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ATTN: Affordable Sales Program
California Department of Transportation
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Re: Notice of Proposed Rulemaking – Affordable Sales Program

Ms. Lowden:

The purpose of this letter is to provide comments on the California Department of Transportation's (Department) proposed regulations regarding surplus properties along State Route 710 in Los Angeles County[1]. The California Transportation Commission (Commission) appreciates the effort to provide affordable housing, particularly for purposes of mitigating the environmental impacts caused by the acquisition of property related to the proposed 710 project (the "highway project"). The Commission supports implementation of the Roberti Law, Government Code sections 54235 et seq., recognizing that the provision of affordable housing through the use of property originally acquired by Caltrans with fuel tax revenues may properly be used to mitigate the environmental impacts caused by certain highway activities.

The Commission, which by law has a central role to play in the establishment of terms, standards, and conditions for conveyances of excess highway property and in approving such conveyances (Streets & Highways Code section 118(a) and (b)), has examined the proposed regulations drafted by Caltrans which would govern the conveyance of the 710 properties. The Commission recognizes that the Department's legal counsel has stated that the proposed regulations are consistent with the Roberti Law and with the State's Constitution, and accepts

[1] The proposed regulations would be added as sections 1475 et seq. to Title 21, Division 2, Chapter 9.5 of the California Code of Regulations.

that conclusion to the extent that the proposed regulations provide for mitigation of environmental impacts of highway activities caused by the 710 corridor project in a manner consistent with the Roberti Act. However, with an intent to improve the proposed regulations, the Commission believes that several issues are worth considering. These issues are discussed following a brief description of the pertinent portions of the Constitution and the Roberti Law.

I. ARTICLE XIX, SECTION 2(a), STATE CONSTITUTION

The use of proceeds from motor vehicle fuel taxes is limited by Article XIX, Section 2(a), of the Constitution. Fuel tax revenues are deposited in the Highway Users Tax Account, which is declared by the Constitution to be a trust fund, and may be used solely for highway purposes, "including the mitigation of their environmental effects."

II. THE ROBERTI LAW

Although the Roberti Law, as originally enacted in 1979, had statewide scope and was not limited to particular projects or selling agencies, as now worded it applies only to properties acquired for the 710 project. It provides that the sale of residential properties in the manner described in the law will mitigate the environmental impacts of the highway project.

The Roberti Law provides for the sale of the residential housing according to a set of priorities. Single family dwellings are to be offered to present occupants who were former owners at fair market value, and to other occupants who are low or moderate income persons and who have been tenants for a defined period of time at an "affordable price," a price based on the tenant's income level.

All other residential properties, including multi-family housing, and any single family housing that was not sold as described in the preceding paragraph, will be offered to housing entities at a "reasonable price." A "reasonable price" is defined to mean a price that allows the housing entity to develop the property for use as affordable rental or owner-occupied housing.

Under the last priority, any remaining residential property is to be offered at fair market value, first to present tenants, then to former tenants, then to persons who would be owner-occupants, and then, presumably, on the open market.

In the case of any sales at less than market value (i.e., at an affordable price or at a reasonable price), the Roberti Law requires that "the selling agency shall impose terms, conditions, and restrictions as will ensure that the housing will remain available to persons and families of low or moderate income". The Roberti Law does not otherwise deal with subsequent sales of properties that were initially purchased at affordable or reasonable below market prices.

III. THE PROPOSED REGULATIONS

A. Subsequent Sales at Fair Market Value

The Roberti Law provides that restrictions are to be imposed on conveyances of residential housing sold at below market rates "to ensure that the housing will remain available to persons and families of low or moderate income." The proposed regulations would allow these below market purchasers (either qualified individual purchasers or housing entities) to resell the property on the open market at fair market value "[n]otwithstanding the restriction limiting occupancy and the subsequent sale of the surplus residential property" imposed pursuant to the Roberti Law.

COMMENT: As a result of the resale of this residential housing at fair market value, by definition the housing being sold would no longer "remain available to persons and families of low or moderate income." Recognizing a homeowner's right to equity and the opportunity for reinvestment of that equity in other housing, are there additional protections that can be included in the proposed regulations to ensure that, through the mitigation program, housing in the region remains available to persons and families of low or moderate income?

B. Distribution of Appreciation in Property Value to Affordable Price Purchaser Upon Re-Sale of the Property

The proposed regulations provide for distribution of proceeds from the open market subsequent sale of property initially acquired at below market prices. Below market sales can be made either to a present occupant who was a tenant for at least two years or to a housing entity. Distribution of the proceeds would depend on whether the property had been purchased by a low or moderate income person at an "affordable price" or by a housing entity at a "reasonable price."

COMMENT: The seller of property that he or she acquired at an affordable price would receive 100% of the net appreciation if the property is resold after five years. Would some other means of calculating the seller's share of appreciation be more consistent with the intended mitigation program?

C. Use of the Proceeds Received by Housing Entities and CalHFA Upon Re-Sale of the Property

The Roberti Law provides that highway activities, including the displacement of people caused by the acquisition of residential property, is an environmental impact that should be mitigated. Environmental impacts generally have a location. In the case of the acquisition of residential properties that were once intended for use for the 710 project, the location of the environmental impacts was centered on the location of those properties.

The proposed regulations allow the use of proceeds generated by fair market value sales to be used for affordable housing anywhere in the geographical area defined in Roberti Law section 54237.7. However, that section defined the geographical area for purposes of the use of proceeds from initial property sales for transportation purposes and not for environmental mitigation purposes.

COMMENTS: Should the proposed regulations include a definition of the area in which the environmental impacts occurred for purposes of the intended mitigation program? Or, as an alternative, would it be appropriate to include a provision as follows: "All proceeds from the subsequent sale of surplus property received by CalHFA and housing entities will be used for affordable housing in a manner that mitigates the environmental impacts caused by the activities described in Government Code section 54238.3, subdivision (a)"?

D. "Double-Escrow" Sales and Distribution of the Proceeds

A tenant living in a single family house who qualifies to purchase the property at an affordable price, which would come with restrictions as noted above, can purchase the property at fair market value free and clear of any restrictions. Whether the tenant purchases the property at an affordable price under the first priority, or at fair market value under the last priority, the proceeds from the initial sale will go to the SR 710 Rehabilitation Account for purposes of funding repairs of certain single family residential properties and then to the Highway Account for use for transportation projects as described in Government Code section 54237.7.

However, under the Roberti Law, in order to purchase at fair market value, the tenant must wait until after housing entities have had a chance to acquire the property. (See Roberti Law section 54237(b) and (e).) In other words, the tenant may miss that opportunity, since the residential property will be offered to housing entities pursuant to Roberti Law section 54237(d), before it is offered at fair market value to present occupants pursuant to Roberti Law section 54237(e).

The proposed regulations provide that a housing entity that acquires single family residential property at a reasonable price may resell the property the same day of acquisition, through what is being called a "double escrow[2], to the tenant, at fair market value. According to Caltrans, on average it is expected that the reasonable price paid by housing entities will be about 60% of fair market value. Thus, based on that figure, through the double escrow process the housing entity on average will receive 40% of the fair market purchase price.

As noted earlier, "reasonable price" is based on a price that allows for development of the property for affordable housing. Moreover, it is conditioned on the housing entity doing one of two things: rehabilitating and developing the property as limited equity cooperative housing or, if that is not feasible, using the property "for low and moderate income rental or

[2] The reference to a "double escrow" is not contained in the proposed regulations, and the "double escrow" process is not explicitly described in the proposed regulations.

owner-occupied housing." However, in the case of the "double escrow" provision, no such development or use would occur. Instead, the housing entity would receive title from the state, at a reasonable price, and simultaneously convey title to the tenant, at fair market value, at an average profit of 40%. Those profits, according to the proposed regulations, would be used for affordable housing purposes and not for transportation projects or maintenance as provided in Roberti Law section 54237.7.

COMMENTS: Should the proposed regulations be modified to require a housing entity that intends immediately to resell the property to a tenant at fair market value to make the initial purchase also at fair market value?

E. The Role of the California Transportation Commission in Approving Conveyances of Excess Highway Property

Streets and Highways Code section 118(b) provides that conveyances of excess highway property shall be approved by the California Transportation Commission. (Section 118 was amended by the same bill that enacted the Roberti Law[3] but no change was made to section 118 with regard to the Commission's approval function.) All initial sales of property governed by the Roberti Law involve conveyances of excess highway property.

However, proposed regulation 1486(d) provides that contracts for sale of properties subject to the regulations "*may* be subject to California Transportation Commission (CTC) approval." (Emphasis added.) In addition, proposed regulation 1477, at subdivisions (a) (5) and (e), appears to create two categories of sales: those that are subject to Streets and Highways Code section 118, which provides for Commission approval, and those that are not.

COMMENT: Are the proposed regulations consistent with the law with respect to the Commission's role in approving conveyances of excess highway property, as provided in Streets and Highways Code section 118(b)?

F. The "Affordable Housing Trust"

The proposed regulations provide that, on resale of properties initially sold at below market rates, CalHFA will receive either half or all of the difference between the initial below market sale price and the fair market price obtained on the subsequent sale. (Proposed Regulation 1478(d) (1) and (d) (1) (A).) Proposed regulation 1491(b) (1) provides that CalHFA shall create and "Affordable Housing Trust" if it decides to provide financing for the sale of single family residential property at affordable prices.

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[3] Senate Bill 86, Roberti, Statutes of 1979, Chapter 1191

COMMENT: It is not clear whether CalHFA's receipt of proceeds, pursuant to proposed regulations 1478(d) (l) and (d) (l) (A), is itself conditioned on its decision to provide financing pursuant to proposed regulation 1491. Would it be appropriate to revise the language so that it is unambiguous and clear that CalHFA's receipt of proceeds is itself conditioned on CalHFA having made such a decision?

G. Subsequent Sales at Affordable Prices and Continuity of Restrictions

In the case of below market initial sales, Roberti Law Section 54237 requires the imposition of restrictions to "ensure that the housing will remain available to persons and families of low or moderate income ..." (See Roberti Law section 54237(b) and (d).) Assuming, for the sake of discussion, that the restrictions do not prevent a subsequent sale at fair market value, as suggested in proposed regulation 1478(d), it is not clear whether and to what extent restrictions would apply to subsequent sales of property at affordable prices, as in the case of sales contemplated in proposed regulation 1478(c) (l) and (c) (2). (See also Roberti Law section 54267(d).) It is also not clear in what manner "affordable prices" will be determined for such sales. The Roberti Law provides a specific definition of "affordable price" in section 54236(b). It also defines "reasonable price" (i.e., the price to be paid by the housing entity) in terms of the "affordable price" at which such property can later be sold to low or moderate income people. Proposed regulation 1478(c) (2), on the other hand, contemplates that a housing entity that has acquired property from Caltrans at a reasonable price will be able to sell it as "decent, safe, and sanitary housing at ... affordable prices *as established by the entity* for persons or families of low or moderate income." (Emphasis added.)

COMMENTS: Would it further the mitigation program to subject sales by a housing entity to low income persons at affordable prices to the restrictions contemplated by the Roberti Law in section 54237(b)? Also, should the proposed regulations be clarified to define the extent subsequent sales of property at affordable prices are subject to the provisions pertaining to allocation of the proceeds of later fair market sales of the property?

H. Accountability

The property contemplated by the proposed regulations is property that was acquired through the use of motor vehicle fuel taxes which can be used to mitigate the environmental impacts caused by certain highway activities. So long as the funds, and the value they represent, are used for purposes of mitigation of the environmental impacts caused by the 710 project, the use is consistent with the Constitution. However, assuming that the restrictions that the Roberti Law requires be imposed on below market sales do not run with the land but instead run with the value the property represents, these funds will end up under the administration of both private and public housing entities as well as CalHFA.

COMMENT: Should the regulations provide a means by which it can be ascertained whether proceeds derived from the value represented by the properties subject to the Roberti Law continue to be used for the purposes allowed by the law?

The Commission applauds the Department's efforts to improve the mitigation associated with the SR 710 project environmental impacts as defined by the Roberti Law and offers the above comments as suggestions to improve the proposed regulations. Thank you for the opportunity to comment as part of this important rulemaking process.

Sincerely,

Will Kempton

WILL KEMPTON
Executive Director

c: Commissioners, California Transportation Commission
Secretary Brian P. Kelly, California State Transportation Agency
Director Malcolm Dougherty, California Department of Transportation