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# Why (And How) Conservatives Should Support Smart Growth

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## **Zoning and Land Use Planning**

*Michael Lewyn\**

### **Why (And How) Conservatives Should Support Smart Growth**

#### INTRODUCTION

In recent decades, the “smart growth” movement has arisen in response to the perceived failures of American suburbs. Smart growth advocates assert that the 20<sup>th</sup>-century shift of people and jobs to automobile dependent-suburbs (often referred to as “sprawl”)<sup>1</sup> increases greenhouse gas emissions and other forms of air pollution by increasing driving,<sup>2</sup> increases obesity by discouraging walking,<sup>3</sup> and has moved jobs to places lacking public transportation and thus inaccessible to the carless poor.<sup>4</sup> Principles commonly associated with smart growth include improving public transit, making neighborhoods more pedestrian-friendly, and land use policies related to the latter goal such as mixing land uses and more dense development.<sup>5</sup>

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<sup>1</sup>See Michael Lewyn, *Sprawl in Canada and the United States*, 44 URB. LAW. 85, 86 & nn.2–3 (2012) (citing numerous definitions of sprawl).

<sup>2</sup>See JULIAN CONRAD JUERGENSMEYER AND THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW*, sec. 9.2 at 321 (2d ed. 2007).

<sup>3</sup>See Paul Boudreaux, *The Impact Xat: A New Approach to Charging for Growth*, 43 U. MEM. L. REV. 35, 79 (2012).

<sup>4</sup>See Robert D. Bullard, Glenn S. Johnson, Angel O. Torres, *Dismantling Transportation Apartheid in the United States Before and After Disasters Strike*, 34 HUMAN RIGHTS 2, 3 (2007).

<sup>5</sup>See Kacie A. Hohnadell, *Community Planning Act: The End of Meaningful Growth Management in Florida*, 42 STETSON L. REV. 715, 739 n. 142 (2013) (describing smart growth as “a philosophy advocating well-planned, high-density mixed-use development, thereby decreasing dependence on automobiles in favor of walking, biking, and the use of mass transit, as well as making use of existing infrastructure.”) (citation omitted).

Often, conservatives and libertarians have been critical of smart growth, because of the risk that smart growth principles might be invoked to justify increased land use regulation.<sup>6</sup> This article argues otherwise, proposing that conservatives should not only support the goals of the smart growth movement, but should also support some policies designed to achieve those goals.

### I. Why Conservatives Should Support Smart Growth

Key conservative values include choice and cost: expanding consumer choice and reducing the cost and intrusiveness of government. Sprawl threatens both values.

#### A. Sprawl vs. Choice

Conservatives tend to favor free markets over government planning, partially because markets provide unanimity without conformity—that is, they allow consumers to satisfy their desires without imposing those desires upon others.<sup>7</sup> But in the most automobile-oriented cities and suburbs, sprawl creates conformity, requiring nearly every adult to drive a car to reach jobs and other destinations.<sup>8</sup> This is the case for numerous reasons.

First, many jobs are not accessible by public transit. In the average American metropolitan area, the typical job is accessible to only 27% of employees by public transit (even assuming a 90-minute transit commute).<sup>9</sup> As jobs have shifted from city to suburb,<sup>10</sup> average commute distances increased from 10 miles in 1983 to over 13 miles in 2009,

<sup>6</sup>See, e.g., Edward T. Canuel, *Supporting Smart Growth Legislation and Audits: An Analysis of U.S. and Canadian Land Planning Theories and Tools*, 13 Mich. St. J. Int'l L. 309, 324 n. 88 (2005) (“Libertarians criticize Smart Growth, and argue for the deregulation of land development . . .”); Wendell Cox & Ronald D. Utt, *Housing Affordability: Smart Growth Abuses Are Creating a “Rent Belt” of High-Cost Areas*, Backgrounder, Jan. 22, 2007, at [http://www.heritage.org/Research/SmartGrowth/upload/bg\\_1999.pdf](http://www.heritage.org/Research/SmartGrowth/upload/bg_1999.pdf) (criticism of smart growth by conservative Heritage Foundation).

<sup>7</sup>See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 14–15, 23 (1982 ed.) (using “unanimity without conformity” phrase).

<sup>8</sup>See *Wooley v. Maynard*, 430 U.S. 705, 715, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977).

<sup>9</sup>See Adie Tomer, *Where The Jobs Are: Employer Access to Labor by Transit* 1, at <http://www.brookings.edu/~media/Research/Files/Papers/2012/7/transit%20labor%20tomers/11%20transit%20labor%20tomers%20full%20paper.pdf>.

<sup>10</sup>*Id.* at 11.

thus increasing commute times even for people whose homes and jobs are near public transit.<sup>11</sup>

Second, sprawl also prevents walking from being a viable alternative to driving, because American street design makes walking uncomfortable and even dangerous. Often, American roads are so wide that they cannot be safely crossed on foot.<sup>12</sup> Many workplaces are kept far from sidewalks by driveways and parking lots, so even a pedestrian who succeeds in crossing a giant street must again dodge cars by walking through a vehicle-filled parking lot.<sup>13</sup> Because most transit users must ultimately walk from a bus or train stop to reach work, these safety hazards endanger transit users as well as those who choose to commute on foot.

By contrast, in less sprawling places (such as New York and its suburbs) people have a wide variety of options. They can live in urban neighborhoods where car ownership is rare, more car-oriented suburban places, and a wide variety of neighborhoods in between those extremes.

### **B. Sprawl Makes Government Bigger and More Intrusive**

Generally, conservatives are more concerned about the size and cost of government than liberals. But sprawl makes government more expensive and intrusive in several respects.

First, sprawl makes Americans more dependent on social welfare programs. Americans who are most dependent on public assistance often cannot afford to purchase and maintain automobiles.<sup>14</sup> In suburbs where car ownership is virtually mandatory for employment, these men and women

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<sup>11</sup>*Id.* at 2.

<sup>12</sup>See Chad Lamer, *Why Government Policies Encourage Suburban Sprawl and the Alternatives Offered by New Urbanism*, 13 KAN. J. L. & PUB. POLICY 391, 397, 403 (2004) (noting that major suburban streets dangerous for pedestrians, and that streets became wider in late 20th century); Stephen H. Burrington, *Restoring the Rule of Law and Respect for Communities in Transportation*, 5 N.Y.U. ENVTL. L. REV. 691, 700, 704 (1996) (explaining that government widens roads to make traffic faster, and that fast traffic reduces pedestrian safety).

<sup>13</sup>*Cf.* JIL MCINTOSH, IT'S NO CAKEWALK BEING A PEDESTRIAN, TORONTO STAR, July 18, 2009, at W2, available at 2009 WLNR 13724302 (parking lots "dangerous" because drivers "busy looking for spots or avoiding cars backing out, making pedestrians vulnerable").

<sup>14</sup>See Katherine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 Fordham L. Rev. 1797, 1823 n. 126 (2007) (majority of women on public assistance do not own cars).

are unemployable, and thus are more likely to become dependent on government for subsistence. Thus, smart growth policies that make jobs more transit-accessible are likely to make the poor more employable and less dependent on social welfare programs.

Second, the cost of mandatory car ownership is effectively a government-imposed tax. The average American household spends \$7,500 per year on car-related expenses, including \$2,657 on vehicle purchases, \$1,935 on gasoline, and over \$2,500 on other expenses such as insurance.<sup>15</sup> These expenditures are effectively a tax, because (as will be shown below)<sup>16</sup> sprawl is in large part a result of government policy. Moreover, this cost is a regressive tax, because car costs are especially burdensome for lower-income workers. Households earning less than \$12,000 per year spend 36% of their income on transportation, as opposed to 14% for high-income households.<sup>17</sup>

Third, sprawl is especially taxing in urban centers. In regions where much of the middle class has moved to suburbia, central cities have been forced to shoulder a disproportionate share of their region's poverty.<sup>18</sup> As a city becomes poorer, its tax base declines, forcing it to choose between reducing services and increasing taxes. In turn, tax increases and reduced services drive out middle-class voters who tend to be more politically conservative, causing city governments to be dominated by liberals and Democrats who tend to favor additional tax increases.<sup>19</sup>

Finally, sprawl ultimately creates similar problems for small towns and suburbs. As a suburb grows, it builds more roads and other infrastructure to support its population. In

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<sup>15</sup>See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 448 (2012 ed.) at [www.census.gov/compendia/statab/2012/tables/12s0684.pdf](http://www.census.gov/compendia/statab/2012/tables/12s0684.pdf).

<sup>16</sup>See Part II *infra*.

<sup>17</sup>See Silbaugh, *supra* note 14, at 1822; Surface Transportation Policy Project, *Driven to Spend* 10, at <http://www.transact.org/PDFs/DriventoSpend.pdf> (listing costs for various economic groups and defining "higher-income" households as those earning over \$60,000 per year).

<sup>18</sup>See ELIZABETH KNEEBONE AND ALAN BERUBE, CONFRONTING SUBURBAN POVERTY IN AMERICA 35 (2013) (although poverty has grown in many suburbs, "the urban poverty rate remained almost twice as high as the suburban rate").

<sup>19</sup>See Michael Lewyn, *Suburban Sprawl, Not Just An Environmental Issue*, 84 MARQ. L. REV. 301, 354–55 (2000) (describing decline of Republican support in cities and inner suburbs).

the short run, this infrastructure is supported by tax revenue from the suburb's new residents.<sup>20</sup> But at some point, the suburb will be "built out"—that is, it will be unable to add new residents by building on undeveloped land.<sup>21</sup> Once this happens, the suburb must pay for the maintenance of existing infrastructure, but will no longer be able to pay for such infrastructure from the tax revenues caused by new growth.<sup>22</sup> Thus, the suburb will have to reduce services or raise taxes. The suburb can mitigate this problem through smarter growth— that is, by allowing the landowners to develop more intensely where there is existing infrastructure, thus reducing the amount of infrastructure it must maintain in the long run.

## II. How Conservatives Can Support Smart Growth

Conservatives tend to be skeptical of smart growth because they often believe that sprawl is a result of the free market, and/or that solutions to sprawl will always involve bigger, more intrusive government.<sup>23</sup> But in fact, sprawl is partially a result of government regulation, and it is therefore possible to create a package of smart growth policies that make government less intrusive.

In particular, conservatives can join with smart growth advocates in opposing (1) government regulations that artificially spread out the population and thus encourage dependence on automobiles, (2) government regulations that artificially prevent people from living near jobs and shops,

<sup>20</sup>See Charles Marohn, *The Small Town Ponzi Scheme*, at <http://www.strongtowns.org/journal/2009/2/3/the-small-town-ponzi-scheme.html>.

<sup>21</sup>Of course, the suburb can always tear down existing structures and build more densely: for example, by tearing down an existing house and substituting an apartment building in its place. But such policies may be resisted by existing homeowners, and thus are rarely implemented. See Edward H. Ziegler, *American Cities and Sustainable Development in the Age of Global Terrorism: Some Thoughts on Fortress America and the Potential for Defensive Dispersal II*, 30 Wm. & Mary Env'tl. L. & Pol'y Rev. 95, 150 (2005) (describing "Not In My Back Yard" resistance by neighbors of development that increases neighborhood density).

<sup>22</sup>See Marohn, *supra* note 20.

<sup>23</sup>See DOLORES HAYDEN, A FIELD GUIDE TO SPRAWL 13 (2004) ("conservatives noted that since most Americans choose to live in suburbs, sprawl must be popular"); James E.A. Slaton, *Navigating the Political Challenges to Sustainable Development*, 26 PROB. AND PROP. 52, 52 (2012) (describing right-wing attacks on smart growth policies; for example, one website claims that "Smart Growth plans usurp property rights") (citation omitted).

and (3) government construction of ever-wider streets and highways.

### **A. Fight Density-Phobia**

American municipal governments have consistently limited population density, both directly by requiring homes and apartments to consume large amounts of land<sup>24</sup> and indirectly by requiring businesses and multifamily dwellings to construct off-street parking spaces.<sup>25</sup>

#### **1. Direct Limits on Density**

As noted above,<sup>26</sup> municipalities often directly regulate density by requiring homes to gobble up large amounts of land,<sup>27</sup> limiting the number of apartments or condominiums

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<sup>24</sup>See Richard Briffault, *Smart Growth and American Land Use Law*, 21 St. Louis U. Pub. L. Rev. 253, 253 (2002) (observing that “hallmarks of American land use law” include “reducing population density and dispersing residents over wider areas”); William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 9.18, at 597–98 (3d ed. 2000) (noting that most zoning ordinances control density through minimum lot-size requirements and similar regulations and that these rules have generally been upheld by courts). The analysis below applies not just to regulations explicitly limiting the number of dwellings per acre but also to less direct forms of antidensity regulation, such as limitations on the height of buildings and “floor area ratios” and “open space ratio[s]” that require parts of a lot to be used for areas other than buildings. *Id.* at 598.

<sup>25</sup>See Part II-A-2 *infra*.

<sup>26</sup>See *supra* notes 24-25 and accompanying text.

<sup>27</sup>See, e.g., Atlanta, GA., Code Of Ordinances, pt. 16, ch. 3, § 16-03.007, at <http://library.municode.com/index.aspx?clientId=10376> (providing that, in one of city’s zones, single-family lots shall have “an area of not less than two acres”).

that can be built on an acre<sup>28</sup> or directly prohibiting high- and midrise apartments.<sup>29</sup>

Such antidensity regulations create automobile-dependent development by reducing both transit use and walking. As a general rule, a neighborhood must have at least seven to 15 dwelling units per acre to support significant transit ridership,<sup>30</sup> because only compact neighborhoods have large numbers of people living within walking distance of a bus or train stop. In areas with lower density, very few people will live within a short walk of a bus or train stop, and transit ridership will therefore be low.<sup>31</sup>

Walking is also less common in such low-density areas, because most residents of these areas will live within walking distance of very few destinations. For example, imagine two neighborhoods near a grocery store: one with 50 residences per acre and another with one house per acre. Because there are 640 acres in a square mile,<sup>32</sup> 32,000 (640 x 50) households in the more compact neighborhood will live

<sup>28</sup>See, e.g., City of Alpharetta, Georgia, Unified Development Code, Art 2.1.1, at <http://www.alpharetta.ga.us/files/docs/pdfs/UDC/Article%202.pdf> (limiting apartment construction to 10 units per acre); Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 Ala. L. REV. 257, 276 (2006) (citing codes of cities that limit multifamily dwellings to between 14 and 22 units per acre). By contrast, prosperous urban neighborhoods sometimes have 100 to 200 dwelling units per acre. See Jane Jacobs, *The Death and Life of Great American Cities* 211 (6th prt. 1961) (observing that neighborhood vitality increases when there are more than 100 residential units per acre); Ruth Eckdish Knack, *Dense, Denser, Denser Still*, PLANNING, Aug. 2002, at 4, 6 (noting that New York's Upper East Side, one of city's "most prestigious residential districts," has "roughly 200 units per acre").

<sup>29</sup>See, e.g., Sandy Springs, Georgia, Development Ordinances, Art. 7.4.3[A], at <http://www.sandyspringsga.org/SandySprings/media/Zoning-Ordinances/Article-VII—Two-Family-and-Multifamily-Dwelling-District-Regulations.pdf> (limiting height to four stories or 60 feet); Lewyn, *supra* note 28, at 276 n. 158 (citing other examples of restrictive height regulations).

<sup>30</sup>See Robert H. Freilich, *The Land Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 URB. LAW. 547, 552 & n. 18 (2009); ANTHONY DOWNS, STILL STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION 210 (2004) (seven units per acre supports bus service once every half-hour).

<sup>31</sup>See Freilich, *supra* note 30, at 552 (citing studies showing that commuters are unlikely to walk more than quarter mile to bus stop or transit station).

<sup>32</sup>Metric Conversions, *Acres to Square Miles Converter*, at <http://www.metric-conversions.org/area/acres-to-square-miles.htm>.

within a one-mile (or about 30-minute)<sup>33</sup> walk of the store, and 8,000 households will live within a quarter-mile (or about 7.5-minute) walk of the store.<sup>34</sup> By contrast, in the more thinly populated area, only 640 households will live within a one-mile walk of the store, and only 160 will live within a quarter-mile walk of the store. Thus, more people can walk to the grocery store in the more compact neighborhood.<sup>35</sup>

In sum, Americans can comfortably walk to shops, jobs, and public transit only in reasonably compact areas. Because the smart growth movement seeks to facilitate walking and public transit, it logically follows that smart growth advocates should generally oppose anti-density regulation.<sup>36</sup>

Conservatives also should oppose such regulation, because they generally seek to increase the rights of property owners.<sup>37</sup> Anti-density regulations limit how many units a landowner can build, and thus reduce property rights. It follows that the elimination of minimum lot size requirements would enhance landowners' rights: a landowner could place as many or as few dwelling units on her land as she desired (rather than being constrained by government regulation).<sup>38</sup>

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<sup>33</sup>See Editorial, A Christmas Gift for Mr. Paterakis, Balt. Sun, Dec. 14, 1997, at 2F (suggesting that it takes 30 minutes to walk a mile).

<sup>34</sup>*Cf.* Freilich, *supra* note 30, at 552 (commuters rarely will walk more than a quarter mile).

<sup>35</sup>*Cf.* Knack, *supra* note 28, at 9 (quoting former redevelopment official as saying that "you need a certain amount of density at a certain household income within a certain radius to support a grocery store").

<sup>36</sup>At least in older areas near public transit. In truly rural areas far from city cores, smart growth advocates may seek to limit density to prevent these areas from turning into suburbs. As to this issue, conservatives and smart growth advocates may have to agree to disagree. *Cf.* Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 893–900 (2006) (discussing Oregon's "urban growth boundary" system limiting conversion of rural land to suburban use).

<sup>37</sup>See Slaton, *supra* note 23, at 52 (conservative opposition to smart growth based on concerns about property rights).

<sup>38</sup>It could be argued that density restrictions are necessary to prevent harmful externalities such as traffic congestion. But because residents of low-density areas drive more than residents of higher-density areas, anti-density regulation may not reduce congestion at all. See Michael Lewyn, *You Can Have It All: Smart Growth and Property Rights Too*, 80 TEMPLE L. REV. 1093, 1109–11 (2007) (discussing argument in more detail, and pointing out that at regional level, correlation between regional density and regional traffic congestion either weak or nonexistent). Moreover, in

## 2. Regulating Density by Regulating Parking

American cities typically require office buildings and shopping centers to devote most of their land to parking.<sup>39</sup> Parking requirements for residential housing can also be quite restrictive. For example, the city code of Jacksonville, Florida, requires landowners in one neighborhood to provide 1.75 parking spaces per apartment, even for one-bedroom apartments.<sup>40</sup> These parking spaces are generally in front of apartments and businesses, thanks to “setback” regulations that force landowners to set their buildings far behind adjacent streets.<sup>41</sup> In theory, a landowner could place something other than parking between buildings and the street—but parking can be used to accommodate drivers and to comply with minimum parking requirements, while other uses might be merely decorative.<sup>42</sup> Thus, setback regulations give landowners a strong incentive to place parking lots between their buildings and nearby streets.

These regulations make society more automobile-dependent in a variety of ways. First, they reduce density, because land devoted to parking cannot be devoted to housing or commerce, which means that fewer people and jobs can be placed on a given parcel of land. For example, in 1961, Oakland, California, began to require one parking space per apartment<sup>43</sup>—a rule less intrusive than some cit-

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case of doubt conservatives should err on the side of liberty, favoring solutions that expand rather than reducing property rights.

<sup>39</sup>See DONALD SHOUP, *THE HIGH COST OF FREE PARKING* 31 (2005) (municipalities typically require office buildings to provide four parking spaces, totaling 1200 square feet, per 1000 square feet of office space).

<sup>40</sup>See Jacksonville, Fla., Ordinance Code, § 656.604, at <http://library.municode.com/index.aspx?clientId=12174>.

<sup>41</sup>See Stoebeck & Whitman, *supra* note 24, § 9.18, at 598 (observing that most zoning ordinances include setback regulations); Mike Snyder, Existing Development Rules Clouding Vision of Pedestrian-Friendly Midtown, *Houston Chron.*, Sept. 11, 2006, at A1 (noting that, in Houston, government requires most buildings outside downtown to be 25 feet from street).

<sup>42</sup>See SHOUP, *supra* note 39, at 107 (recognizing that parking in front of buildings is more convenient for motorists than parking behind buildings).

<sup>43</sup>*Id.* at 143.

ies' current regulations.<sup>44</sup> Within just three years, the number of apartments per acre fell by 30%.<sup>45</sup> As noted above, anti-density regulations make neighborhoods more automobile-dependent.<sup>46</sup>

Second, because parking is often in front of buildings,<sup>47</sup> minimum parking requirements effectively require pedestrians to walk through parking lots to reach most destinations. When pedestrians have to walk through parking lots to reach jobs, shops, and apartments, their commutes become longer, causing them to waste time in a visually unappealing environment.<sup>48</sup> In addition to lengthening pedestrian commutes, the seas of parking created by minimum parking requirements may endanger pedestrians' life and health by forcing them to dodge cars traveling in and out of parking lots.<sup>49</sup>

Third, minimum parking requirements force landowners to subsidize driving. Most American parking is free to motorists, because minimum parking requirements increase the supply of parking and thus drive the market price of parking down.<sup>50</sup> In reality, such "free" parking is paid for by landowners, who either absorb the cost of parking lot construc-

<sup>44</sup>See *supra* note 40 and accompanying text (describing regulations of Jacksonville, Fla.); Lewyn, *supra* note 28, at 278-79 (citing examples from Alabama and Texas).

<sup>45</sup>See Shoup, *supra* note 39, at 144.

<sup>46</sup>See *supra* notes 30-35 and accompanying text.

<sup>47</sup>See *supra* notes 41-42 and accompanying text.

<sup>48</sup>See Douglas G. French, *Cities Without Soul: Standards for Architectural Controls with Growth Management Objectives*, 71 U. Det. Mercy L. Rev. 267, 280 (1994) (describing parking lots as "inconvenient and inhospitable to pedestrians" when placed in front of buildings, and observing that, in contrast, "small setbacks and shop front windows provide more interesting scenery for pedestrians[] and create a feeling of connection between the buildings and the public spaces bordering them).

<sup>49</sup>See, e.g., Jason Misner, *Cyclist Killed in Plaza Lot*, Burlington Post.com, Feb. 26, 2006, available at <http://www.burlingtonpost.com/news/article/46202> (reporting that, after cyclist was killed by car in parking lot, police officer pointed out that "[p]arking lots don't have all the controls other roadways have" and president of Canada Safety Council "implored drivers and pedestrians to exercise a great deal of caution when in a parking lot").

<sup>50</sup>See SHOUP, *supra* note 39, at 1 (noting that 99% of parking in United States is free). Admittedly, cities do not explicitly require that parking be free. But if a city requires the construction of large amounts of parking, the parking supply will increase, thus driving the market price down.

tion themselves or pass those costs on to society as a whole by charging higher prices to tenants (who, if they are businesses, may in turn pass this cost on to their customers).<sup>51</sup> The average parking space costs landowners about \$127 to \$200 per month.<sup>52</sup> Obviously, such a subsidy makes driving more attractive than other forms of transportation. Because minimum parking requirements subsidize driving and make walking more unpleasant and dangerous, smart growth advocates should support their abolition.

From a limited-government perspective, minimum parking requirements should also be repugnant. These regulations limit a landowner's rights by dictating the proper balance between parking lots and buildings— a balance that could easily be decided by landowners themselves. Thus, conservatives too should support the abolition of minimum parking requirements.<sup>53</sup>

### B. Fight Single-Use Zoning

American zoning codes generally mandate that land uses be separated from each other.<sup>54</sup> For example, zoning codes usually prohibit landowners from placing housing next to shops or offices.<sup>55</sup> This system of “single use zoning”<sup>56</sup> means that, at least where residential zones include a large amount

<sup>51</sup>See SHOUP, *supra* note 39, at 2.

<sup>52</sup>*Id.* at 185–92 (explaining logic behind estimates of parking space costs).

<sup>53</sup>It could be argued that minimum parking requirements are necessary to prevent a variety of harmful externalities, such as “cruising” (motorists driving slowly in search of parking places, thus creating congestion) and “spillover parking” (motorists parking in front of houses, thus preventing the residents of such houses from parking nearby). This argument is meritless for two reasons. First, because minimum parking requirements reduce density and make walking unattractive, they make driving more appealing, thus *increasing* pollution and congestion. Second, there are a variety of alternatives that could reduce cruising and spillover parking without increasing automobile dependence to the same extent as minimum parking requirements. See Lewyn, *supra* note 38, at 1120–23 (discussing alternatives in detail; for example, cities could require prevent spillover parking by requiring permits to park on residential streets).

<sup>54</sup>See Briffault, *supra* note 50, at 253 (arguing that American land-use law centers on “the separation of different land uses from each other”); Jerry Frug, *The Geography of Community*, 48 Stan. L. Rev. 1047, 1091 (1996) (noting that “virtually all” of current zoning laws “mandate the separation of different areas by function”).

<sup>55</sup>See, e.g., *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395–95, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816, 54 A.L.R. 1016 (1926) (upholding ordinance separating single-family houses from both

of territory, “[v]ery few people living in America today can simply walk to the local grocer . . . Even if you are going to purchase a single item and the store is very close by, it is normally a car trip away.”<sup>57</sup> For example, in Jacksonville, Florida, the city’s land use map creates a low-density housing zone that is six miles wide, ensuring that only people living near the edge of the zone will be able to walk to shops or jobs.<sup>58</sup> Thus, smart growth advocates should support mixed-use zoning- or at the very least, favor limiting housing-only zones to a few blocks so that people can have the opportunity to walk to shops and jobs.

In addition, single-use zoning limits property rights: single-use zoning means that a landowner who wishes to build apartments near a shopping center, or live above his or her own shop, is simply not allowed to do so. Because conservatives generally favor enhancing landowners’ property rights, they should generally oppose single-use zones.

The complete abolition of zoning, however, may be undesirable because of the risk that under a pure laissez-faire regime, polluting industries might interfere with neighboring landowners’ ability to enjoy their property.<sup>59</sup> For example, a large, smelly factory might actually reduce walkability by making it unpleasant for the factory’s neighbors to go

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apartments and commerce); Lewyn, *supra* note 28, at 271–72 (citing examples from Texas and Alabama).

<sup>56</sup>Terry J. Tondro, *Sprawl and Its Enemies: An Introductory Discussion of Two Cities’ Efforts to Control Sprawl*, 34 CONN. L. REV. 511, 514 (2001).

<sup>57</sup>*Id.* at 517.

<sup>58</sup>*See* JACKSONVILLE PLANNING AND DEVELOPMENT DEPARTMENT, 2030 COMPREHENSIVE PLAN, FUTURE LAND USE ELEMENT 154, at <http://www.coj.net/departments/planning-and-development/community-planning-division/comprehensive-plan.aspx> (“JACKSONVILLE LAND USE PLAN”) (go to “Land Use Element” link; future land use map shows low-density residential zone between San Jose Boulevard and Interstate Highway 95, ending at city’s southern limit, an area six miles wide according to Google Maps).

<sup>59</sup>Of course, nuisance suits could protect landowners from noxious industries. *See, e.g.*, *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 77 S.E.2d 682, 690 (1953) (recognizing oil refinery as nuisance). Nevertheless, nuisance law is less useful to landowners than zoning, because it is an after-the-fact remedy; a victimized homeowner must suffer from nearby pollutants until he has obtained damages or an injunction. *JESSE DUKEMINIER ET AL.*, PROPERTY 926 (7th ed. 2010). *But see* Daniel B. Rodriguez and David Schleicher, *The Location Market*, 19 GEO. MASON L. REV. 637, 658 (2012) (suggesting that noxious land uses often voluntarily self-segregate).

outside. This problem, however, could be easily solved if industrial uses (as opposed to less-polluting office or retail uses) were exempted from a general policy of mixed use.<sup>60</sup> Alternatively, municipalities could continue to use single-use zones, but make residence-only zones small enough so that residents would be within walking distance of other land uses.

### C. Change Street and Highway Design

American local governments often build wide, high-speed streets.<sup>61</sup> For example, in Jacksonville, Florida, the city's comprehensive plan requires major arterials (the largest streets other than limited-access highways) to be at least 150 feet wide,<sup>62</sup> which means that such streets may have as many as 10 lanes.<sup>63</sup> The city requires that minor arterials be 120 feet wide.<sup>64</sup>

<sup>60</sup>In addition, special zones might be appropriate for other unusually controversial land uses such as adult entertainment. *Cf.* *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54, 106 S. Ct. 925, 89 L. Ed. 2d 29, 12 Media L. Rep. (BNA) 1721 (1986) (upholding special zoning for such land uses).

<sup>61</sup>*See* Burrington, *supra* note 12, at 696 (noting that government seeks to speed traffic flow through “plans to build new streets and roads and to widen, straighten, and flatten existing ones”); LEIGH GALLAGHER, *THE END OF THE SUBURBS* 83 (2013) (“Streets tend to be wider in more modern suburbs . . . and a wider street typically encourages drivers to go faster.”).

<sup>62</sup>*See* CITY OF JACKSONVILLE 2030 COMPREHENSIVE PLAN, TRANSPORTATION ELEMENT 35, at <http://www.coj.net/departments/planning-and-development/community-planning-division/comprehensive-plan.aspx> (click on “Transportation Element” link) (hereinafter “JACKSONVILLE TRANSPORTATION PLAN”).

<sup>63</sup>The Comprehensive Plan provides that traffic lanes on arterial streets will be 16 feet wide on outside lanes and 12 feet wide for other lanes. *Id.* at 33. Thus, a 10-lane street might take up 128 feet of pavement (32 feet for two outside lanes and 96 feet for eight 12-foot interior lanes), allowing 22 feet of right-of-way for sidewalks and landscaping. *Cf.* Michael Southworth & Eran Ben-Joseph, *Street Standards and the Shaping of Suburbia*, 61 *J. Am. Plan. Ass'n*, Winter 1995, at 65, 73–76 (recalling that, in 1930s, Federal Housing Administration recommended that streets reserve 16 feet for plants and utilities, in addition to land for traffic lanes and sidewalks, and noting that many municipalities adopted these FHA standards).

<sup>64</sup>*See* JACKSONVILLE TRANSPORTATION PLAN, *supra* note 62, at 35. Although Jacksonville's supersized streets may be an extreme example, other cities have streets wide enough to be unpleasant for pedestrians. *See* Robert Cervero & Michael Duncan, *Walking, Bicycling, and Urban Landscapes: Evidence From the San Francisco Bay Area*, 93 *Am. J. Pub.*

Such wide streets make walking unpleasant and even dangerous, for a variety of reasons. First, a wide roadway takes longer to cross than a narrower street, and thus increases the amount of time a pedestrian is exposed to automotive traffic.<sup>65</sup>

Second, wide streets encourage fast driving.<sup>66</sup> In turn, speeding may increase the number of accidents, because a motorist driving 30 miles per hour has a field of vision spanning about 150 degrees,<sup>67</sup> while a motorist driving 60 miles per hour has a 50-degree field of vision.<sup>68</sup> Fast traffic also increases the risk of death from car crashes: the probability of a pedestrian being killed by an automobile traveling 15 miles an hour is only 3.5%,<sup>69</sup> but that probability increases to 83% if the vehicle is traveling 44 miles per hour.<sup>70</sup>

Third, wide streets reduce population density (and thus walkability) by taking land for roads that could otherwise be used to build housing.<sup>71</sup>

Fourth, where wide streets (including, but not limited to, limited-access highways) go from a city to a set of suburbs, they facilitate sprawl by facilitating commuting from those suburbs, thus causing people and jobs to move to suburbia.<sup>72</sup> If (as is often the case) the suburbs in question have minimal

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Health 1478, 1478 (2003) (“eight-lane thoroughfares” one of the “distinguishing traits of contemporary America [that discourages] . . . walking and bicycling”).

<sup>65</sup>See *Donavan v. Jones*, 658 So. 2d 755, 765 (La. Ct. App. 2d Cir. 1995), writ denied, 661 So. 2d 1379 (La. 1995) and writ denied, 661 So. 2d 1379 (La. 1995) (noting that, according to expert testimony, wider streets take more time to cross).

<sup>66</sup>See GALLAGHER, *supra* note 61, at 83.

<sup>67</sup>See Burrington, *supra* note 12, at 704 n. 50.

<sup>68</sup>*Id.*

<sup>69</sup>*Id.* at 704.

<sup>70</sup>*Id.*

<sup>71</sup>See Michele Derus, Zoning Can Curb Lower-Cost Housing, *Milwaukee-J. Sentinel*, Sept. 21, 1997, at D1 (each 10 feet used for streets reduces number of houses on street by three to 4%); *supra* notes 30-35 and accompanying text (explaining links between density, walkability, and public transit).

<sup>72</sup>See OLIVER GILLHAM, *THE LIMITLESS CITY* 36, 39–41 (2002) (noting that highways made it easier to commute from suburb to city, and describing migration of jobs to suburbs, as businesses followed employees and customers).

public transit,<sup>73</sup> the suburb's road-driven growth increases societal automobile dependence by reducing opportunities for nondrivers, who cannot reach the jobs that have moved to the suburb. Thus, smart growth advocates should favor narrower rather than wider streets and oppose highway expansions.

Conservatives should agree, because wider roads and new highways diminish property rights and increase government spending. To build and widen roads, government must often take land from private ownership through eminent domain.<sup>74</sup> Obviously, a government that takes 100 feet of land for a road reduces private land ownership to a greater extent than if that government had taken only 40 feet of land.

Furthermore, new and widened roads can significantly burden taxpayers. For example, the Intercounty Connector, a highway recently built through the suburbs of Washington, D.C., cost \$2.56 billion<sup>75</sup>—more than the yearly budget of Washington's entire public transit system.<sup>76</sup> Thus, supporters of limited government should be concerned about the growth of government-owned roads.<sup>77</sup>

Issues relating to street design are not amenable to bright-line solutions, given the difficulty of privatizing thousands of miles of government-owned streets and roads. However, both conservatives and smart growth advocates may wish to apply street guidelines used in new urbanist communities. These communities are typically designed to be pedestrian-

<sup>73</sup>See Tomer, *supra* note 9, at 7 (discussing lack of public transit in many metropolitan areas' suburbs).

<sup>74</sup>See *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 706, 43 S. Ct. 689, 67 L. Ed. 1186 (1923) (emphasizing that government has right to use eminent domain to condemn land for roads).

<sup>75</sup>See Katherine Shaver, ICC puts strain on Maryland's transportation funds, at [http://articles.washingtonpost.com/2011-11-21/local/35281465\\_1\\_toll-road-intercounty-connector-icc](http://articles.washingtonpost.com/2011-11-21/local/35281465_1_toll-road-intercounty-connector-icc).

<sup>76</sup>See Dana Hedgepeth, Riders try to redirect Metro in quest for funding, *Washington Post*, Feb. 28, 2012, at B3 (Metro system budget is \$1.6 million).

<sup>77</sup>On the other hand, smart growth advocates and conservatives may have to agree to disagree on issues related to public transit funding. Smart growth advocates generally favor large-scale transit projects in order to make society less automobile-dependent; by contrast, conservatives are likely to favor less government spending generally, and thus to favor less government support of public transit.

friendly, and as a result have relatively narrow streets.<sup>78</sup> For example, one New Urbanist model zoning code, the SmartCode,<sup>79</sup> lists a variety of street designs but proposes no street more than 80 feet wide, and no street with more than four driving lanes.<sup>80</sup> Both conservatives and smart growth advocates should urge states and cities to carefully consider the SmartCode's guidelines.

### III. Conclusion

Because conservatives tend to oppose government-imposed limits on suburban development, one might think that conservatives should be implacable foes of any attempts to make society less automobile-dependent. But in fact, conservatives and smart growth advocates should be able to find common ground on a wide variety of issues. Both groups have good reasons to support density and parking deregulation, mixed-use zoning, and narrower, less expensive streets.

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<sup>78</sup>See GALLAGHER, *supra* note 61, at 113–23 (describing new urbanism generally).

<sup>79</sup>See THE TOWN PAPER, SMARTCODE 9.2 at <http://www.transect.org/codes.html>.

<sup>80</sup>*Id.* at SC30. However, the SmartCode does allow six-lane streets with two lanes set aside for on-street parking. *Id.*