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Going the Extra Mile: Expanding the Promoting Affordable Housing Near Transit Act

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COMMENTS

GOING THE EXTRA MILE: EXPANDING THE PROMOTING AFFORDABLE HOUSING NEAR TRANSIT ACT

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INTRODUCTION

The Promoting Affordable Housing Near Transit Act (“Act”), introduced in Congress in June 2021 and signed into law six months later, proposes a goal of balancing the disproportionately-high costs of housing and transportation felt by lower-income families by combining these resources in one project: transit-oriented housing developments.¹ Middle-income and wealthy suburbanites have ready access to cities by car, but lower-income urbanites lack access to the suburbs without a private vehicle. While the goal of the Act recognizes this disparate outcome, the Act’s failure to include expansion of mass transit into the suburbs will continue to restrict low-income minorities to urban centers, failing to do more than place a band-aid on a decades-long issue. As jobs increasingly move to the suburbs,² placing affordable housing in those areas and creating a transit option for urban dwellers offers a more equitable choice in housing for low-income households. The Act should be amended to require expansion of mass transportation into the suburbs, creating an interconnected system between cities, the suburbs, and suburban neighborhoods. The goal of this Comment is to take the techniques employed in two of the nation’s best transit cities and combine them with the affordability focus of the Act, leading to positive economic development that includes low-income households.

The issue of limited affordable housing is multidimensional, requiring a correspondingly complex solution for this historic problem. Thus, the focus of this Comment touches on just one problematic environment and one potential solution. This Comment uses major metropolitan cities and their surrounding suburbs as the basis of analysis, not to the exclusion of other localities but in recognition of the unsuitability of a one-size-fits-all solution.

It is also important to note here that while the focus of the divide in this Comment is on socioeconomic status and not race, the two are inextricably linked. The history of racial segregation in the United States contributes to the disparity between the racial

1. Promoting Affordable Housing Near Transit Act, H.R. 3680, 117th Cong. (2021) (enacted by incorporation in National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 2446 (2021)).

2. Aimee Picchi, *Suburban Flight? Hiring in Urban Centers is Trailing the Burbs*, CBS NEWS: MONEYWATCH, <https://www.cbsnews.com/news/suburban-flight-hiring-in-urban-centers-is-trailing-the-burbs/> [https://perma.cc/PQY3-QAQ5] (July 27, 2021, 3:37 PM).

makeup of the country and of its socioeconomic classes. As you will see, many of the facially socioeconomic decisions made in the last century act as a mask for racially motivated animus.³ While the examples and solutions provided in this Comment do not focus on the racial disparity in these developments, it must be understood that these implications always lurk beneath the surface.

Part I of this Comment will give a brief overview of the history of residential segregation in the United States and how transportation policies contributed to the concentration of poverty in one area, namely urban city centers. This historical overview focuses on mid-twentieth century America, specifically during the post-World War II era where housing subsidies became more abundant and, increasingly, a covert form of discrimination. This Part concludes by discussing why public transportation has failed to make its way to the suburbs and why its expansion into these areas is necessary for the Act's success.

Part II expounds upon the particulars of the Act and its proposed implementation in the current transportation and housing framework. Finally, Part III offers examples of successful transit-oriented development projects and suggestions of how expansion into the suburbs and multimodal transportation options can cement the Act's success. This Part proposes amending the Act to mandate that federal transit projects affected by the Act include transportation expansion into the suburbs. While the Act in its current form does not exclude the suburbs from transit development, neither does it set forth an objective to promote it. Because most mass transit exists in major metropolitan areas, the Act should demand inclusion of the suburbs in these new developments to help bridge the divide between urban and suburban communities. Lastly, this Part addresses critiques of current approaches to the housing shortage, such as mixed-income communities, and articulates why the proposals in this Comment can mitigate some of these concerns.

I. HISTORY OF THE URBAN/SUBURBAN DIVIDE

Federal transportation policies have historically paved the way for residential segregation throughout the country, both literally and figuratively. Even after explicit forms of segregation were

3. See *infra* Part I.

outlawed, the government and private industries continuously evolved to implement less formal, indirect forms of separation.⁴ Transportation and residential segregation began to rapidly intersect in post-World War II America—when industries were bustling, and the expansion of the automobile provided a new “vehicle” for segregation.⁵

The invention of the automobile brought with it the massive expansion of the nation’s highways.⁶ The federal government funneled significant amounts of money toward the highway system, promoting independent vehicle use to the detriment of major public transit.⁷ Rather than boosting efforts to match or beat the competition from the auto industry, transit agencies across the country cut services.⁸ The focus on the single-car household drew resources away from cities and into the emerging suburbs as middle-class and wealthy White families migrated out of the cities.⁹ Federal highways replaced racial zoning boundaries, providing a physical barrier between Black and White neighborhoods.¹⁰ The intent was to stunt integration in housing without running afoul of newly decided caselaw outlawing discriminatory zoning policies.¹¹

The Levittown development was one of the first mass-produced suburbs in the United States.¹² The development served a primary role in the post-war suburban shift, proving the efficiency of the automobile and the possibility of homeownership, even for aver-

4. See Noel King, *A Brief History of How Racism Shaped Interstate Highways*, NPR (Apr. 7, 2021, 5:02 AM), <https://www.npr.org/2021/04/07/984784455/a-brief-history-of-how-racism-shaped-interstate-highways> [<https://perma.cc/L4PD-UNJY>].

5. See Farrell Evans, *How Interstate Highways Guttied Communities - and Reinforced Segregation*, HISTORY (Oct. 20, 2021), <https://www.history.com/news/interstate-highway-system-infrastructure-construction-segregation> [<https://perma.cc/AK5V-GCMK>].

6. Colin Fiske, *The Interstate Highway System and the Spread of Car Dominance Across the Country*, NORTHCOAST ENV'T CTR.: ECO NEWS (Nov. 29, 2022), <https://www.your-nec.org/the-interstate-highway-system-and-the-spread-of-car-dominance-across-the-country/> [<https://perma.cc/FR5W-VFR3>].

7. See Arthur C. Nelson, *Transit-Oriented Developments Make a Difference in Job Location*, 44 FORDHAM URB. L.J. 1079, 1081 (2017).

8. See Jonathan English, *Why Did America Give Up on Mass Transit? (Don't Blame Cars.)*, BLOOMBERG (Aug. 31, 2018, 11:38 AM), <https://www.bloomberg.com/news/features/2018-08-31/why-is-american-mass-transit-so-bad-it-s-a-long-story> [<https://perma.cc/7MXG-2J8E>].

9. Michael Swistara, *A Fare Share: A Proposed Solution to Address the Racial Disparity in Access to Public Transportation Funding in America*, 26 MICH. J. RACE & L. 521, 528–29 (2021).

10. King, *supra* note 4.

11. See *id.*

12. English, *supra* note 8.

age-wage earning households.¹³ This did not, of course, include average- or low-wage minority households.¹⁴ Located on Long Island in New York, Levittown sat largely isolated from the city except for access by car.¹⁵ Even for those minority households that could afford a car, racially restrictive covenants forbid the sale of suburban homes to non-Whites.¹⁶ The Levittown neighborhood is emblematic of the continued socioeconomic divide seen today. Despite segregation's ceremonial end after the signing of the Civil Rights Act of 1964,¹⁷ the spillover effects of these systemic policies continue to shape our communities.

The rise in popularity of the automobile and the passage of the Interstate Highway Act fueled anti-integration sentiment by providing an easily accessible path for white flight into the suburbs.¹⁸ By design, suburbs are far less dense than urban areas.¹⁹ Due to a lack of density, private transit companies refused to extend lines into the suburbs where ridership would likely not offset the cost of expansion.²⁰ While financially reasonable, the absence of transit in the suburbs created a distinct divide between racial and socioeconomic groups.²¹ The difference in housing assistance paid to low-income minority families compared to low-income White families furthered this disparity.²² A prime example is the Home Owners'

13. *Id.*

14. *Id.*

15. *Id.*

16. Swistara, *supra* note 9, at 528. Restrictive covenants are those in real estate deeds that limit the sale and use of the property. *Id.* In the 1950s and 1960s, racially-restrictive covenants grew in prominence as a way of maintaining homogenous, White suburbs. *1948–1968: Unenforceable Restrictive Covenants*, FAIR HOUS. CTR. OF GREATER BOS., <https://www.bostonfairhousing.org/timeline/1948-1968-Unenforceable-Restrictive-Covenants.html> [<https://perma.cc/WJ88-ARND>].

17. *Segregation in the United States*, HISTORY, <https://www.history.com/topics/black-history/segregation-united-states> [<https://perma.cc/AGK5-NV87>] (Jan. 12, 2023).

18. English, *supra* note 8.

19. Richard Florida, *How Should We Define the Suburbs?*, BLOOMBERG (June 12, 2019, 7:00 AM), <https://www.bloomberg.com/news/articles/2019-06-12/why-we-need-a-standard-definition-of-the-suburbs> [<https://perma.cc/JLW7-WBDT>].

20. English, *supra* note 8.

21. NPR: Weekend Edition Sunday, *City Versus Suburb a Long-Standing Divide in Detroit*, NPR (Mar. 9, 2014, 8:00 AM), <https://www.npr.org/2014/03/09/287877060/city-versus-suburb-a-longstanding-divide-in-detroit> [<https://perma.cc/S5HA-XZLA>] (discussing the long-term racial divide in Detroit, Michigan marked by transportation, notably 8 Mile road).

22. Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america> [<https://perma.cc/87LP-7FBL>]; John Ellington, Yamiche Alcindor & Agustin Armendariz, *Program to Spur Low-Income Housing Is Keeping Cities Segregated*, N.Y. TIMES (July 2, 2017), <https://www.nytimes.com/2017/07/02>

Loan Corporation (“HOLC”) which exclusively granted low interest mortgage loans to Whites in “white areas.”²³ Minority households, on the other hand, were relegated to decrepit housing projects in the inner cities.²⁴ The HOLC led to the creation of redlining maps, one of the most well-known residential segregation tactics employed by the federal government.²⁵ For lower-income households who could not afford a car, suburban life was out of reach. Approximately seventy-four percent of neighborhoods labeled “[h]azardous” by the HOLC more than half a century ago remain low-to-moderate income and majority-minority neighborhoods to this day.²⁶

The national recommendation for an average household’s monthly housing and transportation expenses is forty-five percent of the household’s income.²⁷ Low-income households in the U.S. may spend sixty percent of their monthly income on housing and transportation costs combined.²⁸ This means over half of what these households take home goes to “necessities,” not including the cost of food, clothing, or childcare for families with children. The high cost of living for low-income families creates a large constraint on their freedom of choice, both in housing and work.²⁹

Mass transit plays an integral role in connecting low-income households with opportunities for work.³⁰ The gap between where

/us/federal-housing-assistance-urban-racial-divides.html [https://perma.cc/YJS7-F5QL] (explaining how state discretion in using federal tax credits continues to relegate federally funded affordable housing in high crime, low poverty, and majority-minority neighborhoods).

23. See Bruce Mitchell & Juan Franco, *HOLC “Redlining” Maps: The Persistent Structure of Segregation and Economic Inequality*, NAT’L CMTY. REINVESTMENT COAL. (Mar. 20, 2018), <https://ncrc.org/holc/> [https://perma.cc/6FLA-E22H].

24. *Id.*

25. See *id.* Redlining maps were formally known as “Residential Security” maps. *Id.* The purpose of these maps was to establish areas that posed the highest and lowest risk for mortgage lenders. *Id.* While high-risk areas were labeled red and low risk labeled green, the real colors beneath the surface were Black and White. *Id.* Black neighborhoods were consistently labeled as the highest risk, making it difficult if not impossible for Black citizens to get a mortgage. *Id.* While redlining maps are no longer in use, their effects perpetuate today as descendants of those Black families are unable to benefit from the generational wealth that often results from homeownership. *Id.*

26. *Id.*

27. Rachel D. Godsil & Sarah E. Waldeck, *Home Equity: Rethinking Race and Federal Housing Policy*, 98 DEN. L. REV. 523, 561 (2021).

28. *Id.*

29. *Id.* at 564.

30. *The Unequal Commute: Examining Inequities in Four Metro Areas’ Transportation Systems*, URBAN INST. (Oct. 6, 2020), <https://www.urban.org/features/unequal-commute> [https://perma.cc/8LPD-P48Q] [hereinafter *The Unequal Commute*]. The Author would like

employees live and where jobs are located is called “spatial mismatch,” which disproportionately affects employment outcomes for low-income households.³¹ A 2015 map of Dallas, Texas showed significant growth in low-wage jobs located twenty-five miles outside of downtown Dallas.³² Key employers were the major companies Toyota and Ikea, whose corporate headquarters relocated outside of the center city.³³ The cost of transportation between downtown, where most low-income workers lived, and these low-wage jobs came in the form of a two-hour public transit commute or a forty-five minute car ride.³⁴ Toll fees for this drive ranged from \$175 to \$3,289 per year.³⁵ Even for the households that can afford a car, rising gas prices, the cost of car maintenance, and the cost of the toll may be too high to make the commute affordable. An additional study showed that housing closer to these jobs was also not affordable using the national forty-five percent income recommendation.³⁶

Since the start of the COVID-19 pandemic in 2020, employment recovery and opportunity in the suburbs has surpassed that of urban centers.³⁷ As more people began working from home and the demand for goods and services moved to the suburbs, so did the opportunity to make a profit.³⁸ Many businesses moved their operations into the suburbs to follow that demand.³⁹ Research shows that this shift to the suburbs has continued to impact minority workers more than White workers, with White unemployment rates standing at 5.4% while Black unemployment rates stand at 9.4%.⁴⁰ Additionally, jobs traditionally held by lower-income

to point out that this study addresses issues of spatial mismatch in cities and suburbs due to lack of transit between low-income residents of urban areas to suburban jobs, as well as low-income suburban residents to urban jobs. While the basis of this Comment focuses on the former, the latter is equally as apparent and can benefit equally as much from the solution this Comment puts forth. The core of the problem is a lack of transit between the two areas which can be addressed by this proposal.

31. Earlene K.P. Dowell, *Job Sprawl Results in Unemployment for Low-Income Urban Residents*, U.S. CENSUS BUREAU (Mar. 4, 2020), <https://www.census.gov/library/stories/2020/03/spatial-mismatch-when-workers-can-not-get-to-jobs-in-suburbs.html> [<https://perma.cc/C2WM-B4RM>].

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Picchi, *supra* note 2.

38. *See id.*

39. *Id.*

40. *Id.*

workers, such as service-industry positions, have seen higher growth rates in the suburbs than those in downtown areas.⁴¹ For example, suburban service wages in New York City have increased by seventeen percent since early 2020 while downtown service wages have only increased by eight percent.⁴² With low-income workers less likely to own a car and more likely to live in downtown areas, the absence of a transit option into the suburbs continues to limit low-income, minority access to growth.

Transit-oriented developments (“TODs”) are “the creation of compact, walkable, pedestrian-oriented, mixed-use communities centered around high quality train systems.”⁴³ Some of the goals of TODs are a reduction in vehicle dependency, access to better jobs, revitalization of urban neighborhoods, and connection of urban and suburban areas.⁴⁴ TODs rose in popularity in the U.S. in the late 1990s and early 2000s, but these developments have really garnered public appeal in the last decade.⁴⁵ Notwithstanding its more recent popularity and proven success in neighborhood revitalization, the image of TOD America is not always so positive.

A 2010 study found that TODs in several large cities resulted in those developments becoming less affordable.⁴⁶ This is due in part to a lack of collaboration between the housing and transportation sectors.⁴⁷ When TODs reinvigorate a neighborhood, the disconnect between need and want becomes most apparent. Households with the highest need and actual use of public transit are those making the least amount of money.⁴⁸ However, TOD transformations that lack consideration of housing needs lead to skyrocketing real estate

41. *Id.*

42. *Id.*

43. *Home Page*, TRANSIT ORIENTED DEV. INST., <http://www.tod.org/> [<https://perma.cc/3PTN-KE5W>].

44. *Id.*

45. *See* Nelson, *supra* note 7, at 1084–85.

46. Anita M. Cozart, *Transportation Matters: Closing the Chasm Between Housing and Transportation to Foster Communities of Opportunity for All*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 219, 223–24 (2017).

47. *See id.*

48. *See* Monica Anderson, *Who Relies on Public Transit in the U.S.*, PEW RSCH. CTR. (Apr. 7, 2016), <https://www.pewresearch.org/fact-tank/2016/04/07/who-relies-on-public-transit-in-the-u-s/> [<https://perma.cc/YXV2-J5FC>] (stating that people “who are lower-income, [B]lack or Hispanic, immigrants or under [fifty-years-old] are especially likely to use public transportation on a regular basis. . . .”); *The Unequal Commute*, *supra* note 30 (“[O]ver 790,000 late-shift workers, who are disproportionately low-income people of color, rely on public transportation to get to work but have far fewer options.”).

prices and the eventual displacement of low-income households.⁴⁹ The Atlanta Beltline project exemplifies this issue—with housing costs in the area increasing by twenty-three percent for condominiums and eleven percent for single-family homes in just one year.⁵⁰ Increasing housing costs not only lead to displacement, they also contribute to job inaccessibility.

One study found that approximately seventy-five percent of low- and middle-skill jobs could not be accessed by a one-way, ninety-minute commute.⁵¹ This sheds light on yet another outrageous cost for low-income households: time. An inability to live in affordable housing near transit or affordable housing near work puts an additional burden on employers to retain employees and for employees to retain employment.⁵² The increasingly dispersed locations of jobs increases the burden on lower-income households, especially given the inadequacy of public transit to reach those locations.⁵³ As the COVID-19 pandemic has shown, the human workforce is invaluable. When employees cannot make it to work, production and efficiency slows, and consumers and employers alike feel that burden.

II. PROMOTING AFFORDABLE HOUSING NEAR TRANSIT ACT: HOW IT WORKS

The Promoting Affordable Housing Near Transit Act was introduced in Congress on June 1, 2021.⁵⁴ Previously, when government funded transit projects had unutilized land at the end of a project, that land could be transferred to a local government to use for a public purpose.⁵⁵ Unfortunately, local governments do not always have the budget or expertise to implement a public project in that space, leaving valuable land vacant.⁵⁶ Additionally, local planning

49. Cozart, *supra* note 46, at 223–24.

50. *Id.* at 224.

51. *Id.* at 222.

52. *See id.* at 222–23.

53. FED. TRANSIT ADMIN., FTA NO. 0030, TRANSPORTATION NEEDS OF DISADVANTAGED POPULATIONS: WHERE, WHEN, AND HOW? (2013), https://www.transit.dot.gov/sites/fta.dot.gov/v/files/FTA_Report_No._0030.pdf [<https://perma.cc/9NWL-BZGW>].

54. Promoting Affordable Housing Near Transit Act, H.R. 3680, 117th Cong. (2021).

55. *Summary: Promoting Affordable Housing Near Transit Act*, ADAM SMITH: WASH. 9TH DIST., https://adamsmith.house.gov/_cache/files/0/b/0bc83dd3-675c-472b-8326-904fc3b01e2b/7270FD642DEF512CDDABDE5092F4C67C.tod-bill-fact-sheet-v2.pdf [<https://perma.cc/TB8Z-QEMX>].

56. *Id.*

commissions are subject to aggressive lobbying by NIMBY activists who block development initiatives.⁵⁷ The Act expanded the class of parties eligible to receive this land, at no cost, with an explicit purpose of building affordable housing.⁵⁸

The basics of the Act are as follows: upon completion of a transit project funded by the federal government, the Secretary of Transportation reviews and makes a determination on: (1) whether a nonprofit or other third-party organization has a sufficient history of developing affordable housing; (2) whether the subject land is necessary for use in a TOD; and (3) whether the TOD will increase ridership.⁵⁹

Additionally, the Act requires that, for thirty years, forty percent of the units of each project must be designated for renters whose income falls under sixty percent of the area's median income.⁶⁰ Of that forty percent, twenty percent must be reserved for those falling under thirty percent of the area's median income.⁶¹ This further addresses concerns that affordable housing near transit inevitably attracts higher earning households with less need for transit, displacing lower income households whose financial stability depends on public transportation.⁶² The thirty year requirement reduces the possibility of displacement by market demand by setting aside almost half of the units for lower earning households for three decades.

57. Georgina McNee & Dorina Pojani, *NIMBYism as a Barrier to Housing and Social Mix in San Francisco*, 37 J. HOUS. & BUILT ENV'T. 553, 569–70 (2022). NIMBY stands for “Not In My Backyard,” a hostile anti-development movement that has plagued suburbs since their inception. *Id.* at 553, 555. NIMBY advocates promote the exclusivity and conformity of White, upper-middle class neighborhoods against the introduction of disruptive (read low-income and minority) developments in traditional suburbs. *Id.* at 555. These developments often include public housing, group homes, and other government funded residential uses. With respect to affordable housing proposals in particular, NIMBY supporters have vilified potential residents as “freeloaders, anti-social, and . . . criminal.” *Id.* NIMBYism plays a powerful and domineering role in progressive residential and environmental developments and proponents of the movement are often the most influential voices at community planning meetings. *See id.*

58. H.R. 3680, *supra* note 54.

59. *Id.*

60. *Id.*

61. *Id.*

62. Godsil & Waldeck, *supra* note 27, at 555–56.

III. CLOSING THE DIVIDE

It is unsurprising that jobs in cities are more accessible by transit than those in the suburbs.⁶³ It has been established that transit-users are predominantly those in lower-income households due to the high cost of car ownership.⁶⁴ This leads to concentrated pockets of lower-income households in the cities, with little opportunity for those households to move to jobs in the suburbs.⁶⁵ Even when affordable housing is available in the suburbs, the lack of connectivity among neighborhoods and downtown areas leads to higher transportation costs which cannot be offset by lower rent.⁶⁶ In the Sections that follow, this Comment will describe several successful TODs in two of the nation's most successful transportation cities. Following this overview, the Author will suggest how these local solutions, supplemented in the current framework of the Act, can ease the burden of transportation costs for low-income households, decentralize poverty, and accelerate economic and social growth in the suburbs.

A. *Models for Success*

Several localities across the country have implemented some form of TOD with considerable success. Of note are two metropolitan areas—Denver, Colorado, and Portland, Oregon. These projects make three contributions to the TOD model this Comment focuses on: real estate development, growing public-private partnerships, and community connection.⁶⁷ The success of these projects is not necessarily based on their affordability models, but rather their ability to create an attractive model for community buy-in as well as increasing ridership. In the following paragraphs, this Comment describes the general layout of each development and

63. Cozart, *supra* note 46, at 222.

64. Yonah Freemark, *Expanding Federal Transit Operations Funding Could Help Achieve Equitable Access to Public Transportation*, URB. INST. (Aug. 26, 2021), <https://www.urban.org/urban-wire/expanding-federal-transit-operations-funding-could-help-achieve-equitable-access-public-transportation> [<https://perma.cc/PAS2-KBJM>].

65. Dowell, *supra* note 31.

66. Godsil & Waldeck, *supra* note 27, at 564–65.

67. John Karras, *How Your City Can Succeed in Transit Oriented Development*, URB. SCALE (Mar. 11, 2014), <http://urbanscale.com/blog/how-your-city-can-succeed-in-transit-oriented-development/> [<https://perma.cc/E4H2-E85F>].

pinpoints key elements for use in a more universal plan for equal access.

1. Denver

Denver, Colorado has been a leader in expanding transit since the early 2000s. In 2004, the city began a massive overhaul of its transit system in pursuit of its FasTracks program.⁶⁸ The FasTracks program is Denver's multi-billion dollar project dedicated to building out the city's transit system by expanding existing rail and bus routes.⁶⁹ The Denver Regional Transportation District ("RTD") radiates from its central transportation hub, Denver Union Station ("DUS"), through dozens of suburbs across twelve light rail lines.⁷⁰ RTD also includes a rapid bus system servicing communities from Denver to Boulder.⁷¹ Between 2005 and 2019, RTD stations were linked to twenty-five percent of multifamily developments and thirty-one percent of office developments.⁷² These numbers exclude developments from the major hubs of DUS, downtown Denver, and Boulder.⁷³

Like many TOD projects, revenue generation from increased market prices are a main motivating factor and selling point for FasTracks.⁷⁴ This should not be surprising, given the wide range of entities who must buy into the project to make it possible. To see the commercial success of Denver's TOD program, one need look no further than Old Town Arvada, where a new transit line opening connected this growing suburb to downtown Denver.⁷⁵ The city's goal was to build density around the transit line, creating

68. *Id.*

69. *Id.*

70. *Thinking Big to Develop a Growing Region: Mass Transit on the Fast Track*, METRO DENVER EDC, <https://www.metrodenver.org/do-business/transportation-and-infrastructure/mass-transit> [<https://perma.cc/FBW9-TAP7>].

71. *Id.*

72. REG'L TRANSP. DIST., 2020 TOD STATUS REPORT, <https://www.rtd-denver.com/sites/default/files/files/2021-02/2020-TOD-Status-Report.pdf> [<https://perma.cc/7VNH-DC89>].

73. *Id.*

74. See REG'L TRANSP. DIST., *FASTRACKS PLAN FOR TRANSIT SERVICE AND FACILITIES IN DENVER METROPOLITAN REGION*, at ES-8-9 (2004), https://www3.drcog.org/documents/archive/2004_FasTracks_Plan.pdf [<https://perma.cc/258E-5UNE>]. The original 2004 Plan states the creation of jobs and stimulation of regional economic activity as support for the FasTracks program. *Id.* at ES-8 to ES-9, ES-11.

75. Patrick Sisson, *Can Commuter Rail Save Our Suburbs?*, CURBED (Oct. 8, 2019, 8:00 AM), <https://archive.curbed.com/2019/10/8/20897153/train-transit-real-estate-development-suburbs> [<https://perma.cc/D8ZC-GEJA>].

accessibility to jobs and a more walkable environment.⁷⁶ Since the introduction of this expanded rail line, Arvada sales tax revenue grew seventy-five percent from 2013 to 2018.⁷⁷ A large piece of that revenue arrived before the project was completed, as entrepreneurs introduced new businesses in anticipation of the new line.⁷⁸ Not only does the rail expansion create access to jobs throughout the region, the expansion also facilitates job creation in the many businesses surrounding the stations.⁷⁹ If expanding transit into the suburbs is possible and profitable, making a protected place for low-income households in these areas allows everyone to benefit from this growth. Unfortunately, creating that place is an area where RTD can significantly improve.

While Denver's multistage project placed affordability directly in its 2010 Strategic Plan for Transit Oriented Development, implementation of a more concrete affordability policy had yet to come to realization as recently as January 2021.⁸⁰ In RTD's 2010 Strategic Plan, the department took guidance from the Partnership for Sustainable Communities ("Partnership"), a federal-level coalition working towards creating accessible, affordable, and sustainable communities nationwide.⁸¹ This coalition includes the Department of Transportation ("DOT"), the Environmental Protection Agency ("EPA"), and the Department of Housing and Urban Development ("HUD").⁸² The Partnership urges promotion of affordable housing and economic competitiveness through expansions of mass-transit and TODs that link housing and employment.⁸³ Despite mentioning these forward-thinking initiatives over a decade ago, it was not until February 2021 that RTD supple-

76. *See id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. REG'L TRANSP. DIST., REVISION 2, STRATEGIC PLAN FOR TRANSIT ORIENTED DEVELOPMENT 2-2 to -3 (2009), <https://www.rtd-denver.com/sites/default/files/files/2019-08/rtd-tod-fastracks-strategic-plan-2010.pdf> [<https://perma.cc/8F6T-VDEZ>] [hereinafter 2010 STRATEGIC PLAN]; CHESSY BRADY, REG'L TRANSP. DIST., EQUITABLE TRANSIT ORIENTED DEVELOPMENT (TOD) POLICY 40 (2021), <https://www.rtd-denver.com/sites/default/files/files/2021-03/eTOD-Presentation-and-Policy.pdf> [<https://perma.cc/4TCG-HYR3>] [hereinafter EQUITABLE TOD POLICY].

81. 2010 STRATEGIC PLAN, *supra* note 80, at 2-2 to -3.

82. *Id.* at 2-2.

83. *Id.* at 2-2 to -3.

mented its affordability plan through approval of the Equitable Transit-Oriented Development Policy (“Policy”).⁸⁴

The Policy recognizes the region’s lack of low-cost housing, the importance of transit for low-income households, and the FasTracks program’s capacity to improve both.⁸⁵ The Policy proposes implementing affordability restrictions on either a per-project, per-station, or portfolio-wide basis.⁸⁶ Projections for the Policy show an aspirational goal of making thirty-five percent of all RTD residential units affordable for low-income households over the next ten years.⁸⁷ Affordability will be measured by state and local reports of the area median income of each locality.⁸⁸ Authors of the Policy point to Colorado Revised Statute (“CRS”) sections 32-9-102 and 32-9-119(1)(h) as proof of RTD’s responsibility to “promote the public, health, safety, convenience, economy, and welfare of the residents” and its statutory authority to do so through the “purchase, trade, [and] exchange . . . of real property.”⁸⁹ The authors of the Policy further criticized the 2010 Strategic Plan for failing to create incentives or remove barriers to achieve this goal.⁹⁰

One issue the Policy notes as a barrier to affordable housing development is the cost of land.⁹¹ The Policy proposes price reductions for developers committed to building affordable housing.⁹² In a presentation on the Policy, TOD Manager Chessy Brady looked to peer developments in similar cities to see how other localities found compromises to this issue.⁹³ Those comparisons showed a variety of solutions,⁹⁴ including two that appear most similar to the proposed incentives plan included in RTD’s Policy.

84. *See id.*; EQUITABLE TOD POLICY, *supra* note 80, at 38; *see also* EQUITABLE TRANSIT ORIENTED DEVELOPMENT (TOD) CENTERS ANTI-DISPLACEMENT, STRONG, PROSPEROUS, AND RESILIENT COMMUNITIES CHALLENGE, 2-3 (2021), https://www.sparcchub.org/wp-content/uploads/2021/09/1_SPARCC_ETOD-Centers-Anti-Displacement.pdf [<https://perma.cc/66FU-Z73A>] (providing examples of similar equitable TOD initiatives in Chicago, Illinois, San Jose, California, and Atlanta, Georgia).

85. *See* EQUITABLE TOD POLICY, *supra* note 80, at 37–38.

86. *Id.* at 42.

87. *Id.* at 45.

88. *Id.* at 34.

89. *Id.* at 33; COLO. REV. STAT. §§ 32-9-102, 119(1)(h) (2022).

90. EQUITABLE TOD POLICY, *supra* note 80, at 34.

91. *Id.* at 50.

92. *Id.* at 32 (citing attached Board of Directors Report).

93. *Id.* at 42–43.

94. *Id.*

In San Francisco's Bay Area Rapid Transit ("BART") system, developers of projects with thirty-five percent affordable housing receive discounts on that property.⁹⁵ Affordability for the BART discount means housing in the range of ten-to-sixty percent of the area median income ("AMI").⁹⁶ AMI is a common metric for determining affordability, including in the Act.⁹⁷ The Los Angeles Metro system similarly discounts property for developers based on the percentage of affordable units in the development.⁹⁸ While RTD does not commit to blanket developer discounts, it does propose purchase price and rent reductions on a project-by-project basis.⁹⁹ This Policy provides an ideal of public-private partnership that harnesses the considerable financial benefits generated by the Denver TOD model as support for inclusion of lower-income households in this period of growth. Over a year after the Policy was adopted, public records have not been updated with any definitive outcomes of the Policy's implementation.

RTD's system differs from other cities in its extensive commitment to providing significant, sustainable transit access to suburban neighborhoods. In RTD's 2014 Transit Oriented Development Strategic Plan, the agency recognized the difference in creating TODs in the suburbs given the lack of density and greater levels of car ownership.¹⁰⁰ To accommodate these differences, RTD suburban TODs focus on park-and-ride centers with an associated bus transfer center.¹⁰¹ This change to the TOD model creates parking for the influx of commuters during the work week as they take transit downtown.¹⁰² Additionally, these parking reservoirs act as a resource for car owners on weekends to access the many retail offerings at the station's center.¹⁰³

For non-car owners, the bus transfer centers provide access between suburban neighborhoods that are more auto-oriented while

95. *Id.* at 42.

96. *Id.* at 43.

97. *Id.* at 34, 42.

98. *Id.* at 43.

99. *Id.* at 34.

100. CITY OF DENVER, TRANSIT ORIENTED DENVER: TRANSIT ORIENTED DEVELOPMENT STRATEGIC PLAN 2-11 (2014), https://www.denvergov.org/content/dam/denvergov/Portals/193/documents/TOD_Plan/TOD_Strategic_Plan_FINAL.pdf [<https://perma.cc/V2JF-7VVV>] [hereinafter 2014 STRATEGIC PLAN].

101. *Id.* at 29

102. *Id.*

103. *Id.* at 28–29

also being conveniently located next to a major rail line. This allows lower-income households to live further from the actual station while still maintaining access or, alternatively, it allows these households to live closer to transit but work farther from home. Creating this equally transit-stable environment requires confidence in a rapid bus service, which is not always a guarantee. Further exploration into how to improve reliance and speed of suburban bus lines should be considered to ensure these developments, such as that in Arvada, cater to all income levels. The accessibility gap between households with cars and those without stands in the way of equitable TODs. Solutions to that gap must ensure TODs account for these different needs.

2. Portland

As the name suggests, Portland, Oregon's TriMet system relies on a trio of transportation methods: light rail, commuter rail, and buses.¹⁰⁴ Routinely ranked one of the best transit cities in the country,¹⁰⁵ Portland acts as a model for many up-and-coming transit systems. What makes Portland transit so great? Speed, reliability, and size. Although not as large as New York City or Los Angeles, Portland's ridership rivals many of these major metropolitan cities.¹⁰⁶ Transit planner and public transportation advocate, Christof Spieler, cites TriMet's fifteen-minute frequency service, a motto touted by the agency, as a large reason why transit ridership is so high.¹⁰⁷ Another source of praise comes for TriMet's aerial tram.¹⁰⁸

104. *About TriMet*, TRIMET, <https://trimet.org/about/index.htm> [<https://perma.cc/3X YR-RRQG>].

105. *10 Cities With the Best Public Transportation and What Transit Planners Can Learn From Them*, REMIX (Mar. 22, 2021), <https://www.remix.com/blog/10-cities-with-the-best-public-transportation> [<https://perma.cc/2LV7-GMMA>] (ranking Portland as the tenth-best transit city in the U.S.); Graham Rapier, *Seattle Has the Best Public Transportation in the United States, According to a New Study. Here's How Other Cities Compare*, BUS. INSIDER (Sept. 12, 2019, 8:43 AM), <https://www.businessinsider.com/best-us-cities-for-public-transportation-ranked-wallethub-study-2019-9#10-portland-oregon-1> [<https://perma.cc/A8FH-XJXZ>] (ranking Portland as the tenth-best transit city in the U.S.); Jay Walljasper, *The 13 Best U.S. Cities for Public Transit*, SHAREABLE (Apr. 11, 2011), <https://www.shareable.net/the-13-best-u-s-cities-for-public-transit/> [<https://perma.cc/N5Y2-CZYR>] (ranking Portland as the first-best transit city in the U.S. ahead of New York City, Boston, Massachusetts, and Los Angeles, California).

106. *See generally supra* note 105 and accompanying text.

107. John Notarianni, *How Portland Public Transit Compares to Other US Cities*, OPB (Dec. 19, 2018, 7:15 PM), <https://www.opb.org/news/article/portland-public-transit-comparison-christof-spieler/> [<https://perma.cc/C3KX-WES7>].

108. *Id.*

This form of transit creates a connection between those short distances that are too far to walk or bike.¹⁰⁹ In a distance that makes car ownership appear ideal, Portland fills that space with public transit.

Portland's impressive Metropolitan Area Express ("MAX") light rail system and bus lines both boast impressive fifteen-minute frequencies, but it is their interconnected system that is TriMet's biggest asset. With an extensive rail system throughout the city and connection to several transportation hubs in nearby suburbs, the bus lines pick up where the rail line ends. The bus lines extend the reach of Portland transit to nearby neighborhoods.¹¹⁰ Not only do Portland buses make stops in several suburban areas, but the buses are also very bike-friendly,¹¹¹ allowing for yet another mode of transportation to connect riders in those smaller stretches between stops.

Perhaps even more appealing is TriMet's commitment to equitable access in their administration of the TOD program. TriMet's two ongoing developments, Fuller Road Park & Ride and Hollywood Transit Center, dedicate entire developments to affordable housing.¹¹² The Fuller Road Park & Ride project consists of a six story, 100-unit building with all units priced for residents earning between thirty and sixty percent of the AMI.¹¹³ The Hollywood Transit Center project, located in what will become a new community called hollywoodHUB, will have a thirteen story building with up to 200 homes for residents earning at or below sixty percent of the AMI.¹¹⁴ Both of these projects involve private developers and agencies.¹¹⁵ Clackamas County and developers Geller, Silvis & Associates and Guardian Real Estate Services have joined forces with TriMet in creating the Fuller Road Station Apartments.¹¹⁶

109. *Id.*

110. *Bus Service: It's Easy to Get Around the City on TriMet Buses*, TRAVEL PORTLAND (Nov. 21, 2021), <https://www.travelportland.com/plan/bus-service/> [<https://perma.cc/P2WD-KREF>].

111. *See TriMet System Map: Buses, MAX and WES*, TRIMET, <https://trimet.org/maps/img/trimetsystem.png> [<https://perma.cc/V9SP-XJPZ>].

112. *Transit-Oriented Development*, TRIMET, <https://trimet.org/tod/#development> [<https://perma.cc/ALT6-E6TT>].

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

Similarly, TriMet partnered with nonprofit group BRIDGE Housing for development of hollywoodHUB.¹¹⁷

These projects do not end with construction of the physical housing units. Not only will the Hollywood Transit Center project create livable homes for low-income residents, it also plans to revamp the surrounding area and metro stations.¹¹⁸ New developments include a twenty-four hour fitness center and a Target, popular businesses flanking both sides of the apartment building.¹¹⁹ While many modernization projects result in displacement of low-income households, these two Portland projects demonstrate that communities, governments, and private actors are willing and able to provide affordable housing in up-and-coming areas. These kinds of plans show promise for integrating mixed-income levels in key social areas.

TriMet is no stranger to the affordable TOD housing project. Even before these recent projects, TriMet TOD projects included affordable housing in residential buildings constructed on TriMet property.¹²⁰ For example, the Hazelwood project contains 175 affordable units, Renaissance Commons has 189 affordable units, and Butler Block reserved ten of its 182 units for affordable housing.¹²¹ While Butler Block's number may seem low, the number of affordable units in that building still makes up five percent of the total units.¹²² These older developments represent a common approach to affordable housing: mixed-income housing. Mixed-income housing provides benefits by supplementing the lower rents of affordable units with market-rate or higher rent in the remaining units.¹²³ Although frequently used as a method of housing integration, mixed-income projects have been on the receiving end of sociological criticism, as will be discussed further in Section III.C.

Portland serves as a remarkable standard for achieving affordable housing through the TOD method, but there are a few areas

117. *Id.*; *Impact*, BRIDGE HOUS., <https://bridgehousing.com/about/impact/> [<https://perma.cc/NK7N-ZVD9>].

118. *See Transit-Oriented Development*, *supra* note 112.

119. *Building a Better Hollywood Transit Center*, TRIMET, <https://trimet.org/hollywood/index.htm> [<https://perma.cc/34B2-HY47>].

120. *Transit-Oriented Development*, *supra* note 112.

121. *Id.*

122. *See id.*

123. Paul C. Brophy & Rhonda N. Smith, *Mixed-Income Housing: Factors for Success*, 3 CITYSCAPE, no. 2, 1997, at 1.

that need improvement. First, despite excelling at creating affordable housing near transit, the TriMet system fails to recognize other considerations that impact the usability of these networks for lower-income households. Untraditional work hours and responsibilities are central to lower-income households' way of life and the TriMet system in its current state fails to meet those needs.

While most middle-class residents in mid- to high-skilled jobs follow some variation of a 9 AM to 5 PM work schedule, lower-income jobs often run on a different clock. A study conducted by the Urban Institute revealed that approximately one-third of non-college jobs (jobs not requiring a college degree) were not day shift.¹²⁴ TriMet semi-met this need by providing two, twenty-four-hour bus lines in 2018.¹²⁵ However, those two bus lines both run east-to-west and were suspended due to understaffing amid the COVID-19 pandemic.¹²⁶ It is uncertain when or if these lines will resume twenty-four-hour service. The short range of these lines means large swaths of the city go unserved during late night and early morning hours.

Second, Portland's western suburbs struggle to bring TriMet's extensive network to commercial campuses in these more remote areas. Large companies such as Nike and Intel are major employers for the surrounding area.¹²⁷ Spieler notes that these large campuses, while prosperous, are inherently unsuitable for transit development.¹²⁸ Nike provides over 11,000 jobs at its Beaverton, Oregon campus,¹²⁹ while Intel spreads 21,000 employees over four

124. Gregory Acs & Pamela Loprest, *Low-Skill Jobs, Work Hours, and Paid Time Off*, URB. INST. 1, 2 (Nov. 2008), <https://www.urban.org/sites/default/files/publication/32211/411802-Low-Skill-Jobs-Work-Hours-and-Paid-Time-Off.PDF> [<https://perma.cc/BPZ2-AQZR>]; see also Sisson, *supra* note 75.

125. Aaron Mesh, *In Two Weeks, Some Portland Buses Will Run 24 Hours a Day – Including a Line to the Airport*, WILLAMETTE WEEK (Aug. 19, 2019, 8:23 PM), <https://www.wweek.com/news/2018/08/19/in-two-weeks-some-portland-buses-will-run-24-hours-a-day-including-a-line-to-the-airport/> [<https://perma.cc/6L9J-HEE7>].

126. *24-Hour Service*, TRIMET, <https://web.archive.org/web/20201112024328/https://trimet.org/schedules/24hourservice.htm> [<https://perma.cc/83SH-WQVH>] (this was a COVID-era policy and is no longer in place).

127. *Major Employers*, GREATER PORTLAND INC., <https://www.greaterportlandinc.com/research-center/major-employers/> [<https://perma.cc/4P59-J495>].

128. Notarianni, *supra* note 107.

129. *Nike World Headquarters: Signage and Wayfinding Program for the Sportswear Company's Corporate Campus in Beaverton, Oregon*, PENTAGRAM, <https://www.pentagram.com/work/nike-world-headquarters/story> [<https://perma.cc/6ZP7-9YG7>].

campuses in Hillsboro, Oregon.¹³⁰ These companies provide an unparalleled number of opportunities, yet those prospects are limited to vehicle owners.¹³¹ Finding a way to integrate these campuses into the transportation network could be critical in expanding job agency and opportunity for lower-income households.

B. Going the Extra Mile: Expanding the Promoting Affordable Housing Near Transit Act

Through an implementation of the Act in its current form, supplemented with successful elements from the Denver and Portland projects, the Act has the potential to change the affordable housing crisis for the better. The Act should be amended to include a dedication to expanding mass transit to the suburbs, creating higher density population pockets in these areas. Expanding transit lines to the suburbs would provide the necessary real estate needed for the affordability developments prescribed by the Act while encouraging agency in housing for low-income households. Living in poverty will no longer be a life sentence in the urban core, and gentrification will no longer be synonymous with displacement.

The triumphs and trials of Denver and Oregon's TOD projects provide a strong starting point for the Promoting Affordable Housing Near Transit Act. It is there that this Comment turns next. To start, this Comment looks at the three elements that proved most successful in Denver and Portland: speed, diversity, and inclusion. From there, this Comment will explain what tweaks can be made to both models to create a more idealized version of TOD projects for a federally subsidized model.

Portland's fifteen-minute transit frequency service is unmatched by other U.S. cities. Most cities in the U.S., at best, achieve thirty-minute transit frequency times.¹³² Research shows that ridership reaches its highest levels when transit services reach a frequency of fifteen minutes or better.¹³³ This timeframe puts control in the rider's hands by allowing them to schedule transit around their life, rather than scheduling their life around transit. Unfortunately, even Portland's impressive record of timely

130. *Intel in Oregon*, INTEL, <https://www.intel.com/content/www/us/en/corporate-responsibility/intel-in-oregon.html> [<https://perma.cc/BC5V-TR7S>].

131. See Notarianni, *supra* note 107.

132. English, *supra* note 8.

133. *Id.*

transit frequency only applies during the peak hours of 6:00 AM to 6:00 PM Monday through Friday.¹³⁴ As previously stated, the reliance on a typical commuter work schedule does not address usability concerns for low-income riders with non-traditional work hours. Expansion of transit into the suburbs by the Act must consider the unusual schedules of its ridership to ensure accessibility to those with the greatest need. An example of how this could be improved may be a transition to a more flexible bus system during later hours. Buses require less logistical control than trains and light rail and have the flexibility to change course based on demand.¹³⁵

TriMet's diverse, multimodal system is its next crowning achievement. While many localities offer bus and rail transit, Portland has surpassed other cities in its coordination of multimodal transportation units, allowing them to work better, together.¹³⁶ From the MAX light rail system that takes advantage of street space downtown to trams connecting the city through air space, Portland has found ways to maximize its transit in whatever space possible.¹³⁷ However, Portland's westside corridor, where Nike and Intel campuses are located, continues to face connectivity issues despite a reliable bus system downtown.¹³⁸ Suburbs often lack the

134. *Portland Frequent Route*, RTS, https://www.myrts.com/Portals/0/Schedules/Jan%202022/5_Portland_Freq.pdf?ver=2021-12-14-124835-167 [<https://perma.cc/4Y65-7UAB>].

135. *See generally Demand-Responsive Bus Trials*, TRANSP. FOR LONDON (July 2021), <https://content.tfl.gov.uk/dr-b-research-report-july-2021.pdf> [<https://5PZV-WE6Y>]. This project ended in 2020 after the pandemic hit due to a national call to end non-emergent travel. *Id.* at 3. The goal of this project was not to compete with other transit methods but rather to service those areas that lacked public transportation. *Id.* This led to service in less dense areas outside of London. *Id.* Areas of improvement to this project were a lack of connectivity between the demand-responsive buses and other methods of transportation. *Id.* at 9. Incorporating this demand-responsive bus system into a current transit department would provide that connectivity to rail stations that could further the reach into the city for suburban dwellers. *Id.*

136. Colin Doody, *Inspired Ethnomics: Portland, a Global Model of Transit-Oriented Development*, FACT COMPANY (Feb. 22, 2010), <https://www.fastcompany.com/1558244/inspired-ethnomics-portland-global-model-transit-oriented-development> [<https://perma.cc/K6ZZ-V4ZU>].

137. *TriMet & Regional Mobility*, TRIMET, <https://trimet.org/imi/about.htm> [<https://perma.cc/AA54-K537>].

138. OR. DEPT OF TRANSP., WESTSIDE MULTIMODAL IMPROVEMENTS STUDY: DRAFT ISSUES, NEEDS, AND PROBLEM STATEMENT 2-11 to -12, 3-13, 4-14 (2022), <https://www.oregon.gov/odot/UMO/Documents/westside-study-steering-committee-meeting-1-draft-issues-and-needs.pdf> [<https://perma.cc/2ANH-FNT7>]. A study of the area showed that of 85,000 residents, 64,000 commute outside of the area for work. *Id.* Of the 117,000 workers in the area, 97,000 commute into the corridor for work. *Id.*

density of cities that makes transit ridership profitable.¹³⁹ This is where expansion of transit into the suburbs provides the necessary federal funding, and land, to build the population dense TODs described in the Act.

Portland has shown a history of incorporating affordable housing into its TOD projects. The city uses mixed-income housing to provide affordable units in transit-rich, highly valuable areas.¹⁴⁰ However, Portland's two most recent developments focus on providing 100% affordable units.¹⁴¹ While there can never be too much affordable housing, making fully affordable apartment buildings near transit raises the question of whether this is just a new way of consolidating poverty in a single area.¹⁴² A focus on integration is what makes the Denver model of affordable housing near transit, one very similar to that proposed in the Act, a more appealing model. Rather than creating a separate space for low-income households, the Denver policy promotes inclusion in new developments with its thirty-five percent affordability model.

Where the Act goes further is a mandate from its inception of forty-percent affordability. Such a definitive standard ensures a place for low-income commuters at the center of community prosperity. Amending the Act to prescribe transit expansion into the suburbs would create a space for households of all income levels. With the growth of suburban business campuses, jobs and opportunity are moving to the suburbs.¹⁴³ As demonstrated by Arvada's significant revenue generation, the suburbs have become a haven for work-life balance. Through incorporation of multiple modes of transportation from cities to suburbs, increased frequency during peak hours for the highest-need riders, and inclusionary mixed-income housing, the Act has the potential to improve the American transit model for everyone.

139. English, *supra* note 8.

140. See *Transit-Oriented Development*, *supra* note 112.

141. *Id.*

142. Arthur Nelson mentions this delicate dichotomy in his 2018 article in the *Fordham Urban Law Journal*, stating that “[i]n a static or stagnant economy, any transportation improvement will just shuffle jobs (and housing) around.” Arthur C. Nelson, *Transit-Oriented Developments Make a Difference in Job Location*, 44 *FORDHAM URB. L. J.* 1079, 1086 (2017).

143. Picchi, *supra* note 2.

C. Critiques

1. The Trouble with Mixed-Income Housing

While mixed-income housing is largely becoming the ideal mode for implementing integration in housing, it is a policy that fails to meet all concerns. Professor Audrey McFarlane has criticized mixed-income housing as “discrimination management.”¹⁴⁴ McFarlane argued that large developers receiving tax incentives to build mixed-income housing furthered the social isolation of residential segregation through the advent of what has become known as the “poor door.”¹⁴⁵ In these mixed-income developments, wealthier residents able to pay millions of dollars are separated from lower-income residents, receiving a separate door with a doorman, valet, and concierge.¹⁴⁶ These cases, she argues, show that mixed-income housing, by its nature, requires race and class separation to appease wealthier residents who would otherwise block these developments.¹⁴⁷

While the concern illustrated by Professor McFarlane is warranted and based on very real evidence of exclusionary practice, the proposed development in the Act differs from those cases in two key ways. First, those parties authorized to receive land through the grant must have a demonstrated record of creating affordable housing.¹⁴⁸ In the examples cited by Professor McFarlane, the mixed-housing units were pretext for favorable zoning decisions and tax breaks.¹⁴⁹ The Act’s requirement of a dedication to providing affordable housing limits the possibility of profit-driven developers who will abuse the opportunity. Second, the Act’s thirty-year mandate on maintaining forty percent of the units for those with incomes in the bottom sixty percent of the AMI ensures a considerable timeframe from which community development and the market rate increase cannot proceed to displace those residents that can benefit most.

144. Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. REV. 1140, 1147 (2019).

145. *Id.* at 1144.

146. *Id.* at 1148–49, 1151. The separate door for lower-income residence has become known as “the poor door.” *Id.* at 1153.

147. *Id.* at 1147.

148. Promoting Affordable Housing Near Transit Act, H.R. 3680, 117th Cong. § (1)(B)(v)(III) (2021).

149. See McFarlane, *supra* note 144, at 1142–43.

Professor McFarlane's concerns, however, do highlight an oversight in the Act's language. While many mixed-income developments are not required to separate units based on income, developers have taken liberty to do so in the past. Evidence of these exclusionary practices may encourage a change to the Act's language to ensure units in TODs created by the Act fully integrate low-income units with market-rate units. The absence of this language does not demonstrate a desire to create such separation, but inclusion of this provision could avoid any unintended or unexpected consequences.

2. Planes, Trains, and Auto . . . Buses

Another potential concern is the lack of land often associated with bus systems. While there is often an incentive to provide bus services as they require significantly less real estate investment, the premise of the TOD model envisioned in the Act is the use of extraneous land from transit projects.¹⁵⁰ To assuage these concerns, look to the suburban TOD model instituted by Denver. There, large bus depots act as a central focal point of the larger TOD community, with stops dispersed throughout other neighborhoods.¹⁵¹ The use of a multimodal transit network permits the absence of land use by buses by providing a central terminal from which lines can radiate. Not only does the Denver model provide the real estate necessary for the Act's proposed developments, it also can mitigate some pushback from single-family, car-dependent homeowners who do not wish to live in the denser parts of the suburb.¹⁵²

3. A Penny for Your Ticket?

While much of the discussion in this Comment regarding costs of transportation has focused on increased costs surrounding transit centers, it is important to note the ridership costs that such improvements may affect. A 2022 study by the Victoria Transport Policy Institute ("VTPI"), a private research organization in Canada that focuses on transportation innovations, showed that expanded coverage, increased frequency, and extended hours of oper-

150. See H.R. 3680 § (1)(B)(i)–(ii).

151. See 2014 STRATEGIC PLAN, *supra* note 100, at 28–29.

152. H.R. 3680.

ation all improved service quality, mobility, and ridership.¹⁵³ However, such improvements failed to create widespread affordability.¹⁵⁴ This is unsurprising, considering these innovations must be funded by someone. The study did find, however, that the transit systems that provided more special mobility services (such as access to hospitals, schools, and jobs) as well as those with lower fares and increased public subsidies, were better suited to meet the ridership needs of the community.¹⁵⁵ The cost of affordability was felt in the lack of improvements to transit quality.¹⁵⁶ This is the delicate balance to strike in making TODs attractive and affordable. Creating attractive transit centers and transportation is necessary to achieve community buy-in from more affluent residents, while ridership needs are best met in transit systems with lower ridership costs and more expansive reach.

What this critique fails to address is that when external costs of transit and automobile travel are considered, transit costs and subsidies are proven to be lower overall.¹⁵⁷ On its face, transit requires more subsidization per passenger-mile, approximately forty times more.¹⁵⁸ If the inquiry ended here, the cost of increasing transit would seem excessive and unnecessary. However, many forget the overwhelming cost of automobile travel. Aside from the roads cars travel on, automobile transit requires traffic control, road repair, parking, fuel production, street lighting, emergency services, and a host of other expenses (several overlapping with those special mobility services mentioned in the VTPI study).¹⁵⁹ When these costs are factored into the equation, transit emerges as the more affordable option.¹⁶⁰ So, what can be done to make transit ridership more attractive and affordable? Divert resources away from external automobile costs and toward improving and expanding mass transit.

153. See TODD LITMAN, VICTORIA TRANSP. POL'Y INST., EVALUATING PUBLIC TRANSIT BENEFITS AND COSTS: BEST PRACTICES GUIDEBOOK 13 tbl.4 (2022), <https://www.vtpi.org/tranben.pdf> [<https://perma.cc/P5Z5-PEQA>]; *Who We Are*, VICTORIA TRANSP. POL'Y INST., <https://www.vtpi.org/> [<https://perma.cc/4T2A-CC4E>].

154. See LITMAN, *supra* note 153, at 13 tbl.4.

155. *Id.* at 13.

156. *See id.*

157. *See id.* at 73–74.

158. *Id.* at 74.

159. *Id.* at 75.

160. *See id.* at 75–76.

In 2022, highway transportation received thirty-nine percent of federal transportation and infrastructure spending while rail and mass transit received only twenty-eight percent.¹⁶¹ Disproportionate spending on highways over mass transit has been a recurring theme since the introduction of the automobile.¹⁶² What many fail to recognize is that automobile transit lacks the economy of scale present in mass transit.¹⁶³ Higher ridership leads to lower ridership costs, whereas more automobile use leads to more demand for fuel, road repair, traffic control, and the list goes on.¹⁶⁴ Greater investment in mass transit also leads to higher ridership.¹⁶⁵ President Joe Biden and Secretary of Transportation Pete Buttigieg intended to pass a new infrastructure bill to create fewer roads and more mass transit to better serve disadvantaged areas.¹⁶⁶ Unfortunately, to earn bipartisan support for the bill, Congress reduced the mass transit funding originally proposed and removed provisions restricting the building of new roads until old ones are repaired.¹⁶⁷ The amended Bill was signed into law in November 2021.¹⁶⁸

Despite these recent infrastructure setbacks, TODs remain a viable, affordable option under the Act. As stated previously, one of the biggest barriers to affordable housing near transit is the increased market rates of housing near transit.¹⁶⁹ With the Act's mandate of forty percent affordable housing for TOD units coupled with increased ridership that customarily follows implementation of TODs, the result is decreased automobile use, decreased external automobile transportation costs, and reduced need for extensive highway infrastructure spending. These cost reductions can

161. *What Does America Spend on Transportation and Infrastructure? Is Transportation Infrastructure Improving?*, USA FACTS: STATE OF THE UNION, <https://usafacts.org/state-of-the-union/transportation-infrastructure/> [<https://perma.cc/47T4-SUBV>].

162. See ROBERT S. KIRK & WILLIAM J. MALLETT, CONG. RSCH. SERV., IF10495, HIGHWAY AND PUBLIC TRANSIT FUNDING ISSUES (2021), <https://crsreports.congress.gov/product/pdf/IF/IF10495> [<https://perma.cc/6J9S-GT8L>].

163. See LITMAN, *supra* note 153, at 72–73, 75.

164. *Id.* at 72, 75.

165. *Id.* at 19.

166. Julie Bykowicz & Ted Mann, *Austin Wants Mass Transit, but the New Infrastructure Law Will Give It a Bigger Highway*, WALL ST. J. (Mar. 13, 2022, 5:30 AM), <https://www.wsj.com/articles/austin-wants-mass-transit-but-the-new-infrastructure-law-will-give-it-a-bigger-highway-11647163803> [<https://perma.cc/YUM5-SVXW>].

167. *Id.*

168. See Infrastructure Investment and Jobs Act, Pub L. No. 115-58, 135 Stat. 429 (2021).

169. See Cozart, *supra* note 46.

be reallocated for spending on mass transit, further reducing the cost for riders.

New York City is one of the largest mass transit cities in the country, with more than 5 million riders daily.¹⁷⁰ The city's transit system prides itself on "driv[ing] the New York regional economy by opening up countless job opportunities for millions—jobs that are miles from home."¹⁷¹ Despite the transit system's expanse, a third of New Yorkers—out of the more than 800,000 riders living below the poverty line—were unable to seek jobs farther from home due to increasing transit fares.¹⁷² The city's rise in fares, however, has not been equally felt. Lower income riders are the most likely to use single day passes while middle- and higher-income workers can afford a monthly unlimited pass.¹⁷³ The 2015 increase resulted in a less than four percent increase on the monthly passes but a whopping ten-percent increase for the daily passes.¹⁷⁴

In the wake of continued disparate impacts on lower-income riders, the Community Service Society ("CSS") and Riders Alliance embarked on a "Fair Fares" campaign to decrease ridership costs for low-income riders without increasing fares for more affluent riders.¹⁷⁵ In 2019, Mayor Bill de Blasio agreed to put the Fair Fares plan into action.¹⁷⁶ As of January 2020, all New Yorkers at or below the federal poverty line could sign up to receive MetroCards at a fifty-percent discount, regardless of employment, immigration, or other status.¹⁷⁷ The discount applies to subway and bus fares, as well as to pay-per-ride, weekly, and monthly unlimited passes.¹⁷⁸ While such a drastic cut in prices may sound expensive, when CSS ran the numbers using food stamp data, the prospective cost of foregone revenue from riders below the poverty line resulted in

170. David R. Jones, *Making Public Transit More Affordable*, CMTY. SERV. SOC'Y (Apr. 21, 2016), <https://www.cssny.org/news/entry/making-public-transit-more-affordable> [<https://perma.cc/R86T-UQM6>].

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Fair Fares – A New Commitment from Mayor De Blasio*, CMTY. SERV. SOC'Y (Mar. 5, 2019), <https://www.cssny.org/news/entry/fair-fares-a-new-commitment-from-mayor-de-blasio> [<https://perma.cc/HU32-5N23>].

177. *Id.*

178. *About*, NYC: FAIR FARES, <https://www1.nyc.gov/site/fairfares/about/about.page> [<https://perma.cc/C3H3-6DWS>].

approximately \$194 million per year in lost farebox revenue—that is only 0.2% of the city’s annual budget.¹⁷⁹

The goal of including this example is not to assume that every city and every transit system has the capacity to make these kinds of budgetary decisions, or that this is the only or best option. In fact, despite a 75-million-dollar commitment to the program by the city, research shows that as of 2022 only thirty-five percent of eligible New Yorkers know of and participate in the program.¹⁸⁰ Rather, the purpose of this example is to show that improvements to transit affordability are possible with proper advocacy and public-private cooperation. Though a solution is far from realized, cities like New York are committed to driving the change.

As expressed at the beginning of this Comment, this is not a single issue with a single solution. And it is certainly not a problem to be fixed overnight. But if policymakers and private entrepreneurs can set aside traditional ideas of what transit looks like and instead focus on the facts and examples research has revealed, a change in our infrastructure framework is possible.

CONCLUSION

The cost of living has only increased, and that cost includes more than just rent or mortgage payments. The Promoting Affordable Housing Near Transit Act recognizes the joint burden that transportation and housing place on lower-income budgets and the restrictions that burden places on financial, professional, and personal stability. The Act’s proposal of mixed-income, transit-oriented development does not provide a new approach to the affordable housing crisis, but rather an improved vehicle for implementing this approach that closes affordable housing gaps and improves agency in housing. It does so by utilizing the resources of the private sector while maintaining safeguards to prevent profit-driven developments that work against the cause.

Despite these improvements, the ultimate success of the Act in providing true free agency in housing requires an expansion of transit lines to suburban areas. These areas have largely remained

179. Jones, *supra* note 170.

180. Jen Chung, *NYC commits to \$75 million in funding for “Fair Fares” discounted MetroCard program*, *GOHAMIST* (Feb. 14, 2022), <https://gothamist.com/news/nyc-commits-75-million-funding-fair-fares-discounted-metrocard-program> [<https://perma.cc/QZJ9-NP37>].

White, single-family residential areas, due in part to exclusionary restrictive covenants and similar discriminatory practices. Given the importance of transit in creating equitable housing, its expansion into these areas is key to improving chances of integration—both racially and financially. This Comment proposes the Act include requirements for such expansions to ensure that affordable housing “solutions” do not continue to isolate low-income, minority households in urban areas, and to promote agency in housing for all.

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