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The Zoning and Real Estate Implications of Transit-Oriented Development

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 S. Mark White. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

The nation's 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 businesses. The TCRP Project J-5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and other transportation modes. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they particularly need information in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;
- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may 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. Emphasis is placed on research of current importance and applicability to transit and intermodal operations and programs.

APPLICATIONS

Local government officials, including attorneys, planners, and urban design professionals, are seeking new approaches to land use and development that will address environmental impacts of increased automobile traffic and loss of open space around cities and towns, and alleviate financial pressures on governments and their constituents. Among these approaches is the urban design concept of transit-oriented development, which emphasizes that where transit facilities are in place, or planned to be put in place, there should be a mix of commercial, retail, residential, and civic uses within close proximity to the facilities designed for the best possible interface. The highest density would be closest to these fixed gateways or other transit facilities.

This research produced information on legal and other issues associated with transit-oriented development. The report should be useful to transit and development attorneys, financial officials, planners, development officials, and anyone interested in transit-oriented development.

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The Zoning and Real Estate Implications of Transit-Oriented Development

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1. INTRODUCTION

Transportation is, in many ways, the most important segment of a community's infrastructure. A community's transportation system has a profound influence on its land use patterns and rate of growth. Not only is the transportation network a shaper of urban form, but a region's land use patterns influence the transportation modes used for work and nonwork interurban travel. Since the advent of the federal-aid highway legislation of 1954, the automobile has become the predominant form of transportation in the nation's urban areas[1] Highways in urban areas have fostered urban sprawl, characterized by low-density, single-use suburban development, which has hastened the decline of public transit as a mode of interurban travel.[2] This phenomenon has increased the spatial separation of jobs and residences, has encouraged development in areas not served by public transit, and has created a pattern of development in our suburban areas that ensures almost exclusive reliance on the automobile as the primary means of travel to work and shopping.

This pattern of development has fostered a love-hate relationship between suburban residents and their beloved vehicles Middle-class families who once dreamed of a new single-family home in the suburbs now fight the expansion of highways that would open up new areas for suburban development. Communities in urban areas have devised elaborate systems to control growth and the spread of further subdivisions in suburban areas. Motorists en route to work find their economic productivity stifled by highway gridlock Inter-urban highway travel has proven very inefficient[3] despite its relative popularity. Other unintended consequences of highway travel include automobile fatalities; dependence on imported oil; and energy, environmental, and economic impacts.[4] These environmental impacts have prompted changes in federal legislation designed to encourage shifts in urban travel from the automobile to public transit,[5] such as the Intermodal Surface Transportation Efficiency Act (ISTEA)[6] and the Clean Air Act Amendments of 1990.[7] "Transit supportive existing

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[1] CARLSON, SURFACE TRANSPORTATION POLICY PROJECT, AT ROAD'S END: TRANSPORTATION AND LAND USE CHOICES FOR COMMUNITIES 6 (1995). Transit now accounts for only 5 12 percent of work trips in this country as opposed to 12.6 percent in 1960, while the modal share of the automobile increased from 69 5 percent to 88 percent over the same time period U S DEP'T OF TRANSPORTATION, NATIONAL TRANSPORTATION STATISTICS 231 (1995).

[2] LINCOLN INSTITUTE OF LAND POLICY, THE BROOKINGS INSTITUTION & NATIONAL TRUST FOR HISTORIC PRESERVATION, ALTERNATIVES TO SPRAWL 6-8 (1995)

[3] While a typical highway lane can accommodate only 2,400 persons per hour, a busway can carry up to 9,400 persons per hour and a light rail system can handle over 22,000 persons per hour MUNICIPALITY OF METROPOLITAN SEATTLE, DRAFT ENVIRONMENTAL IMPACT STATEMENT, REGIONAL TRANSIT SYSTEM PLAN, xvi (October 1992)

[4] Motor vehicle accidents are the leading cause of death for Americans until they reach their mid 30s. BUREAU OF TRANSP. STATISTICS, U S. DEP'T OF TRANSP, TRANSP IN THE UNITED STATES: A REVIEW (1997) Imported oil as a share of national consumption has increased from 27 percent in 1985 to 44.5 percent in 1995. Transportation accounts for two-thirds of U S oil consumption, with highway vehicles accounting for the largest share, *Id* Approximately 40 percent of man-made hydrocarbon and nitrogen oxide (NOx) emissions, as well as two-thirds of carbon monoxide (CO) emissions, are generated by automobile travel M BERNICK & R CERVERO, TRANSIT VILLAGES IN THE 21ST CENTURY 44 (1997) Automobiles also generate airborne particulates (PM-10), water pollution from highway construction and drainage, and noise impacts. *Id*. BUREAU OF TRANSP. STATISTICS, *supra*, at 23-25

[5] The Federal-Aid Highway Act of 1962 established that federal funds for urban highways be based upon a "continuing, comprehensive transportation planning process carried out cooperatively by states and local communities" (the so-called "3C" process) 23 C F R § 450 100; Freilich & White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis*, 24 LOY. L A L REV 915 (June 1991) at 923

[6] Pub. L. No 102-240, 105 Stat. 1914 (Dec 18, 1991) ISTEA provides new standards and procedures for transportation planning and investment The centerpiece of the legislation is the U S C Title 23 programs involving new investment in highways, public transit, and transportation planning. Title I, Part A, §§ 1001-1109, 105 Stat. 1915-2064 Funds allocated for the National Highway System (NHS) may be spent on innovative projects as well as new highway construction, § 1006(d), to be codified at 23 U S C § 103(i), including FTA transit projects not on the NHS but within the same transportation corridor and which improve the level of service on NHS highways The Metropolitan Planning Organization (MPO) and the state long-term transportation plan must take into consideration a number of planning criteria, which include congestion relief, effect on land use and development, transportation management and congestion monitoring systems, and methods to expand, enhance and increase use of transit services. ISTEA § 1024(a), codified at 23 U.S.C § 134(f), and § 1025, codified at 23 U S.C. § 135(c).

[7] Pub L No 101-549, 104 Stat 2399 (Nov 15, 1990) Section 108 of the Clean Air Act Amendments of 1990 requires the Environmental Protection Agency (EPA) to publish, in consultation with the Secretary of Transportation, guidance on maintaining a "continuous transportation-air quality planning process," including alternative planning and control activities, plan review, funding and other implementation alternatives, and methods to ensure public participation (§ 108(e)) This process was created under ISTEA Transportation control

land use policies" are one consideration in the issuance of a grant or loan for the construction or expansion of fixed guideway systems under ISTEA.[8]

While suburban sprawl continues, professional planners believe that there is deep-seated dissatisfaction with twentieth century urban sprawl and have championed a return to mixed-use villages and centers that promote pedestrian and transit travel. The so-called "new urbanists"[9] are challenging cities and developers to employ a concept known as "transit-oriented development" (TOD) (also known as pedestrian-oriented development) as an alternative to urban sprawl.[10] This form of development has five major characteristics. First, a TOD has sufficient density to encourage the use of public transit. Second residences, jobs, and retail destinations are located close to public transit facilities. Third, a TOD consists of mixed uses, with retail and employment sites located within walking distance of residential areas. Fourth, the TOD is built on a grid transportation network, which is not divided into the arterial-collector-local road classification system found in most suburban areas. Finally, most TODs contain urban design guidelines and design features that encourage a more pedestrian orientation, which theoretically encourages its residents to eschew the automobile in favor of more communal forms of transportation.

Transit-oriented development is designed to accomplish several key public objectives. First, and foremost, a TOD is designed to encourage residents and workers to utilize public transit rather than the automobile as a primary means of transportation. A second purpose, related to the first, is the minimization of congestion on surrounding roadways. Finally, a TOD is designed to increase pedestrian utilization of streets, sidewalks, and other transportation facilities. TODs, as a form of neotraditional development, are not just an attempt to encourage greater utilization of public transit. TODs also reflect a new approach to suburban development that encourages a greater variety of uses and architectural design than the monotonous, single-use suburban subdivision--the "new suburbia" that has been described as the "packaged villages that are becoming the barracks of the new generation."[11] In fact, the prototype of most neotraditional ordinances--or traditional neighborhood development (TND) ordinances--is the older, urban neighborhood with its mixed uses, narrow gridiron streets, and higher densities.

TOD presents both a challenge and an opportunity for the transit agency. While transit agencies typically lack jurisdiction over land use permitting decisions, they can work with local governments to encourage transit-supportive land use patterns. In addition, they can form partnerships with the private sector in order to fulfill the mandates of TOD regulations. This report describes the major components of local land use and zoning controls that are used to encourage transitoriented development. Section 2 describes, in general terms, the tools and techniques that are normally included in TOD regulations, as well as ancillary techniques that accompany TODs. This includes the results of a survey conducted as part of this research on how TOD has been implemented in other jurisdictions and its effectiveness in encouraging the use of public transit and improving the levels of service on highways and roads. Section 3 presents the first published analysis of legal issues associated with the use of transit-oriented development. While there were no reported cases on the use of transit-oriented development at the time this report was written, the various components of transitoriented development do raise legal issues that require careful analysis and scrutiny prior to implementing a TOD ordinance.

2. ELEMENTS OF TRANSIT-ORIENTED DEVELOPMENT POLICIES

A TOD ordinance covers the following major elements: amount and type of development, and spatial, and relational characteristics. TOD regulations govern the amount of development because they tend to permit higher densities of development proximate to transit stations. TOD regulations govern the type of development by permitting a richer variety of land uses within a given area. TOD regulations are spatial in that they attempt to minimize the distance between highly developed areas and public transit facilities, thereby encouraging persons living or working in the area to use transit facilities. TOD regulations are relational in that they use innovative urban design guidelines to ensure not only compatibility between mixed land uses, but also that those land uses relate functionally to the transit system.

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measures to be included in EPA guidance include, among other things, public transit (§ 108(f(1)(A)). The EPA is authorized to disapprove highway projects for failure to submit a SIP or to conform the SIP to applicable law. In lieu of highway money, the Secretary may approve specific TDM and TSM measures. 42 U.S C. § 7509(b)(2). These include public transit, HOV roads, employer-based trip reduction plans, and other transportation control measures listed in the statute that are excluded from these sanctions The relationship between transit and land use must also be recognized in air quality planning in some states *See, e g* , 9 VA ADMIN CODE § 5-15-140 (transportation plans in serious, severe, or extreme ozone nonattainment areas and serious carbon monoxide nonattainment areas must allow for modeling of transit ridership and show that there is a reasonable relationship between expected land use and the transportation system).

[8] ISTEA § 3010 (to be codified at 49 USC § 1602(i)(2)(C)).

[9] The term "new urbanism" has been in use for many years, originally referring to the trend away from traditional village-oriented development. C. TUNNARD, THE CITY OF MAN 362-85 (1953)

[10] *See generally*, P. CALTHORPE, THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM (1993); P. KATZ, THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY (1994).

[11] Reid v. Architectural Board of Review, 192 N E 2d 74, 80 (Ohio App. 1963) (Corrigan, J, dissenting).

Traditional land use controls designed to alleviate traffic congestion include zoning (especially large-lot zoning), subdivision regulations, and off-street parking requirements.[12] However, traditional land use controls have proven inadequate to relieve the long-term and regional congestion of automobile traffic. Although large-lot zoning reduces traffic on local streets, it produces a land use pattern that is difficult to serve with public transit. Free parking encourages automobile travel. Single-use zoning creates a spatial imbalance between jobs and housing that tends to discourage pedestrian activity. Accordingly, many communities have turned to more innovative land use controls to combat congestion, which are discussed in Parts 2.b. and 2.c. While TOD regulations guide development within a transit station area or corridor, communities may use ancillary regulations to guide growth in these areas and to create procedures for implementing transit-supportive land use policies. Transfers of development rights (TDRs), clustering, concurrency, and urban growth boundaries (UGBs) may be used to shape regional land use patterns by directing growth into compact urban centers and nodes. Ancillary procedures are also needed to provide a vehicle for development approval and to ensure that public land private-sector obligations are fulfilled. Specific plans provide the link between the community's comprehensive land use plan and implementing regulations. Development agreements protect private development rights while providing contractually for the enforcement of transit regulations. Joint development and capital improvements programs (CIPs) provide a structural framework for financing and constructing the infrastructure needed to support these land use patterns. These approaches are described below.

a. Regulating Development Within Station Nodes and Corridors

i. Distance from Transit Stations

An important threshold consideration for a transit agency working with a local government to develop transit-supportive land use policies is to define the jurisdictional coverage of the regulations. Most studies show that in order to effectively encourage transit use, a development must be located so that residents are not required to walk more than a quarter mile to a transit station.[13] The distance that persons are willing to walk to a transit stop is typically about 5 minutes or 1,000 feet, which expands to 1,500 to 2,000 feet around high frequency, high speed facilities such as commuter or light rail.[14] For example, the California Transit Village Development Act[15] authorizes the adoption of a transit village development district that includes all land within a quarter mile of a rail transit station.[16]

ii. Density and Use Regulations

A key to creating transit-supportive land use regulations is designating uses that are supportive of public transit, while excluding those that may be detrimental to residential development or transit destinations. In addition, the regulations must permit or require adequate densities to encourage the utilization of transit. Some communities have carved out special uses in their zoning districts designed to foster the development of transit-supportive retail and commercial facilities, as well as parking and other facilities ancillary to transit stations and interchanges.[17] TOD ordinances often encourage or require more intensive development patterns by establishing minimum densities or by offering density bonuses in exchange for the provision of transit facilities or other urban design features.[18] By increasing densities in transit corridors and nodes, TOD ordinances encourage a more concentrated, rather than dispersed, pattern of development.

The determination of appropriate densities in TOD districts should take into consideration the type of transit service available during the life of the CIP. Density standards may depend upon whether the area encompassed by a TOD is served by local on-street buses, express buses, busways or priority bus lanes, light rail transit, rail buses, commuter rail, regional rail, or heavy rail transit.[19] Systems with higher capacities,

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[12] Freilich & White, *Transportation Congestion and Growth Management Comprehensive Approaches to Resolving America's Major Quality of Life Crisis*, 24 LOY L A L REV 915, 935 (1991).

[13] A recent study of transit-oriented development in California found that the modal share of rail fell by approximately 0 85 percentage points for every 100 foot increase in walking distance R CERVERO, RIDERSHIP IMPACTS OF TRANSIT-FOCUSED DEVELOPMENT IN CALIFORNIA, xi (1993) For sites other than those of the Bay Area Rapid Transit (BART), the modal split of rail exceeded 10 percent only within 500 feet of the station *Id.* Transit ridership was related primarily to neighborhood density and proximity to transit, with mixed land uses and indicators of "walking quality" not highly related to the modal split of transit in residential and office sites. *Id*, at xi-xii

[14] Sacramento Regional Transit District, Transit Master Plan, at 7-13

[15] *See* discussion *infra*

[16] CAL GOV'T CODE § 65460.4.

[17] Most studies show that residential densities of at least 7 to 15 dwelling units per acre are needed in order to encourage the utilization of public transit. Conversely, lower densities discourage the utilization of public transit because they do not provide the critical mass to operate the system, commuters are required to travel too far to transit stations, and the sheer amount of roadways needed to serve lower development densities favors usage of the automobile

[18] *See generally*, M MORRIS, CREATING TRANSIT-SUPPORTIVE LAND-USE REGULATIONS (American Planning Association, Planning Advisory Service Report No 468, December 1996)

[19] TRIANGLE TRANSIT AUTHORITY AND PARSONS BRINCKERHOFF QUADE & DOUGLAS, INC, TRIANGLE FIXED GUIDEWAY STUDY PHASE I/II REPORT, REGIONAL ANALYSIS &

such as heavy rail, are capable of serving areas with higher population densities, whereas lower capacity systems, such as buses, may serve areas with lower population densities.[20] Densities may also be predicated on transit operating costs.[21] From the number of trips per acre, a figure for density within the service area can be derived This procedure is used to determine whether there is sufficient demand to justify the transit service.

Encouraging or requiring developers to construct adequate residential densities in the vicinity of a transit facility is key to the success of the TOD program. Most jurisdictions encourage density increases through the use of density bonuses in exchange for specified urban design elements or the provision of public benefits.[22] The alternative is to mandate that densities exceed a specified minimum. While few cities in the United States have provisions that require minimum densities, minimum and maximum densities are often included as part of a planned unit development (PUD) approval or development agreement. In addition, some states have, through judicial fiat or legislative action, established "regional general welfare" standards that require local governments to accommodate their fair share of regional housing needs by adjusting permitted densities.[23]

iii. Bulk, Setback and Area Controls

TOD ordinances have several features that distinguish them from conventional zoning regulations. First, TOD ordinances often feature maximum setback (or "build-to" lines) rather than minimum setbacks. By bringing buildings closer to the street, TOD ordinances attempt to generate pedestrian activity and to force parking and other automobile-related facilities to the rear of buildings. Second, the frontage and lot size requirements in TODs are reduced in order to encourage higher densities. These may be coupled with zero lot line provisions, which allow homes to be sited with no side setback on the lot. Third, TOD ordinances often require urban design amenities such as colonnades, front porches, and rear parking in order to stimulate pedestrian activity at the street level. General criteria for aesthetic and/or architectural compatibility and design are also included in many ordinances. Because most transit users reach the station by walking, creating adequate outdoor space and an interesting pedestrian environment is thought to encourage transit usage.[24]

iv. Station Area Urban Form

There are six basic modes of a TOD that have emerged in actual practice and in planning theory. These include single-use corridor development, mixed-use corridor development, neotraditional or traditional neighborhood development, transit-oriented development and pedestrian pockets, hamlets and villages, and purlieus. Single-use corridors concentrate single transit-intensive uses in transit corridors while mixed-use corridors attempt to concentrate a variety of land uses on a single parcel. TNDs focus primarily on design features that replicate the traditional town or village concept, such as small lots with narrow streets, front porches, and detached rear parking.[25] TODs and pedestrian pockets feature compact development with mixed uses concentrated along a transit stop.[26] The hamlet or

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CURRENT TREND FUTURE IN 2020, EXECUTIVE SUMMARY 13-14 (August 1994)

[20] The seminal study on the relationship between transit and land use by Pushkarev and Zupan presents a range of densities for various types of transit facilities, ranging from four units per acre for local bus systems serving an employment destination of 10 million gross square feet, to 9 to 12 units per acre for light rail systems serving an employment destination of 35 to 50 million gross square feet B PUSHKAREV & J ZUPAN, PUBLIC TRANSPORTATION AND LAND USE POLICY 184-199 (1977)

[21] H RABINOWITZ & E BEIMBORN, GUIDELINES FOR TRANSIT SENSITIVE SUBURBAN LAND USE DESIGN 42-43 (Final Report) U S DEP'T OF TRANSP (July 1991)

[22] As part of implementation of a statewide demonstration program, the State of California requires a density bonus for a developer of housing within one-half mile of a mass transit guideway station, unless the locality finds that granting of the density bonus would result in a specific, adverse impact upon the public health or safety, and that there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact CAL GOV'T CODE § 65913 5 The density increase required is a minimum of 25 percent over the otherwise maximum residential density allowed under the general plan and any applicable zoning and development ordinances. The local government may require a developer to enter into a development agreement to implement a density bonus granted under the density bonus legislation Further protections are granted against third-party challenges to the increased densities In any action to attack, set aside, void, or annul a density bonus, a court must uphold the decision of the local government to grant the density bonus if the court finds that there is substantial evidence in the record that the housing development will assist the local government to: (1) meet its share of the regional housing needs, or (2) implement its congestion management plan.

[23] S MARK WHITE, AFFORDABLE HOUSING: PROACTIVE AND REACTIVE PLANNING STRATEGIES 61-68 (American Planning Association, Planning Advisory Service Report No. 441, 1992); see discussion of regional general welfare, *supra*

[24] METROPOLITAN TRANSIT DEVELOPMENT BOARD (MTDB), DESIGNING FOR TRANSIT: A MANUAL FOR INTEGRATING PUBLIC TRANSPORTATION AND LAND DEVELOPMENT IN THE SAN DIEGO METROPOLITAN AREA 6 (July 1993)

[25] Christoforidis, *New Alternatives to the Suburb: Neotraditional Developments,* 8 JOURNAL OF PLANNING LITERATURE (May 1994) at 429-440; Duany & Plater-Zyberk, *Suburban Sprawl or Livable Neighborhoods,* Revised Remarks at APA Neotraditional Town Planning Workshops (1991); Knack, *Repent, Ye Sinners, Repent*, PLANNING August 1989 at 4-8

[26] Christoforidis, *supra* n.25; Calthorpe, *supra* n 10.

village concept features a cluster of single-family homes around a central green area.[27] A purlieu is a community with approximately 150 acres and 7,000 residents, with comprehensive urban design regulations but few use restrictions.[28]

A TOD typically contains a mix of residential and nonresidential uses, designed to accomplish several key objectives. First, locating the residences and employment destinations on a single site increases the likelihood that persons will walk to work or commute by transit, rather than by automobile. This is referred to in transportation engineering parlance as the "internal capture" of trip origins and trip destinations. Second, some nonresidential uses, such as daycare and shopping facilities, make commuting by public transit more convenient. Third, a mix of uses holds the TOD together as a community, rather than as a single-use bedroom complex. Finally, TOD ordinances typically feature a town center that hosts the most intensive commercial, civic, and other nonresidential activity serving the neighborhood. A TOD ordinance may require residences to be located within a specified distance of the town center. In addition, the TOD may require a greenbelt or open space to form an edge around the neighborhood.

Several factors are key to the successful implementation of a mixed-use development program. First, sequential development controls are needed to insure that both residential and nonresidential development occurs on the site. In suburban areas, for example, the TOD ordinance may require development to occur in phases, so that subsequent phases of a residential development do not occur until nonresidential supportive uses are in place. Second, incentives--either regulatory or financial--may be needed to encourage nonresidential development in some areas and residential development in others. This may take the form of the donation of excess public land, redevelopment loans, and regulatory incentives such as density bonuses, streamlined processing, or concurrency exemptions.[29] Finally, some mixed use ordinances use detailed urban design guidelines to ensure compatibility between uses and to stimulate pedestrian activity.[30]

v. Street Patterns and Parking Restrictions

Most TOD ordinances feature a traditional "grid" street pattern in which the streets are relatively straight and meet at right angles, forming the rectangular street pattern found in many older neighborhoods.[31] This is in contrast to the curvilinear street pattern found in most modern suburbs. The grid street system has the ability to distribute traffic evenly and efficiently, rather than concentrating traffic on several arterials.[32] A grid system is also easier to navigate because of the lack of deadends and cul-de-sacs.

TODs dispense with the typical classification of arterial, collector, and local streets. Under a TOD classification, the traditional functional hierarchy of streets is abandoned in favor of a system whereby most streets serve basically the same function. While many neotraditional development schemes permit one or several streets to carry through traffic, many require that through traffic be served only by abutting thoroughfares[33] Many neotraditional subdivisions feature the use of alleys to provide access to residential homes and commercial establishments. A major purpose of alleys, when coupled with requirements that parking facilities and garages be located in the rear of an establishment or residence, is to minimize the visibility and function of the automobile.

Neotraditional developments also feature narrower streets than conventional subdivisions. Narrow streets are designed to provide a form of "traffic calming" by minimizing traffic speeds and through traffic while devoting more of the streetscape to pedestrian use than is the case in most conventional residential subdivisions. Narrow streets are also considered easier to cross on foot than wide streets with heavy traffic volumes.[34] Neotraditional communities often encourage on-street parking in order to provide a buffer for pedestrians on the sidewalk. By minimizing street widths, maximizing sidewalks and other pedestrian facilities, and discouraging

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[27] Christoforidis and Knack, *supra* n 25; S SUTRO, REINVENTING THE VILLAGE: PLANNING, ZONING, AND DESIGN STRATEGIES (American Planning Association, Planning Advisory Service Report No. 430, December 1990)

[28] Christoforidis, *supra* n.25

[29] *See* discussion *infra.*

[30] For example, the Charlotte, North Carolina, Uptown Mixed Use District Ordinance and Urban Design Guidelines provide regulations for setbacks, side and rear yards, height, streetscape design, screening, signage, street trees, and other urban design standards. In addition, the standards require that 50 percent of the first floor of any new building over 100,000 square feet be devoted to retail activities in order to stimulate street-level pedestrian activity CharlotteMecklenburg Planning Commission, Uptown Mixed Use District Ordinance And Urban Design Guidelines (April 1987) at § 3053 6

[31] Kulash, Anglin & Marks, *Traditional Neighborhood Development: Will the Traffic Work?,* DEVELOPMENT MAGAZINE (July/August 1990) at 21-23

[32] CITY & COUNTRY OF DENVER, THE GATEWAY PLAN 9 (October 1991)

[33] SACRAMENTO COUNTY, CALIFORNIA, TRANSIT-ORIENTED DEVELOPMENT DESIGN GUIDELINES, (September 1990); SAN DIEGO, CALIFORNIA, TRANSIT-ORIENTED DEVELOPMENT DESIGN GUIDELINES, (October 1991).

[34] Metropolitan Transit Development Board, *supra* n 24 The use of gridiron and narrow streets in neotraditional developments is often attacked by public works officials on public safety grounds Concern has been raised about the ability of fire trucks and other public vehicles to maneuver through narrow streets, In addition, public officials often express concern over potential legal liability associated with approving developments with this type of street pattern. Fulton, *Winning Over the Street People. Traffic Engineering Standards Are Under Attack from All Sides,* PLANNING (May 1991) at 811. For a discussion of safety issues, see INST. OF TRANSP ENG'RS, TRADITIONAL NEIGHBORHOOD DEVELOPMENT STREET DESIGN GUIDELINES 13-19 (June 1997).

limited-access roadway facilities, which tend to inhibit pedestrian travel, the neotraditional community attempts to make the pedestrian rather than the automobile the primary determinant of urban form.

TODs take a different approach to parking than conventional zoning regulations. Many TODs and neotraditional development regulations restrict off-street parking rather than requiring a minimum number of off-street parking spaces. The abundance of suburban parking is often identified as an impediment to public transit for several reasons.[35] First, generous parking requirements facilitate travel by automobile, thereby reducing the likelihood that commuters will choose to travel by public transit. Second, large expanses of asphalt devoted to parking often discourage pedestrian mobility, thereby impeding travel from transit stations to employment destinations. Accordingly, neotraditional ordinances often discourage parking by minimizing the number of spaces available for parking and by requiring landscaping, covered passageways, and other design amenities in order to encourage pedestrian travel.[36]

b. Ancillary Techniques

i. Urban Growth Boundaries and Tier Systems

For development to occur under TOD regulations, development at the periphery of transportation corridors must be controlled as well. Encouraging development to occur first within the transit corridors ensures that the transit facilities will be financially feasible and that the TOD does not evolve as a single-use, sprawling development. Whether a TOD is mandatory or incentive-based, developers may avoid building in areas subject to TOD regulations unless adequate incentives are created for development or unless regional land use controls are in place that channel development into transit corridors or centers.

The key to channeling development into locations, uses, and densities adequate to support public transit is the identification of an appropriate urban form for transportation, one that discourages low-density sprawl and encourages densities that are serviceable by public transit. Regional urban form concepts include urban growth boundaries, centers and nodes, and corridors.[37] A UGB is a mapped line that separates urbanizable land from rural land and within which urban growth is contained for a specified time period.[38] Edges and UGBs are advocated by many neotraditionalists as a way to channel growth into higher-density mixed-use nodes and centers.[39] Because UGBs require large areas in order to effectively contain regional growth, they are often designated on a regional basis or by intergovernmental agreement.[40] UGBs are required by state law in Oregon[41] and Washington.[42]

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[35] Cervero, *Land Uses and Travel at Suburban Activity Centers*, TRANSP QUARTERLY (October 1991) at 479, 480.

[36] Morris, *supra* n 18, at 15. Zoning ordinances typically require a designated number of off-street parking spaces for certain land uses TODs turn this requirement on its head by restricting the number of parking spaces that may be provided and by requiring that parking be placed in the rear of a building or other nonconspicuous location The rationale for parking restrictions is that an abundance of parking encourages automobile travel and reduces transit ridership accordingly Cervero, *supra* n 13 Parking reductions are also justified by the reduced parking demand in the vicinity of transit facilities. A recent study of shared parking in San Diego showed that parking demand for some uses in the vicinity of transit facilities ranged from 7 percent to 69 percent lower than the standard zoning ordinance requirements SAN DIEGO SHARED PARKING STUDY (July 1996) (Prepared by JHK & Associates/Valley Research & Planning Associates.)

[37] An example of this approach is found in the Puget Sound, Washington, Region, which has divided development into the following land use categories: major urban centers, activity centers, employment areas, and residential neighborhoods BELLEVUE CONFERENCE CENTER, TRANSIT/LAND USE LINKAGES: MAKING IT WORK 4 (July, 1993) Major urban centers are areas that contain high concentrations of housing and employment, with direct service by high-capacity transit, and a wide range of other land issues such as retail, recreational, public facilities, parks, and open space Major urban centers are a focus of regional activity and provide services to the general region Activity centers are locations that contain many of the same land uses as activity centers, but tend to be more automobile-oriented because of their physical layout Low density/intensity employment areas include office parks, industrial areas, and manufacturing locations that are developed at relatively low densities. These areas are typically automobile-oriented, single-use areas and do not generate a high degree of transit use Residential neighborhoods generally include single-family residences with varying degrees of multifamily residences, depending on location Commercial services can range from numerous and convenient to nonexistent

[38] G EASLEY, STAYING INSIDE THE LINES, 3 (American Planning Association, Planning Advisory Service Report No. 440, 1992).

[39] Calthorpe, *supra* n 10 at 70-71

[40] Caves, *Defining Urban Regions: Land Use and Legal Considerations*, 4 URBAN RESOURCES 23 (Winter 1987); Smith, *Cooperative Growth Management*, 57 COLORADO MUNICIPALITIES 14 (May/June 1981).

[41] Oregon's UGB program is the first statewide requirement that local governments designate enforceable UGBs *See* 1000 Friends of Oregon v Land Conservation and Development Commission, 292 OR. 735, 642 P 2d 1158 (Or. 1982); Branscomb v. Land Conservation and Development Commission, 297 OR 142, 681 P 2d 124 (OR 1984); Philippi v City of Sublimity, 294 OR 730, 662 P.2d 325 (OR 1983) Goal 12 of the Oregon Land Use Goals and Guidelines Regulations establishes, in addition to a public facilities and services element goal, a transportation goal Morgan & Shonkwiler, *Urban Development and Statewide Planning: Challenges of the 1980's*, 61 OR L REV. 35 (1982). Goal 14 requires local governments to establish urban growth boundaries wherein public facilities and services are extended in such a manner as to separate urbanizable from rural land Env't Rep (BNA) §§ 1286:2511-1286:2513 (9/21/90). The transportation element of the local comprehensive plan emphasizes the relationship between transportation and land use. The number and location

A more sophisticated application of the UGB approach is the use of a "tier system," which has been applied in San Diego, California, and Minneapolis, Minnesota.[43] A principal tenet of the "tier" system involves the geographic and functional division of the planning area into subareas ("tiers").[44] The functional planning area concept recognizes that different areas of the community present different problems relating to growth and development. Nevertheless, while individual geographical or functional areas may need to be separated for specialized treatment, they must still be viewed in terms of their interrelationships with other areas and with the community as a whole. The tier system divides the community into "growth" and "limited growth" categories and adds the tiers as subdivisions of those general categories.[45] Tiers within the growth category are commonly designated as "urbanized" and "planned urbanizing." The tiers within the limited growth category would be "rural/future urbanizing," "agricultural," and "conservation/open space." Each of the tiers has specific geographical boundaries and is capable of being mapped. The urbanized tier consists of those areas that are at or near buildout and served by public facilities. The planned urbanizing area represents the "new" growth area. The rural/future urbanizing area may be a permanent rural density development area or may be a temporary "holding" zone until the growth areas are built out. The rural/future urbanizing tier generally contains lands that lack sewers and that have a lower population density. The agriculture tier is intended to identify those lands that should be preserved either temporarily or permanently for agricultural production. The conservation/open space tier consists of lands containing natural resources or environmentally sensitive areas.

Transportation corridors, as areas that would be targeted for future growth, can be integrated into the framework by inclusion in the area mapped and designed as planned or future urbanizing.[46] Transportation corridors can be separately mapped and may overlay the tier delineations. In a typical community, transportation corridors pass through more than one tier and therefore may require the use of differing techniques. For instance, techniques used in transportation corridors in the urbanized tier will likely have a redevelopment/infill focus, while techniques used in transportation corridors in the future urbanizing area would likely consist of advance acquisition, excess condemnation, and the like. Joint development is a technique that is commonly used in all areas mapped as transportation corridors.

ii. Joint Development

Once a local government has adopted planning policies and implementing ordinances for transit-oriented development, it may want to consider more proactive approaches to stimulate development in transit corridors. While jurisdiction for regulating development in areas subject to a TOD typically resides with the local government, the transit agency may use joint development to alleviate the actual or perceived risks associated with undertaking development in the transit corridor and to obtain financial benefits related to construction and operation of the transit system and other public facilities. Appendix B presents the results of a survey, conducted as part of this project, of joint development projects by transit agencies.

The term "joint development" refers to the development of real estate that is integrated with a transit

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of transportation facilities are required to be consistent with "state or local land use plans and policies designed to direct urban expansion to areas identified as necessary and suitable for urban development" (Goal 12(B)(1)) Plans for new facilities or the expansion of existing facilities are required to identify, *inter alia,* the impact on local land use patterns and existing transportation systems The goal encourages the utilization of existing transportation facilities Capital investment policies are designed to buttress the separation of urbanized from nonurbanized areas enforced through the urban growth boundary Local governments are required to design, phase, and locate transportation facilities, (including air, marine, rail, mass transit, highways, bicycle, and pedestrian facilities) in such a manner as to encourage growth in urbanized areas while discouraging growth in rural areas (Goal 14(B)(2))

[42] The Washington "Urban Growth Areas" legislation requires that each county adopting a comprehensive plan shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature Each city in the county must be included in an urban growth area. An urban growth area may also include territory outside of existing city boundaries only if such territory is already characterized by urban growth or is adjacent to territory already characterized by urban growth. REV CODE WASH § 36 70A 110(1), 1990 Growth Management Act Urban growth should be located first in areas already characterized by urban growth that have existing public facility and service capacities to serve such development, and second in areas already characterized by urban growth that will be served by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources. REV CODE WASH § 36 70A 110(3), 1990 Growth Management Act

[43] R. Freilich & S. White, *Effective Transportation Congestion Management,* 43 LAND USE LAW AND ZONING DIG., No 6, at 3 (June 1991)

[44] R Freilich & J Ragsdale, *Timing and Sequential Controls--The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region,* 58 MINN L REV 1009 (1974); CALLIES & FREILICH, CASES & MATERIALS ON LAND USE, 1986 at 837; M GLEESON, I. BALL, S CHINN, R EINSWEILER, R FREILICH & P. MEAGHER, URBAN GROWTH MANAGEMENT SYSTEMS: AN EVALUATION OF POLICY-RELATED RESEARCH (Planning Advisory Service Reports, No. 309, 310, 1975)

[45] R. FREILICH, A GROWTH MANAGEMENT PROGRAM FOR SAN DIEGO (July 1976)

[46] D. CALLIES, R FREILICH & T. ROBERTS, CASES AND MATERIALS ON LAND USE 586-88 (2d ed. 1994)

station or other transit facility. It may include, among other things, an office tower built in the air rights over a transit terminal or a retail facility directly linked to a transit terminal by a pedestrian walkway.[47] Regardless of the form it takes, joint development is a pairing of public and private resources to achieve a project that will benefit both sectors. Joint development also includes a value capture connotation in which the public sector attempts to recoup some of the real estate--related monetary benefits that result from public investments. Revenues derived from joint development can be used by the public sector to (1) offset the original transit system real estate and capital costs, (2) guarantee provision of desired public amenities, and (3) finance a portion of the transit investment and/or help to pay for ongoing operating *costs* of the transit *system.*

Joint development approaches typically include techniques that capitalize on real property assets that are acquired in the course of transit system development. Examples include those involving property taxes or assessments and excess land acquisition such as land and air rights leasing,[48] negotiated private-sector investments in property and transit station capital costs,[49] connection fees for direction tie-ins to transit stations,[50] and concessions at transit stations.[51] Some states include a proportionality requirement in joint development deals. In Colorado, the state Department of Transportation may grant public benefits in a transportation system in exchange for private contributions to the project so long as the benefit reasonably relates to the value of the contribution.[52]

An example of the range of powers needed to effectuate joint development is provided by the state legislation governing rail transit facilities for the Los Angeles Metropolitan Transit Authority.[53] This legislation authorizes the commission to utilize private entities for the study, planning, design, development, acquisition, installation, construction, leasing, and warranty of rail transit systems.[54] Agreements between the transit agency and private developers may include

> provisions for the lease of facilities, rights-of-way, and airspace, exercise of the power of eminent domain to facilitate the purposes of the agreements, the granting of development rights and opportunities, the granting of necessary easements and rights of access, the issuance of permits and other authorizations, protection from competition, the sharing of costs and liabilities, remedies in the event of default of either of the parties, granting of other contractual and real property rights, and other provisions determined necessary to ensure

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[47] FREILICH & LEITNER, P C, REAL ESTATE RESEARCH CORPORATION, CALVIN SHELTON, AND SPILLMAN BOATMAN INC., PRELIMINARY EVALUATION OF DART JOINT DEVELOPMENT REVENUE POTENTIALS 11 (City of Dallas Publication No *85/86*11, August 1985)

[48] Land and air rights leasing involves negotiation of a long-term lease agreement for real property that is originally purchased by the transit agency for transit purposes, such as station sites and parking areas, or is owned by a public agency In these cases a plan is developed whereby the transit facility requirements can be met within the structure of a larger project, creating space for incremental commercial uses In most cases, the station facilities are wholly integrated in the development project and ancillary facilities such as parking and entranceways are shared These arrangements are typically structured as long-term leases, and the transit agency and/or other public agency can expect to gain contributions to station capital costs as well as long-term lease revenues. Lease revenues can be derived from a base rental value and/or as a percentage of project income, making the public agency a true equity partner in the development City of Dallas Pub No 85/86-11, *supra* n 47, at 12. Most states limit the duration of leasehold interests that may be granted pursuant to a public-private development COLO REV STAT § 43-11202(d)II) (99 years)

[49] A negotiated investment is an agreement between a developer and a public agency or agencies, through which the developer agrees to contribute property and/or capital costs to transit improvement in exchange for some concession that will benefit his development These types of agreements can range from total integration of the transit station and ancillary facilities within the development project to agreements to provide access facilities or other public amenity improvements that enhance the transit facility. In certain instances, local governments can utilize zoning and building permit authorities to bargain with developers to pay for transit-related improvements City of Dallas Pub., *supra* n.47, at 13-14

[50] Connection fees can be charged to owners/developers of both existing and future buildings for being physically connected to a station facility Traditionally, these fees have included: (1) lump sum payments to cover capital costs of knockout panels, entrance areas, etc., plus a fee to cover the intrinsic value of the connection, (2) an annual contribution to the operating cost of the station facility, (3) in lieu dedication of property for station areas or easements, and (4) architectural and operational enhancements to the facility Connection fee agreements are best utilized with either subway or elevated stations where direct access to mezzanine levels creates additional prime rentable areas at the upper or lower levels of buildings. The enhanced value of these areas thus becomes the basis for connection fees and capital investments on the part of the developer, City of Dallas Pub, *supra* n 47, at 14-15.

[51] Concessions involve the generation of revenues through the sale or lease of portions of their station facilities for concessions Concessions may include mechanical or "vending" equipment ranging from automatic teller banking machines to food dispensers to pay telephones. Alternatively, concessions may include space set aside within the station site for retail stands and kiosks or roving vendors permitted to sell from floating locations Major retail stall concessions dictate specific design requirements and accommodations in station areas. These can include supplemental provisions for electrical/water needs and additional space requirements. Freestanding kiosk-type outlets can reduce the structural accommodation requirements City of Dallas Pub., supra n 47 at 15.

[52] COLO REV STAT. § 43-1-1202(d)(I)

[53] While the legislation references the Los Angeles County Transportation Commission, that agency was abolished and succeeded by the Los Angeles Transportation Authority on April 1, 1993 CAL. PUB. UTILITIES CODE § 130051.13 (West 1991, 1998 Suppl.).

[54] CAL. PUB. CON CODE § 20362(a)

the financing, development, and operation of feasible facilities[55]

The state's Department of Transportation is authorized to lease, for up to 99 years, to the transit agency, for sublease to third parties, the use of areas above or below that portion of existing state highways and any portion other than the traveled portion of the right-of-way of state highways, to be directly used for rail transit systems, intermodal facilities, and related commercial development.[56]

The zoning and land use controls adopted by the local government must be carefully considered in the joint development process. The approval of the local government may be required for construction and development. Joint development legislation may also require that the services provided pursuant to the agreement be consistent with the use and zoning of land adjacent to the right-of-way.[57] At the same time, general purpose units of local government (such as cities or counties) may be authorized and empowered to do many things that are unavailable to the transit agency. Cities may be authorized to develop and adopt comprehensive plans to guide their growth and development; to enact zoning regulations; to undertake redevelopment and designate reinvestment zones; to utilize tax increment financing; and to approve special assessment benefit districts, among other powers. Cities, through zoning approval processes and/or subdivision regulations, can exact various contributions from development adjacent to transit stations, including easements, access points, improvements, connections, and even fees that would aid in transit station development and related joint development. The exercise of these powers in coordination with the transit agency's station development policy can materially benefit both the agency and the local government unit.[58] The transit agency and local governments, through cooperative agreements, can aggregate all of the essential governmental powers and authorities for successful large-scale joint development:

- Site assemblage
- Flexibility (or relaxation) of zoning or zoning incentives
- Low-cost financing (through tax-exempt financing, sale-leaseback, lease or loan guarantees, federal grants)
- Construction of infrastructure
- Coordination between governmental entities
- Expedited processing
- Land use coordination
- Establishment or creation of a growth center and, to an extent, a captive market of transit riders.[59]

[55] CAL PUB CON CODE § 20363

[56] CAL. PUB CON. CODE § 20365(b); Cal Str. & H. Code § 104.12

[57] COLO REV. STAT § 43-1-1202(2)

[58] City of Dallas Pub, *supra* n.47 at 18

[59] *Id* at 19

iii. Concurrency

Concurrency regulations tie the issuance of development permits, such as rezonings, planned unit development approvals, subdivision plats, site plans, and building permits, to level of service (LOS) standards identified in a comprehensive plan.[60] Most concurrency ordinances are tied to roadway LOS standards. Few concurrency ordinances tie the issuance of development permits to public transportation capacity. However, many concurrency or adequate public facilities regulations--such as those used in Montgomery County, Maryland--apply a lower roadway LOS where public transit is available. This technique maintains the integrity of the concurrency management system while encouraging development to occur in areas where alternative transportation capacity is available.

Transportation concurrency management areas (TCMAs) are a framework for using concurrency management in a manner conducive to mass transit, economic development, and a desirable urban form.[61]

[60] S MARK WHITE, USING ADEQUATE PUBLIC FACILITIES ORDINANCES FOR TRAFFIC MANAGEMENT 17-21 (American Planning Association, Planning Advisory Service Report No 465, August 1996)

[61] *Id* at 30; GROWTH MANAGEMENT PLANNING & RESEARCH CLEARINGHOUSE, LOCAL GOVERNMENT PLANNING TOOLS (Aug 1992) Florida has created a useful framework for implementing TOD by authorizing realistic, two-tiered level of service standards and TCMAs Local governments may adopt a long-term transportation concurrency management system (LTTCMS) with a planning period of up to 10 years in specially designated districts where significant backlogs exist FLA STAT. § 163.3180(9). An interim LOS may be used for certain facilities, and the local government may use the 10-year CIP as a basis for issuing permits The LTTCMS must be designed to correct existing deficiencies and to set priorities to address backlogged facilities It must be financially feasible and consistent with other elements of the comprehensive plan The DCA may allow up to 15 years based upon the extent of the backlog, whether the backlog occurs on state or local roads, the cost of eliminating the backlog, and the local government's tax and other revenue-raising efforts. In order to "limit the liability" of local governments, the local government may allow development to proceed notwithstanding the transportation LOS if the jurisdiction has an approved comprehensive plan, the development is consistent with the future land use plan, the CIP is financially feasible and includes facilities adequate to serve the development, a fair share of the cost of transportation facilities is assessed against the landowner, and the landowner has made a binding commitment to pay these costs.

The Florida ELMS III legislation, which revised the state growth management law in 1993, now authorizes concurrency exemptions and TCMAs in limited circumstances. Finding that concurrency may sometimes discourage urban infill development and redevelopment, Florida authorizes exemptions from transportation concurrency if a project is otherwise consistent with the comprehensive plan, and the project either promotes public transportation or is located within a designated urban infill development, urban redevelopment, or downtown revitalization area in the comprehensive plan Projects creating special part-time demands in these areas

While the system could be structured in a number of ways, the designation of major nodes and centers could provide a starting point for the designation of TCMAs and the allocation of transportation capacity. Identification of regional service levels and regional improvements establishes a regional transportation carrying capacity, which is then allocated to centers as transportation concurrency management areas. This regional carrying capacity could operate in two different ways. First, the carrying capacity would establish a ceiling on regional development. This would provide a basis for the allocation of capacity to centers/TCMAs, and would also require the affected agencies to debit capacity utilized in centers from the outlying areas. This would ensure that (1) capacity for regional centers is accorded a priority for utilization by the business community, and (2) that capacity is taken away from areas where development is assigned a low priority by the public sector, thereby ensuring that the goals and objectives of development in the regional centers are not thwarted by competition from outlying areas Capacity allocated to TCMAs could be allocated on a first-come first-served basis or subject to certain allocation criteria.

iv. Transfer of Development Rights

The transfer of development rights (TDR) concept provides for planning on an areawide basis by allowing landowners in restricted areas ("sending areas") to transfer densities and other development rights to landowners in areas appropriate for higher densities ("receiving areas"). A TDR system can be used to support transit-oriented development by designating areas around transit stops as receiving areas for TDRs. The TDR system may also have the secondary effect of channeling development into TODs by restricting development outside of transit centers. The usual purpose of TDRs is to ameliorate the harshness of zoning restrictions. TDRs give planners an alternative to purchasing the land outright or abandoning any attempt to enforce carrying capacity by allowing the market to furnish "fair compensation" for rights relinquished through zoning restrictions.[62] The transit agency can use TDRs to encourage transit-supportive development by working with general-purpose local governments to design transit station areas as receiving areas and encouraging development restrictions in peripheral areas.

c. Procedures for Implementing TOD

i. Specific Plans

A specific plan, like a PUD, is a way to adjust general land use planning policies to specific parcels. It is a particularly useful device in states such as California, Florida, Oregon, and Washington, which require consistency between comprehensive land use plans and land use regulations and/or development permits. A specific plan implements the comprehensive plan in one of three ways: (1) by acting as a policy statement that refines the general plan's policies with respect to a specific land area; (2) by directly regulating land use; or (3) by combining detailed policies and regulations into a focused scheme of development.[63] The transit agency can take a leadership role in sponsoring specific plans with transit-supportive land use policies in order to provide a sound legal and planning basis for subsequent development.

ii. Planned Unit Development

Conventional PUD ordinances are typically blamed for the automobile-oriented subdivision that features expansive parking and the "rigorous separation of uses."[64] However, the PUD provides the legal mechanism for achieving the design flexibility needed for a TOD. A PUD allows a local government to control the

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(less than 200 scheduled annual events or not affecting the 100 highest traffic volume hours) may be exempted from concurrency FLA. STAT. § 163 3180(5) "Downtown revitalization" means the "physical and economic renewal of a central business district" and includes downtown development and redevelopment FLA STAT § 163 3164(25) "Urban redevelopment" includes the demolition and reconstruction or substantial renovation of existing buildings or infrastructure within urban infill areas or existing urban service areas FLA STAT. § 163 3164(26) "Urban infill" includes the development of vacant parcels in built-up areas where public facilities such as sewer, roads, schools, and recreation are already in place and the average residential density is at least five dwelling units per acre, the average nonresidential intensity is at 1 0 floor area ratio (FAR), and vacant development land does not constitute more than 10 percent of the area § 163 3164(28) One or more TCMAs may be designated to promote infill development and redevelopment FLA STAT § 163 3180(7). The TCMA must be a "compact geographic area within an existing network of roads where multiple, viable alternative travel paths or modes are available for common trips " An areawide LOS may be used, based upon an analysis that justifies the LOS and that describes how infill or redevelopment will be promoted and how mobility will be accomplished within the TCMA To account for the impacts of redevelopment within an existing urban service area, 110 percent of the actual impact of previously existing development must be reserved for the redevelopment. FLA Stat § 163. 3180(8). Redevelopment that requires less than 110 percent of the previously existing capacity cannot be prohibited because of a reduction in the adopted LOS However, the local government may assess fees or account for the impacts within the CMS and CIP.

[62] R. Freilich & W Senville, *Takings, TDRs, and Environmental Preservation: 'Fairness' and the Hollywood North Beach Case,* 35 LAND USE LAW & ZONING DIG. No 9 (Sept. 1983) *See generally* City of Hollywood v. Hollywood, Inc, 432 So. 2d 1332, 1337 (F1 App. 1983); Penn Central Transp Company v New York City, 438 U S. 104 (1978); Suitum v. Tahoe Regional Planning Agency, ___ U S ___, No 96-243 (May 27, 1997); Barancik v. Marin County, 872 F.2d 834 (9th Cir 1988)

[63] CALIFORNIA GOVERNOR'S OFFICE OF PLANNING & RESEARCH, SPECIFIC PLANS IN THE GOLDEN STATE (1989) at 7.

[64] A Duany, E Plater-Zyberk, and R Shearer, *Zoning for Traditional Neighborhoods,* LAND DEVELOPMENT (fall 1992), at 20

development of individual tracts of land by specifying the permissible form of development in accordance with the local PUD ordinance.[65] The PUD process provides municipalities with more flexibility than does traditional Euclidean zoning.[66] Because PUD zoning allows greater flexibility than traditional zoning, greater emphasis is given to site planning than in single-use districts[67]

iii. Development Agreements

Development agreements, annexation agreements, and settlement agreements are emerging tools for negotiating development approvals. Under a "development agreement," the local government agrees to "freeze" the regulations applicable to a particular property, often in consideration for substantial contributions by the landowner to public infrastructure, environmental mitigation, or affordable housing. A number of states now expressly authorize development agreements[68] and annexation agreements[69] by statute. Most development agreement legislation permits the agreements to be adopted only after specified notice and public hearing requirements are followed, and limits the agreement to a period of 5-10 years.

iv. Capital Improvements Program

A CIP provides the mechanism for staging and sequencing the transportation improvements needed to accommodate a transit-oriented development. The CIP is often used in tandem with concurrency systems in order for local governments to demonstrate that the infrastructure needed to serve new development will be made available within a reasonable period of time. Transit agencies are therefore a key player in the development of a transit-supportive CIP. The CIP typically includes a list of transportation facilities that will be made available, when the facilities will be available, the funding mechanisms used to finance the facilities, and the capacity of the facilities.[70]

d. National Survey

As part of this study, a national survey was conducted of approximately 300 transit agencies. A questionaire forwarded to each agency is reprinted in Appendix A of this report. The survey is not intended to be

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[65] South Creek Associates v. Bixby & Associates, 781 P.2d 1027, 1030 (Colo. 1989) (citing 2 ANDERSON, AMERICAN LAW OF ZONING § 11.12 (1986))

[66] *Id*

[67] Appelbaugh v Board of County Comm'rs, 837 P 2d 304, 307 (Colo App 1992)

[68] ARIZ REV STAT ANN. § 48 701 *et seq.;* CAL GOV'T CODE §§ 65864-65869.5; COLO REV STAT §§ 24-68-101 *et seq.;* HAWAII REV STAT § 46-121 *et seq;* FLA REV STAT. §163 3220-163 3244; MINN. STAT ANN. § 462 358(3c); N J REV. STAT § 40 55-D *et seq;* and NEV. REV STAT § 278 0201 278 0207; *see generally* Delaney, *Development Agreements, The Road from Prohibition to "Let's Make a Deal!,"* 25 URBAN LAWYER 49-67 (1993) 1992 INST ON PLANNING, ZONING & EMINENT DOMAIN, Ch. 2 (Matthew-Bender, 1992); Taub, *Development Agreements,* 42 LAND USE L & ZONING DIG NO. 10, at 3 (Oct 1990)

[69] *See* COLO REV STAT § 31-12-121; Ill Municipal Code § 11-15 1-2 Annexation agreements conditioned on rezoning have been upheld on the grounds that the annexation statute does not prohibit such agreeements. Tanner v City of Boulder, 405 P 2d 939 (Colo banc 1965); Geralnes v City of Greenwood Village, 583 F. Supp. 830 (D Colo. 1984); *cf* Rooney v City of Aurora, 534 P 2d 825 (Colo App. 1975) (dismissal appeal of trial court action challenging contract for annexation and zoning due to lack of final, appealable judgment)

[70] FLA. STAT. §163 3177(3). The California Congestion Management Program (CMP) requirements adopted in 1991 provide an example of state legislation that may be used by local governments and transit agencies to link transit-supportive development policies with a CIP. The CMP is a broader concept than the CIP, of which the latter is only a part. The CMP requires local governments to "analyze the impacts of land use decisions made by local jurisdictions on regional transportation systems, including an estimate of the costs associated with mitigating those impacts." CAL GOV'T CODE § 65089(b)(4) The program must measure the impact to the transportation system using the program's performance measures, which incorporate highway and roadway system performance measures for frequency and routing of public transit and the coordination of transit service provided by separate operators CAL. GOV'T CODE § 65089(b)(2). The performance measures support mobility, air quality, land use, and economic objectives, and are used in the development of the capital improvement program, deficiency plans, and the land use analysis program. *Id*. Despite its clear language about land use decisions, one reviewer notes that, in practice, the CMP law has had far greater relevance to public investment decisions than to land use controls. Pursuant to the CMP, the metropolitan planning organization must prepare procedures for local deficiency plan development and implementation responsibilities, which must include: (1) an analysis of the cause of the deficiency, including identification of the impacts of those local jurisdictions within the jurisdiction of the agency that contribute to the deficiency, (2) a list of improvements necessary for the deficient segment or intersection to maintain the minimum level of service otherwise required and the estimated costs of the improvements; (3) a list of improvements, programs, or actions, and estimates of costs, that will measurably improve multimodal performance using level of service standards, and which contribute to significant improvements in air quality, such as improved public transit service and facilities; (4) an action plan with a specific implementation schedule and implementation strategies for those jurisdictions that have contributed to the cause of the deficiency in accordance with the agency's deficiency plan procedures CAL GOV'T CODE § 65089 4(c)(4)

Action plan strategies must identify the most effective implementation strategies for improving current and future system performance. CAL GOV'T CODE § 65089.4(c). The analysis of the cause of the deficiency must exclude the traffic generated by high-density residential development located within one-fourth mile of a fixed rail passenger station, if more than half of the land area, or floor area, of the mixed use development is used for high density residential housing, as determined by the agency. CAL. GOV'T CODE § 65089 4(f)(6)(B)

a complete or exhaustive list of transit-oriented development projects sponsored by transit agencies throughout the country. Instead, the survey provides an example of how transit agencies are using joint development powers and working with local governments to utilize their regulatory authority to encourage transit-supportive development patterns. In addition, the survey was designed to search for examples of instances in which transit-oriented development projects or ordinances were subjected to litigation. The survey uncovered no examples of litigation. However, the following section presents an overview of legal issues that may be expected to arise in a development of transit-oriented development projects or ordinances.

While the survey identified only a handful of agencies throughout the nation that are involved in TOD, it did reveal a wide variety of techniques in use by the various agencies. The techniques used by survey respondents to encourage TOD are presented in Appendix B. Table 1 describes the approaches and some of the projects undertaken by the agencies. The most commonly used regulatory techniques include mixed-use zoning, density increases, and adding transit-supportive land uses along the rail lines and rail stations. Density bonuses have been used by the City of Culver City (California), King County (Washington) Department of Transportation, and the Triangle Transit Authority in North Carolina to increase ridership along rail lines. Impact fees were used by only three agencies (Broward County Mass Transit in Florida, Tri-County Metropolitan Transportation District [Tri-Met] in Oregon, and the Triangle Transit Authority in North Carolina). Concurrency was reported only in Broward County and King County, perhaps because Florida and Washington mandate the use of concurrency by local governments in those states. The use of density transfers and transfers of development rights were reported only by Tri-Met, King County, and Triangle Transit. Tri-Met and the Sacramento County Regional Transit District were the only agencies to report the use of modified street standards. While it does not appear in Appendix B, tax abatement is also used by Tri-Met and is supported by enabling legislation in Oregon (see discussion in Part 3.d.).

Agencies in California and Oregon have pioneered the use of TOD.[71] TOD is used not only to promote transit ridership, but also to provide housing along transit lines. The most extensive use of TOD was reported by the San Diego Metropolitan Transit Development Board (SDMTDB). To date, the SDMTDB has undertaken 18 joint development projects, which have produced more than 3.7 million square feet of commercial, retail, office, and industrial space and 1,981 units of housing.[72] SDMTDB reported a number of regulatory incentives including density bonuses, mixed use development, permission for transit-supportive land uses, and pedestrian-oriented urban design.

Through a similar mix of regulatory incentives and supported by a statewide growth management law, at least 3,595 housing units and over 650,000 square feet of nonresidential space have been produced or are in development through projects sponsored by Tri-Met. The Westside Station Community Planning project focused on a transit corridor spanning three cities (Beaverton, Hillsboro, and Portland), with each jurisdiction adopting comprehensive plan and code amendments to support TOD. The agency has prepared station area development profiles and development strategies to encourage the development and redevelopment of station areas. A model tax abatement ordinance has been prepared (see description of tax abatement program in Part 3.d).

The Land Use, Transportation, Air Quality Connection (LUTRAQ) process, which is a national demonstration project in conjunction with 1000 Friends of Oregon, is designed to change land use patterns and to utilize transportation demand management (TDM) to influence travel patterns in the Portland area. Tri-Met reports that preliminary results from the first phase of the project increased transit ridership to work by as much as 1000 percent, with a projected shift in transit work trips from 2.7 percent in 1990 to 21 percent by 2010.[73]

The Santa Clara Transit District has used joint development authority to promote housing along its light rail lines. Mixed-use development, density increases, and rezoning to add uses along transit corridors have also been advocated by the district. The district owns 10 large park-and-ride lots totaling approximately 101 acres of land in prime locations. It was thought that this land might be put to other uses in addition to the daytime parking of cars. The agency uses long-term 75-year ground leases in order to construct high-density, multifamily residential housing known as "Trandominiums" on park-and-ride districts adjacent to the city's light rail line. This approach, begun in 1990, involves the lease of land to private developers who enter into a long-term ground lease, construct the project, and pay rent to the district for the term of the lease.[74] Using its ownership rights, the district has entered into three joint public/private projects for the development of affordable housing, daycare, and retail

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[71] For a description of the transit village movement in California, see Bernick & Cervero, *supra* n 4, at 187-212 and 237270

[72] SAN DIEGO METROPOLITAN TRANSIT DEVELOPMENT BOARD, TRANSIT LINKING SAN DIEGO'S DEVELOPMENT (brochure)

[73] TRI-COUNTY METROPOLITAN TRANSIT DISTRICT, REGIONAL PLANS AND PROGRAMS, LAND USE AND DEVELOPMENT PROJECT SUMMARIES 12 (May 18, 1996).

[74] Santa Clara County Transit District response to survey (question 5).

TABLE 1. SAMPLE SURVEY RESPONSES—TOD PROJECTS

Agency	Approaches and Projects
City of Culver City	The city, through its housing division and redevelopment agency, has been involved in three senior housing projects, which are located on existing city bus routes. The bus routes provide connections to commercial and medical facilities and the regional public transportation system.
Broward County Mass Transit	Broward County Transit has reached an agreement with Lauderhill Mall, in which a $90,000 investment will be made to upgrade the parking lot transfer facility. The facility will be entirely accessible to persons with disabilities.
Washington (DC) Metropolitan Area Transit Authority (WMATA)	WMATA has been involved in joint development since 1969 Since that time, WMATA has entered into long-term leases with private developers who have built residential, commercial, retail, and office projects. Each projects is designed to encourage transit ridership and to implement local land use plans.
Community Transit (Snohomish County Public Transportation Benefit Area Corp)	Development Review Program—The purpose of the program is to make Snohomish County a more transit-friendly place. The work consists of reviewing proposed public and private developments and suggesting ways that they can be modified to be more supportive of transit and high-occupancy vehicles (HOVs). The agency assists jurisdictions in the development of transit-supportive land use policies for incorporation into local land use plans.
Santa Clara County Transit District	Long term leases for housing projects (see text)
Champaign--Urbana Mass Transit District (CUMTO)	CUMTO is just starting construction of an intermodal transportation center that will include convenience shops, dry cleaners, daycare facilities, meeting space, and an automated teller machine.
City Utilities of Springfield, Missouri	In 1992, a study was commissioned to determine the need for and viability of a public-private partnership for economic development in Sprinfield Land was purchased for an industrial park. The park is in an enterprise zone, which requires that a certain number of disadvantaged persons be employed in order for companies located there to receive tax benefits. Those employees are often transit riders.
Sacramento Regional Transit District	See discussion of transit master plan in text. One developer paid for a $250,000 light rail transit station and received a 30 percent reduction in its parking requirement (16th and R Street Station)
Tri-County Metropolitan Transportation District (Tri-Met)	Westside Station Community Planning; Light Rail Transit Station Area Development Profiles; Hollywood Development Campaign; Tax Abatement for MF Dev. See discussion in text.
King County Department of Transportation	Has entered into an agreement with a suburban jurisdiction to revise land use and parking policies and suggest conditions for new developments.
Triangle Transit Authority	Has worked with local governments to encourage transit-supportive land use policies, including density increases and TDRs.

uses.[75] The ground lease for the Almaden Park-n-Ride project, a 250-unit affordable housing project, will initially generate about $266,000 per year in lease payments, which is an 8 percent return on the current value of the land.

The district hopes to accomplish three major objectives through its joint development projects. First, the district seeks a continuing source of revenue to defray operating and other expenses. Second, the project will attract new transit riders through the development of high-density, multifamily housing at the park-and-ride lots. Third, the developments will create a sense of place and community near the park-and-ride lots, incorporating them into the surrounding community and making them "something more than sterile expanses of asphalt that emptied out at the end of the day."[76] The joint development will reduce traffic congestion, improve air quality, create live-travel options for transit-dependent groups, and promote infill and preservation of natural resources.[77]

In other instances, the agency has been instrumental in encouraging the adoption of land use policies supportive of transit-oriented development. For example, in Sacramento County, California, the transit-oriented development policies have been described as the "cornerstone" of the county's general plan. These policies

[75] See Appendix C

[76] Santa Clara Transit District response to survey (question 5).

[77] *Id.*

include restrictions on the uses permitted around transit stations, revisions in density restrictions, and the use of design amenities to encourage transit ridership. Sacramento Regional Transit District (SRDT) is one of the few agencies that reported the use of modified street standards as part of its TOD policies The SRDT's transit master plan provides that street patterns in new developments should be designed for pedestrian circulation. The plan policies discourage dead-end streets (such as cul-de-sacs), loop streets, and oversized blocks On cul-de-sacs, "cut-throughs" to arterial streets are encouraged. Grid street patterns and unobstructed through streets with direct access to bus stops are encouraged.[78] The district reported that one developer received a 30 percent reduction in its parking requirement in exchange for financing a $250,000 light rail transit station.

Authorizing transit-supportive land uses such as retail establishments, apartments, and daycare facilities, was frequently cited as a technique used by survey respondents. Express authority for transit uses proximate to other land uses was also cited. Snohomish County, Washington, recently authorized park-and-ride lots and transit centers in all of its land use districts, excluding its mineral conservation and waterfront beach zoning districts. Parking lots are permitted as a right in the multifamily residential district and freeway service, neighborhood business, planned community business, community business, general commercial, industrial park, business park, light industrial, and heavy industrial districts, and are permitted as a conditional use in all other districts.[79] Park-and-pool lots are also permitted in those commercial districts, as well as in residential zoning districts by conditional use. Park-and-pool lots are defined in Section 18.090.653 of the Snohomish County Code as follows: "A parking area comprised of fifty or fewer leased parking spaces located in an existing parking lot serving an existing land use (as) utilized by individuals to access car pools, van pools, or nearby public transit." Buses do not enter, or traverse, these park-and-pool lots.

The King County (Washington) Department of Transportation (KCDOT) has used mixed-use zoning, density bonuses, density transfers, TDRs, and concurrency to encourage transit-oriented development An innovative intergovernmental agreement between KCDOT and the City of Bellevue involved the adoption by the city of zoning for employment and parking restrictions in exchange for increased bus service. Under the "transit service incentive agreement," KCDOT offered up to 10,000 additional bus hours over a 2-year period if employment could be increased in the downtown area and new developments could be built with reduced parking ratios. The city revised its parking ordinance to reduce minimum parking requirements, establish maximum parking requirements, and to authorize a reduction in minimum parking requirements where a developer includes programs to encourage transit usage and carpools.[80]

Triangle Transit Authority (TTA), which serves the Research Triangle Park region of North Carolina, has also focused on intergovernmental cooperation to encourage transit-supportive land use policies. TTA reports that the City of Raleigh has appointed a citizen's group to submit recommendations about the form of communities supported by buses and fixed guideway service. The City of Durham has updated its Comprehensive Plan to establish corridors and potential station locations for pedestrian-oriented, compact mixed-use development supported by bus systems and rail. A similar master plan update in the Town of Cary supports compact development and recognizes station areas and access corridors. Chapel Hill promotes pedestrian-friendly development through zoning and parking controls.[81]

A listing of survey participants engaged in joint development projects is presented in Appendix C of this report. The appendix shows a wide variety of projects throughout the country, based on information provided by the nine agencies that responded to the survey. Since 1978, approximately 6,371 dwelling units, 2 6 million square feet of office floor space, 1.5 million square feet of floor space of commercial or retail use, and 1.7 million square feet of floor space of industrial or institutional use have been added in joint development projects by the seven agencies that provided information. Examples of the type of development being undertaken are provided below.

3. LEGAL BASIS FOR TRANSIT-ORIENTED DEVELOPMENT

To date, there is no reported litigation on transitoriented development. Because the concept is innovative and few projects have been built, the cases provide little guidance on legal issues that may arise in regard to transit-oriented development regulations or projects. However, the individual elements of transit-oriented development, such as mixed uses, flexible zoning, and the use of eminent domain powers and financial incentives to encourage joint development, have been litigated in the courts. In addition, the United States Court of Appeals for the Eleventh Circuit has affirmed that the use of traditional neighborhood development principles is a legitimate use of the police powers.[82] This

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[78] Sacramento Regional Transit District, Transit Master Plan, at 7-14.

[79] Memorandum from Brent Russell, System Planner, to Charles Prestrud, Supervisor of Comprehensive Planning, re: Code SCRUB for Transit Facilities (Jan 10, 1996) (Copy provided by author upon request)

[80] King County Department of Transportation, "Meeting the Suburban Transit/Land Use Challenge: The Metro/Bellevue Transit Incentive Agreement "

[81] Triangle Transit Authority response to survey (question 5)

[82] Restigouche, Inc v. Town of Jupiter, 59 F 3d 1208 (11th Cir 1995).

section will provide an overview of those legal issues and how they might be resolved by the courts.

a. Constitutional Issues: Takings, Due Process, and Equal Protection

TOD ordinances and other transit-supportive land use regulations may be challenged on various constitutional grounds, including the takings, due process, and equal protection clauses of the federal and state constitutions. In addition, the use of eminent domain and financial incentives in joint public-private partnership arrangements to encourage development in transit corridors may be challenged for a lack of a valid public purpose or under the public emoluments clauses of state constitutions.

The judicial approach to land use regulations that are designed to effectuate a shift in transportation modes has been characterized by judicial deference. This standard of deference, which has allowed local governments to enforce single-use zoning with generous parking requirements,[83] should also allow local governments to choose more compact, transit-supportive development patterns

The constitutional issues associated with the use of transit-supportive land use regulations are summarized in *Eide v Sarasota County*.[84] In *Eide*, the county's comprehensive land use plan identified various areas of the county as "village activity centers," "community centers," and "town centers." The village activity centers were permitted to have approximately 75 acres of commercially zoned land while community centers were permitted 125 acres in commercial use. Centers with less than 50 percent of the acreage in commercial use are authorized to adopt "sector plans" in order to determine future commercial land use allocations to support population growth in the area. However, mere adoption of a sector plan does not change the zoning of the properties. While the comprehensive plan adopted by Sarasota County was not a true TOD in that it was not linked to rail or other forms of public transit, it embodies many of the principles set forth in TODs and neotraditional planning.

The plaintiff owned two residentially zoned properties (one zoned for single-family use and the other for multifamily use) and was informed that a sector plan was being prepared that encompassed those properties. Plaintiff requested that both properties be designated as commercial areas in the sector plan. The area was designated in the comprehensive plan as a village activity center around a regional shopping mall. The final sector plan, however, recommended that the properties continue to be zoned residential. Mr. Eide challenged the sector plan under 42 U.S.C. §1983 and the due process and equal protection clauses of the Fourteenth Amendment.

Rejecting these challenges, the court described the four major types of constitutional challenges to a land use regulation. First, a land use regulation can be challenged as a taking without just compensation under the Fifth Amendment of the United States Constitution.[85] In a takings case, unlike substantive due process, the courts balance the public interest supporting the governmental action against the severity of the private deprivation.[86] The remedy for a just compensation violation is monetary damages. In order to bring a just compensation challenge, the landowner must obtain a final decision regarding the application of the zoning ordinance to his property and also utilize state procedures for obtaining just compensation.

The second type of challenge is known as a "due process takings" claim. This type of claim asserts that the application of the regulation goes so far and destroys the value of the property to such an extent that it has accomplished a taking without the use of eminent domain procedures, which is an invalid exercise of the police power.[87] The remedy for a due process takings claim is invalidation of the offending regulation and actual damages for the application of the regulation.

The third type of challenge is a substantive due process challenge, which alleges that the regulation is arbitrary and capricious, does not bear substantial relation to the public health, safety, morals, or general welfare, and is therefore an invalid exercise of the police power.[88] In a substantive due process case, the courts are concerned with the rationality of government action regardless of its economic impact (as in a takings case).[89]

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[83] The following language from the Maryland Court of Appeals is illustrative:

> " shopping centers were not thought of when zoning regulations were first adopted for a number of the subdivisions of this State There is no serious controversy in this case over the proposition that commercial strip zoning has proven undesirable under present day conditions The shopping and motoring habits of people are quite different today than what they were in 1931 Popular desire or need for large shopping areas and the necessity of off-street parking facilities in connection therewith now seem to be generally recognized

Pressman v City of Baltimore, 222 Md 330, 160 A 2d 379, 383 (1960)

[84] 908 F 2d 716 (11th Cir 1990), *cert. denied*, 498 U.S 1120 (1991)

[85] *Id* at 720

[86] Kawaoka v City of Arroyo Grande, 17 F 3d 1227, at 1238 (9th Cir 1994)

[87] Eide, 908 F 2d at 721

[88] *Id* (Citing Nectow v City of Cambridge, 277 U S. 183, 236, 48 S. Ct 447, 448, 72 L Ed 842 (1928); Greenbriar v. City of Alabaster, 881 F 2d 1570, 1577 (11th Cir 1989); Stansberry v Holmes, 613 F 2d 1285, 1289 (5th Cir) *cert denied*, 449 U S 886 (1980); and Shelton v City of College Station, 780 F 2d 475, 482 (5th Cir 1986), *cert denied*, 477 U S 905 (1986) (The last case cited as providing for the requirement of "only a conceivable rational basis ")

[89] Kawaoka v. City of Arroyo Grande, 17 F.3d 1238 (9th Cir 1994) (citing Kenneth H Young, 1991 ZONING & PLANNING LAW HANDBOOK §§ 7 02-7 03, at 144-145 (1991);

In order to sustain a substantive due process challenge, the plaintiff must prove that the government has acted arbitrarily and capriciously. A substantive due process challenge may be facial or as applied.[90] The remedy for a successful facial challenge is invalidation of the regulation, while a remedy for an as-applied challenge is an injunction to prevent the application of the regulation to the property and/or damages resulting from the unconstitutional application of the regulation.

The fourth type of challenge identified by *Eide is* that of equal protection. Unless the regulation applies to a suspect class or invades a fundamental right, it will survive judicial scrutiny if it is rationally related to a legitimate public purpose.[91] If the regulation implicates a suspect class or a fundamental right, then it is subject to strict scrutiny[92] The remedy for an equal protection challenge is an injunction against enforcement of the regulation.

Due process challenges to TOD regulations should seldom meet with success. The following language from *Euclid v. Ambler Realty Co.*[93] is particularly applicable:

> Building zone laws are of modern origin They began in this country about 25 years ago Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation In a changing world it is impossible that it should be otherwise But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinance, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall

Under the rationale expressed in *Euclid*, courts have routinely upheld the use of minimum lot size, minimum floor space, and minimum funding requirements as a vehicle to control traffic congestion.[94] Courts have also upheld the denial of uses due to traffic concerns.[95]

Due process and equal protection analysis requires that a zoning or land use regulation be rationally related to a legitimate public purpose. Judicial review under this standard is highly deferential. While the effect of transit-oriented development on commuting behavior is far from certain (although the TOD also relates to other public policies such as economic development and affordable housing), due process and equal protection analysis provide local governments wide latitude to make reasonable assumptions about the relationship between TODs and travel behavior. Land use regulations will survive scrutiny under due process or equal protection analysis if any conceivable scenario would support the regulation.[96] Under federal due process or equal protection analysis, regulations will fail this test only if the regulation is truly irrational--e.g., if entitlement to develop is determined by a coin toss or alphabetical order.[97]

In *Eide*, the Eleventh Circuit rejected Eide's "as applied" substantive due process claim on the grounds that he had failed to submit a plan for commercial development or a petition to rezone the property. Therefore, the court ruled that the county had not had an opportunity to apply the sector plan to Eide's property. The court ruled that Mr. Eide had abandoned any claim as to the facial unconstitutionality of the sector plan.

While Eide did not reach the merits of a village center or a traditional neighborhood development scheme under the constitutional challenge, traditional neighborhood development principles were endorsed in a recent decision of the Eleventh Circuit.[98] In *Restigouche Inc. v. Town of Jupiter*, the landowner applied to the town for a special exception to build an automobile campus on his property. The town was concurrently conducting a study of the Indiantown Road Corridor, and it subsequently adopted a comprehensive land use plan for the corridor with specific zoning regulations

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Nollan v. California Coastal Comm'n, 483 U.S 825 at 834 n 3, 107 S Ct at 3147 n 3 (1987)

[90] 908 F 2d at 722 (citing Pennell v. City of San Jose, 485 U.S. 1, 10-12, 108 S Ct 849, 857, 99 L. Ed 2d 1 (1988); Weissman v Fruchtman, 700 F. Supp. 746, 752-53 (S D.N Y 1988))

[91] *Id* (citing Fry v City of Hayward, 701 F Supp 179, 181 (N.D Cal 1988)).

[92] *Id.* (citing San Antonio Independent School District v Rodriguez, 411 U S. 1, 16-17; 93 S. Ct 1278, 1287-88; 36 L. Ed.2d 16 (1973)).

[93] 272 U S 365, 386-87, 47 S Ct. 114, 118, 71 2d.Ed 303, 310 (1926)

[94] Freilich & White, *supra* n 5; Barnard v Zoning Board of Appeals of Town of Yarmouth, 313 A 2d 741, 745-46 (Me. 1974)

[95] Freilich & White, *supra* n 5; Crown Central Petroleum Corp. v Mayor & City Council of Baltimore, 258 Md. 82, 265 A 2d 192 (1972) (upholding denial of permit for car wash due to existing traffic conditions).

[96] Heightened scrutiny under equal protection is required only where a land use regulation would discriminate against a suspect class or intrude upon a fundamental right. Real estate developers are not considered a suspect class, nor is land development considered a fundamental right

[97] Creative Environments, Inc v Estabrook, 680 F 2d 822 (1st Cir.), *cert denied*, 459 US. 989, 103 S Ct 345, 74 L. Ed.2d 385 (1982).

[98] Restigouche, Inc v Town of Jupiter, 59 F 3d 1208 (11th Cir. 1995)

applicable to the subdistrict. Pursuant to these regulations, the town denied the special exception for the automobile campus. Following *Eide,* Restigouche brought a just compensation takings claim and a substantive due process claim against the application of those regulations to his property.

Rejecting the just compensation claim as unripe, the court nevertheless held that the regulations satisfied substantive due process. The court applied a two-step substantive due process analysis identified in *Haves v. City of Miami*,[99] for analyzing substantive due process challenges. First, the court must determine whether the legislation identifies a legitimate public purpose. Second, the court assesses whether a rational basis exists for the governmental agency to believe that the legislation would further the hypothesized purpose. The court noted that "[t]he town asserts that the Comprehensive Plan and IOZ Regulations reflect its concern with preserving and establishing an aesthetically-pleasing corridor along Indiantown Road, and its goal of creating an identifiable, traditional downtown" (emphasis added). The court held that the maintenance of community aesthetics is a legitimate public purpose or goal that a legislative body may pursue. The court further ruled that the IOZ regulations would further the regulations of maintaining a traditional downtown:

> To further the goal of creating a traditional main street, the Town sought to encourage retail uses along Indiantown Road which would serve the everyday needs of nearby residents, promote pedestrian traffic, and have a character consistent with the neighboring residential developments. The Town could have reasonably believed that the purchase of an automobile is not an everyday need, that the typically large lot of an automobile dealership might break up the pedestrian flow between retail establishments, and that such dealerships might disrupt the planned residential character of the street with bright lights, red flags, and flashy signage Thus, we readily conclude that the prohibition of car dealerships could rationally further the Town's legitimate aesthetic purposes and its goal of creating a traditional downtown[100]

Any mandatory restrictions in a TOD or neotraditional zoning ordinance must be rational and reasonable in its application to specific uses. In *Dallen v. City of Kansas City,*[101] the city of Kansas City, Missouri, adopted a corridor overlay district that contained many neotraditional principles, including 10-foot build-to lines (maximum setbacks), prohibitions on blank walls, a prohibition on parking between buildings and the primary street line, and a prohibition on "[d]esign and materials that suggest rural, rustic or non-urban characteristics." The plaintiffs owned a gasoline station that they wished to build in a manner permitted by the underlying zoning district, but in conflict with the corridor overlay district. Finding that the underlying zoning district permitted "unrestricted use of the property" so long as the district requirements were complied with, the Court of Appeals found the requirements "confiscatory and unconstitutional." Specifically, the court ruled that the maximum setback was arbitrary and unreasonable in that it conflicts with the underlying regulations and "completely ignores the realities of operating a gas station."[102] Moreover, the court found many of the provisions confusing and ambiguous: "i.e., what exactly constitutes 'rural, rustic or non-urban characteristics'?"

The establishment of street classification standards is also subject to due process review. The establishment of street classification criteria is a legislative function that will not be disturbed by the courts. *Friends of H Street*[103] is an unusual case in which a residential association sought an injunction to force the city to reduce the traffic speed and volume on an existing street under theories of nuisance, inverse condemnation, dangerous condition of public property, and inconsistency with the city's general land use plan. The courts rejected the lawsuit on all counts. The city initiated a study of traffic conditions following complaints from area residents. When the city council refused to take action on the resulting H Street (East Sacramento) Neighborhood Preservation Transportation Plan, the residents brought the lawsuit claiming that traffic speeds and traffic volumes disturbed their sleep, generated excessive noise, impaired ingress and egress from their driveways, exposed them to high concentration of carbon monoxide and other vehicle emissions, reduced their property values, and otherwise created nuisance conditions. The court rejected the lawsuit on the rationale that traffic conditions are generally applicable to persons in close proximity to roads and freeways and "must be endured without redress."[104]

Courts have also upheld land use regulations designed to protect transportation capacity against takings challenges.[105] In *City of Hollywood v. Hollywood, Inc.,*[106] the court upheld the use of transportation capacity and transit as a basis for a TDR system. A planning study established a 3,000 dwelling-unit cap for a redevelopment study area.[107] The "development zone" was assigned a multifamily density of 32.5 units per acre, and the "control zone" was assigned a density of 7 units per acre. Development rights were transferable from the control zone at 32.5:1 if property was dedicated as open space. Accordingly, the landowner added 368 multifamily units to the development zone and lost 79 single-family units in the control zone. The court rejected the landowner's takings challenge, ruling that

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[99] 52 F 3d 918, 921 (11th Cir. 1995)
[100] 59 F 3d at 1214
[101] 822 S W 2d 429 (Mo App. 1991)
[102] 822 S.W.2d at 435
[103] Friends of H Street v. City of Sacramento, 20 Cal. App 4th 152, 24 Cal. Rptr. 2d 607 (1993)
[104] 24 Cal. Rptr 2d at 613
[105] *See generally,* S Mark White, *supra* n 60
[106] *Id*
[107] SOUTH SHORE [CITY OF MIAMI BEACH] REVITALIZATION STRATEGY. (Miami Beach Department of Planning, July 1983).

the downzoning allowed a reasonable use of the property. The court found that the TDR system mitigated the economic impact of the regulations, and that the beach dedication constituted valid quid pro quo for the development restrictions.

Most courts have upheld the use of concurrency to delay development pending the availability of public facilities.[108] In *Kawaoka v. City of Arroyo Grande,*[109] a landowner challenged a specific plan requirement on substantive due process grounds.[110] In that case, the city redesignated the plaintiffs agricultural property for residential use, but required that a specific plan be prepared prior to converting the land to residential use. The landowner's "as applied" substantive due process challenge was rejected on the grounds that the landowner had not applied for a specific plan, even though procedures for application of a specific plan were not adopted until after the lawsuit had been filed. The court also rejected facial substantive due process challenges to the specific plan requirement and rural residential designation applied by the city. The court ruled that it is reasonable for a local government to delay development of the size proposed by the plaintiffs in that case (55 acres) in order to determine whether adequate public facilities will be available. Rejecting plaintiffs argument that adequate public facilities were, in fact, available, the court ruled that the city may require "a plan to insure coordinated development of a significant parcel of land and to insure that adequate resources exist.."[111] While the court's opinion intimates that specific plan regulations authorized the land owners to act jointly with neighboring landowners in submitting the specific plan, the court ruled that this was not a requirement of the specific plan regulations.

Regulations that restrict parking in a TOD should survive scrutiny under a constitutional analysis. The regulation of parking is considered a legitimate exercise of the police power, and local governments are not constitutionally obligated to zone sufficient space for the parking of automobiles.[112] In addition, the public purpose underlying parking restrictions is supported by the Clean Air Act, which authorizes the regulation of on- and off-street parking spaces to reduce automobile emissions.[113]

In *Parking Assn. of Georgia, Inc. u. City of Atlanta,*[114] the Georgia Supreme Court rejected a takings challenge to landscaping requirements for parking lots. An association of companies who managed and owned parking lots challenged the city's ordinance requiring curbs, landscaping, and trees for these parking lots. The Georgia Supreme Court held that the ordinance was not a taking of property. The court held that this ordinance did not physically take or occupy the property of the parking lot owners. The United States Supreme Court denied certiorari over the dissent of Justice Thomas.[115]

Many TOD ordinances require developers to install and/or to dedicate transit or pedestrian facilities. To the extent that these requirements are considered exactions of public facilities rather than design criteria for the private development itself, they may be subject to takings analysis as an exaction. The power to require the dedication of off-site road facilities as a condition of subdivision approval is well-established in most states.[116] Other cases have upheld the use of impact fees, a form of monetary exaction, for transit facilities.[117] The local government must, however, be prepared to demonstrate the causal relationship between the need for the roadway facility and the impacts of the

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[108] S. Mark White, *supra* n 60

[109] 17 F 3d 1227 (9th Cir. 1994)

[110] The city also adopted a water moratorium for a duration of 1 year.

[111] 17 F 3d at 1234

[112] One older case is surprisingly hostile to rear parking requirements--another mainstay of the neotraditionalists. In Klein v Mayor and Aldermen *of Jersey* City, 4 N.J. Misc. 277, 132 A 502 (1926), the New Jersey Supreme Court invalidated a zoning regulation requiring that garages be "erected on the rear line of the lot to store a pleasure automobile." The court found that the regulation was not a valid exercise of the police power, interpreting the ordinance to mean that a garage can only be placed on a lot in which there is a residence The court reasoned that garages are no more detrimental to the health, safety and welfare in a residence zone than a business zone Clearly, the majority rule is more favorable to parking restrictions, aesthetic controls and municipal attempts to regulate traffic congestion since the decision in Klein It is doubtful that even the New Jersey Supreme Court would reach the same result if confronted with the same situation today This is especially true for restrictions that are part of a comprehensive scheme of regulation for transit-oriented developments State v. Rush, 324 A 2d 748 (Me 1974)

[113] South Terminal Corp. v. EPA, 504 F 2d 646 (1st Cir 1974); Annotation, *What Are "Land Use and Transportation Controls" Which May Be Imposed, Under § 110(a)(2)(B) of the Clean Air Act,* 30 A L.R Fed. 109

[114] 450 S E 2d 200 (1994), *cert. denied,* 115 S Ct. 2268, reh'g denied, 116 S Ct 18 (1995)

[115] However, the legislative versus adjudicative debate after Dolan was energized by Justice Thomas' dissent from the denial of certiorari (joined by Justice Connor) in Parking Association of Georgia, where he stated:

> "It is hardly surprising that some courts have applied Tigard's rough proportionality test even when considering a legislative enactment It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking A city council can take property just as well as a planning commission can Moreover, the general applicability of the ordinance should not be relevant in a takings analysis . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference "

[116] *See, e g,* Ayres v City Council, 34 Cal 2d 31, 207 P 2d 1 (1949).

[117] Blue Jeans Equities v. City and County of San Francisco, 4 Cal Rptr 2d 114 (Cal App 1992); Russ Building Partnership v. City and County of San Francisco, 199 Cal. App 3d 1496, 246 Cal. Rptr. 21 (1987).

subdivision, and the benefits accruing to the subdivision from the dedicated facilities.[118]

Some cases have upheld exactions for transit access[119] and bikeway/pedestrian facilities.[120] In *Sudarsky v. City of New York,* the landowner applied for a building permit in a special transit land use (TA) district. The city required an easement for subway use to reduce conflicts between pedestrian access and persons entering the subway system A small portion of the landowner's parcel was located in the TA district, but no development was planned there. While a downzoning of the parcel was in progress, an initial determination was made that no transit easement certification was needed. After this certification was rescinded, the landowner filed suit claiming violations of procedural due process, substantive due process, and takings, in that transit easement was simply artifice to delay development in anticipation of downzoning. The United States District Court rejected the substantive due process claim, finding no legitimate claim of entitlement (property interest) as the planning commission retained discretion as to when to initiate downzoning. The court further rejected the procedural due process claims on the grounds that an adminstrative appeal was available of the determination that a transit easement was required. The court rejected the landowners takings claims under *Nollan u. California Coastal Commission,*[121] ruling that no individualized inquiry into impact was required so long as the requisite nexus between the type of project and the need for transit was present.

The United States Supreme Court's decision in *Dolan v. City of Tigard* supersedes the holding in *Sudarsky* as to the need for an individualized impact determination, but nevertheless affirms that a nexus between development and pedestrian facilities may be constitutionally established. In *Dolan,* the plaintiffs sought a building permit to demolish a 9,700-square foot building and construct a replacement 17,600-square foot building for an electric and plumbing supply business on 1.67 acres of land in Tigard's downtown central business district. The property lies within an "action area" overlay zone, which allowed the city to attach conditions to the Dolans' development at the building permit stage in order to accommodate projected transportation and public facility needs. Pursuant to the requirements of Oregon's comprehensive land use management program, the City of Tigard codified its comprehensive plan in a community development code (CDC). The CDC required the Dolans and all others located in the Central Business District to comply with a 15 percent open space requirement. Tigard granted the Dolans' application, but required them to dedicate, inter alia, a floodplain easement and an 8-foot easement strip for construction of a pedestrian and bicycle pathway as a condition of the permit. The exactions required dedication of approximately 10 percent of the Dolans' total property. The Tigard Planning Commission's final order for the permit based the two easement conditions on the city's comprehensive master drainage plan and the pedestrian/bicycle pathway plan, which purportedly established a "reasonable relationship" between the Dolans' developmental impacts and the need for increased drainage and alternative means of transportation, respectively.

The Oregon Supreme Court upheld the district court's finding that Tigard's exaction did not create a taking of the Dolans' property. The United States Supreme Court reversed the Oregon Supreme Court and adopted a "rough proportionality" test, requiring: (1) the existence of an "essential nexus" between the permit exactions and the state interest that satisfies *Nollan;* (2) a demonstration by the city of "rough proportionality" between the harm caused by the new land use and the benefit obtained by the condition; and (3) an "individualized determination" by the city that the conditions satisfy the proportionality requirement. The court distinguished the situation there from the land use controls employed in, for example, *Euclid* and *Agins v. Tiburon.*[122]

> First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.[123]

Annexation agreements and other forms of development agreements have been classified as a valid and enforceable exercise of the police power. Courts have upheld development agreements attached to a rezoning as valid conditional zoning.[124] Courts have also indicated a willingness to enforce infrastructure requirements attached to a negotiated agreement, as exactions imposed as part of an agreement voluntarily entered into between the city and a developer are not subject to constitutional nexus standards.[125] Regulatory contracts

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[118] Scrutton v City of Sacramento, 275 Cal App 2d 412, 79 Cal Rptr 872 (1969); Transamerica Title Insurance Co v. City of Tuscon, 23 Ariz App 385, 533 P 2d 693 (1975)

[119] Sudarsky v. City of New York, 779 F. Supp. 287 (S.D N Y 1991), *aff'd,* 969 F.2d 1041, *cert. denied,* 113 S Ct. 1059 (1993). Several statutes authorize transit exactions Maryland authorizes local governments to require the reservation of land for mass transit facilities (busways or light rail) for a 3-year period MD ANN CODE Art. 28, § 7-116(a) Properties reserved for transit are exempt from all state and local taxes during the reservation period

[120] Dolan v. City of Tigard, 512 U S 374, 114 S. Ct. 2309 (1994)

[121] 483 U S. 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987)

[122] Euclid v Ambler Realty Co, 272 U.S. 365 (1926) and Agins v. Tiburon, 447 U S 255, 260 (1980).

[123] 114 S. Ct 2309, 2317

[124] Giger v City of Omaha, 232 Neb. 676, 442 N.W. 2d 182 (1989)

[125] Leroy Land Development Corp. v Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991); Thrust IV Inc. v.

such as development agreements may be distinguished from proprietary municipal contracts in the nature of a business venture, such as leases relating to city-owned property.[126] This distinction may be important for purposes of asserting governmental immunity in a breach of contract action.[127] The California Transit Village Development Planning Act authorizes local governments to mandate the use of development agreements to implement density bonus provisions near transit stations.[128]

b. Zoning Authority

Zoning has long been used as a mechanism to control traffic congestion.[129] Low densities are often used to avoid undue congestion on local links and intersections Discretionary review through the use of special exceptions and special or conditional use permits is often used to deny uses with intensive traffic-generating characteristics. Courts have routinely approved the use of zoning for these purposes. Accordingly, courts should have little trouble approving of the use of zoning to encourage a shift in modes of travel from roads and highways to public transportation.

The TOD regulations must provide adequate authority to deny uses deemed inconsistent with the character of the TOD and the ridership objectives of the ordinance Absent such authority, the integrity of the TOD program could be undermined by development that does not functionally relate to the transit facilities that support it. The comprehensive plan and sound planning policies can provide the basis for denying functionally inconsistent uses. In addition, the courts--even in conservative jurisdictions such as Virginia--will respect local planning policies designed to preserve community character.

An example of the use of zoning to promote multi-mode. transportation goals is provided by a comprehensive rezoning by Montgomery County, Maryland, which was based on transportation and transit assumptions. In *Montgomery County v. Woodward & Lothrop, Inc.*,[130] the county adopted a short-range "sector plan" in order to implement the 1964 On Wedges and Corridors General Plan for Montgomery and Prince George's counties and the Friendship Heights area adjoining the District of Columbia. The sector plan resulted in a comprehensive rezoning of this intensively commercial area based, in large part, on traffic and transit capacity, including a 20 percent modal split assumption. The plan reflected a mixed-use development scheme consistent with the "urban crossroads" pattern of development that had emerged, with an intensive commercial core and single-family neighborhoods surrounding it.

The Maryland Court of Appeals (Maryland's highest court) rejected a takings and due process challenge leveled at the comprehensive rezoning. In addition, the court upheld the use of an "optional method of development" technique, by which developments with a minimum of 22,000 square feet may develop more intensely in exchange for the provision of open space and other facilities and amenities. The court found that this did not violate the uniformity clause of the zoning enabling legislation, nor did it confiscate the landowner's property. The court further rejected an argument that the optional form of zoning amounted to an unlawful floating zone.

Even conservative jurisdictions such as Virginia recognize the use of zoning as a mechanism to combat traffic congestion. In *Board of Supervisors of Fairfax County v. Southland Corporation*,[131] the Virginia Supreme Court upheld a zoning ordinance distinguishing quick service food stores from other grocery stores and similar retail uses in commercial districts. While the landowner claimed that large shopping centers and supermarkets generate more total traffic than small convenience stores, the county defended the ordinance on several grounds. First, actual traffic counts showed that the peak hours of vehicle activity entering and leaving quick service food stores coincided with that of adjacent roadways. Second, the intensity of traffic in relation to land area was far greater for small convenience stores than for larger shopping centers. Finally, the stores have little flexibility in the location of entrances and curb cuts, thereby increasing the likelihood of creating substantial traffic in the most congested parts of the traffic pattern at the most congested hours. By contrast, larger shopping centers may be subjected to far more traffic control and may be more readily kept away from congested intersections and other congested areas of the roadway. The Virginia Supreme Court felt that the county's proof created a "fairly debatable" issue and upheld the ordinance.

In *City Council of the City of Salem v. Wendy's of Western Virginia, Inc.*,[132] the Virginia Supreme Court upheld the refusal to rezone a residential parcel to authorize the construction of a fast food restaurant. The property was located in a 40-acre residential subdivision lying east of 37 single-family dwellings and one

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Styles, 1995 WL 251276 (N D Cal.) (remedy provision of development agreement limiting causes of action to mandamus and specific performance barred action for Fifth Amendment substantive due process)

[126] See discussion of governmental-proprietary distinction, *infra* Colowyo Coal v City of Colorado Springs, 879 P. 2d 438 (Colo. App. 1994) (contract for supply of coal for electrical generation); City of Corpus Christi v Bayfront Associates, Ltd., 814 S.W.2d 98 (Tex. App. 1991) (city did not breach lease contract obligating city to assist in obtaining necessary permits).

[127] Josephine E Abercrombie Interests, Inc v. City of Houston, 830 S.W.2d 305 (Tex. App. 1992) (city not immune in action alleging fraud, wrongful foreclosure, breach of fiduciary duty and breach of implied warranties arising from Community Development Block Grant loans)

[128] CAL GOV'T CODE § 65460.10

[129] Freilich & White, *supra.* n 5

[130] 280 Md. 686, 376 A 2d 483 (1977).

[131] 297 S E 2d 718 (Va. 1982)

[132] 471 S.E.2d 469, 252 Va 12 (1996).

apartment complex. All the residential dwelling parcels were zoned R-2, but the city's comprehensive plan provided for the residential area to the east to become industrial. While the owner provided evidence that the area was unsuitable for residential use, the city showed that the single-family dwellings to the east compose "a viable residential community." A city expert described the area as follows:

> The housing stock is quite traditional for the 1950s to early sixties time frame, there are mature trees on site, the integrity of the housing stock is good, the appearance of the yards is good, the sense and feel that one gets when traveling by car, the sense that one gets and feels when standing along Highland Road after you turn off Midland and only going just a lot or two is that one is in a residential area. The area does not appear to be suffering from any stress relative to dilapidated housing, does not appear to be suffering from a preponderance of for sale or rent signs There does not appear to be a lack of pride in the home ownership, the properties are improved by way of painting and appearance, again all indications it strikes me that this is a residential area of some standing in terms of length of time, and an area that has obviously maintained its integrity in both appearance and value[133]

The court noted further that the city is "out of land" that can be developed for industrial use, while the city's director of planning and development stated that "eventually," but not "at this very moment," the Fairfield area will become "an industrial area, not a commercial area " This fact is recognized in the city's comprehensive plan, the witness pointed out. He also opined that any transition from residential to industrial uses should be accomplished by a rezoning directly from R-2 to an industrial classification rather than "going through a commercial type development" by rezoning the area "one piece at a time." The court noted further testimony that "a drive thru, fast-food establishment...would put an inordinate pressure on the adjoining properties along Highland and...could lead to a domino-type effect or a mushroom effect whereby there would be other requests to go commercial," which would be "very difficult to deny." Such a result, stated the court, would interfere with the city's "enviable" practice of "piecing together industrial properties" and developing them as a unit. Accordingly, the court held that "[i]n denying the rezoning request, the City properly endeavored to protect an existing, established, and stable residential neighborhood... [and] elected to adhere to the standards of its comprehensive plan, a matter within the council's discretion."[134]

An ordinance requesting the rezoning of a tract of land for transit-oriented development may also be susceptible to challenge under the theory of "spot zoning." Spot zoning is the reclassification of a small area in a manner inconsistent with the surrounding area, solely to benefit the private interests of the landowner.[135] For example, in *Numer v. Kansas City*,[136] the city rezoned a small parcel in a residential neighborhood from an apartment classification to an intensive retail business classification to authorize a filling station. The neighborhood was residential in character and was zoned in all directions for apartments. The court invalidated the rezoning ordinance as spot zoning, reasoning as follows:

> Ordinarily, a change in zoning regulations involving a single or a very few properties should be made only where new or additional facts, such as a change in conditions, or other considerations materially effecting the merits have intervened since the adoption of the regulations; and whether such a change will be permitted depends on whether the change is reasonably related to the public welfare, and is in accord with the statutory purposes or the general scheme of a comprehensive zoning plan
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> In addition to the foregoing objections to "spot zoning", it is the fact that it often encourages, if it does not necessitate, justifiable efforts on the part of other property owners in the vicinity to seek similar reclassification in order to regain their values or to preserve them, thus tending to depart further from the spirit design and comprehensive plan of the zoning system.[137]

Spot zoning is not necessarily invalid, and its validity depends upon the circumstances of each case.[138] Factors affecting the validity of an ordinance reclassifying a property to any matter different from surrounding uses include the size of the property being reclassified, the consistency of the rezoning ordinance with the comprehensive plan, the public need for the uses allowed by the reclassification, and whether there has been a change in the character of the neighborhood.[139] Regional considerations, such as the classification of land in surrounding communities as well as the impact of the property on surrounding areas, may also be considered.[140] If the reclassification is consistent with the comprehensive plan and is in harmony with the orderly growth of the community, the courts have upheld the creation of small districts within residential areas for the use of grocery stores, drug stores, barber shops, gasoline filling stations, and other uses designed to accommodate the surrounding neighborhood.[141] Numerous cases have upheld the establishment of small areas to permit the operation of neighborhood

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[133] *Id.,* at 472

[134] *Id,* (citing to Board of Supervisors of Loudoun County v. Lerner, 221 Va 30, 37, 267 S E 2d 100, 104 (1980))

[135] Mueller v C. Hoffmeister Undertaking and Livery Co, 121 S W 2d 775 (Mo 1939); Wippler v Hohn, 110 S W 2d 409 (Mo 1938).

[136] 365 S.W.2d 753 (Mo. App. 1963)

[137] *Id.,* at 760

[138] Annotation, Spot Zoning, 51 A.L.R.2d, 263, 272 (1957)

[139] *Id.,* at 273-79, 284

[140] Cresskill v Dumont, 15 N J. 238, 104 A.2d 441 (1954); Save a Valuable Environment (SAVE) v. City of Bothell, 89 Wash. 2d 862, 576 P.2d 401 (Wash. 1978); *see* discussion of regional general welfare, *infra.*

[141] Annotation, 51 A.L.R.2d at 276-77 (citing Cassel v. Mayor & City Council of Baltimore, 195 Md. 348, 73 A 2d 486 (1950))

shopping centers or neighborhood commercial uses within a short distance of residential areas.[142] Cases upholding these zoning classifications have relied upon the social need served by small-scale neighborhood commercial uses, as well as the easy access to those services from nearby residences.[143] Courts have upheld the reclassification of areas along highway interchanges from residential to retail on the rationale that, unless the rezoning were granted, traffic would be diverted to other parts of the city.[144] In addition, a TOD is easily classified as a comprehensive zoning technique, such as an historic overlay zone, which is not generally considered spot zoning.[145]

In *Marshall v. Salt Lake City*,[146] the City of Salt Lake City adopted a "Residential 'C'" district as part of its zoning ordinance. The Residential C district authorized retail shops, fire and police stations, banks, theatres, lunch rooms, drug stores, shoe repair shops, barber shops, garages, and service stations. The intent of this classification was to create small "utility zones" within a reasonable distance of neighboring residences. Rejecting a spot zoning challenge to the ordinance, the Utah Supreme Court reasoned as follows:

> Here the general zoning plan of the city set within a reasonable walking distance of all homes in the Residential "A" districts the possibilities of such homes securing daily family conveniences and necessities, such as groceries, drugs, and gasoline for the family car, with free air for the tires and water for the radiator, so the wife and mother can maintain in harmonious operation the family home, without calling Dad from his work to run errands To effectuate this objective, there were created, on a definite, unified plan, at the intersections of definite fixed through streets, these small residential utility districts, limited and confined to such uses Being set up on such a definite and comprehensive plan it cannot be said to be arbitrary and discriminatory[147]

Spot zoning issues must also be considered where a PUD is used to gain approval. A PUD is considered the equivalent of a zoning classification. In some states, the adoption of a PUD is, in effect, a rezoning even where no specific rezoning ordinance is passed and is considered a legislative act.[148] Typically, the PUD is a "floating zone" that is not fixed at its inception to the zoning map.[149] The floating zone "hovers over the entire municipality until subsequent action causes it to embrace an identified area."[150] Because the PUD is an act of rezoning, it typically requires a recommendation from the planning commission and final action by the city council.[151] While the PUD involves the reclassification of a specific parcel, courts have routinely rejected challenges that the PUD constitutes "spot zoning."[152]

The PUD is probably the most effective vehicle for implementing a TOD. PUDs provide a vehicle for releasing developers from the rigidity of straight zoning.[153] PUD is an effective device where the straight zones prohibit the developer from tailoring a specific development to a particular tract of land, and if the uses included in the development cut across a number of zoning classifications.[154]

In *Kawaoka v. City of Arroyo Grande*,[155] the court rejected an argument that the specific plan and rural residential designation of the property constituted spot zoning. First, the court reasoned that spot zoning refers to property that is small in size, and that the 17-acre parcel proposed by the Kawaoka's was too large to be considered spot zoning. In addition, the court ruled that this case is unlike cases in which a lot in the center of a business or commercial district is limited to uses for residential purposes. The court ruled that a finding of spot zoning in that case "would paralyze urban planners, who under certain circumstances need to draw lines and differentially zone much smaller areas of land than this."[156]

Minimum density zoning is an emerging tool to ensure the compatibility of development with transit facilities. While there are no cases involving the validity of minimum density zoning, the use of noncumulative zoning has become commonly accepted. Under noncumulative zoning, mutually exclusive zones are created. Cumulative zoning, by contrast, establishes single-

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[142] Annotation, *supra*, 51 A.L R 2d at 298-302

[143] Id; Anderson v Zoning Com of Norwalk, 157 Conn 285, 253 A 2d 16; Marblehead v Rosenthal, 316 Mass 124, 55 N E 2d 13 (1944); State ex Rel Oliver Cadillac Co v Christopher, 298 S.W 720 (Mo Banc 1927); Goddard v Stowers,, 272 S W 2d 400 (Tex Civ App 1954); Marshall v Salt Lake City, 105 Utah 111, 141 P 2d 704 (1943)

[144] McNutt Oil & Ref Co v Brooks, 244 S.W 2d 872 (Tex. Civ App 1951) (upholding rezoning to authorize truck service station on highway interchange)

[145] A-S-P Associates v City of Raleigh, 298 N.C 207, 258 S E 2d 444 (1979)

[146] 105 Utah 111, 141 P 2d 704 (1943)

[147] 141 P 2d 711

[148] South Creek Associates v Bixby & Associates, 781 P.2d 1027, 1032 (Colo 1989) (citing Tri-State Generation & Transmission Co v City of Thornton, 647 P 2d 670 (Colo 1982)); Sundance Hills Homeowner's Ass'n v. Board of County Commissioners, 188 Colo. 321, 534 P.2d 1212 (1975)); McDowell v United States, 870 P 2d 656, 658 (Colo App. 1994) (PUD is a rezoning because it allows diversity of uses not included within original zoning).

[149] Lutz v City of Longview, 83 Wash 2d 566, 520 P 2d 1374 (1974)

[150] *Id*, at 1376 (citing 1 R Anderson, AMERICAN LAW OF ZONING § 5 16)

[151] *Id*, at 1377; Cheney v Village Two at New Hope, Inc., 429 Pa 626, 241 A 2d 81 (1968).

[152] *Id*, at 1379 (spot zoning argument rejected because comprehensive plan lacked specific guidelines for designation of PUD)

[153] *Id*, at 1376

[154] *Id.*

[155] 17 F 3d 1227 (9th Cir 1994).

[156] 17 F 3d at 1237 The court also rejected a substantive due process challenge to a 1-year water moratorium imposed by the city, and found that the plaintiffs had not deduced sufficient evidence to prove an equal protection violation based on racial animus

family residences as the highest and best use and permits them in any district, while excluding commercial and industrial uses from residential zones.[157] Noncumulative zoning has been sustained on a variety of theories, including the promotion of health and safety, promotion of commerce and industry, increase in tax revenues, and prevention of urban blight.[158]

Cities have used a variety of zoning to discourage parking. Connecticut authorizes local governments to accept a fee in lieu of mandatory parking requirements[159] The fee may be used for either the provision of transit facilities or operating expenses associated with transit facilities that are designed to reduce reliance on private automobiles

Oregon mandates the use of parking restrictions in its transportation planning regulations. Local transportation system plans (TSPs) in the Portland area must establish maximum parking limits for office and institutional developments that reduce the amount of parking available at such developments.[160] Local governments in metropolitan planning organization (MPO) areas must implement a parking plan that achieves a 10 percent reduction in the number of parking spaces per capita in the MPO area over the planning period. This is done through a combination of restrictions on development of new parking spaces and requirements that existing parking spaces be redeveloped to other uses.[161] The parking plan must assist in achieving the measurable standards for traffic reduction. Existing development must be allowed to redevelop a portion of existing parking areas for transit-oriented uses, including bus stops and pullouts, bus shelters, park-and-ride stations, transit-oriented developments, and similar facilities, where appropriate.[162]

California expressly authorizes variances from parking requirements in order to encourage the use of transit: [163]

> [A] variance may be granted from the parking requirements of a zoning ordinance in order that some or all of the required parking spaces be located offsite, including locations in other local jurisdictions, or that in-lieu fees or facilities be provided instead of the required parking spaces, if both the following conditions are met: (a) The variance will be an incentive to, and a benefit for, the nonresidential development (b) The variance will facilitate access to the nonresidential development by patrons of public transit facilities, particularly guideway facilities.

Mixed-use development can sometimes be achieved through a use variance. While an area variance consists of variances to bulk, area, height, density, and setback restrictions, an area variance permits a use other than one permitted by the zoning ordinance in the particular district.[164] While an area variance requires compliance with the "practical difficulties" standard, a use variance requires a showing of "undue hardship."[165] Use variances are not permitted in all states.[166]

c. Environmental Impact Statements and Environmental Reporting Requirements

Environmental impact statements (EIS) are often required for large-scale transportation projects such as highways and rail transit facilities.[167] In some states, the EIS requirement applies to development permits for private projects, as well as to publicly sponsored projects.[168] EIS requirements have often been used to stall or to defeat highway construction projects.[169] However, the courts have been reluctant to require an analysis of transit as an alternative to construction of highway projects in EIS documents.[170]

In one reported case, the EIS process was used to stall a neotraditional development. In *Chaparral*

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[157] 2 P ROHAN, ZONING AND LAND USE CONTROLS §14 01[1] (1997)

[158] *Id.* § 14 02.

[159] CONN GEN STAT § 8-2c

[160] OR ADMIN RULES §660-012-0035(2)(e) (Applies to areas of population greater than 1 million)

[161] OR. ADMIN RULES § 660-012-0045(5)(c)

[162] OR ADMIN RULES § 660-012-0045(4)(e)

[163] CAL GOV'T CODE § 65906 5

[164] Matthew v Smith, 707 S.W.2d 411, 413 (Mo. Banc 1986).

[165] 707 S W 2d at 416; Downtown Cluster of Congregations v District of Columbia Board of Zoning Adjustment, 675 A.2d 484, 491 (D C App 1996). In Downtown Cluster of Congregations, the District of Columbia Court of Appeals upheld a use variance for a "mixed use" development consisting of office, retail, and service uses. Significantly, the absence of a Metrorail connection, as well as the small footprint of the building, resulted in a finding of undue hardship. Downtown Cluster suggests that good transit *access* may defeat a finding of undue hardship, thereby rendering the use variance an ineffective vehicle to implement TOD.

[166] 9 RATHKOPF'S, THE LAW OF ZONING AND PLANNING § 43 02[3] (1997)

[167] No Slo Transit v. City of Long Beach, 197 Cal App 3d 241, 242 Cal Rptr 760 (1987) (approving Environmental Impact Report under California Environmental Quality Act for Long Beach to Los Angeles rail transit project).

[168] *See, e g,* San Franciscans for Reasonable Growth v. City and County of San Francisco, 151 Cal App 3d 61, 198 Cal Rptr. 634 (1984) (overturning EIR which dramatically underestimated square footage of downtown construction and, therefore, impact on city's bus system).

[169] Annotation, Necessity and Sufficiency of Environmental Impact Statements under Section 102(2)(C) of National Environmental Policy Act of 1969 in Cases Involving Highway Projects, 64 ALR Fed 1; Keith v Volpe 352 F Supp 1324 (C D. Cal 1972), *aff'd,* 506 F 2d 696 (9th Cir), *cert denied,* 420 U S 908.

[170] *See* Annotation, *supra;* Louisiana Environmental Society v. Brinegar, 407 F. Supp. 1309 (W D La 1976); Movement Against Destruction v Volpe, 361 F Supp. 1360 (D C Md 1973), *aff'd.,* 500 F 2d 29 (4th Cir); Piedmont Heights Civic Club, Inc v Moreland, 637 F.2d 430 (5th Cir. 1981); compare, Citizens for Balanced Environment v. Secretary of Transp, 515 F. Supp 151 (D. Conn 1980), *aff'd,* 650 F 2d 455 (2nd Cir)

Greens v. City of Chula Vista,[171] neighboring landowners challenged the Otay Ranch, a proposed neotraditional community in the City of Chula Vista, California. The project was described as a parcel of approximately 22,509 acres of undeveloped property in southwestern San Diego County, on which Baldwin Builders proposed approximately 50,000 dwelling units in 15 villages throughout the project site over a 30- to 50-year period. The project was approved for 23,483 dwelling units, with 11,375 acres designated as a managed preserve and 1,166 acres designated as natural open space. The city certified a program environmental impact report (PEIR) for the project under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 *et seq).* The PEIR was challenged for its alleged failure to analyze the impacts of the project on species preservation. The court rejected the challenge, but the opinion says nothing relating to the transportation aspects of the development.

Transit agencies are sometimes accorded special status under EIS legislation. In *Long Beach Savings & Loan Association v Long Beach Redevelopment Agency*,[172] the court rejected a challenge to a mitigated negative declaration under the CEQA approving a disposition and development agreement between the city's redevelopment agency and the developer of a downtown office, retail, and entertainment complex. Under CEQA, an environmental impact report (EIR) must be prepared if a project will have significant environmental effects. If a threshold study determines that the project will not have significant environmental effects, the agency may prepare a "negative declaration" that must include, *inter alia*, mitigation measures that would avoid potentially significant effects.

The city prepared a downtown redevelopment plan that envisioned a new business core comprising high rise buildings and a pedestrian mall. Pursuant to the redevelopment plan, the city constructed a public transit exchange for the city's bus facilities. The city then determined that a multipurpose complex next to the exchange was desirable to encourage pedestrian travel between downtown locations and the use of public transportation. The city approved a developer's bid to construct a mixed-use project next to the exchange, and issued a negative declaration requiring, *inter alia*, the developer to encourage its employees to utilize public transportation and to comply with the city's downtown design guidelines. The mitigation measures included the following specific requirements:

> If it is demonstrated in the project operations, that joint usage [of parking facilities] is not functioning and the parking demands are not reasonably met as determined by the Long Beach City Planning Commission, then the applicant shall stagger the hours of operation, secure additional parking, or appropriately alter the Land Use Mix. The above shall be reviewed and acted upon by the Long Beach City Planning Commission at a full public hearing This mitigation measure shall be included as a condition of site plan review.[173]

Noting that "redevelopment projects receive special status under [CEQA]", the court approved the mitigation measures. The court noted that the California statute provides specifically that redevelopment plans are considered a single project under CEQA, and that redevelopment EIRs can be prepared on an areawide basis with negative declarations prepared in lieu of subsequent supplemental or site-specific EIRs. The court noted that "the city's experts opined that the mix of office, shopping, restaurant and entertainment facilities in international plaza lessen traffic because drivers in a single trip could accomplish multiple tasks." The court also noted that "the city's experts concluded that by locating the project adjacent to the transit exchange, workers and visitors would readily use public transportation."[174]

The most widely publicized use of the EIR process to implement transit-oriented development is the western bypass study conducted for southeastern Washington County, Oregon, by the Oregon Department of Transportation (ODOT).[175] In 1987, Tri-Met completed a corridor study that recommended construction of a major new highway or bypass to alleviate traffic congestion in the Portland region. The western bypass study was initiated by ODOT to determine a location for the bypass. As part of the major investment study (MIS) for the project, a no-build alternative and four build alternatives were identified. The build alternatives included the bypass, a transportation system management (TSM) alternative, and a high-occupancy vehicle express service alternative, as well as an innovative alternative developed by One Thousand Friends of Oregon, a citizen group, which is known as the LUTRAQ alternative.

The LUTRAQ alternative departs from the existing land use plans and provides for mixed-use land use patterns to cluster jobs, residences, and shopping near transit lines.[176] Transit-supportive land uses would be concentrated along a planned light rail corridor. Three land use concepts were identified as part of LUTRAQ. The first, mixed-use centers, range from a large center in Beaverton to less intensive centers along the transportation corridor. The second, urban TODs, are located outside of mixed-use centers and include medium- to high-density residential uses with a commercial core area.[177] Finally, neighborhood TODs provide for medium-density residential areas with local shopping needs. This land use pattern is designed to locate 65 percent of future households and 78 percent of future

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[171] 50 Cal 4th 1134, 58 Cal. Rptr 2d 152 (Cal. App 1996)
[172] 188 Cal App 3d 249, 232 Cal Rptr. 772 (1987).

[173] 232 Cal Rptr. at 779
[174] 232 Cal. Rptr at 282
[175] *Western Bypass Study--Alternative Analysis* Oregon Department of Transportation, May 1995.
[176] *Id.* at 2-8.
[177] *Id.*

jobs within walking distance of existing and proposed transit facilities.[178]

LUTRAQ resulted in a 64 percent reduction in vehicle hours of delay (VHD), with 40 percent to 70 percent by roadway class, as well as a 16 percent reduction in evening peak hour vehicle hours of travel (VHT) over all roadway classes. Because LUTRAQ involves fewer roadway capacity improvements, it results in a higher volume to capacity (v/c) ratio and a lower roadway level of service than the other alternatives.[179] While LUTRAQ had the lowest VHD reduction of any alternative, it nevertheless performed well in that category. LUTRAQ resulted in a 15.5 percent reduction in VHT (compared to 12.5 percent to 12.9 percent for the other alternatives) and the highest reduction in overall vehicle miles traveled (VMT) (a 6.4 percent reduction).[180] LUTRAQ's transit mode split of 17 percent exceeds the mode split of 14 percent for the bypass and arterial expansion alternatives.[181]

d. Joint Development and Redevelopment Authority

Joint development strategies are often confronted by the public emoluments clauses of most state constitutions, which prohibit public agencies from lending or using credit to further private enterprise.[182] However, the United States Supreme Court's decisions in *Berman v. Parker*[183] and *Hawaii Housing Authority v. Midkiff*[184] have expanded the purview of public purposes that may be accomplished by joint development projects.[185] As is stated in *Berman v. Parker*, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[186] A careful analysis of state and federal law should be undertaken in order to determine whether a joint development project would be permissible under the state, as well as the federal, constitutions.

The courts have refused to overturn the excess condemnation of land and air rights above it solely because of the possibility that the transit authority might sell or lease the rights to developers in order to generate revenues.[187] Because of the question of whether there is necessity for a taking as a matter of legislated discretion that would not be disturbed by the courts, absent bad faith or lack of statutory authority, courts typically authorize transit authorities to take air rights above terminals and stations even where they will not be presently used by the authority.[188] Having acquired the excess for minimal outlays, the agency may then hold the property until some future time when the air rights may be conveyed or leased to private parties to recoup project costs.[189]

In addition, many agencies use financing agreements to provide for private contributions towards capital and debt amortization costs, bond financing to enable private partners to secure capital at discounted costs, and tax increment financing to recoup site acquisition improvements and to provide revenues for bond retirement.[190] Special assessments have also been approved as a method of financing transit facilities, thereby authorizing transit authorities to recoup some of the value added to surrounding real property as a result of the construction of transit facilities.[191]

Several states have provided transit authorities expedited permitting authority in the siting of regional transit facilities. This authority has been upheld against challenges predicated on invasion of home rule authority and equal protection.[192] Many states require approval by the public utilities commission prior to execution of a lease or other encumbrance on property rights possessed by the transit agency, such as air rights.[193]

Public/private partnerships are an effective way of merging public powers with private resources in order to implement transit-oriented development.[194] Public agencies can acquire land through eminent domain needed for transit facilities.[195] Moreover, public agencies can, to some extent, override "NIMBY" ("not in my backyard") opposition to transit-oriented development projects by taking advantage of zoning override provisions in state legislation.[196] In some states, regional transit agencies are considered state agencies that are

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[178] *Id*

[179] ODOT at 5-24

[180] *Id* at 5-25

[181] *Id* at 5-26

[182] Freilich & Nichols, *Public-Private Partnerships in Joint Development: The Legal and Financial Anatomy of Large-Scale Urban Development Projects*, 7 MUNICIPAL FINANCE JOURNAL 5 (Winter 1986) at 11

[183] 348 U S 26 (1954).

[184] 467 U.S 229, 104 S Ct. 2321 (1984)

[185] Freilich & Nichols, *supra* n 182, at 12

[186] 348 U S at 32.

[187] Concept Capital Corporation v Dekalb County, 255 Ga. 452, 339 S E 2d 583 (1986)

[188] *Id*, City of Atlanta v. Heirs of Champion, 244 Ga 620, 261 S.E.2d 343 (1979)

[189] Freilich & Nichols, *supra* n.182.

[190] Freilich & Nichols, *supra* n 182, at 9-10

[191] Freilich & White, *supra* n 5 at 191; Southern California Rapid Transit District v. Bolen, 1 Cal. 4th 654, 3 Cal Rptr. 2d 843, 822 P 2d 875, 878 (1992)

[192] Seto v. Tri-County Metropolitan Transp. District, 311 Oreg. 456, 814 P. 26 1060 (1991); *see also* Tri-County Metropolitan Transp. District v City of Beaverton, 132 Oreg. App 253, 888 P 2d 74, *review denied*, 320 Oreg. 598, 891 P.2d 1 (1995); Tri-County Metropolitan Transp. District v. City of Beaverton, 138 Oreg. App 48, 906 P.2d 827 (Or. App. 1995)

[193] *In re* Honolulu Rapid Transit Company, Ltd., 507 P 2d 755 (Haw 1973).

[194] Freilich & Nichols, *supra* n 182

[195] City of Dallas Publication, *supra*, n.47, at 16.

[196] S. Mark White, *supra* n 23 at 17.

not subject to local land use plans or zoning ordinances.[197]

Oregon expressly authorizes financial incentives for transit-oriented developments through an ad valorem tax exemption program.[198] The legislation contains the following findings to support the public purpose underlying the program:[199]

> (1) The legislature finds that it is in the public interest to stimulate the construction of transit supportive multiple-unit housing in the core areas of Oregon's urban centers to improve the balance between the residential and commercial nature of those areas, and to ensure full-time use of the areas as places where citizens of the community have an opportunity to live as well as work (2) The legislature also finds that it is in the public interest to promote private investment in transit supportive multiple-unit housing in light rail station areas and transit oriented areas in order to maximize Oregon's transit investment to the fullest extent possible and that the cities and counties of this state should be enabled to establish and design programs to attract new development of multiple-unit housing, and commercial and retail property, in areas located within a light rail station area or transit oriented area. (3) The legislature further finds that the cities and counties of this state should be enabled to establish and design programs to attract new development of multiple-unit housing in light rail station areas, in transit oriented areas or in city core areas by means of the local property tax exemption authorized under ORS 307.600 to 307.691 The programs shall emphasize the following: (a) The development of vacant or underutilized sites in light rail station areas, transit oriented areas or core areas, rather than sites where sound or rehabilitable multiple-unit housing exists (b) The development of multiple-unit housing, with or without parking, in structures that may include ground level commercial space. (c) The development of multiple-unit housing, with or without parking, on sites with existing single-story commercial structures (d) The development of multiple-unit housing, with or without parking, on existing surface parking lots. (4) The programs shall result in the construction, addition or conversion of units at rental rates or sale prices accessible to a broad range of the general public

The legislation is limited to multifamily housing located within a one-half mile radius of an existing or planned light rail station.[200] The housing project must consist of the following elements:

- The structure must have a minimum number of dwelling units as specified by the city or county;
- The structure must not be designed or used as transient accommodations, including but not limited to hotels and motels;
- The structure must have those design elements benefiting the general public as specified by the city or county; and
- If in a light rail station area or transit-oriented area, the structure must: (a) be physically or functionally related to a light rail line or mass transportation system; and (b) enhance the effectiveness of a light rail line or mass transportation system.

Local standards and guidelines shall establish policy governing basic requirements for an application, including but not limited to: (a) existing utilization of proposed project site, including justification of the elimination of any existing sound or rehabilitable housing, (b) design elements, (c) rental rates or sales prices, (d) extensions of public benefits from the project beyond the period of the exemption, (e) minimum number of units.[201]

Projects qualifying for the program are exempt from ad valorem taxation for no more than 10 successive years. The exemption shall not include the land or any improvements not a part of the multiple-unit housing, but may include parking constructed as part of the multiple-unit housing construction, addition, or conversion. In the case of a structure to which stories or other improvements are added or a structure that is converted in whole or in part from other use to dwelling units, only the increase in value attributable to the addition or conversion shall be exempt from taxation.[202]

The city or county may approve the application if it finds that:

(1) The owner has agreed to include in the construction, addition, or conversion as a part of the multiple-unit housing one or more design elements benefiting the general public as specified by the city or the county, including but not limited to open spaces, parks and recreational facilities, common meeting rooms, child care facilities, transit amenities, and transit or pedestrian design elements.

(2) The proposed construction, addition, or conversion project is or will be, at the time of completion, in conformance with all local plans and planning regulations, including special or district-wide plans developed and adopted pursuant to ORS Chapters 195, 196, 197, 215, and 227, that are applicable at the time the application is approved.

(3) The owner has complied with all local standards and guidelines.[203]

The use of TDRs to accomplish redevelopment was recently addressed in *A Local and Regional Monitor v. Los Angeles*,[204] which involved a citizens' association suit to halt a downtown Los Angeles redevelopment project. The project is a 2.7-million square foot, mixed-use development with three proposed office towers, medical office space, a child care center, an amphitheater, a dining club, a 600-room hotel and midrise offices, and a public cultural facility. It is located in a blighted portion of a redevelopment area of downtown Los Angeles

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[197] Rapid Transit Advocates, Inc. v Southern California Rapid Transit District, 185 Cal App 3d 996, 230 Cal Rptr. 225 (1986)
[198] OR REV STAT. §§ 307 600 - 307.691
[199] OR REV STAT § 307 600
[200] OR REV STAT § 307 605
[201] OR REV. STAT § 307 610.
[202] OR REV. STAT § 307 630
[203] OR. REV STAT. § 307 650.
[204] 12 Cal. App 4th 1773, 16 Cal. Rptr 2d 358 (1993)

geles, and is to be built in five phases over a 12-year period The Los Angeles Community Redevelopment Agency (CRA) has touted the project on the grounds that it will, *inter alia*, support the transit system, including the light rail and metro rail, which are within walking distances of the project[205] An agreement between the developer and the CRA contains a transportation management program that establishes a 50 to 55 percent rideshare requirement to encourage transit use and a peripheral parking program restricting onsite parking by requiring 40 percent of office parking to be located offsite The agreement also obligates the developer to pay a fee to support onsite transportation management facilities and to contribute toward the Metro Rail assessment

Critical to the program's success is the transfer of floor area ratio (TFAR) program. The project includes a transfer of 695,000 square feet to the project site, thereby allowing the developer to exceed the 6:l maximum floor area ratio otherwise applicable in the redevelopment area The court described the program as follows:

> The overall effect of the floor area ratio transfer is that, while certain parcels may be developed to a density much greater than that of other nearby parcels, the overall density of the area is the same as it would have been if all the parcel owners developed their properties to the full extent allowed by the zoning ordinance[205]

Under the agreement, the sending site is the Los Angeles Convention Center expansion area, with the unused development rights being owned by the CRA and the city The compensation paid for the transferred rights, referred to as "Public Benefit Resources," is unusual in that it involves payment for the transfer of public property rights rather than private property rights as in most TDR systems. Pursuant to the agreement, the developer agreed to pay $34 million for the TFAR, with the CRA allocating $1.7 million of those payments to improve transportation systems and facilities

A citizens' group challenged the city's approval of the agreement on the grounds that the EIR was inadequate. Ruling that the plaintiffs had failed to exhaust their administrative remedies, the court nevertheless ruled that the city's approval of the EIR was based on substantial, competent evidence. Not only had the city properly adopted a statement of overriding considerations justifying the impact of the project on the freeway system, but the city also required mitigation measures such as ridesharing and access to existing and future mass transportation facilities Further, the court ruled that the TFAR ordinance authorized the use of TFAR monies to expand the convention center, and that the CRA could properly transfer 86,000 square feet to the project to build a cultural center for the city and its citizens. In addition, the court rejected the citizens' argument that the agreement was inconsistent with the general plan: "A Center is not the same thing as, for example, the planned de-urbanized Hollywood Hills or the Sepulveda Basin. ALARM's tenuous efforts to decentralize the center would conflict with the general plan's policies." [citation omitted][207]

e. Regional General Welfare and Intergovernmental Agreements

Regional general welfare is a concept that requires local governments to take the impact of local zoning on regional needs, such as housing, into consideration.[208] The most famous application of regional general welfare is the New Jersey Supreme Court's Mt. Laurel decision, which struck down the exclusionary zoning system of a suburban township and required affirmative measures to implement affordable housing objectives.[209] The regional general welfare doctrine can also provide a basis for granting flexible zoning approvals, such as planned unit developments, that implement such public objectives as increasing transit ridership and providing affordable housing.[210]

At least one court has applied the regional general welfare concept to environmental issues. In Save a *Valuable Environment (SAVE) v. City of Bothell,*[211] the City of Bothell rezoned a farm for use as a regional shopping center. The farm was designated "greenbelt/ agricultural" in the Comprehensive Plan. The rezoning was approved by the voters and was accompanied by a concomitant agreement. An environmental organization challenged the rezoning. The trial court found that, while the rezoning could confer benefits on the residents of the City of Bothell, the effect on residents outside the city limits rendered the decision illegal spot zoning

In affirming the trial court decision, the court of appeals ruled that local governments must consider the environmental effects of zoning actions in relation to the general community, as well as the local government.[212] While the court expressly declined to require interjurisdictional planning, it noted that such arrangements could have avoided the invalidation of the rezoning. The court cited several decisions in other ju-

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[205] 16 Cal Rptr 2d at 363

[205] 16 Cal Rptr 2d at 364

[207] 16 Cal. Rptr. 2d at 385

[208] S. Mark White, *supra* n.60, at 14

[209] Southern Burlington County NAACP v Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), ***cert. denied,*** 423 U.S. 808 (1975); see also Britton v. Town of Chester, 595 A 2d 492 (N.H. 1991); Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983); Associated Homebuilders v. City of Livermore, 18 Cal. 3d 582, 135 Cal Rptr. 4, 557 P.2d 473 (1976); Berenson v. Town of New Castle, 341 N.E. 2d 236 (N.Y. 1975); National Land & Investment Co v. Kohn, 215 A.2d 597 (Pa. 1965); Board of Supervisors v. Carper, 200 Va. 653, 107 S.E. 2d 390 (1959)

[210] Brennick v. Newington Planning and Zoning Commission, 41 Conn. Supp. 593, 597 A.2d 346 (1991) (regional housing needs could be considered in granting a zoning permit)

[211] 89 Wash. 2d 862, 576 P.2d 401 (Wash 1978)

[212] 576 P.2d 405-06.

risdictions requiring local governments to accommodate regional housing needs[213] and the state legislative policy establishing the right to a healthful environment.[214] In particular, the court cited the comments of state agencies with regard to environmental impacts, including traffic congestion and reductions in air quality that would result not only from approval of the project, but also the commitment of funds that would encourage further automobile use.

An interesting response to regional general welfare requirements was developed by the Town of New Castle, New York, in response to a Supreme Court decision that established a regional general welfare requirement. In *Berenson v. Town of New Castle*,[215] the New York Court of Appeals established a two-tier test for regional general welfare. First, local governments must provide a properly balanced and well-ordered plan for the community. Second, the plan must adequately consider regional needs in housing requirements. In response to the *Berenson* mandate, New Castle adopted five provisions for the construction of multifamily housing. The first two provisions created several specific central urban districts with a minimum density of 10 units per acre. The minimum density may be increased to 20 units under a system of "incentive density bonuses," where the developer provides certain additional features such as senior citizen or low to moderate income housing, handicapped units, energy saving devices, recreational facilities, offsite improvements, and underground parking. The second provision authorized a multifamily plan development (MFPD) "floating zone." In order to qualify for the MFPD, a tract must be at least 5 acres and within one-half mile of a business district. The MFPD authorizes densities of 4.5 to 9 units per acre and allows different landowners to combine their tracts to attain the 5-acre minimum requirement. Third, the town authorized accessory apartments to be constructed in any part of the town, provided that they occupy no more than one-fourth of the total floor space. Finally, the ordinance authorized, by special permit, large multifamily designed residential development (MFDRD). This required a tract with a minimum size of 100 times the applicable single-family lot size permitted in the underlying district in any 0.5-, 1-, or 2-acre residential district. Not only could landowners combine their holdings to reach the minimum size, but owners of tracts spanning the border between the town and adjacent local governments may include adjacent property in computing the minimum land area requirement where the neighboring jurisdiction approves a coordinated plan for the development of its portion of the land. With regard to an MFDRD, the town was to review various considerations, primarily those of keeping environmental conservation in harmony with adjacent single-family residential districts. The system was challenged and upheld in *Blitz v. Town of New Castle*.[216]

The court in *Blitz* rejected the developer's regional general welfare challenge, discussing favorably its plan to concentrate development near existing population centers with excess capacity to support increased population, while providing for less concentrated development near existing business districts and the rural cluster provisions of the MFDRD. While almost 90 percent of the town remained zoned for single-family housing, the town's housing implementation plan and environmental impact statement provided for a population growth of approximately one-third over the next 10 years, with most of the increase attributable to multifamily housing. The court rejected an attack on the town's stated goal of providing 50,000 new housing units through 1989, applying the presumption of validity that attaches to legislative determinations. The court ruled that the town's regional housing goals were both physically and economically feasible under the multi-family restrictions.

In addition, the court upheld the minimum land area requirement of the MFDRD, ruling that this provided for "the harmonious co-ordination of such development with surrounding single-family areas." In addition, this requirement economizes the provision of water and sewer systems. Finally, the requirement ensures coordinated development with neighboring jurisdictions. Finally, the court rejected the plaintiffs contention that the ordinances were confiscatory. The court ruled that the plaintiff had failed to present an adequate evidentiary showing that the ordinance was confiscatory, while the town had presented credible evidence that the plaintiff could develop its property as a 117-unit MFDRD in conjunction with a 53-unit cluster development of a neighboring property, with the two developments sharing common sewer and water facilities.

States with regional general welfare requirements will find that intergovernmental agreements provide a useful framework for regulating land use across jurisdictional boundaries. The Arizona statute authorizes intergovernmental agreements between counties, tribal governments, cities, and towns that include a joint development plan for transportation and transit.[217] The KCDOT, which responded to the survey prepared for this report, entered into an incentive agreement with the City of Bellevue in which the city agreed to reduce parking requirements and increase employment density in its central business district. In exchange, the transit agency agreed to increase its bus service frequencies in the area.

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[213] Associated Home Builders v City of Livermore, 18 Cal. 3d 582, 135 Cal Rptr. 41, 557 P.2d 473 (1976); Southern Burlington County NAACP v Township of Mt Laurel, 67 N.J. 151, 336 A 2d 713 (1975), *cert denied*, 423 U.S. 808 (1975); Berenson v. Town of New Castle, 341 N.E.2d 236 (N.Y. 1975)

[214] WASH REV CODE § 43.21C.020(3) (Environmental Policy Act)

[215] 38 N Y 2d 102, 378 N Y Supp 2d 672, 341 N.E 2d 236 (1975)

[216] 94 A.D.2d 92, 463 N.Y S 2d 832 (1983)

[217] ARIZ REV. STAT. § 9-461.11 E 1.

f. Certainty and Definiteness

Neotraditionalists decry the complexity of zoning ordinances and subdivision regulations, preferring to regulate through the use of design codes that emphasize visual design archetypes rather than textual standards. In addition, the standards used in neotraditional codes emphasize flexibility over precision. The neotraditionalists' concern is understandable. However, visual aids and flexible standards potentially confer wide discretion in those administering the ordinance which, in turn, creates due process concerns relating to the certainty and definiteness of the standards used in the codes.[218]

Zoning ordinances must provide uniform rules to guide their administration by local zoning or other officials. The fundamental rule is that a zoning ordinance, like any other type of ordinance, must establish some sort of standard in order for it to operate uniformly.[219] Zoning ordinances must be reasonably definite and certain so that they may be reasonably interpreted.[220] An ordinance is void for vagueness where it forbids or requires an act in terms so vague that persons of common intelligence must guess at its meaning and would differ as to its application.[221] It has been specifically held that a zoning ordinance must set forth clear and definite standards with regard to the types of uses that may be allowed or prohibited.[222]

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[218] This discussion does not imply that illustrative design codes cannot be as specific as textual standards. Nor does this discussion suggest that standards will meet constitutional standards of precision simply because they are textual and not visual Nothing in this discussion is intended to disparage the laudable attempts of nontraditionalists to simplify the complexities of land use regulations. However, any attempt to simplify ordinances by removing measurable standards is subject to scrutiny for compliance with the vagueness doctrine Moreover, some courts have expressed skepticism about standards which rely on visual interpretation This does not suggest that design codes are fatally flawed, but instead that they should be drawn with these principles in mind (as should textual standards).

[219] McQuillan Municipal Corporations, $ 25.62 (1996).

[220] McQuillan, Municipal Corporations, § 25.62 (1996) *See also* Johnson v Huntsville, 29 So 2d 342, 345 (Ala 1947) ("The restriction on property rights must be declared as a rule of law in the ordinance "); Hartnett v Austin, 93 So 2d 86, 88 (Fla 1956)("[I]t is a rule long recognized that a municipal ordinance should be clear, definite, and certain in its terms An ordinance which is so vague that its precise meaning cannot be ascertained is invalid, even though it may otherwise be constitutional "); State v Hailey, 633 P 2d 576, 579-80 (Idaho 1981)(fact that terms "downtown" and "business core" were not defined in ordinance was insufficient to render ordinance invalid for vagueness); Beaven v Village of Palatine, 160 N.E.2d 702, 705 (Ill Ct App. 1959) (provision of ordinance, while not forbidding operation of concrete mixing plant, sufficiently definite); Adler v Town of Cumberland, 623 A 2d 178, 179 (Me 1993) (ordinance not vague where term "guest house" sufficiently defined); State v Parker, 237 N W. 409, (Minn 1931) (municipal charter that incorporated provision of State Housing Act held void for uncertainty where term "lot" made description of criminal offense "too indefinite and uncertain."); Morristown Road Assoc's v Mayor & Common Council & Planning Bd. of Borough of Bernardsville, 394 A.2d 157,161 (N.J Sup Ct. 1978) ("zoning ordinance must be clear and explicit in its terms, setting forth adequate standards to prevent arbitrary and indiscriminate interpretation and application by local officials"); Lane County v. R A Heintz Constr. Co., 364 P 2d 627, 629 (Ore. 1961) ("Certainty is one of the prime requisites of a statute It is an essential to its validity A statute infected with the vice of uncertainty must be pronounced inoperative and void."); Seal Builders & Realty Corp. v. Pawtucket Bd of Appeals, 230 A 2d 875, 877 (R I 1967) (repeal of ordinance did not "result in leaving the building inspector without appropriate standards "); Indian Trail Property Owners Ass'n v. City of Spokane, 886 P 2d 209, 215 (Wash 1994) ("A zoning ordinance does not have to meet impossible standards of specificity but must set forth uniform guidelines so that its interpretation is not left solely to the discretion of administrative bodies or officials.").

[221] State ex rel. Casey's General Stores v. City Council of Salem, 699 S.W.2d 775, 777 (Mo App 1985)

[222] *See* Rohan, zoning & land use controls, § 36 03[8] (1996); *see also* Hartley v City of Colorado Springs, 764 P.2d 1216, 1226 (Colo. 1988) ("[L]egislative enactment void for vagueness if it fails to provide fair warning of the conduct prohibited or if its standards are so ill-defined as to create a danger of arbitrary and capricious enforcement."); Henry v Board of County Commr's of Putnam County, 509 So 2d 1221, 1222 (Fla. Dist. Ct App. 1987) ("Terms used in ordinance must make reference to determinable criteria, and provide a context in which a court can determine a particular regulation is reasonable "); County of Lake v. First Nat'l Bank of Lake Forest, 402 N.E.2d 591, 594 (Ill. 1980) ("The rule that an ordinance is void if it is indefinite and uncertain and its precise meaning cannot be ascertained.. applies to zoning ordinances."); McCallum v. City of Biddeford, 551 A.2d 452 (Me. 1988) (term "good cause" in ordinance was "reasonable and intelligible standard that [did] not force people of general intelligence to guess at its meaning"); Pulaski Highway, Inc v. Town of Perryville, 519 A.2d 206, 210-11 (Md 1987) (ordinance requiring application for conditional use permit for adult bookstore sufficiently specific and thus ordinance was not unconstitutionally vague); Town of Kearny v. Modern Trans. Co , 283 A 2d 119, 121 (N J Sup. Ct. App. Div 1971) ("Ordinances must be clear and unambiguous so that men of ordinary intellect need not guess at their meaning."); Cleaver v Board of Adjustment, 200 A 2d 408, 413 (Pa. 1964) ("Certain and definite and valid standards for zoning must be prescribed in the Legislative Act and in the zoning ordinance "); Ciaffone v. Community Shopping Corp, 77 S E 2d 817, 821 (Va Ct. App. 1953) ("Certainty and definiteness are prime requisites of an ordinance and the courts may hold a particular zoning ordinance or a provision thereof to be invalid and void for uncertainty, vagueness, or indefiniteness "); Town of Clyde Hill v. Roisen, 767 P.2d 1375, 1377 (Wash. 1989) (naturally grown fence ordinance not void for vagueness "because it provides persons of common intelligence with adequate notice of the conduct it makes criminal and because it contains standards that prevent arbitrary enforcement") *But see* People v Gates, 116 Cal. Rptr. 172 (Cal. Ct. App 1974) (zoning standards considered sufficient if administrative body required to make decisions in relation with general health, safety, and welfare standard)

The void for vagueness doctrine has its underpinnings in principles of due process and the need to restrain administrative discretion:

> The "void-for-vagueness" doctrine stems from the Due Process Clauses of the 14th Amendment, United States Constitution These clauses require that statutes whose enforcement may result in a deprivation of liberty or property be worded with precision sufficient to enable reasonable people to know what conduct is proscribed so they may conduct themselves accordingly A regulation is not ambiguous where consultation with local government officials can resolve any ambiguity regarding the meaning of the regulation [223]

The doctrine is grounded not only on notice to the regulated party, but is also designed to prohibit arbitrary and discriminatory enforcement.[224] An ordinance is rendered invalid "where it leaves its administration or enforcement to the ungoverned discretion or arbitrary action of the municipal legislative body or of administrative bodies or officials.[225]

The degree of vagueness that the courts will allow under this doctrine, as well as the relative importance of fair notice and fair enforcement, depends on the nature of the legislation.[226] "Language which reasonable people can understand is not unconstitutionally vague merely because it requires interpretation on a case-by-case basis."[227] An example of the leniency granted by courts to discretionary language is the use of variances. Typically, variances are authorized "where necessary to avoid undue hardship, provided there is no substantial departure from the intent" of the Zoning Ordinance. Courts have uniformly rejected contentions that this does not furnish adequate standards to support the denial of a variance.[228]

At least one court has applied the vagueness doctrine to a trip reduction ordinance. In *Potomac Greens Associates v. Alexandria*,[229] the Fourth Circuit Court of Appeals considered a traffic management plan (TMP) ordinance requiring a traffic impact study and a TMP with special use permit applications for buildings with at least 50,000 square feet. The ordinance required "reasonable and practicable actions" to achieve the goals of 10 percent to 30 percent of commercial/industrial trips during peak morning hours being made by high-occupancy vehicles, dispersion of no more than 40 percent of trips during the peak morning hours, and a limit that no more than 40 percent of trips be made by single-occupant vehicles during peak evening hours. The landowner proposed 2.35 million square feet of office space and 107,000 square feet of retail space. The court found the ordinance void due to failure to comply with notice, following certification to the state supreme court. The court of appeals vacated a ruling on vagueness by the district court, which found the ordinance unconstitutionally vague because (a) the standards were not binding and (b) the ordinance contained no definition of "substantial reduction" in traffic or "reasonable and practicable."

The use of architectural review boards to impose aesthetic standards on new development has generated litigation over the adequacy of compatibility standards.[230] In addition, the courts in some states have

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[223] Kawaoka v City of Arroyo Grande, 17 F.3d at 1236 (9th Cir. 1994); Hoffman Estates v Flipside, Hoffman Estates, Inc, 455 US 489, 498, 102 S Ct 1186, 1193, 71 L. Ed 2d 362 (1982); Joseph E Seagram & Sons, Inc V Hostetter, 384 U S. 35, 48-49, 86 S Ct 1254, 1263, 16 L Ed 2d 336, 1966)

[224] Fitzgerald v City of Maryland Heights, 796 S W 2d 52, 55 (Mo App 1990) (upholding standard of "for cause shown" for impeachment of municipal officials); Grayned v City of Rockford, 408 U S. 104, 108-09, 92 S Ct 2294, 33 L Ed 2d 222 (1972)

[225] *Id See also* Zebulon Enterprises, Inc. v County of DuPage, 496 N.E 2d 1256, 1261 (Ill Ct App 1986) (ordinance regulating mini-theaters violated First Amendment in that ordinance did not have "sufficiently narrow, objective and definite standards to guide the county board in deciding whether to allow the special use "), Jackson v Zoning Bd of New York City, 290 A.2d 438, 440 (Pa 1972) (ordinance provision clearly set out standard and thus there was no unlawful delegation due to ordinance's failure to define term "variance ")

[226] Fitzgerald, *supra* n 224 (citing Village of Hoffman Estates v Flipside, Hoffman Estates, Ltd, 455 U S 489, 498, 102 S Ct. 1186, 71 L Ed 2d 362 (1982)

[227] *Id*

[228] Barnard v Zoning Board of Appeals of Town of Yarmouth, 313 A 2d 741, 748 (Me 1974).

[229] 6 F.3d 173 (4th Cir 1993)

[230] *Compare* State *ex rel* Stoyanoff v Berkeley, 458 S.W 2d 305 (Mo 1970) (upholding standards prohibiting "unsightly, grotesque and unsuitable structures, detrimental to the stability of value and the welfare of surrounding property . and to the general welfare and happiness of the community. "); Reid v Architectural Board of Review, 192 N E.2d 74 (Ohio App 1963) (upholding denial of residential permit on the grounds that it did not conform to the "character of houses in the area"); State *ex rel* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W 2d 217 (1955) (upholding architectural review standard requiring that the exterior structure not be at variance with structures "in the immediate neighborhood. as to cause a substantial depreciation in property values of said neighborhood"); with City of West Palm Beach v Duffey, 30 So. 2d 491 (Fla 1947) (invalidating ordinance requiring that appearance of new buildings must "substantially equal that of the adjacent buildings or structures"); Morristown v. Mayor & Com. Council, 394 A 2d 157 (N J Super 1978) (invalidating design review standards requiring *inter alia*, a "coordinated and harmonious appearance" and prohibiting "excessive similarity or dissimilarity of design"); Pacesetter Homes, Inc v. Village of Olympia Fields, 104 Ill App 2d 218, 244 N.E.2d 369 (1968) (striking ordinance prohibiting "excessive similarity of appearance and the repetitiveness of features resulting in displeasing monotony of design"); Pacesetter Homes, Inc. v Village of Olympia Fields, 104 Ill App 2d 218, 244 N E 2d 369 (1968) (striking ordinance prohibiting "excessive similarity or dissimilarity of design" with regard to specific architectural elements); Anderson v. City of Issaquah, 70 Wash App. 64, 851 P.2d 744 (1993); Dallen v City of Kansas City, 822 S W 2d 429 (Mo. App. 1991) The formulation of adequate standards has been described as the "most troublesome problem encountered in municipal attempts to control architectural design"

shown a reluctance to accept aesthetics alone as a basis for imposing design standards.[231] The majority of states, however, now accept aesthetics as a basis for design review. Some cases striking design standards based on aesthetics have, however, accepted such standards when they are based on other legitimate zoning considerations, such as property values.[232]

In *Anderson v. City of Issaquah*,[233] the Washington Court of Appeals found unconstitutionally vague a design review ordinance requiring compatibility between buildings and "harmony in texture lines and masses." The ordinance also stated that, *inter alia*, building components have an "appropriate portion and relationship to each other," harmonious colors, and avoid "monotony of design" in single or multiple building projects. The city's development commission denied land use approval for the project because among other things, the applicant had failed to break up its blank walls with sculptures, benches, fountains, or similar design elements. The court of appeals found that this conferred an undue amount of discretion onto the development commission. In interpreting and applying the code, the court felt that the commissioners were left only to their own individual, subjective "feelings" about the city's "image" and as to whether the project is "compatible" or "interesting." The opinion does, however, recognize that the vagueness test does not require an ordinance to meet "impossible standards of specificity," and that legislation may use technical words that are commonly understood in an industry or that have well-settled meanings without running afoul of the vagueness doctrine. In addition, the court intimated that procedural due process protection, such as a hearing requirement, will assist in combating charges of vagueness.[234] Moreover, the opinion cited with favor several ordinances from other jurisdictions in which written criteria were illustrated by schematic drawings and photographs.[235] Accordingly, the court suggested that "aesthetic considerations are not impossible to define in a code or ordinance."[236]

Even where they survive an attack on their legitimacy, code standards should be sufficiently precise to carry out the intent of the legislative body. For example, in *Peter Schroeder Architects v. City of Bellevue*,[237] the plaintiff constructed a sunroom that would extend 5 feet into the setback. The ordinance permitted "minor structural elements" to intrude into the setback. Minor structural elements were defined to include, among other items, "bay windows" and "similar elements of a minor character." The city denied the landowner's permit on the grounds that a minor structural element does not include enclosed structures and that the setback intrusion would violate the spirit of the code. On appeal, however, the Washington Court of Appeals found that the sunroom constituted a "bay window" and reversed the city. The court noted that the city "must interpret and enforce the code as it is written, without adding new criteria on a case-by-case basis," adding that "[i]t is unreasonable to expect architects and other professionals to comply with unarticulated standards."[238] A more precisely written ordinance could have cured this defect.

The use of a PUD procedure resolves the issue of certainty and definiteness in the administration of a TOD scheme in many states. Because the designation of a PUD is considered a rezoning, courts often grant considerable latitude in the development of standards for the designation of a PUD. For example, in *Tri-State Generation and Transmission Co. v. City of Thornton*,[239] the Colorado Supreme Court approved the following standards in a PUD ordinance:

> 1. Compatibility with the surrounding area
> 2. Harmony with the character of the neighborhood
> 3. Need for the proposed development
> 4. The [e]ffect of the proposed Planned Unit Development upon the immediate area.
> 5. The [e]ffect of the proposed Planned Unit Development upon the future development of the area
> 6. Whether or not an exception from the zoning ordinance requirements and limitations is warranted by virtue of the design and amenities incorporated in the development plan
> 7. That land surrounding the proposed Planned Unit Development can be planned in coordination with the proposed Planned Unit Development.
> 8. That the proposed change to Planned Unit Development District is in conformance with the general intent of the comprehensive master plan and [the general zoning ordinance of Thornton]
> 9. That the existing and proposed streets are suitable and adequate to carry anticipated traffic within the proposed district and in the vicinity of the proposed district.
> 10. That existing and proposed utility services are adequate for the proposed development
> 11. That the Planned Unit Development creates a desirable and stable environment
> 12. That the Planned Unit Development makes it possible for the creation of a creative innovation and efficient use of the property

The design innovation and flexibility set forth in the Thornton, Colorado, PUD standards is readily adaptable to the TOD scenario. However, the TOD regulations themselves should be rather specific as to which uses are permitted and which are prohibited within the TOD district. In addition, the design standards must

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Morristown, *supra*, 394 A 2d at 161 (citing 2 ANDERSON, AMERICAN LAW OF ZONING § 9 75 (2d ed 1976))

[231] Morristown, *supra* N 230

[232] *Id*

[233] 70 Wash App 64, 851 P. 2d 744 (1993)

[234] *Id*, 851 P 2d at 754

[235] *Id* at 753 n 14

[236] *Id* at 753

[237] 83 Wash. App 188, 920 P 2d 1216 (1996)

[238] 920 P 2d at 1218.

[239] 647 P.2d 670 (Colo Banc 1982)

ensure that the development that occurs conforms to the intent of the TOD designation. Accordingly, the courts' approval of standards for designating or not designating a TOD is somewhat deceptive. The TOD is normally the first stage in the approval process, with subsequent site plans or subdivision plats required as the development nears completion The approval of subsequent site plans, subdivision plats, or building plats will be governed by the TOD regulations applied to the property Those regulations must probably satisfy a standard of certainty and definiteness greater than that set forth in the Thornton, Colorado, regulations in order to justify the denial of nonconforming proposals. The TOD regulations must be drafted in order to satisfy this legal standard.

g. Comprehensive Plan Consistency

Many states now require local governments to take public transit into consideration as part of the comprehensive planning process. The "second generation" programs balance transportation needs with other public policies and objectives, involve sophisticated fair share planning, and require the use of specific implementation measures to achieve transportation goals and objectives. This type of legislation has its roots in the rise of the comprehensive plan from the Standard Zoning Enabling Act, regional general welfare jurisprudence, and federal legislation that required housing plans in order to receive community development and block grant funding.[240]

The comprehensive plan has been described as the "essence of zoning."[241] The plan sets forth the basic land use policies governing community development as well as the studies and documentation underlying a community's policy choices. By requiring communities to support land use regulations with a comprehensive plan, landowners are protected from arbitrary restrictions and the courts can be assured that the public welfare is being served "[The comprehensive plan] is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll."[242]

The requirement that land use regulations conform to a comprehensive plan (known as the "consistency" requirement) is derived from Section 3 of the Standard Zoning Enabling Act (SZEA), which provided that zoning regulations be "in accordance with a comprehensive plan." The language found in most states that follow this model is very broad and general, and does not specifically require local governments to develop policies relating to affordable housing. The Missouri zoning enabling legislation for cities provides an example:

> [Zoning] regulations shall be made *in accordance with a comprehensive plan* and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements . .(Emphasis added)[243]

The majority of states have adopted the "unitary" view that this language does not require a separate document called a "comprehensive plan," and the plan may be found in the text of the zoning ordinance itself.[244] In states following the SZEA model, local governments are generally not required to prepare a comprehensive plan, zoning ordinances are not invalid for failure to prepare a separate comprehensive plan,[245] and local governments may be permitted to disregard separate comprehensive plans and master plans in rendering zoning decisions.[246] In addition, planning in these states is entirely a function of local governments, with little or no participation by state agencies.[247]

The comprehensive plan requirement has experienced a gradual evolution from its undefined status in the SZEA to the elevation of the plan as the constitution for land use regulations and land use decisions.[248] For purposes of analyzing the rise of the comprehensive plan as an antidote to exclusionary zoning, four major stages in the evolution of the plan should be examined: the recognition of the plan as a separate document, external consistency, the involvement of the state in the planning process, and internal consistency.

The first stage in the evolutionary process has been the recognition of the plan as a discrete document, generally consisting of a report including maps, diagrams, and text with statements of overall goals, objectives,

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[240] S Mark White, *State and Federal Planning Legislation for Manufactured Housing: New Opportunities for Affordable, Single-Family Shelter*, 28 URB LAW 263 (1996) at 272

[241] Udell v Haas, 235 N E 2d 897 (N Y 1968).

[242] *Id* at 901

[243] MO REV STAT § 89 040 (Vernon's 1989).

[244] *See* State *ex rel.* Chiavola v. Village of Oakwood, 886 S W 2d 74 (Mo App. 1994); *see, e g.*, Cathcart-Maltby-Clearview v Snohomish County, 96 Wa 2d 201, 634 P.2d 853 (19___); West Hill Citizens for Controlled Density v. King County Council, 29 Wash App 168, 627 P 2d 1002 (1981) (comprehensive plan only a guide to zoning regulations); Haar, *In Accordance With A Comprehensive Plan*, 68 HARV L REV 1154, 1156, 1158 (1955); Mandelker, *The Role of the Comprehensive Plan in Land Use Regulation*, 74 MICH L REV 900 (1976); *compare* Baker v Milwaukee, 271 Or 500, 533 P 2d 772 (1975) (comprehensive plan controls over conflicting zoning ordinance)

[245] *See, e.g*, State *ex rel* Chiavola v Village of Oakwood, 886 S.W.2d 74 (Mo. App 1994); Dawson Enterprises, Inc. v. Blaine County, 98 Idaho 506, 567 P. 2d 1257 (1977) (separate comprehensive plan not required by pre-1977 zoning legislation).

[246] Strandberg v Kansas City, 415 S.W 2d 737 (Mo Banc 1967); Treme v St. Louis County, 609 S W.2d 706 (Mo. App. 1980)

[247] R Healy, Land Use & the States, (1976).

[248] Callies & Freilich; *supra*, n 44, at 372-73

and policies for the community.[249] Several states now authorize or mandate that local governments prepare a separate comprehensive plan with specified "elements," or chapters of the comprehensive plan devoted to specific planning topics or issues.[250] Examples of elements that may be required include land use elements that designate the general distribution and location of various land use categories, transportation and circulation, environment or conservation, public facilities and services, redevelopment, and economic development.[251] The comprehensive plans of local governments in some states are now required to take public transit into consideration in the transportation element, or by adopting a separate transit element in the plan.[252] In most states, however, the local government is authorized but not required to take transit into consideration.[253] For the Maryland-Washington Regional District that includes Prince George's and Montgomery counties, the Maryland statutes authorize "functional plans" for various elements of the general plan including mass transit (light rail and busways).[254]

For example, the legislation requiring a plan to be prepared by the Tahoe Regional Planning Agency (TRPA) provides as follows:[255]

> The goal of transportation planning shall be: (A) To reduce dependency on the automobile by making more effective use of existing transportation modes and of public transit to move people and goods within the region and (B) To reduce to the extent feasible air pollution which is caused by motor vehicles. Where increases in capacity are required, the [TRPA] shall give preference to providing such capacity through public transportation and public programs and projects related to transportation. The [TRPA] shall review and consider all existing transportation plans in preparing its regional transportation plan pursuant to this paragraph.

A second stage in the evolution of the comprehensive plan has been the requirement that zoning and land use regulations conform to the comprehensive plan--the so-called "plan as law" or "consistency" doctrine.[256] Some states provide that the plan is merely advisory.[257] In Utah, local governments are given express authority to adopt ordinances mandating compliance with the general (comprehensive) plan,[258] while others mandate that zoning and other land use regulations must be consistent with the plan.[259] By statute or case law, several states have mandated that land use decisions implementing the comprehensive plan, such as rezonings, permit approvals, and subdivision approvals, must also conform to the comprehensive plan.[260] Several Maryland cases have ruled that a subdivision plat may be denied due to inconsistency with a comprehensive plan, even where the proposed densities are consistent with the zoning regulations.[261] The comprehensive plan is now considered the "constitution" for all future development in states having mandatory planning and consistency requirements.[262]

A third stage in the evolution of the comprehensive plan has been the involvement of the state or regional agencies in the development of comprehensive plans.[263] While land use planning is typically the responsibility of local governments alone, some states now require that the comprehensive plan indicate how it relates to the plans of neighboring communities.[264] Nevada provides for the establishment of a regional planning agency and the coordination of the comprehensive plans of cities and counties with the master plan for the

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[249] *See, e g,* N J STAT. ANN § 40:55D-28 b; and UTAH CODE ANN § 10-9-301

[250] *See, e g,* UTAH CODE ANN §§ 10-9-302 (municipal general plans), 17-27-301 (county general plans)

[251] S Mark White, *supra* n.240 at 274-75.

[252] *See, eg,* CAL GOV'T CODE § 66801 (Tahoe Regional Planning Agency)

[253] *See, e g,* CONN GEN. STAT §§ 8-23, 8-24; FLA STAT ANN §163 3177(7)(a); Georgia Code § 50-8-92; Idaho Statutes § 67-6508(i); IND STAT ANN § 36-7-4-503; Md Ann. Code srt. 66B, § 3 05(a)(1)(iii); NEV. REV. STAT § 278 160(o) (authorizing as part of local master plan a "transit plan" that shows "a proposed system of transit lines, including rapid transit, streetcar, motorcoach and trolley coach lines and related facilities") (For jurisdictions without a comprehensive plan, the Nevada legislation authorizes the Governor to adopt a comprehensive plan and zoning regulations. This includes, as a purpose of the comprehensive plan, "[t]o provide and encourage a safe, convenient and economic transportation system including all modes of transportation such as air, water, rail, highway and mass transit, and recognizing differences in the social costs in the various modes of transportation " NEV. REV. STAT § 278 655); N.J STAT ANN § 13:17-11 (Hackensack Meadowlands master plan); OKLA STAT. § 19-866 10; Utah code § 10-9-302(2)(b), 17-27-302(2)(b); Wash REV CODE § 36.70.350(5)

[254] MD. ANN CODE Art 28, § 7-108(c)

[255] CAL GOV'T CODE § 66801, Art V, (c)(2); NEV REV STAT. § 277 200 Art. V (c)(2)

[256] *See generally,* White, *supra* n.60

[257] *See, e g.,* UTAH CODE ANN. § 10-9-303(6)(a)

[258] UTAH CODE ANN. § 10-9-303(6)(b)

[259] *See, eg.,* Idaho Code § 67-6511(c) (plan amendment required before granting rezonings inconsistent with plan); Dawson Enterprises, Inc. v Blaine County, 98 Idaho 506, 567 P.2d 1257

[260] *See, e g.,* OR REV STAT § 197 175 (land use decisions, generally)

[261] Board of County Comm'rs v Gaster, 401 A.2d 666 (Md. 1979); Coffey v Maryland-National Capital Park and Planning Comm'n, 441 A 2d 1041 (Md 1982); *see also* Webb v Giltner, 468 N.W.2d 838, 840 (Ia. App. 1991) (where there is a written plan it cannot be ignored by the local government); Little v. Board of County Commissioners of Flat Head County, 631 P.2d 1282, 1293 (Mont. 1981) ("Why have a plan if the local governmental units are free to ignore it at any time?")

[262] Board of County Comm'rs v. Snyder, 627 So 2d 469 (Fla 1993); Concerned Citizens of Calaveras County, 166 Cal. App. 3d 90, 212 Cal Rptr 273, 278 (Cal App. 3 Dist. 1985) (citing O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965); Machado v Musgrove, 519 So. 2d 629, 632 (Fla.App.1987), *rev denied,* 529 So.2d 694 (Fla 1988).

[263] *White, supra* n.60.

[264] *See, e.g., N.J.* STAT ANN. § 40:55D-28 d

region.[265] The most dramatic manifestation of this stage is the development of statewide planning goals and policies to which local comprehensive plans must conform[266] and the review and approval of local comprehensive plans by state agencies.[267]

A fourth stage in the evolution of the comprehensive plan is the internal consistency requirement. Consistency in some states now requires not only that land use regulations conform to the comprehensive plan (this is referred to as "vertical" or "external" consistency), but also that local comprehensive plans conform to goals and policies mandated by the state and that the various elements of the comprehensive plan be internally consistent ("internal" consistency).[268] For example, the Washington legislation establishes the following requirement for internal consistency: "The plan shall be an internally consistent document and all elements shall be consistent with the future land use map."[269]

Regulations adopted to implement the Washington growth management legislation define consistency in several places, as follows:

> [The internal consistency] requirement appears to mean that the parts of the plan must fit together so that no one feature precludes the achievement of any other [270]
>
> 'Consistency' means that no feature of a plan or regulation is incompatible with any other feature of a plan or regulation
>
> Consistency is indicative of a capacity for orderly integration or operation with other elements in a system [271]
>
> [Internal consistency] means that each part of the plan should be integrated with all other parts and that all should be capable of implementation together. Internal consistency involves at least two aspects:
>
> (1) Ability of physical aspects of the plan to coexist on the available land;
>
> (2) Ability of the plan to provide that adequate public facilities are available when the impacts of development occur [272]

Several states have developed the comprehensive planning process into a vertically integrated system with mandatory statewide planning requirements, consistency, and mandatory planning elements.[273] Not only do these states require consistency between zoning ordinances and comprehensive plans, but they have clarified the requisite form and content of comprehensive planning documents and established statewide planning goals binding upon local governments.

Oregon directly requires the use of TOD regulations in certain instances as part of the plan implementation process. Its statewide land use planning program establishes a series of mandatory goals to direct local land use planning, including transportation pans and urban growth boundaries.[274] Pursuant to the state planning legislation, the state's Land Conservation and Development Commission (LCDC) has published a transportation planning rule (TPR) that expressly incorporates the concept of transit-oriented development.[275] Transit-oriented development is defined in the state rule as follows:

> Transit-Oriented Development (TOD) means a mix of residential, retail and office uses and a supporting network of roads, bicycle and pedestrian ways focused on a major transit stop designed to support a high level of transit use The key features of transit oriented development include: (a) A mixed use center at the transit stop, oriented principally to transit riders and pedestrian and bicycle travel from the surrounding area; (b) High density of residential development proximate to the transit stop sufficient to support transit operation and neighborhood commercial uses within the TOD; (c) A network of roads, and bicycle and pedestrian paths to support high levels of pedestrian access within the TOD and high levels of transit use[276]

The plan requires a statewide TSP to be prepared by ODOT, regional TSPs to be prepared by MPOs, and local TSPs to be prepared by cities and counties.[277] In MPO areas, regional and local TSPs must achieve a reduction in automobile VMT per capita, to equal zero to no increase within 10 years of adoption of a plan, a 10 percent reduction within 20 years of adoption of a plan, and a 20 percent reduction within 30 years of adoption of a plan.[278] In the Portland area, local governments are required to evaluate alternative land use designations, densities, and design standards to meet local and regional transportation needs, including the following:[279]

- Increasing residential densities and establishing minimum residential densities within one quarter mile

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[265] For a summary of the preparation of regional plans for Washoe County, Nevada, and Mohave County, Arizona, see Freilich & White, *The Interaction of Land Use Planning and Transportation Management,* TRANSPORT POLICY (1994) at 101-115; NEV REV STAT § 278 170 1

[266] *See, e g,* FLA STAT ANN. § 187 201; HAW REV STAT. § 226-1 *et seq* (State Planning Act)

[267] *See, e.g.,* OR REV STAT. § 197 040(2)(c) and (d) (State Land Conservation and Development Commission to prepare statewide planning guidelines and to review local plans for compliance with mandatory statewide planning goals).

[268] Lesher v Communications v. Walnut Creek, 52 Cal.3d 531, 277 Cal Rptr. 1, 802 P 2d 317 (1990); Sierra Club v. Kern County Board of Supervisors, 126 Cal App 3d 698, 708, 179 Cal Rptr 261 (1981)

[269] RCW § 36.70A 070 (West 1941)

[270] WAC 365-195-070(7)

[271] WAC 365-195-210

[272] WAC § 365-195-500.

[273] These states are: Oregon, Florida, California, New Jersey, Maine, Vermont, Rhode Island, Georgia, and Hawaii *See generally* White, *supra,* n.240

[274] OR. REV. STAT ANN § 197.175

[275] OR ADMIN RULES § 660-012-000 *et seq*

[276] OR ADMIN RULES § 660-012-0005(22)

[277] OR ADMIN RULES § 660-012-0015.

[278] OR ADMIN. RULES § 660-012-0035(4).

[279] OR ADMIN. RULES § 660-012-0035(2).

of transit lines, major regional employment areas and major regional retail shopping areas;

- Increasing densities (i e , minimum floor area ratios) in new commercial office and retail developments;
- Designating lands for neighborhood shopping centers within convenient walking and cycling distance of residential areas;
- Designating land uses to provide a better balance between jobs and housing considering the total number of jobs and total of number of housing units expected in the area or subarea; the availability of affordable housing in the area or subarea; and provision of housing opportunities in close proximity to employment areas
- Establishing maximum parking limits for office and institutional developments which reduce the amount of parking available at such developments

Also within MPO areas, local governments are required to adopt land use and subdivision regulations to reduce reliance on the automobile. These regulations:[280]

- Allow TODs on lands along transit routes;
- Implement a demand management program to meet the measurable standards set in the TSP;
- Implement a parking plan that achieves a 10 percent reduction in the number of parking spaces per capita in the MPO area over the planning period;[281] and
- Require all major industrial, institutional, retail, and office developments to provide either a transit stop on site or a connection to a transit stop along a transit trunk route when the transit operator requires such an improvement.

In areas with a population greater than 25,000 that are already served by a public transit system or where a determination has been made that a public transit system is feasible, local governments must adopt land use and subdivision regulations that provide the following requirements:[282]

- Along existing or planned transit routes, designate types and densities of land uses adequate to support transit.
- Transit routes and transit facilities shall be designed to support transit use through provision of bus stops, pullouts and shelters, optimum road geometrics, on-road parking restrictions, and similar facilities, as appropriate.
- New retail, office, and institutional buildings at or near major transit stops are required to provide for convenient pedestrian access to transit through the use of walkways and pedestrian connections to adjoining properties.[283] In addition, on sites with major transit stops, non-residential buildings must either locate buildings within 20 feet of the transit stop or provide a pedestrian plaza at the transit stop or a street intersection.
- The designation of pedestrian districts and adoption of appropriate implementing measures regulating development within pedestrian districts.
- Designate employee parking areas in new developments with preferential parking for carpools and vanpools.
- Allow redevelopment of a portion of existing parking areas for transit-oriented uses, including bus stops and pullouts, bus shelters, park and ride stations, transit oriented developments, and similar facilities, where appropriate.
- Require road systems for new development that can be adequately served by transit, including provision of pedestrian access to existing and identified future transit routes. This includes, where appropriate, separate accessways to minimize travel distances.

California's Transit Village Development Planning Act of 1994 (TVDPA) encourages, on a statewide basis, the use of transit-oriented development.[284] The TVDPA is optional legislation that authorizes the adoption of a transit village plan for a transit village development district that addresses the following characteristics as set forth in the legislation: [285]

(a) A neighborhood centered around a transit station that is planned and designed so that residents, workers, shoppers, and others find it convenient and attractive to patronize transit

(b) A mix of housing types, including apartments, within not less than a quarter mile of the exterior boundary of the parcel on which the transit station is located

(c) Other land uses, including a retail district oriented to the transit station and civic uses, including day care centers and libraries

(d) Pedestrian and bicycle access to the transit station, with attractively designed and landscaped pathways

(e) A rail transit system that should encourage and facilitate intermodal service, and access by modes other than single occupant vehicles.

(f) Demonstrable public benefits beyond the increase in transit usage, including all of the following: (1) Relief of traffic congestion (2) Improved air quality (3) Increased transit revenue yields (4) Increased stock of affordable housing (5) Redevelopment of depressed and marginal inner-city neighborhoods (6) Live- travel options for transit-needy groups (7) Promotion of infill development and preservation of natural resources. (8) Promotion of a safe, attractive, pedestrian- friendly environment around transit stations (9) Reduction of the need for additional travel by providing for the sale of

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[280] OR. ADMIN RULES § 660-012-0045(5)

[281] This may be accomplished through a combination of restrictions on development of new parking spaces and requirements that existing parking spaces be redeveloped to other uses, and includes land use and subdivision regulations setting minimum and maximum parking requirements (OR. ADMIN. RULE § 660-012-0045 (5))

[282] OR. ADMIN RULES § 660-012-0045(4)

[283] The requirement is excused where such a connection is impracticable due to physical or topographical conditions, existing incompatible development or legal restrictions *See*, OR. ADMIN RULES 660-012-0045(3)(b)(E), and 4(b)(B) & (C)

[284] CAL GOV'T CODE § 65460 - 65460.10

[285] CAL. GOV'T CODE § 65460 2.

> goods and services at transit stations (10) Promotion of job opportunities (11) Improved cost-effectiveness through the use of the existing infrastructure (12) Increased sales and property tax revenue (13) Reduction in energy consumption
>
> (g) Sites where a density bonus of at least 25 percent may be granted pursuant to specified performance standards
>
> (h) Other provisions that may be necessary, based on the report prepared pursuant to subdivision (b) of Section 14045[286]

The legislation authorizes state transportation funding and permit processing assistance as incentives to development TVPs.[287] A transit village plan is prepared, adopted, and amended in the same manner as a general plan.[288] The transit village plan must be consistent with the general plan,[289] and the legislation prohibits the approval of any local public works project, tentative subdivision map, or zoning ordinance unless it is consistent with the adopted transit village plan.[290] To increase transit ridership and to reduce vehicle traffic on the highways, local, regional, and state plans are encouraged to direct new development close to the transit stations and to provide financial incentives to implement the plans.[291]

Metropolitan planning organizations are directed to provide special consideration to projects that have implemented transit-oriented development:[292]

> As part of implementation of the demonstration program established pursuant to Section 14045 of the Government Code, the regional transportation planning agency preparing the seven-year regional transportation improvement program pursuant to Section 65082 shall consider those exclusive mass transit guideway projects where the applicant and the local entity responsible for land use decisions have entered into a binding agreement to promote high density residential development within one-half mile of a mass transit guideway station Any project selected by the agency which is located in a demonstration site shall be considered for inclusion in the regional transportation improvement program This section shall not preclude the agency from applying the criteria for making awards which may be required or permitted pursuant to other provisions of law

The Minnesota Metropolitan Council has created a "livable communities" program designed to change long-term market incentives that adversely impact creation and preservation of living-wage jobs in the fully metropolitan area, create incentives for developing communities to include a full range of housing opportunities, create incentives to preserve and rehabilitate affordable housing, and create incentives for all communities to implement compact and efficient development.[293] The council is authorized to establish guidelines for the livable community demonstration account for projects that the council would consider funding with either grants or loans. The guidelines must provide that the projects will:

> (1) interrelate development or redevelopment and transit; (2) interrelate affordable housing and employment growth areas; (3) intensify land use that leads to more compact development or redevelopment; (4) involve development or redevelopment that mixes incomes of residents in housing, including introducing or reintroducing higher value housing in lower income areas to achieve a mix of housing opportunities; or (5) encourage public infrastructure investments which connect urban neighborhoods and suburban communities, attract private sector redevelopment investment in commercial and residential properties adjacent to the public improvement, and provide project area residents with expanded opportunities for private sector employment [294]

As in Florida and Oregon, the State of Washington has adopted mandatory comprehensive planning requirements (unlike those states, the comprehensive planning requirements are limited to designated cities and counties, primarily in the Seattle area). Local governments must include a transportation element in the comprehensive plan as well as transportation concurrency requirements.[295] Innovative land use techniques may be used to implement the comprehensive plan including density bonuses, cluster housing, planned unit developments, and the transfer of development rights.[296] Local governments subject to the planning requirements must designate an urban growth area, or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.[297] Urban growth areas may include areas and densities sufficient to permit the urban growth that is projected to occur in the county for the succeeding 20-year period. The urban growth area must permit urban densities and must include greenbelt and open space areas. An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. Under the statute, the urban growth area is designed to implement the policy that urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas. Urban growth may

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[286] Note: Government Code § 14045 authorizes three or more TOD demonstration projects and directs the preparation of a report on their effectiveness.

[287] § 65460 5

[288] § 65460.7.

[289] § 65460.8

[290] § 65460 9.

[291] § 65460.3

[292] CAL GOV'T CODE § 65083.

[293] MINN STAT. ANN. § 473.25

[294] MINN STAT. ANN § 473 25(b).

[295] RCW § 36 70A 070(6).

[296] RCW 36.70A.090.

[297] RCW § 36 70A.110

also be located in designated "new fully contained communities" that implement, among other things, "transit-oriented site planning and traffic demand management programs."[298]

The state's implementation rules for the growth management legislation recommends an inventory of transit facilities in the transportation plan, including an inventory of transit facilities and services within the planning area and an analysis of projected transit needs based on projected land use assumptions. The regulations suggest that transit improvements be planned in areas of projected residential and/or employment centers. The regulations provide that "[c]onsideration of current and projected surrounding land use should be made with respect to uses that are compatible and available for current and projected transit needs."[299]

The regulations also provide the ability to utilize concurrency as a means to encourage transit-oriented development through the use of "district, areawide, corridor, or other nontraditional level of service standards."[300] The LOS standards must include, at a minimum, arterials and transit routes.[301]

The street classification criteria of a TOD should also be addressed in the comprehensive plan. In *Friends of H Street v. City of Sacramento*,[302] the court rejected plaintiffs argument that the refusal to reroute traffic was inconsistent with the general plan. The court noted that local governments in California are required to conform proposed public works projects to the general plan.[303] However, the court found that the general plan statutes address only future improvements, and do not require local governments to bring existing neighborhoods and streets into compliance with the general plan.[304] The court held that the city's refusal to reroute traffic from the street involved a legislative function beyond the purview of judicial review, rather than the application of legislative criteria to a specific situation.

4. CONCLUSION

This report represents the result of a comprehensive survey of transit agencies throughout the United States, as well as a survey of the case law and state statutes on transit-oriented development. Transitoriented development represents a significant departure from traditional zoning practice. Because the concept is in its infancy, it has generated no litigation to date. However, many features of transit-oriented development strategies, such as traditional neighborhood development and village policies, parking restrictions, and concurrency management have been litigated.[305] In addition, many states--most notably Florida, California, Oregon, and Washington--have incorporated transit-oriented development and neotraditional planning principles into their zoning and planning statutes. At the conceptual level, then, transit-oriented development has a sound legal and constitutional basis.

The implementation of transit-oriented development strategies presents legal issues that must be resolved through careful drafting. While neotraditionalists and new urbanists decry the complexity of traditional zoning ordinances, those ordinances must be drafted with precision in order to avoid challenges on the basis of indefiniteness and uncertainty. In addition, courts have thrown out maximum setback (build-to lines) and rear parking restrictions when they have proven arbitrary and irrational as applied to specific development proposals such as gas stations.[306] These problems can be avoided through the use of comprehensive planning studies, comprehensive planning policies, and careful drafting procedures for implementing TOD strategies.

In addition, general-purpose local governments and transit agencies are finding that proactive development policies are sometimes needed to stimulate private interest in TOD strategies. Moving away from conventional residential subdivision patterns and automobile-oriented office and retail facilities is a departure from standard development practice, which creates an element of perceived risk by the development community. Accordingly, many states now create authority for joint development strategies such as excess condemnation, long-term leasing, and other joint development practices in order to stimulate private interest in TODs and to engage private resources in transit investments. While the survey responses in this report are not intended to present a complete overview of what has been accomplished by transit agencies throughout the United States, a great deal of development has been undertaken by the agencies who did respond. These joint development efforts have produced a wide variety of residential, retail, and office uses that have not only stimulated economic opportunities along transit corridors, but that promise to increase ridership opportunities for the affected transit facilities.

In addition, both transit agencies and general-purpose local governments must realize that TOD ordinances and neotraditional planning standards are only part of the overall picture. What happens outside of the transit corridors is equally important. Tier systems and

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[298] RCW § 36 70A 110(3), 36.70A.350

[299] WAC § 365-195-325(2)(c)(iv)

[300] WAC § 365-195-325(2)(e)

[301] *Id*

[302] Friends of H Street v City of Sacramento, 20 Cal. App.4th 152, 24 Cal Rptr 2d 607 (1993)

[303] *Id* at 617 (citing Friends of "B" Street v. City of Hayward, (106 Cal. App 3d 998, 165 Cal. Rptr 514 (1980))

[304] *Id*

[305] S Mark White & D. Jourdan, *Neotraditional Development: A Legal Analysis*, 49 LAND USE LAW & ZONING DIG. No. 8 (August 1997) at 4; Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990), *cert denied*, 498 U.S 1120 (1991); Restigouche, Inc v. Town of Jupiter, 59 F.3d 1208 (11th Cir. 1995).

[306] Dallen v. City of Kansas City, 822 S W 2d 429 (Mo. App 1991).

urban growth boundaries have encouraged higher densities in areas such as San Diego and Portland, thereby producing a more favorable climate for increasing residential densities and economic development opportunities along transit nodes and corridors.[307] In addition, intergovernmental agreements and metropolitan transportation plans are mechanisms for producing a realistic and affective transition of uses along transit corridors that cross jurisdictional boundaries.

TOD is a promising concept that offers to bolster transit ridership while producing affordable housing and economic development opportunities along transit corridors. It responds to a real public need and is increasingly recognized in state enabling legislation. While it does raise some legal issues with regard to implementation, these issues are not insurmountable. When the principles discussed in this report are taken into consideration, valid TOD strategies can become reality.

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[307] Freilich, Garvin, and White, *Economic Development and Public Transit Making the Most of the Washington Growth Management Act*, 16 PUGET SOUND L REV (1993) at 949-973.

APPENDIX A-SURVEY QUESTIONS

The following are the questions for the survey conducted for this Report. The survey was mailed by the National Research Council, and 14 responses were received.

1. Please provide the name and address of your agency or firm.

2. Please provide the name, telephone number and fax number of an appropriate contact person who is familiar with your agency or firm's development policies.

3. Over the past 20 years, has your agency or firm been involved in any joint public-private development involving residential, commercial, office, retail or industrial uses?
   - ❑ Yes
   - ❑ No

4. Please describe your agency or firm's involvement with any residential, commercial, retail, office, industrial, or similar development which has been designed to encourage the use of public transit by persons residing or working within the vicinity of a transit station.

_____
_____
_____
_____

5. If your agency or firm has been involved in joint public-private development, please describe the land uses associated with the development, as follows:

Project Name:
Date Proposed or Request for Proposals Issued:
Date Construction Completed: __(check here if not completed)
Location: __Central City __Suburban __Exurban
__Other (please describe:)
Sponsoring Agency:
Other Participating Agencies:

Name of Private Developer(s)

Land Use	Square Footage Proposed	Square Footage Completed	Form of Ownership	Distance from Transit Station
Multi-family Residential				
Single-Family Residential				

Commercial/ Retail				
Office				
Industrial				
Other				

Please feel free to attach additional pages for other projects, if necessary (forms are provided in Appendix A).

6. For any of the projects listed under question 5, above, have any studies been done to determine the degree to which the project has encouraged the use of public transit, and/or to determine trip generation rates?

7. Has your agency been involved in any effort to revise local zoning or other land use controls to encourage public transit usage? Yes No

8. If your answer to question 6 was "yes," what types of revisions has your agency advocated?

- ❑ Mixed use development
- ❑ Density increases in transit corridors
- ❑ Rezoning to add permitted uses in transit corridors
- ❑ Density bonuses
- ❑ Impact fee waivers, exemptions or modifications
- ❑ Concurrency or adequate public facilities waivers, exemptions or modifications
- ❑ Transfer of development rights
- ❑ Density transfers
- ❑ Modification of local street standards
- ❑ Other (Please describe):

APPENDIX B—TECHNIQUES USED BY SURVEY RESPONDENTS TO ENCOURAGE TOD

Agency	Mixed Use	Density Bonus	Density Increase	Density Transfer	TDR	Street Stds	Uses	Impact Fee	Concur-rency
City of Culver City	✓	✓	✓						
Broward County Mass Transit								✓	✓
Washington Metropolitan Area Transit Authority									
Community Transit (Snohomish County Public Transportation Benefit Area Corp.							✓		
Santa Clara Cou nty	✓		✓				✓		
Champaign-Urbana Mass Transit Dist.									
City Utilities of Springfield, MO									
Sacramento Regional Transit District	✓		✓			✓	✓		
Tri-county Metro Transp. District	✓		✓		✓	✓	✓	✓	
King County DOT	✓	✓	✓	✓	✓				✓
Triangle Transit Authority	✓	✓	✓	✓	✓	✓	✓	✓	

APPENDIX C—SURVEY PARTICIPANTS ENGAGED IN JOINT DEVELOPMENT PROJECTS

Project Name/ Respondent/ Form of Ownership	Other Agencies	Developer	Proposed	Completed	Location	R sf	DU	C/R sf	O sf	I sf	NR sf (1)	Other sf	Acres	Type	Transit Access/ Notes
Lauderhill Mall Broward County Mass Transit															Parking lot transfer facility upgrade; $90,000
Culver City Senior Housing Culver City, CA Private/Nonprofit	Culver City Housing Division (HUD Funds) and Redevelopment Agency	Jewish Federation Council of Greater Los Angeles	1989	1992	S		48					Senior Hsg. Residential			300 ft from transit station
Rotary Plaza Culver City, CA	Culver City Housing Division (HUD Funds) and Redevelopment Agency		1982	1986	S		100					Senior Hsg. Residential			100 ft from transit station
Studio Royale & Palm Court Culver City, CA Private/Nonprofit	Culver City Housing Division (HUD Funds) and Redevelopment Agency	Retirement Housing Foundation and Rotary Club	1985	1990 & 1991	S		197					Senior Hsg. Residential			200 ft from transit station
CUMTD Intermodal Transportation Center CUMTD	FTA (Fed.): Illinois DOT; City of Champaign		1996	1998	S			33,575				CUMTD facilities; concourse			Uses Livable Communities funds
American Plaza Transfer Station San Diego MTDB	Shimizu Land Corporation				C			14,000	555,630			Hotel; parking			Trolley, bus, commuter rail
Chula Vista Visitor Information Center San Diego MTDB	City of Chula Vista, County			1986	S						1,600	Visitor information; parking			Trolley, bus

Project Name/ Respondent/ Form of Ownership	Other Agencies	Developer	Proposed	Completed	Location	R sf	DU	C/R sf	O sf	I sf	NR sf (1)	Other sf	Acres	Type	Transit Access/ Notes
County Administration Center San Diego MTDB	County								600,000						Trolley, bus
Creekside Apartments San Diego MTDB 50 year ground lease		WKB General Partnership			C		144					Daycare & play area			Trolley, bus
Fashion Valley Shopping Center San Diego MTDB		Hahn Corp.		Sep-80	C										Freestanding structure surrounded by bus bays
Grossmont Trolley Center Cinemas San Diego MTDB	La Mesa Community Redevelopment Agency	CCRT Properties		1991	S							Under regional shopping mall	15.30	Retail	Trolley, bus
La Mesa Village Plaza San Diego MTDB	La Mesa Community Redevelopment Agency	La Mesa Village Plaza Associates, Commonwealth Companies, Inc.		1991-1992	S		95			244,000					Trolley, bus
Lemon Grove Depot San Diego MTDB		City of Lemon Grove		1986	C							Depot and Chamber offices			Trolley, bus
Martin Luther King Promenade San Diego MTDB	Centre City Development Corporation	Public and private Private owners										Linear park	12.00	Park	Trolley
MTSI James R. Mills Building San Diego MTDB	San Diego Regional Building Authority	Starboard Development Corporation	Mar-86	Jan-89	C			6,500	173,500						Trolley passes through building
Rio Vista West Mixed Use San Diego MTDB		Cal Mat Properties, Inc.		1995-1996			1,000	325,000	165,000						Trolley, bus

Project Name/ Respondent/ Form of Ownership	Other Agencies	Developer	Proposed	Completed	Location	R sf	DU	C/R sf	O sf	I sf	NR sf (1)	Other sf	Acres	Type	Transit Access/ Notes
San Diego Convention Center San Diego MTDB	Unified Port District			1989-1998	C					1.46 million					Trolley
San Diego Jack Murphy Stadium Station San Diego MTDB	City			1998								LRT station			Light rail
Santa Fe Depot/Santa Fe Plaza San Diego MTDB		Catellus Corporation		2008	C	Unspecified residential						Hotel			Multiphased; commuter rail and trolley
SDSU Transit Center San Diego MTDB	SDSU & County			1987								Transit center			Trolley
Sweetwater Union Adult Education School San Diego MTDB	High School District with National City Community Development Commission			1996			40	8,000			24,000	School (included above), parking			Trolley, bus
Uptown District San Diego MTDB		Oliver McMillan/ Odmark & Thelan		1990		304,000	318	145,000					14.00	Mixed	Bus; has commercial center and 1200 parking spaces
Villages of La Mesa San Diego MTDB	La Mesa Community Redevelopment Agency	ITEC Properties & Douglas Allred		1987	S		384								
Tamien Child Care Center Santa Clara County Transit District Transit District Lease to Operator		None			S			9,600						Day care	At transit station
Almaden Park-and-Ride Lot Joint Development Project Santa Clara County Transit District Rental	City of San Jose Housing Dept.	Almaden Lake Village Assoc.	1992	Not	E	135,000	250						5.00	R	100 ft from transit station

Project Name/ Respondent/ Form of Ownership	Other Agencies	Developer	Proposed	Completed	Location	R sf	DU	C/R sf	O sf	I sf	NR sf (1)	Other sf	Acres	Type	Transit Access/ Notes
Ohlone-Chynoweth Park-and-Ride Lot Joint Development Project Santa Clara County Transit District MFR—Rental; C/R—Lease; Other—Lease	City of San Jose Housing Dept.	Eden Housing, Inc.	1995	Not	S	319,600	200	5,000				3,000	7.00	Retail & day care	MFR: 50 ft from transit station; C/R: 50 ft from transit station; Other: 100 ft from transit station
Partnership Industrial Center Springfield CU Fee by City Utilities	City of Springfield	Springfield Business & Development Corp.; Springfield Area Chamber of Commerce	1992	Ongoing									350.00		5 mi., located in enterprise zone. 350 acres proposed, 150 acres completed
Beaverton Creek Station Area Tri-Met			1996		S		562						120.00	MF	Adjacent
Civic Stadium Housing Development Tri-Met	Portland Development Commission, City of Portland Bureau of Planning, etc.	Grayco Resources, Inc.	Apr-97	Apr-98	C		135	Ground floor of civic stadium					0.49	MF/C	Pedestrian access to transit. MF and commercial
East Burnside Infill Housing: 172nd & East Burnside Tri-Met Sale and development agreement using excess LRT ROW, CMAQ funds	Portland Development Commission, City of Portland Bureau of Planning, etc.		1993		S		22						0.37		Adjacent to transit station; 60 units/acre

Project Name/ Respondent/ Form of Ownership	Other Agencies	Developer	Proposed	Completed	Location	R sf	DU	C/R sf	O sf	I sf	NR sf (1)	Other sf	Acres	Type	Transit Access/ Notes
East Burnside Infill Housing: Gresham Central Tri-Met Sale excess LRT ROW to private developer with development agreement; CMAQ funds used	Portland Development Commission, City of Portland Bureau of Planning, etc.		1993	1996	C		90						2.58	R	Adjacent to transit station; 35 units/acre
El Monica Tri-Met CMAQ funds	Portland Development Commission, City of Portland Bureau of Planning, etc.	Peter Calthorpe-Designer			S		74								1300–1500 sf homes on 1700–2500 sf lots
Gateway Project Tri-Met	Sisters of Providence			1995	C				Medical office & park & ride facility						Adjacent to transit station
Goose Hollow Development Strategy Tri-Met			1997	To be 1998			588	Commercial alterations (sf n/r)	Medical alterations (sf n/r)						Station community plan. Transit agency assisting in locating development opportunities. Currently mixed use with bus ridership of 10,850.
Gresham Civic Neighborhood Plan District Tri-Met	City of Gresham, Winmar, Tri-Met and Metro		1995	1997	S								130.00	Mixed	New MAX transit station planned
Howard's Way Condominiums Tri-Met					C		24							MF	Adjacent to LRT station; condominiums
Orenco Tri-Met	City of Hillsboro		1996				1,600	550,000	100,000				135.00	Mixed (see above)	Near station

Project Name/ Respondent/ Form of Ownership	Other Agencies	Developer	Proposed	Completed	Location	R sf	DU	C/R sf	O sf	I sf	NR sf (1)	Other sf	Acres	Type	Transit Access/ Notes
SW 185th Avenue/Parr Lumber Tri-Met Oregon Regional Primate Research Center and the Parr Family	Hillsboro, Washington County & Beaverton		Planned					Range		Range					Adjacent to transit station
SW 205th Avenue/Quatama Tri-Met	Hillsboro						500						88.00	Mixed (R, O, C, retail)	Adjacent to transit. One 58-acre parcel planned for housing; another 30-acre parcel for 500–600 dwelling units.
Ballston Metro Center WMATA MFR—fee ownership; CR—lease; Hotel—lease		Giusepe Cecchi	1982, 1985	1990	S	355,596		244,055				Hotel: 130,290			Adjacent to transit station
Bethesda Metro Center WMATA All lease		R&K Metro Associates, L.P	1979	1985	S			60,000	378,000			Hotel: 380 rooms			Adjacent to transit station
Dupont Circle WMATA Lease		Square 138 Associates, L.P	1986	1987	C			3,171							Adjacent to transit station
Farragut North WMATA Lease		Miller/Connecticut Ave. Associates	1974	1978	C			41,650	143,933						Adjacent to transit station
Friendship Heights (Chevy Chase Metro Building) WMATA Lease		Chevy Chase Land Company	1982	1984	S			16,000	212,508						Adjacent to transit station
McPherson Square WMATA Lease		14th and Eye Street Associates, L.P	1980	1983	C			10,725	153,567						Adjacent to transit station

Project Name/ Respondent/ Form of Ownership	Other Agencies	Developer	Proposed	Completed	Location	R sf	DU	C/R sf	O sf	I sf	NR sf (1)	Other sf	Acres	Type	Transit Access/ Notes
New Carrollton WMATA		National Railroad Passenger Corp. (Amtrak)	1983									Intercity Railroad Passenger Station: 11,783			
New Carrollton WMATA		Prince George's County	1982	1985								Parking garage			100 yds from transit station
Van Ness WMATA Lease		4250 Connecticut Avenue, L.P	1979	1983				41,500	162,500						Adjacent to transit station
TOTAL						1,114,196	6,371	1,513,776	2,644,638	1,704,000	25,600	3,000	880		

Key:

sf = square feet
DU = dwelling units
MF = multifamily residential
SF = single-family residential
C = commercial
R = retial
O = office
I = institutional
(1) = The column refers to undesignated nonresidential square footage

Respondents:

Broward County Mass Transit (Florida)
Champaign-Urbana Mass Transit District (CUMTD) (Illinois)
Connecticut Department of Transportation
City of Culver City, California
King County Department of Transportation (Washington)
Tri-County Metropolitan Transportation District (Oregon)
Sacramento Regional Transit District (California)
Metropolitan Transit Development Board (San Diego, California)
Santa Clara County Transit District (SCCTD)
City Utilities of Springfield, Missouri (Springfield CU)
Triangle Transit Authority (North California)
Community Transit (Snohomish County, Washington)
Washington Metropolitan Area Transit Authority (WMATA) (District of Columbia)
Yakima Transit (Washington)

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