

# Legal Research Digest 36

## TRANSIT-ORIENTED AND JOINT DEVELOPMENT: CASE STUDIES AND 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 John L. Renne, Ph.D., AICP; Keith Bartholomew, J.D.; and Patrick Wontor. 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

In 1999, *TCRP Legal Research Digest 12: The Zoning and Real Property Implications of Transit-Oriented*

*Development* (TOD) addressed the legal implications of this subject, but it did so with a narrow focus and at a time when fewer completed TOD projects were available for study.

Since 1999, much has changed in law and practice with regard to TOD. Many new TOD and joint development programs and projects have come "on line." In addition, federal law and new guidelines have changed, making these developments easier to finance and build. Much of the material in the 1999 study is still relevant; however, this publication (*TCRP LRD 36*) is intended to help transit and legal professionals benefit even more from an up-to-date treatment of TOD legal issues.

The project examines a combination of large, medium, and small TOD and joint development projects since 1999 and provides comprehensive case studies, with an emphasis on what made the project succeed and how legal issues relate to TODs in general. Case studies from Portland, Oregon; Oakland, California; Chicago, Illinois; Plano, Texas; and Morristown, New Jersey, while illustrating important legal issues, demonstrate that what is needed for TOD success extends beyond laws, financial mechanisms, and public-private contracts.

Sample documents have been included, as a supplement to the case studies; these are published on the enclosed CD-ROM. The CD is included as an integral part of the digest and necessary to view the sample documents. The sample documents are not intended as models, but to show the legal structure on which the project transactions were based and are to be considered with the results achieved.

## **CONTENTS**

### I. Introduction, 3

### II. Literature Summary, 3

- A. Defining TOD, TAD, and TJD, 3
- B. Trends Favoring TOD, 4
- C. Market for TOD, 5
- D. TCRP LRD 12, 6

### III. Statutory/Regulatory Laws, 6

- A. Planning for TOD and Joint Development, 6
- B. Funding TOD and Joint Development, 13
- C. Agency Authority to Sponsor and Invest in TOD/Joint Development Projects, 16

### IV. Case Law, 17

- A. Procedural Due Process, 18
- B. Vested Rights, 19
- C. Consistency, 19
- D. NEPA and “Mini-NEPAs,” 20
- E. Eminent Domain, 21
- F. Religious Land Uses, 22

### V. Case Studies, 23

- A. Portland’s Pearl District, 23
- B. Oakland’s Fruitvale Transit Village, 25
- C. Chicago’s Bethel New Life Development, 28
- D. Plano’s Downtown Revitalization, 30
- E. Morristown Transit Village, New Jersey, 33

### VI. Conclusions, 34

## **Contents of CRP-CD-96**

Appendix A: Legislative Administrative Programs, Policies, and Case Law, A-2

Appendix B: Transit-Oriented Development Overlay District Model Bylaw, A-7

Appendix C: Purchase and Sale Agreement for Metro TOD/Urban Centers Easement, A-20

Appendix D: Amended Restated Agreement for Development Between the City of Portland and Hoyt Street Properties, L.L.C. (March 12, 1999), A-53

Appendix E: Ground Lease Between San Francisco Bay Area Rapid Transit District (Landlord) and Fruitvale Development Corporation, Inc. (Tenant), A-140

Appendix F: BART Transit-Oriented Development Policy, A-203

Appendix G: Purchase, Sale, and Development Agreement Between New Jersey Transit Corporation (Seller) and Rosewood Lafayette Commons, L.L.C. (Buyer), December 31, 2007, A-206

## TRANSIT-ORIENTED AND JOINT DEVELOPMENT: CASE STUDIES AND LEGAL ISSUES

By John L. Renne, Ph.D., AICP; Keith Bartholomew, J.D.; and Patrick Wontor

### I. INTRODUCTION

The purpose of this digest is provide an update to *The Zoning and Real Estate Implications of Transit-Oriented Development (TCRP LRD 12)*. When *TCRP LRD 12* was published in early 1999, only a handful of transit-oriented development (TOD) and transit-based joint development statutory and regulatory programs existed in the United States; those that did exist were, at that juncture, new and relatively untested. Since then, the field has filled with a number of new TOD and joint development programs, policies, and built projects, along with a robust academic and professional literature. Cumulatively, these sources demonstrate a wide range of legal devices geared, directly and indirectly, toward promoting and building TOD and joint development projects.

This digest attempts to trace these developments, beginning with an overview of the significant literature since the late 1990s. The literature summary is followed by a comprehensive survey of recently adopted federal, state, and regional statutory and regulatory programs promoting or facilitating TOD and joint development and a review of related case law. The digest's third section provides detailed case studies from Portland, Oregon; Oakland, California; Chicago, Illinois; Plano, Texas; and Morristown, New Jersey. These case studies, while illustrating important legal issues, demonstrate that TOD success extends beyond laws, financial mechanisms, and public-private contracts. The report concludes that these constructs, while instrumental to the success of TOD and joint development, are indicative of a more basic foundation at the root of every successful project—leadership from the public, nonprofit, and private sectors.

We expect significant changes over the next decade for TOD in America. Recent studies indicate that over the next couple of decades the country will need to build several thousand new TODs to keep up with demand,<sup>1</sup> which is a stark contrast to the several hundred present at the beginning of the 21st century.

### II. LITERATURE SUMMARY

In the late 1990s and early 2000s, several books made a link between TOD and sustainability and smart

growth principles.<sup>2</sup> Peter Newman and Jeffrey Kenworthy's *Sustainability and Cities: Overcoming Automobile Dependence* and Robert Cervero's *Transit Metropolis* each provide an international focus of the importance of integrated land-use planning with high-quality mass transit systems. In the United States, however, some remained skeptical that TOD would yield significant results in such an automobile-oriented society.<sup>3</sup> However, in recent years, TOD literature has demonstrated benefits, particularly in the areas of travel behavior and property value, along with studies that have reported on policies and implementation.<sup>4</sup> This section summarizes TOD literature, beginning with a section on definitions followed by sections on trends favoring TODs, benefits and outcomes of TOD, and building TODs.

#### A. Defining TOD, TAD, and TJD

Similar to Dena Belzer and Gerald Autler,<sup>5</sup> *Transit Oriented Development and Joint Development in the United States: A Literature Review* (2002) distinguished between TOD and transit-adjacent development (TAD).

A TAD is just that—development that is physically near transit; it fails to capitalize upon this proximity, however, to promote transit riding. A TAD lacks any functional connectivity to transit—whether in terms of land-use composition, means of station access, or site design. A number of U.S. TODs discussed in the literature more closely resemble TADs.<sup>6</sup>

The spectrum between TOD and TAD was revisited in a 2009 study, which compares urban design elements and travel behavior and vehicle ownership trends in the

<sup>2</sup> PETER NEWMAN & JEFFREY KENWORTHY, *SUSTAINABILITY AND CITIES: OVERCOMING AUTOMOBILE DEPENDENCE* (1999); ROBERT CERVERO, *THE TRANSIT METROPOLIS* (1998); MICHAEL BERNICK & ROBERT CERVERO, *TRANSIT VILLAGES IN THE 21ST CENTURY* (1997).

<sup>3</sup> MARLON BOARNET & RANDALL CRANE, *TRAVEL BY DESIGN: THE INFLUENCE OF URBAN FORM ON TRAVEL* (2001).

<sup>4</sup> See, e.g., ROBERT CERVERO ET AL., *TRANSIT ORIENTED DEVELOPMENT IN THE UNITED STATES: EXPERIENCES, CHALLENGES, AND PROSPECTS 102* (Transit Cooperative Research Report, Transportation Research Board, 2004).

<sup>5</sup> DENA BELZER & GERALD AUTLER, *TRANSIT ORIENTED DEVELOPMENT: MOVING FROM RHETORIC TO REALITY* (2002).

<sup>6</sup> ROBERT CERVERO, CHRISTOPHER FERRELL & STEVEN MURPHY, *TRANSIT-ORIENTED DEVELOPMENT AND JOINT DEVELOPMENT IN THE UNITED STATES: A LITERATURE REVIEW 5* (Transit Cooperative Research Program, Research Results Digest No. 52, Transportation Research Board, 2002).

<sup>1</sup> See, e.g., REID EWING, JERRY WALTERS, KEITH BARTHOLOMEW, DONA CHEN & STEVE WINKETMAN, *URBAN LAND INSTITUTE, GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE 23–27* (2008).

train station precincts of Berkeley, Hayward, and Fremont, California. TADs are more suburban-like, with lower densities, a dominance of surface parking and auto-centric design, limited pedestrian and bicycle access, more single-family homes, and industrial and segregated land uses.

Among the three case studies, Fremont is most TAD-like and downtown Berkeley is the most transit-oriented. While each station serves different functions, the study found more sustainable travel patterns in Berkeley, followed by Hayward, and then Fremont. For example, the share of transit commute trips in 2000 was twice as high in Berkeley as compared to Fremont; however, from 1990 to 2000, the growth in the share of transit commuting was greatest in Fremont. Perhaps more astonishing than transit commuting is the share of walking and biking commute trips. Berkeley's share in 2000 was nine times greater than Fremont but during the last decade of the century, Fremont outpaced Berkeley with a 69 percent growth in walking and bike commuting as compared to a 21 percent growth in Berkeley. This is perhaps correlated with vehicle ownership. From 1990 to 2000, the percentage of households in downtown Berkeley owning one or no vehicles decreased from 80 to 74 percent whereas Fremont saw an increase from 35 to 46 percent. An important finding from this analysis is that the TAD-TOD spectrum is not static, but can change over time corresponding to local development decisions.<sup>7</sup>

Dittmar and Ohland propose a performance-based definition of TOD in the *New Transit Town*. A TOD typology should meet five main goals: location efficiency, rich mix of residential and commercial choices, value capture, place making, and the resolution of the tension between node and place. *Location efficiency* comprises density, transit accessibility, and pedestrian friendliness. A *rich mix of choices* refers to people's ability to not only have transport alternatives but also have choice in housing, retail, and employment. *Value capture* relates to household and community cost savings associated with transit use, which is less expensive compared to automobile use. They defined *place making* as the ability for TOD to create attractive, pedestrian-friendly neighborhoods replete with high-quality civic spaces, similar to European cities.<sup>8</sup> Last, the *tension between node and place* stems from the work of Luca Bertolini and Tejo Spit, who evaluated the redevelopment of rail station precincts across Europe.<sup>9</sup>

<sup>7</sup> John Renne, *From Transit-Adjacent to Transit-Oriented Development*, 1-15 LOCAL ENVIRONMENT 14, 1 (2009), available at <http://www.informaworld.com/smpp/content~db=all?content=10.1080/13549830802522376>.

<sup>8</sup> HANK DITTMAR & GLORIA OHLAND, THE NEW TRANSIT TOWN: BEST PRACTICES IN TRANSIT-ORIENTED DEVELOPMENT (2004).

<sup>9</sup> LUCA BERTOLINI & TEJO SPIT, CITIES ON RAILS: THE REDEVELOPMENT OF RAILWAY STATION AREAS (1998).

The concept of transit-joint development (TJD) implies a *quid pro quo* between the public sector (usually a transit agency) and a developer. An important article from the early 1990s by John Landis and Robert Cervero notes that joint development, in the context of TOD, is the process in which a public entity and a private developer work together under a common vision in order to create a successful development. They identify nine categories that joint development projects can be classified into based on two broad categories, revenue-sharing and cost-sharing arrangements. The nine categories are 1) station leases and development, 2) nonstation leases and development, 3) station interface or station connections, 4) benefit assessment district, 5) incentive agreements, 6) cost-sharing agreements, 7) joint use of facilities, 8) capital or service provision, and 9) development-concession leases. More importantly, they note that four conditions are necessary for TJD: a healthy local real estate market, an entrepreneurial public agency, coordination across agencies, and the recognition that the benefits of TOD extend beyond generating revenues.<sup>10</sup>

Moreover, the study further defines joint development as:

Any formal agreement or arrangement between a public transit agency and a private individual or organization that involves either private-sector payments to the public entity, or private-sector sharing of capital costs in mutual recognition of the enhanced real estate development potential or market potential created by the siting of a public transit facility.<sup>11</sup>

## B. Trends Favoring TOD

Belzer and Autler identified three trends in American cities that related to an increasing importance for TOD. These trends include a resurgence of downtowns, continued growth of the suburbs, and a renewed interest and investment in transit. They note:

At the convergence of these three trends is the realization that a substantial market exists for a new form of walkable, mixed-use urban development around these new rail or rapid bus stations and transit stops.... These [TODs] have the potential to provide residents with improved quality of life and reduced household transportation expenses while providing the region with stable mixed income neighborhoods that reduce environmental impacts and provide real alternatives to traffic congestion.<sup>12</sup>

In the mid 2000s, Reconnecting America's Center for Transit-Oriented Development (CTOD) became active in publishing TOD-related research. *Hidden in Plain Sight: Capturing the Demand for Housing Near Transit* illustrated how demographic changes in America are supportive of TOD. In analyzing all 3,341 of the Na-

<sup>10</sup> JOHN LANDIS & ROBERT CERVERO, *Transit Joint Development in the USA: An Inventory and Policy Assessment*, vol. 9, issue 4, ENVIRONMENT AND PLANNING 431-52 (1991).

<sup>11</sup> *Id.*

<sup>12</sup> BELZER & AUTLER, *supra* note 5, forward, <http://www.brookings.edu/es/urban/publications/belzertod.pdf>.

tion's fixed transit stations and an additional 630 stations that would likely be built before 2025, the study found that with market demand for TOD at 25 percent of all new households, an additional 14.6 million households in these transit zones would more than double the existing stock of 6 million households.<sup>13</sup> Jonathan Levine and Aseem Inam also found similar demand at the national level of a quarter to a third of all households; however, Levine also argues that local government zoning regulations across the country restrict mixed-use development, thus creating an artificial cap on supply below what markets are demanding.<sup>14</sup> Perhaps high demand with limited prospects of supply is the basis for why *Emerging Trends in Real Estate* has rated TOD as a top investment prospect in each of its annual reports since 2004.<sup>15</sup>

### C. Market for TOD

TODs are a niche market in America. However, if future trends yield more demand, the only way to increase supply is to address policy at various levels of government. The federal government's main responsibility for facilitating TOD is related to funding, whereas states such as California, New Jersey, Oregon, and Florida have taken on policies to encourage metropolitan planning organizations (MPOs) and local governments to promote TOD. TOD is most influenced by local government because of land-use regulatory powers; however, the transit agencies and local governments can enter into cooperative agreements to combine powers important in joint developments, such as site assemblage, zoning, financing, infrastructure provision, and expedited approvals.<sup>16</sup>

Jan Schuerer et al. examined TOD, TJD, and value capture in a report that outlines a value capture strategy using an Integrated, Risk-Sensitive Infrastructure Investment (IIRSII) Strategy model.<sup>17</sup> The method,

<sup>13</sup> RECONNECTING AMERICA'S CENTER FOR TRANSIT-ORIENTED DEVELOPMENT, HIDDEN IN PLAIN SIGHT: CAPTURING THE DEMAND FOR HOUSING NEAR TRANSIT (2004, revised 2005), available at <http://www.reconnectingamerica.org/public/show/ipsi>.

<sup>14</sup> Jonathan Levine & Aseem Inam, *The Market for Transportation-Land Use Integration: Do Developers Want Smarter Growth Than Regulations Allow?*, 31 TAUBAN COLLEGE OF ARCHITECTURE AND URBAN PLANNING, JOURNAL OF TRANSPORTATION, 409–27 (2004); JONATHAN LEVINE, RESOURCES FOR THE FUTURE, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND USE (2006).

<sup>15</sup> JONATHAN D. MILLER, URBAN LAND INSTITUTE & PRICewaterhouseCOOPERS, EMERGING TRENDS IN REAL ESTATE (2004–2009).

<sup>16</sup> CERVERO, FERRELL & MURPHY, *supra* note 6, at 5, [http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp\\_rrd\\_52.pdf](http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rrd_52.pdf).

<sup>17</sup> JAN SCHEURER, PETER NEWMAN, JEFF KENWORTHY & THOMAS GALLAGHER, LIGHT RAIL TRANSIT AND URBAN REDEVELOPMENT WITH VALUE CAPTURE FUNDING AND JOINT DEVELOPMENT MECHANISMS, INSTITUTE FOR SUSTAINABILITY AND TECHNOLOGY POLICY (2000), available at

“though it sounds complicated, is simply a strategy for funding the provision of infrastructure (including rail, roads, parks, communications, etc.) that more equitably distributes the investment risk (such as construction cost) among the eventual beneficiaries.”<sup>18</sup>

John Renne and Peter Newman also describe how TOD projects could be facilitated through joint development and value capture. They note that the public sector can reduce risk for developers. The article identifies the roles of the public and private sectors during the planning stage and development stages. During the planning stage, the public sector should establish goals, develop the community vision in coordination with the public, seek out a suitable development partner, create a legal agreement between all parties, analyze feasibilities, develop exit strategies, and develop procedures for future stages of the deal. The role of the private sector is to establish goals, create a pro forma and analyze market feasibility, create a partnership with the government, and develop exit strategies consistent with the public sector's goals. During the development stage, the public sector can help to expedite the approval process, provide oversight of the development, and begin transit service, and lease or sell building space (which depends on the agreement). The private sector should build the project and sell or lease buildings. A value capture mechanism can be linked to density bonuses, rate increases, tax increment financing, and a rail trust fund from parking revenue.<sup>19</sup>

Cervero et al. discuss issues related to TOD and TJD implementation. The first point in the report is that TODs can only be created when the market allows for such development. “A body of research and empirical evidence has shown that TOD and TJD cannot overcome a flat or anemic local real-estate market.”<sup>20</sup> The creation of a TOD needs the assistance of government support, even when local markets are healthy. Incentives such as grants, sliding-scale impact fees, tax abatements, financial participation, tax increment financing, benefit assessment districts, empowerment zones, and enterprise communities and loans are all useful in TODs. Land-based initiatives, which can facilitate the construction of TOD, include assembly, swaps, land banking, and the sale or lease of development rights. With respect to zoning, incentives such as density bonuses, performance zoning, inclusionary zoning, interim zoning, floating zones, planned unit development, specific plans, and transfer of development rights are all noted as important tools for TODs.

[http://www.istp.murdoch.edu.au/ISTP/publications/rail\\_pay/rail\\_pay.html](http://www.istp.murdoch.edu.au/ISTP/publications/rail_pay/rail_pay.html).

<sup>18</sup> *Id.*, Appendix.

<sup>19</sup> John Renne & Peter Newman, *Facilitating the Financing and Development of “Smart Growth,”* 56 TRANSP. Q., 2, 23–32 (2002).

<sup>20</sup> CERVERO, FERRELL & MURPHY, *supra* note 6, at 44.

With respect to infrastructure: “Before private capital will come to depressed urban districts, substantial improvements are often necessary not only to enhance a neighborhood’s appearance and capacity for growth but also to demonstrate a *bona fide* public commitment to turning an area around.”<sup>21</sup>

New drainage, water systems, underground utility placement, parkland, pathways, landscaping, and street-lighting upgrades have all attracted private investments in the TODs. Other important approaches for government to encourage TOD include streamlining development review, remediation of brownfields, resource sharing, siting of government facilities, and transportation demand management.<sup>22</sup>

*Developing Around Transit: Strategies and Solutions that Work* is published by the Urban Land Institute (ULI), which is targeted towards making development work.<sup>23</sup> The final chapter of the book expands on a 2003 ULI publication called *Ten Principles for Successful Development Around Transit*, which includes:

1. Make it better with a vision.
2. Apply the power of partnerships.
3. Think development when thinking about transit.
4. Get the parking right.
5. Build a place, not a project.
6. Make retail development market driven, not transit driven.
7. Mix uses, but not necessarily in the same place.
8. Make buses a great idea.
9. Encourage every price point to live around transit.
10. Engage corporate attention.<sup>24</sup>

The publication of *Transit Oriented Development: Making It Happen* provided a theoretical departure from many of the previous books, which have sought to justify the benefits and importance of TOD, towards a discussion of best practice examples in implementing TOD. The chapters, written by academic and professionals across Australia, Asia, Europe, and North America, address implementation tools and processes, along with the role of the local community and markets in implementing TOD.<sup>25</sup>

Marilee Utter notes in Chapter 16, “Developing TOD in America: The Private Sector View,” “Despite much excitement for TOD, the market reality is that TOD is just beginning to gather momentum. ... While the public sector has made major investments in transit systems and station area plans, it actually falls to private

sector developers to implement and build these vibrant districts.”<sup>26</sup>

#### D. TCRP LRD 12

Set in the context of these emerging policy and market trends, *TCRP LRD 12 (The Zoning and Real Estate Implications of Transit-Oriented Development)* explores the local zoning controls used to encourage transit-oriented development and presents an analysis of legal issues associated with TOD. The report begins with a short outline of the primary development issues addressed by TOD-based zoning codes, with sections on distance from transit stations; density and use regulations; bulk, setback, and area controls; urban form; street patterns; and parking restrictions. The report’s central section presents the results of a national survey of 300 transit agencies that assessed the level of agency participation with TOD and TJD activities. The survey results showed that only a handful of agencies in the United States were involved in TOD projects. Those that were involved tended to focus on zoning controls to foster higher density, mixed-use, and transit-supportive land uses. A few agencies employed other techniques such as density bonuses, impact fees, and density-transfer mechanisms. The survey also revealed that there had not, as of that time, been any instances of litigation over TOD-related issues. *TCRP LRD 12* concludes with an outline of the legal bases for TOD zoning, with a general discussion of legal issues related to local planning and zoning.

### III. STATUTORY/REGULATORY LAWS

This section provides summary descriptions of statutory and regulatory programs adopted by federal, state, and regional governments to facilitate or promote TOD, TJD, and other related development types. Although the section focuses on programs initiated since *TCRP LRD 12* (1999), several other longer-standing programs are also covered. Generally, the programs fall into three basic types: those that either encourage or require planning or zoning for TOD and joint development, those that provide funding for TOD-related infrastructure or housing, and those that provide basic legal authority to transit agencies to engage in TOD/joint development activities.<sup>27</sup>

#### A. Planning for TOD and Joint Development

A growing number of statutes and administrative programs provide direction, guidance, and technical and financial support for local efforts aimed at creating TOD and joint development general-plan policies and implementing regulations. While some programs are directive and mandatory, most are voluntary and incentive based.

<sup>21</sup> *Id.* at 60 (emphasis in original).

<sup>22</sup> *Id.* at 61–64.

<sup>23</sup> ROBERT DUNPHY ET AL., URBAN LAND INSTITUTE, *DEVELOPING AROUND TRANSIT: STRATEGIES AND SOLUTIONS THAT WORK* (2004).

<sup>24</sup> ROBERT DUNPHY, DEBORAH MYERSON & MICHAEL PAWLUKIEWICZ, URBAN LAND INSTITUTE, *TEN PRINCIPLES FOR SUCCESSFUL DEVELOPMENT AROUND TRANSIT* (2003).

<sup>25</sup> *TRANSIT ORIENTED DEVELOPMENT: MAKING IT HAPPEN* (CAREY CURTIS, JOHN RENNE & LUCA BERTOLINI Eds.) (2009).

<sup>26</sup> *Id.* at 209.

<sup>27</sup> App. A provides a list of all statutory and regulatory programs discussed in this section. App. B provides a Model Bylaw Transit-Oriented Development Overlay District.

## 1. Federal New Starts Criteria for Capital Transit Projects

Undoubtedly, the most important program in this area is the federal New Starts major capital investment program administered by the Federal Transit Administration (FTA). Prior to the passage of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA),<sup>28</sup> New Starts funding applications were assessed using only very narrow measures of ridership, efficiency, and energy savings.<sup>29</sup> Factors such as land use and economic development—which are now acknowledged as instrumental to the success of transit investments<sup>30</sup>—were not considered, at least directly. ISTEA, for the first time, introduced the notion that “transit supportive existing land use policies and future patterns” should be considered in assessing New Starts applications.<sup>31</sup> FTA implemented this language through its 1996 *Federal Register* notice on New Starts criteria, where the agency indicated that it intended to rate projects on a three-point scale (low, medium, high) according to “existing land use, containment of sprawl, transit supportive corridor policies, supportive zoning regulations near transit stations, tools to implement land use policies, and the performance of land use policies.”<sup>32</sup>

ISTEA’s successor, the Transportation Equity Act for the 21st Century (TEA-21),<sup>33</sup> readopted the prior language on transit-supportive land use and added consideration of “cost of urban sprawl” and possible “reductions in local infrastructure costs achieved through compact land use development.”<sup>34</sup> In its subsequent implementing regulations, adopted in 2000, FTA elaborated on the statutory criteria, indicating that it intended to “evaluate existing conditions in the corridor and the degree to which local land use policies are likely to foster transit supportive land use, measured in terms of the kinds of policies in place, and the commitment to these policies.”<sup>35</sup> In making this evaluation, FTA announced the following factors as important: existing land use, likely impact of transit on future land use,

growth management policies, transit-supportive policies and zoning regulations, implementation tools, and existing and planned pedestrian facilities.<sup>36</sup>

The impact of the land-use criterion in the New Starts approval process has been significant; in some cases, high scores on the land-use criterion have led to the approval of projects that scored low on other criteria, including those related to cost-effectiveness.<sup>37</sup> Congressional concern over these outcomes, expressed in the fiscal year (FY) 2005 Appropriations Bill Conference Report,<sup>38</sup> led to an informal declaration by FTA that it would effectively limit the effect of the land-use factor to counter-balance poor performance on other New Starts criteria.<sup>39</sup>

Nevertheless, in the 2005 Act that replaced TEA-21—the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)—Congress not only retained the “supportive land use policies and future patterns” language from the earlier acts, but upgraded it from a mere “consideration” to a “justification factor” and added economic development as a distinct, new criterion.<sup>40</sup> In its 2007 draft revision to the New Starts administrative rule, FTA proposed combining the economic development and land-use factors into a single effectiveness criterion that would assess a proposed New Starts capital project for its likely impact in promoting the construction of TOD.<sup>41</sup> Con-

<sup>36</sup> *Id.*

<sup>37</sup> U.S. CONGRESS, HOUSE COMMITTEE ON APPROPRIATIONS, DEPARTMENTS OF TRANSPORTATION & TREASURY & INDEPENDENT AGENCIES APPROPRIATIONS BILL, 2005, H.R. REP. NO. 108-671, at 91.

<sup>38</sup> *Id.*

(The IG has found that in some cases, even if a project has received a low cost-effectiveness rating, a high land use rating could result in a total project rating of medium. Therefore, FTA may be promoting projects where the cost effectiveness does not support continuation of the project, yet possible development opportunities around the project may allow it to continue forward.)

<sup>39</sup> “Dear Colleague” Letter from Jennifer L. Dorn (Mar. 9, 2005), <http://www.fta.dot.gov/documents/DC3-9-05.pdf>.

<sup>40</sup> Pub. L. No. 109-59, § 3011, 119 Stat. 1144, 1575 (2005), codified at 49 U.S.C. § 5309(d)(2)(B) (2007).

<sup>41</sup> Department of Transportation, Federal Transit Administration, Major Capital Investments Projects, Part III, 72 Fed. Reg. 43328, 43354 (Aug. 3, 2007). Under the proposed rule, this combined criterion would receive 40 percent of the weight of the “effectiveness measure,” which would be weighed equally with a measure of cost effectiveness. *Id.* The agency’s position that economic development and land use factors should be combined was supported by a panel of experts convened to articulate reasonable research methods into TOD impacts of transit. *Measuring the Economic Development Benefits of Transit Projects: Proceedings of an Expert Panel Workshop 1*, prepared by Cambridge Systematics, Inc., for FTA Office of Planning and Environment (Mar. 2008) (“Panelists noted that economic development and land use are closely related and difficult to evaluate separately, and suggested that economic development includes land use changes that generate economic value.”). Although Congress put final adoption of the proposed new rules on hold, Pub. L. No. 110-161, Div. K, Tit. I,

<sup>28</sup> Pub. L. No. 102-240, 150 Stat. 1914 (1991).

<sup>29</sup> G.B. ARRINGTON, LIGHT RAIL AND THE AMERICAN CITY: STATE-OF-THE-PRACTICE FOR TRANSIT-ORIENTED DEVELOPMENT, IN TRANSPORTATION RESEARCH CIRCULAR E-C058: EXPERIENCE ECONOMICS AND EVOLUTION FROM STARTER LINES TO GROWING SYSTEMS, 9th National Light Rail Transit Conference 189 (2003), <http://www.drcog.org/documents/LRT%20and%20TOD.pdf>.

<sup>30</sup> See, e.g., ROBERT CERVERO, THE TRANSIT METROPOLIS: A GLOBAL INQUIRY (1998).

<sup>31</sup> ISTEA, Pub. L. No. 102-240, § 3010, 105 Stat. 1914, 2093 (1991).

<sup>32</sup> Sec. 5309 (§ 3(j)), FTA New Starts Criteria, 61 Fed. Reg. 67093, 67106 (Dec. 19, 1996).

<sup>33</sup> Pub. L. No. 105-178, 112 Stat. 107 (1998).

<sup>34</sup> *Id.* § 3009; 112 Stat. at 353.

<sup>35</sup> 49 C.F.R. pt. 611, App. A. (2009). The 2000 administrative rule also replaced the three-tier rating system (low, medium, high) with a five-tier system (high, medium-high, medium, low-medium, low). 49 C.F.R. § 611.9(a)(4) (2009).

gressional and transit industry dissatisfaction with the draft rule, however, led to a postponement of rule final adoption.<sup>42</sup> With the expiration of SAFETEA-LU in 2009, it seems unlikely that adoption of any new or amended administrative rule will occur until after the passage of new transportation legislation.

Given the stalling of the proposed new rule, FTA's current practice is to assign land-use factors 50 percent of the weight in project justification analyses.<sup>43</sup> As might be expected, such heavy weighting of TOD-related development and policy has had a positive influence on the propagation of TOD planning and zoning at the local government level.<sup>44</sup> In her 2002 survey of 21 transit agencies, Elizabeth Deakin et al. observed that "[v]irtually all agencies responded that they give high priority to projects serving...areas with land uses in place or planned that support transit use."<sup>45</sup> In some cases, agencies conditioned transit expansions on the existence of supportive existing land uses or planning and zoning for future TOD.<sup>46</sup>

## 2. State Laws and Programs

While much of the TOD literature highlights the roles that local and regional agencies have in facilitat-

ing the construction of TOD,<sup>47</sup> significant policy developments have been occurring at the state level. As Renne identifies, state-level policy on TOD can

play an important role in financing strategic and station-area planning, infrastructure, and streetscape improvements. Other roles for state government include promoting regional planning and coordination across state agencies, setting goals to facilitate tax savings, encouraging environmental stewardship, creating funding programs and incentives, reducing regulatory and statutory barriers to land use, promoting public-private partnerships, and establishing pilot programs.<sup>48</sup>

One of the earliest state-level TOD policies in the United States is California's Transit Village Development Planning Act of 1994,<sup>49</sup> which establishes a planning goal for local, regional, and state agencies to direct new development into transit station areas<sup>50</sup> and authorizes cities and counties to adopt transit village development districts meeting certain specified land-use and transit operational standards.<sup>51</sup> Local governments that implement such districts may grant density bonuses of up to 25 percent to development projects meeting certain standards<sup>52</sup> and may become eligible for special state funds allocated for transportation improvements in transit village districts.<sup>53</sup> Once a local government adopts a transit village district, only public works projects, subdivision and parcel maps, and zoning ordinance amendments that are consistent with the district may be approved.<sup>54</sup> Although tax-increment financing and land-assemblage authority were included in the original version of the Act, these powers were excised from the legislation before final passage.<sup>55</sup> Insufficient state funding has reportedly hampered the Act's impacts on local TOD planning and zoning.<sup>56</sup>

The California Jobs-Housing Balance Improvement Program was created by the state legislature in 2000 to encourage the housing development of areas experienc-

---

§ 170, 121 Stat. 2401, Dec. 26, 2007, FTA is currently conducting further research into methods for measuring the combined economic development/land use criterion, with a particular focus on hedonic land price and interactive land use-transportation models, Federal Transit Administration, Discussion Paper on the Evaluation of Economic Development 1 (2009), [http://www.fta.dot.gov/documents/Econ\\_Dev\\_Discussion\\_Paper\\_1-16-09\\_Final.pdf](http://www.fta.dot.gov/documents/Econ_Dev_Discussion_Paper_1-16-09_Final.pdf), 2009 Additional Proposed Guidance on New Starts/Small Starts Policies and Procedures, available at [http://www.fta.dot.gov/planning/newstarts/planning\\_environment\\_10278.html](http://www.fta.dot.gov/planning/newstarts/planning_environment_10278.html).

<sup>42</sup> Pub. L. No. 110-161, Div. K, Tit. I, § 170, 121 Stat. 2401 (2007).

<sup>43</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, PUBLIC TRANSPORTATION: IMPROVEMENTS ARE NEEDED TO MORE FULLY ASSESS PREDICTED IMPACTS OF NEW STARTS PROJECTS 14 (2008), <http://www.gao.gov/new.items/d08844.pdf>; FED. TRANSIT ADMIN., ANNUAL REPORT ON FUNDING RECOMMENDATIONS: PROPOSED ALLOCATIONS OF FUNDS FOR FISCAL YEAR 2009 B-10 (2008), available at [http://www.fta.dot.gov/regional\\_offices\\_7753.html](http://www.fta.dot.gov/regional_offices_7753.html).

<sup>44</sup> G.B. ARRINGTON, *supra* note 29, at 191, <http://www.drcog.org/documents/LRT%20and%20TOD.pdf>; CAMBRIDGE SYSTEMATICS, SUMMARY ANALYSIS OF TRANSIT SUPPORTIVE LAND USE FOR NEW STARTS PROJECTS: FY 2003 ANNUAL REPORT ON NEW STARTS (2002), available through TRIS database, <http://tris.trb.org/view.aspx?>

<sup>45</sup> Elizabeth Deakin, Christopher Ferrell, Jonathan Mason & John Thomas, *Policy and Practices for Cost-Effective Transit Investments: Recent Experiences in the United States*, 1799 TRANSP. RES. REC. 1, 7 (2002).

<sup>46</sup> *Id.*; LEVINE, *supra* note 14, at 15 ("the Bay Area Rapid Transit (BART) District considers the willingness of a municipality to accept higher-density, transit-oriented development near proposed station sites in determining routing and location of new service extensions").

<sup>47</sup> *E.g.*, CERVERO ET AL., *supra* note 4; DITTMAR & OHLAND, *supra* note 8.

<sup>48</sup> John Renne, *Smart Growth and Transit-Oriented Development at the State Level: Lessons from California, New Jersey, and Western Australia*, 11 J. PUB. TRANSP. 77, 83 (2008). The American Association of State Highway and Transportation Officials (AASHTO) also reports significant involvement in TOD policy and development by departments of transportation in more than a dozen states nationally. CAMBRIDGE SYSTEMATICS, THE ROLE OF STATE DOTs IN SUPPORT OF TRANSIT-ORIENTED DEVELOPMENT (2006), [http://www.trb.org/NotesDocs/25-25\(20\)\\_FR.pdf](http://www.trb.org/NotesDocs/25-25(20)_FR.pdf).

<sup>49</sup> CAL. GOV'T CODE § 65460 (Deering 2008).

<sup>50</sup> *Id.* § 65460.3.

<sup>51</sup> *Id.* §§ 65460.2, 65460.4.

<sup>52</sup> *Id.* § 65460.2(g).

<sup>53</sup> *Id.* § 65460.5(a).

<sup>54</sup> *Id.* § 65460.9.

<sup>55</sup> Renne, *supra* note 48, at 86.

<sup>56</sup> *Id.*; ROBERT CERVERO, TRANSIT VILLAGES IN CALIFORNIA: PROGRESS, PROSPECTS, AND POLICY REFORMS 9 (1998), <http://iurd.berkeley.edu/sites/default/files/wp1/98-08.pdf>; CERVERO ET AL., *supra* note 4, at 47-48.

ing large increases in job growth and job development in areas lacking sufficient employment.<sup>57</sup> While broadly targeted to areas of the state experiencing jobs–housing imbalances, the program is also motivated by a desire to encourage the location of mixed-use development in transit station areas.<sup>58</sup> The legislation provided funding to the state’s Department of Housing and Community Development for two purposes: the creation of an incentive-based grant program to fund local government public facilities and services and an infusion of funds for the state’s revolving fund that provides predevelopment loans for affordable housing.<sup>59</sup>

The first of these initiatives, the California Jobs-Housing Balance Incentive Grant Program, provided \$25 million<sup>60</sup> in one-time funding to local governments for the construction of public facilities and services. Local jurisdictions competed for the funds by demonstrating compliance with state housing planning requirements and posting at least a 12 percent increase in housing permit levels during 2001 above the average annual rate of the 3 previous years.<sup>61</sup> The amount of funding provided to a jurisdiction was a function of the number of units permitted and the jurisdiction’s degree of housing versus jobs imbalance.<sup>62</sup> Though the program was primarily aimed at overcoming “fiscalized zoning” and NIMBY-based resistance to permitting new housing, additional grant monies were provided to further incentivize the permitting of multifamily, affordable, and infill housing.<sup>63</sup> The program succeeded in helping to increase local government compliance with the state housing planning laws (up from 68 percent in 2001 to 78 percent in 2006),<sup>64</sup> and in increasing the amount of housing in areas deemed to be housing-poor. Of particular note was the program’s effect on the stock of multifamily housing, which increased by 128 percent in participating jurisdictions, compared to a 50 percent increase in single-family housing.<sup>65</sup> The program, designed to provide one-time funding, is now completed;

however, elements of the program have been continued through the state’s Workforce Housing Reward Program.<sup>66</sup>

New Jersey was arguably the originator of the TOD concept, at least in a suburban context, with the construction of Llewellyn Park in 1857 along a railroad extension from New York City.<sup>67</sup> Railroad suburbs grew rapidly in the state throughout the second half of the 19th century and the first half of the 20th.<sup>68</sup> New Jersey’s Transit Village Initiative is a partnership formed by the New Jersey Department of Transportation and New Jersey Transit that provides incentives to local governments for redeveloping and revitalizing areas around transit facilities. Incentives include preferential access to state grants and technical assistance from a task force that includes representatives from state environmental, planning, economic development, housing, and transportation agencies.<sup>69</sup> To qualify, local governments demonstrate a commitment for future housing, employment, and population growth; have a rail, light rail, ferry, or bus transfer station; and have vacant or underutilized land within walking distance of that station. The local government must also have an adopted TOD redevelopment plan or zoning ordinance that contains transit-supportive land-use designations, densities, site and architectural design guidelines, and parking regulations.<sup>70</sup> Since the program’s inception in 1999, 19 transit villages have been designated.<sup>71</sup> A 2005 evaluation of 16 villages showed that in the program’s first 5 years, more than 800 new housing units worth \$191 million and more than \$330 million in nonresidential development had been built in the villages.<sup>72</sup>

Connecticut’s Transit-Oriented Development Pilot Program, adopted by the state legislature in 2007, authorizes the State Bond Commission to issue up to \$5 million in bonds to support the creation of a TOD program in the state’s department of transportation.<sup>73</sup> The target of the program is to promote TOD planning and zoning initiatives in four rail and bus rapid-transit corridors in the state. Qualifying local governments may

<sup>57</sup> CAL. HEALTH & SAFETY CODE § 50542 (Deering 2008).

<sup>58</sup> *Id.* § 50541(i).

<sup>59</sup> *Id.* § 50542.1(a). A third element of the Program would have provided funds to local agencies for the purpose of attracting employment to “housing rich” communities. *Id.* § 50543. That provision, however, was made inoperative by subsequent legislation. Stats. 2000, chap. 665 § 8.

<sup>60</sup> While the program was initially allocated \$110 million, subsequent legislation rescinded the funding commitment. CALIFORNIA DEPT. OF HOUSING AND COMMUNITY DEVELOPMENT, CALIFORNIA’S JOB-HOUSING BALANCE INCENTIVE GRANT PROGRAM: FINAL REPORT TO THE LEGISLATURE 3 (n.d.). The program’s funding was restored, albeit at a lower level, through voter initiative. CAL. HEALTH & SAFETY CODE § 53533(a)(8) (Deering 2008).

<sup>61</sup> CALIFORNIA DEPT. OF HOUSING AND COMMUNITY DEVELOPMENT, *supra* note 60, at 5.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 3.

<sup>64</sup> *Id.* at 10.

<sup>65</sup> *Id.* at 7.

<sup>66</sup> CAL. HEALTH & SAFETY CODE § 50550 (Deering 2008).

<sup>67</sup> JAMES HOWARD KUNTLER, GEOGRAPHY OF NOWHERE 46–49 (1993).

<sup>68</sup> Renne, *supra* note 48, at 95.

<sup>69</sup> New Jersey Department of Transportation, Transit Village Initiative Web site: Frequently Asked Questions (2009), <http://www.state.nj.us/transportation/community/village/faq.shtm>.

<sup>70</sup> New Jersey Department of Transportation, 2009 Transit Village Criteria & Scoring Guide 1–2, <http://www.nj.gov/transportation/community/village/pdf/2009guide.pdf>.

<sup>71</sup> New Jersey Department of Transportation, Transit Village Initiative Web site: Frequently Asked Questions (2009), <http://www.state.nj.us/transportation/community/village/faq.shtm>.

<sup>72</sup> JAN S. WELLS & STEPHAN J. SCHMIDT, TRANSIT VILLAGE MONITORING RESEARCH: BUILDING PERMIT DATA: 1999–2004 3 (2005), [http://policy.rutgers.edu/vtc/tod/documents/Building\\_Permits.pdf](http://policy.rutgers.edu/vtc/tod/documents/Building_Permits.pdf).

<sup>73</sup> CONN. GEN. STAT. § 13b-791l(a) (2008).

use program funds for the development of TOD development plans, overlay zones, market and financial analyses, and implementation activities, including brownfield remediation planning and the preparation of joint development agreements.<sup>74</sup> The program complements a 2005 state requirement that regional planning agencies identify potential TOD sites within their jurisdictions.<sup>75</sup>

Although not specifically designated as a TOD provision, Florida's concurrency requirement—specifically the provisions allowing for transportation exceptions to the concurrency—effectively promotes TOD planning and zoning. Part of Florida's growth management system, concurrency requires that, as a condition of approval for new development, adequate public facilities and services be available concurrent with the impacts of the development.<sup>76</sup> With respect to transportation capacity, “facilities needed to serve new development shall be in place or under actual construction within 3 years after the local government approves a building permit or its functional equivalent that results in traffic generation.”<sup>77</sup> In response to concerns that application of this requirement might inhibit infill and redevelopment in urbanized areas, in 2005 the state legislature created an exception to the transportation concurrency requirement for developments that, among other objectives, promote public transit ridership.<sup>78</sup> To qualify an area for the exception, local governments must include in their planning documents TOD-style provisions that address “urban design; appropriate land use mixes, including intensity and density; and network connectivity plans needed to promote urban infill, redevelopment, or downtown revitalization.”<sup>79</sup> The agency in charge of implementing the provision, the Department of Community Affairs, has developed criteria for exception approvals that set minimum standards for features typically addressed in TOD planning, including density, diversity, and design.<sup>80</sup>

### 3. Regional Laws and Programs

As indicated above, much of the existing TOD literature covers local and regional policy initiatives.<sup>81</sup> The

<sup>74</sup> *Id.* § 13b-7911(f).

<sup>75</sup> Anika Singh Lemar, Transit-Oriented Development: Land Use Planning Responds to Climate Change, *Sustainable Developments: Climate Change and Sustainable Development Practice Group 3* (2008), [http://www.wiggin.com/files/CCSDnewsletter\\_Land%20Use%20Planning%20Lemar%2012.08.pdf](http://www.wiggin.com/files/CCSDnewsletter_Land%20Use%20Planning%20Lemar%2012.08.pdf).

<sup>76</sup> FLA. STAT. § 163.3180(2) (2009).

<sup>77</sup> *Id.* § 163.3180(2)(c).

<sup>78</sup> *Id.* § 163.3180(5)(a).

<sup>79</sup> *Id.* § 163.3180(5)(e).

<sup>80</sup> FLORIDA DEPARTMENT OF COMMUNITY AFFAIRS, A GUIDE FOR THE CREATION AND EVALUATION OF TRANSPORTATION CONCURRENCY EXCEPTION AREAS 21–24 (2007), <http://www.dca.state.fl.us/fdcp/dcp/transportation/Files/AGuideCreationEvaluationTCEAs.pdf>.

<sup>81</sup> See Renne, *supra* note 48, at 83.

objective here is not to recreate that literature, but to focus on a few examples that represent the range of policy options.

*a. Regional Planning & Zoning Policies.*—The Livable Centers Initiative (LCI) is a competitive planning grant program administered by the Atlanta Regional Council (ARC) to encourage local jurisdictions to plan and implement strategies linking transportation with land use to support and create sustainable communities. Though not targeted exclusively at TOD, the program's goals are consistent with TOD outcomes: to

encourage a diversity of mixed-income residential neighborhoods, employment, shopping and recreation choices at the activity center, town center, and corridor level; provide access to a range of travel options including transit, roadways, walking and biking to enable access to all uses within the study area; develop an outreach process that promotes the involvement of all stakeholders.<sup>82</sup>

Using \$10 million in Federal Surface Transportation Program dollars, the LCI program has funded 86 planning studies for four development types in the Atlanta region: town centers, activity centers, corridors, and emerging regional centers.<sup>83</sup> Planning grants are awarded according to an application's consistency with the policies of ARC's Regional Development Plan “to encourage activity and town center development.”<sup>84</sup> Transportation projects identified in the planning studies are then eligible for special funding through the region's long-range transportation plan and transportation improvement program. Selection of these projects for funding hinges on the applicant community's progress in implementing zoning amendments identified in the LCI planning study and the project's role in supporting a mixture of transportation modes.<sup>85</sup> Funding for supplemental planning studies is also available for those communities that show a strong level of commitment to implementation of policies developed through the planning process.<sup>86</sup> To date, more than \$500 million has been allocated for the program.<sup>87</sup>

In 2004, three LCI study area plans were evaluated for their likely impacts on travel and air quality indices. The analysis showed that, compared to trend development assumptions, the LCI plans for the three areas would reduce vehicle miles traveled, vehicle trips, and emissions of air pollutants (including CO<sub>2</sub>) by 5 percent,

<sup>82</sup> Atlanta Regional Council, Livable Centers Initiative (LCI) Web site (2009), <http://www.atlantaregional.com/html/308.aspx>.

<sup>83</sup> ATLANTA REGIONAL COUNCIL, 2007 LCI IMPLEMENTATION REPORT A-3, A-5 (2007); Atlanta Regional Council, LCI Recipients Web site, <http://www.atlantaregional.com/html/323.aspx>.

<sup>84</sup> *Id.* at A-4.

<sup>85</sup> *Id.* at A-7.

<sup>86</sup> *Id.*

<sup>87</sup> Atlanta Regional Council, LCI Implementation Web site, <http://www.atlantaregional.com/html/324.aspx>.

10 percent, and 24 percent, respectively.<sup>88</sup> A 2007 evaluation of the program showed that more than 63,000 units of housing, nearly 12 million square ft of commercial, and more than 40 million square ft of office development had occurred in the LCI study areas since the program's inception.<sup>89</sup> The LCI program received national recognition by the U.S. Environmental Protection Agency (EPA) in 2008.<sup>90</sup>

Similar to the LCI, the Metropolitan Transportation Commission (MTC) in the San Francisco Bay Area uses federal transportation dollars (Enhancement, Congestion Management Air Quality, and Surface Transportation Program funds) to support community-based planning and resulting transportation projects through its Transportation for Livable Communities (TLC) program. Proposals for planning and capital funding are assessed using the program's five main principles: maximize community and stakeholder involvement, integrate transportation and land use, provide transportation choices and linkages, encourage compact development, and support neighborhood revitalization and placemaking.<sup>91</sup> Between the program's launch in 1998 and 2005, MTC issued more than \$2.5 million in planning grants and nearly \$83 million in capital grants.

In addition to planning and capital grants, the TLC program contains a Housing Incentive Program (HIP). Through this unique program, MTC provides federal transportation funding to communities that successfully promote high-density housing and mixed-use developments in transit station areas.<sup>92</sup> Because of regulatory restrictions, use of the funds is limited to transportation-related projects. However, the local government is free to use the funds anywhere within its jurisdiction. In its first funding cycle (2001), MTC provided \$9 million in HIP funding to local governments.<sup>93</sup> In 2005, HIP grants totaled more than \$30 million.<sup>94</sup>

<sup>88</sup> SMARTRAQ, BEFORE AND AFTER STUDY: LIVABLE CENTERS INITIATIVE (LCI) III-10-11, IV-14-15, V-11 (2004), [http://www.act-trans.ubc.ca/smartraq/files/GRTA\\_LCI\\_III\\_1234\\_2.pdf](http://www.act-trans.ubc.ca/smartraq/files/GRTA_LCI_III_1234_2.pdf).

<sup>89</sup> ATLANTA REGIONAL COUNCIL, *supra* note 83, at 5, *link available at* <http://www.atlantaregional.com/land-use/livable-centers-initiative/evaluation/lci-evaluation-1>.

<sup>90</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, 2008 NATIONAL AWARD FOR SMART GROWTH ACHIEVEMENT 9-10 (2008), [http://www.epa.gov/smartgrowth/awards/sg\\_awards\\_publication\\_2008.htm](http://www.epa.gov/smartgrowth/awards/sg_awards_publication_2008.htm).

<sup>91</sup> METROPOLITAN TRANSPORTATION COMMISSION, TRANSPORTATION FOR LIVABLE COMMUNITIES: WORKS IN PROGRESS 9 (2004), [http://www.mtc.ca.gov/library/TLC/TLC-Works\\_In\\_Progress.pdf](http://www.mtc.ca.gov/library/TLC/TLC-Works_In_Progress.pdf).

<sup>92</sup> *Id.* at 4-5.

<sup>93</sup> *Id.* at 7.

<sup>94</sup> Metropolitan Transportation Commission, Resolution 3710: FY 2004-05 Housing Incentive Program (adopted June 22, 2005), [http://www.mtc.ca.gov/planning/smart\\_growth/hip.htm](http://www.mtc.ca.gov/planning/smart_growth/hip.htm).

The TLC program complements MTC's 2005 Transit-Oriented Development Policy for Regional Transit Expansion Projects (Resolution 3434). In a manner consistent with the land use components of the Federal New Starts criteria, Resolution 3434 provides at the regional level a tie between transit capital funding and local land-use conditions and policies. Specifically, the Resolution prohibits funding for the capital construction costs of specified extensions to the region's ferry and rail transit services until the relevant local governments have adopted transit-supportive station area plans.<sup>95</sup> To evaluate the sufficiency of station area plans, the Resolution classifies the planned extensions by whether existing or planned housing densities within a 0.5 mi radius of the future stations meet specified threshold levels. For those projects not meeting the threshold, MTC will not fund construction of the extension until the local government adopts planning amendments that will bring planned density levels up to the threshold. MTC anticipates that this will lead ultimately to the construction of an additional 42,000 units of transit-oriented housing. In addition to density levels, the Resolution requires station area plans to address pedestrian-friendly design standards, local circulation, and TOD-supportive parking policies. A 2006 analysis of development capacities and market conditions along those transit extensions not currently meeting the policy's threshold levels indicates that the thresholds can be met with appropriate planning initiatives.<sup>96</sup>

The Indirect Source Review system of the San Joaquin Valley Air Pollution Control District in the Fresno, California, region imposes an impact fee on new land-use development to help mitigate transportation-related air pollutants (NOx and PM10) associated with the new development and to encourage developers to create projects that minimize emissions.<sup>97</sup> The program, which applies to all development types over a minimum base level, assesses fees for the estimated 10-year total emissions associated with the development. The fees, which are currently set at \$9,350 per ton for NOx and \$9,011 per ton for PM10, are calculated by estimating the cost of offsetting emission reduction strategies.<sup>98</sup>

The incentive part of the program provides fee reductions for incorporating features into the project that will reduce transportation-related emission rates below base levels. These features, which reflect many TOD-

<sup>95</sup> Metropolitan Transportation Commission, MTC Resolution 3434: Transit-Oriented Development (TOD) Policy for Region Transit Expansion Projects (adopted July 27, 2005), [http://www.mtc.ca.gov/planning/smart\\_growth/tod/TOD\\_policy.pdf](http://www.mtc.ca.gov/planning/smart_growth/tod/TOD_policy.pdf).

<sup>96</sup> Nelson\Nygaard, MTC's Resolution 3434: Transit Oriented Development Policy 3-2 (2006), [http://www.mtc.ca.gov/planning/smart\\_growth/tod/TOD\\_Policy\\_Evaluation.pdf](http://www.mtc.ca.gov/planning/smart_growth/tod/TOD_Policy_Evaluation.pdf).

<sup>97</sup> San Joaquin Valley Air Pollution Control District, Rule 9510: Indirect Source Review (adopted Dec. 15, 2005), <http://www.valleyair.org/rules/currnrules/r9510.pdf>.

<sup>98</sup> *Id.* at 15.

related planning objectives, include proximity to retail; a balanced jobs-to-housing ratio; proximity to transit services and facilities; intersection density; and the provision of sidewalks, bicycle lanes, and long-term bicycle parking.<sup>99</sup> In 2006–2007, the district collected nearly \$13 million in fees and spent more than \$9.5 million on emission reduction projects. These projects resulted in emission reductions of 824.07 tons of NOx and 33.71 tons of PM10.<sup>100</sup>

*b. Regional Visioning and Planning.*—As was noted in a recent edition of the *Journal of the American Planning Association*:

Regional planning in the United States is back. A common subject among practitioners and policymakers in the 1970s, regional planning suffered a major contraction during the new federalism of the Reagan era. However, by [1990], U.S. metropolitan regions had started seeking visions of their own. Over the course of the next decade and a half, planners and citizens increasingly articulated priorities and values to help shape the futures of their metropolitan regions.<sup>101</sup>

The article goes on to chart more than 80 regional visioning and planning studies completed between 1989 and 2003. Although most of these planning processes were motivated solely by the initiative of the sponsoring planning agency,<sup>102</sup> several state policies and programs have arisen that at least support regional visioning and planning; in some cases, the policies now require such planning. While the policies do not, as a whole, call specifically for the creation of TOD/joint development projects and planning, they certainly implicate that style of development.

The California Regional Blueprint Planning Program, administered by the state's department of transportation, provides grants to MPOs to engage in scenario planning analyses that will lead to the articulation of "regional consensus and performance outcomes on a more efficient land use pattern that supports improved mobility and reduces dependency on single-occupant vehicle trips," while accommodating an adequate supply of housing, reducing impacts on natural resources and air quality, and promoting a prosperous economy.<sup>103</sup> Similar to the objectives of TOD, the

Blueprint program's aims include the adoption of land-use planning policies that will "reduce dependency on auto trips by fostering a more efficient regional land use pattern that enables more walking, bicycling and transit use."<sup>104</sup> Using federal transportation planning and research funds, the department has allocated \$5 million for Blueprint grants each year since 2005<sup>105</sup> to fund TOD-related planning analyses in nine California regions.<sup>106</sup>

Integrated regional land use–transportation planning in California has recently gotten a further boost by the passage of Senate Bill (SB) 375, which requires each MPO in the state to include a "sustainable communities strategy" as part of the region's long-range transportation systems plan. The strategy is required to include transportation and land use policies designed to meet a CO<sub>2</sub> reduction target specified for the region by the state's Air Resources Board. While not specifically aimed at promoting TOD, the purpose of SB 375 is widely understood to be a greater integration of land-use and transportation planning and policy to reduce reliance on automobile transportation and increase walking, bicycling, and transit use.<sup>107</sup>

The Oregon Transportation Planning Rule, adopted by the state's Department of Land Conservation and Development in 1991, is a far-reaching administrative regulation articulating numerous standards for local government planning and zoning. Among the rule's provisions is a mandate that MPOs in the state develop land use–transportation plans that will result in reduced reliance on automobiles and "a significant increase in the share of trips made by alternative modes, including walking, bicycling, ridesharing and transit."<sup>108</sup> Key to achieving these reductions is a requirement that local governments amend local zoning ordinances to allow for TOD-style development projects in areas surrounding major transit stations.<sup>109</sup> This provision is targeted at counteracting the widely observed local zoning prohibitions on many of the density, mixed-use, and street design attributes of TOD.<sup>110</sup>

<sup>99</sup> San Joaquin Valley Air Pollution Control District, On-Site Emission Reduction Mitigation Measures (2007), <http://www.valleyair.org/ISR/ISROnSiteMeasures.htm>.

<sup>100</sup> SAN JOAQUIN VALLEY AIR POLLUTION CONTROL DISTRICT, 2007 ANNUAL REPORT ON THE DISTRICT'S INDIRECT SOURCE REVIEW PROGRAM 3 (2007), <http://www.valleyair.org/ISR/Documents/ISRAnnualReport2007.pdf>.

<sup>101</sup> Keith Bartholomew & Reid Ewing, *Land Use-Transportation Scenarios and Future Vehicle Travel and Land Consumption: A Meta-Analysis*, 75 J. AM. PLAN. ASS'N 13 (2009) (citations omitted).

<sup>102</sup> Keith Bartholomew, *Cities and Accessibility: The Potential for Carbon Reductions and the Need for National Leadership*, 36 FORDHAM URB. L. J. 159, 195 (2009).

<sup>103</sup> California Department of Transportation, *Blueprint Program Goals* (2008), [http://calblueprint.dot.ca.gov/index\\_files/BP\\_Fact\\_Sheet.pdf](http://calblueprint.dot.ca.gov/index_files/BP_Fact_Sheet.pdf).

<sup>104</sup> California Department of Transportation, FY 2008/09 Regional Blueprint Planning Grant Application (2008), [http://calblueprint.dot.ca.gov/0809/2008-09\\_Blueprint\\_Application.pdf](http://calblueprint.dot.ca.gov/0809/2008-09_Blueprint_Application.pdf).

<sup>105</sup> *Id.*

<sup>106</sup> CALIFORNIA DEPARTMENT OF TRANSPORTATION, CALIFORNIA REGIONAL BLUEPRINT PLANNING PROGRAM REPORT TO JOINT LEGISLATIVE BUDGET COMMITTEE (2006), [http://calblueprint.dot.ca.gov/0607\\_grant\\_info\\_files/BP\\_Report\\_final.pdf](http://calblueprint.dot.ca.gov/0607_grant_info_files/BP_Report_final.pdf).

<sup>107</sup> See *The Basics of SB 375: Transportation, Housing and Greenhouse Gases*, Institute for Local Government, [http://www.cacities.org/resource\\_files/27856.Basics%20of%20SB%20375.pdf](http://www.cacities.org/resource_files/27856.Basics%20of%20SB%20375.pdf).

<sup>108</sup> OR. ADMIN. R. § 660-12-0035(5)(A), (C) (2009).

<sup>109</sup> OR. ADMIN. R. § 660-12-0045(5)(a) (2009).

<sup>110</sup> LEVINE, *supra* note 14, at 43–44; Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 263–64 (2006).

A framework for TOD-focused integrated regional planning has also been created in Nevada, where the state legislature in 1999 adopted the Southern Nevada Regional Planning Coalition Act. The Act creates a regional planning coalition for the Clark County–Las Vegas region comprised of the county commissioners and city council members of at least the three most populous cities in the county.<sup>111</sup> The coalition is tasked with crafting a 20-year regional policy plan and implementing strategies<sup>112</sup> that promote sustainable growth,<sup>113</sup> maximize use of existing infrastructure through infill and redevelopment in urban centers,<sup>114</sup> and ensure the provision of adequate public services concurrent with new development.<sup>115</sup> To achieve these results, the statute requires, *inter alia*, the development of a land-use element that provides for mixed-use and transit-oriented development.<sup>116</sup> The coalition is also required to study and develop incentives to facilitate the building of mixed-use, transit-oriented, and brownfield developments.<sup>117</sup> The coalition's first policy plan, completed in 2001, contains a transportation element that promotes "land use patterns and development designs that will support regional mass transit" and reduces vehicle miles traveled (VMT) by "promoting mixed-use developments and jobs/housing balance in each jurisdiction."<sup>118</sup> Now that a regional plan is established, plans and regulations of state agencies and local governments affecting lands within the region must be consistent with the provisions of the regional plan.<sup>119</sup>

## B. Funding TOD and Joint Development

### 1. Funding for TOD/Joint Development-Related Infrastructure

The most basic way statutory and regulatory law promotes TOD and joint development is through the creation of infrastructure investment programs that provide the basic hardware to support those types of development. Certainly, this includes providing the threshold facilities associated with transit services, but it also may include other types of public infrastructure, including streets and sewer and water facilities.

Federal funding of joint development projects received a considerable boost with the amendments to the definition of "capital project" in SAFETEA-LU. Under prior law, capital projects could not include projects containing "commercial revenue-producing facilities,"

which severely limited the incorporation of private development into transit facilities.<sup>120</sup> The current definition, by contrast, includes transit improvements, including intercity bus and rail stations and terminals, that "incorporate private investment, including commercial and residential development."<sup>121</sup> The private development components must enhance the effectiveness of, and relate physically or functionally to, the transit system and provide a "fair share of revenue" for public transportation.<sup>122</sup> According to the FTA guidance on this provision, federal funding can include the full range of development-related costs, including real estate acquisition, site preparation, and project development activities.<sup>123</sup> Defining "capital project" in this way opens up funding opportunities for joint development projects from a number of sources, including the New Starts grants program,<sup>124</sup> the urbanized area formula grants program,<sup>125</sup> and the Surface Transportation Program under Title 23.<sup>126</sup>

The California Infrastructure and Economic Development Bank was created in 1994 by the Bergeson-Peace Infrastructure and Economic Development Bank Act<sup>127</sup> to "promote economic revitalization, enable future development, and encourage a healthy climate for jobs."<sup>128</sup> Through its Infrastructure State Revolving Fund Program, the bank provides low-cost funding to public agencies for a wide range of public infrastructure projects, including streets, transit facilities, parks, and sewer and water facilities.<sup>129</sup> The bank uses a 200-point ranking system to determine the allocation of program funds among qualifying applicants. TOD-related criteria appear in several locations in the ranking system, including in the Quality of Life/Community Amenities subcategory, which allocates up to 30 points for projects that "contribute to a greater use of public transit systems."<sup>130</sup> Additionally, the first priority under the Land Use, Environmental Protection, Housing element is to

<sup>120</sup> FTA Transit Program Changes, Authorized Funding Levels, and Implementation of SAFETEA-LU, 70 Fed. Reg. 71,950, 71,952 (Nov. 30, 2005).

<sup>121</sup> 49 U.S.C. § 5302(a)(1)(G) (2009).

<sup>122</sup> *Id.*

<sup>123</sup> Notice of Final Agency Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law, 72 Fed. Reg. 5788, 5792 (Feb. 7, 2007).

<sup>124</sup> 49 U.S.C. § 5309 (2009).

<sup>125</sup> 49 U.S.C. § 5307 (2009).

<sup>126</sup> 23 U.S.C. § 133(b)(2) (2009).

<sup>127</sup> CAL. GOV'T CODE §§ 63000–63070 (2008).

<sup>128</sup> California Infrastructure and Economic Development Bank, About Us Web site (2008), available at [http://www.ibank.ca.gov/about\\_us.htm](http://www.ibank.ca.gov/about_us.htm).

<sup>129</sup> California Infrastructure and Economic Development Bank, Criteria, Priorities, and Guidelines for the Infrastructure State Revolving Fund Program 4–5 (2008), available at [http://www.ibank.ca.gov/infrastructure\\_loans.htm](http://www.ibank.ca.gov/infrastructure_loans.htm).

<sup>130</sup> *Id.*

<sup>111</sup> NEV. REV. STAT. § 278.02514 (2009).

<sup>112</sup> NEV. REV. STAT. § 278.02528(1) (2009).

<sup>113</sup> NEV. REV. STAT. § 278.02521(3)(b) (2009).

<sup>114</sup> NEV. REV. STAT. § 278.025(4) (2009).

<sup>115</sup> NEV. REV. STAT. § 278.025(5) (2009).

<sup>116</sup> NEV. REV. STAT. § 278.02528(2)(b)(3)(I) (2009).

<sup>117</sup> NEV. REV. STAT. § 278.02535(1)(b) (2009).

<sup>118</sup> Southern Nevada Regional Planning Coalition, Southern Nevada Regional Policy Plan 20 (2001), [http://www.snrpc.org/Reports/s\\_nevada\\_plan2.pdf](http://www.snrpc.org/Reports/s_nevada_plan2.pdf).

<sup>119</sup> NEV. REV. STAT. §§ 278.02549(2)(a), 278.02577 (2009).

“renew and maintain existing urban areas,”<sup>131</sup> which is TOD-supportive, if not explicitly TOD-related. Similarly, additional criteria allocate points to projects that improve air quality and promote energy conservation.<sup>132</sup> Although the program was originally appropriated \$161 million by the state legislature, the program’s revolving fund and leverage promotion framework has allowed the bank to approve more than \$380 million in total loans.<sup>133</sup>

Maryland’s Smart Growth Priority Funding Areas Act, adopted in 1997, is widely regarded as a hallmark in modern growth management policy. The primary purpose of the Act is to use state infrastructure spending policy to help direct new development into existing population centers, while protecting the state’s scenic and agricultural lands.<sup>134</sup> Under the Act, all “growth-related” infrastructure, housing, and economic development projects funded by state agencies<sup>135</sup> are restricted to “priority funding areas” (PFAs),<sup>136</sup> which the Act defines as incorporated municipalities, designated business development areas, enterprise zones, and other areas designated by counties using existing and planned development densities and the presence of sewer and water services.<sup>137</sup> In a 2005 assessment of the Act, researchers found that approximately 70 percent of state funding for growth-related projects occurred within PFAs, while 75 percent of local funding was within PFAs.<sup>138</sup> Although the Act does not prohibit development outside of PFAs, the restriction of state funding for infrastructure is designed to dampen the economic viability for extra-PFA development projects. The Act also is not specifically focused on promoting TOD and TJD. However, by focusing infrastructure funding in already developed areas of the state, the Act assists in creating land use conditions conducive to transit.

The Massachusetts Transit Oriented Development Bond Program, part of the state’s Commonwealth Capital Funding Program, is intended to increase compact, mixed-use, walkable development close to transit stations. To help accomplish this objective, the program

provides financing for pedestrian improvements, cycling facilities, housing projects (25 percent of which must be affordable to middle- and low-income households), and parking facilities within 0.25 mi of commuter rail, subway, and bus rapid transit stations and ferry terminals.<sup>139</sup> Funds are provided on a competitive basis, depending on the relative quality of the TOD in which the proposed project will be sited. Criteria include development densities, the degree to which land uses are mixed, the quality of the area’s pedestrian environment, and the amount of parking in the area.<sup>140</sup> Award amounts include a \$1 million maximum for pedestrian and cycling facilities and \$2 million for parking facilities and housing projects.<sup>141</sup>

The Massachusetts TOD Bond program is part of a larger state effort to promote smart growth in central business districts, traditional town centers, around transit stops, or in other appropriate areas. Accompanying programs include a Smart Growth Incentive Zoning Program, a Smart Growth School Cost Reimbursement Program, a Priority Development Fund, and a Planning Assistance Grant Program.<sup>142</sup>

The San Diego Association of Governments’ (SANDAG) Smart Growth Incentive Program uses infrastructure funding incentives to encourage coordinated regional planning to bring transit service, housing, and employment together. Working together with area local governments, SANDAG developed a Smart Growth Concept Map<sup>143</sup> indicating areas appropriate for smart growth funds. To be designated, an area must currently meet minimum density and transit service standards or have planning and zoning in place that will lead to such conditions.<sup>144</sup> Although the program was initially funded using federal transportation enhancement funds, current funding is provided by a portion of a local half-cent sales tax. Projects eligible for capital funding include public plazas, pedestrian and bicycle facilities, traffic calming features, and other related transportation projects.<sup>145</sup> Areas that do not yet have the necessary planning and zoning in place can apply for planning grants to complete plan and code

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> California Infrastructure and Economic Development Bank, Financing Facilities that Build Communities, [http://www.cdfa.net/cdfa/cdfaweb.nsf/fbaad5956b2928b086256efa005c5f78/553601b06f71136086257576005f97d2/\\$FILE/Stan\\_I-Bank%20CDFA-Sustainable.pdf](http://www.cdfa.net/cdfa/cdfaweb.nsf/fbaad5956b2928b086256efa005c5f78/553601b06f71136086257576005f97d2/$FILE/Stan_I-Bank%20CDFA-Sustainable.pdf).

<sup>134</sup> Marie Howland & Jungyul Sohn, *Has Maryland’s Priority Funding Areas Initiative Constrained the Expansion of Water and Sewer Investments?*, 24 LAND USE POLICY 175 (2005).

<sup>135</sup> MD. CODE ANN., STATE FIN. & PROC. § 5-7B-0-01(c)(1) (2008).

<sup>136</sup> *Id.* § 5-7B-04(a).

<sup>137</sup> MARYLAND OFFICE OF PLANNING, SMART GROWTH: DESIGNATING PRIORITY FUNDING AREAS 3 (1997), <http://www.mdp.state.md.us/PDF/OurProducts/Publications/ModelsGuidelines/pfa.pdf>.

<sup>138</sup> Howland & Sohn, *supra* note 134, at 184.

<sup>139</sup> Executive Office of Transportation and Public Works, TOD Infrastructure and Housing Support Program: TOD Program Guidelines 3 (2008), [http://www.eot.state.ma.us/todbond/downloads/program\\_guidelines.pdf](http://www.eot.state.ma.us/todbond/downloads/program_guidelines.pdf).

<sup>140</sup> *Id.* at 9–10.

<sup>141</sup> *Id.* at 7.

<sup>142</sup> *Id.* at 3–4.

<sup>143</sup> SANDAG, Regional Comprehensive Plan Smart Growth Concept Map (2008), [http://www.sandag.org/programs/land\\_use\\_and\\_regional\\_growth/comprehensive\\_land\\_use\\_and\\_regional\\_growth\\_projects/RCP/region.pdf](http://www.sandag.org/programs/land_use_and_regional_growth/comprehensive_land_use_and_regional_growth_projects/RCP/region.pdf).

<sup>144</sup> SANDAG, Pilot Smart Growth Incentive Program Guidelines 6–13, [http://www.sandag.cog.ca.us/uploads/projectid/projectid\\_264\\_4156.pdf](http://www.sandag.cog.ca.us/uploads/projectid/projectid_264_4156.pdf).

<sup>145</sup> SANDAG, Smart Growth Incentive Program: Guidelines and Call for Projects 4 (2008), [http://www.sandag.org/uploads/projectid/projectid\\_340\\_8985.pdf](http://www.sandag.org/uploads/projectid/projectid_340_8985.pdf).

changes that would qualify them for smart growth funding. SANDAG estimates that funding for the program will total \$280 million through the year 2048.<sup>146</sup>

## 2. Funding for TOD/Joint Development-Related Housing and Infill Development

While state funding programs for affordable housing are common, less common are programs designed to make housing *and* transportation affordable by focusing housing in TOD areas. Several progressive state programs, nevertheless, are attempting to achieve these twin, related objectives, and they may represent the vanguard of a new direction in housing policy.

One of the early programs of this type was developed by Metro, Portland, Oregon's, regional government in 1998, to help foster the construction of planned TOD housing in the region. The agency expanded the program in 2004 to create a Transit-Oriented Development and Center Program. The innovative program helps to offset some of the costs of high-density TOD by purchasing TOD easements from developers and, in some cases, acquiring fee title to TOD-suitable lands and then selling them to private developers at a reduced cost. These easements and land sales carry with them restrictive covenants that specify minimum development densities and/or building heights, mixed-land use requirements, pedestrian-friendly design features and amenities, and reduced parking ratios. The TOD projects funded through the program help to implement the metropolitan area's long-range plan, the 2040 Growth Concept, which calls for a significant amount of the region's growth to be concentrated in medium- to high-density mixed-use, walkable urban centers and corridors linked by high-quality transit service.<sup>147</sup>

The program began with a \$3 million FTA grant that was facilitated by the agency's 1997 joint development administrative regulations. By 2007, the program had expended more than \$17 million to fund 29 projects around the region.<sup>148</sup> These projects contain more than 2,500 units of new housing and 1.2 million sq ft of commercial space. Metro estimates that more than 3,000 new transit trips per day have been generated from these projects.<sup>149</sup>

The California Predevelopment Loan Fund, administered by the state's Department of Housing and Community Development, is a revolving loan fund that supports the construction of affordable housing in the state.

The loans help provide "bridge" funding of costs that are typically incurred through the development stages leading up to actual construction of housing projects, including land acquisition, professional services, site preparation, permitting and entitlement, and infrastructure expenses.<sup>150</sup> Entities eligible for these loan funds include government agencies and nonprofit organizations that provide assisted housing for primarily low-income households.<sup>151</sup> While the Department is required to give priority to projects located in public transit corridors when making general allocations of Predevelopment Loan Fund monies,<sup>152</sup> the legislature has specified that funds from the Jobs-Housing Balance Improvement Program *must* be used for projects located within 0.5 mi of an existing or planned transit station "where two or more mass transit modes, or one transit mode with three or more mass transit lines, are accessible to the public."<sup>153</sup>

California's Transit-Oriented Development Implementation Program was established in 2006 by ballot initiative as part of the Housing and Emergency Shelter Trust Fund Act of 2006.<sup>154</sup> The twin purposes of the Transit-Oriented Development Housing Fund, as the program is titled by the Department of Housing and Community Development, are to provide grants to local governments for TOD-related infrastructure and loans to help finance the construction of TOD-located housing.<sup>155</sup> The latter component requires that loan recipients provide at least 15 percent of the housing units in a project at rates that are affordable for low- or very-low-income households and that the project be located no further than 0.5 mi from an existing transit station,<sup>156</sup> or a future station that is part of a metropolitan or state transportation improvement program.<sup>157</sup> While projects may include nonresidential components, including retail,<sup>158</sup> the primary purpose of the fund is to provide gap financing for rental-housing projects and mortgage assistance funds for home-ownership projects.<sup>159</sup> To maximize the fund's potential transit rider-

<sup>150</sup> *Id.* § 50530.5(b).

<sup>151</sup> *Id.* § 50531(b).

<sup>152</sup> *Id.* § 50532(h)(1). The Department is also directed to give priority to projects in public transit corridors when distributing funding from the state's Rental Housing Construction Program. *Id.* § 50737(f). "Public transit corridors" is defined, in both contexts, as areas within 0.25 mi of transit routes that receive average or higher levels of service (as determined by the relevant transit service provider). *Id.* § 50093.5.

<sup>153</sup> *Id.* § 50545(a).

<sup>154</sup> *Id.* § 53560.

<sup>155</sup> *Id.* § 53562.

<sup>156</sup> *Id.* § 53562(b); California Dept. of Housing and Community Development, TOD Housing Program: Second Round Guidelines 7 (2009), <http://www.hcd.ca.gov/fa/tod/>.

<sup>157</sup> California Dept. of Housing and Community Development, *supra* note 156, at 5.

<sup>158</sup> CAL. HEALTH & SAFETY CODE § 53562(b) (Deering 2008).

<sup>159</sup> California Dept. of Housing and Community Development, *supra* note 156, at 1.

<sup>146</sup> SANDAG, TransNet Extension Ordinance and Expenditure Plan (Commission Ordinance 04-01) 8, [http://www.sandag.cog.ca.us/uploads/projectid/projectid\\_341\\_8806.pdf](http://www.sandag.cog.ca.us/uploads/projectid/projectid_341_8806.pdf).

<sup>147</sup> See App. C for a sample purchase agreement and easement deed restriction from the Metro TOD and Centers Program.

<sup>148</sup> METRO, TRANSIT-ORIENTED DEVELOPMENT AND CENTERS PROGRAM: ANNUAL REPORT 2, 12 (2007), [http://library.oregonmetro.gov/files/transit-oriented\\_development\\_and\\_centers\\_2007\\_annual\\_report.pdf](http://library.oregonmetro.gov/files/transit-oriented_development_and_centers_2007_annual_report.pdf).

<sup>149</sup> *Id.* at 17.

ship benefits, the Department limits funding to TOD areas within regions that have high levels of traffic congestion, high development densities, and high-quality transit service.<sup>160</sup> The department allocates funds using a competitive point system that prioritizes projects according to their relative ability to increase transit ridership.<sup>161</sup> The system assigns points for a number of features that have been empirically associated with levels of transit ridership,<sup>162</sup> including transit service frequency, the type of user information provided at the station, the population density of the surrounding area, whether the area is designated for infill development and TOD in regional and local plans, the extent to which the project provides housing to moderate- and low-income households, the presence of transit-supportive retail and institutional uses, pedestrian-friendly street and site design features, and the amount and pricing of parking associated with the project.<sup>163</sup>

Recognizing the critical role that housing can play in maintaining the vitality of downtown areas and in promoting transit ridership,<sup>164</sup> the California Downtown Rebound Capital Improvement Program provides loans for planning and constructing affordable residential infill and redevelopment projects in the state's downtown areas and "the development of higher density housing adjacent to existing or planned mass transit stations."<sup>165</sup> The program, which was created by the state legislature in 2000, is currently not funded.<sup>166</sup>

The Illinois Business Location Efficiency Incentive Act supports both the location of businesses near transit facilities and the provision of affordable workforce housing. The Act, which became law in 2007, provides a tax incentive to businesses that locate or relocate in areas requiring minimal or no new infrastructure investments and that are proximate to housing that is affordable to the employees of that business or is accessible to mass transit.<sup>167</sup> Businesses locating in areas not meeting these standards may still qualify if they develop an "employee housing or transportation remediation plan" that will increase affordable housing or transportation options near the targeted location. Businesses that meet these standards qualify for a business tax credit bonus for up to 10 percent more than they

would normally receive through other incentive programs.<sup>168</sup>

Oregon's Transit Supportive Multi-Unit Housing Property Tax Exemption Program allows cities and counties to provide property tax exemptions for affordable multifamily housing constructed on vacant or underutilized sites in rail station areas.<sup>169</sup> Projects that qualify may be exempt from *ad valorem* taxation for up to 10 years.<sup>170</sup>

### C. Agency Authority to Sponsor and Invest in TOD/Joint Development Projects

As outlined in *TCRP 12*, many states implicitly or explicitly prohibit transit agencies from directly engaging in or investing in development activities. In some states, the prohibitions are constitutionally based and, hence, difficult to overcome. Other states, however, have addressed actual or perceived barriers by passing legislation explicitly granting agencies TOD development authority.

Examples of this type of authorization include the organic acts for the California transit districts, in particular those for the San Jose,<sup>171</sup> Sacramento,<sup>172</sup> Sonoma–Marin,<sup>173</sup> and San Mateo<sup>174</sup> districts, which expressly authorize the agencies to engage in TOD projects. These authorizations typically include a definition of TOD; for example, this provision from the Sacramento Regional Transit District Act:

As used in this section, "transit-oriented joint development project" means a development project for commercial, residential, or mixed-use purposes that is undertaken in connection with existing, planned, or proposed transit facilities and is located one-fourth mile or less from the exterior boundary of the parcel on which that facility is located.<sup>175</sup>

By including such specific definitions, these authorizations can also be understood as limitations: real estate development projects not meeting the definition can be reasonably interpreted as being beyond the scope of the district's authority. Another limitation is that these authorizations do not include authority to use eminent domain for TOD projects, and in some cases specifically prohibit it.<sup>176</sup>

A complementary provision of California law grants authority to all transit districts to enter into joint development agreements with public agencies, public utilities, or private entities for the development of real property, including the development of "commercial,

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 2.

<sup>162</sup> Richard Lee & Robert Cervero, Research Basis for Proposed Criteria of the TOD Housing Program: The Effect of Housing Near Transit Stations on Vehicle Trip Rates and Transit Trip Generation—A Summary Review of Available Evidence (2007), see summary at [http://www.hcd.ca.gov/fa/tod/todresearch\\_sumappda102207.pdf](http://www.hcd.ca.gov/fa/tod/todresearch_sumappda102207.pdf).

<sup>163</sup> California Dept. of Housing and Community Development, *supra* note 156, at 17–23.

<sup>164</sup> CAL. HEALTH & SAFETY CODE § 50898 (Deering 2008).

<sup>165</sup> *Id.* § 50898.1(a).

<sup>166</sup> California Dept. of Housing and Community Development, Downtown Rebound Capital Improvement Program Web site, <http://www.hcd.ca.gov/fa/drp/>.

<sup>167</sup> 35 ILL. COMP. STAT. 11/5 (2009).

<sup>168</sup> *Id.* 10/11(c) (2009).

<sup>169</sup> OR. REV. STAT. § 307.600 (2007).

<sup>170</sup> *Id.* § 307.612(1).

<sup>171</sup> CAL. PUB. UTIL. CODE § 100130.5 (Deering 2008).

<sup>172</sup> *Id.* § 102240.5.

<sup>173</sup> *Id.* § 105087.

<sup>174</sup> *Id.* § 103240.5.

<sup>175</sup> *Id.* § 102240.5(a).

<sup>176</sup> *E.g., id.* § 102240.5(d).

residential, or mixed uses.<sup>177</sup> The purpose of such projects must be “to foster transit use, enhance the transit service, or foster the integration of land use and transportation.”<sup>178</sup>

In Connecticut, the authority to engage in TOD projects is granted not to the state’s transit districts but to the Commissioner of Transportation and requires further approval from the state’s Secretary of the Office of Policy and Management.<sup>179</sup> As with the California examples, the grant of authority includes a definition of TOD, which also acts as a limitation. In this case, however, the geographic scope is broadened to 0.5 mi or “walking distance” of transit facilities.<sup>180</sup> Maryland similarly provides specific authority to its state department of transportation to engage in TOD activities.<sup>181</sup>

Pennsylvania’s Transit Revitalization Investment District Act, adopted in 2004, authorizes the state’s transit agencies to designate “transit revitalization investment districts” (TRIDs) to “[p]romote local, county and regional economic development and revitalization activities through private sector investment, reinvestment and joint development activities in conjunction with public transportation improvements.”<sup>182</sup> Designated TRIDs may include lands within 0.5 mi radius of an existing or planned rail or busway transit station and must be supported by a planning study that provides analysis of existing conditions, proposed land uses, property availability, infrastructure conditions, and public financing requirements.<sup>183</sup> Once a TRID has been created, the transit agency may acquire and develop land within the TRID.<sup>184</sup> The TRID designation also creates a co-terminus “value capture area” in which the transit agency may share—along with the municipality, school district, and county—in the incremental increases in property tax revenues generated by the new real estate investment within the TRID.<sup>185</sup> Revenues accrued from the value capture area must be used for creation and maintenance of necessary public improvements in the TRID.<sup>186</sup>

#### IV. CASE LAW

When *TCRP LRD 12* was published 10 years ago, there were no reported cases involving TOD or TJD projects. A telling factor indicating that transit-related development products have moved from infancy toward maturity is the presence of at least some litigation involving the development strategies. TOD planning poli-

cies and zoning regulations, while perhaps oriented toward different aims than traditional “Euclidean” zoning and planning practices, are nevertheless based on the same basic governmental function of exercising police power regulatory control over the use of land. Hence, the same general legal limitations that apply to all land-control regulations and approval processes—such as uniform treatment within zoning districts<sup>187</sup> and the need for quasi-judicial decisions to be supported by substantial evidence<sup>188</sup>—apply to TOD regulations and proceedings as well. The following subsections, while tracing many of the recurrent legal issues that arise in modern land-use law, cover the issues from the perspective of TOD, TJD, and related development project types.

A fundamental issue in any land-use regulatory matter is whether the government is acting within the scope of its police power authority. That authority is restricted by constitutional principles of substantive due process, which require regulatory actions to have some logical connection to community health, safety, morals, or general welfare.<sup>189</sup> When the regulation emanates from a local government, an allied issue is whether the local government is acting within the scope of authority delegated to it by the state legislature. As instruments of the state, local governments have no inherent power apart from that granted to them by the state. Although through much of the 19th and 20th centuries courts interpreted grants of authority to local governments narrowly, the more recent interpretive trend has been to view such delegations broadly.<sup>190</sup>

In *Molo Oil Co. v. City of Dubuque*,<sup>191</sup> owners and lessees of industrial properties in a riverside area of Dubuque, Iowa, known as Ice Harbor appealed the city’s rezoning of their properties to a planned unit development (PUD) classification. Before the rezoning, the area had been zoned and used for heavy industrial uses. In 1989, however, the city designated the area an urban renewal district and commissioned the creation of a new master plan. The master plan recommended transitioning the area from its current industrial character to a more pedestrian-oriented environment with recreational, commercial, and residential uses. In 2001, the area adjacent to Ice Harbor, which had also been industrial, was redeveloped into a \$188 million campus consisting of a river walk, museum/aquarium, hotel, water park, and conference center. In 2002, to continue the redevelopment of the broader area and to implement the master plan, the city rezoned the entire Port of Du-

<sup>177</sup> *Id.* § 99420(a).

<sup>178</sup> *Id.* § 99420(c).

<sup>179</sup> CONN. GEN. STAT. § 13b-79kk(b) (2008).

<sup>180</sup> *Id.* § 13b-79kk(a)(4).

<sup>181</sup> MD. CODE ANN., TRANSP. § 7-102(a)(2) (2008).

<sup>182</sup> 73 PA. CONS. STAT. § 850.102(2)(i) (2008).

<sup>183</sup> *Id.* §§ 850.103, 850.301(1), (3).

<sup>184</sup> *Id.* § 850.501.

<sup>185</sup> *Id.* § 850.701.

<sup>186</sup> *Id.* § 850.702.

<sup>187</sup> *Evarts v. City of Somerville*, 2006 Mass. 14 LCR 148, 2006 LEXIS 21 (Mass. Land Ct. Mar. 7, 2006).

<sup>188</sup> *IBC Denver II v. City of Wheat Ridge*, 183 P.3d 714 (Colo. Ct. App. 2008).

<sup>189</sup> *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 542, 125 S. Ct. 2074, 2083–84, 161 L. Ed. 2d 876, 891 (2005).

<sup>190</sup> JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 3.7, West Group (2d ed. 2007).

<sup>191</sup> *Molo Oil*, 692 N.W.2d 686 (Iowa 2005).

buque area, including Ice Harbor, to a PUD. Under the PUD zone, the existing industrial uses, including those of the plaintiffs, were allowed to continue as nonconforming uses, but with tight restrictions on expansion, change of use, and rebuilding.

The plaintiffs appealed the rezoning, claiming that the city's action went beyond its police power authority and affected a taking of their property in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution and parallel provisions of the Iowa constitution. The state Supreme Court, affirming the prior decision of the district court, found that the city's action was well within the police power authority over planning and zoning issues delegated to it by the state legislature. Echoing language from the Standard State Zoning Enabling Act of 1924,<sup>192</sup> the relevant provision of state law cited by the court provides that zoning regulations "shall be made in accordance with a comprehensive plan and designed to...encourage efficient urban development patterns...[and] to promote health and the general welfare."<sup>193</sup> So long as it is fairly debatable that a zoning provision has "any real, substantial relation to the public health, comfort, safety, and welfare," the court stated, it will be deemed valid.<sup>194</sup> Applying that standard to the Ice Harbor rezoning, the court confirmed the city's findings, based on the underlying master plan, that the rezoning "encouraged efficient development patterns; ...promoted the health and general welfare...; and was made with a view to encourage the most appropriate use of the land."<sup>195</sup> As to the takings claim, the court affirmed the lower's court holding that the claim was not ripe, as the plaintiffs had not yet exhausted their administrative remedies.<sup>196</sup>

### A. Procedural Due Process

In addition to ensuring that land-use regulations are within the government's legitimate police power authority, it is equally important that land-use decision-making processes adequately safeguard participants' procedural due process rights. Both the Fifth and Fourteenth Amendments to the Federal Constitution prohibit government from depriving "any person of life, liberty, or property without due process of law."<sup>197</sup> Determining precisely what process is due in the land-use permitting and zoning contexts has been a subject of fairly vigorous judicial debate.<sup>198</sup>

In *Summers v. City of Charlotte*,<sup>199</sup> two groups of land owners petitioned the City of Charlotte, North Carolina, in 1999 to rezone lands in the city's SouthPark area.

One group sought to change the zoning of their property from a general office designation to a mixed-use district; the other group sought to change the zoning of an adjacent property from a general commercial classification to a commercial center designation. In 2000, the city adopted a small area plan for the SouthPark area, containing goals for "creating a greater mixture of land uses, especially by incorporating more multi-family residential development; identifying and planning for future mass transit service in the SouthPark area; [and] developing a multi-modal transportation system that emphasized pedestrian improvements and linkages to mass transit."<sup>200</sup>

Shortly after the city's adoption of the plan, the state legislature amended the state zoning and planning legislation to allow for "conditional zoning." Conditional zoning is a process that allows both rezoning and conditional use approval to occur in a single process, as opposed to the more traditional two-step procedure. After subsequent modifications to their rezoning petitions, the two groups of land owners sought approval of their applications under the new conditional zoning process. The city, determining that the applications met the goals of the small area plan, approved the applications subject to continuing compliance with the relevant zoning code provisions for the respective designations.

Surrounding homeowners sued the city, claiming the conditional zoning process violated constitutional guarantees of separation of powers and the plaintiffs' substantive and procedural due process rights. The plaintiffs' primary objection was to the removal of the customary conditional use permitting process that follows most rezonings. Because rezoning processes in North Carolina are treated as legislative actions, they provide surrounding property owners with only limited participation rights. Hence, the elimination of the conditional use process, with its quasi-judicial procedural rules, effectively reduced the neighbors' opportunity to participate in the approval process. In affirming a lower court judgment in favor of the city, the state court of appeals noted that the "fundamental premise of procedural due process protection is notice and the opportunity to be heard," which the court found the plaintiffs had received abundantly through various public meetings the city hosted for the proposed rezonings.<sup>201</sup>

In *Albuquerque Commons v. City of Albuquerque*,<sup>202</sup> the holder of a long-term lease to an abandoned high school site in the Uptown section of Albuquerque, New Mexico, sought to redevelop the property with a big-box retail project. Citing concerns about the possible negative air quality impacts that could come with additional auto-oriented commercial uses, the city adopted a moratorium on development in the entire Uptown area and directed the creation of a new sector plan. Under the new plan, the high school site and two adjacent properties were reclassified as "Intense Core," a designation

<sup>192</sup> See JUERGENSMEYER & ROBERTS, *supra* note 190, § 3.6.

<sup>193</sup> IOWA CODE § 414.3 (2008).

<sup>194</sup> *Molo Oil*, 692 N.W.2d at 691.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 694.

<sup>197</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

<sup>198</sup> See, e.g., *Fasano v. Wash. County*, 264 Or. 574, 507 P.2d 23 (1973).

<sup>199</sup> 149 N.C. App. 509, 562 S.E.2d 18 (2002).

<sup>200</sup> *Id.* at 21.

<sup>201</sup> *Id.* at 24–25.

<sup>202</sup> 144 N.M. 99, 184 P.3d 411 (2008).

intended to promote a pedestrian- and transit-friendly environment by, *inter alia*, prohibiting free-standing retail structures, limiting their size, and capping the maximum percentage of space devoted to retail to 10 percent. After the adoption of the plan, city staff denied the pending big-box application for the high school site, finding the project inconsistent with the provisions of the new plan.

The applicant simultaneously brought two separate actions, seeking judicial review of both the plan adoption<sup>203</sup> and the denial of the development application. The controlling issue governing the outcome of both appeals was whether the city acted correctly in adopting the new plan through a legislative process, or whether the action needed to be accomplished through a quasi-judicial proceeding. Under New Mexico law, municipal action that affects a downzoning of a limited number of specifically targeted properties must be supported by findings and evidence of either a change in conditions in the community surrounding the subject property or a demonstration that the prior zoning designation was the result of some governmental mistake.<sup>204</sup> Given the small number of properties designated “Intense Core” in the new sector plan and the increased restrictions on uses allowed in the zone compared to the previous designation, the state Supreme Court had little difficulty finding that the city acted in error. Citing the seminal Oregon case, *Fasano v. Washington County*,<sup>205</sup> the court held that for the rezoning to be valid, the city would have had to conduct quasi-judicial proceedings and satisfy the “change or mistake” criteria.

## B. Vested Rights

Any time a local government changes the legislative standards that govern the uses allowed on a piece of land, the question arises whether the new regulation can legally be applied to development applications for that property that may be pending or approved but not constructed. If the owner’s rights to develop under the old standards are deemed to be “vested,” the new regulations cannot be enforced without giving rise to a takings claim. On the other hand, if the development rights have not been vested, the new regulations can be applied. Although the bright line for when vesting occurs varies from state to state, under the basic rule, the government must have given at least some preliminary approval for the project and the land owner must have acted in good faith in reliance on that approval by mak-

ing improvements to the land or other significant commitment of resources.<sup>206</sup>

In *Wal-Mart Stores v. Clark County*,<sup>207</sup> Wal-Mart began early in 1999 pursuing construction of two new supercenters in the Las Vegas region. By the fall of that year, the company had expended substantial sums for the purchase and lease of the two properties and for architectural, engineering, water, and utility services. The company had also received site grading permits from the county and had begun actual site preparation activities. In October of that year, however, members of the Clark County Commission became concerned about the possible negative impacts the two supercenters might have on pedestrian and vehicle traffic and passed an ordinance prohibiting businesses with more than 110,000 sq ft of retail space from devoting more than 7.5 percent of that space to the sale or display of food items. The ordinance effectively prohibited construction of the supercenters, both of which were to include substantial grocery components.

Believing its property rights had been violated by the late adoption of the ordinance, Wal-Mart sued the county, claiming that it had a vested right to continue with the construction of the two stores. On a motion for a preliminary injunction, the federal district court found that the prior preliminary approvals from the county and the company’s significant expenditures in reliance on those approvals demonstrated that the development rights in the two projects were indeed vested under Nevada law. Having found that the company would likely succeed on the merits of its case once it went to trial, and that it would likely suffer irreparable harm should the ordinance be allowed to go into effect, the court issued the preliminary injunction, barring enforcement of the ordinance.

## C. Consistency

*Consistency* usually refers to some level of consonance between a local government’s zoning ordinance and its general or comprehensive plan.<sup>208</sup> Washington’s Growth Management Act (GMA), however, also requires consistency between planning and zoning policies and actual outcomes. For urban counties in the western portion of the state, the law requires a periodic assessment to

[d]etermine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual

<sup>203</sup> As part of the action to review adoption of the new sector plan, the applicant (now plaintiff) included § 1983 claims for damages it allegedly suffered to its procedural and substantive due process rights and for inverse condemnation for allegedly taking its property rights in violation of the Fifth and Fourteenth amendments.

<sup>204</sup> See *Miller v. Albuquerque*, 89 N.M. 503, 506, 554 P.2d 665, 668 (1976); *Davis v. Albuquerque*, 98 N.M. 319, 648 P.2d 777 (1982).

<sup>205</sup> 264 Or. 574, 507 P.2d 23 (1973).

<sup>206</sup> STUART MECK, *GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE* 8–95 (2002), see <http://ideas.repec.org/p/hud/wpaper/39157.html#provider> regarding availability.

<sup>207</sup> 125 F. Supp. 2d 420 (D. Nev. 1999).

<sup>208</sup> JUERGENSMEYER & ROBERTS, *supra* note 190, § 2.12.A.

growth and development that has occurred in the county and its cities.<sup>209</sup>

In *Kitsap County v. Central Puget Sound Growth Management Hearings Board*,<sup>210</sup> the county's assessment showed that during the first 5 years of the state's growth management program, only 18 percent of residential units had located in the county's urban growth areas (UGAs) despite a county growth policy stating that 83 percent of units should be within UGAs. Although the county's comprehensive plan had been in effect only during the last year of the 5-year period covered in the assessment, the court held that the level of inconsistency between the plan's policies and facts on the ground triggered the statutory obligation to adopt reasonable remedial measures. These measures, according to the court, needed to be something more than what the county had articulated, which the court found to be a mere recounting of preexisting policies.

Another atypical application of the consistency doctrine arises when conflicts occur between the contents of plans developed by regional authorities, such as MPOs, and those created by local municipalities. Looking again at the GMA, the Washington Court of Appeals in *City of Des Moines v. Puget Sound Regional Council*<sup>211</sup> reviewed an alleged conflict between the Council's regional transportation plan, which included an additional runway for the Seattle-Tacoma International Airport, and the comprehensive plans of local governments adjacent to the airport. Although there was some question as to whether an actual conflict existed, the court nevertheless reached the bigger issue of how to resolve such conflicts. The court found no specific statutory guidance on how to resolve such conflicts, and instead had to rely on the GMA's broader structure:

[W]hen construed as a whole, the GMA evinces the Legislature's intent to discard the traditional land use system in which each jurisdiction functioned as an isolated entity in favor of a scheme which stresses coordination, cooperation, and integration. In light of this legislative purpose, we agree with the PSRC that if the coordinated planning process does not result in consistency between regional and local plans, the regional plans must prevail.<sup>212</sup>

#### D. NEPA and "Mini-NEPAs"

The National Environmental Policy Act of 1969<sup>213</sup> (NEPA) requires government agencies to assess the environmental impacts posed by "major federal actions."<sup>214</sup> For such actions, the agency must, in most cases, prepare at least an environmental assessment, if not a full-blown environmental impact statement.<sup>215</sup> In

*Woodham v. Federal Transit Administration*,<sup>216</sup> the primary issue was whether FTA's plan approval and project funding for a transit-oriented joint development project was a major federal action under NEPA, triggering the environmental analysis requirements. The project at issue was a proposed joint development for the Lindbergh transit station area in Atlanta, which included the construction of new office buildings, retail shops, and rental and for-sale multifamily residential units. The Metropolitan Atlanta Regional Transit Authority (MARTA) applied to FTA for joint development funds that would finance the purchase of land for the project. Analogizing to non-joint development cases involving land purchases, the court noted that to be a major federal action under NEPA, the federal agency must have "sufficient 'power' or 'control' over a project."<sup>217</sup> In this case, the court held, FTA had no such control or responsibility:

MARTA created, developed, and implemented the joint development plan, using funds received from private investors. While MARTA used FTA funding to purchase property (9.6 of the 48 total acres) and begin preliminary development of the project, these funds do not transform the joint development plan into a "major federal action."<sup>218</sup>

The court consequently granted FTA's motion to dismiss the NEPA claim and a related claim under the National Historic Preservation Act.

*Utahns for Better Transportation v. U.S. Department of Transportation*<sup>219</sup> represents a more traditional application of NEPA in transportation contexts—the proposed construction of a new highway through federally-protected wetlands. Plaintiffs in the case, several Utah-based environmental groups, sought a declaration that the environmental impact statement for the project failed to meet NEPA standards for, *inter alia*, failing to consider a transit-oriented development land use alternative. Citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,<sup>220</sup> the court held that the proffered alternative was remote and speculative and, hence, did not meet NEPA's "rule of reason."<sup>221</sup> The defendant transportation agencies, consequently, were not required to consider the alternative.

Notwithstanding the holding in *Utahns*, the recent popularity of transit-based land-use visioning and scenario planning projects in the United States has led some writers to assert that land use alternatives, such as the one promoted in *Utahns*, have ceased to be speculative and have become part of the state-of-the-practice for transportation and land-use planners.<sup>222</sup>

<sup>216</sup> 125 F. Supp. 2d 1106 (N.D. Ga. 2000).

<sup>217</sup> *Id.* at 1109.

<sup>218</sup> *Id.*

<sup>219</sup> 305 F.3d 1152 (10th Cir. 2002).

<sup>220</sup> 435 U.S. 519, 551, 98 S. Ct. 1197, 1215, 55 L. Ed. 2d 460, 484 (1978).

<sup>221</sup> *Utahns*, 305 F.3d at 1172.

<sup>222</sup> E.g., Keith Bartholomew, *Cities and Accessibility: The Potential for Carbon Reductions and the Need for National Leadership*, 36 *FORDHAM URB. L.J.* 159, 199–204 (2009); Reid

<sup>209</sup> WASH. REV. CODE § 36.70A.215(1)(a) (2009).

<sup>210</sup> 138 Wash. App. 863, 158 P.3d 638 (2007).

<sup>211</sup> 97 Wash. App. 920, 988 P.2d 993 (1999).

<sup>212</sup> *Id.* at 998–99.

<sup>213</sup> Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4331–4347 (2006)).

<sup>214</sup> 42 U.S.C. § 4332(2)(C)(iii) (2006).

<sup>215</sup> 40 C.F.R. §§ 1500–1508 (2008).

Changes in the application of NEPA's rule of reason over time suggest that the determination of a proposed alternative's reasonableness is based on context. What was unreasonable in the past may become reasonable over time due to changes in technology, science, society, economics, and professional practice: "the concept of alternatives is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood."<sup>223</sup>

The completion of more than 80 metropolitan-wide, transit-based scenario planning projects between 1989 and 2003,<sup>224</sup> coupled with increased court scrutiny of the land-use assumptions used to justify new highway projects<sup>225</sup> and the adoption of state<sup>226</sup> and introduction of federal<sup>227</sup> legislation encouraging land-use scenario analysis, suggests that *Utahns* may represent the end of the "speculative" phase for such alternatives. Perhaps the holding in *Utahns* is better understood as the result of the plaintiffs' failure to satisfy the "pleading" requirements of *Vermont Yankee*—NEPA participants must articulate proposed alternatives with sufficient specificity—than an indication that transit-based land use alternatives are, per se, beyond the rule of reason. This interpretation is bolstered by the subsequent history of the case, where, during a remand on other grounds, the plaintiffs developed a detailed "Citizens Smart Growth Alternative" that became the basis for a settlement of the litigation.<sup>228</sup> Tellingly, in a subsequent study of another proposed highway, the Utah Department of Transportation—the primary defendant in *Utahns*—decided on its own accord to incorporate a transit-oriented land-use alternative as part of its NEPA analysis.<sup>229</sup>

---

Ewing, Research You Can Use: Regional Scenario Plans and Meta-Analysis, Plan., Mar. 2007, at 38, [http://cmpweb.arch.utah.edu/files/Research\\_Mar07.pdf](http://cmpweb.arch.utah.edu/files/Research_Mar07.pdf).

<sup>223</sup> E.g., Bartholomew, *supra* note 222, at 201 (2009) (quoting *Vermont Yankee*, 435 U.S. at 552–53).

<sup>224</sup> BARTHOLOMEW & EWING, *supra* note 101, at 16–18, [http://www.scag.ca.gov/pptac/pdfs/other/JAPA\\_LUTS.pdf](http://www.scag.ca.gov/pptac/pdfs/other/JAPA_LUTS.pdf).

<sup>225</sup> See *Conservation Law Found. v. FHWA*, No. 06-cv-45-PB, 2007 U.S. Dist. LEXIS 64465 (D. N.H. Aug. 30, 2007); *Senville v. Peters*, 327 F. Supp. 2d 335 (D. Vt. 2004); *N.C. Alliance for Transp. Reform v. U.S. DOT*, 151 F. Supp. 2d 661, 690 (M.D.N.C. 2001); *Sierra Club v. U.S. DOT*, 962 F. Supp. 1037 (N.D. Ill. 1997); *Citizens for a Better Environment v. Deukmejian*, 1990 U.S. Dist. LEXIS 17976 (N.D. Cal. Dec. 21, 1990).

<sup>226</sup> CAL. GOV'T CODE § 65080.3 (2008).

<sup>227</sup> H.R. 1329, 111th Cong. § 6304(c)(6) (2009).

<sup>228</sup> Robert W. Adler, *In Defense of NEPA: The Case of the Legacy Parkway*, 26 J. LAND RESOURCES & ENVTL. L. 297, 306 (2006).

<sup>229</sup> *Envision Utah, Mountain View Corridor Growth Choices Process: Helping Solve Our Communities' Transportation Problems*, in *Mountain View Corridor Draft Environmental Impact Statement App. 3A* (Utah Department of Transportation 2008), [www.udot.utah.gov/mountainview/.../mountainview.../03A-Growth\\_Choices\\_Study.pdf](http://www.udot.utah.gov/mountainview/.../mountainview.../03A-Growth_Choices_Study.pdf).

Despite NEPA's dominance in the environmental legal literature, environmental analysis and reporting is not just a function of federal law. Since the passage of NEPA in 1969, 16 states and the District of Columbia have passed "mini-NEPAs," requiring assessments of state and local actions in a manner similar to NEPA.<sup>230</sup> The actions covered by these mini-NEPAs vary from state to state. In some states, such as Connecticut, the mini-NEPA affects only state agency activities.<sup>231</sup> In others, such as New York, actions by local governments, including land-use permitting, are covered.<sup>232</sup> The attorney general of California has interpreted that state's mini-NEPA—the California Environmental Quality Act (CEQA)—as requiring local governments to assess greenhouse gas (GHG) emissions in land-use planning and permitting contexts.

In a celebrated lawsuit against San Bernardino County, the state attorney general asserted that CEQA required the county to assess and mitigate GHG emission impacts associated with an update of the county's general plan.<sup>233</sup> As part of the settlement of the lawsuit, the county agreed to prepare a plan that will include a GHG emissions inventory and emissions reduction targets.<sup>234</sup> The application of CEQA to GHGs is also being observed in project level decisions. In *Center for Biological Diversity v. Yucca Valley*,<sup>235</sup> a California superior court reversed a municipality's permit approval of a new 184,000 sq ft Wal-Mart Supercenter for failing to account for the project's transportation-related GHG emissions. Both of these cases suggest that GHG impacts analysis under state mini-NEPAs could favor TOD and joint development projects, where GHG emissions are comparatively lower.

## E. Eminent Domain

The use of eminent domain powers to facilitate economic development objectives, while always contentious, became particularly controversial after the Su-

---

<sup>230</sup> Caleb W. Christopher, *Success By a Thousand Cuts: The Use of Environmental Impact Assessment in Addressing Climate Change*, 9 VT. J. ENVTL. L. 549, 553 (2008).

<sup>231</sup> CONN. GEN. STAT. §§ 22a-1 to 22a-1h (2008).

<sup>232</sup> Kathryn C. Plunkett, *Comment, Local Environmental Impact Review: Integrating Land Use and Environmental Planning Through Local Environmental Impact Reviews*, 20 PACE ENVTL. L. REV. 211, 211–12 (2002).

<sup>233</sup> Akin Gump Strauss Hauer & Feld, *Environmental Alert: Affirmative Use of the California Environmental Quality Act to Require Consideration of Climate Change Impacts in Land Use Planning* (Sept. 14, 2007), <http://www.akingump.com/files/Publication/71a70d4c-b16d-462b-ae5a-6054e9c5600f/Presentation/PublicationAttachment/36045993-7a52-40a4-88e7-627bd65486bb/1026.pdf>.

<sup>234</sup> Settlement Agreement between the State of California and the County of San Bernardino (Aug. 21, 2007), [http://ag.ca.gov/cms\\_pdfs/press/2007-08-21\\_San\\_Bernardino\\_settlement\\_agreement.pdf](http://ag.ca.gov/cms_pdfs/press/2007-08-21_San_Bernardino_settlement_agreement.pdf).

<sup>235</sup> Case No. CIVBS800607 (Sup. Ct. San Bernardino Cty. May 14, 2009).

preme Court's decision in *Kelo v. New London*.<sup>236</sup> The controversy came to TOD/joint development contexts in the litigation surrounding the Atlantic Yards Arena and Redevelopment Project in Brooklyn, New York. The estimated \$4 billion project, situated on top of the Metropolitan Transportation Authority's (MTA) Vanderbilt Rail Yards, is one of the largest transit-oriented joint development projects ever proposed. In addition to a new arena for an National Basketball Association franchise, the project will encompass 336,000 sq ft of office space, 6,430 units of affordable and market-rate housing, 247,000 sq ft of retail space, a 180-room hotel, and 8 acres of open space.<sup>237</sup> The site is served by 13 subway lines, the Long Island Rail Road, and 11 bus lines.<sup>238</sup>

While most of the Atlantic Yards site is comprised of the MTA rail yards, it also includes several privately-owned parcels. When the quasi-public agency building the project announced its plans to use eminent domain to assemble the project's real estate, the owners of the privately-owned parcels sued to stop the takings. In two separate actions, one in federal court<sup>239</sup> and one in state court,<sup>240</sup> the landowners argued that the project did not meet the Public Use Clause of the Federal Constitution's Fifth Amendment and parallel provisions in the state constitution. While acknowledging that the project will provide significant public benefits "such as the redress of blight, the construction of a sporting arena, and the creation of new housing, including 2,250 new units of affordable housing," the plaintiffs argued in both cases that the primary motivation for the project was to enrich the private individual who proposed the project and who stands to profit substantially from its completion.<sup>241</sup> Noting that the primary mechanism for enforcement of the Public Use Clause is accountability of political officials to the electorate, the federal court of appeals observed that its standard of review in such cases is "an extremely narrow one."<sup>242</sup> In line with *Kelo* and other federal decisions, the court stated that so long as the exercise of eminent domain is "rationally related to a conceivable public purpose," the constitutional standards have been satisfied.<sup>243</sup> The courts in both cases found that this standard had been amply met.<sup>244</sup>

<sup>236</sup> 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).

<sup>237</sup> Barclays Center, About Atlantic Yards Web site (2008), available at [http://www.barclayscenter.com/about/about\\_atlanticyards.shtml](http://www.barclayscenter.com/about/about_atlanticyards.shtml).

<sup>238</sup> Barclays Center, Transportation Web site (2008), available at [http://www.barclayscenter.com/venue/venue\\_4.shtml](http://www.barclayscenter.com/venue/venue_4.shtml).

<sup>239</sup> *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008).

<sup>240</sup> *Goldstein v. N.Y. State Urban Dev. Corp.*, 2009 N.Y. Slip Op. 3903, 64 A.D. 3d 168, 879 N.Y.S.2d 524, 2009 N.Y. App. Div. LEXIS 3754 (2009).

<sup>241</sup> *Goldstein*, 516 F.3d at 56.

<sup>242</sup> *Id.* at 57.

<sup>243</sup> *Id.* at 58.

<sup>244</sup> *Id.* at 59; *Goldstein*, 2009 N.Y. App. Div. LEXIS 3754, at 25.

## F. Religious Land Uses

Although religious land uses do not, per se, have a TOD or joint development dimension to them, federal legislation that limits local government planning and zoning authority over religious uses can affect TOD and joint development projects. The Religious Land Uses and Institutionalized Persons Act of 2000 (RLUIPA) is Congress's second recent attempt to "protect the free exercise of religion from unnecessary government interference,"<sup>245</sup> the prior statute<sup>246</sup> having been invalidated by the Supreme Court.<sup>247</sup> Both RLUIPA and its predecessor represent congressional responses to the Supreme Court's ruling in *Employment Division v. Smith*,<sup>248</sup> where the Court held that neutral, generally applicable laws that impact religious land uses need only show a rational relationship to a legitimate governmental interest—a fairly low legal standard. RLUIPA increases protection of religious land uses beyond this standard in two primary ways. First, the Act requires governments whose individualized land-use decisions place a substantial burden on the exercise of religion to demonstrate that those decisions advance a compelling governmental interest and are no more restrictive than necessary.<sup>249</sup> Second, the Act prohibits land-use regulations that treat comparable religious and nonreligious assemblies unequally.<sup>250</sup>

It was this second RLUIPA standard—the "equal terms" provision—that was central to the U.S. district court decision in *River of Life Kingdom Ministries v. Village of Hazel Crest*.<sup>251</sup> The church in that case had purchased property in a B-2 transit-oriented commercial district that was also part of the village's tax increment financing district. The B-2 district, which was intended to promote transit-oriented commercial uses, did not permit churches. It did, however, allow for art galleries, museums, public libraries, recreational buildings, and community centers. When the church's application for a special-use permit was denied, it sued the village, arguing that because these other noncommercial, nonreligious uses were assembly-oriented uses comparable to religious uses, the village's prohibition on churches violated RLUIPA. The court agreed, initially, and granted the church's motion for a temporary restraining order (TRO) against the village.<sup>252</sup> In response, the village amended the B-2 zone to eliminate all of the

<sup>245</sup> 146 CONG. REC. H7190 (2000) (statement of Rep. Charles T. Canady).

<sup>246</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb.

<sup>247</sup> *Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

<sup>248</sup> 494 U.S. 872, 885, 110 S. Ct. 1595, 1603, 108 L. Ed. 2d 876, 890 (1990).

<sup>249</sup> 42 U.S.C. § 2000cc(a)(1).

<sup>250</sup> 42 U.S.C. § 2000cc(b)(1).

<sup>251</sup> No. 08 C 0950, 2008 U.S. Dist. LEXIS 53491 (N.D. Ill. July 14, 2008).

<sup>252</sup> *Id.* at 17.

uses mentioned in the church's TRO motion. In subsequent proceedings on the church's motion for a preliminary injunction, the church argued—and the court agreed—that gymnasiums and day-care centers, which were still allowed in the amended B-2 zone, were comparable to religious uses. Having found the basis for facial discrimination, the court needed to determine whether that was sufficient to demonstrate a violation of the RLUIPA equal-terms provision.

To date, only two federal circuit courts of appeal have addressed the issue of what level of scrutiny is appropriate for alleged cases of unequal treatment under RLUIPA—and they have each developed different standards.<sup>253</sup> In the Third Circuit, governments are strictly liable for equal-terms violations,<sup>254</sup> while in the Eleventh Circuit, unequal treatment violates RLUIPA only when the government cannot show that the regulation is narrowly structured to achieve a compelling governmental interest.<sup>255</sup> Electing to follow the Eleventh Circuit standard, the court in *River of Life* acknowledged the village's argument that "the very purpose of the TIF will be thwarted by an exception to the Zoning Ordinance because the Church's [no alcohol] protective zone will inhibit the development of the types of businesses that the transit-oriented development plan was designed to encourage." In balancing this along with the other factors necessary for issuing a preliminary injunction, the court found that the church had not proven its burden and ruled in favor of the village.<sup>256</sup>

## V. CASE STUDIES

This section presents case studies of TOD and joint development in Portland, Oregon; Oakland, California; Chicago, Illinois; Plano, Texas; and Morristown, New Jersey. These case studies were chosen because they each represent similar but unique approaches to integrate real estate development with public transportation.

A common theme among all case studies is that success depends upon the coordination across public and private stakeholders with active leadership. In all cases, cooperation between multiple government agencies is vital, especially municipal government and transit agencies. Portland demonstrates how a redevelopment authority, the Portland Development Commission, can be a successful implementation strategy for TODs by using a number of economic development tools to revitalize the Pearl district. Oakland and Chicago show the power of community-based nonprofits in building

TODs, the Unity Council, and Bethel New Life, respectively. Plano demonstrates a municipality-sponsored joint development, and Morristown illustrates a transit agency-led TOD.

Data were gathered from January 2009 to May 2010 and based on Web sites, newspaper articles, reports, email correspondence, and telephone interviews. This exercise uncovered many interesting findings, and the more we investigated the more we found, yet for the purpose of this digest we have kept the summaries consistent, brief, and focused on legal issues.

## A. Portland's Pearl District

### Pearl District Case Study Highlights

- Type of TOD/TJD: \$3.5 billion of private TOD development within two blocks of a streetcar line built since 2002.
- Lead Agency: Portland Development Commission (PDC), which provides planning support, predevelopment assistance, property acquisition, and redevelopment and public infrastructure along with grants and loans to spur redevelopment.
- Key Legal Issues: Zoning, public-private development agreements, property tax abatement.
- Key Element: Development agreement provisions providing for minimum development densities and a \$700,000 private-sector contribution to fund streetcar construction.

The Pearl District is a neighborhood adjacent to downtown Portland that has undergone a laudatory transformation in integrating transit with urban revitalization. This case study focuses the role of the PDC in using economic development tools to spur revitalization in a neighborhood served by the Nation's first modern streetcar line, as well as regional light rail and local buses.

The Pearl District contains nearly 4,700 housing units, with 16 percent officially classified as affordable, though the PDC maintains that 25 percent of the units in the Pearl District are affordable to 60 percent of median family income. The streetcar line opened in 2002. Since then, ridership has grown substantially, streetcar extensions have been constructed, and more than \$3.5 billion dollars of development has sprung up within two blocks of the line. This growth has equated to significant tax gains for the City of Portland. In 2000, the total property tax dollars collected for the River District, which includes the Pearl District, amounted to \$623,000. By 2008–2009, the amount of taxes collected exploded to \$23.5 million.

The PDC has been the primary public agency responsible for redevelopment in the Pearl District. The PDC's budget is distributed among three primary departments: Development Assistance, Economic Development, and Housing. Though its budgets are approved

<sup>253</sup> Sarah K. Campbell, *Note, Restoring RLUIPA's Equal Terms Provision*, 58 DUKE L.J. 1071, 1074 (2009).

<sup>254</sup> See *Lighthouse Institute for Evangelism v. Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007).

<sup>255</sup> *Midrash Sephardi v. City of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004); *Primera Iglesia Bautista Hispana v. Broward County*, 450 F.3d 1295, 1307–08 (11th Cir. 2006).

<sup>256</sup> *River of Life Kingdom Ministries*, 2008 U.S. Dist. LEXIS 53491, at 45–46.

by the city council, no elected official is employed at the PDC, rendering it a quasi-independent agency. As an engine of investment, the PDC provides a multitude of services to homeowners, developers, and businesses, both inside the Pearl and across the city. PDC's success in the Pearl District is the result of three fundamental factors: supportive zoning by the city, an aggressive PDC-private sector development agreement, and property tax abatement.

### 1. Zoning

Most of the land use in the Pearl District is residential or mixed-use. The city facilitates the mix of uses with zoning policy that reflects the Pearl's development goals outlined in a number of plans that date back to 1972. One of the dominant land-use themes in the Pearl District is the CX (Central Commercial) Zone, which allows a broad range of uses. Zoning encourages development with intense building coverage and large and closely-placed buildings to create a pedestrian-oriented atmosphere of safe and attractive streets.

Surrounding the Pearl's light rail corridor are EX zoning classifications. The EX zone, or Central Employment Zone, is intended to "allow industrial and commercial uses, which need a central location. Residential uses are allowed but are not intended to predominate or set development standards for other uses in the area."<sup>257</sup>

Since the 1980s, Portland has been offering floor area ratio (FAR) bonuses to developers to encourage housing growth in certain target areas. Today, Portland encourages denser development by allowing developers to exceed existing FARs in exchange for specific types of development.<sup>258</sup> In addition, developers can earn bonus FAR through the inclusion of public use facilities: "In the North Pearl area, floor area used for specified neighborhood facilities is not counted towards maximum FAR for the site. The specified neighborhood facilities are public schools, public community centers, daycare facilities for children, and public libraries."<sup>259</sup>

### 2. Development Agreement

In addition to transit-supportive zoning, another key element to the success of the Pearl District redevelopment process was the execution of a master development agreement between PDC and Hoyt Street Properties, one of the key landowners in the district.<sup>260</sup> The goals of the agreement were to increase the overall density of eventual development, increase the availability

of affordable housing, obtain rights-of-way for a fine grid of public streets through the district, obtain private-sector contributions to help fund public improvements in the district, obtain land for the creation of two plazas in the center of the district, and obtain a no-cost option to purchase additional land for the creation of a neighborhood park. These objectives were tied to a series of public facility improvements promised by the city. The agreement used a set of contingent obligations to tie Hoyt's and the city's responsibilities together:

- **Lovejoy Ramp Project:** In exchange for the city's obligation to replace two obsolete viaducts with new surface streets, Hoyt promised to provide the rights-of-way for the new streets plus a \$121,000 contribution to the project.

- **Streetcar Project:** In exchange for the construction of the streetcar project through the District, Hoyt agreed to an increase of approximately 22 units per acre in the minimum density standards already imposed on Hoyt's properties by the city zoning ordinance. Hoyt also agreed to a contribution of up to \$700,000 to the local improvement district established to help fund streetcar construction.

- **Park Squares Project:** Hoyt agreed to convey to the city two parcels of land in exchange for the city's promise to construct parks/plazas on those parcels. Hoyt additionally agreed to another increase in the minimum density standards for the properties surrounding the plazas.

- **Neighborhood Park Project:** In exchange for Hoyt's grant of a 6-year no-cost option to purchase land for a neighborhood park, the city agreed to resell the land back to Hoyt if the city did not complete park construction within 3 years and to give Hoyt the first right to negotiate with the city for the sale of unused city-owned property in the District.

The central importance of the City/Hoyt agreement to the Pearl District's success is summarized by the city this way:

The Agreement tied development densities to public improvements with the minimum required housing density increased incrementally from 15 to 87 units per acre when the Lovejoy Viaduct was deconstructed, to 109 units/acre when the streetcar construction commenced and 131 units/acre when the first neighborhood park was built. The developer has stated that without the Streetcar and the accessibility it provides, these densities would not have been possible. The agreement was a unique and essential piece of the public/private partnership that catalyzed development of the [Pearl] District and serves as a model for the agreement established for in South Waterfront [another streetcar-served TOD].<sup>261</sup>

<sup>257</sup> Portland Planning Online, Employment and Industrial Zones, <http://www.portlandonline.com/bps/index.cfm?&a=53298> and <http://www.portlandonline.com/planning/index.cfm?&a=64465&c=36238%23d> (last visited Sept. 23, 2010).

<sup>258</sup> Portland Planning Online, Central City Plan District, <http://www.portlandonline.com/planning/index.cfm?&a=64465&c=36238#d> (last visited Jan. 19, 2009).

<sup>259</sup> *Id.*

<sup>260</sup> See App. D for the agreement.

<sup>261</sup> PORTLAND OFFICE OF TRANSPORTATION & PORTLAND STREETCAR, INC., PORTLAND STREETCAR DEVELOPMENT ORIENTED TRANSIT 5 (2008), [http://www.portlandstreetcar.org/pdf/development\\_200804\\_report.pdf](http://www.portlandstreetcar.org/pdf/development_200804_report.pdf).

### 3. Tax Abatement

Redevelopment in the Pearl District is additionally supported by the city's expansive tax abatement program, which covers much of the housing that has been constructed around the streetcar line. To qualify for the abatement, developers had to prove that the abatement was required for project feasibility. A large number of tax abatements were granted for projects along the streetcar corridor in the Pearl District. The tax abatement is significant: one condo owner in the Pearl District reported that his annual property taxes were only \$163 as opposed to \$2,700, the normal annual property tax.<sup>262</sup> Penthouse condos valued at \$599,000 would enjoy a discount of almost \$6,000 annually.<sup>263</sup>

## B. Oakland's Fruitvale Transit Village

### Fruitvale Case Study Highlights

- Type of TOD/TJD: Nonprofit-initiated development around heavy rail station in a blighted inner-city.
- Lead Agencies: Unity Council Community Development Corporation (CDC) in partnership with the Bay Area Rapid Transit District (BART) and the City of Oakland.
- Key Legal Issues: Community-BART partnership to overcome local objections, creative financing, ground lease and land swap, and transit agency relaxation of commuter parking replacement standards.
- Key Elements to Success: Community champion enabled CDC to partner with the transit agency to create a new vision for the station.

In the early 1990s, BART developed a plan for the Fruitvale station to increase the amount of commuter parking by erecting a three-story parking structure. The plan did not sit well with the Fruitvale community. Unity Council, a local CDC, organized the community's opposition to the project. An existing parking lot was already flanking the station; an additional parking structure would have further separated the community from transit access. The community also worried that the parking lot would create a number of negative externalities including crime, traffic, and pollution.

To develop a more positive redevelopment scheme, the Unity Council sought out funding from the City of Oakland for a series of community workshops.<sup>264</sup>

The resulting plan included a 9-acre transit village on the site of BART's existing surface parking lot. The plan included a public plaza, child care, senior housing, parking structures, medical and office use, and ground-

floor retail. The plan also linked the BART station to a commercial corridor two blocks north of the station.

### 1. Creative Financing

The plan's limitations were exposed when a market analysis conducted in early 1995 concluded that the future of the village was not possible without substantial public subsidy.<sup>265</sup> The Unity Council was disappointed when it received only \$3.3 million in grants and \$3.3 million in loans out of a \$20-million Federal Empowerment Zone grant it was hoping for. Unity Council's future looked even bleaker when BART was unable to provide the \$15 million it had committed to the project. The Unity Council began to overcome the funding gap by first helping BART secure a \$7.6-million grant from the FTA to construct the transit parking structure.<sup>266</sup> It then financed a loan against the future income stream from parking fees at another parking structure to be built in a later phase of the project. Over the next couple of years, Unity Council would accrue more grants to fund the childcare center and the pedestrian plaza.<sup>267</sup>

The following table outlines both the source and the use of the funds for Phase I of the project. About 51 percent of funding for the project was debt, 71 percent of which was bonded by the City of Oakland, underwritten by a subsidiary of Citigroup.<sup>268</sup> About 70 percent of the project's costs were hard construction costs, with predevelopment costs totaling \$1 million, or about 2 percent of Phase I's total costs.

<sup>262</sup> Kendra Hogue, *Win/Win Real Estate*, THE OREGONIAN, Jan. 4, 2004, at H1. Retrieval from LEXISNEXIS Academic.

<sup>263</sup> Jan Behrs, *Housing Havens: Property Tax Breaks Add Luster to Listings*, THE OREGONIAN, Nov. 12, 2006, at H1. Retrieval from LEXISNEXIS Academic.

<sup>264</sup> Manuela Silva, *The Fruitvale Village*, 1 ECONOMIC DEVELOPMENT JOURNAL 31 (2002). Retrieval from Academic Search Complete Online.

<sup>265</sup> Urban Land Institute Sacramento, San Francisco BART, [http://www.ulisacramento.org/documents/tod/5.Project%20Profiles/CaseStudies/SanFrancisco\\_BART.pdf](http://www.ulisacramento.org/documents/tod/5.Project%20Profiles/CaseStudies/SanFrancisco_BART.pdf) (last visited May 8, 2009).

<sup>266</sup> Unity Council, Fruitvale Village Project Overview, [http://www.unitycouncil.org/download/fv\\_overview.doc](http://www.unitycouncil.org/download/fv_overview.doc) (last visited Mar. 15, 2009).

<sup>267</sup> Federal Highway Administration, Partnerships, Enhancements, and Public Involvement, <http://www.fhwa.dot.gov/environment/ejustice/case/case6.htm> (last visited Apr. 19, 2009).

<sup>268</sup> Housing Finance, Regional News: Feb. 2003, available at [http://www.housingfinance.com/ahf/articles/2003/February/Regional\\_News.html](http://www.housingfinance.com/ahf/articles/2003/February/Regional_News.html) (last visited July 31, 2010).

### Fruitvale Transit Village Sources and Uses of Funds, Phase I, 2004

#### Equity

|                                    |                    |
|------------------------------------|--------------------|
| FEMA                               | \$1,045,304        |
| Ford Foundation                    | \$122,000          |
| R&R Goldman Fund                   | \$300,000          |
| Levi-Strauss                       | \$226,881          |
| E&W Haas Jr. Fund                  | \$400,000          |
| PG&E                               | \$50,000           |
| Neighborhood Reinvestment Corp.    | \$100,000          |
| National Council of La Raza (NCLR) | \$25,000           |
| Land Proceeds                      | \$517,025          |
| <b>Total Equity</b>                | <b>\$2,786,210</b> |

#### DOT/BART

|  |                    |
|--|--------------------|
| Metropolitan Transportation Commission | \$47,121           |
| FTA Child Development Center           | \$2,300,000        |
| FTA Pedestrian Paseo                   | \$780,000          |
| FTA-CMA Bike Facility                  | \$400,000          |
| FTA-Pedestrian Plaza                   | \$2,228,534        |
| <b>Total DOT/BART</b>                  | <b>\$5,755,655</b> |

#### Debt

|                             |                     |
|-----------------------------|---------------------|
| Unity Council FTV/Perm Loan | \$885,473           |
| Unity Council Bridge Loan   | \$911,830           |
| NCBDC                       | \$750,000           |
| City Section 108            | \$3,300,000         |
| Citibank Subordinate        | \$1,400,000         |
| City Housing Loan           | \$750,000           |
| 501 (C)3 Bonds              | \$19,800,000        |
| <b>Total Debt</b>           | <b>\$27,797,303</b> |

#### City of Oakland

|  |                     |
|--|---------------------|
| City EDI                                   | \$3,300,000         |
| Economic Development Administration Grant  | \$1,380,000         |
| Measure K Bonds (prepaid lease)            | \$2,540,000         |
| City Library (\$4.5-million prepaid lease) | \$4,900,000         |
| Community Development Block Grant/Other    | \$77,339            |
| EPA Grant                                  | \$99,998            |
| City-BTA Bike Station                      | \$400,000           |
| Tax Increment Allocation (B) (LISC)        | \$4,000,000         |
| <b>Total City of Oakland</b>               | <b>\$16,697,337</b> |

#### Interest/Miscellaneous

|                                      |                  |
|--------------------------------------|------------------|
| Interest/Other                       | \$643,707        |
| Additional Bond Funds Interest/Misc. | \$176,661        |
| <b>Total Interest/Miscellaneous</b>  | <b>\$820,368</b> |

#### TOTALS

|                               |                     |
|-------------------------------|---------------------|
| Equity                        | <b>\$2,786,210</b>  |
| City of Oakland               | <b>\$16,697,337</b> |
| DOT/BART                      | <b>\$5,755,655</b>  |
| Interest/Misc.                | <b>\$820,368</b>    |
| Debt                          | <b>\$27,797,303</b> |
| <b>TOTAL SOURCES OF FUNDS</b> | <b>\$53,856,873</b> |

### Fruitvale Transit Village Total Uses of Funds, Phase I

|                              |                    |                                      |                     |
|------------------------------|--------------------|--------------------------------------|---------------------|
| <b><u>Predevelopment</u></b> |                    | <b><u>Hard Construction Cost</u></b> |                     |
| Staff and Overhead           | \$645,985          | Off-Site                             | \$1,291,931         |
| Contract Services            | \$389,286          | Building Structure                   | \$27,793,806        |
| <b>Total Predevelopment</b>  | <b>\$1,035,271</b> | General Contractor Fees              | \$1,095,138         |
|                              |                    | Construction Contingency             | \$1,679,789         |
| <b><u>Soft Cost</u></b>      |                    | Bond Requirements                    | \$144,935           |
| Acquisition Cost             | \$1,764            | Tenant Improvements                  | \$2,341,680         |
| Architecture and Engineering | \$2,819,787        | Plaza Improvements                   | \$1,800,000         |
| Permits, Fees, and Taxes     | \$773,218          | Public Art                           | \$24,185            |
| Development Staff/Operating  | \$2,840,686        | <b>Total Hard Construction Costs</b> | <b>\$36,171,464</b> |
| Utility Hookups              | \$600,000          |                                      |                     |
| Environmental Remediation    | \$188,680          | <b><u>Interest and Fees</u></b>      |                     |
| Legal, Insurance, and Other  | \$744,031          | Construction Interest                | \$2,671,049         |
| Contingency                  | \$630,144          | City Section 108                     | \$150,000           |
| Bike Facility Soft Cost      | \$262,968          | NCBDC                                | \$76,285            |
| <b>Total Soft Costs</b>      | <b>\$8,861,278</b> | Unity Council                        | \$172,868           |
|                              |                    | Bond Issuance Cost                   | \$790,490           |
| <b><u>Bridge Loans</u></b>   |                    | Reserves and Lease-up                | \$323,600           |
| Unity Council Bridge Loan    | \$911,830          | <b>Total Interest and Fees</b>       | <b>\$4,184,292</b>  |
| NCBDC                        | \$750,000          |                                      |                     |
| <b>Total Bridge Loans</b>    | <b>\$1,661,830</b> | <b><u>TOTALS</u></b>                 |                     |
|                              |                    | Predevelopment                       | <b>\$1,035,271</b>  |
|                              |                    | Hard Construction Cost               | <b>\$36,171,464</b> |
|                              |                    | Soft Cost                            | <b>\$8,861,278</b>  |
|                              |                    | Interest and Fees                    | <b>\$4,184,292</b>  |
|                              |                    | Bridge Loans                         | <b>\$1,661,830</b>  |
|                              |                    | <b>TOTAL USES OF FUNDS</b>           | <b>\$51,914,135</b> |
|                              |                    | <b>SURPLUS (DEFICIT)</b>             | <b>\$1,942,738</b>  |

Source: Unity Council—[http://www.unitycouncil.org/download/fv\\_overview.doc](http://www.unitycouncil.org/download/fv_overview.doc)

Construction on the project began in 1998 with a 67-unit senior housing building. Construction on the 300-space BART garage did not begin until 2002, 10 years after the original BART proposal. Phase I of the Fruitvale Transit Village was completed in 2004. Phase II of the project, which includes redeveloping the large surface parking lots east to southeast of the Village, is tentatively scheduled for completion in 2012.<sup>269</sup>

## 2. Ground Lease and Land Swap

Completing the agreement for the ground rights to the development site took the Fruitvale Development Corporation (FDC)—the project’s developer—and BART several years to finalize.<sup>270</sup> Of the two parcels involved, BART granted FDC simple fee ownership of the parcel for the Unity Council Office, a Head Start facility, a clinic, and the central pedestrian plaza. The other parcel, for which BART granted FDC a 95-year ground lease, contains the project’s senior center and library. In exchange for these parcels, BART received possession of a lot behind the station owned by the Unity Council, as well as other nearby parcels owned by the city of Oakland, for construction of the BART parking garage. The primary advantage of the deal is that it “gave the FDC and the Unity Council proprietary rights to the entire development site without reducing the value of BART’s land assets near the transit station.”<sup>271</sup>

## 3. New BART TOD Policy Relaxes Commuter Parking Standards

BART set a precedent in 2005 by adopting a TOD policy that seeks to encourage transit ridership by encouraging TOD, fostering partnerships, promoting value capture, and shifting access to BART stations to non-automobile modes. Consistent with these objectives, the policy contemplates reducing vehicle parking at stations when justified by “the context of both development around transit and access strategies on a corridor or line segment.”<sup>272</sup> The new policy reduced the amount of parking required to be constructed as part of Phase I of the Fruitvale project, thereby substantially reducing project costs.

## 4. Project Assessment

Officials believe that the success of the Fruitvale project hinges on the completion of and demand for the condominiums and townhouses being built in Phase II. Currently, there are 47 residential units in the village,

<sup>269</sup> City of Oakland, Fruitvale Transit Village Phase 2 Initial Study and Environmental Review Checklist, <http://www.oaklandnet.com/government/ceda/revise/planningzoning/majorProjectsSection/Fruitvale%20Transit%20Village%20FINAL%2012-19-08.pdf> (last visited Apr. 26, 2009).

<sup>270</sup> See App. E for agreement.

<sup>271</sup> Flaminio Squazzoni, *Local Economic Development Initiatives from the Bottom-Up: The Role of Community Development Corporations*, 4 COMMUNITY DEV. J. 44 (2009).

<sup>272</sup> Bay Area Rapid Transit District, Transit Oriented Development Policy, adopted July 14, 2005. See App. F.

37 of them market rate and 10 affordable; these were rented with ease. This next phase of the project will add 275 multifamily housing units.

Overall, critics have pointed to the financing scheme that was used in Phase I of Fruitvale as a poor model for other TODs. According to TCRP-102, “...it is unlikely that this would have occurred were it not for heavy subsidies, drawn from 20 [(30, actually)] separate funding sources.”<sup>273</sup> This complexity of funding sources “would have prompted most private investors to shy away from the project.”<sup>274</sup> After the completion of the project, the Ford Foundation, a key donor to the project, went even further, saying, “There is virtually total agreement...that Fruitvale Village cannot be a financing model for other nonprofits.”<sup>275</sup>

## C. Chicago’s Bethel New Life Development

### Bethel Case Study Highlights

- Type of TOD/TJD: Nonprofit-initiated development around a heavy rail station in a blighted inner-city neighborhood.
- Lead Agencies: Bethel New Life Community Development Corporation in partnership with the Chicago Transit Authority (CTA).
- Key Legal Issues: Community partnership to overcome station closure and creative financing.
- Key Elements to Success: Community champion enabled the CDC to partner with the transit agency to create a new vision for the station precinct and create a LEED Gold-rated project.

West Garfield Park (WGP) is located 5 mi west of downtown Chicago. During the early 20th century, the area developed into a thriving commercial district, but the Depression of the 1930s tempered its rise. Though it showed promise after World War II, disinvestment in the late 1950s and 1960s destroyed the area.

From 1970 to 2000, WGP’s population dropped by over 50 percent (from 48,464 to 23,019); poverty substantially increased (from 25 percent to 35.9 percent, though down from 41 percent in 1990); housing units decreased (from 13,177 to 7,909); and vacancy increased (from 8 percent to 13 percent).<sup>276</sup>

<sup>273</sup> TRANSIT-ORIENTED DEVELOPMENT IN THE UNITED STATES: EXPERIENCES, CHALLENGES, AND PROSPECTS 124 (Transportation Research Board, TCRP Report 102), [http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp\\_rpt\\_102.pdf](http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rpt_102.pdf).

<sup>274</sup> L. Owen Kirkpatrick, *The Two “Logics” of Community Development: Neighborhoods, Markets, and Community Development Corporations*, 35.2 POLITICS AND SOCIETY 329–59 (2007).

<sup>275</sup> Elizabeth B. Hughes, *In Transit*, in 35 FORD FOUNDATION REPORT 16 (2005), retrievable from Academic Search Complete.

<sup>276</sup> Greater Chicago Housing and Community Development Web site, CCA: West Garfield Park, <http://data.cmap.illinois.gov/chicagoareahousing.org> (last visited May 18, 2009).

Against this tide, the Bethel New Life Community Development Corporation has, over the past 25 years, helped to create more than \$100 million dollars in direct community investment and more than 1,000 housing units, and has placed over 5,000 people in jobs.

In the past, Bethel's focus had been concentrated on advocacy. This is evidenced in the organization's participation in the Lake Street El Coalition, which successfully lobbied against CTA's proposed closure of the Pulaski El station as part of its broader plan to eliminate the Lake Street line. After CTA's decision to keep and rebuild the El line, Bethel led efforts to help redevelop the area surrounding the Pulaski station. As part of that redevelopment, CTA provided more than \$300 million to reconstruct the station and connect the station platform to a 23,000 sq ft, \$5 million center that Bethel was building next to the station with funding from various local, state, and federal sources.<sup>277</sup> Once a brownfield site, the two-story structure now houses six commercial retail shops, a Subway restaurant, a dry-cleaner, and a community bank on the ground floor, and Bethel's Childcare Development Center, Employment Services Center, and a community computer lab on the second floor.

The CTA part of the project was the skybridge connection between the Pulaski Station and the second floor of the Bethel building. Interestingly, CTA staff report that the agency required no contractual agreement with Bethel as a condition for the agency's participation in the project:

As far as anyone can remember, we did not have any formal agreement with Bethel New Life. It seems like, since we did our portion of the project after their building was completed, we weren't worried about putting our investment into the bridge, but having the rest of the project fall through. Because we paid the design and construction costs ourselves, we weren't asking Bethel New Life or any developer to manage funds for us and didn't need any legal protections in that sense.<sup>278</sup>

CTA's commitment to rebuild the Lake Street El line and the Pulaski Station apparently was sufficient to help Bethel obtain necessary funding for the building. Once that was completed and occupied, CTA perceived no legal exposure in extending the skybridge to the project. The chronology of events functionally eliminated the need for more formal legal structures.

---

<sup>277</sup> Keith Schneider, *Chicago Developer Capitalizes on Transit Access*, N.Y. TIMES, Mar. 3, 2002, at 6, available at <http://www.nytimes.com/2002/03/03/realestate/chicago-developer-capitalizes-on-transit-access.html>.

<sup>278</sup> Email to author from Stina Fish, Chicago Transit Authority, Jan. 12, 2010 (Available from author upon request).

The Bethel building went on to achieve a LEED<sup>279</sup> Gold rating. Its green amenities include photovoltaic panels on the roof and a photovoltaic cornice that will shade the façade to reduce cooling loads; a water-based heating system; and light shelves, sunlight shafts, and a daylight-responsive lighting system to reduce the building's reliance on conventional electricity. The roof consists of a 9,000 sq ft vegetated roof to reduce heat gain and manage storm water run-off. Altogether, the building is expected to use 50 percent less energy than conventional construction.<sup>280</sup>

### 1. Creative Financing

The TOD is also serving as a growth anchor in the area. The building is home to about 100 permanent new jobs.<sup>281</sup> Financing for the project came from a variety of sources. Publicly funded grants totaled 59 percent, loans totaled 39 percent, and privately funded grants (i.e., the Local Initiatives Support Corporation (LISC) grant<sup>282</sup>) accounted for the balance.

---

<sup>279</sup> LEED is a system of quantifying building sustainability. To obtain LEED certification, a development must meet a set of sustainable building criteria. Meeting the minimum set of criteria qualifies a structure as LEED Certified. The three additional levels, Silver, Gold, and Platinum, are more prestigious certification levels. For more information about LEED certification, see their Web site: <http://www.usgbc.org/leed/>.

<sup>280</sup> Diane W. Calmenson, *Urbanist Cowboys*, BUILDINGS (June 2004), <http://www.buildings.com/Magazine/ArticleDetails/tabid/3413/ArticleID/3978/Default.aspx> (last visited May 11, 2009).

<sup>281</sup> CHICAGO METROPOLITAN AGENCY FOR PLANNING, URBAN DESIGN STRATEGY REPORT, <http://www.cmap.illinois.gov/uploadedFiles/RCP/Forum/UrbanDesignStrategyReport.pdf> (last visited Apr. 4, 2009).

<sup>282</sup> Local Initiatives Support Corporation (LISC) provided a startup grant that was funded by Bank One and State Farm. See the Bethel project's profile from LISC at [http://www.lisc-chicago.org/content/11/documents/project\\_profile\\_-\\_bethel.pdf](http://www.lisc-chicago.org/content/11/documents/project_profile_-_bethel.pdf).

## Bethel Center Funding

| <u>Funding Source</u>                             | <u>Amount</u>      | <u>Notes</u> |
|---|--------------------|--------------|
| LISC/Chicago                                      | \$117,000          | 1            |
| City of Chicago Empowerment Zone                  | \$1,680,000        | 4            |
| Ill. Dept. Commerce Economic Opportunity (DCEO)   | \$1,300,000        | 4            |
| Chicago Dept. Environment                         | \$430,000          | 4            |
| Commonwealth Edison and Ill. DCEO                 | \$400,000          | 2            |
| U.S. Bank   | \$1,000,000        | 3            |
| U.S. Dept of Health and Human Services            | \$100,000          | 4            |
| Community Development Financial Institutions Fund | \$1,600,000        | 5            |
| <b>TOTALS</b>                                     | <b>\$6,627,000</b> |              |
| <b>PROJECT COSTS</b>                              | <b>\$4,500,000</b> |              |
| <b>SURPLUS (DEFICIT)</b>                          | <b>\$2,127,000</b> |              |

1. Start-up and operating grants for the Employment and Community Technology Center.
2. Grant for photovoltaic cells.
3. Construction loan.
4. Grants.
5. Take out financing.

Source: [www.community-wealth.org](http://www.community-wealth.org)

### 2. Project Impacts

WGP's ascent has been slow. According to the National Association of Realtors (NAR), WGP has the lowest average home price in the area, at \$112,000. The mortgage crisis also appears to have taken a heavy toll on the area. In 2006, WGP had the second highest amount of foreclosures per square mile and in 2007, the fourth highest. The study area's homeownership rate in 1990 was about 25 percent and in 2000, 28 percent. NAR reports that the home ownership rate has climbed to 34 percent for the neighborhood.<sup>283</sup> At the time this report was written, 191 houses were available for purchase in WGP; only 9 rental units were available, with an average rental cost of \$1,200.<sup>284</sup>

Nevertheless, Bethel's success, like many other TODs, is based on the efforts of director Mary Nelson and her ability to create alliances. Bethel not only pre-

served the existing train station, but utilized a community campaign to create new employment in a mixed-use, LEED-Gold-rated building.

### D. Plano's Downtown Revitalization

#### Plano Case Study Highlights

- Type of TOD/TJD: Municipal-led redevelopment of a suburban downtown.
- Lead Agencies: City of Plano and Dallas Area Rapid Transit (DART).
- Key Legal Issues: Creation of a New Urbanist-style zoning code, land assembly.
- Key Elements to Success: Municipal leadership in planning, zoning, land assembly, and development marketing.

Plano is characterized by a traditional town center. Like many town centers, Plano's fell into a state of disrepair as new, large-lot, single-family housing became available on the outskirts of the city. As Plano's profile switched from farm town to suburb to boomburb, the economic profile of the town center shifted as well. During the 1980s, the downtown tenant mix changed from

<sup>283</sup> Census data was compiled for the study area only, which makes up a sizeable proportion of WGP. Though data for the study area and data for WGP are not completely comensurable, they are closely related.

<sup>284</sup> National Association of Realtors, West Garfield Park Summary, <http://neighborhoods.realtor.com/IL/Chicago/West-Garfield-Park/479104/Summary> (last visited May 18, 2009).

retail support (grocery, drug, and hardware) to specialty shops.

### 1. *Planning and Zoning*

In 1991, in the height of Plano's suburban growth, Plano approved a new downtown redevelopment plan to address downtown's relative blight. Its goals were to use New Urbanist concepts to develop the town center and expand downtown through infill development around historic commercial buildings.

In 1993, the city implemented a special zoning district in the 80-acre downtown area that incorporated many of the TOD zoning issues outlined in *TCRP LRD 12*: it allowed mixed-use development, regulated surface parking, limited building heights to four stories, and required new buildings to be closer to the street.

During this same time, DART was planning a new rail corridor with a terminal station in Plano. While initial plans were for minimal levels of service on the new line, DART responded to the city's new downtown plan and zoning ordinance by deciding to provide regular levels of service. This decision, in turn, reinvigorated the city's commitment to downtown redevelopment and helped stimulate market attention in the area.

### 2. *Land Acquisition and Assembly*

The most visible result of this new transit focus was the reprogramming of the land immediately east of the

station, which had been slated for a park-and-ride lot. Instead, DART used eminent domain to acquire an adjacent parcel, further from the station platform, for its parking lot and, through a land swap deal not unlike the one at the Fruitvale BART station, turned the original parcel over to the city. After acquiring rights to the site, assembling other nearby properties, and remediating contaminated soils on the site, the city put out a request for proposal to develop its first TOD, Eastside Village I.

The site of Eastside Village I was leased to the developer for 70 years with three 10-year renewal options. Annual base rent was \$0.60 per sq ft, which was discounted in the first and second year of the lease 25 percent and 50 percent. After the third year, the ground lease was adjusted based on the net operating income generated by the development. Eastside Village I was completed in 2002, almost a year before rail service.

The second phase of the project, Eastside Village II, which was completed soon thereafter, resembled its predecessor in concept, size, and scale, and it was assembled from two parcels. The first parcel was a 1-acre site owned by the city, and the second parcel, about 2 acres, was owned by a utility company. After purchasing the utility parcel, the city deeded its share to the developer in exchange for 100 parking spots.

### Plano Transit Village, Phases I and II

|                      | <b>Eastside Village I</b>   | <b>Eastside Village II</b>  |
|----------------------|---|---|
| Completed            | 2001  | 2002  |
| Site Size            | 3.6 acres   | 3.1 acres   |
| Gross Building Area  | 245,000 ft <sup>2</sup>   | 245,000 ft <sup>2</sup>   |
| Building Height      | 3 and 4 stories   | 3 and 4 stories   |
| Dwelling Units       | 33 efficiencies, 118 1-bedrooms,<br>83 2-bedrooms   | 38 efficiencies, 137 1-bedrooms,<br>54 2-bedrooms                       |
| Nonresidential Space | 15,000 ft <sup>2</sup> (two restaurants, small offices,<br>and a community room leased by the city) | 25,000 ft <sup>2</sup> (ground floor retail)                            |
| Amenities            | Courtyard, pool, structured parking   |   |
| Parking              | 5-level interior parking garage with<br>351 spaces and 47 street surface spaces                     | 419 garage spaces (100 owned by city),<br>33 surface spaces             |
| Developer Costs      | \$15,720,000 total; \$13,100,000 hard costs   | \$17,830,000; \$15,100,000 hard costs                                   |
| City of Plano Costs  | \$2 million (\$1,030,098 credited against<br>land transferred by DART to Plano)                     | \$800,000 towards infrastructure  |
| Property Tax         | 1998 Valuation—\$1,102,211;<br>2002 Valuation—18,029,765  | 1999 Valuation—\$979,328;<br>2002 Valuation—\$2,277,678 (partial value) |

Phase I opened about 1½ years ahead of DART's light rail and leased quickly. After Phase II was complete, occupancy rates dropped from 98 percent to 89 percent but returned to 98 percent once DART began service. Altogether, there are about 500 housing units between the two properties.

#### 3. Assessment

One of the issues with the Plano TOD is that ridership figures for the Plano station have not met expectations. Out of 24 nonterminal stations in the system, Plano's ridership ranks third from the bottom. After DART's announcement to provide Plano with regular service, Plano sacrificed its park-and-ride for the opportunity to develop a Transit Village. From May 2003 to May 2006, ridership numbers for Plano grew, but perhaps DART and the city of Plano should have provided more commuter parking in Eastside Village. On the other hand, planners shifted commuter parking to nearby stations at Parker Road. A fair amount of parking also exists at the Bush Turnpike station. The table below shows trends in ridership in downtown Plano and nearby stations.

Parking and transit ridership in TODs is a highly-debated topic, as illustrated in Plano. As noted earlier in the literature section and demonstrated in Plano, train stations can have a large impact on property value and land-use intensity in TODs. However, they often compete with room for commuter parking unless the government subsidizes structured parking garages. Moreover, even if 30–40 percent of the residents of Eastside Village commute on DART, the majority of the residents would not commute on transit. However, the ridership data collected by DART does not indicate how many people are using other modes such as walking and biking nor does it show the average household VMT in comparison to the average for the city. Recent national studies indicate that projects such as Eastside Village produce significantly reduced VMTs. Over time, as downtown Plano intensifies, it will be important to monitor not only transit ridership but also the travel behaviors of residents, employees, and other users of downtown. Moreover, researchers need to examine the importance of the rail station in spurring the economic revitalization of the downtown as a whole.

## Parking Spaces and Ridership for Downtown Plano and Adjacent Stations

| <u>DART LRT Station</u> | <u>Park-and-Ride Spaces</u> | <u>Average Weekday Boardings</u> |                 |                 |                 | <u>3-Year Growth</u> |
|-------------------------|-----------------------------|----------------------------------|-----------------|-----------------|-----------------|----------------------|
|                         |                             | <u>May 2003</u>                  | <u>May 2004</u> | <u>May 2005</u> | <u>May 2006</u> |                      |
| Parker Road             | 1,555                       | 2,766                            | 3,076           | 2,872           | 3,349           | 21.08%               |
| Downtown Plano          | 0                           | 591                              | 637             | 668             | 773             | 30.80%               |
| Bush Turnpike           | 778                         | 778                              | 846             | 997             | 1097            | 41.00%               |

Source: Transit Cooperative Research Program (TCRP) RPT 95, Table 17-5

### E. Morristown Transit Village, New Jersey

#### Morristown Transit Village Case Study Highlights

- Type of TOD/TJD: Transit agency-initiated joint development on the parking lot of a commuter rail station in suburban/historic township.
- Lead Agencies: New Jersey Transit.
- Key Legal Issues: Structuring a joint development and rezoning.
- Key Elements to Success: New rail service and state assistance through the NJ Transit Village Initiative made Morristown a good case for NJ Transit's first TJD.

Located in Central New Jersey, Morristown is a small historic township with approximately 19,000 people nestled in densely populated Morris County, which has an estimated population of nearly 490,000 people. In 1996, NJ Transit began the Midtown Direct rail service, allowing a one-seat ride from Morristown to Penn Station in Manhattan. This had a large impact on transit ridership, which grew along the corridor by 72 percent from 1997 to 2007. Seeking to further catalyze the success of the Morristown train station, in 1999 the town was selected by the state as one of the first communities to participate in New Jersey's Transit Village Initiative, a program that seeks to revitalize train station precincts across the state by promoting TOD. NJ Transit then chose the commuter parking lot at the Morristown station as the site of its first TJD, known today as the Highlands at Morristown Station. This case study summarizes TOD and TJD in Morristown, which is an example for other historic cities and towns who wish to integrate transit and development.

#### 1. Transit Village Designation

The NJ Transit Village Initiative, which is described more fully in Section III.A.2, is a unique program that creates a partnership across various state agencies to work closely with municipalities to enable TOD. The New

Jersey Department of Transportation staffs the program but works closely with NJ Transit and other agencies to provide technical assistance, expedited regulatory approvals, and grants to the Transit Villages.

Private-sector investment in the Morristown Transit Village, between 1999 and 2003, included 87 new residential units constructed within a .25 mi of the train station and another 149 units built between the .25-mi and .5-mi radius. This resulted in a total residential investment of nearly \$11 million with an additional \$16 million in nonresidential construction in the Transit Village area.<sup>285</sup> These figures do not include the TJD, otherwise known as the Highlands at Morristown Station, which did not break ground until 2008.

#### 2. Transit Joint Development

In the late 1990s, the commuter parking lot next to the Morristown train station was built to meet a parking shortage at the station. Immediately after the parking lot was paved, NJ Transit received significant interest from developers seeking to redevelop the area. NJ Transit was mutually interested in developing the site but had to retain the parking spaces at the station in any development proposal. To do this, NJ Transit collaborated with Morristown to develop a special TOD zoning overlay, to facilitate denser, mixed-use development surrounding the station. The rezoning was also important to the state's selection of Morristown as a Transit Village, which signified that the town was willing to grow in population and density.

After the appropriate zoning enabled denser, mixed-use development, NJ Transit put out a request for proposal to develop the site. Morristown was the first joint development project for a TOD in the history of NJ Transit, so much of the process was a learning experience for both the public and private sectors. Competi-

<sup>285</sup> Jan Wells & John Renne, Alan M. Voorhees Transportation Center, *Implementation of the Assessment Tool: Assessing the Impacts of the New Jersey Transit Village Initiative* (2004) available at: [http://policy.rutgers.edu/vtc/tod/documents/NJ%20Transit%20Villages\\_economic%20activity.pdf](http://policy.rutgers.edu/vtc/tod/documents/NJ%20Transit%20Villages_economic%20activity.pdf).

tion for the site was strong, which allowed NJ Transit to choose among five developers. The selection criteria not only included cost, but 60 percent of the criteria were based on other factors, such as project creativity.<sup>286</sup>

Rosewood Lafayette Commons LLC, a spin-off of Roseland Properties, developed the Highlands at Morristown in 2008. As of 2007, the future site of the Highlands consisted of 460 parking spaces at Morristown's commuter parking lot. Out of the 460, 124 were permitted spots and the rest were daily parking spots for residents and nonresidents, with 600 on the waiting list. Each space at the Morristown station was earning \$700 per space with a 2 percent vacancy, considerably high in comparison to neighboring stations on the line.

In 2007, NJ Transit and Rosewood signed a Purchase, Sale, and Development Agreement that created two condominium units, one for transit parking and one for residential, commercial, and associated parking. NJ Transit retained the commuter parking condominium and the developer retained the other unit. Moreover, Rosewood agreed to build the parking structure for NJ Transit. The agreement calls for a personal completion guaranty and a \$10 million irrevocable letter of credit in case of default by the developer. It also contains easements to ensure that NJ Transit could maintain ongoing transportation operations on the site. The agreement also contains a management agreement for interim parking during the construction phase of the project.<sup>287</sup>

After developing the commuter lot, the site now has 722 parking spaces; NJ Transit owns 422 spaces with the balance of parking dedicated to the residences of the Highlands. The five-story parking structure was primarily financed by the developer, who contributed \$7 million to the \$8.75 million project, with the balance paid by NJ Transit.<sup>288</sup>

NJ Transit's benefits are twofold. The agency gains riders due to the immediate proximity of dense development to the station, thus earning more farebox revenues. In turn, the developer shares a portion of its commercial rental income with NJ Transit and pays the property taxes. "New Jersey Transit will receive at least \$230,000 a year in rent plus additional rent from retail properties, parking proceeds, and a percentage of the residential income," according to NJ Transit.<sup>289</sup>

Development of the Highlands has not been without delay. According to the local press, the 2008 ground-

<sup>286</sup> *Next Stop: Transit Villages*, BUSINESS NEWS, at 28 (Oct. 16, 2001), retrievable from LEXISNEXIS Academic.

<sup>287</sup> See App. G for Purchase, Sale and Development Agreement between NJ Transit and Rosewood Lafayette Commons, LLC.

<sup>288</sup> *Transit Village Update*, TRANSIT-FRIENDLY DEVELOPMENT NEWSLETTER, Dec. 2008, available at [http://policy.rutgers.edu/vtc/tod/newsletter/vol4-num3/tran\\_village\\_update.html#Morristown](http://policy.rutgers.edu/vtc/tod/newsletter/vol4-num3/tran_village_update.html#Morristown).

<sup>289</sup> Christine Krelying, *Walking Is Good for You and It's Good for Your Community*, PLANNING 5-9 (Jan. 2001), <http://www.friedmanco.com/Planning%20Mag%20TOD%20202.pdf>.

breaking<sup>290</sup> of the project occurred 6 years after its estimated completion.<sup>291</sup> In fact, though the zoning for the site was approved in 1999, the site plan did not receive final approvals by Morristown until 2005. The lengthy development process may have resulted from the first-of-its-kind joint development between NJ Transit and a private developer, who then had to get approvals from the municipal government with respect to a number of issues including design.

## VI. CONCLUSIONS

TOD and TJD emerged as distinct planning concepts in the last quarter of the 20th century. As outlined above, the concepts have now been enshrined in numerous government regulations and policies and provided the focus for a growing academic and professional literature. Much of the motivation driving the development of those policies, and much of the focus in the literature, has been on the use of TOD and TJD as strategies for increasing transit ridership, reducing emissions of air pollutants, easing traffic congestion, and decreasing energy consumption. While those benefits are still at the heart of TOD initiatives, the case studies above show that TOD's positive role in stimulating the investment of private and nonprofit capital into real estate development markets is as important to local citizens and decision-makers as the presumed transportation benefits.

Whatever the motivation for pursuing TOD/TJD, successful projects do not happen on their own, or just because government has invested public money into transit and other infrastructure. TOD and joint development projects succeed, most fundamentally, because there is a market for those types of development. Though market analyses from just 10 years ago indicated modest support for TOD-style development, there is evidence that market support for TOD is growing and will continue to grow in coming decades,<sup>292</sup> current economic conditions notwithstanding.<sup>293</sup>

In addition to supportive market conditions, the case studies reported here show that being able to leverage those conditions into actual TOD/TJD projects depends,

<sup>290</sup> Evelyn Lee, *Morristown Transit Village Moves Ahead*, NJBIZ, Mar. 24, 2008, [http://ads.njbiz.com/industry\\_article.asp?cID=2&aID=88521712.1317.959218.7327498.7981916.433&aID2=73777](http://ads.njbiz.com/industry_article.asp?cID=2&aID=88521712.1317.959218.7327498.7981916.433&aID2=73777).

<sup>291</sup> Bill Swayze, *Remaking Morristown as Transit Village*, THE STAR-LEDGER, Oct. 19, 2000, at 25, retrievable through LEXISNEXIS Academic.

<sup>292</sup> Susan Handy, *Is Support for Traditionally Designed Communities Growing?*, J. AM. PLAN. ASS'N 74(2), 209-221 (2008), pdf download available at <http://www.informaworld.com/smpp/content~db=all~content=a792286419~frm=titlelink>.

<sup>293</sup> Joe Cortright, *Driven to the Brink: How the Gas Price Spike Popped the Housing Bubble and Devalued the Suburbs* (2008), <http://www.ceosforcities.org/files/Driven%20to%20the%20Brink%20FINAL.pdf>.

to a large degree, on the structures of both public and private law.

On the public law side, recent developments in federal, state, and regional laws and programs are making it easier to plan, zone, permit, and fund TOD/TJD. The laws and programs outlined in Section III of this digest cover eight primary areas of public law, many of which were highlighted in *TCRP LRD 12*:

- Transit agency authority to engage in TOD and joint development.
- Direction to local government to plan and regulate for TOD and joint development.
- Federal involvement in TOD and joint development.
- TOD and joint development as part of local and regional visioning processes.
- TOD planning and incentive grant programs.
- Infrastructure investment programs that support or prioritize TOD.
- Infrastructure concurrency or adequate public facilities requirements.
- Funding programs that cover construction costs or provide incentives for the location of housing and other development in TOD areas.

On the private law side, one of the trends observed through this research was the growth in frequency and sophistication of developer agreements between public agencies and private real estate interests. For projects constructed 10 years ago or more, agency/developer agreements covering TOD-based design and land-use issues were rare. As stated by a CTA staff member involved in the Bethel New Life project: “Ten-plus years ago, it really was a big deal of a TOD project. It seems like just the fact that we were building this direct connection between a private development and a public station, in an underinvested area of Chicago drew a lot of attention. It probably didn’t even occur to us or to Bethel New Life to get into a more sophisticated agreement.” Compare that approach to the 2007 purchase agreement from the Portland Metro TOD and Centers Program (see Appendix C). That agreement incorporates as conditions precedent to closing 1) the completion of a formal agency design review to ensure the inclusion of transit-supportive design elements, and 2) the recording of a deed restriction limiting current and future uses of the subject property to transit-supportive uses. As stated in the purpose section of the agreement, these contractual requirements are central to supporting the public policy rationale for using public money for a private development project:

The purpose of this Agreement is to bring about the inclusion of certain design features into a private development project that will support higher density and mixed-use in close proximity to a transit station. Said design features will increase the efficiency of the transportation system and the modal share of non-auto trips, ease regional congestion, and help improve regional air quality.

Because the inclusion of these design features imposes extraordinary financial burdens on the development project and to ensure the project retains these features for at least thirty (30) years, this Agreement provides for the acquisition and recording of a TOD/Urban Centers Easement.<sup>294</sup>

*TCRP LRD 12* concludes with the assessment that TOD is a promising concept that, with proper attention to important legal principles, can be effectively pursued “to bolster transit ridership while producing affordable housing and economic development opportunities.” Collectively, the body of laws, programs, case law, and case studies reviewed in this digest confirm *TCRP LRD 12’s* assessment and demonstrate more completely how the promised benefits of TOD/TJD can be realized.

---

<sup>294</sup> See App. C, § 1.1.



**ACKNOWLEDGMENTS**

This study was performed under the overall guidance of TCRP Project Committee J-5. The Committee is chaired by **Robin M. Reitzes**, San Francisco City Attorney's Office, San Francisco, California. Members are **Rolf G. Asphaug**, Denver Regional Transportation District, Denver, Colorado; **Sheryl King Benford**, Greater Cleveland Regional Transit Authority, Cleveland, Ohio; **Darrell Brown**, Darrell Brown & Associates, New Orleans, Louisiana; **Dennis C. Gardner**, Ogletree, Deakins, Nash, Smoak & Stewart, Houston, Texas; **Clark Jordan-Holmes**, Joyner & Jordan-Holmes, P.A., Tampa, Florida; **Elizabeth M. O'Neill**, Metropolitan Atlanta Rapid Transit Authority, Atlanta, Georgia; **Ellen L. Partridge**, Chicago Transit Authority, Chicago, Illinois; and **James S. Thiel**, Wisconsin Department of Transportation, Madison, Wisconsin. **Rita M. Maristch** provides liaison with the Federal Transit Administration, **James P. LaRusch** serves as liaison with the American Public Transportation Association, and **Gwen Chisholm Smith** represents the TCRP staff.

## Transportation Research Board

500 Fifth Street, NW  
Washington, DC 20001

## THE NATIONAL ACADEMIES™

*Advisers to the Nation on Science, Engineering, and Medicine*

The nation turns to the National Academies—National Academy of Sciences, National Academy of Engineering, Institute of Medicine, and National Research Council—for independent, objective advice on issues that affect people's lives worldwide.

Subscriber Categories: Administration and Management • Law • Public Transportation

ISBN 978-0-309-21334-9



These digests are issued in order to increase awareness of research results emanating from projects in the Cooperative Research Programs (CRP). Persons wanting to pursue the project subject matter in greater depth should contact the CRP Staff, Transportation Research Board of the National Academies, 500 Fifth Street, NW, Washington, DC 20001.