

UCLA

UCLA Journal of Environmental Law and Policy

Title

Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations

Permalink

<https://escholarship.org/uc/item/7095r4dk>

Journal

UCLA Journal of Environmental Law and Policy, 21(1)

Author

Kushner, James A.

Publication Date

2002

DOI

10.5070/L5211019395

Copyright Information

Copyright 2002 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations

*James A. Kushner**

ABSTRACT

Smart Growth envisions a reduction in the extension of low-density suburban subdivisions as the predominant pattern of development. New Urbanism reflects a more pedestrian-oriented European style of urban life. Growth policies that target development toward urban infill and revitalization could result in the intensification of ethnic separation. The success of the strategies carries the alternative image of gentrification and displacement of the poor. Were New Urbanism to integrate economic classes through a mixture of housing types and costs (ranging from lofts and live/work units to higher density apartments, townhouses, and even single family detached homes) utilizing adequate subsidies, local governments could provide an optimally designed stock of housing. If designed around transit, it could dramatically improve access to jobs and other services while offering more diverse neighborhoods. America's major cities include slum housing and a stock of barely habitable shelters which have served as housing for those of very low income, particularly new immigrants. Were these slums and lower-cost shelters replaced by new and revitalized development, cities such as New York or Los Angeles might cease to serve their democratizing and incubation function and the quality of life and opportunity for new immigrants and the poor may diminish.

* Visiting Professor of Law, University of Southern California Law School and Professor of Law, Southwestern University School of Law. This paper has been informed and enriched by the comments of George Lefcoe on an earlier draft.

While many European cities are the archetype of New Urbanism, others have been allowed to become unfriendly to the pedestrian and too-automobile dominated. The affluence of Europe has generated a rising middle-class that enjoys driving modern automobiles and prefers the privacy and bucolic appearance of the American suburb. Increasing development of suburban detached homes and increasing automobile trips and ownership poses a threat to the quality of European urban life. As communities grapple with developers of such housing, a New Urbanist design model may offer huge benefits to mitigate the suburban pressure.

I.

INTRODUCTION

American growth patterns have been driven by natural and unnatural forces. Vast amounts of land tended to foster individualism, privacy, and noncontiguous non-compact land use patterns. The national transportation policy of reliance on personal automobile transport resulted in dispersed housing sites and the decline of central cities. Furthermore, American courts have endorsed the doctrine of "Euclidean" zoning. "Euclidean" zoning calls for the separation of uses: commercial facilities, offices, single-family detached homes and apartments are all physically separate.¹ This pattern results in the devotion of a substantial portion of regional land for automobile use.² It generates traffic congestion,³ dependence on oil,⁴ extraordinary transportation costs for families,⁵ higher costs to deliver municipal services,⁶ and

1. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 397 (1926) (sustaining zoning that restricts development within a district to a uniform set of uses, maximum building height, and a minimum lot size with uniform standards on the relation of the structure to the lot, a scheme prohibiting multi-use development).

2. See J. R. MEYER ET AL., *THE URBAN TRANSPORTATION PROBLEM* 311 (1965) (reporting that one-quarter of Los Angeles is dedicated to automobiles); John Pastier, *New Open Space in L.A.*, *LANDSCAPE ARCHITECTURE*, May 1994, at 42 (reporting that two-thirds of downtown is used to move and store automobiles).

3. Craig N. Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 *STAN. ENVTL. L.J.* 141, 171-72 (1998).

4. J.H. CRAWFORD, *CARFREE CITIES* 82 (2000) (discussing the price of military actions taken to protect petroleum supplies).

5. AMERICAN AUTOMOBILE ASSOCIATION, *YOUR DRIVING COSTS* (1998), cited in Oren, *supra* note 3 at 165.

6. Patrick Gallagher, *The Environmental Social and Cultural Impacts of Sprawl*, 15 *NAT. RESOURCES & ENV'T* 219 (2001); Cameron Speir & Kurt Stephenson, *Does Sprawl Cost Us All?: Isolating the Effects of Housing Patterns on Public Water and*

pollution.⁷ In addition to the obvious adverse effects of automobile-based planning, community life disappears under this "Dumb Growth."⁸ For example, pedestrian life and urban living are exchanged for individuals socializing in private homes or in a few regional destinations that offer entertainment, an ersatz European-type urban walking experience, and a reasonably safe environment—typically the shopping mall.

During the past thirty years, the principal response to the effects of suburban sprawl⁹ and urban decline has been the American attempt at growth management. Individual communities might utilize devices such as urban growth boundaries,¹⁰ development moratoria,¹¹ the establishment of complicated systems of annual permit caps,¹² or growth systems linked to infrastructure capacity—that is, to deny permits absent adequate roads, water,

Sewer Costs, 68 J. AM. PLAN. ASS'N 56 (2002) (indicating significantly higher costs of sprawl).

7. CRAWFORD, *supra* note 4, at 82 (2000) (stating that in addition to air pollution itself, automobile-generated pollution is also credited with worsening global warming and coastal flooding).

8. James A. Kushner, *Smart Growth: Urban Growth Management and Land-Use Regulation Law in America*, 32 URB. LAW. 211, 230 (2000), *reprinted as modified in*, INSTITUTE ON PLANNING, ZONING & EMINENT DOMAIN 7-1 (2000).

9. Urban sprawl, while typically perceived as a universally understood doctrine, actually takes many varying forms. George Galster et. al., *Wrestling Sprawl to the Ground: Defining and Measuring an Elusive Concept*, 12 HOUSING POL'Y DEBATE 681 *passim* (2001) (offering a conceptual definition considering distinct dimensions of land use patterns—density, continuity, concentration, clustering, centrality, nuclearity, mixed uses, and proximity—with sprawl defined as a low value in at least one dimension). *See generally* ROBERT H. FREILICH, *FROM SPRAWL TO SMART GROWTH* (1999); WILLIAM FULTON ET AL., BROOKINGS INSTITUTION, *WHO SPRAWLS MOST? HOW GROWTH PATTERNS DIFFER ACROSS THE U.S.* 3, 7, 16 (2001) (examining multiple definitions of sprawl including the author's adopted methodology of rates of land consumption as compared to population growth), *available at* <http://www.brook.edu/dydocroot/es/urban/fulton-pendall.htm>; JAMES H. KUNSTLER, *THE GEOGRAPHY OF NOWHERE* (1993); Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 137 (1999); Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301 (2000); Douglas R. Porter, *Reinventing Growth Management for the 21st Century*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 705 (1999).

10. *See* Michael J. Stewart, *Growth and Its Implications: An Evaluation of Tennessee's Growth Management Plan*, 67 TENN. L. REV. 983, 989 (2000).

11. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1472 (2002).

12. *See* Constr. Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 901 (9th Cir. 1975). *But see* Bldg. Indus. Ass'n v. City of Oceanside, 33 Cal. Rptr. 2d 137, 140 (1994) (invalidating permit cap as inconsistent with state inclusionary housing and planning policies).

sewers, and schools.¹³ America's experience in the 20th century has demonstrated the value of regional and comprehensive planning. Individual local growth management initiatives, haphazardly imposed, have failed to generate rational urban design.¹⁴ In the process, progressive architects and planners have identified development design modifications and have spawned new movements based on principles long-understood in the European planning community.

The Smart Growth movement represents a policy shift toward more compact development as a brake on urban sprawl. Simply stated, Smart Growth calls for public subsidies for growth, such as facilities and infrastructure subsidies, being targeted at areas deemed appropriate for urbanization. Smart Growth, as compared to first generation growth management, enjoys widespread support both by public officials and the public, who are concerned with traffic congestion, as well as the development community. New Urbanism, also a movement designed to generate more compact development, is comparatively more focused on architecture and community design. New Urbanism calls for more human scale, walkable streets, the mixing of shops and residence in the urban center designed to generate city life, and a higher density, less automobile-dominated community. This article will describe these new planning movements, discuss current research that touches on land economics and planning implications, and explore the questions of how central cities, the poor, and minority ethnic populations may be impacted by these movements. Finally, the potential for exporting these planning movements to other lands will be explored.

II.

SMART GROWTH

Smart Growth¹⁵ is a movement that potentially represents the most significant American architectural, social, and political

13. See, e.g., FLA. STAT. ANN. § 163.3180 (West 2000) (requiring concurrency); *Golden v. Planning Bd.*, 285 N.E.2d 291 (N.Y. 1972) (requiring timed-sequential zoning).

14. James A. Kushner, *Growth Management and the City*, 12 YALE L. & POL'Y REV. 68, 72-73 (1994).

15. See generally DAVID O'NEILL, THE SMART GROWTH TOOL KIT (2000); John M. Armentano, *Zoning and Land Use Planning*, 30 REAL EST. L.J. 77 (2001) (discussing New York Smart Growth); Robert W. Burchell et al., *Smart Growth: More Than a Ghost of Urban Policy Past, Less Than a Bold New Horizon*, 11 HOUSING POL'Y DEBATE 821 (2000) (providing an enthusiastic review while recognizing the

change since the short-lived populist movements of the late 19th century. Smart Growth envisions a reduction in the extension of low-density suburban subdivisions as the predominant pattern of development. Instead, development should be more concentrated around public transit. Smart Growth has been embraced by rich and poor, Republican¹⁶ and Democrat,¹⁷ land developers and the environmental community. It is based on the recognition that sprawl can no longer deliver either affordable or accessible housing without terrible traffic congestion and that cities failing to adopt Smart Growth systems will miss out on economic development and the sought-for opportunities that come with growth.¹⁸ Smart Growth also embraces policies that target infrastructure subsidies to designated growth areas¹⁹ and that direct government investments to advance its goals, such as a preference for infill development and renovation and revitalization of schools and neighborhoods over new development on the suburban periphery.²⁰ Indeed, one reason for the overwhelming sup-

current automobile-dominated community design as a constraint); Karen A. Danielson et al., *Retracting Suburbia: Smart Growth and the Future of Housing*, 10 HOUSING POL'Y DEBATE 513 (1999); Kushner, *supra* note 8.; James C. Nicholas & Ruth L. Steiner, *Growth Management and Smart Growth in Florida*, 35 WAKE FOREST L. REV. 645 (2000). (discussing the Florida Statewide Planning system as Smart Growth); Brian W. Ohm, *Reforming Land Planning Legislation at the Dawn of the 21st Century: The Emerging Influence of Smart Growth and Livable Communities*, 32 URB. LAW. 181 (2000); Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247 (2000); Patricia E. Salkin, *Smart Growth at Century's End: The State of the States*, 31 URB. LAW. 601 (1999) (reviewing Smart Growth initiatives in 19 states); Patricia E. Salkin & Paul Bray, *Compact Planning Offers a Fresh Approach for Regional Planning and Smart Growth: A New York Model*, 30 REAL EST. L.J. 121 (2001).

16. See E.J. Dionne, Jr., "Smart Growth" Politics, WASH. POST, Jan. 15, 1999, at A29; see also Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PA. L. REV. 873, 876-77 (2000) (discussing the popularity of Smart Growth in Virginia); *EPA Chief Backs Smart Growth*, NEW URB. NEWS, Mar. 2002, at 1 (discussing the support of EPA Administrator and former New Jersey Republican Governor Christine Whitman).

17. See Parris N. Glendening, *Smart Growth: Maryland's Innovative Answer to Sprawl*, 10 B.U. PUB. INT. L.J. 416 (2001); Pollard, *supra* note 15, at 253 (characterizing former Democratic Maryland Governor Parris Glendening as a crusader); Norman B. Rice, *Smart Growth: A Catalyst for Public-Interest Investment*, 26 FORDHAM URB. L.J. 1417 (1999) (author served as mayor of Seattle from 1990 to 1997).

18. Oliver A. Pollard, III, *Smart Growth and Sustainable Transportation: Can We Get There From Here?*, 29 FORDHAM URB. L.J. 1529, 1530-32, 1535-1538 (2002).

19. See John W. Frece, *Smart Growth: Prioritizing State Investments*, 15 NAT. RESOURCES & ENV'T 236, 237 (2001) (discussing the Maryland program).

20. See John W. Frece & Andrea Leahy-Fucke, *Smart Growth and Neighborhood Conservation*, 13 NAT. RESOURCES & ENV'T 319, 322-25 (1998), in which the Maryland Governor's Smart Growth assistant describes the state program which in-

port expressed for Smart Growth is that while some have a vision of hyper-regulated Portland with transit-oriented development, urban revitalization, and urban growth boundaries,²¹ most base their support on the image of the more modest Maryland policies, which merely target infrastructure subsidies to areas planned for growth.²² Maryland's alternative to Portland's urban growth boundaries is the establishment of urban service districts that simply limit public delivery and public subsidy of services rather than impose direct restraint on growth and development. The Maryland Smart Growth program represents a statewide program of urban service boundaries, which may encourage a smarter form of growth, but unlike the Portland model, leaves the landowner free to pursue land development throughout the region where the internalizing of infrastructure costs projects a profit.²³

Smart Growth has its critics. The libertarian critique argues for the deregulation of land development.²⁴ Both the libertarian and the social equity critics charge that restrictions on urban sprawl or development will adversely affect housing supply and affordability.²⁵ The social equity critique also shares a distrust of government,²⁶ namely that Smart Growth is simply an attractive technique to exclude by the suburban NIMBY ("not in my backyard") crowd.²⁷ A structural critique charges that the doctrine of Smart Growth, once established, serves as an unfunded mandate, as many communities lack the resources to achieve intelligent

cludes many positive symbolic investments such as funds for urban and brownfield cleanup, school renovation, mortgage loans in Smart Growth neighborhoods. See also MARYLAND OFFICE OF PLANNING, *MANAGING MARYLAND'S GROWTH: MODELS AND GUIDELINES* (2d ed. 1998).

21. See Stewart, *supra* note 10, at 1017.

22. See Bernard H. Siegan, *Smart Growth and Other Infirmities of Land Use Controls*, 38 SAN DIEGO L. REV. 693, 696 n.7 (2001) (endorsing Maryland's plan and eschewing the plan in Portland, Oregon).

23. PETER CALTHORPE & WILLIAM FULTON, *THE REGIONAL CITY: PLANNING FOR THE END OF SPRAWL* 64-65 (2001).

24. See *id.* at 64.

25. See, e.g., Matthew E. Kahn, *Does Sprawl Reduce the Black/White Housing Consumption Gap?*, 12 HOUSING POL'Y DEBATE 77 (2001).

26. See Clint Bolick, *Subverting the American Dream: Government Dictated "Smart Growth" is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859 (2000).

27. See Gregg Easterbrook, *Comment on Karen A. Danielson, Robert E. Lang & William Fulton's "Retracting Suburbia: Smart Growth and the Future of Housing,"* 10 HOUSING POL'Y DEBATE 541, 542 (1999); see also Gerald E. Frug, *Euphemism as a Political Strategy*, 30 ENVTL. L. REP. 11,189 *passim* (2000) (arguing Smart Growth requires higher suburban density and thus the challenge is to overcome the desire for exclusivity).

growth.²⁸ The legalistic critique points to rather vague arguments that development regulation violates certain constitutional norms.²⁹ Nevertheless, a wide array of legal scholars finds the legal jurisprudence to embrace even the most comprehensive form of Smart Growth.³⁰ The environmental critique argues that the weaker Maryland form of infrastructure targeting and resource protection is insufficient to protect sensitive ecological resources,³¹ and that even in the relatively more rigid Portland style of Smart Growth, regulation is still too relaxed to achieve Smart Growth³² or sustainability.³³ Smart Growth may mask the problem of unsustainable consumption and overpopulation.³⁴

28. See, e.g., Michael Barrette, *Smart Money: Smart Growth Plans Are "in," But Local Governments Have a Hard Time Finding the Cash to Carry Out the Mandates*, PLAN., Nov. 2001, at 14 (smart growth compliance requires combining private foundation money with traditional funding mechanisms to achieve their smart growth goals).

29. Bolick, *supra* note 26, at 867–72 (arguing that Smart Growth regulations constitutes a taking of property); James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 450–63 (2001) (supporting possible as-applied excessive permit conditions or excessive regulation a local possibility, but no facial condemnation); Jeffery M. Sharp, *Digest of Selected Articles*, 29 REAL EST. L.J. 160, 166–68 (2000); Siegan, *supra* note 22, at 701 (arguing that Portland-style Smart Growth is violative of the rights of travel and equal protection and it is a taking of property).

30. See FREILICH, *supra* note 9, at 65–84 (1999); Dowling, *supra* note 16, at 881–87 (arguing that Smart Growth regulations are consistent with the takings doctrine); Holloway & Guy, *supra* note 29, at 469; James A. Kushner, *supra* note 8, at 237; John R. Nolon, *Local Land Use Controls that Achieve Smart Growth*, 31 ENVTL. L. RPT. 11,025, 11,036 (2000); David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 WAKE FOREST L. REV. 671, 705 (2000) (arguing that Smart Growth regulations are consistent with takings doctrine but that growth management initiatives in North Carolina are further constrained by state legislation preempting local ordinances by requiring state enabling legislation).

31. Christopher M. Corchiarino, Comment, *Educating Smart Growth: One Size Fits All Growth Initiatives are Lacking Sound Environmental Guidance*, 9 U. BALT. J. ENVTL. L. 1, 2 (2001).

32. Pollard, *supra* note 15, at 281–82.

33. See Timothy Beatley & Richard Collins, *Smart Growth and Beyond: Transitioning to a Sustainable Society*, 19 VA. ENVTL. L.J. 287, 290 (2000) (arguing that Smart Growth is too modest an initiative); see also Gerrit J. Knapp, *Economics and the Smart Growth Movement*, 19 VA. ENVTL. L.J. 329, 332 (2000) (stating that Smart Growth is largely about open space protection, infrastructure provision and urban liveability, not sustainability). But see Vicki Been, *Comment on Beatley and Collins' Smart Growth and Beyond: Transitioning to a Sustainable Society*, 19 VA. ENVTL. L.J. 323, 328 (2000) (stating that despite not offering sustainability, Smart Growth offers the possibility of development internalizing its costs, substantially achieving sustainability).

34. Pollard, *supra* note 15, at 282.

Advocates both of Portland style regulation and Maryland urban service districts posit that a modest increase in residential density will generate vastly more livable and environmentally protected communities. Further, the environmental critique holds that for urban design to be sustainable, densities must greatly exceed single family homes on quarter-acre lots. Density must allow mass transit alternatives to the automobile and the opportunity for walking and neighborhood destinations. As Timothy Beatley and Richard Collins have stated, albeit in addressing the modest Maryland version of Smart Growth in contrast to current development patterns: "The result will not be terrifically different than the prevailing similar growth patterns. Funneling growth into areas defined as having densities of 3.5 units per acre does not exactly reassure us that we are in a city-building mode."³⁵ This criticism is well-taken and thus many would resist labeling detached houses on quarter-acre lots (7 or 8 to the hectare) as Smart Growth.

The next section of this article will describe the related progressive planning movement called New Urbanism. New Urbanism reflects an American version of the European compact city, where the mixing of shops and residence in the urban center is designed to generate city life and attract pedestrians toward a higher density, less automobile-dominated community. Smart Growth linked to New Urbanism is about a very different community design and higher density pattern. Despite the attractive image of Smart Growth, it has also been argued that acceptable higher density housing around transit is an unrealistic vision to accommodate anticipated growth.³⁶ Rather than a criticism of Smart Growth, this reflects an anti-transit spending argument. Smart Growth, including higher density around transit corridors, would contribute to the accommodation of anticipated growth and offer alternatives to the anticipated worsening traffic;³⁷ however, it would not eliminate the need for creative solutions to the

35. Beatley & Collins, *supra* note 33, at 295.

36. Peter Gordon & Harry W. Richardson, *Are Compact Cities a Desirable Planning Goal?*, 63 J. AM. PLAN. ASS'N 95, 97-99 (1997). *But cf.* ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 218-27 (1994) (arguing that it is difficult and expensive to accommodate all urban growth through transit-oriented development but a very important component).

37. ANTHONY DOWNS, *STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION* 112-20 (1992).

explosion in population growth.³⁸ Another valid criticism is that communities will likely label any proposed rules as Smart Growth when in fact they may be NIMBY-type growth management. This results in development leapfrogging to the next accommodating town resulting in even more sprawl.³⁹ For example, it has been argued that the Smart Growth plan adopted by Loudoun County, Virginia, by limiting regulation to a single county and by failing to offer a regional solution, will simply force people who cannot live there to drive through the town twice a day from more distant suburbs.⁴⁰ Developers are likely to simply leapfrog over Smart Growth sensitive towns or counties, generating both Dumb Growth sprawl further away and Dumb Growth traffic that will fill Smart Growth community streets.

Smart Growth is a vague doctrine that attempts to target infrastructure capital improvement subsidies, such as roads, utilities, and schools toward land planned for urbanization and away from areas currently not identified or planned for urbanization. These Smart Growth urbanizing districts typically run along transportation corridors of major roads and transit stops.⁴¹ Theorists and advocates typically call for the establishment of urban growth boundaries so that urbanization pressures can be removed from agricultural areas and other critical open spaces. Only through revitalizing urban centers can growth be accommodated without further urban sprawl and a rising threat to the urban ecology. One problem with the establishment of growth areas or boundaries is that local governments often designate far too many greenfields on the urban fringe for growth—often more than double any reasonable projection of need.⁴² One explanation for these excessive urban growth boundaries is that reductions of the boundary permitting growth of the urbanized community are not politically simple, and “overzoning” for development reflects a compromise to mitigate what would otherwise be an even more

38. John K. McIlwain, *Show Me the Money: A Proposed Federal Response to Urban Sprawl*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 26, 27–28 (2001) (stating that there is predicted a nearly six million population increase in Los Angeles area by 2020 and up to 1.3 million annual additional American Households, requiring 30 to 40 million new homes).

39. Kushner, *supra* note 14, at 72–73.

40. McIlwain, *supra* note 38, at 29.

41. Nolon, *supra* note 30, at 11,027.

42. Beatley & Collins, *supra* note 33, at 295 (reporting some Maryland counties were designating more than twice what was needed for development).

frequent and wrenching boundary adjustment process. Compromising on consistency between growth or service boundaries and projected market demand also no doubt reflects the compromise to secure adoption of a boundary. Excessively permissive growth constraints may also reflect the desire to accommodate housing need without excessive price inflation and to encourage campaign contributions by attracting politically-powerful developers and offering a regulatory system that can be politically manipulated. Regulators may also seek to subsidize housing development on the urban fringe by depressing land prices through “overzoning” for homes.

Land economists argue that the failure to designate sufficient competing sites for new development will inflate land prices, exacerbating the opportunity to develop affordable housing.⁴³ Yet, students of the Portland experience suggest that that community’s land use scheme displays overzoning for development. Also, economic analysis suggests that high housing prices are a function of excessive regulation, not of supply constraints.⁴⁴ Economists Edward L. Glaeser and Joseph Gyourko reject the classical view and argue that housing prices are a function of regulatory and entitlements acquisition cost rather than land value alone. Their thesis appears intriguing and credible but the hypothesis remains suspect. Their approach compares cities, but not local jurisdictions within a regional area. Rarely does one encounter regional government or land use approvals under one regional agency. In actuality, the regulatory environment runs across a continuum in fifty, one hundred, or more separate communities and jurisdictions. Often a neighboring town or county is offering even cheaper land. If town A imposes high fees and standards, town B should offer the same product at a dramatically reduced price. The lowest priced homes are often in neighborhoods beyond a generally acceptable commute. Although such housing prices may reflect less costly regulation and re-

43. See EDWARD L. GLAESER & JOSEPH GYOURKO, *THE IMPACT OF ZONING ON HOUSING AFFORDABILITY* 4–5 (Harvard Institute of Economic Research, discussion paper No. 1948, 2002) (rejecting what the author’s refer to as classical land economics focusing on demand), available at <http://post.economics.harvard.edu/hier/2002papers/2002list.html>.

44. *Id.* at 16 (rejecting classical land economics focusing on supply and demand, in favor of an econometrics model based on a theory of regulatory inflation); see also Virginia Postrel, *Economic Scene — One Theory on Why it Seems Easier to Buy a House in the Nation’s ‘Red’ Zone*, N.Y. TIMES, Mar. 28, 2002, at C2 (describing the Glaeser & Gyourko study *supra* note 43).

duced development and infrastructure quality standards, affordable new home prices classically reflect that the development is built on cheap land just beyond the urban fringe.

Adhering to classical land economics theory, which contends that demand is the most significant determinant of rents, a Brookings Institution study⁴⁵ by Arthur C. Nelson, Rolf Pendall, Casey J. Dawkins, and Gerrit J. Knapp, appears more realistic than Glaeser & Gyourko in recognizing the multiple factor, more nuanced vision of housing markets and prices. It found demand to be the most robust factor in setting rents. Although counter-intuitive, they argue that Portland has actually increased supply relative to demand ahead of other cities. While the investigators acknowledge that growth management does raise housing costs, they note that growth management also increases community desirability, which carries other benefits. The studies of Portland reflect higher density transit-oriented developments that offer walkable neighborhoods with mixed uses. These neighborhoods with reduced automobile access and more pedestrian amenities may range in density from eight or more units an acre. These New Urbanist neighborhoods, according to this literature review, rather than reflecting this anticipated exclusion by growth management, are actually increasing supply and reducing exclusion by generating more multi-family and subsidized housing. The increased densities also moderate growth management-induced price inflation, and growth management reduces infrastructure cost. Some increased housing prices are offset by cheaper commuting on public transit and cheaper energy costs (presumably from smaller units or from environmentally-friendly materials and building techniques known as “green architecture”). While the authors do not discuss Smart Growth because of its widely disparate definitions, they nevertheless recognize the existence of both more intelligent forms of growth management and growth management that is not well conceived. The Brookings Institution study, which reviews a wide array of available studies, concludes that the Portland urban growth boundary imposes either a *di minimis* effect or possibly no effect on housing prices.⁴⁶

45. ARTHUR C. NELSON, ET AL, THE LINK BETWEEN GROWTH MANAGEMENT AND HOUSING AFFORDABILITY: THE ACADEMIC EVIDENCE (Brookings Institution discussion paper, 2002).

46. *Id.* at 25–26 (showing a range in price differential between no impact and less than \$10,000 per house).

The lack of significant price inflation from growth management regulation may be a function of Portland's over-generous boundary line that generates a land supply in excess of demand. Glaeser & Gyourko argue that high housing prices in California are a function of a more complex, cost-inflating, rigid set of zoning and subdivision standards.⁴⁷ Unfortunately, this is a questionable assumption. Zoning and subdivision regulations, including exactions, impact fees, and other permit conditions, are not terribly different in suburban Los Angeles than in suburban Kansas City, yet housing price variation is robust. While securing permits and entitlements under subdivision and environmental review statutes is more costly in California, the real difference still remains: Los Angeles has simply exhausted its supply of undifferentiated land suitable for suburban-style development.⁴⁸ Immigration and birthrates are generating a dramatic increase in demand for a scarce resource. The only strategy for generating a more affordable expanding housing supply is to establish a program of higher density development, predominantly targeted at urban infill developments and around transit corridors throughout the region. This plan would include the establishment of substantial programs to expand housing subsidies and to reclaim and rebuild urban brownfields.

Some data suggests that Portland, Oregon, the archetypical American Smart Growth city, is not significantly more dense than cities perceived to reflect urban sprawl.⁴⁹ Data also suggests that growth is more compact in Portland.⁵⁰ Curiously, Los Angeles, the archetypical city of urban sprawl, is actually the densest of all continental United States urban metropolitan areas.⁵¹ Although Manhattan is extremely dense, when its suburbs

47. GLAESER & GYOURKO, *supra* note 43, at 21.

48. See WILLIAM B. FULTON, *SPRAWL HITS THE WALL: CONFRONTING THE REALITIES OF METROPOLITAN LOS ANGELES* 30 (2001).

49. FULTON ET AL., *supra* note 9, at 7 (stating that Portland is not among the twenty highest density cities, having declined in density by 11 percent from 1982 to 1997); see also Knapp, *supra* note 33, at 332 (stating that despite great strides in Portland, and while the urban growth boundary has expanded by but two percent, the urban footprint of Portland has grown by 30 percent).

50. CALTHORPE & FULTON, *supra* note 23, at 125 (citing research which compared growth in Portland at 1.2 square miles per year to Washington D.C. at 8.5 square miles each year, and noted that while D.C. residents require 480 square meters, those in Portland require but 120, a 400 percent difference).

51. FULTON ET AL., *supra* note 9, at 7 (stating that the three most dense Consolidated Metropolitan Statistical Areas based on persons per urbanized acre were Honolulu, with 12.36, Los Angeles with 8.31, and New York with 7.99); *id.* at 14 (stating that while Los Angeles had but 8.09 persons per urbanized acre in 1982 as

are included a lower density heightened version of sprawl comparable to Los Angeles is found.⁵²

Smart Growth may be one of those planning fictions, like the "Green Heart" of the Netherlands, that may not actually exist, but it allows planning to project a positive image of environmentalism and reflect a sense of civic optimism. Planners have dubbed the Randstadt of the Netherlands, the lands between Amsterdam, Den Haag (The Hague), Rotterdam, and Utrecht, the nation's "Green Heart." Preserving open space and clean air in one of the densest nations on the planet became a national shared movement. The reality of the "Green Heart," despite containing lovely land and nature accessible by bicycle, including the beautiful town of Gouda, is not consistent with its environmental image. The district is largely agricultural, which is not its best environmental use, and there has actually been more development within the heart than around it.⁵³ Nevertheless, the "Green Heart" has been mapped, planned, and its preservation campaigned for and assured as a symbol of planning and progress.⁵⁴

While better designs for suburban growth would hopefully be generated under the Smart Growth movement, impediments to central city redevelopment threaten failure. Such impediments include: reluctant developers; the need for complex multiple subsidy layers which force near-involuntary partnerships of governmental agencies and financial players; high land assembly costs; and high risk. These revitalization impediments suggest

compared to New York City's 9.44, by 1997, Los Angeles has densified to 9.12 persons per acre, while New York has sprawled to but 2.37). *But see* Galster et. al., *supra* note 9, at 68 (stating that under various sprawl measurements of density, New York still rules).

52. FULTON ET AL., *supra* note 9, at 7, 14; *see also* Dowell Myers, *Demographic Dynamism and Metropolitan Change: Comparing Los Angeles, New York, Chicago, and Washington, DC*, 10 HOUSING POL'Y DEBATE 919 (1999) (comparing growth and population diversity trends).

53. *Compare* Michel Van Eeten & Emery Roe, *When Fiction Conveys Truth and Authority: The Netherlands Green Heart Planning Controversy*, 66 J. AM. PLAN. ASS'N 58 (2000) and Emery Roe & Michel van Eeten, *The Heart of the Matter: A Radical Proposal*, 67 J. AM. PLAN. ASS'N 92 (2001), with Ernest R. Alexander, *Netherlands Planning: The Higher Truth*, 67 J. AM. PLAN. ASS'N 91 (2001) and Ernest R. Alexander, *Alexander Responds*, 67 J. AM. PLAN. ASS'N 97 (2001).

54. *But see* Timothy Beatley, *Dutch Green Planning More Reality Than Fiction*, 67 J. AM. PLAN. ASS'N 98 (2001) (arguing that the Green Heart is not a fiction and deserves to be protected, and advocating urban greening).

that infill development will require aggressive reform.⁵⁵ Nevertheless, urban development has dramatically increased in the last decade and Smart Growth makes central city revitalization an imperative.⁵⁶ Dramatic urban revitalization will likely be imminent in cities like Los Angeles that have sprawled across both wilderness areas and borders of neighboring urbanized regions, as well as those regions that are choking in highway congestion as urban real estate transactions increasingly become the most attractive game in town.

The following initiatives would expeditiously advance the generic call for Smart Growth:

1. Make the infrastructure investment to create efficient, high-speed inter-city trains and convenient local transit in urban areas.⁵⁷
2. Increase funding for urban transit and "Transit-oriented development" (TOD): mixed-use, high-density walkable pedestrian neighborhoods around stops.⁵⁸
3. Condition transit subsidies on land use conversion to TOD around stations and stops.

55. J. Terrence Farris, *The Barriers to Using Urban Infill Development to Achieve Smart Growth*, 12 HOUSING POL'Y DEBATE, 1, 1-2 (2001) (arguing that barriers to infill are typically insurmountable and advising Smart Growth advocates to do it in the suburbs).

56. William H. Hudnut, III, *Comment on J. Terrence Farris's "The Barriers to Using Urban Infill Development to Achieve Smart Growth,"* 12 HOUSING POL'Y DEBATE 31 (2001).

57. Transit/rail advocates; ROBERT CERVERO, *THE TRANSIT METROPOLIS* (1998). Cf. Kevin J. Klesh, Note, *Urban Sprawl: Can the "Transportation Equity" Movement and Federal Transportation Policy Help Break Down Barriers to Regional Solutions?*, 7 ENVTL. LAW. 649, 666 (2001) (anticipating greater transit equity with increased transit funding as compared to highway funds).

58. MICHAEL BERNICK & ROBERT CERVERO, *TRANSIT VILLAGES IN THE 21ST CENTURY* (1997); DOWNS, *supra* note 37, at 85-89; Michael Bernick & Amy Freilich, *Transit Villages and Transit-Based Development: The Rules are Becoming More Flexible—How Government Can Work With the Private Sector to Make it Happen*, 30 URB. LAW. 1, 1-2 (1998); Robert Cervero, *Growing Smart by Linking Transportation and Urban Development*, 19 VA. ENVTL. L.J. 357 (2000); Robert H. Freilich, *The Land-Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 URB. LAW. 549-50 (1998); James A. Kushner, *The Reagan Urban Policy: Centrifugal Force in the Empire*, 2 UCLA J. ENVTL. L. & POL'Y 209, 242-45 (1982) [hereinafter *Centrifugal Force*]; James A. Kushner, *Urban Transportation Planning*, 4 URB. L. & POL'Y 161, 173 (1981) [hereinafter *Urban Transportation*]. See also Matthew W. Ward et al., *National Incentives for Smart Growth Communities*, 13 NAT. RESOURCES & ENV'T 325, 328 (1998) (emphasizing brownfields cleanup and Tea-21 non-highway transportation funding).

4. Condition transit funding on cities establishing a transit corridor plan with identified routes implemented through the use of TODs around stops.⁵⁹

5. Condition transit funding on the establishment of "urban growth boundaries" that accommodate reasonably anticipated regional growth.⁶⁰

6. Establish incentives for in-fill development. Empowerment and enterprise zones⁶¹ should be available to encourage TOD development along transit corridors in lower-income communities in need of revitalization.

7. Establish a tax credit program offering incentives for urban infill development.⁶²

8. Require inclusion of a minimum percentage of low-income housing tax-credit financed units and offer reservation priority for developers of TODs.

9. Establish a housing program generating a mixture of incomes linked by transportation and employment access, targeting infill development along transit corridors.⁶³

10. Make necessary modifications to the federal Community Development Block Grant Program to authorize the use of block

59. Cf. Eric M. Braun, *Smart Growth in North Carolina: Something Old or Something New?*, 35 WAKE FOREST L. REV. 707, 716 (2000) (calling for specific statutory Smart Growth planning elements such as a vision statement, infrastructure, economic development, housing, recreation, and land use and calling for specific implementation techniques).

60. Stephanie Yu, Note, *The Smart Growth Revolution: Loudoun County, Virginia and Lessons to Learn*, 7 ENVTL. LAW. 379, 399-400 (2001) (stating that urban growth boundaries are the most critical and controversial Smart Growth component designed to contain sprawl, and reviewing Austin, Texas, Portland, and Loudoun County).

61. The enterprise zone program is based on a principle of cutting taxes and offering subsidies to start-up businesses in impacted specially selected low income districts. See 26 U.S.C. §§ 1391-1397D (2000). See generally Wilton Hyman, *Empowerment Zones, Enterprise Communities, Black Business, and Unemployment*, 53 WASH. U. J. URB. & CONTEMP. L. 143 (1998).

62. One alternative proposal is to establish property tax systems on the theory of Henry George to tax land at its potential value, an incentive to develop or sell: Smart Growth taxation. Thomas Gihring, *Incentive Property Taxation: A Potential Tool for Urban Growth Management*, 65 J. AM. PLAN. ASS'N 62, 77 (1999). Another alternative tax proposal that would encourage Smart Growth and discourage sprawl would be a progressive tax on consumption that would heavily tax expensive vehicles, vacation homes, and lavish lifestyles in lieu of taxing savings, income, capital gains, or inheritances. EDWARD J. McCAFFREY, *FAIR NOT FLAT: HOW TO MAKE THE TAX SYSTEM BETTER AND SIMPLER* (2002); Beatley & Collins, *supra* note 33, at 296-301, 307 (2000) (advocating a steeply progressive tax on consumption and recognizing affluent consumption, such as the impact of vacation homes on sprawl).

63. McIlwain, *supra* note 38, at 34-35.

grant funds for development of TODs in low-income communities.⁶⁴

11. Condition federal highway and transit funding on the states' requiring a transit corridor plan element in local comprehensive plans that designate TOD development at transit stops.

12. Modify state redevelopment laws to allow their use as an alternative to traditional blight determination in executing infill TOD plans,⁶⁵ albeit with stringent restrictions favoring rehabilitation and reuse over clearance or demolition.

13. Eliminate sprawl-generating subsidies such as funds for suburban highway and road construction or the provision of subsidized water,⁶⁶ or sewer facilities and service,⁶⁷ on the urban fringe. Structure compensating subsidies that favor urban infill and TOD development.

14. Plan for the use of parks and green space throughout the community to make attractive pedestrian corridors.⁶⁸

15. Establish regional government authority to plan transit and corridor development rather than allowing traditional local autonomy.⁶⁹

16. Establish a regional tax-sharing scheme that will encourage affordable housing inclusion and discourage destructive sales tax competition.⁷⁰

64. 42 U.S.C. §§ 5301–5317 (2000); CHARLES E. DAYE ET AL., HOUSING AND COMMUNITY DEVELOPMENT 454–489 (3d ed. 1999).

65. George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1032–33 (2001).

66. Mark P. Berkman & Jesse David, *Water Subsidies in Southern California: Do They Exist and Have They Contributed to Urban Sprawl?*, 37 CAL. W. L. REV. 121 (2001).

67. Phillip J. Longman, *Who Pays for Sprawl? Hidden Subsidies Fuel the Growth of the Suburban Fringe*, U.S. NEWS & WORLD REPORT, Apr. 27, 1998, at 22 (reporting that equal pricing of sewer connections allows those who live near the treatment plant and endure its odor to pay more than the cost of service while the affluent escape the odor and pay less than the full cost for waste treatment).

68. Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl with Smart Growth?*, 35 WAKE FOREST L. REV. 563, 574–607 (2000).

69. Janice C. Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 GA. ST. U. L. REV. 1019, 1026–31 (2001).

70. *Centrifugal Force*, *supra* note 58, at 231; *Urban Transportation* *supra* note 58, at 173–74.

III. NEW URBANISM

New Urbanism⁷¹ reflects a vision not so much of the future but of a better past. For some, New Urbanism reflects the small town America that might be seen in a New England village or a mid-western town. The style is neo-traditional: walkable, friendly streets with folks on their front porches, with neighbors able to walk on car-free or traffic-calmed quiet narrow streets to neighborhood shops or schools. For others, the image is distinctly nostalgic of the European street scene: housing over shops, sidewalk cafes and restaurants, with attractive pedestrian spaces allowing the forgoing of autos for a walk to services, work, or recreation. Different adherents of Smart Growth and New Urbanism advocate different levels of density. Perhaps New Urbanism has been inspired as much by trips to American theme parks as visits to Europe. Many New Urbanist communities conjure images more like Disney or Las Vegas than Paris or Vienna. There is nothing wrong with the Disney Main Street design. Indeed, the Disney Imagineers are visionary in recognizing the nostalgic, or the romantic movie-inspired image of a friendly small town—a dream shared by many. The young and old are attracted to New Urbanist communities, and developers are attracted to what could result in better communities, urban revitalization, and higher profits from increased density. Like Smart Growth, New Urbanism is a vague label with an unclear definition of appropriate density.

71. See generally PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM* (1993); CALTHORPE & FULTON, *supra* note 23, at 282–85; MICHAEL N. CORBETT, *A BETTER PLACE TO LIVE: NEW DESIGNS FOR TOMORROW'S COMMUNITIES* (1981); ANDRÉS DUANY ET AL., *SUBURBAN NATION* (2000); PETER KATZ, *THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY* (1994); ROBERT STEUTEVILLE ET AL., *NEW URBANISM: COMPREHENSIVE REPORT AND BEST PRACTICES GUIDE* (2001); Eric M. Braun, *Growth Management and New Urbanism: Legal Implications*, 31 *URB. LAW.* 817 (1999); Robert J. Sitkowski et al., *Enabling Legislation for Tradition Neighborhood Development Regulations*, *LAND USE L. & ZONING DIG.* 3 (Oct. 2001); Rebecca R. Sohmer & Robert E. Lang, *From Seaside to Southside: New Urbanism's Quest to Save the Inner City*, 11 *HOUSING POL'Y DEBATE* 751 (2000). Using econometrics, Edward Glaeser and Jesse Shapiro do not see any signs of New Urbanism, as the trend outside a few extremely high population cities, and warm climate cities, urbanism is in decline. EDWARD L. GLAESER & JESSE SHAPIRO, *IS THERE A NEW URBANISM? THE GROWTH OF U.S. CITIES IN THE 1990s* (Harvard Institute of Economic Research, discussion paper No. 1925, 2001), available at <http://post.economics.harvard.edu/hier/2001papers/2001list.html>.

Critics of New Urbanism are relatively few, perhaps because the movement has been developer-driven rather than originating from idealistic political, academic, or grassroots-based organizations. The latter are nevertheless quickly getting on board the movement. Criticism is most frequently lodged by suburban subdivision advocates who fear reduced support for freeways, street widening, and parking expansion. Such critics also fear lowered property values caused by abandoning the suburban lifestyle for high density urban communities.⁷² Like NIMBY attitudes toward the poor or apartments, this concern may often be couched in the form of environmental objections or the protection of the rural or historic character of a community.⁷³ Paradoxically, an alternative criticism is that New Urbanism is little more than a marketing strategy for suburban development.⁷⁴ Although the mixed use of New Urbanism carries near-universal design support, its nontraditional nature makes financing precarious and renders urban projects risky.⁷⁵ Another ecological criticism questions the consistency between the village image of New Urbanism and the search for sustainability.⁷⁶ Some have charged New Urbanism as being physically determinist and aesthete—that pretty buildings can solve social problems.⁷⁷ By imposing a design and being insufficiently sensitive to preexisting neighborhood form, New Urbanism has also been called anti-democratic.⁷⁸ This is certainly an interesting critique. New Urbanist architects have demonstrated the ability to adapt a project to be

72. Frug, *supra* note 27, at 11,193–95 (arguing that Smart Growth must overcome exclusion).

73. *Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1965) (rejecting the use of the justification to defend large-lot zoning).

74. Braun, *supra* note 71, at 821.

75. Joseph E. Gyourko & Witold Rybczynski, *Financing New Urbanism Projects: Obstacles and Solutions*, 11 HOUSING POL'Y DEBATE 733, 739–41 (2000).

76. Ruth Durack, *Village Vices: The Contradiction of New Urbanism and Sustainability*, PLACES, Fall 2001, at 64 (noting villages tend to be closed and self-interested and anathema to cultural diversity).

77. Charles C. Bohl, *New Urbanism and the City: Potential Applications and Implications for Distressed Inner-City Neighborhoods*, 11 HOUSING POL'Y DEBATE 761, 771 (2000); Michael Pyatok, *Comment on Charles C. Bohl's, New Urbanism and the City: Potential Applications and Implications for Distressed Inner-City Neighborhoods—The Politics of Design: The New Urbanists vs. the Grass Roots*, 11 HOUSING POL'Y DEBATE 803, 809–11 (2000) (critical of failure to adhere to one-for-one replacement of public housing units).

78. See Archon Fung, *Beyond and Below the New Urbanism: Citizen Participation and Responsive Spatial Reconstruction*, 28 B.C. ENVT'L AFF. L. REV. 615, 616–17 (2001) (advocating a more bottom-up citizen participation mechanism where expressed needs generate development initiatives).

compatible with adjacent development as well as a region's cultural history and its climate through techniques such as utilizing traditional materials and building design to allow natural ventilation and insulation instead of utilizing building methods that demand air conditioning, or providing a building or neighborhood design that accommodates traditional cultural practices. In a number of communities, New Urbanist planners are offering community planning education, including a comparison of the full range of community and building design options. The frequent result is that the community members and public officials enthusiastically endorse New Urbanist designs.⁷⁹

New Urbanist theory is directed toward building a physical design that fosters a sense of community, and citizen participation in planning is a central component of that goal's achievement. Yet, it is likely that some communities or developers will simply propose New Urbanist-type architecture of the wrong scale or design for the site. Thus, New Urbanist developments require closer supervision and more careful review than traditional development that adheres to an already proven template. The need for greater involvement of local elected and administrative staff officials can generate more democratic participation in planning, but also carries the potential for generating real estate "deals" with little community input. Nevertheless, the anti-democratic critique of New Urbanism appears equally applicable to all architectural and planning initiatives. As New Urbanist codes often require ordinance modifications or the pursuit of variances for certain design elements, it is possible that a developer, to save time and money, may forgo the available mechanisms thereby forsaking the realization of what might be a good New Urbanist design. Ill-designed New Urbanism will undoubtedly occur. No one should endorse a project simply because there are front porches and a New Urbanism label. Several projects claim to be New Urbanist, yet fail to address all components of the New Urbanist charter.⁸⁰ Simply planting trees in the street, although not

79. Cara Mia DiMassa, *Azusa Residents Help Plan Future of Last Rural Site*, L.A. TIMES, Oct. 28, 2001, at B5; *Southern California City Takes the Driver's Seat*, NEW URB. NEWS, Apr.-May 2002, at 12; see also Evan Halper, *New Urbanism Housing Style Filling a Void*, L.A. TIMES, Oct. 21, 2001, at B7.

80. See generally CHARTER OF THE NEW URBANISM (Michael Leccese et al. eds., 1999); CONGRESS FOR THE NEW URBANISM, CHARTER OF THE NEW URBANISM (1998), available at <http://www.cnu.org/aboutcnu/index.cfm?formation=charter&CFID=2610287&CFTOKEN=64652054> (including nine elements at the region, city, and town level favoring urban infill, revitalization, and regional tax base sharing;

such a bad idea, is not by itself New Urbanism. The New Urbanist development should make walking to local destinations more attractive than using an automobile. Architectural design will return the community center from private living rooms and rear yards to the streets, in the form of walkways, porches, and housing over shops, which would dramatically reduce or eliminate automobile traffic and parking. Smart New Urbanism would assure that these communities are well-served by mass transit.

New Urbanism is somewhat vague on the question of density. New Urbanist theorists describe four-story cities.⁸¹ To its advocates the idealized image may be Amsterdam, Berlin, Vienna, Paris, or "Celebration"⁸²—a largely low-density single-family home community built by Disney in Orlando, Florida. In fact, New Urbanism does not impose a particular density regime. Instead, New Urbanists look at a continuum of varying densities, unified by an attempt to create a sense of community in a district that invites walking to a full range of community destinations.

Unlike Smart Growth, which tends to be criticized by the right, New Urbanism faces criticism from the left. Perhaps the contrast stems from New Urbanism being largely a developer-supported and advocated planning movement. Many criticize New Urbanism based on early publicized projects catering to the affluent. It may also be that as certain landowners and developers are threatened by Smart Growth regulation, New Urbanism has yet to show on their radar as most communities enact New Urbanism on a parcel-by-parcel basis through an overlay zoning amendment enacted at the developer's request. By intelligently advocating this dual code zoning, New Urbanism has avoided confrontations between new and old. By comparison, Smart Growth versus Dumb Growth is a steel cage wrestling match for hegemony.⁸³

The anecdotal reports from New Urbanist towns and developments suggest great enthusiasm for these initiatives on the part of

nine elements at the neighborhood, district, and corridor level, such as compact, pedestrian-friendly, well-planned and transit-accessible; and nine elements covering the block, street, and building styles).

81. CHRISTOPHER ALEXANDER, ET. AL., *A PATTERN LANGUAGE* 114-19 (1977).

82. Douglas FRANTZ & CATHERINE COLLINS, *CELEBRATION, U.S.A.: LIVING IN DISNEY'S BRAVE NEW TOWN* (1999); Dana Young, Note, *The Laws of Community: The Normative Implications of Crime, Common Interest Developments, and "Celebration,"* 9 HASTINGS WOMEN'S L.J. 121, 129-30 (1998).

83. Frug, *supra* note 27, at 11,190 (discussing a lack of communication between pro- and anti-Smart Growth opponents).

consumers and developers.⁸⁴ Although the current typical new dwelling unit in America tends to be a single-family detached home in a suburban Dumb Growth subdivision,⁸⁵ the demographic projections for the coming years suggests a rising demand for pedestrian-friendly neighborhoods and a declining interest in the suburban subdivision.⁸⁶ The proliferation of Starbucks Coffee shops is a symbol of a “cappuccino culture” that is epidemic.⁸⁷ The burgeoning market for European style, compact, urban neighborhoods promises a New Urbanist success.

IV. THE IMPACT OF SMART GROWTH AND NEW URBANISM ON POOR AND MINORITY ETHNIC POPULATIONS

The focus of this paper is a discussion of how racial and ethnic minority groups and the poor may be affected by Smart Growth and New Urbanism. The discussion is theoretical because America has so much Dumb Growth that it is too difficult to measure New Urbanism as well as Smart Growth-based communities. Most first generation New Urbanist developments appear to be suburban rather than urban; their only impact is to drain more wealth and tax base from the city. Reflecting a new generation, New Urbanist urban infill projects are proliferating, albeit at a tentative pace, awaiting proof of market success. New Urbanist urban center projects should soon begin to generate interesting data allowing comparisons of rents and demographic change. But until then, we can only hypothesize: should Asian, Latino, African-American, and low-income communities get on the bandwagon or stay away from this movement?

A critical question that faces urban regional communities is where can growth be accommodated? It is difficult to upgrade suburban subdivisions that do not reside within a pedestrian-shed to any destination. Most cities lack adequate land to accommo-

84. *Demand for Walkable Neighborhoods Primed to Boom*, NEW URB. NEWS, Sept. 2001, at 21.

85. Dowell Myers & Elizabeth Gearin, *Current Preferences and Future Demand for Denser Residential Environments*, 12 HOUSING POL'Y DEBATE 633, 633-35 (2001).

86. *Id.*

87. Dowell Myers refers to the café culture, *see id.* at 665, and Robert Freilich has referred to “cappuccino cowboys” in reference to the members of that culture who choose to drive SUVs and live rural, Robert H. Freilich, Remarks on Sprawl at Institute on Planning, Zoning and Eminent Domain, San Francisco (Oct. 28, 1999).

date projected population growth by replicating single-family subdivisions. Worsening congestion on highways and major arterial and collector streets, along with land shortages all argue for targeting development towards a revitalized higher density central city with the development of higher density in-fill around the stops of rail, subway, bus, or other transit alternatives in higher density corridors throughout a region.

Minority and poor communities in America have a long history of not benefiting from urban planning initiatives⁸⁸ and not being included in the planning process.⁸⁹ That experience alone should counsel hesitation before endorsing new initiatives. Data demonstrates that African-American housing consumption is greater in sprawl communities, with Black households residing in larger units that they are more likely to own, which increases their affordability.⁹⁰ Higher prices in relatively non-sprawling cities may simply reflect the desirability of the rare city life, suggesting the strategy to improve affordability may be greater density and increased infill rather than more sprawl.

Most urban initiatives are adopted in the hopes that they will succeed and most opposition is premised on the lack of confidence in the effectiveness of the strategy. There are those who advocate suburban diversity, encouraging further migration of the central city and working poor toward the opportunities found in the sprawling suburbs.⁹¹ These efforts could be effective when accompanied by planning for regional transit corridors that will improve access to shopping and employment, but such develop-

88. See generally MARTIN ANDERSON, *THE FEDERAL BULLDOZER—A CRITICAL ANALYSIS OF URBAN RENEWAL 1949-1962* (1964); JAMES A. KUSHNER, *APARTHEID IN AMERICA* (1980), previously published as James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547 (1979); THE SOCIAL SUSTAINABILITY OF CITIES: DIVERSITY AND THE MANAGEMENT OF CHANGE (Mario Polèse & Richard Stren eds., 2000); Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745 (1971); James A. Kushner, *Litigation Strategies and Judicial Review Under Title I of the Housing and Community Development Act of 1974*, 11 URB. L. ANN. 37 (1976) [hereinafter *Litigation Strategies*]; *Centrifugal Force*, *supra* note 58, at 211-16.

89. ALAN A. ALTSHULER, *COMMUNITY CONTROL: THE BLACK DEMAND FOR PARTICIPATING IN LARGE AMERICAN CITIES* 13 (1970); Shery R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLANNERS 216 (1969); *Litigation Strategies*, *supra* note 88, at 51.

90. Kahn, *supra* note 25, at 78-83.

91. See generally Charles E. Daye, *Whither "Fair Housing": Meditations on Wrong Paradigms, Ambivalent Answers, and a Legislative Proposal*, 3 WASH. U. J. L. & POL'Y 241 (2000); Florence Wagman Roisman, *Opening up the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65 (2001).

ment is not being undertaken in most American communities. Growth policies that target development toward urban infill and revitalization could result in the intensification of ethnic separation.⁹² The success of this strategy also carries the threat of gentrification.⁹³ Under gentrification, a consumer preference for urban living causes developers to increase rents, displacing the poor into a dwindling supply of decent housing, resulting in landlord exploitation, excessive rent costs, overcrowding, or the outright expulsion from the city or entry into homelessness.⁹⁴

In reality, Smart Growth and New Urbanism would be implemented over time and in the short term would have only a modest impact on development patterns. Even if wildly successful, such plans would not represent the dominant design for many years. Were New Urbanism to integrate economic classes through integration of housing types and costs—ranging from lofts and live/work units to higher density apartments, townhouses, and even single family detached homes—local governments could use adequate subsidies to provide a stock of optimally designed housing. If designed around transit, these housing options could dramatically improve access to jobs and other services while offering more diverse neighborhoods. Regardless of the available subsidy mechanisms, Smart Growth and New Urbanism reflect a vision of higher density and an alternative to the recently-traditional single family home. Through higher density, home prices and rents should be reduced.⁹⁵ With-

92. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 218–26 (1968). See generally Symposium, *The Urban Crisis: The Kerner Commission Report Revisited*, 71 N.C. L. REV. 1283 (1993).

93. Donald C. Bryant, Jr. & Henry W. McGee, *Gentrification and the Law: Combatting Urban Displacement*, 25 WASH. U. J. URB. & CONTEMP. L. 43, 74 (1983).

94. Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 791–820 (1993) (aesthetic ideology, city planning, and architecture have generated segregation and gentrification); James Geoffrey Durham & Dean E. Sheldon, III, *Mitigating the Effects of Private Revitalization on Housing for the Poor*, 70 MARQ. L. REV. 1, 10–17 (1986); Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507, 508 (1991) (anti-gentrification strategy); Richard T. LeGates & Chester Hartman, *Gentrification-Caused Displacement*, 14 Urb. Law 31 (1982); Peter Marcuse, *To Control Gentrification: Anti-displacement Zoning and Planning for Stable Residential Districts*, 13 N.Y.U. REV. L. & SOC. CHANGE 931, 931–32 (1985); Harold McDougall, *Gentrification: The Class Conflict Over Urban Space Moves into the Courts*, 10 FORDHAM URB. L.J. 177, 177–79 (1982); Henry W. McGee, Jr., *Afro-American Resistance to Gentrification and the Demise of Integrationist Ideology in the United States*, 23 URB. LAW. 25, 25–26 (1991).

95. Pollard, *supra* note 15, at 282–84.

out praising gentrification, some level of gentrification is a sign of health in the housing and commercial markets and community environment. While programs such as housing subsidy, production, and relocation assistance designed to mitigate the cost of relocation through conversion should be enacted, the poor, particularly those in America's central cities, have more to fear from the absence of gentrification. The gentrification image is one that can be used to contest every urban revitalization initiative. While the poor of San Francisco have been hammered by that city's renaissance, as have neighborhoods in New York City, Washington, D.C., and Chicago, most cities are searching to replicate the success of a few gentrified historic neighborhoods. Although this goal is hypothetical and rather implausible, New Urbanists' dream of America's urban centers is gaining the attractiveness of European cities. Such a phenomenon would generate widespread displacement of the poor, but failing to undertake a promising revitalization strategy for fear of its success would dramatically undercut city resources.

The antidote for displacement is a healthy housing production program that starts with obligations on developers to include affordable housing. A legislative strategy would be to advocate for the enactment of adequate implementing subsidy programs, including housing trust funds supported by impact fees imposed on market rate development.⁹⁶ Tony Downs validly challenges Smart Growth to identify subsidies and mechanisms that assure affordable housing is not overlooked. He suggests that failing to do so will exacerbate economic and racial segregation.⁹⁷

A number of HOPE VI public housing projects have been successfully designed within New Urbanist criteria. In such projects, high-rise and higher density buildings are being demolished and redesigned for fewer residents. The redesigned projects are often leaving elevator towers for senior citizens, while replacing family buildings with lower density structures in a New Urbanist design. The projects are also redesigned to attract and integrate working

96. *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991); 1 JAMES A. KUSHNER, *SUBDIVISION LAW AND GROWTH MANAGEMENT* § 6.28 (2d ed. 2001).

97. Anthony Downs, *Conflicts Between Smart Growth and Housing Affordability*, Speech Before the Annual Convention of the Association of Collegiate Schools of Planning (Nov. 8, 2001), at <http://www.anthonydowns.com/cleveland.htm>.

people in projects formerly targeted at the nonworking. Such projects can be popular throughout the economic spectrum.⁹⁸

The initial New Urbanist communities appeared targeted at the middle- and upper middle-class. Relatively few projects included units for the poor. This strategy was likely meant to entice governments and developers to more readily accept New Urbanism. Once communities embrace the design model, the New Urbanist theorists argue that the second generation of projects could begin to integrate a full range of economic classes.

Suburban communities have long opposed land use that integrates minority racial groups and those of lower socio-economic levels. The enthusiasm for New Urbanist projects likely to house the poor or minorities may wane. Suburban communities in the path of transit corridors may continue traditional patterns of only accommodating housing for the affluent. Such patterns would continue the disparity between suburb and city, rich and poor, white and non-white. Official suburban government hostility toward affordable housing or integrated housing is often motivated in part by the desire to avoid expensive infrastructure and service obligations, including new schools and lost opportunities for higher tax-generating uses. In addition to popular and official suburban hostility, America has a most unfortunate history of segregation that manifests itself in private market racial and ethnic discrimination in the sale and rental of housing.⁹⁹ For central

98. CALTHORPE & FULTON, *supra* note 23, at 253–262; DAYE, ET AL, *supra* note 54, at 199–200; Hector Becerra, *Building Confidence in a New Project Aliso Village*, L.A. TIMES, Aug. 23, 1998, at B2, available at 1998 WL 2457281; Bohl, *supra* note 67, at 776–77 (New Urbanist improvements impressive); Stephanie E. Bothwell et al., *Restoring Community Through Traditional Neighborhood Design: A Case Study of Diggs Town Public Housing*, 9 HOUSING POL'Y DEBATE 89 (1998) (Norfolk, Va.); James E. Rosenbaum et al., *Lake Parc Place: A Study of Mixed-Income Housing*, 9 HOUSING POL'Y DEBATE 703 (1998) (Chicago); Jerry J. Salama, *The Redevelopment of Distressed Public Housing: Early Results from HOPE VI Projects in Atlanta, Chicago, and San Antonio*, 10 HOUSING POL'Y DEBATE 95 (1999); *Diggs Town: Place Design Award*, PLACES, Winter 2000, at 10; *Hope VI Funds New Urban Neighborhoods: The First Major Round of U.S. Department of Housing and Urban Development (HUD) Hope VI Grants Under the Bush Administration, Totaling Nearly \$500 Million Focuses on Principles of New Urbanism*, NEW URBAN NEWS, Jan.–Feb. 2002, at 9.

99. JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION §§ 1.01, 10.01 (2d ed. & Supp. 2000); James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1052–60 (1989); James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348, 348–55 (1988), also published in THE FAIR HOUSING ACT AFTER TWENTY YEARS 48 (R. Schwemm ed. 1989).

city governments, New Urbanism is an attractive design that can generate enthusiastic support and the best chance for physical, economic, and fiscal revitalization.

It is difficult to forecast how New Urbanism will impact current patterns of racial and ethnic segregation. However, it is likely that as New Urbanism offers higher densities and thus potentially lower rents, access by those of lower income, including diverse racial and ethnic group members, will be enhanced. Further, to the extent that New Urbanism occurs in the central city, minority group members that have resisted suburban migration might be more inclined to move to an attractive New Urbanist neighborhood. Census research suggests that regions experiencing population growth and housing development are experiencing greater rates of residential racial integration as compared to more stagnant urban centers that have retained traditional racial residential concentration and separation patterns.¹⁰⁰ Thus, New Urbanism may generate a significant integrative effect on neighborhoods.

A study of New Urbanist developments in Canada suggests the design is more popular and more financially successful within urban districts, where it is viewed as consistent with goals of social equity, but less popular in suburban developments.¹⁰¹ The impression that American projects seem more successful in the suburbs may be false or may simply reflect the national suburban preference. The preference for decentralized settlements far from the city has been established over generations, so that exclusive settlements are associated with appreciating real estate values and community stability. Only when cities become a more attractive residence alternative and the market can appreciate New Urbanism will the central city developments enjoy the success of Canadian and European urban projects.

Mitigation measures are required to assure that New Urbanist projects actually reflect New Urbanist ideals. States should enact obligations for mandatory inclusion of affordable housing as part of a system of state planning guidelines. This would encourage sound planning that can be supported by public transport and

100. See Richard H. Sander, *Housing Segregation and Housing Integration: The Diverging Paths of Urban America*, 52 U. MIAMI L. REV. 977, 991-94 (1998); see also Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23, 36-40 (1994).

101. See Jill Grant, *Mixed Use in Theory and Practice: Canadian Experience With Implementing a Planning Principle*, 68 J. AM. PLAN. ASS'N 1, 76-78 (2002).

would place all necessary destinations within a pedestrian shed. In other words, planning should assure that housing residents can conveniently walk along attractive and stimulating paths, gardens, and parks to schools, shopping, transit, health care, parks, entertainment, and other services, facilities, and employment centers. Mitigation might also make displaced eligible for priority relocation or subsidized inclusion within New Urbanist housing and shops. Gentrification, at least in streets adjacent to revitalized affluent neighborhoods, is likely to occur in portions of the city. However, it is not realistic to suggest that these movements will be so successful that the city center will be fully revitalized.

Should the unimaginable occur and New Urbanism become orthodox, a different set of problems would beset the poor, ethnic and racial minorities, and immigrants. America's major cities have provided slum housing and a stock of barely habitable shelter to those of very low income, particularly new immigrants. Were these slums and lower-cost shelter replaced by new and revitalized development, cities such as New York or Los Angeles may cease to serve their democratizing and incubation function, and the quality of life and opportunity for new immigrants and the poor could diminish. Nations from which America's immigrants come might need to accommodate larger populations. Europe might possibly be pressured to accept a larger share of immigrants and refugees, which would exacerbate housing problems there. America may lose much of its attractiveness to immigrants. Another possible result is that pervasive gentrification could generate illegal slums, squatter settlements, *colonias*, or "Hooverilles." During the depression and the Administration of President Herbert Hoover, Hooverilles grew on the outskirts of suburbs and edge cities. Should cities in America indeed realize their dreams, hopefully the product of growth and development will be sufficient to subsidize a stock of adequate housing as has been demonstrated in cities such as Vienna.¹⁰² If New Urbanism rules, the infill development and revitalization of housing markets, commerce, and entertainment should fill local tax coffers and generate the resources to improve schools, transit, infrastructure, job training, cultural attractions, and access.

102. James A. Kushner, *Growth for the Twenty-First Century—Tales from Bavaria and the Vienna Woods: Comparative Images of Urban Planning in Munich, Salzburg, Vienna, and the United States*, 29 URB. LAW. 911, 940-43 (1997), reprinted as modified in, 6 S.C. INTERDISC. L.J. 89, 119-22 (1997).

V.

ON IMPORTATION OF SMART GROWTH AND NEW
URBANISM TO EUROPE

Should Smart Growth and New Urbanism be imported by European Communities? While many European cities are the archetype of New Urbanism, others have been allowed to become less friendly to the pedestrian and too automobile dominated. The affluence of Europe has generated a rising middle-class that enjoys driving modern automobiles and prefers the privacy and bucolic appearance of the American suburb. Increasing development of suburban detached homes and increasing automobile trips and ownership poses a threat to the quality of life. As communities grapple with developers of such housing, a New Urbanist design model may offer huge benefits to mitigate the suburban pressure.¹⁰³ Were Europe's suburban projects developed around transport within a pedestrian-shed, a New Urbanist design would present a reasonable compromise between privacy, access, and the environment. A European focus on the need for protecting the urban fringe from urbanization may bring attention to the increasingly critical need to adhere to traditional European policies that favor pedestrians, bicycles, and public transportation over the less livable community that is generated by suburban sprawl and the automobile.

VI.

CONCLUSION

The goals of Smart Growth and New Urbanism are lofty, and in most American urban areas, unattainable. The opportunity to create an attractive alternative housing opportunity designed around transit and walkable neighborhoods in an efficient, higher density pattern through the region along transit corridors may be the only rational model to accommodate anticipated population growth, improve access to home ownership and affordable housing, and allow for an increasingly popular lifestyle. New Urbanism offers a superior urban design. We should applaud the New Urbanist developers who are producing the most exciting American urban development projects of the last half century. Unfortunately, neither leadership and resources nor public opinion and demand needed to increase spending for the essential

103. *New Urbanism Makes Inroads in Germany*, NEW URB. NEWS, Apr.-May 2002, at 8.

transportation infrastructure and to ease adoption of an integrated land use plan exist. Smart Growth can have a measured impact on reducing the rate of urbanization of agricultural land and other greenfields and thus the pace of sprawl, but the flexibility of Smart Growth will not significantly alter the continued proliferation of Dumb Growth and automobile-generating low density residences on the urban edge. Rendering the central city as attractive as the suburban dream is the foundation for Smart Growth's success. For this to occur, financing instruments and capital to fund the infill and redevelopment of the urban center must be developed.

New Urbanism will succeed because there is strong market demand and aggressive developers motivated to produce New Urbanist developments. The problem is that marketing and development constraints currently favor suburban or non-urban sites. New Urbanism in the central city is too often a risky venture dependent on complex government subsidy mechanisms that can only be extended to demonstration projects. The only vehicle that would hold promise would be a Housing and Urban Development mortgage covering a portion of subsidized units with a gradual increase in rent or mortgage payment to encourage those on subsidy to remain as their incomes rise. The instrument would be modeled on the successful Section 222(d)(4) unsubsidized multifamily program.¹⁰⁴ A percentage of the units should be subsidized under a model of the currently unfunded Section 8 program,¹⁰⁵ or the 235¹⁰⁶/236¹⁰⁷ programs that allow home ownership or rental. The mortgages should also include a mechanism for financing commercial space, including a set percentage of space subsidized for low-income residents or community entrepreneurs. There is a strong desire to have mixed-use developments include restaurants, indoor and outdoor cafes, and full service markets. The mortgage should be structured to afford low-income entrepreneurs that take a lease to receive a mortgage subsidy that would be graduated down over the first three to five years.

Cookie Cutter New Urbanism would be a mistake. For example, the use of outdoor cafes and sit-down restaurants may be a central attraction in European-American and Middle Eastern

104. DAYE ET AL., *supra* note 54, at 236-238.

105. *Id.* at 210-24.

106. *Id.* at 238.

107. *Id.* at 238-39.

communities, but other cultures may prefer a range of outdoor fast food and farmer's market stalls. Demanding by zoning code that a restaurant be included within each project, like the enforcement of traditional multi-car parking requirements, can discourage good projects and threaten revitalization efforts. Portland, for example, imposes no off-street parking requirements in central city development.¹⁰⁸ Should the many extensions of rail and other transit with stops surrounded by New Urbanist villages throughout urban America demonstrate an enthusiastic market, the future may be bright for increased encouragement and subsidy. The Smart Growth and New Urbanist movements may one day be recognized as revolutionary, but that decision must be made by the marketplace.

Smart Growth and New Urbanism offer the best feasible strategy for reforming American urban design and rejuvenating its cities and suburbs. The renewed central city raises the possibility of gentrification yet offers minority and poor communities the best opportunity for enhanced access to employment, community destinations, and an improved urban living environment. The radical objective of America's progressive planning initiatives is to reinstate the American central city as a community attractive to the spectrum of household types and incomes and preferred over the reigning suburban pastoral of the 20th Century.

108. John Bailey & Elizabeth Humphrey, *Comment on Dowell Myers and Elizabeth Gearin's "Current Preferences and Future Demand for Denser Residential Environments,"* 12 HOUSING POL'Y DEBATE 665, 668 (2001).