



April 5, 2013

The Honorable Peter M. Rogoff
Administrator
Federal Transit Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

RE: Joint Development: Proposed Circular, Docket No. FTA-2013-0013

Dear Administrator Rogoff:

On behalf of the Center for Transit-Oriented Development (CTOD), we write to provide comments on the Federal Transit Administration's proposed circular on joint development, issued March 6, 2013. CTOD appreciates the opportunity to submit comments to FTA regarding its guidance on joint development activities.

CTOD is the only national effort dedicated to providing best practices, research, and tools to support equitable market-based transit-oriented development (TOD). CTOD partners work with both the public and private sectors to strategize about ways to encourage the development of high-performing communities around transit stations and to build transit systems that maximize development potential. CTOD is a partnership of Reconnecting America, the Center for Neighborhood Technology (CNT), and Strategic Economics. Reconnecting America is a national nonprofit that helps transform promising ideas into thriving communities, where transportation choices make it easy to get from place to place, where businesses flourish, and where people from all walks of life can afford to live, work, and visit. CNT is a creative think-and-do tank that advances urban sustainability by researching, inventing, and testing strategies that use resources more efficiently and equitably. Strategic Economics is an urban and regional economics and research firm.

CTOD has received federal funding to evaluate best practices in TOD, to research economic development impacts of transit investments, and to help develop standards and guidelines for TOD. However, we did not use federal funds to develop these comments. Our recommendations reflect many years of discussion with developers, local economic development directors, the transit industry, community development practitioners, land planners, academics, residents, and employers, as well as our own experience working with communities that are trying to build transit networks and promote mixed-income, transit-oriented development.

CTOD appreciates FTA's attention to joint development, as joint development is often a mechanism for creating walkable, transit-oriented communities. Such communities have numerous benefits that accrue to families and individuals as well as to public and private-sector entities, including the federal government. The impacts of mixed-income, mixed-use TOD can include reduced household expenditures on housing and transportation, increased revenues for local governments, and higher sales for local businesses, as well as improved public health and safety and protection of the natural environment. Transit agencies' contribution to TOD through joint development activities have been shown to both increase ridership on their systems and to promote economic development in the surrounding communities.

The proposed circular is an improvement over the existing guidance in several ways. First, the organization and flow of the document is logical and understandable, and the definitions of key terms and illustrative examples provided in various sections are helpful in clarifying points of confusion. Equally important is the inclusion of FTA's statement of policy, namely, that "FTA encourages recipients to undertake joint development, and promotes the recipient's ability to work with the private sector and others to pursue joint development." (Proposed Circular, II-1) This clearly articulated policy will encourage transit agencies to elevate joint development amidst their other operational priorities, which will ultimately help to create more transit-supportive communities.

We also appreciate FTA's clear explanation of the difference between joint development and TOD, two terms that are often conflated with each other. We commend FTA for the statement that "FTA's policy is to encourage TOD in all appropriate circumstances," (Proposed Circular, II-1) and suggest that FTA could strengthen this statement by also encouraging transit agencies to deploy their existing tools, such as new transit lines and joint development activities, in ways that will encourage TOD in the surrounding neighborhoods.

Within the context of our overall support for the proposed circular, we offer suggestions to improve or refine some of its elements. Our suggestions stem from our work with transit agencies on joint development and TOD, including a roundtable we hosted in 2011 on the topic for FTA. In general, we believe the circular should lay out a process and requirements for joint development that are as clear and simple as possible, to avoid confusion and delay during the time-sensitive project development process. In addition, we urge FTA to keep requirements as flexible as possible, since joint development goals and project details will differ significantly from one region to another, and even within regions. The questions and suggestions below are intended to assist FTA in achieving those goals.

1. Revenue Requirements

- a. CTOD recommends that FTA acknowledge other benefits of joint development for transit agencies besides revenue generation.**

CTOD recognizes that revenue generation for transit agencies is an important goal of joint development projects, particularly in these fiscally constrained times. We also believe that joint development serves other important goals, including increased ridership and economic development (both of which help to make the case for increased support to transit from local communities, so in a sense they can be seen as potential revenue raisers as well). Joint development can create value to the community and region when design patterns allow a reduction in cost of living by lowering the costs of transportation through increased transit, bicycle, and walking trips, allowing people to put more of their money back into the local and regional economy.

We are concerned that the proposed circular appears to elevate revenue generation above other goals. For example, on page II-2 the circular states, “FTA’s policy is to maximize the utility of FTA-funded projects and encourage transit agencies *to generate program income* through joint development.” (Emphasis added.) Similarly, on page II-3, the circular states that a joint development project must “*produce revenue* and reserve a fair share of that revenue for public transportation” (emphasis added); the italicized phrase appears to be a new requirement that did not appear in previous guidance. The emphasis in the circular on production of revenue for the transit agency could give the impression that FTA will not approve joint development projects that serve other important goals, such as catalyzing development in a weak-market area or providing affordable housing. CTOD therefore recommends that FTA explicitly acknowledge in the circular that increased ridership and economic development, among others, are important outcomes of joint development projects.

b. CTOD recommends that FTA not introduce a new requirement but rather continue to rely on local determination of “fair share of revenue.”

CTOD appreciates FTA’s retention of the provision in the existing guidance that allows a transit agency’s Board of Directors (or equivalent governing body) to determine whether the terms of the joint development project are commercially reasonable and fair to the agency. The local agency is in the best position to understand the interplay between the agency’s goals, market conditions, community needs, local and regional requirements, and other factors that will help to determine whether the share of revenue to be received by the transit agency is fair.

We are therefore concerned that the circular introduces a new requirement that FTA approve the amount of revenue as “meaningful.” (Proposed Circular, III-6) The introduction of this new requirement raises the possibility that FTA may reject a proposed project based on the actual amount of revenue to be received, even after the local Board of Directors has determined that the transit agency will receive a fair share of revenue. “Meaningful” is also a subjective term, which could differ depending upon who is doing the review. Moreover, the amount of revenue generated by joint development projects has historically been relatively small compared to transit agencies’ overall budgets, raising the question of whether any realistic amount of revenue from joint development would be considered meaningful.

An additional point of concern stems from comments made by FTA staff on a March 28, 2013 public webinar on the proposed circular. In discussing the fair share of revenue, staff introduced the idea that

fare revenue from increased ridership could only be considered part of the “fair share of revenue” if it was a “net positive” to the transit agency, an apparent change from current practice.

We urge FTA not to impose additional restrictions on the evaluation of “fair share of revenue” by requiring transit agencies to demonstrate that revenue is “meaningful” or that an increase in fare revenue is a net positive for the agency. In order to achieve the dual goals of establishing requirements for joint development that are both clear and flexible, we recommend that FTA continue its practice of relying on a local determination of fair share.

2. Relationship to New Starts Program’s Affordable Housing Criteria

a. CTOD recommends that FTA explicitly state that transit agencies can support affordable housing through joint development.

As you are aware, FTA recently issued a final rule governing the evaluation criteria for the New Starts program. As part of that rule, FTA included, for the first time, an evaluation of the number of affordable residential units in place around proposed transit stations and of the plans and policies in place to support preservation and creation of additional affordable units. CTOD has commended this approach due to the benefits it will provide the new transit line as well as the families occupying the units. In addition, the new rule allows transit agencies to undertake joint development activities as part of their New Starts project without having to include the joint development costs in the New Starts project’s cost-effectiveness evaluation. FTA explicitly stated that it intended this change to remove a disincentive to transit agencies conducting activities as part of the New Starts process to achieve a more transit-supportive environment around the future stations. Taken together, these two rule changes create the potential for a significant increase in affordable housing around new transit lines.

As currently proposed, the circular does not mention affordable housing production as a possible goal of joint development, despite the fact that locating affordable housing near transit is one of the most effective ways of increasing transit ridership.¹ Given FTA’s recognition in the New Starts context of the value of locating affordable housing near transit, we recommend that FTA make clear that the circular not only allows but encourages transit agencies to support affordable housing preservation or production through joint development. Such a statement will help to ensure that FTA’s position on the importance of affordable housing is consistent across programs.

3. Additional Points of Clarification

a. FTA should clearly explain the relationship between joint development and incidental use, and clarify that non-profit uses are permitted in both cases.

¹ See, e.g., “Locating Affordable Housing Near Transit: A Strategic Economic Decision,” Reconnecting America, September 2012.

The proposed circular states that transit agencies may pursue joint development through incidental use of real property. (Proposed Circular, II-4) However, in the section explaining incidental use of real property (pages IV-4 and IV-5), the circular does not indicate whether, and to what extent, a proposed incidental use of transit property is subject to the joint development requirements outlined in Chapter III. Instead, the circular lists considerations for incidental use from the Grant Management Requirements Circular, 5010.1D (which the proposed circular is intended to supersede as it pertains to joint development). Taken together, these sections of the proposed circular raise questions about whether incidental use should or should not be considered joint development.

Similarly, FTA should clarify the statement in the section on incidental use that “[w]hile FTA is particularly interested in encouraging incidental use as a means of supplementing transit revenues, non-profit uses are also permitted under certain circumstances.” (Proposed Circular, IV-5) The circular gives no indication as to what those circumstances would be. We note that in the section on “Use of Real Property,” the circular states that “[i]n approving a use of real property, or property rights, FTA will rely on the project participants, including, notably, the grant recipient, to determine the appropriate use of real property for joint development.” (Proposed Circular, IV-1) This statement suggests that it is the transit agency, not FTA, that should determine when a non-profit use, such as community services or affordable housing, is appropriate as an incidental use. FTA should clarify that its approval of an incidental use will not depend upon the type of use, but rather upon whether that use interferes with the public transportation use of the property.

b. FTA should explicitly state that land sales are possible under joint development rules.

Under current guidance, transit agencies cannot sell land in fee simple for a joint development, but they can sell land with a reservation of rights sufficient to allow the agency to retain satisfactory continuing control and to ensure that the land remains in a transit use. The ability to sell land in joint development projects has been used in several situations, particularly in situations in which the land would not generate enough lease revenue to justify the staff time required to manage the lease, or in cases in which the financing sources require the developer to own the underlying land. Our reading of the circular suggests that FTA does not intend to change this eligibility, and that the full list of possible arrangements (including “sale”) on page IV-3 is intended to apply to joint development projects. However, because the circular does not explicitly state that sales (other than fee simple sales) are allowed in joint development, it could be interpreted to allow only leases. We therefore recommend that in order to provide clear and flexible guidance, FTA explicitly state that sales (other than fee simple sales) are permitted under joint development rules.

c. FTA should clarify that the 2011 pedestrian and bicycle policy guidance *de facto* thresholds for a functional relationship to transit apply in the joint development context.

The proposed circular states that it supersedes joint development provisions included in the 2011 Policy Statement on the Eligibility of Pedestrian and Bicycle Improvements Under Federal Transit Law (Proposed Circular, page 1). However, that guidance is cited later in the circular, in the section on

functional relationship to public transportation, to provide more specific information about the distance most people will walk or bicycle to a transit station. (Proposed Circular, III-5) It is not clear whether the guidance is cited merely as an illustrative example, or if FTA's intention is that joint development projects that are within the thresholds in the 2011 guidance (1/2 mile for projects with a pedestrian component and 3 miles for projects with a bicycle component) will have a *de facto* relationship to public transportation. Greater clarity on this point would be useful.

d. FTA should clarify the impact of Full Funding Grant Agreements on parking requirements in joint development.

In our previous work on joint development, CTOD has identified parking requirements as one of the biggest points of confusion. In particular, it is not clear to many participants in joint development projects whether, and how much, parking must be replaced if parking spaces are converted to another use. While we appreciate FTA's clear statement that under joint development rules, FTA does not require one-to-one replacement, the circular does not adequately explain how requirements from the New Starts program might limit that flexibility. The discussion of Full Funding Grant Agreements in the section on parking states that transit agencies must achieve "certain 'user benefits'", the implication being that elimination of parking spaces could affect the agency's ability to achieve those benefits. Since "user benefits" is not a defined term in the recently-issued New Starts regulation, FTA should clearly articulate what provisions in Full Funding Grant Agreements could require replacement parking, and provide examples of scenarios in which one-to-one replacement would and would not be necessary for projects on land that was +funded through an FFGA.

e. FTA should clarify the applicability of the circular to joint development projects in which the land was purchased with non-FTA federal funds.

In recent years, transit projects have received federal funding from sources beyond FTA's programs, including FHWA's Surface Transportation Program and Congestion Mitigation and Air Quality Program and DOT's TIGER and TIFIA programs. We hope and expect that these programs will remain important sources of funding for transit going forward. In order to avoid confusion, FTA should clearly state whether and to what extent the circular applies to transit-agency owned land that was purchased with federal funding or financial assistance from non-FTA programs.

4. Comments on Process.

a. CTOD recommends that FTA include graphics such as a flow chart and timeline to help clarify the approval process, as well as additional illustrative examples.

As noted above, the proposed circular greatly improves on the organization and clarity of the previous guidance. In order to make the circular as clear and simple as possible, CTOD recommends that FTA include a flow chart indicating when FTA or other federal requirements are triggered during a joint development project, along with a schedule or timeline for FTA review and approval (including an

indication of which decisions will be handled by headquarters and which by regional offices). Joint development projects are by their nature time-sensitive, as market conditions and developer interests can change in a relatively short timeframe. For this reason a clear understanding and shared expectations among all parties regarding the review process and timeline is essential.

In addition, the circular should offer more examples of actual scenarios and acceptable outcomes, such as model language for achieving satisfactory continuing control, possible shared parking arrangements, and example situations in which NEPA does and does not apply. While such examples cannot be expected to cover every scenario, they can serve as a helpful guide to transit agencies and other joint development participants as well as FTA regional staff charged with reviewing proposed joint development projects. A nationally available database of FTA-approved joint development projects, as called for in comments to this docket by the American Public Transportation Association, would also help by supplementing the illustrative scenarios included in the circular with real-life examples.

CONCLUSION

CTOD greatly appreciates the opportunity to provide this input into FTA's Proposed Joint Development Circular. We look forward to continuing to work with FTA to expand the use of joint development and other land disposition activities to support the creation of equitable transit-oriented development. In the meantime, please contact Sarah Kline at (202) 429-6990 x202 or skline@reconnectingamerica.org with any questions about these comments.

Sincerely,



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