBINA, in the City of Portland, County of Multnomah and State of Oregon,

and

Parcel II:
Lots 3 and 4: EXCEPT the West 20 feet thereof; and the West 20 feet of Lots 5 and 6; and the North 10 feet of the West 20 feet of Lot 7, Block 36, M. PATTON'S SECOND ADDITION TO ALBINA, in the City of Portland, County of Multnomah and State of Oregon.

EXHIBIT B
FORM OF BARGAIN AND SALE DEED

After Recording Return to and
Tax Statements to be sent to:

Michelle Haynes

REACH Community Development, Inc.

1135 SE Salmon Street
Portland, Oregon 97214

BARGAIN AND SALE DEED

KNOW ALL PEOPLE, that the TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, an Oregon mass transit district ("TriMet"), does hereby grant, bargain, sell and convey to REACH Community Development, Inc., an Oregon non-profit corporation ("Developer"), and unto its successors and assigns, all the following described real property, with the tenements, hereditaments and appurtenances (herein called the "Property"), situated in the County of Multnomah and State of Oregon:

Parcel I:
Lots 1 and 2, EXCEPT the West 20 feet thereof; and the West 20 feet of Lot 7, EXCEPT the North 10 feet thereof; and the West 20 feet of Lot 8, Block 36, M. PATTON'S SECOND ADDITION TO ALBINA, in the City of Portland, County of Multnomah and State of Oregon,

and

Parcel II:
Lots 3 and 4: EXCEPT the West 20 feet thereof; and the West 20 feet of Lots 5 and 6; and the North 10 feet of the West 20 feet of Lot 7, Block 36, M. PATTON'S SECOND ADDITION TO ALBINA, in the City of Portland, County of Multnomah and State of Oregon.

This conveyance is made pursuant to that certain Agreement for Disposition and Development of Real Property between Developer and TriMet dated _____, __, 2007, a Memorandum of which was recorded on _____, 2007 as Fee No. _____, Records of Multnomah County, Oregon (the "DDA"). Any capitalized terms in this Deed shall have the meanings set out in the DDA, unless otherwise defined herein. The Developer has given $300,000 and other value for this conveyance.

This conveyance is subject to the following:

1. All easements, covenants, restrictions, conditions and encumbrances of record.

2. Grantee's covenant, by and for itself, its successors, its assigns and every successor-in-interest to the Property or any part thereof, that (a) during construction of the Project, it will not discriminate against any employee or applicant for employment on account of race, color, creed, religion, age, gender, sex, sexual orientation, marital status, national origin, ancestry or disability; and (b) that it will not discriminate against or segregate any person or group of persons in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property on account of race, color, creed, religion, age, gender, sex, sexual orientation, marital status, national origin, ancestry or disability, nor will it or any person claiming under or through it, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, or others in connection with the Property.

3. Grantee's covenant, by and for itself, its successors, its assigns and every successor-in-interest to the Property or any part thereof, that the Property shall be held, developed, sold and conveyed subject to the restrictions set forth in the DDA, including Section 7 thereof.

It is intended that the delivery of this Deed shall not effect a merger of those provisions of the DDA that are intended by the terms of said Agreement to continue after the delivery of this Deed.

BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 197.352. THIS INSTRUMENT DOES NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES, TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 197.352.

IN WITNESS WHEREOF, the Tri-County Metropolitan Transportation District of Oregon has caused this Deed to be executed this ___day of _____, 2007.

TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, an Oregon mass transit district

By: _____
Neil McFarlane, Executive Director

STATE OF OREGON)
) ss.
County of Multnomah)

The foregoing instrument was acknowledged before me this _____ day of _____, 2007, by Neil McFarlane as Executive Director of the Tri-County Metropolitan Transportation District of Oregon, on its behalf.

_____
Notary Public for Oregon
My commission expires: _____

Accepted by Developer:

_____
Name: _____
Title: _____

EXHIBIT C
PROJECT BUDGET

Crown Motel
Financial Description
Sources and Uses of Financing
10/11/2007

SOURCES OF FINANCING	Total	Residential	Commercial
Residential Loan w/OAHTC	2,675,961	2,675,961	
Commercial Loan	462,178		462,178
Developer Loan (deferred fee)	200,000	200,000	-
Subtotal of loans	**3,338,139**	**2,875,961**	**462,178**
LIHTC (4%)	3,347,180	3,347,180	-
Capital Contributions:			
SDC Waivers	109,089	109,089	-
GP Loan:			
Metro	365,000	334,489	30,511
Enterprise GCI		-	-
OHCSD Weatherization Funds	65,172	65,172	-
Tri Met Predev Funds	192,500	192,500	-
BETC	25,000	25,000	-
PDC Equity Gap Loan	4,367,500	3,656,115	711,385
Cash Flow During Lease-Up		-	-
Subtotal of equity	**8,471,441**	7,729,546	**741,896**
Total Sources	**11,809,580**	**10,605,506**	**1,204,074**

USES OF FINANCING	Total	Residential	Commercial
Acquisition	305,000	279,505	25,495
Construction	8,372,409	7,482,187	890,222
Const Contingencies	412,875	374,109	38,766
Developer Fee	820,000	751,455	68,545
Soft Costs	1,899,296	1,718,250	181,046
Total Uses	**11,809,580**	**10,605,506**	**1,204,074**
per unit		196,398	
Total per Unit without acquisition		191,222	
SURPLUS/(GAP)	(0)	-	(0)

Housing Development Center HDC Proforma 10-9-07 Tab: soruse

Crown Motel

10/11/2007

Financial Description
Detailed Cost Breakdown

8.2

		Total Project Cost	Housing Costs 91.6%	Commercial 8.4%	Depreciable for 4% LIHTC
Acquisition Cost					
Purchase Price	100%	300,000	274,923	25,077	-
Improvements	0%		-	0	0
Closing/Recording		5,000	4,582	418	0
Construction Costs					
Residential (includes all site clearing)		7,474,856	7,474,856	0	7,437,720
Commercial		774,653		774,653	0
Utility Fees		8,000	7,331	669	5,957
Construction Inflation Contingency	4.00%		0	0	0
TI allowance ($26/SF)	25	114,900		114,900	0
Construction Contingency	5.00%	412,875	374,109	44,511	374,109
Development Costs					
Performance Bond	1.75%		0	0	0
Building Permits/Fees		87,914	62,237	5,677	62,237
SDC's	1.00%	119,040	109,089	9,951	
Soils/Geotech		10,000	9,164	836	9,164
Environmental Study (level I & haz mat)		6,350	5,819	531	5,819
Insurance During Construction		50,000	45,820	4,180	45,820
Environmental Consultant/Testing		10,000	9,164	836	9,164
Environmental Remediation		20,000	18,328	1,672	0
Special Inspection		20,000	18,328	1,672	18,328
Survey (ALTA & power pole)		6,500	5,957	543	5,957
Design Review App Fee		7,557	6,926	632	6,926
Architect/Engineering Design & Reimb		635,895	582,740	53,155	582,740
Investor Legal		0	0	0	0
Sponsor Legal		60,000	54,989	5,015	54,985
Consulting Fees for CFC		6,000	5,498	502	5,498
Construction Loan Fees					
Const loan fees	0.50%	26,905	24,656	2,249	24,656
Closing/Title costs	0.0084	45,200	41,422	3,778	41,422
Lender Inspections	10	5,000	4,582	418	4,582
Const. Lender Legal Review		35,000	32,074	2,926	32,074
Const lender review fees		2,500	2,291	209	2,291
Bond Fees:					
Issuer Fee (to OHCS)	0.50%	26,905	24,656	2,249	0
Admin Fee (on-going $75/unit/yr)	75	4,050	3,711	339	0
Bond Council Fee		50,000	45,820	4,180	0
Financial Advisor Fee		0	0	0	0
State Fee		0	0	0	0
Issuer's Council Fee		0	0	0	0
Negative Arbitrage		0	0	0	
Permanent Loan Fees					
Perm Loan Fees (to NOAH)	1.00%	31,381	26,760	4,622	0
Lender: Rate Lock Fee	1.00%	0	0	0	0
Closing costs: perm loan	0.0016	5,021	4,601	420	0
Perm Loan Legal		2,000	1,833	167	0
Interest					
Construction Loan Interest (10 Mo.)	6.50%	59,968	54,955	5,013	54,955
Lease up period interest (7 Mo.)	6.50%	195,285	178,961	16,324	0
Other Soft Costs					
Accounting Review: consulting		10,000	10,000	0	5,000
Audit		10,000	10,000	0	10,000
Developer Fee	7.46%	820,000	751,455	68,545	713,883
Tax Credit Reservation Fee		16,822	16,822	0	0
Initial Deposit to Rep Res		0	0	0	0
Lease Up Reserves		25,000	25,000	0	0
Operating Reserve	3	99,000	99,000		0
Marketing		15,000	13,746	1,254	0
Market Study		1,250	1,146	104	1,146
Appraisal		11,000	10,080	920	5,500
Commercial Lease Payments (9 months)		41,364		41,364	0
Relocation		0	0	0	0
Other Application Fees; Copying, etc.		6,500	5,957	543	0
FFE (Lobby & Units)		50,000	50,000	0	50,000
Soft Cost Contingency	5.00%	104,888	96,121	8,768	70,000
TOTAL		11,809,580	10,605,506	1,209,819	9,639,932
		11,809,580	10,605,506	1,204,074	
(Gap)/Surplus:			(0)		

EXHIBIT D
SCHEDULE OF PERFORMANCE

Legal			
Item	**Party**	**Estimated Completion**	**Final Deadline**
Execute Disposition and Development Agreement	TriMet, Dev.	7/15/07	10/31/07
Developer provides Project Budget and construction budget to TriMet	Dev	10/14/07	12/1//07
Developer provides evidence of Project financial commitments to TriMet	Dev.	1/15/08	5/15/08
Developer enters into binding contract with construction contractor approved by TriMet	Dev.	2/11/08	6/01/08
90-day notice to Lessee that conditions to terminate lease have been met	TriMet	10/01/07	4/15/08
TriMet transfers Property to Developer	TriMet, Dev.	2/15/08	6/31/08
TriMet issues Certificate of Completion for Project based on substantial completion	TriMet	12/16/08	12/01/09
Design			
TriMet reviews and approves Design Drawings. (based on 100% DD set)	TriMet	9/28/07	10/28/07
Design Review approved (staff decision published)	Agencies	10/28/07	11/30/07
TriMet reviews and approves Construction Drawings and Specifications (based on 100% GMP set)	TriMet	12/31/07	3/15/08
Building permits issued	Agencies	3/10/08	6/15//08
Construction			
Construction begins (new construction-not demo)	Dev.	3/12/08	7/15/08
Construction substantially complete	Dev.	12/16/08	12/01//09
Construction complete	Dev.	12/30/08	1/31/10
TriMet issues Certificate of Completion	TriMet	12/30/08	1/11/10
Operations			
Developer adopts Transportation Demand Management Program acceptable to TriMet	Dev., TriMet	9/01/08	9/01/09
Developer submits annual Transportation Demand Management report to TriMet	Dev.	1/02/09	1/02/10

EXHIBIT E
SCOPE OF DEVELOPMENT

Scope of Development

The Developer shall construct a Project with the following characteristics:

1. provides a minimum of 50 residential units;
2. provides a minimum of 12 of units for larger families requiring more than two bedrooms;
3. in the designated affordable units, restricts rents paid directly by tenants to 30 percent of 50 percent of the area median income, adjusted for household size; except for units with Section 8 rent subsidies, wherein the "contract rents" are federally subsidized and the tenants pays no more than 35% of their income for rent);
4. provides a minimum of 3,000 square feet of commercial space on the ground floor;
5. utilizes materials expected to perform for a minimum of 30 years and maintains adequate reserves to replace, repair and maintain the building in good condition;
6. has entrances and windows oriented to activate N. Interstate Avenue;
7. controls access to building common areas and parking.

EXHIBIT F
FORM OF CERTIFICATE OF COMPLETION

The TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, an Oregon mass transit district ("TriMet"), hereby certifies that REACH Community Development, Inc. ("Developer") has satisfactorily completed construction of the Project as described in the Agreement for Disposition and Development of Property, dated _____, 2007 (herein called the "DDA"), a memorandum of which was recorded in the Records of Multnomah County, Oregon as Document No. _____, on _____, 2007. Capitalized terms used herein without definition shall have the meaning ascribed to them in the DDA.

Pursuant to Section 3.11 of the DDA, TriMet hereby certifies that:

(i) the Project is completed according to the Construction Plans and Specifications, except for punch list items which do not materially affect the use of the Project for the purposes intended under the DDA;

(ii) the City of Portland has issued a temporary or permanent Certificate of Occupancy with respect to the Project; and

(iii) any other improvements required by the terms of the DDA to have been completed at the time the Project is complete have been substantially completed.

This Certificate of Completion is and shall be a conclusive determination of the satisfaction of all of the agreements, covenants and conditions contained in the DDA with respect to the obligations of Developer, its successors and assigns, as to the construction of the Project, and such obligations are hereby terminated. This Certificate represents and certifies the completion of Developer's construction obligations described herein as to TriMet only.

Further,

(1) Any party acquiring or leasing any portion of the Project shall not (because of such purchase or lease) have any obligation under the DDA with respect to the construction of the Project, and

(2) The Sections of the DDA that, by their terms, are expressly intended to survive issuance of this Certificate of Completion, including, but not limited to the Developer obligations evidenced at 3.11.2; the obligations evidenced at Section 7; and all indemnity obligations, including but not limited to the indemnity obligations evidenced at Sections 3.6 and 4.1 of the DDA, shall survive and remain in effect for the periods identified in the DDA notwithstanding issuance of this Certificate ("Surviving Sections").

Other than its right to enforce the Surviving Sections, TriMet shall hereafter have, or be entitled to exercise, no rights or remedies or controls that it may otherwise have been entitled to exercise under the DDA with respect to the construction of the Project, or as a result of a default in or breach of any provisions of the DDA relating to construction by the Developer, or by any successors in interest or assigns of Developer. Without limitation, TriMet confirms that TriMet no longer has any right of re-entry to the Project or termination of the DDA.

IN WITNESS WHEREOF, TRIMET has caused this instrument to be executed this ___ day of _____, 200_.

TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON

By: _____
Neil McFarlane, Executive Director

STATE OF OREGON)
) ss.
County of Multnomah)

This instrument was acknowledged before me on _____, 2005, by _____, Executive Director of the TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, an Oregon mass transit district.

_____
Notary Public for Oregon
My commission expires: _____

EXHIBIT G
FORM OF ESCROW INSTRUCTIONS & QUITCLAIM DEED

ESCROW INSTRUCTIONS FOR QUITCLAIM DEED

First American Title Insurance Company
200 SW Market Street, Suite 250
Portland, OR 97201
Attention: [INSERT TITLE OFFICER]

Re: Escrow No.

REACH COMMUNITY DEVELOPMENT, INC. ("Developer") has entered into that certain Agreement for Disposition and Development of Real Property related to 5204 and 5226 N. Interstate Avenue ("DDA") with the Tri-County Metropolitan Transportation District of Oregon ("TriMet") dated as _____, 2007, a Memorandum of which was recorded on _____, 200_ as Fee No. _____, Records of Multnomah County, Oregon, whereby TriMet will convey to the Developer or its assignees certain real property (the "Property") in Multnomah County, Oregon. The Property is the subject of this escrow and is described in the accompanying quitclaim deed ("Quitclaim Deed").

Section 9.4.1 of the DDA provides that, under certain circumstances, TriMet is entitled to reconveyance of the Property pursuant to the Quitclaim Deed and Escrow Instructions. This document constitutes those escrow instructions and is for the purpose of irrevocably instructing you as to the disposition of the accompanying Quitclaim Deed.

In the event that you receive from TriMet a notice signed by TriMet's Executive Director certifying that a copy of said notice has been delivered concurrently to Developer and certifying that the DDA has been terminated according to its terms and the rights to the Property described in the Quitclaim Deed have revested in TriMet pursuant to the DDA ("Notice of Termination"), you shall at the end of sixty (60) days after receipt of said instructions record the Quitclaim Deed unless you are, within said sixty (60) day period, notified by TriMet that TriMet has withdrawn the Notice of Termination, or unless you are prohibited from recording the Quitclaim Deed by temporary restraining order, preliminary injunction, or other court order.

In the event that you receive a copy of a Certificate of Completion issued by TriMet with respect to the Property (either an original or one certified by Developer as being a duplicate of the original), you will forthwith return the Quitclaim Deed to Developer.

These instructions may not be withdrawn or in any way amended, modified or waived without the prior written consent of both of the parties hereto.

Please indicate your acceptance of and agreement to carry out these instructions as indicated below.

Very truly yours,

TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, an Oregon mass transit district

By: _____
Neil McFarlane, Executive Director

REACH COMMUNITY DEVELOPMENT, INC, an Oregon non-profit corporation

By: _____
Dee Walsh, Executive Director

ACCEPTED AND AGREED TO THIS ___ DAY OF _____, 200__.

FIRST AMERICAN TITLE INSURANCE COMPANY.
By: _____
Name: _____
Title: _____

EXHIBIT G CONTINUED
FORM OF QUITCLAIM DEED

After recording return to
and send tax statements to:

Manager, Real Property Acquisition
TriMet
710 NE Holladay Street
Portland, OR 97232

For valuable consideration, receipt of which is hereby acknowledged, REACH COMMUNITY DEVELOPMENT, INC., an Oregon non-profit corporation ("Grantor"), does hereby release and quitclaim to the TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, an Oregon mass transit district ("Grantee"), all right, title and interest in and to the following described real property, with the tenements, hereditaments and appurtenances, situated in the County of Multnomah and State of Oregon, to wit:

Parcel I:
Lots 1 and 2, EXCEPT the West 20 feet thereof; and the West 20 feet of Lot 7, EXCEPT the North 10 feet thereof; and the West 20 feet of Lot 8, Block 36, M. PATTON'S SECOND ADDITION TO ALBINA, in the City of Portland, County of Multnomah and State of Oregon,

and

Parcel II:
Lots 3 and 4: EXCEPT the West 20 feet thereof; and the West 20 feet of Lots 5 and 6; and the North 10 feet of the West 20 feet of Lot 7, Block 36, M. PATTON'S SECOND ADDITION TO ALBINA, in the City of Portland, County of Multnomah and State of Oregon.

To have and to hold the same unto the said Grantee and Grantee's successors and assigns forever.

The true and actual consideration paid for this transfer, stated in terms of dollars, is $1.00 (one dollar). However, the true and actual consideration consists of or includes other value given or promised which is the whole consideration.

BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 197.352. THIS INSTRUMENT DOES NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS

INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES, TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 197.352.

IN WITNESS WHEREOF, Grantor has executed and sealed this instrument this _____day of _____, 200_.

REACH COMMUNITY DEVELOPMENT, INC.

By: _____
Dee Walsh, Executive Director

The foregoing instrument was acknowledged before me this _____ day of _____, 200__, by Dee Walsh as Executive Director of REACH Community Development, Inc. , on its behalf.

_____
Notary Public for Oregon
My commission expires:_____

EXHIBIT H
MEMORANDUM OF AGREEMENT

After recording return to:

Manager, Real Property Acquisition
TriMet
710 NE Holladay Street
Portland, OR 97232

Form of Memorandum of Agreement For the Disposition And Development of Real Property

THIS MEMORANDUM OF AGREEMENT FOR DISPOSITION AND DEVELOPMENT OF REAL PROPERTY ("Memorandum") shall serve as notice to all persons that the **TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON**, an Oregon mass transit district ("TriMet"), and **REACH COMMUNITY DEVELOPMENT, INC**, an Oregon non-profit corporation ("Developer"), have entered into an Agreement For Disposition And Development of Real Property dated _____, 2007 ("Agreement") relating to the real property conveyed by TriMet (the "Property") located in Multnomah County, Oregon. The Property is more particularly described as:

Parcel I:
Lots 1 and 2, EXCEPT the West 20 feet thereof; and the West 20 feet of Lot 7, EXCEPT the North 10 feet thereof; and the West 20 feet of Lot 8, Block 36, M. PATTON'S SECOND ADDITION TO ALBINA, in the City of Portland, County of Multnomah and State of Oregon,

and

Parcel II:
Lots 3 and 4: EXCEPT the West 20 feet thereof; and the West 20 feet of Lots 5 and 6; and the North 10 feet of the West 20 feet of Lot 7, Block 36, M. PATTON'S SECOND ADDITION TO ALBINA, in the City of Portland, County of Multnomah and State of Oregon.

Among other things, the Agreement requires TriMet to convey the Property to Developer upon the satisfaction of certain conditions precedent, and requires Developer to construct and complete certain infrastructure and project improvements on the Property all as more particularly set forth in the Agreement (the "Project"). Other property or value was part of the whole consideration given for the Property conveyance referenced herein.

TriMet and Developer execute this Memorandum to acknowledge being bound by the Agreement and to give notice of the Agreement to third parties.

TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, an Oregon mass transit district

By: _____
Neil McFarlane, Executive Director
Date: 10-25-07

REACH COMMUNITY DEVELOPMENT, INC., an Oregon non-profit corporation

By: _____
Dee Walsh, Executive Director
Date: 10-22-07

STATE OF OREGON)
) ss.
County of Multnomah)

This instrument was acknowledged before me on October 25, 2007, by Neil McFarlane, Executive Director of the TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON, an Oregon mass transit district.

OFFICIAL SEAL
KARMEN FALIGOWSKI
NOTARY PUBLIC-OREGON
COMMISSION NO. 391477
MY COMMISSION EXPIRES MAY 12, 2009

_____
Notary Public for Oregon
My commission expires: 5-12-09

STATE OF OREGON)
) ss.
County of Multnomah)

This instrument was acknowledged before me on October 22nd, 2007, by Dee Walsh, Executive Director of REACH COMMUNITY DEVELOPMENT, INC, an Oregon non-profit corporation.

OFFICIAL SEAL
LINDA F DAVIDSON
NOTARY PUBLIC-OREGON
COMMISSION NO. 393409
MY COMMISSION EXPIRES JUNE 7, 2009

_____
Notary Public for Oregon
My commission expires: 6-7-09

APPENDIX D

SURVEY QUESTIONS

TCRP J-5, STUDY TOPIC 15-03
TRANSIT PUBLIC PRIVATE PARTNERSHIPS: LEGAL ISSUES

Agency Name: _____

Name of Employee: _____

Job Title: _____

Contact telephone/ cell phone number: _____/ _____

Email address: _____

How many years have you been with the agency? _____

NOTE:

(a) The term public-private partnership (PPP) as used herein refers to the contractual arrangements between a public entity such as a transit agency and a private partner to facilitate the construction or development of an infrastructure project. Depending on the contractual arrangements, the private partner may be responsible for the design and construction of the project, as well as its operation, maintenance, and/or financing.

(b) Please provide copies via e-mail or on a disk or provide an Internet-link for any contracts or other documents identified in your responses.

(c) In responding to the following questions, please feel free to attach extra pages as needed.

1. Within the past ten years has your agency used a PPP for the purpose of acquiring, improving, constructing, developing, operating, maintaining and/or financing an infrastructure project or used a PPP for transit-oriented development (TOD)?

YES __ NO __

If your answer is yes, please provide the following information for your agency's PPP projects and answer the remaining questions in the survey. If your answer is "no," it is not necessary to complete the remainder of the survey, but please submit your response to this question.

(a) the name or other identification of the PPP and a description of the PPP Project;

_____

_____

(b) the date(s) of the project, contract, or lease;

_____

(c) the name of the private partner(s);

_____

(d) the cost of the project; and

_____

(e) whether the private partner continues to have any responsibility for the project(s) (*e.g.*, leasing, operation, and/or maintenance).

_____

2. For your agency, what have been the advantages and disadvantages of PPPs for infrastructure projects, TOD, or joint development?

_____

_____

_____

3. For each PPP project that you have identified, please state whether your agency used any one of the following methods of contracting for the delivery of the project(s).

a. Design-Build **YES __ NO __**

b. Design-Build-Operate-Maintain **YES __ NO __**

c. A+B Contracting **YES __ NO __**

d. Construction Manager/General Contractor **YES __ NO __**

e. Construction Manager at Risk **YES __ NO __**

f. Operate-Maintain **YES __ NO __**

g. Operation, Maintenance, and Management **YES __ NO __**

h. Build-Own-Operate **YES __ NO __**

i. Other (please identify)

_____

_____

In regard to the above answers, please provide a copy of any contracts that your agency has used.

4. For each PPP project that you have identified, if your agency used a method of contracting for a project that included financing to be arranged or provided in whole or in part by the private partner, please state whether your agency used any one of the following methods of contracting for the delivery of the project(s).

a. Design-Build-Finance-Operate **YES __ NO __**

b. Design-Build-Finance-Operate-Maintain **YES __ NO __**

c. Design-Build-Finance-Operate-Transfer **YES __NO __**

d. Build-Operate-Transfer **YES __NO __**

e. Build-Transfer-Operate **YES __NO __**

f. Other (please identify)

_____

_____

In regard to the above answers, please provide a copy of any contracts that your agency has used.

5. In addition to any contract(s) identified in response to questions 3 and 4, was there an umbrella agreement, memorandum of understanding, or other separate document between or among the PPP partners that set forth their obligations in respect to the PPP and/or the project?

YES __NO __

If your answer is yes, please state the type of agreement and provide a copy.

6. (a) In evaluating a prospective project for a PPP does your agency undertake a Value for Money or other analysis of the project?

YES __NO __

(b) If your answer is yes, what factors does your agency consider before proceeding with a PPP?

_____

_____

_____

7. In your agency's experience, what are the key legal issues that should be addressed in the contract(s) for a PPP project?

_____

_____

_____

Please provide copies of any contractual provisions or specifications that your agency has developed to deal with any legal issues or problems that your agency has encountered and had to resolve with PPPs.

8. Has your agency encountered any real property and/or land-use issues in connection with PPP projects (*e.g.*, for New Starts or other facilities, TOD, and/or joint development)?

YES __ NO __

If your answer is yes, please describe the issues and how they were resolved.

_____

_____

_____

9. Have your agency and its private partner(s) in PPPs had any federal or other tax issues for PPP projects (*e.g.*, issues relating to 63-20 corporations; the preservation of the status of tax-exempt debt; qualifying an issuance of bonds as tax exempt; issues regarding private activity bonds or exempt facility bonds; certificates of participation; or long-term leases or lease/purchase agreements)?

YES __ NO __

(a) If your answer is yes, please describe the issue(s) and their outcome(s).

_____

_____

_____

(b) If your agency or a private partner has ever requested a ruling from the IRS or any taxing authority regarding a PPP project, please describe the request and the ruling that was obtained and provide a copy.

_____

_____

_____

10. (a) For each PPP project that you have identified, was the contractor required to provide performance and payment bonds for the full amount or value of the applicable contracts under federal and/or state law?

YES __NO __

(b) If your answer is no, were any waivers or exceptions with respect to the amounts of the bonds sought and/or obtained from the FTA or otherwise?

YES __NO __

If your answer is yes, please describe the waiver(s) or exception(s) obtained.

_____

_____

_____

11. (a) For each PPP project that you have identified, did your agency receive a federal grant for the PPP project?

YES __NO __

(b) If your answer is yes, please state (a) the type of grant; (b) the amount; and (c) the percentage of the project that was federally funded.

_____

_____

_____

12. For each PPP project that you have identified, if your agency received a federal grant, please state (a) the percentage and amount of the local match and (b) the source or sources used to fulfill the local match for each project.

_____

_____

_____

13. (a) For each PPP project that you have identified, did the private partner assume responsibility for securing the insurance cover?

YES __NO __

(b) Regardless of which party was responsible for the insurance, please state (1) the kinds of risks that were insured; (2) if not already explained, your agency's role or responsibility for the insurance; and (3) any issues or problems encountered regarding insurance for PPP projects.

_____

_____

_____

14. For any PPP project that you have identified, has your agency shared revenue with the private partner?

YES __NO __

If your answer is yes, please describe (a) any revenue sharing arrangements for the project and/or provide a copy of any revenue sharing agreement and (b) state whether an exception was needed and obtained from FTA to permit your agency to share revenue with the private partner.

_____

_____

_____

15. For the PPP projects that you have identified, (a) has your agency encountered any issues or problems (*e.g*. delays in approvals, additional expense) because of the FTA grant approval process for New Starts (or other FTA funding programs) that have affected your agency's use of PPPs?

YES __NO __

(b) Has your agency encountered any issues or problems with the process for environmental reviews that have affected your agency's use of PPPs?

YES __NO __

If your answer is yes to part (a) and/or (b), please describe the issues or problems and whether and how they were resolved.

_____

_____

_____

16. For each PPP project that you have identified, has your agency agreed to an availability payment structure for the project?

YES __NO __

If your answer is yes, please explain and/or provide a copy of any relevant agreement.

_____

_____

_____

17. Have the laws of your state permitted, encouraged, or restricted your agency's use of, or a private party's participation in, PPPs for infrastructure projects, TOD, and/or joint development?

YES __NO __

If your answer is yes, please explain.

_____

_____

_____

18. For each PPP project that you have identified, please state whether the funding/financing of the PPP(s) included any of the following sources, and, if so, the amount(s) involved.

a. Qualified Private Activity Bonds	**YES __NO __**	**AMOUNT** _____
b. Non-qualified Private Activity Bonds	**YES __NO __**	**AMOUNT** _____
c. Exempt Facility Bonds	**YES __NO __**	**AMOUNT** _____
d. Farebox Revenue Bonds	**YES __NO __**	**AMOUNT** _____
e. Grant Anticipation Notes	**YES __NO __**	**AMOUNT** _____

f. Bonds issued by 63-20 Nonprofit Corporations	**YES __NO __**	**AMOUNT _____**
g. Certificates of Participation	**YES __NO __**	**AMOUNT _____**
h. Transportation Infrastructure Financing Innovation Act (TIFIA)	**YES __NO __**	**AMOUNT _____**
i. State Infrastructure Bank	**YES __NO __**	**AMOUNT _____**
j. Other Bank Financing	**YES __NO __**	**AMOUNT _____**
k. Private Investment/Financing	**YES __NO __**	**AMOUNT_____**
l. Tax Increment Financing	**YES __NO __**	**AMOUNT_____**
m. Assessment District Funds	**YES __NO __**	**AMOUNT_____**
n. Development Impact Fees	**YES __NO __**	**AMOUNT_____**
o. Other sources (please identify):	**YES __NO __**	**AMOUNT _____**

_____

If your agency has prepared a summary of or a chart illustrating a PPP project's funding, please provide a copy.

19. For each PPP project that you have identified, have your agency and the private partner entered into a long-term lease regarding the operation and/or maintenance of the completed infrastructure project?

YES __NO __

If your answer is yes, please identify the project, describe the nature of the lease and its term, and provide a copy.

_____

_____

_____

20. For each PPP project that you have identified, have any lease/purchase agreements been used for rolling stock and/or other equipment?

YES __ NO __

If your answer is yes, please describe the nature of the agreement and the financial benefit obtained by the agency or the PPP.

_____

_____

_____

21. For each PPP project that you have identified, to the extent not discussed in response to question 9, have there been any federal or other tax issues concerning long-term leases and/or lease/purchase agreements?

YES __ NO __

If your answer is yes, what were the issues and how were they resolved? Please provide a copy of any contractual provisions developed by your agency or the PPP in respect to the issue or problem and/or any rulings by tax authorities.

_____

_____

_____

22. For each PPP project that you have identified, did the PPP involve transit-oriented development and/or joint development?

YES __ NO __

If your answer is yes, please state (a) the contractual amount or value of the development; (b) the private partner's investment or other contribution; (c) the federal funding, if any, for the development; and (d) whether the TOD or joint development has been or is being used to fund other transit capital improvements or expenses.

_____

_____

_____

23. If your agency was selected to participate in one of the three pilot projects authorized by SAFETEA-LU, please provide a copy of your agency's PPP pilot funding application and materials, along with any comments your agency has regarding the pilot program.

_____

_____

_____

24. Please describe your agency's approach to managing and administering a PPP (*e.g.*, a project manager, dedicated management team, outside specialists, project manual, periodic monitoring, the use of performance standards).

_____

_____

_____

25. Please identify any PPP transit project in the United States or abroad of which you are aware that you believe would be important for the Report to discuss.

_____

_____

_____

Thank you for your cooperation and for copies of contracts and other documents provided with your responses. As noted, please provide the copies by e-mail or on a disk and/or an Internet link if they are available on line.

Please return your completed survey <u>preferably via e-mail</u> to:

The Thomas Law Firm
ATTN: Larry W. Thomas
1701 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006
Tel. (202) 280-7769
<u>lwthomas@cox.net</u>

APPENDIX E—SUMMARY OF TRANSIT AGENCY RESPONSES TO THE SURVEY

1. Ten transit agencies responded to the survey that within the past 10 years their agency had used a PPP for the purpose of acquiring, improving, constructing, developing, operating, maintaining and/or financing an infrastructure project or used a PPP for TOD.

The City of Lacrosse Municipal Transit Utility reported that in 2010 it had used a PPP for the Grand River Station, a $30-million joint development project that included transit and housing, parking, and commercial space. The private partner was Gorman & Company, which has continued responsibility for leasing, operation, and maintenance.

The Transit Manager of the Connecticut DOT reported on a project now being initiated known as the Stamford Transit Oriented Development with the date of the project and identity of the private partner to be determined; however, there is a state commitment of $40 million for the project. The RFP indicates that the private partner would be committed to a 3-year contract with two 3-year renewable terms at the state's discretion.

The Director of Economic Development for DART stated that there had been one "borderline" PPP, a $6-million pedestrian project funded 80 percent by the FTA with a 20 percent local match that was shared 50 percent by the city and 50 percent by the developer.

The Milford Transit District in Milford, Connecticut, advised that the Westfield Shoppingtown, Inc., $525,000 project is "currently in design," and the private partner will be responsible for maintenance, trash collection, snow removal, utilities, and security.

New Jersey Transit has had two projects within the past 10 years. The first project, the $1-billion River Line Light Rail Project, opened in March 2004. The private partner Southern New Jersey Rail Group (Bombardier) has continued responsibility for operation and maintenance of the project. The second project, the Weehawken Ferry Terminal, which opened in May 2006, was a $44-million project for which the private partner, New York Waterway, is responsible for leasing and maintaining the terminal.

PVTA in Springfield, Massachusetts, reported that its HMTC project, a joint development transit center with educational office, classroom space, and café, was an $8.1-million project undertaken with HIF, LLC, as the private partner that has continued responsibility for leasing and operating the facility to tenants, including the PVTA.

SANDAG advised that it had one PPP—the $7.9-million Grossmont Trolley Station, for which the private partner was Fairfield Realty, which also has continued responsibility for the station.

SEPTA reported that it has had two PPPs in the past 10 years. One PPP was for the $2,200,000 SEPTA Wayside Energy Storage System, a project that included a unique combination of advanced energy storage and software technologies to recover excess train braking energy at a substation and store the energy for later use as train traction power. SEPTA reports that excess energy may be sold through the wholesale and regulatory markets. The private partner serves as an intermediary between the local electric utility company and SEPTA.

A second PPP project is still in the proposal stage, but a private partner will be selected to design, build, own, operate, maintain, and finance a combined heat and power plant on SEPTA's property. The private entity will finance the plant and sell electric power and heat to SEPTA under a long-term energy service agreement.

SARTA describes its PPP as "clean energy for the operation of a public compressed natural gas (CNG) facility." The private partner for the $1.6-million project, which opened in May 2011, was Clean Energy, which has continued responsibility for the maintenance of the facility.

TriMet of Oregon reported on a 2008 PPP for the Patten Park TOD, a mixed-use commercial/residential with low-income housing project that cost $15.5 million. The private partner, REACH Community Development, owns and operates the project.

2. Transit agencies having PPPs noted a variety of advantages and disadvantages of PPPs for infrastructure projects, TOD, or joint development.

Advantages included the following:

- The city was able to complete a large housing project downtown that increased the tax base (City of Lacrosse Municipal Transit Utility).
- There are shorter durations for the design and construction phases and sharing of risk with resulting benefits for the commuting public (Connecticut DOT).
- There may be no acquisition cost for land (Milford Transit District).
- The "sole sourcing of the architectural/engineering firm" for a project was reported to be an advantage (Milford Transit District).
- New Jersey Transit states that an advantage to its agency is the ability to use private sector management efficiencies with New Jersey Transit overseeing the project's and the public's goals.
- A PPP eliminates some ownership issues and costs, reduces the risks in developing a project, and maintains control of the design (PVTA).
- SEPTA states that PPPs simplified the procurement process by having the vendor procure the required equipment. For SEPTA's energy storage system project, "SEPTA receives energy savings [and] reduced expense with little upfront investment." For its combined heat and power plant project, the PPP simplifies the procurement process by having the private entity construct the plant without the requirements [being] placed on the public entity." Once more, "SEPTA expects to receive energy savings in reduced expenses with no upfront investment."
- For TriMet, its PPP TOD project allows TriMet to fully utilize TriMet-owned property in a manner that supports the transit district, with risk taken by a private developer. TriMet states that there were no disadvantages in using a PPP for its TOD project.

Disadvantages were:

- A PPP may be a lengthy, complicated project (City of Lacrosse Municipal Transit Utility).
- There is a need for confidentiality during the selection and negotiation process (Connecticut DOT).
- One agency reported that although its PPP project is currently in the design phase, thus far the insurance requirements are excessive (Milford Transit District).
- Another agency states that there is a disadvantage in that there is less control over the use and operation of a project (PVTA).

3. Transit agencies reported on the form of contracting that the agency had used for the delivery of its PPP project or projects.

No agency reported using simply a DB form of contracting for project delivery. Three agencies used a DBOM contract.[893] One agency used A+B contracting.[894] Four agencies used the CMGC form of contracting for project delivery.[895] SEPTA explained that it "used a Request for Qualifications procurement process and entered into a development agreement with REACH," the private partner that used a CMGC for construction. One agency used a design-build-operate-maintain-manage form of contracting,[896] whereas one used a design-build-manage contract for a PPP.[897]

Several agencies provided contracts and related documents.

4. Agencies also were asked whether they had used a method of contracting for a project that included financing to be arranged or provided in whole or in part by the private partner. SARTA stated that it had used DBFO form of contracting, whereas SEPTA stated that it had used the DBFO type of contracting in regard to "limited operations." Both the Connecticut DOT and SEPTA reported using the DBFOM form of contracting for a PPP, but the Connecticut DOT stated that its DBFOM contract "allows for" the DBFOT method of project delivery. TriMet explained that the developer used the DBFOM form of contracting as TriMet had transferred the property in question via a developer agreement. Finally, although the financing aspect was not discussed in its response, the PVTA reported that it used a design-build-lease method.

5. The transit agencies using PPPs were asked whether, in addition to any form of contract delivery that they previously identified in their responses, there was an umbrella agreement, memorandum of understanding, or other separate document between or among the PPP partners that set forth their obligations in respect to the PPP or the project.

Only a few agencies had additional agreements. However, one agency reporting having used a development agreement (City of Lacrosse Municipal Transit Utility); another agency had used an access and operations agreement (New Jersey Transit); another agency said it had separate agreements without further identifying them; and one agency had used an agreement for disposition and development of real property (TriMet).

6. Transit agencies were asked whether in evaluating a prospective project for a PPP the agency undertakes a VfM or other analysis of the project. Six agencies said that they did undertake such an evaluation,[898] with two agencies indicating that they do not[899] and two agencies not responding to the question.

As for the factors that the agencies are considering before proceeding with a PPP, the agencies state they evaluate or consider the following:

- One agency determines the useful life of the facility and ensures that it will be used as such for at least the determined useful life (Milford Transit District).
- New Jersey Transit states that it considers "[p]rice, past performance, customer service record and other factors."
- SEPTA states that it considers return on investment. Furthermore, "SEPTA's upfront cost outlay is primary factor"; however, SEPTA's response notes that the agency has not undertaken many PPPs. SEPTA

[893] Response of Connecticut DOT; New Jersey Transit; and SARTA.

[894] Response of PVTA.

[895] Responses of City of Lacrosse Municipal Transit Utility; Milford Transit Authority; Pioneer Valley Transit Authority; and SEPTA.

[896] Response of New Jersey Transit.

[897] Response of SEPTA.

[898] Responses of Lacrosse; Connecticut DOT; Milford Transit District; NJ Transit; SEPTA; and TriMet.

[899] Responses of PVTA and SARTA.

states that for another PPP, its "net present value" was determined on the return on investment and that "SEPTA's upfront cost outlay is a primary factor."

- SARTA considers the time lines for construction with penalties when time lines are not met.
- TriMet considers property value, increased ridership, and projected lease payments and sales price.

7. As for the key legal issues that should be addressed in the contract or contracts for a PPP project, the agencies reported:

Agencies should ensure a project's compliance with federal regulations (City of Lacrosse) and an "environmental planning approach [to allow] for transparency to prospective developers regarding mitigation" (Connecticut DOT). Milford Transit District noted that the parties' responsibilities should be defined and that the agreement should address public safety, for example, regarding site selection. Likewise, the PVTA advised that the contract should have a "very detailed description of responsibilities of each entity," allocations of cost, and an "accounting process showing how the private investment requirements are satisfied." The contract should contain provisions regarding liability insurance (SEPTA) and provide for penalties if the project is not completed on time (SARTA). The contract, in addition to addressing and meeting FTA requirements, should provide for appropriate remedies if a developer fails to perform its obligations (TriMet). Finally, New Jersey Transit stated that the key legal issues are "highly dependent" on the facts related to the project.

8. Only two agencies responded that they had encountered any real property or land use issues in connection with their PPP projects (e.g., for New Starts or other facilities, TOD, or joint development). PVTA stated that because zoning-required parking was not satisfied, a variance was required from the city. The owner had to obtain the approvals because the issue was not anticipated in the joint development agreement. The costs (legal and architectural fees) to the owner were used to satisfy its private investment requirement. TriMet explained that it encountered issues with zoning, relocation of tenants of a prior facility, and other encumbrances on the property, such as parking requirements.

9. No agency having had a PPP project in the past 10 years stated that it or its private partner(s) had any federal or other tax issues for PPP projects (e.g., issues relating to 63-20 corporations, the preservation of the status of tax-exempt debt, qualifying an issuance of bonds as tax exempt, private activity bonds or exempt facility bonds, certificates of participation, or long-term leases or lease/purchase agreements).

The PVTA did state that "PVTA issued [a] long-term lease at nominal cost given PVTA federal pass-thru funding to build [the] facility."

10. Six agencies reported that, for each PPP project that the agency identified in its response to the survey, the contractor was required to provide performance and payment bonds for the full amount or value of the applicable contracts under federal and/or state law.[900] SANDAG stated that neither bond was required. SEPTA stated that neither bond was required for one PPP project but also there was no request for a waiver or exception with respect to any bonds. As for its second PPP, SEPTA stated that the requirements have not been determined as of the time of its response, but a performance bond "most likely" will be required and there has been no request for a waiver or exception to any bond sought or required.

11 and 12. Transit agencies reported on whether they received a federal grant for the PPP project(s) identified in their responses, and, if so, (a) the type of grant; (b) the amount; and (c) the percentage of the project that was federally funded.

[900] Responses of Lacrosse; Connecticut DOT; Milford Transit District; NJ Transit (also stating that no waiver was requested); Pioneer Valley Transit Authority.

The City of Lacrosse Municipal Transit Utility received § 5309 capital grants in the amount of approximately $9 million, which was about 30 percent of the cost of the project. It appears that the local contribution was $11 million, or 70 percent, with TIF being the source of the funding.

Milford Transit District's PPP was funded 80 percent by the FTA and 20 percent by the State of Connecticut. The FTA capital grants were for the amounts of $41,000 and $494,000.

New Jersey Transit reported that for one PPP there was no federal funding but the other project received a "100% federal earmark grant."

PVTA received $4.4 million for its PPP project from the FTA, about 54.3 percent of the cost. PVTA explained that the federal grants required $1.1 million in Massachusetts grants and that the total local and state contribution to the project was $2.7 million.

Neither SANDAG nor SEPTA received a federal grant for their PPPs.

SARTA received $1.6 million in funds from the FTA and $500,000 in ARRA funding. The local match was 20 percent for the FTA funds and 49 percent for the ARRA funding.

TriMet's PPP received 60 percent of its funding from the FTA under a New Starts grant for the Interstate MAX Light Rail Project, with local government contributions providing the remaining 40 percent.

13. Agencies that have had PPPs in the past 10 years reported also on whether the private partner assumed responsibility for securing the insurance cover.

The City of Lacrosse Municipal Transit Utility stated that there had been no problems in working with the private developer to procure insurance, which included the coverage for the building and general liability with insurance for crime and directors' and officers' coverage along with an umbrella policy.

Other agencies reported that the private partner assumed responsibility for the insurance cover,[901] whereas the private partner did not do so with respect to other PPPs.[902] New Jersey Transit stated that the agency holds owner's insurance.[903] Milford Transit District also advised that the private partner did not assume the responsibility for insurance for the PPP. With respect to details regarding insurance, for the Milford Transit project the coverage included $10 million for commercial general liability, $1 million for products/completed operations liability, $1 million for advertising injury coverage, and $5 million for automobile liability, as well as statutory workers' compensation and $1 million for each occurrence, $1 million for each employee for employer's liability. PVTA's private partner assumed responsibility for insurance only for the building.[904]

14. As for revenue sharing with a private partner, three agencies reported sharing revenue;[905] three agencies reported that their PPPs did not involve revenue sharing.[906]

15. In regard to FTA approvals, TriMet reported it had encountered some issues or problems (e.g., delays in approvals, additional expense) because of the FTA grant approval process for New Starts (or other FTA funding programs) that affected the agency's use of PPPs. TriMet reported that "FTA concurrence" and the "cost of staff time" were issues. TriMet was the only agency that reported that it had encountered issues or problems with the process for environmental reviews that had affected the agency's use of PPPs. TriMet's response noted that NEPA review was required prior to the purchase of property for the project.

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[901] Responses of Connecticut DOT; SEPTA (stating that coverage included liability, pollution, worker's compensation, and automobile insurance); Stark Area Regional Transit Authority; and TriMet.

[902] Response of SANDAG.

[903] *See* NJ Transit contract for the Weehawken Ferry Terminal project that provides details on the insurance.

[904] *See* Response of PVTA, Joint Development Agreement in App. C for details.

[905] Responses of NJ Transit (Weehawken Ferry Terminal project); PVTA; and SEPTA.

[906] Responses of Lacrosse; NJ Transit (River Line Light Rail project); and Milford Transit District.

16. Only one agency, SEPTA, stated that the agency had agreed or would agree to an availability payment structure for a PPP project.[907]

17. As for whether an agency's state law permitted, encouraged, or restricted the agency's use of, or a private party's participation in, PPPs for infrastructure projects, TOD, or joint development, the Connecticut DOT advised that legislation had been amended to allow for such private participation. New Jersey Transit's response stated that New Jersey law encourages PPPs and allows the agency to enter into DBFOM contracts. SEPTA explained that "Pennsylvania's Guaranteed Energy Saving Act permits public entities to participate in PPPs by eliminating the need to meet the requirements of the State Separation Act."[908] The latter act "requires the use of multiple prime contractors when public entities undertake capital projects." However, TriMet observed that "changes in Oregon condemnation laws potentially restrict [the] ability to acquire property to be used in a PPP."[909]

18. Several agencies reported that their agency had not funded or financed a PPP with any of the following sources: qualified private activity bonds, non-qualified private activity bonds, exempt facility bonds, fare box revenue bonds, GANs, bonds issued by 63-20 nonprofit corporations, certificates of participation, TIFIA, a SIB, other bank financing, private investment/financing, TIF, assessment district funds, or development impact fees.[910] However, the Connecticut DOT noted that it was to be determined whether the above sources, with the exception of fare box revenue bonds and GANs, would be used for its prospective Stamford Transit Oriented Development project.

The City of Lacrosse Municipal Transit Utility reported using private investment/financing, as did the PVTA, the latter in the amount of $1 million. The City of Lacrosse Municipal Transit Utility also used TIF in the amount of $10 million.

As for other sources, the City of Lacrosse Municipal Transit Utility used Wisconsin Housing & Economic Development tax credits. For the Milford Transit District, the sources of funding for its PPP were the FTA and the State of Connecticut. The PVTA relied on state and FTA grants and "local land/property donations." Finally, for one project, SEPTA used a state grant, private funds, and SEPTA funds.

19. Several transit agencies have entered into a long-term lease for the operation or maintenance of the completed project.[911] The Connecticut DOT had not determined whether a lease will be involved in the Stamford Transit Oriented Development project.

20. Only New Jersey Transit reported that for one of its PPP projects, lease/purchase agreements had been used for rolling stock or other equipment, i.e., ticket vending machines for its Weehawken Ferry Terminal project with the contractor making the lease payments toward the purchase.

21. Agencies reported that there had not been any federal or other tax issues concerning long-term leases or lease/purchase agreements.

22. Four agencies had PPP projects that involved TOD or joint development.[912] The City of Lacrosse Municipal Transit Utility stated that the total value of the development was $30 million with $10 million from the private partner's investment or other contributions and $9 million from the FTA. Revenue from the leases will be used for operating and maintaining the facility. For PVTA, the total value of the development

[907] Response of SEPTA regarding Wayne Junction Combined Heat and Power Plant project.

[908] Response of SEPTA.

[909] Response of TriMet.

[910] Responses of NJ Transit; SANDAG; SEPTA (for one project); and SARTA.

[911] Responses of Lacrosse; Milford Transit District (*see* copy in App. C); NJ Transit (32-year lease for the Weehawken Ferry Terminal project); Pioneer Valley Transit Authority (*see* copy in App. C); SEPTA (5-year lease for one project and an anticipated 20-year lease for the second project); and SARTA.

[912] Responses of Lacrosse; PVTA; SANDAG; and TriMet.

was $8.1 million with $1 million from the private partner's investment or contribution and $4.4 million in federal funding. The development is not being used to fund other transit capital improvements or expenses. For TriMet's PPP project, the total value of the development was $15.5 million with $3.215 million secured through the sale of LIHTCs. There were no "direct federal funds" for the project. The development is not being used to fund other transit capital improvements or expenses.

23. [Omitted]

24. Agencies were asked about their agency's approach to managing and administering a PPP, for example, the use of a project manager, dedicated management team, outside specialists, project manual, periodic monitoring, and the use of performance standards.

The City of Lacrosse noted that its PPP was a public works project that included planning, engineering, and transit but that outside legal services were used for the development agreement. The Connecticut DOT identified the use of a project manager and "outside specialists." New Jersey Transit stated that its project management program is managed by New Jersey Transit and that it "follows all requirements of the FTA process. The program is managed with an eye toward providing good customer service with less reliance on the taxpayer." Milford Transit District also used a project manager for its PPP project. TriMet stated that it uses a project manager and utilizes support from the TriMet legal department and its engineering staff as needed.

25. As for any other PPP transit project in the United States that would be important to discuss in the digest, TriMet identified the San Francisco Transbay Transit Center.

APPENDIX F—TRANSIT AGENCIES RESPONDING TO THE SURVEY

Capital Area Transportation Authority (CATA), Lansing, MI
Central Arkansas Transit Authority (CATA), North Little Rock, AR
Centre Area Transportation Authority (CATA), State College, PA
City of Alexandria (Atrans), Alexandria, LA
City of Arcadia Transit (Arcadia Transit), Arcadia, CA
City of La Crosse Municipal Transit Utility (La Crosse MTU), La Crosse, WI
City of Montgomery-Montgomery Area Transit System (MATS), Montgomery, AL
City Utilities of Springfield (The Bus), Springfield, MO
Connecticut Department of Transportation (CDOT), Newington, CT
Cooperative Alliance for Seacoast Transportation (COAST), Dover, NH
Dallas Area Rapid Transit (DART), Dallas, TX
Decatur Public Transit System (DPTS), Decatur, IL
Fresno Area Express (FAX), Fresno, CA
Gary Public Transportation Corporation (GPTC), Gary, IN
Gold Coast Transit (GCT), Oxnard, CA
Greater Cleveland Regional Transit Authority (GCRTA), Cleveland, OH
Greater New Haven Transit District (GNHTD), Hamden, CT
Greater Portland Transit District (Metro), Portland, ME
Housatonic Area Regional Transit (HARTransit), Danbury, CT
Intercity Transit (I.T.), Olympia, WA
Kalamazoo Metro Transit System (Metro Transit), Kalamazoo, MI
Kanawha Valley Regional Transportation Authority (KVRTA), Charleston, WV
Lane Transit District (LTD), Eugene, OR
Luzerne County Transportation Authority (LCTA), Kingston, PA
Mass Transportation Agency (MTA), Flint, MI
Merrimack Valley Regional Transit Authority (MVRTA), Haverhill, MA
Metro-North Commuter Railroad Company, New York, NY
Milford Transit District (MTD), Milford, CT
Milwaukee County Transit System (MCTS), Milwaukee, WI
Montebello Bus Lines (MBL), Montebello, CA
Monterey-Salinas Transit (MST), Monterey, CA
MTA Bus Company (MTABUS), New York, NY
Muskegon Area Transit System (MATS), Muskegon, MI

New Orleans Regional Transit Authority (NORTA), New Orleans, LA
Niagara Frontier Transportation Authority (NFT Metro), Buffalo, NY
New Jersey Transit Corporation (NJTC), Newark, NJ
North County Transit District (NCTD), Oceanside, CA
Ohio Valley Regional Transportation Authority (OVRTA/EORTA), Wheeling, WV
Pierce County Transportation Benefit Area Authority (Pierce Transit), Tacoma, WA
Pine Bluff Transit (PBT), Pine Bluff, AR
Pioneer Valley Transit Authority (PVTA), Springfield, MA
Pueblo Transit System (PT), Pueblo, CO
Rhode Island Public Transit Authority (RIPTA), Providence, RI
Sacramento Regional Transit District (Sacramento RT), Sacramento, CA
Salem Area Mass Transit District (Cherriots), Salem, OR
San Diego Association of Governments, San Diego, CA
San Joaquin Regional Transit District (RTD), Stockton, CA
San Mateo County Transit District (SamTrans), San Carlos, CA
Seattle Center Monorail Transit (SMS), Seattle, WA
Southeastern Pennsylvania Transportation Authority (SEPTA), Philadelphia, PA
South Florida Regional Transportation Authority (Tri-Rail), Pompano Beach, FL
Southwest Ohio Regional Transit Authority (SORTA/Metro), Cincinnati, OH
Stark Area Regional Transit Authority (SARTA), Canton, OH
Toledo Area Regional Transit Authority (TARTA), Toledo, OH
Transit Authority of Omaha (Metro), Omaha, NE
Tri-County Metropolitan Transportation District of Oregon (TriMet), Portland, OR
Valley Regional Transit, Meridian, ID
Worcester Regional Transit Authority (WRTA), Worcester, MA
Yakima Transit (YT), Yakima, WA

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