

# PLANNING FOR DENSITY: PROMISES, PERILS AND A PARADOX

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## I. INTRODUCTION

Over the past few decades, land use planning and urban development practices increasingly have come to prioritize “planning for density.” Put differently, government officials at all levels have embraced the goal of promoting and developing dense, mixed-land-use, walkable urban environments, rather than dispersed, sprawling single-land-use, auto-dependent suburban ones. The trend is perhaps most evident in efforts to densify and redevelop center cities, although many suburban communities, both old and new, also have embraced the goal of planning for density and revised their planning practices accordingly.

The planning for density toolkit is expansive, spanning both mandatory rules and voluntary incentives. These tools include: smart-growth and growth-management policies that seek to direct new development into built-up areas and restrict new suburban development;<sup>1</sup> regional government devices that aim to address interlocal inequities and rationalize development within metropolitan areas;<sup>2</sup> urban development efforts, including tax

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1. See, e.g., *About Smart Growth*, U.S. EPA, <https://www.epa.gov/smartgrowth/about-smart-growth#smartgrowth> (last visited Jan. 1, 2018); *APA Policy Guide on Smart Growth*, AM. PLAN. ASS’N (Apr. 14, 2012), <https://www.planning.org/policy/guides/adopted/smartgrowth.htm>.

2. See generally MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* (1997); NEAL R. PEIRCE WITH CURTIS W. JOHNSON & JOHN STUART HALL, *CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD* (1993); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1136–41 (1996); Sheryll D. Cashin, *Localism, Self-Interest, and the*

increment financing and other economic development incentives, urban infill, and brownfield remediation efforts;<sup>3</sup> and “new urbanist” planning and development practices, including innovative and increasingly popular regulatory alternatives to Euclidian zoning.<sup>4</sup> None of this is to say that we do not continue to build sprawling suburbs, because we certainly do. But it is to say that both regulators and developers are more focused—or at least focused with more intentionality—on density than they were in past generations.

Proponents of planning for density argue that it holds many promises—economic, ecological, and social<sup>5</sup>—but they tend to disregard or dismiss the reality that there are perils and paradoxes associated with these practices as well. In this essay, I explore these perils and paradoxes. I do so as a proponent of urban density. In the interest of full disclosure, I grew up in suburban Kansas City, and I understand and respect Americans’ affinity for suburbia. But I have—to the befuddlement of my suburbanite family members—come to consider myself a convert to urbanism.<sup>6</sup> An authentic religious conversion usually entails a careful study of a new faith—including the confrontation and engagement with its limitations and failings—that leads to the conviction that it holds the truth *despite its flaws*. The same, I think, is true of a conversion to urbanism. I have written extensively about how land use planning, policing, and education policies can be employed to help urban communities thrive.<sup>7</sup> This work has led to the

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*Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2034–37 (2000).

3. See generally NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 82–85 (2010) [hereinafter GARNETT, ORDERING THE CITY]; Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65 (2010); *Empowerment Zones, Renewal and Enterprise Communities*, U.S. DEPT. OF HOUSING & URB. DEV., [https://egis-hud.opendata.arcgis.com/datasets/23a64021cec34a8d99b159a58c535d0d\\_0](https://egis-hud.opendata.arcgis.com/datasets/23a64021cec34a8d99b159a58c535d0d_0) (last visited Jan. 1, 2018); *Overview of the Brownfields Program*, U.S. EPA, <https://www.epa.gov/brownfields/overview-brownfields-program> (last visited Jan. 1, 2018); *Urban Infill and Brownfield Redevelopment*, SUSTAINABLE CITIES INST., NAT’L LEAGUE OF CITIES (Mar. 7, 2017), <http://www.nlc.org/resource/urban-infill-brownfields-redevelopment>.

4. See Nicole Stelle Garnett, *Redeeming Transect Zoning?*, 78 BROOK. L. REV. 571, 580 n.34 (2013). See also *What is New Urbanism?*, CONGRESS FOR THE NEW URBANISM, <https://www.cnu.org/resources/what-new-urbanism> (last visited Jan. 1, 2018) (summarizing the principles of new urbanism).

5. See *infra* Part II.

6. My husband and I live what passes for an “urban” life in South Bend, Indiana. We have chosen to raise our family in a modest, century-old house located less than a mile from both the university where I work and downtown South Bend; our children have all attended an urban Catholic parish school founded more than 150 years ago.

7. See, e.g., GARNETT, *supra* note 3, at 83–87; MARGARET F. BRINIG & NICOLE STELLE GARNETT, LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS’ IMPORTANCE IN URBAN AMERICA 2–4 (2014); Nicole Stelle Garnett, *Affordable Private Education and the Middle*

conviction that the only successful way to promote policies that encourage density and urban vitality is to face the reality that these practices are not costless—and to find ways to address their costs. That is, I have come to believe that the case for density must reflect both a conviction that density is worth promoting and an understanding that planning for density is hardly a panacea. In other words, we need to be smarter about smart growth.

This essay proceeds in three parts. The first briefly describes the social, economic, ecological, and political dynamics fueling the trend toward planning for density. This section focuses, in particular, on the motivations of those promoting the tools in the planning-for-density toolkit, outlining the promises that proponents argue that these tools hold. The second addresses the perils of mandatory planning devices that seek to achieve density. The final section discusses a paradox of planning for diversity that virtually nobody considers, but which I believe may offer a path forward.

## II. THE PROMISES OF PLANNING FOR DENSITY

The current focus on planning for density results from the confluence of a number of factors. The first is the fact that elite residential preferences, especially among young professionals, increasingly have come—for a variety of reasons—to favor urban life.<sup>8</sup> These shifting preferences have fueled an urban comeback in some cities,<sup>9</sup> leading many urban leaders to focus on building the

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*Class City*, 77 U. CHI. L. REV. 201, 202–04 (2010); Nicole Stelle Garnett, *Managing the Urban Commons*, 160 U. PA. L. REV. 1995, 1998–99 (2012); Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 5–6 (2004); Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1077–81 (2005); Nicole Stelle Garnett, *Save the Cities, Stop the Suburbs?*, 116 YALE L.J. 598, 621–25 (2006); Nicole Stelle Garnett, *The People Paradox*, 2012 U. ILL. L. REV. 43, 45–46 (2012) [hereinafter *The People Paradox*].

8. See, e.g., Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275 (2006) (attributing the increased desire to live in urban areas to a rise in income and education levels and a decline in crime rates).

9. See, e.g., Joe Cortright, *Surging City Center Job Growth*, CITY OBSERVATORY 1–2 (Feb. 2015), <http://cityobservatory.org/wp-content/uploads/2015/02/Surging-City-Center-Jobs.pdf>; Melanie Eversley, *Hard-Knocks Cities Are Working on a Comeback*, USA TODAY (July 24, 2014, 10:40 PM), <https://www.usatoday.com/story/news/nation/2014/07/24/cities-visitors-campaigns/12202367/>; Richey Piiparinen, *The Rust Bend “Comeback”: To What?*, HUFFINGTON POST (Feb. 1, 2017, 6:50 AM), [http://www.huffingtonpost.com/entry/the-rust-belt-comeback-to-what\\_us\\_5890e681e4b080b3dad6fc81](http://www.huffingtonpost.com/entry/the-rust-belt-comeback-to-what_us_5890e681e4b080b3dad6fc81); Richard Voith & Susan Wachter, *The Return of America’s Cities: Economic Rebound and the Future of America’s Urban Centers*, PENN INST. FOR URB. RES. (Aug. 12, 2014), <http://pennur.upenn.edu/publications/the-return-of-americas-cities>. But see Jacob Anbinder, *Fool for the City: How We’re Over-hyping America’s Urban Comeback*, THE WEEK (Mar. 5, 2015), <http://theweek.com/articles/542508/fool-city-how-overhyping-americas-urban-comeback>.

kinds of communities that will attract what Richard Florida has called the “creative class.”<sup>10</sup> The second is the environmental movement, which has raised awareness about the ecological effects of sprawling suburban development, spurring the development of federal and state environmental initiatives as well as the “smart growth” movement and the regulatory tools associated with it.<sup>11</sup> The third is the regional government movement, which promotes policies, including growth management, that aim to mute the importance of local government boundaries and emphasizes the need for greater coordination among local government within metropolitan areas—especially with respect to land use planning.<sup>12</sup> And the fourth is the growing influence of the new urbanists, a loosely affiliated group of planners, architects, and lawyers who promote both urban design practices and regulatory alternatives to traditional Euclidean zoning practices.<sup>13</sup>

Not surprisingly, the articulated promises of planning for density map neatly onto the forces motivating the trend. For urban leaders, planning for density is a marketing strategy. As one commentator noted over a decade ago, urban leaders in cities large and small find themselves “[o]n a hunt for ways to put sex in the city.”<sup>14</sup> They seek to build the kind of communities—urban, mixed-use, and diverse—that they believe will attract elite, well-educated, hip, young, and affluent residents. The reasoning behind this ambition traces its roots to Richard Florida’s enormously influential book, *The Rise of the Creative Class*. Florida argues, in this book and others, that the modern economy is increasingly fueled by “creative” people who are attracted to “creative centers” that provide “the integrated eco-system or habitat where all forms of creativity—artistic and cultural, technological and economic—can take root and flourish.”<sup>15</sup> Cities,

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10. RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* (2002) [hereinafter FLORIDA, *THE RISE OF THE CREATIVE CLASS*]; RICHARD FLORIDA, *THE FLIGHT OF THE CREATIVE CLASS: THE NEW GLOBAL COMPETITION FOR TALENT* (2007) [hereinafter FLORIDA, *THE FLIGHT OF THE CREATIVE CLASS*].

11. See, e.g., RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 224 (2004); DOUGLAS FARR, *SUSTAINABLE URBANISM: URBAN DESIGN WITH NATURE* (2007).

12. See, e.g., Briffault, *supra* note 2, at 1147–50; ORFIELD, *supra* note 2, at 123–24; DAVID RUSK, *CITIES WITHOUT SUBURBS* 70 (1993).

13. See *What is New Urbanism?*, *supra* note 4.

14. John Leland, *On a Hunt for Ways to Put Sex in the City*, N.Y. TIMES, Dec. 11, 2003, <http://www.nytimes.com/2003/12/11/garden/on-a-hunt-for-ways-to-put-sex-in-the-city.html>.

15. FLORIDA, *THE RISE OF THE CREATIVE CLASS*, *supra* note 10, at 218. Accord FLORIDA, *THE FLIGHT OF THE CREATIVE CLASS*, *supra* note 10; RICHARD FLORIDA, *WHO’S YOUR CITY?: HOW THE CREATIVE ECONOMY IS MAKING WHERE TO LIVE THE MOST IMPORTANT DECISION IN YOUR LIFE* 116–20 (2008) [hereinafter FLORIDA, *WHO’S YOUR CITY?*].

Florida argues, “have become the prime location for the creative lifestyle and the new amenities that go with it.”<sup>16</sup> Florida’s arguments have been sharply criticized,<sup>17</sup> and the extent of America’s urban comeback remains contested.<sup>18</sup> But these disputes have not tempered the enthusiasm of urban leaders for “densification”—a reality reflected in, among other trends, the adoption of “new urbanist” land use regulations discussed below.<sup>19</sup>

Environmentalists focus on the ecological promises of planning for density.<sup>20</sup> They argue that “smart growth” regulations that channel growth back into urban centers and older suburbs (and restrict new development on the urban fringe) will help preserve greenfields and valuable agricultural lands,<sup>21</sup> protect wetlands and other sensitive habitats,<sup>22</sup> maintain biodiversity,<sup>23</sup> and reduce greenhouse gases.<sup>24</sup>

For regional government proponents, planning for density is a means of addressing the inefficiencies and inequalities that

16. FLORIDA, *THE RISE OF THE CREATIVE CLASS*, *supra* note 10, at 287.

17. See, e.g., JOEL KOTKIN, *THE HUMAN CITY: URBANISM FOR THE REST OF US* (2016) (questioning the evidence supporting Florida’s conclusions); David Brooks, *Where America is Working*, N.Y. TIMES, June 3, 2016, <https://www.nytimes.com/2016/06/03/opinion/where-america-is-working.html?mcubz=3>; Ian David Moss, *Deconstructing Richard Florida*, CREATEQUITY (Apr. 27, 2009) <http://createquity.com/2009/04/deconstructing-richard-florida/>. But cf. RICHARD FLORIDA, *THE NEW URBAN CRISIS: HOW OUR CITIES ARE INCREASING INEQUALITY, DEEPENING SEGREGATION, AND FAILING THE MIDDLE CLASS—AND WHAT WE CAN DO ABOUT IT* (2017) [hereinafter FLORIDA, *THE NEW URBAN CRISIS*] (recognizing that the benefits of urbanism are not equally distributed); Max Heninger, *A New Urban Crisis*, REAL CLEAR POLICY (Jan. 4, 2017) [http://www.realclearpolicy.com/articles/2017/01/04/a\\_new\\_urban\\_crisis\\_110129.html](http://www.realclearpolicy.com/articles/2017/01/04/a_new_urban_crisis_110129.html) (recognizing the competing views of Florida and Kotkin).

18. See, e.g., Anbinder, *supra* note 9.

19. See *infra* notes 44–45 and text accompanying notes.

20. See generally David Dodman, *Urban Form, Greenhouse Gas Emissions and Climate Vulnerability*, in POPULATION DYNAMICS AND CLIMATE CHANGE 64–79 (José Miguel Guzmán et al. eds., 2009), [http://www.unfpa.org/sites/default/files/resource-pdf/pop\\_dynamics\\_climate\\_change\\_0.pdf](http://www.unfpa.org/sites/default/files/resource-pdf/pop_dynamics_climate_change_0.pdf); Michael P. Johnson, *Environmental Impacts of Urban Sprawl: A Survey of the Literature and Proposed Research Agenda*, 33 ENV’T & PLAN. A 717 (2001); *APA Policy Guide on Smart Growth*, *supra* note 1; *Sprawl Overview*, SIERRA CLUB, <http://vault.sierraclub.org/sprawl/overview/> (last visited Jan. 1, 2018).

21. See, e.g., *APA Policy Guide on Agricultural Land Preservation*, AM. PLAN. ASS’N, <https://www.planning.org/policy/guides/adopted/agricultural.htm> (last visited Jan. 1, 2018).

22. See, e.g., William E. Buzbee, *Urban Sprawl, Federalism and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 74–75 (1999).

23. See, e.g., Francesca Ortiz, *Biodiversity, the City, and Sprawl*, 82 B.U. L. REV. 145, 169–75 (2002); *Study Shows Urban Sprawl Threatens Genetic Diversity*, THE SAN DIEGO UNION-TRIB., Sept. 22, 2010, 6:00 AM, <http://www.sandiegouniontribune.com/sdut-urbanization-threatens-genetic-diversity-species-2010sep22-story.html>.

24. See, e.g., Christopher Jones & Daniel M. Kammen, *Spatial Distribution of U.S. Carbon Footprints Reveals Suburbanization Undermines Greenhouse Gas Benefits of Urban Population Density*, 48 ENVTL. SCI. & TECH. 895 (2014) (finding that dense urban centers contribute less greenhouse-gas emissions per person than other areas of the country, but these cities’ extensive suburbs wipe out their climate benefits).

pervade our metropolitan areas.<sup>25</sup> Proponents of regional government assume that suburbs are places of exit.<sup>26</sup> According to this account, suburbanites abandoned cities (often motivated by racism);<sup>27</sup> municipal incorporation laws shield suburbs from annexation;<sup>28</sup> exclusionary suburban land use policies prevent the exit of poor urban residents;<sup>29</sup> and exiters saddle urban governments with the burden of addressing (but not the resources to address) the myriad woes of poverty.<sup>30</sup> The never-ending cycle of new suburban development also necessitates wasteful development of new infrastructure (while older, urban infrastructure decays or lies fallow), reduces the opportunities for interlocal cooperation, and prevents local governments from capitalizing on economies of scale.<sup>31</sup>

Regionalists argue that suburbanites remain, in important respects, part of the urban polity, reasoning that the suburbs where they live are intertwined socially and economically with the center cities.<sup>32</sup> According to this view, suburbanites are essentially economic “leeches” that reap the benefits of cities without contributing in any meaningful way to supporting them.<sup>33</sup> For regionalists, economic and social justice mandate planning for density, especially through regional growth management tools that

25. See *supra* note 2.

26. See Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277 (2007).

27. See Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 256 (1993) (“[M]illions of people have escaped city problems by crossing the boundary between city and suburb . . . segregat[ing] many of America’s metropolitan areas into ‘two nations’: rich and poor, white and black, expanding and contracting.”); Cashin, *supra* note 2, at 2015 (“[F]ragmented political borders were . . . the result of economic, social, and racial differentiation—a locational sorting process . . .”).

28. See Briffault, *supra* note 2, at 1141–44.

29. See LEE ANNE FENNELL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* 42–60 (2009); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1048 (1996).

30. See ORFIELD, *supra* note 2, at 2 (“Throughout the United States, people move ‘up and out,’ taking their economic and social resources with them and leaving behind an increasingly dense core of poverty in the city and rapidly growing social needs in older suburbs.”).

31. See PEIRCE, *supra* note 2, at 97–99; Briffault, *supra* note 2, at 1147–50; Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 204–06 (2001).

32. The continued importance of center cities is supported by substantial evidence linking overall regional health with center-city fortunes, see RUSK, *supra* note 12, at 72–73, and suggests that commuters to city jobs tend to have higher wages than suburban employees, Gillette, *supra* note 31, at 241–42.

33. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 443 (1990) (asserting that suburbanites routinely deny that “[t]he city was the primary center of jobs and commercial and cultural institutions for the region”); Gillette, *supra* note 31, at 241 (“[S]uburbanites exploit the central city by taking advantage of the cultural and commercial benefits . . . but then retreat without contributing to the services necessary to provide those benefits and without redressing the social problems endemic to cities.”).

direct new development back into built-up areas. Encouraging (or requiring) urban redevelopment is embraced as a way to right the wrongs wrought by our fragmented system of local government, build more inclusive and just communities, and improve the educational and economic prospects of the urban poor.<sup>34</sup>

And then there are the new urbanists. I want to spend just a bit more time on them, both because they are not well-known outside of land use circles and because their growing influence on land use regulation is underappreciated. The new urbanism is also central to the paradox of planning for density. The new urbanists are a loosely affiliated group of architects and urban planning professionals who promote the development of—and the adoption of legal rules that mandate the development of—mixed-land-use “urban” neighborhoods.<sup>35</sup> The new urbanists’ claim builds, in important ways, upon Jane Jacobs’s enormously influential book, *The Death and Life of Great American Cities*.<sup>36</sup> Jacobs wrote at the apex of the urban renewal period, when urban planning ideology strongly favored the imposition of single-land-use patterns on our cities, even to the point of demolishing mixed-land-use communities in order to replace them with single-land-use ones. She vehemently rejected the accepted wisdom that dense urban neighborhoods were antiquated and unhealthy.<sup>37</sup> On the contrary, she argued that mixed-land-use neighborhoods are critical to city life, because commercial land uses both generate social capital and guarantee a steady supply of “eyes upon the street” to monitor and keep disorder and crime in check.<sup>38</sup>

The new urbanists embrace many of the environmentalists’ and regionalists’ arguments, but they argue that planning for density has cultural and aesthetic benefits as well. Their case against Euclidean zoning is part anti-suburban polemic and part pro-urban philosophy. At heart, the new urbanists’ claim is that cities are good for us, and suburbs are bad.<sup>39</sup> They are bad for two

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34. See Frug, *supra* note 27, at 279–81, 294–99.

35. See *Charter of the New Urbanism*, CONGRESS FOR THE NEW URBANISM (2001), <https://www.cnu.org/who-we-are/charter-new-urbanism> (stating the principles of the new urbanism); *What is CNU?*, CONGRESS FOR THE NEW URBANISM, <https://www.cnu.org/who-we-are> (last visited Jan. 1, 2018) (same); see also GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 149–54 (1999) (describing the principles of the new urbanism).

36. See generally JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

37. *Id.* at 3–25.

38. *Id.* at 34–38.

39. See, e.g., LÉON KRIER, *THE ARCHITECTURE OF COMMUNITY* 104 (Dhiru A. Thadani & Peter J. Hetzel eds. 2009) (“Functional zoning replaces the organic order of the city with the mechanical disorder of the suburbs . . .”).

reasons. First, the new urbanists believe that suburbs are ugly. Indeed, they think just about everything built since the Second World War that was not designed by new urbanists is ugly.<sup>40</sup> Second, they believe that urban neighborhoods build community. Cities, they argue, are as socializing and democratizing as suburbs are privatizing. Cities are diverse and vibrant, suburbs monolithic and isolating. To put the claim into social-science terminology, the new urbanists argue that cities generate social capital by drawing together strangers who would not otherwise connect, while suburbs inhibit social capital by further privatizing our already-atomized culture.<sup>41</sup> Thus, it follows that zoning laws that mandate a single-land-use, “suburban” built environment are antisocial and ought to be scrapped.<sup>42</sup> The normative claims of new urbanists are colorfully summarized by James Howard Kunstler as follows: “[T]he model of the human habitat dictated by zoning is a formless, soulless, centerless, demoralizing mess. It bankrupts families and townships. It causes mental illness. It disables whole classes of decent, normal citizens. It ruins the air we breathe. It corrupts and deadens our spirits.”<sup>43</sup>

Kunstler makes clear that the normative and aesthetic claims of the new urbanists are intertwined. New urbanists believe that architectural design can cure the social, as well as the aesthetic, woes of our culture. Traditional architecture, they argue, is friendly and welcoming; suburban architecture is cold and privatizing. They love front porches and hate garage doors. This is important because, over the last few decades, the new urbanists have mounted a remarkably successful public relations campaign against traditional zoning practices and the suburban land use patterns resulting from them. They also have developed an

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40. JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* 10 (1993) [hereinafter KUNSTLER, *THE GEOGRAPHY OF NOWHERE*] (“Eighty percent of everything ever built in America has been built in the last fifty years, and most of it is depressing, brutal, ugly, unhealthy and spiritually degrading . . .”).

41. By social capital, I refer here to Robert Putnam’s “lean and mean” definition: “[S]ocial networks and the norms of reciprocity . . . that arise from them.” ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000). Specifically, the new urbanists claim, to borrow from Putnam, that nonresidential land uses are “bridging” institutions—that is, they draw together groups of individuals who might not otherwise interact. *Id.* at 22–24. For a thoughtful discussion of the new urbanism and social capital, see Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 559–61 (2006).

42. JAMES HOWARD KUNSTLER, *HOME FROM NOWHERE: REMAKING OUR EVERYDAY WORLD FOR THE TWENTY-FIRST CENTURY* 134–35 (1996) [hereinafter KUNSTLER, *HOME FROM NOWHERE*] (“The public consensus about how to build a human settlement . . . has collapsed. Standards of excellence in architecture and town planning have collapsed. . . . What was thrown away must now be reconstructed, spelled out, and reinstated.”).

43. *Id.* at 112.



alternative to zoning laws—“transect zoning”—that seeks to impose these aesthetic sensibilities through the law, which local governments increasingly are embracing.<sup>44</sup> The reach of these regulations varies by jurisdiction,<sup>45</sup> with a growing number of local governments, including several major cities, choosing to implement them comprehensively on a city-wide basis.<sup>46</sup>

### III. THE PERILS OF PLANNING FOR DENSITY

The perils of planning for density are well-understood, if contested, and are primarily associated with the coercive (rather than the voluntary) regulatory practices in the planning-for-density toolkit—especially regulations that promote urban density by restricting suburban growth. The economics of growth management are fairly straightforward. Despite their best efforts, land use planners inevitably confront the law of supply and demand. Both economic theory and empirical research suggest that regulatory limits on new development drive up property values and reduce housing affordability.<sup>47</sup> Michael Schill succinctly summarized the problem as follows: “The Achilles’ heel of the ‘smart growth’ movement is the impact that many of the proposals put forth by its advocates would have on affordable housing.”<sup>48</sup>

According to proponents, properly structured, metropolitan- or state-wide limits on suburban development are necessary to

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44. See *Tools*, CONGRESS FOR THE NEW URBANISM, <https://www.cnu.org/resources/tools> (last visited Jan. 1, 2018); CHAD EMERSON & ANDRES DUANY, *THE SMARTCODE SOLUTION TO SPRAWL* (2007).

45. See Nate Berg, *Brave New Codes*, ARCHITECT MAG., July 2010, at 50, 51–53, <http://cdn.coverstand.com/11050/41861/41861.2.pdf>.

46. The cities of Miami, Denver, and Cincinnati have overhauled their existing zoning codes in favor of transect-zoning regulations. See, e.g., Dakota Handon & Alex Adams, *Miami 21: The Blueprint for Miami’s Future*, FLA. PLAN. 4 (Winter 2010), [http://www.fltd.com/research/tod\\_planning\\_and\\_fbc\\_in\\_florida/miami\\_21/miami\\_21\\_florida\\_planning.pdf](http://www.fltd.com/research/tod_planning_and_fbc_in_florida/miami_21/miami_21_florida_planning.pdf); CITY OF MIAMI PLAN. AND ZONING DEP’T, *MIAMI21: YOUR CITY, YOUR PLAN*, [www.miami21.org](http://www.miami21.org) (last visited Jan. 1, 2018); Christopher N. Osher, *Denver Council Passes Overhaul of City’s Zoning Laws*, DENVER POST (June 21, 2010, 4:03 PM), <http://www.denverpost.com/2010/06/21/denver-council-passes-overhaul-of-citys-zoning-laws/>; *How Does the Denver Zoning Code Work?*, DENVER DEP’T OF COMMUNITY PLAN. AND DEV., <https://www.denvergov.org/content/denvergov/en/community-planning-and-development/zoning/neighborhood-context.html> (last visited Jan. 1, 2018); John Yung, *Here’s How Cincinnati’s Form-Based Codes are Designed to Spur Redevelopment*, CINN. BUS. COURIER (Jan. 14, 2014, 9:45 AM) <http://www.bizjournals.com/cincinnati/news/2014/01/21/heres-how-cincinnati-form-based.html>.

47. See, e.g., Shen, *infra* note 54, at 70 (reviewing empirical studies analyzing the price effects of growth controls).

48. Michael H. Schill, Comment, *Smart Growth and Affordable Housing*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 102, 102 (Anthony Downs ed., 2004).

achieve urban density because local government power leads inevitably to a tragedy of the commons scenario within a metropolitan area.<sup>49</sup> Each suburban government jealously guards its authority to regulate land use so as to maximize local tax revenues (and resident satisfaction).<sup>50</sup> More affluent “inner-ring” suburbs tend to accomplish these goals through exclusionary zoning techniques that freeze out new development, pushing it to the suburban fringe.<sup>51</sup> Communities located on that fringe, recognizing their competitive advantage, have incentives to encourage development by relaxing land use standards.<sup>52</sup> Increased sprawl results inevitably from this pattern of exclusion and invitation.<sup>53</sup> When growth controls are imposed locally, therefore, they tend to exacerbate, rather than ameliorate, sprawl by shifting development to non-controlled areas.<sup>54</sup> As William Fischel has observed, local growth controls “probably cause metropolitan areas to be to spread out . . . [by] caus[ing] developers to go to other communities.”<sup>55</sup>

For this reason, growth-management and regional government proponents alike tend to favor controls imposed at the state or regional level, such as the urban growth boundaries imposed in Oregon. Proponents argue that regional growth controls can counter the inefficiencies described above by channeling new development back into declining center cities and saving undeveloped land from “cheating” suburbs with lax land use

49. See, e.g., ARTHUR C. NELSON & JAMES B. DUNCAN WITH CLANCY J. MULLEN & KIRK R. BISHOP, *GROWTH MANAGEMENT PRINCIPLES & PRACTICES* 19 (1993) (“Regional approaches to planning and growth management issues have long been championed as a necessary alternative to the problems associated with fragmented, uncoordinated, and competitive local government policies.”).

50. See, e.g., Briffault, *supra* note 33, at 349 (noting that “local government law does not distinguish within the category of municipal corporation between city and suburb”); *id.* at 366 (linking suburban autonomy and local land use regulation); Briffault, *supra* note 2, at 1134–35.

51. See Briffault, *supra* note 2, at 1135–36 (noting that affluent communities use exclusionary zoning to preserve high tax base); Frug, *supra* note 29, at 1083–84 (describing use of exclusionary zoning).

52. See Briffault, *supra* note 2, at 1135 (attributing “leapfrog” pattern of development” to exclusionary zoning in central suburbs that forces new development to outer-ring suburbs with more favorable political climates); WILLIAM A. FISCHEL, *DO GROWTH CONTROLS MATTER? A REVIEW OF EMPIRICAL EVIDENCE ON THE EFFECTIVENESS AND EFFICIENCY OF LOCAL GOVERNMENT LAND USE REGULATION* 55 (1990).

53. See, e.g., Robert H. Freilich & Linda Kirts Davis, *Saving the Land: The Utilization of Modern Techniques of Growth Management to Preserve Rural and Agricultural America*, 13 URB. L. 27, 30–31 (1981).

54. See, e.g., Q Shen, *Spatial Impacts of Locally Enacted Growth Controls: The San Francisco Bay Region in the 1980s*, 23 ENV’T & PLAN. B: PLAN. & DESIGN 61, 86 (1996).

55. FISCHEL, *supra* note 52, at 55.

regulations.<sup>56</sup> Unfortunately, centralized growth management policies likely exacerbate their price effects. One benefit of the traditional pattern of exclusion and invitation described above is that new growth on the suburban fringe tends to mitigate the price effects of growth controls in inner suburbs.<sup>57</sup> Sprawl, in turn, promotes the housing filtering process, by which a wealthier individual moving to a larger house sets off a “chain of successive housing moves” that increases the availability of quality housing for poor and moderate-income individuals.<sup>58</sup> We might therefore expect comprehensive growth management, more than local controls, to increase overall regional housing prices.<sup>59</sup>

Regional government proponents counter that centralized control over development policy can actually increase the affordability of housing overall,<sup>60</sup> by curtailing local governments’ exclusionary tendencies.<sup>61</sup> This is because regional growth policies not only limit exclusionary zoning, but also often incorporate planning tools (such as housing linkage, inclusionary zoning, density bonuses, and impact-fee waivers) designed to increase the supply of affordable housing.<sup>62</sup> Perhaps. But even assuming that policymakers muster the political will to implement affordability-promotion tools on a large enough scale to counter the

56. See, e.g., *id.* at 30 (arguing that growth controls would “benefit central city dwellers through rehabilitation and revitalization of the central city” and “would be environmentally beneficial by preserving agricultural land and open space”); William B. Shore, *Recentralization: The Single Answer to More Than a Dozen United States Problems and a Major Answer to Poverty*, 61 J. AM. PLAN. ASS’N 496 (1995).

57. See Nicole Stelle Garnett, *Save the Cities, Stop the Suburbs?* 116 YALE L.J. 598, 605–609 (2006) (reviewing literature).

58. Brian J.L. Berry, *Ghetto Expansion and Single-Family Housing Prices: Chicago, 1968–1972*, 3 J. URB. ECON. 397, 417 (1976) (arguing that suburbanization led to a massive chain of moves, which mitigated the price effects of racial discrimination in Chicago and enabled many families to improve their housing situation).

59. See, e.g., Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 509–28 (1991) (arguing that competition between municipalities may reduce their ability to exact concessions from developers); Arthur C. Nelson et al., *The Link between Growth Management and Housing Affordability: The Academic Evidence*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 127–28 (predicting that regional growth management policies will have greater price effects than will local ones, which permit housing consumers to migrate to uncontrolled jurisdictions).

60. See, e.g., GERRIT KNAAP & ARTHUR C. NELSON, *THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON* 52–58 (1992) (discussing conflicting evidence on the price effects of Oregon’s comprehensive growth management program).

61. Metropolitan fragmentation undoubtedly permits local governments to dress up exclusionary zoning in a growth-management gown. After all, limits on *all* new development serve the double purpose of excluding disfavored land uses (and questionable new neighbors) and making existing homes a scarcer, and therefore more valuable, resource. See, e.g., Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE: J. POL’Y DEV. & RES. 139, 146 (2005) (discussing literature).

62. Richard P. Voith & David L. Crawford, *Smart Growth and Affordable Housing*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT?, 86–100.

regressive effects of growth management—a big “if,” in my opinion—the transitional fairness questions raised by suburban growth restrictions remain. These concerns are not limited to housing affordability. Even if a regional development strategy succeeded in holding constant the overall cost of housing, most affordable housing would likely continue to be found in center cities and older suburbs.<sup>63</sup> After all, regional growth-management strategies aim to channel new development into built-up areas. Yet, as Robert Bruegmann highlights in his excellent history of suburban sprawl, urban life has always been most difficult for the poor, and suburbs have long represented the urban poor’s hope for a better life.<sup>64</sup> The reality is that suburbs offer the good schools, economic opportunities, and environmental amenities that wealthy urban dwellers can afford to purchase and poorer ones cannot<sup>65</sup>—realities that Richard Florida himself acknowledges in a recent book.<sup>66</sup>

Moreover, and in my view more importantly, there is something slightly unseemly about dramatically curtailing suburban growth at a time when racial minorities are responsible for the lion’s share of suburban population gains in many major metropolitan areas.<sup>67</sup> A majority of Asian Americans, half of Hispanic Americans, and nearly forty percent of African Americans are now suburbanites.<sup>68</sup> Efforts to channel development into the urban core could slow or reverse this trend, which is fueling increased suburban racial diversity. This risk is especially pronounced because many of the most diverse neighborhoods have characteristics that draw the ire of sprawl opponents: they are located in low-density metropolitan areas in the West and Southwest and filled with relatively low cost “starter homes.”<sup>69</sup> It is difficult to avoid concluding that changing the rules of the development game at this time is tantamount to pulling the suburban ladder out from under those late exiters who

63. See Schill, *supra* note 48, at 104.

64. See ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* 26–29 (2005).

65. See, e.g., James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2102–08 (2002) (discussing the connection between economic status and educational achievement); Michael H. Schill, *Deconcentrating the Inner-City Poor*, 67 CHI.-KENT L. REV. 795, 811–31 (1991) (advocating policies that help the urban poor move to suburbs).

66. See FLORIDA, *THE NEW URBAN CRISIS*, *supra* note 17.

67. WILLIAM H. FREY, *Melting Pot Suburbs: A Study of Suburban Diversity*, in 1 REDEFINING URBAN AND SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000, at 155, 163 (Bruce Katz & Robert E. Lang eds., 2003).

68. *Id.* at 167–74.

69. See Been, *supra* note 61, at 164 (“[N]ew neighborhoods of starter homes are more racially mixed than established neighborhoods.” (citation omitted)).

previously were excluded from suburban life by economic circumstance, exclusionary zoning, and—in some cases—intentional discrimination. Moreover, the primary advantages of growth management imposed in the name of planning for density may be enjoyed by individuals who have perpetrated, or at least benefited from, this past exclusion: that is, the current suburban homeowners who are the immediate beneficiaries of the economic and environmental amenities that attend growth controls.<sup>70</sup>

The new urbanists promise that their regulatory alternative to Euclidean zoning promotes density while avoiding or mitigating the economic perils of growth controls by “simplifying” land use regulation.<sup>71</sup> New urbanists argue that cities should reject *use-based* zoning regulations in favor of a system of *form-based* aesthetic controls that governs the appropriate form of buildings in a given neighborhood.<sup>72</sup> Their regulatory alternative to zoning finds its roots in architect Andrés Duany’s 2003 *SmartCode*. New urbanist codes flow from the assumption that urban development proceeds naturally from more-dense areas to less-dense ones.<sup>73</sup> Duany calls this progression the “transect” and urges cities to replace traditional use zoning with regulations on building form appropriate to the various “transect zones” along the progression.<sup>74</sup> Most cities’ transect-zoning schemes, by and large, have adopted this formula (depicted in Figure 1 below), which assumes a natural progression of urban development from more to less dense.<sup>75</sup>

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70. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400 (1977) (“Antigrowth measures have one premier class of beneficiaries: those who already own residential structures in the municipality doing the excluding.”). Although the evidence is mixed, some studies show a correlation between levels of home ownership and support for growth controls. See, e.g., MARK BALDASSARE, TROUBLE IN PARADISE: THE SUBURBAN TRANSFORMATION IN AMERICA 95 (1986) (finding strong correlation between home ownership and support for limiting apartment construction); Alan Gin & Jonathan Sandy, *Evaluating the Demand for Residential Growth Controls*, 3 J. HOUSING ECON. 109 (1994) (support for growth controls increases with rates of home ownership). But see Mark Baldassare & Georjeanna Wilson, *Changing Sources of Suburban Support for Local Growth Controls*, 33 URB. STUD. 459, 462 (1996) (evidence on correlation mixed).

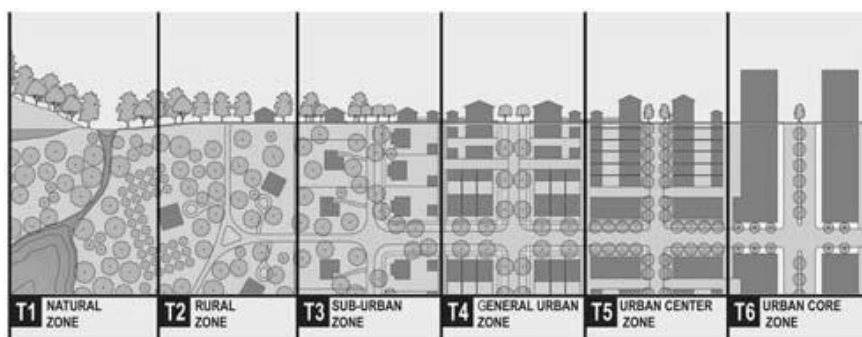
71. See DANIEL G. PAROLEK ET AL., FORM-BASED CODES: A GUIDE FOR PLANNERS, URBAN DESIGNERS, MUNICIPALITIES, AND DEVELOPERS 4, 39 (2008) (arguing that new urbanist codes ought to be “simple” and short).

72. *Id.* at 12 (describing form-based codes as a method to regulate new-urbanist-style development by controlling physical form rather than land use).

73. See ANDRÉS DUANY ET AL., SMARTCODE: VERSION 9.2, at vi–vii (2012).

74. *Id.* at xi; Andrés Duany & Emily Talen, *Transect Planning*, 68 J. AM. PLAN. ASS’N 245, 245–48 (2002).

75. *The Transect*, CTR. FOR APPLIED TRANSECT STUD., <http://transect.org/transect.html> (last visited Jan. 1, 2018) (“Before the automobile, American development patterns were walkable, and transects within towns and city neighborhoods revealed areas that were less

**Figure 1. The Urban Transect<sup>76</sup>**

Drawing upon this concept, proponents of transect zoning urge regulators to scrap traditional zoning codes, which regulate based upon property uses, in favor of a regulatory system that targets building density and form.<sup>77</sup> Proponents of transect zoning argue that the codes defining the appropriate building forms along the transect—known in the vernacular as “form-based codes”—ought to be “simple” and short.<sup>78</sup> Unfortunately, while new urbanists echo Jacobs’ embrace of urban land use patterns, their preferred method for achieving them departs from her relatively libertarian belief that cities thrive best when government leaves them alone.<sup>79</sup> As implemented, neither the new urbanism nor the new urbanists’ regulatory alternative to zoning is a libertarian project. On the contrary, to borrow from Vicki Been and Bob Ellickson’s description of building codes, form-based codes can be “technical document[s], whose level of difficulty at places may rival that of the Internal Revenue Code.”<sup>80</sup> New urbanists have specific ideas about how buildings should look: they should not only be architecturally appropriate, but also attractive, indeed welcoming, in their details.<sup>81</sup> Many form-based codes favor “traditional”

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urban and more urban in character. This urbanism could be analyzed as natural transects are analyzed.”).

76. *Id.*

77. PAROLEK ET AL., *supra* note 71, at 18–19.

78. *Id.* at 39.

79. See DUANY ET AL., *supra* note 73, at iv (“[The SmartCode] is meant to be law . . . administered by municipal planning departments and interpreted by elected representatives of local government.”); *Form-Based Codes Defined*, FORM-BASED CODES INST., <https://formbasedcodes.org/definition/> (last visited Oct. 24, 2017) (“[F]orm-based codes are regulatory, not advisory.”).

80. ROBERT C. ELICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 447 (3d ed. 2005).

81. See generally KRIER, *supra* note 39 (discussing architecture and urbanism).

building designs—that is, those reminiscent of the pre-zoning communities that new urbanists champion as a planning ideal. And, while most new urbanists argue that form-based codes are distinct from architectural regulations, in practice, many form-based codes mandate architectural design elements.<sup>82</sup>

There are both practical and theoretical reasons why architectural details pervade transect-zoning regulations. Practically, determining which building “forms” belong in a given transect zone is not a self-evident proposition, but rather, must be spelled out in architectural codes, such as the one reproduced above in Figure 1.<sup>83</sup> Moreover, detailed architectural restrictions may placate groups that are resistant to regulatory changes enabling density and a mixing of land uses—particularly, homeowners concerned about protecting their property values from externalities that nonresidential land uses may generate.<sup>84</sup> Theoretically, many new urbanists believe that our society’s idea of what constitutes “good” urban environments has been corrupted by decades of zoning. Therefore, they believe that pervasive and comprehensive government regulation is required in order to mandate those environments. As James Howard Kunstler argues, “The[se] codes will invoke in words and graphic images standards of excellence that previously existed in the minds of ordinary citizens but which have been forgotten and forsaken. The codes, therefore, aim to restore the collective cultural consciousness.”<sup>85</sup>

Not surprisingly, therefore, form-based codes frequently impose high compliance costs. These costs flow in large part from the imposition of architectural standards, which, at a minimum, require securing the services of an architect to ensure compliance, but may also require expensive building materials.<sup>86</sup> This extra

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82. See Berg, *supra* note 45, at 51–53.

83. See Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVTL. L. 395, 404–06 (2008); Kenny Be, *Everybody Must Get Zoned: Kenny Be Looks at Denver’s New Zoning Rules*, WESTWORD (Jan. 20, 2010, 8:36 AM), <http://www.westword.com/news/everybody-must-get-zoned-kenny-be-looks-at-denvers-new-zoning-rules-5879939#page-1> (“[A]t 730 pages, not including 76 neighborhood maps and six Overlay District maps, the new zoning code is being called an improvement. It is a control-freak fantasy, with detailed rules for every aspect of city life.”).

84. GARNETT, ORDERING THE CITY, *supra* note 3, at 200–201.

85. KUNSTLER, HOME FROM NOWHERE, *supra* note 42 at 135.

86. See Ajay Garde, *Designing and Developing New Urbanist Projects in the United States: Insights and Implications*, 11 J. OF URB. DESIGN 33, 43–44 (2006) (noting that architectural features, materials and highly detailed design codes are cost burdens associated with new urbanism); Yan Song & Mark Stevens, *The Economics of New Urbanism and Smart Growth: Comparing Price Gains and Costs Between New Urbanists and Conventional Developments*, in THE OXFORD HANDBOOK OF URBAN ECONOMICS AND PLANNING 503, 513–19 (Nancy Brooks et al. eds., 2012).

layer of difficulty supplements pre-existing regulations of “building form,” including building codes and the accessibility regulations of the Americans with Disabilities Act (ADA).<sup>87</sup> Moreover, the public-choice realities discussed above often require that form-based codes supplement, rather than supplant, pre-existing zoning regulations and growth controls.<sup>88</sup> Essentially, these codes are the equivalent of a highly technical performance-zoning overlay.<sup>89</sup> Not only are new urbanist developments more expensive than conventional ones,<sup>90</sup> but compliance costs have stalled some redevelopment efforts governed by form-based zoning.<sup>91</sup> In other

87. See, e.g., CNTY. OF SANTA BARBARA PLANNING & DEV. DEPT, LOS ALAMOS BELL STREET DESIGN GUIDELINES 24 (2011) (mandating that ramps and guiderails should complement the overall design intent while conforming with existing building code and ADA requirements). For a discussion of general building costs associated with ADA compliance, see ELLICKSON & BEEN, *supra* note 80, at 452.

88. See Kaizer Rangwala, *Hybrid Codes Versus Form-Based Codes*, NEW URB. NEWS, Apr.–May 2009, at 12, 13 (noting that, despite plans for city-wide form-based codes, limited resources, development, and political pressures forced officials to adopt hybrid codes or overlay districts in Phoenix and Ventura); see also DONALD L. ELLIOTT, A BETTER WAY TO ZONE: TEN PRINCIPLES TO CREATE MORE LIVABLE CITIES 37–38 (2008) (asserting that form-based codes are likely to supplement rather than replace conventional zoning because of lack of time, money, and political support); John M. Barry, *Form Based Codes: Measured Success Through Both Mandatory and Optional Implementation*, 41 CONN. L. REV. 305, 331 (2008) (offering parallel form-based codes that supplement conventional zoning as a solution when there is public opposition to mandatory form-based codes).

89. Performance zoning regulates land use by establishing parameters designed to limit the negative impact of the use. Although performance zoning is more flexible than conventional zoning, it is often difficult to administer and no major city has replaced Euclidean zoning in favor of performance zoning. See ELLIOTT, *supra* note 88, at 23–26; JULIAN CONRAD JUERGENSEMEYER & THOMAS ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 101–02 (2d ed. 2007). For an example of a highly detailed form-based overlay, see Jeremy E. Sharp, An Examination of the Form-Based Code and Its Application to the Town of Blacksburg 20–21 (Nov. 4, 2004) (unpublished Master’s thesis, Virginia Polytechnic Institute and State University), <https://vtechworks.lib.vt.edu/bitstream/handle/10919/37154/SharpFINALmajorpaper.pdf?sequence=1&isAllowed=y> (noting that South Miami’s highly detailed form-based overlay regulates the uses on each floor of buildings in the urban zone).

90. See, e.g., Joseph E. Gyourko & Witold Rybczynski, *Financing New Urbanism Projects: Obstacles and Solutions*, 11 HOUSING POL’Y DEBATE 733, 739–40 (2000) (concluding, based on an extensive survey of builders and developers, that new urbanist projects are more expensive); Philip Langdon, *The Not-So-Secret Code: Across the U.S., Form-Based Codes Are Putting New Urbanist Ideas into Practice*, AM. PLAN. ASS’N (Jan. 2006) (asserting that the cost of form-based codes “exceeds that of a conventional land-use plan” making citywide form-based coding “prohibitively expensive”).

91. See GARNETT, ORDERING THE CITY, *supra* note 3, at 176–180; Ed Tombari, *The Future of Zoning?*, 22 LAND DEV. 23, 25 (2009) (noting development drawbacks to Arlington, Virginia’s form-based overlay that include having to go back to the Planning Board in order to make minor facade changes); Mark Simpson, *Cost and Business Resistance Kill Orlando Suburb Beautification and Traffic Calming Effort*, WNYC: TRANS. NATION (Apr. 2, 2011), <http://www.wnyc.org/story/285835-cost-and-business-resistance-kill-orlando-suburb-beautification-and-traffic-calming-effort/> (noting the cost of a form-based redevelopment project as a reason for its rejection); Robert Steuteville, *Survey: Combine New Code with Activities and Investment*, CONGRESS FOR THE NEW URBANISM: PUB. SQUARE (Apr. 1, 2010), <https://www.cnu.org/publicsquare/survey-combine-new-code-activities-and-investment>



words, new urbanist regulation may exacerbate, rather than mitigate, the economic effects of achieving urban density through growth management.

#### IV. THE PARADOX OF PLANNING FOR DENSITY

I come at last to the paradox of planning for density, a paradox that flows from the particular claims of the new urbanists. As discussed previously, the new urbanists argue that planning for density—or, at least their version of it, which focuses on encouraging and/or mandating mixed-land-use developments—holds promises beyond the economic, ecological, and distributional. Specifically, building upon Jane Jacobs' claims about the communitarian benefits of the urban form, the new urbanists argue that planning for density will foster the social capital necessary to build thriving communities.

The paradox of planning for density can be summarized in four words: “Was Jane Jacobs wrong?” Recall that Jane Jacobs argued that dense, mixed-land-use urban neighborhoods were safer and more socially cohesive than less populated, single-use ones.<sup>92</sup> These claims, which have been embraced with great gusto by the new urbanists, flowed from two convictions/predictions about the effects of density, especially of commercial land uses, on city life. First, she argued that mixed-land-use neighborhoods are safer than single-land-use ones.<sup>93</sup> She intuited that, by drawing people into city streets, businesses generate “eyes upon the street” that keep disorder and crime in check.<sup>94</sup> Indeed, she went so far as to argue that neighborhood bars could contribute to neighborhood security, reasoning that their patrons would serve a private surveillance function well into the night hours.<sup>95</sup> Second, Jacobs argued that commercial land uses help build community by bringing together people who would not otherwise meet. Jacobs reasoned, “The trust of a city street is formed over time from many, many little public sidewalk contacts. It grows out of people stopping by at the bar for a beer, getting advice from the grocer and giving advice to the newsstand man . . . .”<sup>96</sup> Drawing from Jacobs, the new urbanists assert that the single-land-use design of

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(noting that only twenty-nine percent of the communities that adopted form-based codes during or after 2007 have had projects built).

92. See JACOBS, *supra* note 36, at 3–25.

93. *Id.* at 36–37.

94. *Id.* at 34–35 (“A well-used city street is apt to be a safe street. A deserted city street is apt to be unsafe.”).

95. *Id.* at 40–41.

96. *Id.* at 56.

suburbia deprives many Americans of the opportunity to build community and relationships with one another.<sup>97</sup> Philip Langdon, for example, echoes Jacobs when he argues, “[T]he tavern, the cafe, the coffee shop, the neighborhood store . . . have been zoned out of residential areas . . . . As informal gathering places have been banished, many opportunities for making friendships and pursuing common interests have disappeared.”<sup>98</sup>

Unfortunately, Jacobs’ arguments appear to be intuitively appealing but empirically unsustainable. The popular and academic commentary on Jacobs’ arguments almost entirely neglects to take into account the empirical literature testing and rejecting her hypotheses. These studies find instead that commercial land uses increase crime and disorder and suppress social capital.<sup>99</sup> In a number of studies criminologists, sociologists, and environmental psychologists have examined the connection between land use patterns and disorder, crime, and “collective efficacy,” which sociologists and social psychologists define as the “ability of neighborhoods to realize the common goals of residents and maintain effective social control.”<sup>100</sup> These studies test Jacobs’ claims by comparing the levels of crime, disorder, and social cohesion in exclusively residential and mixed-land-use neighborhoods.<sup>101</sup> These studies generally find that exclusively

97. ANDRES DUANY, ELIZABETH PLATER-ZYBECK & JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 59–64 (2010) (“Americans are splintering into insular factions, each pursuing an increasingly narrow agenda, with nary a thought for the greater good. Further, more and more citizens seem to be withdrawing from public life into the shelter of their private homes . . . . [I]t is near-impossible to imagine *community* independent of the town square or the local pub . . . . [P]edestrian life cannot exist in the absence of worthwhile destinations that are easily accessible on foot. This is a condition that modern suburbia fails to satisfy, since it strives to keep all commercial activity well separated from housing.”).

98. PHILIP LANGDON, *A BETTER PLACE TO LIVE: RESHAPING THE AMERICAN SUBURB* 15–16 (1994).

99. See, e.g., Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 *AM. J. SOC.* 603, 624 (1999) (“Neighborhoods with mixed residential and commercial development exhibit higher levels of both physical and social disorder, regardless of sociodemographic characteristics.”).

100. Tracey L. Meares, *Praying for Community Policing*, 90 *CAL. L. REV.* 1593, 1604 (2002). For a fuller discussion on collective efficacy and neighborhood health, see Sampson & Raudenbush, *supra* note 99. See also Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, *SCL*, Aug. 15, 1997, at 918.

101. Some of these studies focus on so-called land use “hot spots”—that is, particular land uses associated with high levels of crime and disorder. It is fair to say that the empirical literature on land use “hot spots” does not bear out Jacobs’s hunch about taverns, as there is ample evidence that bars increase crime and disorder and suppress informal social controls within a neighborhood. See, e.g., Dennis W. Roncek & Mitchell A. Pravatiner, *Additional Evidence that Taverns Enhance Nearby Crime*, *SOC. & SOC. RES.*, July 1989, 185; Dennis W. Roncek & Pamela A. Maier, *Bars, Blocks and Crimes Revisited: Linking the Theory of Routine Activities to the Empiricism of “Hot Spots”*, 29 *CRIMINOLOGY* 725 (1991).

residential neighborhoods have lower crime rates, less disorder, and more collective efficacy than mixed residential and commercial neighborhoods.<sup>102</sup>

Researchers conducting these studies link their findings to the “routine activities” theory of crime.<sup>103</sup> Routine activities theory builds on the insight that most predatory crime is opportunistic. As Robert Sampson and Stephen Raudenbush summarize, “predatory crime involves the intersection in time and space of motivated offenders, suitable targets, and the absence of capable guardians.”<sup>104</sup> Land use patterns are relevant to this thesis for two reasons. First, non-residential land uses (for example schools, stores, parks, etc.) may serve to invite would-be offenders into a neighborhood. Moreover, by providing places where individuals congregate, commercial land uses generate a larger pool of potential victims than residential ones. In other words, while Jacobs may have been right that commercial land uses increase the number of individuals present in an urban neighborhood, the routine activities theory suggests that higher numbers of “eyes upon the street” may increase the number of potential offenders, as well as the number of law-abiding crime monitors.

Second, contrary to Jacobs’s intuition, commercial land uses decrease incentives for private surveillance efforts. Jacobs argued that outsiders as well as insiders to a community provide the “eyes upon the street” needed to suppress disorder and crime.<sup>105</sup> Unfortunately, the empirical evidence suggests that the opposite is true. Strangers “invited” to a community by commercial land uses apparently act to decrease, rather than increase, the level of informal surveillance in a neighborhood. They also appear to reduce neighborhood social cohesion.<sup>106</sup> Resident surveys conducted for the land use studies discussed above, however, suggest that commercial land uses reduce informal monitoring, because they reduce the sense in which residents consider it their “own;” perhaps, because commercial land uses generate foot traffic that makes it difficult for residents to discern between insiders and outsiders in a community.<sup>107</sup> In one study, for example,

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102. See, e.g., Ralph B. Taylor et al., *Street Blocks with More Nonresidential Land Uses Have More Physical Deterioration: Evidence from Baltimore and Philadelphia*, 31 URB. AFF. REV. 120 (1995).

103. Jeffrey D. Morenoff, et al., *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 CRIMINOLOGY 517, 521 (2001).

104. Sampson & Raudenbush, *supra* note 99, at 610.

105. JACOBS, *supra* note 36, at 35.

106. See Taylor et al., *supra* note 102.

107. See Pamela Wilcox et al., *Busy Places and Broken Windows? Toward Defining the Role of Physical Structure and Process in Community Crime Models*, 45 SOC. Q. 185, 188–90,

“[r]esidents on blocks with more nonresidential land use . . . recognized other on-block residents less well, felt that they had less control over events in the neighborhood, and were less likely to count on a neighbor to watch out for suspicious activity,” than residents of exclusively residential blocks.<sup>108</sup>

Since most of my early scholarship might have been described as “Jane Jacobs on steroids,” these findings were initially devastating to me. I pondered them for years before I came to the conclusion that intellectual honesty demanded that I build a case for planning for density, rather than build a case for mixed-land-use planning, that tackles the uncomfortable reality that these empirical studies present. My case is built upon an apparent paradox, which I call the “People Paradox.” The People Paradox can be summarized as follows: In urban neighborhoods, people may not make us safer, but for a variety of reasons, they apparently make us feel safer. The empirical evidence suggests that, although we are not safer in busy places, we think that we are. That is, we feel safer in busy places. At least in urban neighborhoods, that is, we are afraid of being alone. We believe that there is safety in numbers. For a variety of reasons that I explore in detail in other work, we associate “aleness” with vulnerability to crime.<sup>109</sup> As Mark Warr, the author of one of the most systematic studies linking the fear of crime to the fear of being alone, has observed, “being alone in a truly dangerous environment is the stuff of nightmares.”<sup>110</sup>

This People Paradox suggests that, even if the new urbanists’ project rests on a flawed intuition about the benefits of mixed-land-use communities, we need not abandon efforts to plan for density. This is because fear of crime is at least as important a contributor to residential stability as crime itself—the two phenomena being related but distinct. Safety—reflected both in actual crime rates and the perceived risk of victimization—strongly influences residential location decisions. In his 1956 essay, *A Pure Theory of Local Expenditures*, Charles Tiebout influentially hypothesized that municipalities compete for residents by offering different packages of public policies and

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200 (2004); Stephanie W. Greenberg et al., *Safety in Urban Neighborhoods: A Comparison of Physical Characteristics and Informal Territorial Control in High and Low Crime Neighborhoods*, 5 POPULATION & ENV’T 141, 162 (1982); Taylor et al., *supra* note 102, at 121.

108. Ellen M. Kurtz et al., *Land Use, Physical Deterioration, Resident-Based Control, and Calls for Service on Urban Streetblocks*, 15 JUST. Q. 121, 135 (1998).

109. See *The People Paradox*, *supra* note 7, 71–75 (2012) (reviewing literature).

110. Mark Warr, *Dangerous Situations: Social Context and the Fear of Victimization*, 68 SOC. FORCES 891, 895 (1990).

public goods.<sup>111</sup> According to the Tiebout model, residents sort themselves within a metropolitan area according to their preferences for public goods and municipal services.<sup>112</sup> The benefit of this sorting is that it drives efficiency by subjecting local governments to market competition.<sup>113</sup>

Although Tiebout did not mention it specifically, safety undoubtedly is one of the public goods influencing residential sorting. The Tieboutian case for safe city neighborhoods is not merely a theoretical one. In one nationwide study, Julie Berry Cullen and Steven Levitt found a strong correlation between crime and urban flight. Each reported city crime correlated with a one-person decline in city population; “[a] [ten percent] increase in crime correspond[ed] to a [one percent] decline in city population.”<sup>114</sup> Cullen and Levitt also found that residents motivated to move by fear of crime were more likely to remain in the same metropolitan area than those moving for other reasons, which suggests that the fear of crime encourages residents to move to the suburbs.<sup>115</sup> And, importantly, even studies that question the connection between fear and migration to the suburbs suggest that crime exerts a relatively strong, and negative, influence on in-migration—that is, on residents’ decision to move from the suburbs to the city.<sup>116</sup> Moreover, while Cullen and Levitt’s study focused on the connection between crime and out-migration to suburbs, fear of crime undoubtedly also influences residents intra-locally as well, with safer neighborhoods enjoying greater residential stability than more dangerous ones.<sup>117</sup>

This connection between fear of crime and residential stability is important because residential stability is strongly correlated with collective efficacy.<sup>118</sup> Not surprisingly, neighborhoods with

111. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

112. *Id.* at 418–19.

113. The empirical evidence in a variety of contexts supports Tiebout’s hypothesis. See William A. Fischel, *Footloose at 50: An Introduction to the Tiebout Anniversary Essays*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 8–11 (William A. Fischel, ed., 2006). Critics, however, caution that Tieboutian competition between municipalities has a dark side, enabling exclusionary zoning and contributing to the intra-metropolitan inequities that concern regional government proponents. See Lee Anne Fennell, *Exclusion’s Attraction: Land Use Controls in Tieboutian Perspective*, in *THE TIEBOUT MODEL AT FIFTY*, *supra*, at 163–99.

114. Julie Berry Cullen & Steven D. Levitt, *Crime, Urban Flight, and the Consequences for Cities*, 81 REV. ECON. & STAT. 159, 159 (1999).

115. *Id.* at 167.

116. See, e.g., Martin T. Katzman, *The Contribution of Crime to Urban Decline*, 17 URB. STUD. 277 (1980).

117. See generally Cullen & Levitt, *supra* note 114 (examining connection between fear of crime and out-migration to suburbs).

118. See *supra* notes 100–102 and accompanying text.

high levels of collective efficacy are healthier than those with lower levels. Neighborhoods with low levels of collective efficacy exhibit more signs of social distress—for example, they are more dangerous and disorderly and residents are more fearful of victimization—than those with higher levels. In a major study of 343 Chicago neighborhoods, Robert Sampson, Stephen Raudenbush, and Felton Earls found that residential stability, measured by average residential tenure and levels of homeownership, was one of three major factors explaining neighborhood variation in collective efficacy, and that collective efficacy, in turn, mediated the negative effects of the other two factors—economic disadvantage and immigration—enough to reduce violent crime in a neighborhood.<sup>119</sup> These findings are consistent with other social science research linking residential tenure and homeownership, especially of single-family homes, with high levels of collective efficacy.<sup>120</sup>

#### V. CONCLUSION: THE PLANNING FOR DENSITY AND THE PEOPLE PARADOX

Proponents tend to agree that the best way to secure the promises of planning for density is for residents to live—and developers to build—in built-up areas rather than in new suburbs on the outskirts of metropolitan regions. In other words, the primary goal of planning for density is urban redevelopment.<sup>121</sup> When considering what kinds of policies will advance that goal, it is important to acknowledge that Americans' suburban affinities are not universally shared. Cities are not for everyone, to be sure. But they are for some people. Just as some people would, if given the opportunity, prefer to live in suburbs—despite their many flaws—so also would many people prefer to live in cities—despite their many flaws. And, the way to increase the numbers of people who fall into the latter category is to embrace the People Paradox, which suggests busy-ness, not sterility, is what draws people to urban life.

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119. Sampson et al., *supra* note 100, at 921; Sampson & Raudenbush, *supra* note 99 (“Systemic theories of urban communities have long pointed to the importance of residential stability as a major feature of urban social organization.” (citation omitted)).

120. See, e.g., Chris L. Gibson et al., *Social Integration, Individual Perceptions of Collective Efficacy, and Fear of Crime in Three Cities*, 19 JUST. Q. 537, 540–43 (2002) (collecting literature); Matthew R. Lee & Terri L. Earnest, *Perceived Community Cohesion and Perceived Risk of Victimization: A Cross-National Analysis*, 20 JUST. Q. 131, 138–39 (2003); Wilcox et al., *supra* note 107, at 186–88.

121. A secondary goal, beyond the scope of this paper and embraced with particular zeal by new urbanists, is the development of new, more-urban suburbs.

The People Paradox also suggests partial solutions to the economic and distribution perils of planning for density—although these solutions are ones that many land use planners will find discomfiting. In my view, the best way to achieve density likely is persuasion, not coercion. The coercive tools in the planning-for-density toolkit promoted by environmentalists and regionalists seek to drive development back into urban centers by increasing the cost of suburban growth. But they do little to address myriad challenges to building healthy urban communities that would-be city dwellers, rich and poor, care about deeply. The form-based codes promoted by new urbanists offer expensive aesthetic micromanagement of those challenges. But if we really want to achieve the goal of density, the best way to do so is to reduce the costs of living in cities and the costs of development in cities. Coercive regulation will do neither. Furthermore, the People Paradox suggests that discussions of planning for density are all-to-frequently divorced from the discussions of managing the effects of density. In particular, it suggests an overlooked connection between policing practices and land use policies, a subject beyond the scope of this Article about which I have written extensively on.<sup>122</sup>

Finally, the people paradox suggests an overlooked connection between land use policy and education policy. As Joel Kotkin has observed, the young and hip may be attracted to busy cities, but most creative people are middle-aged and middle class—not young and hip. And middle-aged, middle class people continue to gravitate to suburbs for the same reasons that their parents did: schools. It is telling that, while many cities made a comeback in recent years, the comeback was primarily driven by young people and rich people. The population share of middle class families living in cities continues to decline. Addressing the affordability of urban life may be a necessary but not sufficient component of a strategy to retain middle class families; addressing the educational woes of urban schools is a critical component.<sup>123</sup> But the perils and paradoxes of education reform strategies are a subject for another day.

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122. See sources cited *supra* note 7.

123. See Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201 (2010).

