

State Intervention to (Un)manage Growth



Author: Laura Snider

Laura is a Juris Doctor candidate at Emory University School of Law, Class of 2017. She holds a Bachelor's degree in Landscape Architecture from the University of Florida. After graduating from Emory, she plans to pursue a career in commercial real estate in Atlanta, Georgia.

Abstract

The classic dream of moving to a spacious, single-family home in the suburbs has led urban sprawl to become the standard pattern of American growth. Unfortunately, this type of growth—in the aggregate—has created a vast array of unintended consequences. From increased commuting times and traffic congestion to the degradation of ecosystems to the demise of the classic, American “Main Street,” sprawl has left its footprint on many facets of the environment and human life. Sprawl’s harms are often periodic and delayed, thus it is unlikely that the underlying issues causing and exacerbating the harms will ever be addressed. Further, as local governments predominantly regulate land use decisions, municipalities rarely, if at all, consider the statewide and regional harms their regulations may create in the aggregate.

This article presents suggestions for state involvement in local planning and zoning strategies to effectively combat urban

sprawl and its negative effects. In particular, it presents a two-step approach for states to implement: (1) adopting extensive regulation at a state level, and (2) amending existing state grants of power to municipalities and prohibiting specific sprawl-inducing mechanisms at a local level.

This article proceeds by first analyzing existing American zoning law and details how states grant municipalities power to regulate local land use and development. It next details how this grant of power has led to a widespread development pattern known as urban sprawl, and illustrates the negative effects it has had on the environment, human health and lifestyle.

Sprawl’s effects have not gone unnoticed, as it has become a recognized issue in many state legislatures. The discussion continues by examining two major state actions that have been used to minimize its effects, and describing a theory on how a free market approach to land use and management could combat sprawl. After analyzing existing responses and theories on combatting urban sprawl, the concluding paragraphs argue that a combination of both extensive regulation at a state level, coupled with novel deregulation at a local level, is the best strategy for combatting sprawl and its negative effects on humans and the environment.

1. INTRODUCTION

“Our laws actively shape our communities and our landscapes.”¹ From its implementation in the early part of the 20th century, local zoning became and still continues to be the dominant model of land use regulation in the United States.² These proactive zoning regulations—set by municipalities—create a template for how future urban and suburban development will occur.³ The predominate

land use template in the United States widely segregates residential, commercial, industrial, and agriculture uses and justifies such separation as necessary to protect the health, safety, morals, and welfare of a community.⁴ This separation of uses has created a heavy dependence on automobiles, however that has led to numerous detrimental effects on the environment, humans, and communities.⁵

This development pattern, known as urban sprawl, “consumes thousands of acres of forests and farmland, woodlands and wetlands . . . requires government to spend millions extra to build new schools, streets, water and sewer lines . . . leaves boarded up houses, vacant storefronts . . . and traffic congestion stretching miles from urban centers.”⁶ What has proved to be “beneficial” at a local level to municipalities that set these standards has created extreme failings at regional and state levels. Municipalities are not required to consider how these development trends might affect their surroundings,⁷ thereby many municipalities have continued to enact and enforce zoning regulations that promote urban sprawl.

Given the serious consequences, municipal zoning and land use regulation must be reformed to combat sprawl and its increasingly negative effects. This Article argues that states must reclaim some zoning and land use authority from municipalities. Municipalities have proven unable to effectively mitigate sprawling development patterns both because of their limited territorial reach and their reluctance to consider the general welfare of the larger regional and state community. This article argues that through larger intervention at a state level, the general welfare of the larger community can be more adequately addressed.

This article proceeds in four parts. Part I discusses the history and structure of zoning in the United States and details how municipalities inherited their authority to

zone from the states. Part II introduces urban sprawl, a predominant form of American development, and discusses the negative effects it creates and exacerbates on the environment and human health and lifestyle. Part III first analyzes state legislative actions that have been initiated with the purpose of curtailing sprawl. It introduces the concept of libertarian land use and how its free market principles might effectively combat sprawl. Part IV then applies the legislative actions and free market concepts discussed in Part III to provide a legislative plan (offered at two varying degrees of state involvement) for states to combat sprawl. The conclusion suggests that more state regulation is best suited for deterring sprawl and mitigating its effects.

1. AMERICAN ZONING

The predominant method of land use regulation in the United States is the local zoning ordinance.⁸ When the Supreme Court upheld the constitutionality of zoning in *Village of Euclid v. Ambler Realty Co.*⁹ in 1926, over 400 municipalities had zoning ordinances in place.¹⁰ Today, almost every state and major city, with the exception of Houston, Texas,¹¹ employs zoning as its principal tool of land use regulation.¹²

The basic structure of Euclidean zoning has changed little since its adoption in the 1920s.¹³ A typical zoning code designates various zones or districts, which group and separate a municipality into its various uses.¹⁴ Within the zoning districts are uniform regulations to ensure that similar uses are regulated equally.¹⁵ These regulations typically address types of allowable uses, density of development, and allowable size, shape, and character of buildings.¹⁶ Zoning's ability to proactively regulate the character, shape, and feel of a community thus assures property owners as to what they and their neighbors will be permitted to do on or near their property.¹⁷

The authority to regulate private land use and development is derived from the police power of the state.¹⁸ The police power allows the states to exercise their governmental power to protect the health, safety, morals, and general welfare of its citizens.¹⁹ Although the police power is held by the states, they have delegated this power to their municipalities, thus enabling the municipalities to impose land use regulations and restrictions within their territorial reach.²⁰

In 1926, the U.S. Department of Commerce issued the Standard State Zoning Enabling Act ("SSZEA"), which

provided a common statutory basis for municipalities' zoning power.²¹ The SSZEA was drafted with careful consideration for curing nuisance issues²² prevalent in previous land use cases.²³ The drafters noted that courts often drew lines to establish residential districts, thus protecting them from noxious and offending neighboring uses.²⁴ Using this concept of segregation of uses, the SSZEA authorized municipalities to designate zoning districts whereby only compatible uses could be grouped with one another.²⁵ The SSZEA recognized a powerful new tool to shape cities: this delegation to municipalities allowed them to not only use state police power retroactively (abating nuisances that were threatening citizen's health, safety, and welfare) but also proactively (preventing future nuisances from occurring before they arose).²⁶

Since the SSZEA's adoption, the majority of states have based their zoning enabling legislation upon the model, whereby they delegate their police power to municipalities.²⁷ Zoning enabling acts won quick acceptance and appeal nationally and among multiple groups:²⁸ city councils now had a new tool to respond to their communities' requests and complaints;²⁹ it appealed to "planners' innate sense that the world would be better if there was 'a place for everything and everything in its place;'"³⁰ real estate developers were able to build and sell "communities" on sizeable tracts of land and turn a large profit;³¹ and most importantly, zoning enabling legislation appealed to citizens who wanted to protect their homes and way of life from potential nuisances.³²

American zoning law has become the most critical and formative tool in shaping land development in the last century. Although zoning law purports to protect the health, safety, morals, and welfare of the community, it has unfortunately led to drastic, unintended consequences on humans and the environment, which are discussed below.

2. URBAN SPRAWL

While definitions vary, urban sprawl is currently defined as low density, automobile dependent development patterns created on the edges of urban cores.³³ These developments following the urban sprawl pattern usually consist of strictly separated uses, which essentially "leapfrog" away from the city core, thus reducing walkability from destination to destination and creating dependence on the automobile.³⁴

This sprawled development pattern has become standard in the United States.³⁵ Although the trend toward suburbanization began in the nineteenth century, the most

rapid expansion of suburban sprawl occurred in the latter part of the twentieth century.³⁶ Following World War II, a combination of new housing policies³⁷ and the expansion of a new interstate highway system³⁸ incentivized people to move out of city cores and into surrounding suburban areas.³⁹

During this immense growth, Euclidean zoning played a major role in the developments' growth patterns.⁴⁰ Euclidean zoning, characterized by a strict separation of uses, low-density requirements, and uniform dimensional standards, became the template for new urban and suburban development.⁴¹ Local governments believed the intermingling of land uses would have detrimental effects on human health and safety;⁴² therefore, zoning codes required a strict segregation of residential, commercial, industrial, and agricultural land uses.⁴³ These segregating zoning codes "essentially outlaw[ed]" any mixed-use, traditional neighborhood construction,⁴⁴ thereby creating an environment where every activity—whether it be taking the dog to the park, going to work, or picking up milk from the store—required an additional automobile trip.⁴⁵

Sprawl's development patterns have had indirect effects on many facets of the American life. With its strict separation of uses and low-density developments, urban sprawl requires more land than would a denser, traditional neighborhood development. With uses separated across a vast surface area, sprawling developments lead to two, major effects on human activity. First, such developments lead to an increased dependence on automobiles and roadway infrastructure to get people from point A to point B. Second, there is lessened physical activity in humans because the walkability in communities is not a major concern.

A. Dependence on Automobiles and Infrastructure

Most obviously, a heavy dependence on personal automobiles creates a substantial demand on limited, natural resources and significantly contributes to greenhouse gas emissions in the atmosphere. The average car uses about 550 gallons of gasoline and produces about 8,800 pounds of carbon dioxide each year.⁴⁶ SUVs and minivans—which currently make up more than half of the vehicle market—burn about twice the amount of gasoline and produce about twice as much carbon dioxide than their sedan counterparts.⁴⁷ These harmful emissions will continue and worsen, barring the widespread acceptance of alternative fuels for mobility, because sprawl limits peoples' transportation choices—or lack thereof.⁴⁸

An increased dependence on automobiles goes hand-in-hand with an increase in the need for roadway infrastructure to carry those vehicles. Billions of taxpayer dollars are spent on highway infrastructure every year, and the cost only continues to increase as more vehicles drive on the road.⁴⁹

With the large increase in highway spending, it might follow that traffic congestion would lessen. On the contrary, the number of hours spent sitting in congestion has increased significantly.⁵⁰ Between 2002 and 2012, the number of hours vehicular travelers spent sitting in traffic congestion increased 19.6%.⁵¹

This increase in vehicles and infrastructure also depletes one of the most basic natural resources—developable land.⁵² As sprawl continues to encroach on undeveloped land, it necessitates additional, environmentally harmful infrastructure. Because the average house and lot size continue to grow, land consumption rates are increasing much faster than population growth.⁵³ The extra mileage of water and sewer pipe and road asphalt necessary to serve sprawled developments requires far more land and resources than compact developments.⁵⁴

B. Lessened Physical Activity and Walkability

A dependence on cars to get people from place to place substitutes for other methods of transport, such as biking and walking. Physical activities such as these have many positive benefits for the human physical and emotional state. Regular physical activity is associated with improved quality of life, emotional well-being, and positive mental health.⁵⁵ In addition, physical activity has a well-established role in preventing chronic diseases in individuals.⁵⁶ Chronic diseases are costly as related to health but also as related to finances.⁵⁷ Chronic diseases are ranked as four of the top five most costly health conditions, with \$1.35 trillion being spent on health care in 2012.⁵⁸

Conversely, regular physical activity has been associated with lower health care costs.⁵⁹ To maintain a physically active lifestyle, the United States Department of Health and Human Services recommends walking as a simple and effective strategy.⁶⁰ The Department has recognized that while walking is ultimately a choice made by the individual, the decision to walk can be made easier by programs and policies that provide those individuals with opportunities and encouragement for walking.⁶¹

In sum, the rise of sprawl has adverse effects on the

environment, human health, and social and community life. States are privy to these aforementioned problems and have sought to mitigate these harms in various ways, which are explored below.

3. RESPONSES TO SPRAWL

The effects of sprawl have not gone unnoticed, and many states have taken statewide regulatory approaches either by providing a model land development code or by insisting on more consistency in planning.

A. State Intervention as a Means to Control Sprawl

Traditional zoning law enables local governments to prescribe land use decisions with which states have traditionally chosen not to interfere.⁶² Unfortunately, this delegation of authority to local governments has become one of the fundamental causes of sprawl.⁶³ For example, policies on transportation, economic development, and environmental protection are generally regulated at a statewide level, yet many municipalities' land use regulations have a major effect on these policies.⁶⁴ Even to the extent that "[e]ach locality may be acting rationally with respect to its own self-interest," the aggregate of all of these localities implementing similar sprawl-inducing regulations leads to larger statewide and regional problems.⁶⁵

To preserve its agricultural and tropical land and heritage from the state's rapid pace of urban development, Hawaii was the first state to implement a statewide land use planning system in 1961.⁶⁶ Since then, several other states have adopted their own comprehensive systems of statewide planning for growth management.⁶⁷ Most significant among them are Vermont, Florida, and Oregon, whose programs shifted considerable regulatory power back to the state or regional level.⁶⁸

Both Vermont's and Florida's statewide planning statutes share similar characteristics. Both statutes are historically related to the American Law Institute's Model Land Development Code ("MLDC").⁶⁹ The MLDC approach shifts authority away from localities by requiring regional or state approval for all major development projects and areas of critical concern.⁷⁰

In the 1960's, Vermont experienced widespread resort development that drastically increased land values and threatened the state's traditionally pastoral landscape.⁷¹ In response to these threats, the state enacted the Vermont State Land Use and Development Act of 1970 ("Act 250").⁷² Act 250 requires that all public and private developments

involving ten or more acres and all residential developments involving ten or more units obtain a permit from the relevant regional Environmental District Commission ("EDC").⁷³ The EDC, acting as a regional control, may deny the development a permit if the development is "detrimental to the public health, safety or general welfare."⁷⁴

By 1972, Florida was facing extreme population pressures,⁷⁵ an extreme drought,⁷⁶ and a growing environmental movement.⁷⁷ To address these concerns, the state enacted the Florida Environmental Land and Water Management Act of 1972 ("ELWMA").⁷⁸ Like Act 250, ELWMA provided for the regional regulation of development, but it maintained a much higher threshold of review for proposed developments.⁷⁹ ELWMA compelled regional regulation of any "development of regional impact" ("DRI").⁸⁰

A DRI is defined as "any development, which because of its character, magnitude, or location, would have a substantial effect upon the health, safety, and welfare of citizens of more than one county."⁸¹ If a proposed development qualifies as a DRI, the developer must file an application with the relevant municipality,⁸² and it will hold a public hearing.⁸³ Before the public hearing, the relevant regional planning agency will prepare a report and any recommendations on the regional impact of the proposed development for the municipality.⁸⁴ After the public hearing, the municipality may approve, deny, or approve subject to conditions, restrictions, or limitations on the proposed development.⁸⁵ In making its decision, the municipality considers whether the proposed development is consistent with the local comprehensive plan and land use regulations, whether the proposed development is consistent with the regional planning agency's report and recommendations, and whether the proposed development is consistent with the State Comprehensive Plan.⁸⁶ While the municipality is granted extensive authority to regulate DRIs, its decision is still subject to review by the state land planning agency, which may appeal the municipality's decision to the Florida Land and Water Adjudicatory Commission.⁸⁷

Although Florida and Vermont both aligned their statewide land development goals with the objectives of the MLDC,⁸⁸ they both eventually adopted many principles established by the planning consistency approach discussed below.⁸⁹

In reaction to population pressures, rapid development, and an interest in protecting its natural resources, Oregon adopted the Oregon State Land Use Act⁹⁰ in 1973.⁹¹ Unlike

the MLDC approach, which relied on direct state and regional regulation of major projects and critical areas, the planning consistency approach relies on state oversight of local planning and zoning regulations.⁹²

In the mid 1980's, both Florida⁹³ and Vermont⁹⁴ implemented considerations from Oregon's planning consistency approach into their land use planning statutes by adding provisions for municipalities to enact comprehensive plans consistent with statewide policies and goals. Since then, six other states⁹⁵ have formulated some type of review process, which encourages consistency between state and local governments, compatibility among plans of adjoining jurisdictions, and consistency among plans and regulations within jurisdictions.⁹⁶

The Oregon State Land Use Act provides for a seven-member Land Conservation and Development Commission ("LCDC").⁹⁷ The LCDC is required to adopt, and given the authority to revise, statewide land use planning goals.⁹⁸ Municipalities must then create comprehensive land use plans that comply with the LCDC's adopted goals.⁹⁹ Additionally, any regulations and zoning ordinances created by the municipality must comply with the LCDC's adopted goals.¹⁰⁰ The LCDC is responsible for reviewing and enforcing the municipalities' plans and regulations for consistency with statewide goals.¹⁰¹

The existing 19 goals adopted by the LCDC generally fall into five categories:¹⁰² the planning process,¹⁰³ resource lands protection,¹⁰⁴ human interaction with the environment,¹⁰⁵ urbanization,¹⁰⁶ and goals relating to special areas.¹⁰⁷ Of these goals, the most notable is Goal 14, Urbanization.¹⁰⁸

Goal 14 provides for "an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land and to provide for livable communities."¹⁰⁹ To satisfy this goal, the LCDC requires that municipalities establish and maintain urban growth boundaries.¹¹⁰ Urban growth boundaries distinguish "urban and urbanizable land" from "rural land" and define a line beyond which development may not occur.¹¹¹ This segregation encourages compact development by requiring that a municipality not permit development on more lands than it needs for future growth.¹¹²

Inside the urban growth boundary, a municipality must accommodate housing needs for residents of all income levels and provide for the municipality's economic

development by making available adequate amounts of land for commercial and industrial uses.¹¹³ Municipalities with a population greater than 2,500 must additionally create a public facility plan ensuring that adequate transportation and utilities are available for all developments within the urban growth boundary.¹¹⁴ Oregon's urban growth boundary system has generally been successful at increasing the availability of land for multifamily housing, commercial, and industrial uses, while still ensuring that almost all of all new development occurs within the urban growth boundary.¹¹⁵

Outside of the urban growth boundary, the main focus of Goal 14 is the preservation of existing natural resources and rural industries, primarily farming and forestry.¹¹⁶ Oregon's urban growth boundary system has also been largely successful at preserving the state's farmlands and forests. In addition, Oregon farms have become more economically successful than farms in neighboring states, such as Washington.¹¹⁷

B. Libertarian Land Use as a Means to Control Sprawl

A radically different approach to state intervention, commonly referred to as "libertarian land use," argues that municipalities and states should deregulate many common land use controls to reduce sprawl.¹¹⁸ After a brief review of the free market concept of libertarian land use, the case of Houston, Texas's application of libertarian land use concepts is presented to show how free market principles have not been entirely realized.

As with the political philosophy, the term "libertarian" implies antagonistic attitudes towards governmental controls that limit peoples' freedoms. As such, libertarian land use is critical of zoning ordinances that restrict property owners' freedoms to use, develop, and sell their properties as they see fit.¹¹⁹

Libertarian land use not only views zoning ordinances as "a violation of property rights" as a "taking" under the Constitution but also as an arbitrary and inefficient means of regulating land use.¹²⁰ Because the government has no means of rational economic calculation of people's preferences when imposing zoning ordinances, the government cannot weigh the appropriate pros and cons of the restrictions it establishes.¹²¹ This becomes increasingly problematic as governments must address and adapt to community changes, such as population and demographic shifts, without adequate resources to make informed decisions.¹²² Government control over land use may also

lead to an abuse of discretionary power, with government officials' decisions being primarily motivated by job security and political popularity¹²³ rather than local need.¹²⁴

Libertarian land use asserts that a person who has legally acquired property should rightly be able to use his or her property in any way that does not intrude upon the property rights of others.¹²⁵ Libertarian land use principles rely on traditional property and contract law to address the problems that zoning ordinances preemptively attempt to solve.¹²⁶

Perhaps the most notable mechanism of controlling land use without governmental interference is the restrictive covenant. Restrictive covenants may restrict the same sort of activities as a zoning ordinance rather than affecting the entire municipality; however, the restrictive covenant only affects the desires of the agreeing parties.¹²⁷ Restrictive covenants act as a form of "voluntary zoning," where agreeing parties may be used to control common NIMBY¹²⁸ fears such as skyscrapers in the suburbs or strip clubs next to schools.¹²⁹

Libertarian land use sees restrictive covenants as "a device of the market to maximize the value of property."¹³⁰ Unlike a municipality, which has no objective means of economic calculation when enacting land use restrictions, a private property owner holds a stake in the market and is capable of weighing the pros and cons of placing land use restrictions on the property.¹³¹ Here, a property owner can weigh the benefit of owning an enforceable, restrictive covenant over his or her neighbor's property against the disadvantage the restriction would have on the use of his or her property and subsequently, any detriment the restriction would have on the market value of the property.¹³² Restrictive covenants allow property and covenant owners, who have personal and intimate knowledge of local conditions, to propose and enforce their agreed-upon restrictions. These restrictions are motivated by the owners' desire to improve the property and its market value, unlike restrictions in zoning ordinances, which are preemptively decided by government official's discretionary power.¹³³

Houston is often cited as a living example of libertarian land use¹³⁴ as it is the only American city without a formal zoning code.¹³⁵ Because Houston refuses to adopt a zoning code, many believe that Houston's land use regulation is "extremely modest when compared to what is contained in most zoning ordinances."¹³⁶ Thus, when Houston is cited

as one of the most congested,¹³⁷ automobile dependent,¹³⁸ and sprawled cities,¹³⁹ there is understandable concern that a free market, libertarian land use approach would do nothing to combat the effects of urban sprawl.¹⁴⁰ This concern might be a valid one if Houston's land use was one that was completely deregulated. The city's land use is regulated, however, in ways that are generally similar to any other American city.¹⁴¹

Houston's lack of a formal zoning code does not provide the free market opportunities¹⁴² promised by a libertarian land use approach. Although Houston does not have a restriction explicitly prohibiting the mixing of residential and commercial uses,¹⁴³ it still maintains other sprawl-inducing development regulations,¹⁴⁴ such as minimum lot sizes,¹⁴⁵ minimum parking requirements,¹⁴⁶ and setback requirements.¹⁴⁷

Houston's deregulation of use restrictions may be the only libertarian land use principle evoked by the "free market" image of the city. Like libertarian land use principles advocate,¹⁴⁸ use designations are developed through the adoption and enforcement of restrictive covenants.¹⁴⁹ Even the restrictive covenants in Houston are "so heavily facilitated by government involvement that they resemble zoning."¹⁵⁰ Houston city code allows the city attorney to enforce restrictive covenants, where the city may seek civil penalties of up to \$1,000 per day for the violation of a covenant.¹⁵¹ In its covenant enforcement, "the city focuses on enforcement of use restrictions (that is, covenant provisions requiring separation of uses), as opposed to enforcement of other restrictions such as aesthetic rules."¹⁵² These enforcement actions thus force Houston taxpayers to subsidize the enforcement of restrictive covenants that segregate land uses and promote sprawled development.¹⁵³

4. SUGGESTED STRATEGIES FOR INCORPORATING LIBERTARIAN LAND USE INTO STATE INTERVENTION

Land is a precious and scarce natural resource. It should be utilized to best provide for the needs and desires of the people. This will occur to the most optimum degree if the use and development of the land is left to the private market place *except in those instances when the government has a vital and pressing need to impose regulation.*¹⁵⁴

This Part suggests that the juxtaposition of extensive regulation at a statewide level and minimal regulation at a local level will be the most effective means of combatting urban sprawl. The proposal is that states adopt legislation requiring implementation of urban growth boundaries and

state zoning enabling acts that require municipal zoning should amend their acts to no longer require the adoption and enforcement of municipal regulation. A more extreme approach suggests that states amend their zoning enabling legislation and enact complementing legislations that specifically prohibit municipalities from enacting ordinances known to promote sprawl.

The authority to implement an urban growth boundary requires state legislative action.¹⁵⁵ This legislation should first require that each municipality of a certain size or population within the state adopt an urban growth boundary as part of its comprehensive plan. As the municipalities develop their individual comprehensive plans, the state legislation should additionally encourage¹⁵⁶—or alternatively, require¹⁵⁷—that municipalities collaborate with one another to ensure a uniform framework for planning actions.

The state legislative action should additionally include relevant factors, which help to justify the municipalities' decisions on where to draw their urban growth boundaries. These factors might include existing and projected population figures, the cost of extending infrastructure to specific areas, existing public facilities, and existing open space and reserve land.

Continuing state involvement with urban growth boundaries should be minimally intrusive on municipality decisions. State involvement should be limited to three responsibilities. First, the state should oversee municipalities' compliance with the legislative action, thus ensuring that all municipalities have created and adopted a comprehensive plan and urban growth boundary. Second, whenever a municipality wishes to expand its urban growth boundary, the state should have the right to appeal the municipality's decision if it believes the expansion is unnecessary or inappropriate. Lastly, the state should be responsible for resolving any disputes between multiple municipalities regarding urban growth boundaries.

One approach is to eliminate requirements from the state enabling acts that require that municipalities zone. Another approach would reach all state enabling legislation, not just ones that require municipalities to create zoning ordinances, by removing municipalities' authority to regulate specific zoning controls that promote sprawl.

Although every state has some form of zoning enabling legislation, some states specifically require that municipalities adopt and enforce zoning ordinances.¹⁵⁸ The

proposal suggests that those states amend their zoning enabling legislation to merely grant municipalities zone authority rather than explicitly require them to zone.

This approach will likely only lead to minimal change,¹⁵⁹ however and the suggestion would only affect a small number of states.¹⁶⁰ Further, in states where municipal zoning is optional, the vast majority of municipalities in those states continue to enact and enforce sprawl-inducing legislation. A more extreme and directed approach to state intervention and deregulation at a municipal level to more effectively sprawl's effects would suggest that states amend their zoning enabling acts to limit municipalities' police power to only regulations that do not conflict with state regulations, restrictions, or goals. After that states should enact legislation to prohibit municipalities from adopting sprawl-inducing regulations.

Because municipalities' power to regulate land use is dependent on the state's grant of authority,¹⁶¹ the state has the ability, *a fortiori*, to amend its zoning enabling act to restrict municipalities' authority to enforce its police power. By simply amending a typical state zoning enabling act to include an additional restriction that municipalities may adopt any regulation purposed for promoting the health, safety, morals, or welfare of the community so long as there are no other superseding state regulations or restrictions, states can ensure their authority to prohibit sprawl-inducing ordinances proposed by municipalities.¹⁶² Using Section 1 of the SSZEA as an example of how a state zoning enabling act could be amended to provide for state restrictions on municipalities, such amendment could read as follows:

For the purpose of promoting health, safety, morals, or the general welfare of the community, local legislative body of cities and incorporated villages is hereby empowered to regulate and restrict [*subject to any superseding regulations and restrictions promulgated by the state government or any agency or subdivision thereof*], the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.¹⁶³

By adding this simple phrase to a state's zoning enabling act, the state government can guarantee municipalities'

zoning ordinances will comply with state goals of combatting sprawl.¹⁶⁴ Municipalities will thus retain the authority to regulate local land use decisions affecting the specific needs of their communities, but states will reclaim the authority to supersede sprawl-inducing regulations known to be harmful at regional and statewide levels.¹⁶⁵

After amending its zoning enabling act to allow for the intervention of municipalities' granted police power, the state can develop additional legislation that prohibit municipalities from developing ordinances that promote sprawled development patterns. This state prohibition of specific municipal ordinances to promote statewide goals has already been implemented in a number of states.¹⁶⁶

This suggests that states adopt specific legislations prohibiting municipalities from adopting the three most sprawl-inducing regulations: (1) single use zoning, (2) parking minimums, and (3) density restrictions.

First, states should enact legislations prohibiting municipalities from creating zoning ordinances that restrict mixed-use developments in residential and commercial zoning districts. Mixed-use developments are a blend of residential, commercial, cultural, and institution uses.¹⁶⁷ These developments are closely linked, thus increasing density and reducing the need for transportation.¹⁶⁸ As previously mentioned,¹⁶⁹ typical zoning codes generally mandate a strict separation of uses. This system of single use zoning increases the likelihood that people will not live near work, recreation, or shopping.¹⁷⁰

While a number of municipalities have created specific "mixed-use" zoning districts,¹⁷¹ they are still segregated from the traditional residential and commercial zoning districts. Thus, unless one lives in or close to a mixed-use district, he or she is still forced to drive to a mixed-use development zoned in a mixed-use district to take advantage of its benefits.

If states were to enact legislation that prohibited municipalities from restricting mixed-use developments in both residential and commercial zoning districts, mixed-use developments would have more opportunities to develop in other areas, thus affording those living and working in residential and commercial districts the opportunity to walk or bike to nearby shops, housing, offices, and restaurants. Such legislation could read as follows: "The adoption of an ordinance by a governing body, which prohibits or has the effect of prohibiting the development of residential,

commercial, mixed-use buildings and properties is expressly prohibited." As written, this type of legislation would still allow municipalities to restrict industrial uses (one of the most cited reasons for separation of uses¹⁷²) from interfering with residential and commercial properties. The legislation would simply afford residents the chance to visit small-scale shopping, work, and recreation without the necessity of getting in the car.

States should also enact legislation prohibiting municipalities from mandating parking minimums. It is commonplace for municipalities to require landowners to provide their customers, visitors, and guests with ample off-street parking,¹⁷³ typically requiring commercial properties to devote more than half of their land to parking stalls.¹⁷⁴ When regulations force landowners to use valuable square footage for parking, it lessens available space for housing or other businesses. This creates two problems: (1) it further spreads out destinations, thus making it more difficult to develop pedestrian-friendly environments; and (2) it artificially subsidizes driving.¹⁷⁵ When most destinations provide a guaranteed parking space at no cost, it makes driving more attractive than other forms of transportation,¹⁷⁶ such as walking, biking, or public transportation.¹⁷⁷

States should thus enact legislation that prohibits municipalities from creating zoning ordinances that require parking minimums. Such legislation could read as follows: "The adoption of an ordinance by a governing body, which requires or incentivizes a minimum number of off-street parking stalls is expressly prohibited." This sort of deregulation would enhance landowners' freedoms by giving them the right to determine how much parking is necessary on their land and whether to charge for it. This free market approach allows landowners to weigh the value of adding buildable square footage against the benefits of providing their customers, tenants, and guests with a free—or now chargeable—parking spaces. With deregulation of parking minimums, the government would artificially decrease the supply of parking, thus increasing the market price of parking.¹⁷⁸ With an increased market price, the demand for parking should decrease, thus decreasing driving and increasing alternative forms of transportation, such as walking, biking, and public transportation.¹⁷⁹

Lastly, states should enact legislation that prohibits municipalities from placing density thresholds on residential properties. Historically, municipalities have sought to limit population densities by requiring that properties, particularly

residences, consume large amounts of land.¹⁸⁰ These density regulations thus create sprawled developments, which in turn, create a dependency on automobiles and reduce walkability.¹⁸¹

If states did not allow municipalities to set minimum density regulations for properties in residential zones, then landowners would have the freedom to build more units on less land, thus increasing the number of destinations one could reach on foot. Legislation for this type of deregulation could be written as follows: “The adoption of an ordinance by a governing body, which requires that residences be built on a minimum lot or parcel size is expressly prohibited.” As written, this deregulation still allows for market choice: those who wish to continue to live in low-density housing can still purchase such homes. This sort of deregulation simply affords landowners the opportunity to build more diverse types of living, thus allowing those who wish to live in more walkable, compact spaces the opportunity to do so.

In sum, state legislative acts that prohibit municipalities from prohibiting mixed-use developments and implementing parking minimums and density restrictions will likely give landowners more freedom to develop more mixed, compact development and allow strategic infill developments on existing tracts of land. This freedom to develop, coupled with the implementation of urban growth boundaries discussed in Part IV, allows new and existing developments “to grow in and up, not out,” which is the aim of urban growth boundaries as well as the aim of curtailing urban sprawl.¹⁸²

5. CONCLUSION

The detrimental effects urban sprawl has had on the health, safety, morals, and welfare of communities require major reform in current land use policies. State intervention to (1) limit horizontal development through urban growth boundaries, and (2) enable otherwise restricted developments through amendments to zoning enabling acts provides a strategy for curtailing harmful developments while still enabling novel growth.

Hopefully, through this two-step, state action approach, land owners and developers can provide communities with mixed-use, connected developments, thus reducing automobile dependence and managing sprawl's detrimental effects. More land can be dedicated to habitat and ecosystem conservation through the protections afforded by urban growth boundaries; fewer automobiles on the road can limit greenhouse gas and pollutant emissions; pedestrian-friendly environments can enhance peoples' everyday way

of life by reducing commuter frustrations, promoting social interactions, and providing a sense of autonomy to those unable to drive.

The little-changed land use policies adopted in the early 20th century must be adapted to address one of this generation's most pressing issues. With state action shaping how municipalities can regulate (and not regulate) land use and development, urban sprawl might be hindered and its effects minimized.

6. BIBLIOGRAPHY/ENDNOTES

- 1 Jay Wickersham, *Legal Framework: The Laws of Sprawl and the Laws of Smart Growth*, in *URBAN SPRAWL: A COMPREHENSIVE REFERENCE GUIDE* 26 (David C. Soule, ed. 2006).
- 2 *E.g.*, *id.* at 27.
- 3 *E.g.*, *id.*
- 4 *E.g.*, *id.* at 27–28.
- 5 *E.g.*, *id.* at 30.
- 6 David C. Soule, *Defining and Managing Sprawl*, in *URBAN SPRAWL: A COMPREHENSIVE REFERENCE GUIDE* 3 (David C. Soule, ed. 2006). (quoting Maryland Governor, Parris N. Glendening, *A New Smart Growth Culture for Maryland*).
- 7 *E.g.*, Wickersham, *supra* note 1, at 31.
- 8 *E.g.*, Lesley R. Attkisson, *Putting a Stop to Sprawl: State Intervention as a Tool for Growth Management*, 62 *VAND. L. REV.* 979, 993 (2009).
- 9 272 U.S. 365 (1926).
- 10 Wickersham, *supra* note 1, at 27.
- 11 *See infra* Part III.
- 12 SONIA A. HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION* 31–32 (2014).
- 13 Wickersham, *supra* note 1, at 28.
- 14 HIRT, *supra* note 12, at 32. “A typical zoning code partitions a municipality into residential, commercial, and industrial zones. Uses may then be further subdivided: for example, single-family or multifamily residential; small shops or office complexes; and light or heavy industrial.” James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 *HARV. ENVTL. L. REV.* 489, 493 (1994) [hereinafter *The Quiet Revolution Continues*].
- 15 Wickersham, *supra* note 1, at 28.
- 16 HIRT, *supra* note 12, at 32.
- 17 Wickersham, *supra* note 1, at 28.
- 18 PETER W. SALSICH & TIMOTHY J. TRYNIECKI, *LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW* 3 (2003).
- 19 *Id.*
- 20 *Id.* at 5.
- 21 ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, *A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS* (1926) [hereinafter *A STANDARD STATE ZONING ENABLING ACT*]. “This ‘Act’ was not an ‘Act of Congress.’ The federal government published it as an example of progressive legislation that individual states might want to adopt. No one was forcing cities to zone, but some in the federal government thought it was a good idea.” DONALD L. ELLIOT, *A BETTER WAY TO ZONE: TEN PRINCIPLES TO CREATE MORE LIVABLE CITIES* 15–16 (2008).
- 22 While the SSZEA acted as a template for all states, the language of

- the SSZEA reflects specific nuisance concerns Manhattan residents were facing at the time. Concerns over “safety from fire,” “adequate light and air,” and “adequate provision of transportation, water, sewage” DANIEL R. MANKELKER, *LAND USE LAW* at 4–14 (2003) (quoting A STANDARD STATE ZONING ENABLING ACT, *supra* note 21).
- 23 *Id.* at 4–13.
- 24 *Id.*
- 25 *Id.*
- 26 ELLIOT, *supra* note 21, at 17.
- 27 MORTON GITELMAN, JOHN R. NOLON, PATRICIA E. SALKIN, & ROBERT R. WRIGHT, *LAND USE: CASES AND MATERIALS* 309 (2004).
- 28 ELLIOT, *supra* note 21, at 18.
- 29 *Id.*
- 30 *Id.*
- 31 Marc. A. Weiss, *Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley*, *BERKELEY PLANNING JOURNAL*, 3(1) 7,8 (1986).
- 32 *Id.*
- 33 *See e.g.*, Soule, *supra* note 6, at 28.
- 34 *See id.*
- 35 ANDRES DUANY, ELIZABETH PLATER-ZYBERK, & JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 4 (2000).
- 36 Wickersham, *supra* note 1, at 30.
- 37 “The most significant of these [policies] were the Federal Housing Administration and the Veterans Administration loan programs which, in the years following Second World War provided mortgages for over eleven million new homes . . . directed at new single-family suburban construction.” DUANY, *supra* note 35, at 7–8 (alteration in original).
- 38 “The Interstate Highway act of 1956 provided for 41,000 miles of roadway.” *Id.* at 8.
- 39 *Id.*
- 40 Wickersham, *supra* note 1, at 30.
- 41 *Id.*
- 42 Attkisson, *supra* note 8, at 982.
- 43 *Id.* *See also supra* note 14 and accompanying text.
- 44 *Id.* (alteration in original).
- 45 *See The Quiet Revolution Continues, supra* note 14, at 496.
- 46 Sarah Gardner, *The Impact of Sprawl on the Environment and Human Health*, in *URBAN SPRAWL: A COMPREHENSIVE REFERENCE GUIDE* 244 (David C. Soule, ed. 2006).
- 47 *Id.*
- 48 *See* William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 71–74 (1999).
- 49 Between 2002 and 2012, highway spending increased from \$68.2 billion to \$105.2 billion. Tony Dutzik, *Highway Spending is Eating the Budget*, *STRONG TOWNS* (Jan. 19, 2017), <http://www.strongtowns.org/journal/2017/1/18/highway-spending-is-eating-the-budget> (citing Federal Highway Administration, 2015 Conditions and Performance Report). Surprisingly, most of the highway budget is not going toward building new roads or fixing old roads, but towards paying interest on existing highway debt. *Id.*
- 50 *Id.*
- 51 *Id.*
- 52 *Id.* at 91. “Some states may be entirely built-out, a situation that may not be tolerable to many people and may adversely affect growth and attitudes about growth” *Id.* In addition to the loss of developable land, sprawl contributes to wetland and habitat loss for local flora and fauna as “fragmentation and expanding edge habitats means that many endangered specialized species and rare biological communities may suffer substantially reduced populations and eventual extinction.” *Id.*
- 53 Gardner, *supra* note 46, at 240–41.
- 54 *See* ROBERT W. BURCHELL, ANTHONY DOWNS, BARBARA McCANN, & SAHAN MUKHERJI, *SPRAWL COSTS: ECONOMIC IMPACTS OF UNCHECKED DEVELOPMENT* ch. 5 (2005). In addition to the environmental impacts, the excess infrastructure creates a financial “burden on local governments, which in turn can lead to higher taxes.” *Id.* at 50.
- 55 U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *STEP IT UP! THE SURGEON GENERAL’S CALL TO ACTION TO PROMOTE WALKING AND WALKABLE COMMUNITIES* 5 (2015) (citations omitted).
- 56 *Id.* at 4 (citations omitted). “Regular physical activity helps prevent risk factors for disease (such as high blood pressure) and protect against multiple chronic diseases (such as heart disease, stroke, some cancers, diabetes, and depression).” *Id.* (citations omitted).
- 57 *See id.*
- 58 *Id.*
- 59 *Id.* at 5 (citations omitted). 11% of the aggregate health care expenditures for 2012 (\$117 billion) was associated with people having inadequate levels of physical activity. *Id.* (citations omitted).
- 60 *Id.* at 9. Walking is a year-round activity, good for people who are inactive to become physically active, and people can tailor their walking patterns to fit their time, needs, abilities, and frequency. *Id.*
- 61 *Id.* at 16. “The ways in which communities are designed and built can present barriers to walking.” *Id.* at 14. Large distances between home, work, school, stores, etc. can limit people’s ability to incorporate walking into their everyday activities. *Id.* People are generally willing to walk about a half a mile to reach a destination, but when it’s farther than that, walking is no longer becomes a convenient option. *Id.*
- 62 Attkisson, *supra* note 8, at 993. “Such a system makes intuitive sense as local officials have likely a better understanding of the types of regulations most suitable to a particular locality than do regional or state officials.” *Id.*
- 63 *Id.*
- 64 *Id.*
- 65 *Id.* at 269.
- 66 Attkisson, *supra* note 8, at 998.
- 67 DOUGLAS R. PORTER, *MANAGING GROWTH IN AMERICA’S COMMUNITIES* 233 (1997).
- 68 *The Quiet Revolution Continues, supra* note 14, at 512.
- 69 MODEL LAND DEV. CODE (1975). “The American Law Institute’s Model Land Development Code (“MLDC”) was strongly influenced by the Vermont Statute, and it served in turn as the model for both provisions of the Florida statute.” *The Quiet Revolution Continues, supra* note 14, at 512.
- 70 MODEL LAND DEV. CODE (1975). *See also* FLA. STAT. ANN. § 380.012 (West 2015); VT. STAT. ANN. tit. 10, § 151 (2003).
- 71 *See* PORTER, *supra* note 67, at 244.
- 72 VT. STAT. ANN. tit. 10, § 151 (West 2015).
- 73 VT. STAT. ANN. tit. 10, § 6026 (2015). Act 250 also created nine regional EDCs, who became responsible for reviewing these large-scale projects. *Id.*
- 74 VT. STAT. ANN. tit. 10, § 6087(a) (2015).
- 75 At the time, Florida had become the fastest growing state, having a population of approximately 6.7 million people. US DEP’T OF COMMERCE, BUREAU OF THE CENSUS, *ESTIMATES OF POPULATION OF THE UNITED STATES* 14 (1973).

- 76 This drought in southeast Florida led to the threat of severe saltwater intrusion and the creation of muck fires in the Everglades and record low water depths in Lake Okeechobee. Nancy Stroud, *A History and New Turns in Florida's Growth Management Reform*, 45 JOHN MARSHALL L. REV. 397, 398 (2012).
- 77 *Id.*
- 78 FLA. STAT. § 380 (2015).
- 79 See FLA. STAT. § 380.06 (2015).
- 80 *Id.*
- 81 FLA. STAT. § 380.06(1) (2015). See also MODEL LAND DEV. CODE § 7-301(1) (1975)
- The State Land Planning Agency shall by rule define categories of Development of Regional Impact that, because of the nature or magnitude of the development or the nature or magnitude of its effect on the surrounding environment, are likely in the judgment of the Agency to present issues of state or regional significance.
- Id.*
- 82 FLA. STAT. § 380.06(7) (2015). See also MODEL LAND DEV. CODE § 7-303(1) (1975).
- 83 FLA. STAT. § 380.06(11) (2015). See also MODEL LAND DEV. CODE § 7-303(2) (1975).
- 84 FLA. STAT. § 380.06(12) (2015). The regional planning agency determines the proposed development's regional impact by looking at a series of factors including whether the development will have a favorable impact on state or regional resources, whether the development will significantly impact adjacent jurisdictions, and whether the development will affect peoples' ability to find "adequate housing reasonably accessible to their places of enjoyment." FLA. STAT. § 380.06(12)(a)1)-(3) (2015). Cf. MODEL LAND DEV. CODE § 7301(2) (1975) (noting that the state shall prepare a report for the municipality rather than a regional planning agency).
- 85 FLA. STAT. § 380.06(14) (2015). See also MODEL LAND DEV. CODE § 7-304 (1975).
- 86 FLA. STAT. § 380.06(14)(a)-(c) (2015).
- 87 FLA. STAT. § 380.07(2) (2015). Cf. MODEL LAND DEV. CODE § 7-501(1) (1975) (noting that the State Land Adjudicatory Board decides appeals).
- 88 See *supra* note 69 and accompanying text.
- 89 See PORTER, *supra* note 67, at 245 ("Florida led the way in 1985 with legislation to strengthen its local planning requirements and engage in state-level planning.") ("Vermont . . . enacted new legislation in 1988 requiring local governments to adopt plans consistent with state planning goals."); *The Quiet Revolution Continues*, *supra* note 14, at 523 ("By the end of the 1980's, both states had passed a planning consistency statute based on the Oregon statute.").
- 90 OR. REV. STAT. § 197 (2015).
- 91 *The Quiet Revolution Continues*, *supra* note 14, at 523 (citing JOHN M. DEGROVE, LAND, GROWTH AND POLITICS 235-37 (1984)).
- 92 *Id.* at 522-23.
- 93 See FLA. STAT. §§ 163.3161-.3243 (2015); FLA. STAT. § 186 (1999); FLA. STAT. § 187.201 (2015).
- 94 See VT. STAT. ANN. tit. 24, § 4301-87 (2015).
- 95 See generally GA. CODE ANN. §§ 36-70, 50-8 (2105); ME. REV. STAT. ANN. tit. 30-A § 4312(3) (2015); MD. STATE FIN. & PROC. CODE ANN. § 5-212 (2015); N.J. STAT. ANN. §§ 52:18A-196 to 207 (2015); R.I. GEN. LAWS § 45-22.2 (2015); WASH. REV. CODE ANN. § 36.70A (2105) (planning consistency approaches of Georgia, Maine, Maryland, New Jersey, Rhode Island, and Washington, respectively).
- 96 PORTER, *supra* note 67, at 253; *The Quiet Revolution Continues*, *supra* note 14, at 525.
- 97 OR. REV. STAT. § 197.030(1) (2015).
- 98 OR. REV. STAT. § 197.225 (2015).
- 99 OR. REV. STAT. § 197.175 (2015).
- 100 *Id.*
- 101 OR. REV. STAT. § 197.045 (2015).
- 102 Edward J. Sullivan, *Urban Growth Management in Portland, Oregon*, 93 OR. L. REV. 455, 457.
- 103 Goal 1 (Citizen Involvement) and Goal 2 (Land Use Planning). See OR. ADMIN. R. 660-015-0000 (2015).
- 104 Goal 3 (Agricultural Lands), Goal 4 (Forest Lands), and Goal 5 (Natural Resources). See *id.*
- 105 Goal 6 (Air, Water, and Land Resources Quality), Goal 7 (Areas Subject to Natural Hazards), Goal 8 (Recreational Needs), and Goal 13 (Energy Conservation). See *id.*
- 106 Goal 9 (Economic Development), Goal 10 (Housing), Goal 11 (Public Facilities and Services), Goal 12 (Transportation), and Goal 14 (Urbanization). See *id.*
- 107 Goal 15 (Willamette River Greenway). See OR. ADMIN. R. 660-015-00005 (2015). Goal 16 (Estuarine Resources), Goal 17 (Coastal Shorelands), Goal 18 (Beaches and Dunes), and Goal 19 (Ocean Resources). See OR. ADMIN. R. 660-015-0010 (2015).
- 108 See Attkisson, *supra* note 8, at 1001-03; Sullivan, *supra* note 102, at 457.
- 109 Or. Dep't of Land Conservation and Dev., *Goal 14: Urbanization in Oregon's Statewide Planning Goals & Guidelines* 1 (Mar. 12, 2010), http://www.oregon.gov/LCD/docs/goals/compilation_of_statewide_planning_goals.pdf.
- 110 *Id.*
- 111 *Id.*
- 112 *Id.*
- Establishment and change of urban growth boundaries shall be based on the following: (1) Demonstrated need to accommodate long range urban population, consistent with a 20-year population forecast coordinated with affected local governments; and (2) Demonstrated need for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space, or any combination of the need categories in this subsection (2)
- Id.*
- 113 Wickersham, *supra* note 1, at 49.
- 114 *Id.*
- 115 *Id.* at 50.
- 116 *Id.* at 49.
- 117 *Id.* at 50.
- 118 See Michael Lewyn, *You Can Have It All: Less Sprawl and Property Rights Too*, 80 TEMP. L. REV. 1093, 1101 (2007).
- 119 Ben O'Neill, *How Zoning Rules Would Work in a Free Society*, MISES INST. (June 17, 2009), <https://mises.org/library/how-zoning-rules-would-work-free-society>.
- 120 *Id.*
- 121 *Id.* "How then, can planners possibly be as familiar with the location, development, construction, and operation of shopping centers, housing developments, nursing homes, or mobile parks as those who develop, own or operate them?" Bernard H. Siegan, *Conserving and Developing the Land*, 27 SAN DIEGO L. REV. 279, 287 (1990) [hereinafter *Conserving and Developing the Land*].
- 122 O'Neill, *supra* note 119. "[I]n particular, zoning laws will inevitably involve substantial discretionary power being aggregated to government bureaucrats and being exercised without recourse to any rational means of economic calculation." *Id.*
- 123 "[R]egardless of their knowledge or ability, planners are not destined

- to make a significant impact on the regulation of land use. The major decisions will be adopted by the elected office holders who possess the final authority.” *Conserving and Developing the Land*, *supra* note 131, at 287 (1990).
- 124 O’Neill, *supra* note 119.
- [A] local property owner, affected by zoning decisions, is merely another face in the crowd whose power over zoning decisions is limited to his political influence with the local council. As a result, most people have little ability to exercise control over the zoning decisions in the neighborhood in which their property is located.
- Id.*
- 125 *Id.*
- 126 *Id.*
- 127 See BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING 77–78* (1972) [hereinafter *LAND USE WITHOUT ZONING*]; O’Neill, *supra* note 119.
- 128 “Not In My Back Yard.” *E.g.*, DUANY, *supra* note 35, at x.
- 129 O’Neill, *supra* note 119.
- 130 Bernard H. Siegan, *Smart Growth and Other Infirmities of Land Use Controls*, 38 SAN DIEGO L. REV. 693, 745 (2001) [hereinafter *Smart Growth and Other Infirmities*].
- 131 O’Neill, *supra* note 119.
- 132 *Id.*
- 133 See *id.*
- 134 See generally Bernard H. Siegan, *Non-Zoning in Houston*, 13 J. L. & ECON. 71 (1970) [hereinafter *Non-Zoning in Houston*] (analyzing how Houston operates its land use controls, particularly the restrictive covenant, without a zoning code).
- 135 *E.g.*, Michael Lewyn, *How Overregulation Creates Sprawl (Even in a City Without Zoning)*, 50 WAYNE L. REV. 1171, 1172 (2004) [hereinafter *How Overregulation Creates Sprawl*].
- 136 *Non-Zoning in Houston*, *supra* note 134, at 75.
- 137 “Houstonians lost thirty-seven hours per person in 2001 to traffic congestion, more than commuters in seven of the nine comparably sized urban areas.” *How Overregulation Creates Sprawl*, *supra* note 135, at 1196 (citing TEX. TRANSP. INST., 2003 URBAN MOBILITY STUDY, Exhibit A–4, available at <http://mobility.tamu.edu/ums/report/> (last visited Jan. 11, 2004)).
- 138 “Houstonians drive more than other Americans: The average Houstonian travels 37.6 miles per day by automobile, more than residents of any other large American region.” *Id.* at 1177 (citing U.S. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., HIGHWAY STATISTICS 2001, tbl. HM–72, available at <http://www.fhwa.dot.gov/ohim/hs01/hm72.htm> (last visited March 3, 2003)).
- 139 “Because Houston is so sprawling and automobile-dominated, most jobs are not near bus or rail stops, and most Houstonians must own cars and drive many miles to do their daily errands” *Id.* at 1195 (citations omitted).
- 140 Not only are there worries that a free market approach to land use may do nothing to combat sprawl, but there are also assertions that such deregulation is the cause of sprawl. “[T]he President of the Urban Land Institute, a real estate industry research organization, blames Houston’s sprawl on its lack of land use regulation, asserting that Houston is ‘a textbook example of the sprawl and hopscotch that comes with . . . a laissez faire business climate.’” *Id.* at 1175 (citations omitted) (alteration in original).
- 141 See *id.* at 1178.
- 142 Numerous commentators assert that “unzoned Houston” allows “developers [to] determine the size of most building lots, not the planners and politicians” based on the private market. *Smart Growth and Other Infirmities*, *supra* note 130, at 734 (alteration in original).
- 143 *How Overregulation Creates Sprawl*, *supra* note 135, at 1190.
- 144 See *id.* at 1179–86 (arguing that the combination of Houston’s minimum lot sizes, minimum parking requirements, and mandatory setbacks make Houstonians more automobile dependent because they discourage walking, reduce density, and encourage developers to incentivize driving).
- 145 See Houston, Texas, Municipal Code § 42–197(a) (2015). “Houston’s government-created low density effectively forces Houstonians into their cars because . . . Houston’s low density makes improved public transit impractical.” *How Overregulation Creates Sprawl*, *supra* note 135, at 1180 (citations omitted).
- 146 See Houston, Texas, Municipal Code § 26–471(a) (2015). “Virtually every structure built in Houston must, under municipal law, have an ample supply of parking.” *How Overregulation Creates Sprawl*, *supra* note 135, at 1182.
- 147 See Houston, Texas, Municipal Code § 42–150(b) (2015). “Thanks to Houston’s building line or setback requirements, Houston’s sea of government-mandated parking is usually in front of most buildings.” *How Overregulation Creates Sprawl*, *supra* note 135, at 1183 (citations omitted) (internal quotation marks omitted).
- 148 See *supra* Part III.
- 149 *LAND USE WITHOUT ZONING*, *supra* note 127, at 26.
- 150 *How Overregulation Creates Sprawl*, *supra* note 135, at 1190.
- 151 Houston, Texas, Municipal Code §§ 10–552(a), 10–553 (2015).
- 152 *How Overregulation Creates Sprawl*, *supra* note 135, at 1190–91.
- 153 See *id.*
- 154 *Conserving and Developing the Land*, *supra* note 121, at 279 (emphasis added).
- 155 See *supra* Part III.
- 156 Washington encourages municipal cooperation. WASH. ADMIN. CODE § 365–196–310(3)(a) (2015) (“The adoption, review and amendment of the urban growth area should reflect a cooperative effort among jurisdictions to accomplish the requirements of the act on a regional basis, consistent with the county-wide planning policies and, where applicable, multicounty planning policies.”).
- 157 Oregon requires municipal cooperation. Or. Dep’t of Land Conservation and Dev., *Goal 14: Urbanization in Oregon’s Statewide Planning Goals & Guidelines* 1 (Mar. 12, 2010) (“Establishment and change of urban growth boundaries shall be a cooperative process among cities, counties and, where applicable, regional governments.”). http://www.oregon.gov/LCD/docs/goals/compilation_of_statewide_planning_goals.pdf.
- 158 See *infra* notes 159–160 and accompanying text.
- 159 Currently, 46 states enable—but do not require—their municipalities to adopt and enforce zoning ordinances. See ALA. CODE § 11–52–70 (2015); ARIZ. REV. STAT. ANN. § 9–462.01 (2015) (West); ARK. CODE ANN. § 14–17–209(a) (West 2015); ANN. CAL. GOV’T CODE § 65850 (West 2015); COLO. REV. STAT. § 31–23–301(1) (West 2015); CONN. GEN. STAT. ANN. § 8–1(a) (West 2015); DEL. CODE ANN. tit. 9, §2601(a) (West 2015); GA. CODE ANN. 36–66–2(b) (West 2015); HAW. REV. STAT. ANN. § 46–4 (West 2015); 55 ILL. COMP. STAT. ANN. 5/5–12001 (West 2015); IND. CODE ANN. § 36–7–4–202(a) (West 2015); IOWA CODE ANN. § 414.1 (West Proposed Official Draft 2015); KAN. STAT. ANN. § 12–741(a) (West 2015); KY. REV. STAT. ANN. § 100.203 (West 2015); LA. REV. STAT. ANN. § 33:4722 (2015); ME. REV. STAT. ANN. tit. 30–a, § 4352 (2015); MASS. GEN. LAWS ANN. ch. 40A, § 5 (West 2015); MICH. COMP. LAWS ANN. § 125.3211(1) (West 2015); MINN. STAT. ANN. § 462.357 (West 2015); MISS. CODE ANN. § 17–1–3(1) (West 2015); MO. ANN. STAT. § 89.020(1) (West 2015); MONT. CODE ANN. § 76–2–201(1) (West 2015); NEB. REV. STAT. ANN. § 23–114(1) (West Proposed Official Draft 2015); NEV. REV. STAT. ANN. § 278.020(1) (West 2015); N.H. REV. STAT. ANN. § 674:16 (Proposed Official Draft 2015); N.J. STAT. ANN. §40:55D–62(a) (West Proposed Official Draft 2015); N.M. STAT. ANN. § 3–21–1(A) (West Proposed Official Draft 2015); N.Y. TOWN LAW § 261 (McKinney Proposed Official Draft

- 2015); N.C. GEN. STAT. ANN. § 160A–381(a) (West Proposed Official Draft 2015); N.D. GEN. CODE ANN. § 40–47–01 (West 2015); OHIO REV. CODE ANN. § 519.02 (West 2015); OKLA. STAT. ANN. tit. 11, § 43–101 (West 2015); OR. REV. STAT. ANN. § 227.215(2) (West 2015); 53 PA. STAT. ANN. § 10601 (West Proposed Official Draft 2015); R.I. GEN. LAWS ANN. § 45–22.1–1 (2015); S.C. CODE ANN. § 6–29–710 (1976); S.D. CODIFIED LAWS § 11–4–1 (2004); TENN. CODE ANN. § 13–7–101 (West 2015); TEX. LOC. GOV'T CODE ANN. § 211.001 (West 2015); UTAH CODE ANN. § 10–9a–102 (West 2015); VT. STAT. ANN. tit. 24, § 4414 (West Proposed Official Draft 2015); VA. CODE ANN. § 15.2–2281 (West 2015); WASH. REV. CODE ANN. § 35A.63.100 (West Proposed Official Draft 2015); W. VA. CODE ANN. § 8A–7–1 (West 2015); WIS. STAT. ANN. § 59.69 (West Proposed Official Draft 2015).
- 160 Only four states currently require that municipalities adopt and enforce zoning ordinances. See ALASKA STAT. § 29.40.010(a) (West 1985); FLA. STAT. ANN. § 163.3171(1) (West 2015); IDAHO CODE ANN. § 67–6511(1) (West 2015); MD. CODE ANN., Land Use § 4–202(a) (West 2015); WYO. STAT. ANN. § 18–5–201 (West 2015).
- 161 See *supra* Part I.
- 162 See Attkisson, *supra* note 8, at 1011.
- 163 *Id.* (emphasis added) (quoting A STANDARD STATE ZONING ENABLING ACT, *supra* note 21 (alteration in original)).
- 164 See *id.*
- 165 See *id.*
- 166 SALSICH, *supra* note 18, at 142. For example, a Florida statute prohibits municipalities from enacting any ordinances that would prohibit the “installation of solar collectors, clotheslines, or other energy devices based on renewable resources.” *Id.* (quoting FLA. REV. STAT. § 163.04 (2008)). The State legislature included with the statute, a statement of legislative intent stating that the statute was designed to “protect the public health, safety, and welfare by encouraging the development and use of renewable resources in order to conserve and protect the value of land, buildings, and resources.” FLA. REV. STAT. §163.04 (2008).
- 167 Am. Planning Ass'n, *Zoning for Mixed Uses*, PAS Quick Notes No. 6, <https://www.planning.org/pas/quicknotes/pdf/QN6.pdf>.
- 168 *Id.*
- 169 See *supra* Part I.
- 170 See *supra* Part II.
- 171 *E.g.*, Atlanta, Georgia Municipal Code §16–19B.002 (2015) (“Such areas are defined as planned development districts for the establishment of complementary groupings of residential, in combination with commercial and/or office, uses.”).
- 172 Attkisson, *supra* note 8, at 994.
- 173 DONALD C. SHOUP, THE HIGH COST OF FREE PARKING 22, 25 (2005) (noting that minimum parking requirements became common in the late 1940s and are now essentially universal).
- 174 See *id.* at 31.
- 175 *You Can Have It All*, *supra* note 118, at 1118–19.
- 176 *Id.* at 1119.
- 177 “When fewer people use public transit, public transit agencies have less fare revenue, which means that they can provide less transit service. Thus, minimum parking requirements indirectly limit public transit service, which in turn makes commuters more dependent on automobiles.” *Id.*
- 178 See *id.* at 1118–19.
- 179 See *id.*
- 180 *Id.* at 1106.
- 181 *Id.*
- 182 Robert Cervero, *Growing Smart by Linking Transportation and Urban Development* 19 VA. ENVTL. L.J. 357, 362 (2000).