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Winter 2015

The (Somewhat) False Hope of Comprehensive Planning

Michael Lewyn, *Touro Law Center*



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Citation: 37 U. Haw. L. Rev. 39 2015



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The (Somewhat) False Hope of Comprehensive Planning^{*}

Michael Lewyn^{**}

I. INTRODUCTION

Some commentators describe municipal comprehensive land use plans as a potential remedy for suburban sprawl¹ (by which I mean automobile-oriented development, often in suburban areas far beyond a region's traditional urban core).² But in fact, states that require municipalities' zoning to be consistent with their comprehensive plans can be just as automobile-oriented as more permissive states. For example, Florida has required municipalities to comply with their own comprehensive plans since 1985,³ yet public transit ridership in every single Florida metropolitan area is lower than the U.S. average.⁴ Florida's metropolitan areas are also among the most dangerous for pedestrians.⁵ By contrast, there are five

^{*} I published a shorter article on this topic, entitled *Plans Are Not Enough*, which can be found at 42 REAL EST. L.J. 240 (2013). In that article, I focused on the issues addressed in Part III of this Article (that is, pro-sprawl comprehensive plans). In addition to addressing those issues in more depth, this Article adds a significant amount of background (Part II), discusses how the goals of the smart growth movement can be met without comprehensive plans (Part IV) and discusses why comprehensive plans are useful regardless of their impact on smart growth (Part V).

^{**} Associate Professor, Touro Law Center. Wesleyan University, B.A.; University of Pennsylvania, J.D.; University of Toronto, L.L.M. I would like to thank Katrina Kuh and David Schleicher for their helpful comments. In addition, I would like to thank all the people who attended presentations about this article, including the faculty of New York Law School and visitors to numerous conferences.

¹ Eric Links, *Property-hole-in-one for Land-Use Control: Endorsing the Dominance of Comprehensive Plans*, 33 WM. MITCHELL L. REV. 627, 634 (2007) (citation omitted) ("Comprehensive planning is a comprehensive response to the systemic problems of sprawl."); Thomas Pelham, *Transportation Concurrency, Mobility Fees, and Urban Sprawl in Florida*, 42/43 URB. LAW. 105, 105 (2010/2011); *infra* pages 17-19.

² See Michael Lewyn, *Sprawl in Canada and the United States*, 44 URB. LAW. 85, 86 (2012) (citing numerous definitions incorporating these elements).

³ Pelham, *supra* note 1, at 105.

⁴ See Brian McKenzie & Melanie Rapino, *Commuting in the United States: 2009*, U.S. CENSUS BUREAU 5-6, 9 (Sept. 2011), <http://census.gov/prod/2011pubs/acs-15.pdf> (indicating that five percent of Americans commute via public transit and displaying a map showing that no Florida region has such high ridership).

⁵ See Richard S. Geller, *The Legality of Form-Based Zoning Codes*, 26 J. LAND USE & ENVTL. L. 35, 64-65 (2010) (most dangerous metropolitan areas for pedestrians are in Florida); see also Robert D. Bullard, Glenn S. Johnson & Angel O. Torres, *The Costs and*

metropolitan areas where over ten percent of workers use public transit⁶—and only one of those regions (San Francisco) is in a state that requires cities to both create comprehensive plans and to comply with those plans.⁷ Thus, it appears that the mere existence of a binding municipal comprehensive plan does not necessarily lead to less automobile-dependent, sprawling development.

This Article accordingly suggests that a municipal comprehensive plan (by which I mean a document issued by a municipality in order to guide its zoning code, as opposed to a statewide or regional plan),⁸ is neither sufficient nor necessary for “smart” growth (by which I mean land development that is oriented towards bicyclists, pedestrians, and transit users, rather than favoring cars alone).⁹

Part II of the Article briefly outlines the growing prominence of both comprehensive planning and smart growth. Part III explains that comprehensive plans are not sufficient to reduce sprawl, and in fact may accelerate sprawl. Part IV of the Article shows that comprehensive plans

Consequences of Suburban Sprawl: The Case of Metro Atlanta, 17 GA. ST. U. L. REV. 935, 996 (2001) (stating that in the 1990s, metropolitan areas with the highest rates of pedestrian fatalities were Miami and Fort Lauderdale, both in Florida).

⁶ See Brian S. McKenzie, *Public Transportation Usage Among U.S. Workers: 2008 and 2009*, U.S. CENSUS BUREAU 5-6 (Oct. 2010), <http://www.census.gov/prod/2010pubs/acsbr09-5.pdf> (listing New York, New York, Boston, Massachusetts, San Francisco, California, Chicago, Illinois and Washington, D.C. as most transit-friendly regions).

⁷ See Jerrold A. Long, *Overcoming Neoliberal Hegemony in Community Development: Law, Planning, and Selected Lamarckism*, 44 URB. LAW. 345, 361 n.61 (2012) [hereinafter Long, *Overcoming Neoliberal Hegemony in Community Development*] (the four states requiring strict compliance are California, Florida, Delaware and Oregon). In addition, the law of Washington and Wisconsin is unclear as to whether municipalities must strictly comply with comprehensive plans. See Jerrold A. Long, *Realizing the Abstraction: Using Today's Law to Reach Tomorrow's Sustainability*, 46 IDAHO L. REV. 341, 363-64 nn.99-100 (2010) [hereinafter Long, *Realizing the Abstraction*] (discussing Washington and Wisconsin law).

⁸ See MARYA MORRIS, SMART CODES: MODEL LAND USE DEVELOPMENT REGULATIONS 6 (2009) (discussing how the local comprehensive plan is “a policy document in text and map form” which should be the “primary guide for whether property ought to be rezoned”).

⁹ See Whitney G. Stohr, *The Local Identity of Smart Growth: How Species Preservation Efforts Promote Culturally Relevant Comprehensive Planning*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10024, 10027 (2013) (describing smart growth as “the antithesis of sprawl” and listing a variety of smart growth principles, including “increased transportation choices”). Admittedly, many lists of smart growth principles include concepts unrelated to walkability, such as “a variety of housing options,” “protected open space,” and “predictable” public decision-making. *Id.* However, the latter goals could be met in sprawl-dominated communities as well, and thus appear to me to be largely irrelevant to the differences between sprawl and smart growth.

are not necessary to reduce sprawl because the goals of the smart growth movement may also be furthered through statewide legislation and municipal zoning. Part V adds that comprehensive plans, although neither necessary nor sufficient for “smarter” growth, may nevertheless be desirable for a variety of reasons unrelated to smart growth.

II. BACKGROUND

The relationship of comprehensive planning and smart growth involves the intersection of two movements: the growth of state-mandated comprehensive planning in the 1960s and 1970s and the smart growth movement of more recent decades.

A. *The Fall and Rise of Comprehensive Planning*

If one defines comprehensive planning broadly as any sort of legislation designed to regulate a city’s physical form, then such planning is older than the United States. For example, in 1681 William Penn created a street plan for the new city of Philadelphia, setting aside open spaces in the central city.¹⁰

But the distinction between planning and zoning is far newer. In 1909, Los Angeles enacted the first zoning ordinance in the United States.¹¹ In 1916, New York followed suit.¹² At first, the legality of zoning was unclear because state law did not yet explicitly authorize such regulation.¹³ To solve this problem, in 1926, the U.S. Department of Commerce drafted the Standard Zoning and Enabling Act (SZEa), a model state law which gave cities the right to enact zoning laws.¹⁴ SZEa states that zoning “shall be in accord with a comprehensive plan.”¹⁵ Two years later, the Commerce Department drafted another model statute, the Standard City Planning Enabling Act (SCPEA).¹⁶ SCPEA provided that city-appointed planning

¹⁰ See generally JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 16 (3d ed. 2013) (providing a more detailed account of William Penn’s work in Philadelphia).

¹¹ Nicolas M. Kublicki, *Land Use By, For, and Of the People: Problems with the Application of Initiatives and Referenda to the Zoning Process*, 19 PEPP. L. REV. 99, 107 (1991).

¹² *Id.* at 108.

¹³ *Id.*

¹⁴ *Id.* at 108-10; see also U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926), available at <http://www.planning.org/growing smart/pdf/SZEnablingAct1926.pdf> (displaying a copy of the Act).

¹⁵ *Id.* at 6.

¹⁶ See Charles M. Haar & Michael Allan Wolf, *Planning and Law: Shaping the Legal*

commissions should draft comprehensive plans governing zoning, streets, and other public works.¹⁷ The first statute was far more popular; by 1930, thirty-five states had adopted statutes based upon SZEAs, and only ten states had adopted laws based upon SCPEAs.¹⁸ Today, zoning and enabling statutes based on the SZEAs are virtually universal, to a much greater extent than statutes based upon the SCPEAs.¹⁹

These statutes had limited influence upon planning.²⁰ The SZEAs, unlike the SCPEAs, required local governments to zone “in accordance with a comprehensive plan”²¹ but failed to define the term “comprehensive plan” or to state what it meant for municipalities to zone in accordance with one.²² As a result, most courts did not require cities to create formal comprehensive plans but instead held that any local decision that conformed to the city’s basic land use policies was “in accordance with a comprehensive plan”²³ because a city could implicitly create a “plan” through its zoning code.²⁴ Although many American cities have in fact adopted comprehensive plans,²⁵ courts generally treat these plans as at most advisory documents.²⁶

Environment of Land Development and Preservation, 40 ENVTL. L. REP. NEWS & ANALYSIS 10419, 10420 (2010); see also U.S. DEPARTMENT OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928), available at <http://www.planning.org/growingsmart/pdf/CPEnabling%20Act1928.pdf> (displaying a copy of the Act).

¹⁷ See Haar & Wolf, *supra* note 16, at 10420-21; see also Stuart Meck, *The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL’Y 295, 297-98 (2000) (describing the Act in more detail).

¹⁸ Patricia Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 J. MARSHALL L. REV. 253, 267 (2012).

¹⁹ See Gary D. Taylor & Mark A. Wyckoff, *Intergovernmental Zoning Conflicts over Public Facilities Siting: A Model Framework for Standard State Acts*, 41 URB. LAW. 653, 683 (“The SZEAs were either adopted as published, or with minor variations, in all fifty states, while the format and contents of the SCPEAs were followed by many, but not all states.”).

²⁰ See Lesley R. Attkisson, *Putting a Stop to Sprawl: State Intervention as a Tool for Growth Management*, 62 VAND. L. REV. 979, 991 (2009) (“[T]he Standard Planning Act makes planning optional rather than mandatory for local governments.”).

²¹ See U.S. DEP’T OF COMMERCE, *supra* note 14.

²² See Attkisson, *supra* note 20, at 990.

²³ *Id.*

²⁴ Meck, *supra* note 17, at 305.

²⁵ See JUERGENSEMEYER & ROBERTS, *supra* note 10, at 25 (noting that plans became more common after mid-twentieth century federal legislation required municipalities to draft such plans in order to obtain federal funds for slum clearance).

²⁶ *Id.* at 31. Within this group, there is a split between states that treat the plan as legally insignificant and those that give the plan persuasive weight in judicial review of municipal zoning decisions. See Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 42 URB. LAW. 665, 666-69 (2010) (discussing cases on both sides of issue); Long,

But in the 1970s, some states began to exert more control over local land use.²⁷ As part of this “Quiet Revolution,”²⁸ several states required municipalities to adopt and comply with comprehensive plans.²⁹ California required zoning ordinances to be consistent with comprehensive plans in 1971.³⁰ Oregon required adoption of comprehensive plans in 1969,³¹ and in the mid-1970s its state Supreme Court interpreted the state’s preexisting legislation to require municipalities to comply with those plans.³² During this period, the state also increased state oversight of local development by requiring municipalities to incorporate state policies into their zoning regulations.³³ Similarly, Florida’s comprehensive planning rules were part of a broader set of state laws; that state required local governments to adopt, and to act consistently with, their comprehensive plans in 1975,³⁴ three years after the state created a state planning agency.³⁵ But the trend towards state-mandated planning has slowed; since 1975, only one state (Delaware) has enacted such a requirement.³⁶

B. The Rise of Sprawl (and of Smart Growth)

After World War II, highways facilitated suburb-to-city commutes, and federally insured home loans helped suburban commuters afford new

Overcoming Neoliberal Hegemony in Community Development, *supra* note 7, at 363 n.75 (footnote omitted) (as of 2003, eighteen states viewed plans as insignificant, while twenty-six gave them some weight).

²⁷ See Salkin, *supra* note 18, at 253-55 (discussing the interplay between state and federal land use control in the 1970s).

²⁸ See Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 J. MARSHALL L. REV. 357, 357 (2012) (using the term, and describing Oregon’s reforms as part of the “Quiet Revolution”).

²⁹ See Stephen D. Villavaso & Johanna Lundgren, *Model Comprehensive Planning Legislation for Louisiana*, 49 LOY. L. REV. 917, 925 (2003).

³⁰ See Daniel J. Curtin, Jr., *Ramapo’s Impact on the Comprehensive Plan*, 35 URB. LAW. 135, 140 (2003).

³¹ See Sullivan, *supra* note 28, at 364.

³² *Id.* at 369. Courts required county compliance in 1973 decision, and city compliance two years later. *Id.*

³³ *Id.* at 369-70.

³⁴ See Nancy Stroud, *A History and New Turns in Florida’s Growth Management Reform*, 45 J. MARSHALL L. REV. 397, 397 (2012) (describing Florida policies as part of “Quiet Revolution”); see also *id.* at 400 (describing Florida policies).

³⁵ *Id.*

³⁶ See Gabor Zovanyi, *The Role of Initial Statewide Smart-Growth Legislation in Advancing the Tenets of Smart Growth*, 39 URB. LAW. 371, 405 (2007). Delaware’s mandatory planning requirement extended to all municipalities in 1996, and in 2001, municipalities were required to rezone all land in accordance with plans. *Id.*

homes.³⁷ Federal housing legislation placed most public housing in central cities, thus packing the poor into cities while causing the middle class to steer clear of neighborhoods dominated by concentrated poverty.³⁸ As a result of these policies (among others),³⁹ America's metropolitan population shifted en masse from city to suburb: in 2000, sixty-two percent of the metropolitan population lived in suburbs, up from forty-one percent in 1950.⁴⁰ These statistics actually understate the growth of suburbia, as many cities gained population only by annexing suburban territory.⁴¹ Often, the middle and upper classes fled to suburbia, while cities became dominated by the poor.⁴² More recently, the sprawl revolution has eaten its own children, as population has moved from inner suburbs to outer suburbs.⁴³

1. Car-dependent suburbs

The suburbs created by this movement of population are generally not walkable, transit-accessible "streetcar suburbs."⁴⁴ Instead, they are automobile-dependent,⁴⁵ in part because of zoning. For example, zoning regulations separate land uses, meaning that, at a minimum, housing cannot be immediately adjacent to employment, schools or shopping.⁴⁶ Zoning laws also limit residential and commercial density in numerous ways, including regulations requiring every house or apartment building to consume a minimum amount of land,⁴⁷ minimum parking requirements

³⁷ See JUERGENSMEYER & ROBERTS, *supra* note 10, at 296; see also Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 305-08 (2000) (discussing federal housing policy in greater detail).

³⁸ *Id.* at 308-10.

³⁹ *Id.* at 304-28 (discussing other factors making cities less attractive to middle class).

⁴⁰ See OLIVER GILLHAM, *THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE* 18 (2002).

⁴¹ See David Rusk, *Changing the "Rules of the Game": Tools to Revive Michigan's Fractured Metropolitan Regions*, 13 J. L. SOC'Y 197, 219-27 (2011). "Elastic" cities that were able to annex suburban territory generally grew in late 20th century, while "inelastic" cities confined within their pre-1950 boundaries usually lost population. *Id.*

⁴² *Id.* at 228-29 (discussing growing city and suburb economic gap).

⁴³ See Lewyn, *supra* note 37, at 362-64 (citing examples).

⁴⁴ See Rusk, *supra* note 41, at 220 (using term to describe suburbs served by "streetcar lines within easy walking distance").

⁴⁵ See MORRIS, *supra* note 8, at 125-26 (finding that American development is often times "not conducive to walking or bicycling" and indeed "hostile toward anything but the automobile").

⁴⁶ *Id.* at 126 ("[S]harp separation of land uses" meant that "housing, employment, schools and shopping are at great distances from one another.").

⁴⁷ See EDWARD H. ZIEGLER, JR. ET AL., 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING, § 51.10 (4th ed. 2011) (describing the various applications of lot size

requiring buildings to set aside land for off-street parking,⁴⁸ and a variety of other techniques.⁴⁹ Such anti-density regulation reduces the number of people who can live within walking distance of any given destination, thus reducing walkability still further.⁵⁰

2. *The response to sprawl, part 1: growth management*

The backlash against suburban sprawl began with “growth management” laws designed to protect rural areas and newer suburbs from being overwhelmed by development.⁵¹ For example, one 1969 case upheld a New York suburb’s zoning law discouraging development in areas without adequate roads, sewers and other public facilities.⁵² Similarly, Oregon’s statewide growth management legislation was designed primarily to prevent farmland from being turned into suburbia.⁵³ But these laws did not directly attack the automobile-dependent nature of sprawl.

3. *The response to sprawl, part 2: smart growth*

In the 1990s, the “smart growth”⁵⁴ movement arose, and mounted a broader attack upon sprawl. Smart growth advocates point out that because driving is virtually mandatory in many suburbs, urban sprawl causes

requirements).

⁴⁸ See DONALD C. SHOUP, *THE HIGH COST OF FREE PARKING* 22, 25 (2005) (such requirements virtually universal in United States).

⁴⁹ Other such regulations include height restrictions and “bulk” limitations prohibiting landowners from building on all of their land. See ZIEGLER ET. AL., *supra* note 47, at § 54.3 (describing these limits in more detail).

⁵⁰ See *infra* notes 96, 98-99 and accompanying text (explaining negative side effects of overly low density); see also PAMELA BLAIS, *PERVERSE CITIES: HIDDEN SUBSIDIES, WONKY POLICY, AND URBAN SPRAWL* 60-61 (2011).

⁵¹ See Daniel R. Mandelker, *Managing Space to Manage Growth*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 801, 803-04 (1999) (emphasizing that the purpose of growth management is to “time development so that local governments can budget and plan for needed services and facilities,” and observing that, in the absence of growth management, growing areas may be too overwhelmed by population growth to “provide facilities and services when new development needs them”).

⁵² *Golden v. Planning Bd.*, 285 N.E.2d 291, 302-03 (N.Y. 1972).

⁵³ Sullivan, *supra* note 28, at 367-68; see also JUERGENSMEYER & ROBERTS, *supra* note 10, § 9.2 (describing other growth management strategies).

⁵⁴ JUERGENSMEYER & ROBERTS, *supra* note 10, at 298 (explaining that Maryland’s 1997 smart growth initiatives popularized the term). I ran a search for articles in Westlaw Classic’s JLR (Journals and Law Reviews) database (which includes law reviews and similar journals) referring to “smart growth” and found not a single article before 1995. By contrast, I found 42 such articles between 1995 and 1999, and over 1400 articles after 2000.

societal vehicle mileage to increase,⁵⁵ thus leading to increased traffic congestion,⁵⁶ air pollution and greenhouse gas emissions.⁵⁷ By contrast, more compact development would reduce driving and thus reduce pollution.

For example, a recent study sponsored by the U.S. Department of Energy⁵⁸ suggests that compact, transit-oriented development reduces greenhouse gas emissions by reducing driving. In particular, the study found that doubled residential density, combined with transit-supportive land use policies and improved public transit would reduce household driving by as much as twenty-five percent.⁵⁹ In turn, such a reduction in driving would reduce U.S. greenhouse gas emissions by as much as eleven percent by 2050.⁶⁰ Similarly, Harvard economist Edward Glaeser and UCLA economist Matthew Kahn conducted a study finding that low-density, automobile-oriented regions emitted more greenhouse gases from transportation than more pedestrian- and transit-oriented regions.⁶¹ For example, New York City, the region with the highest use of public transit,⁶² emitted only 19,524 pounds of carbon dioxide (a major greenhouse gas,⁶³ also known as “CO₂”) per household from automobiles and transit users combined,⁶⁴ the lowest amount among ten metropolitan areas studied.⁶⁵ By contrast, several lower-density regions emitted over 25,000 pounds of transportation-related CO₂ per household.⁶⁶ Moreover, suburbs, which tend to be less compact and more automobile-oriented, have significantly higher

⁵⁵ See GILLHAM, *supra* note 40, at 75 (“Between 1980 and 1997, total annual vehicle miles traveled (VMT) in the [United States] increased by 68 percent.”).

⁵⁶ *Id.* (“Between 1982 and 1996, the average annual delay experienced by individual drivers increased by 150 percent.”).

⁵⁷ *Id.* at 76.

⁵⁸ See NATIONAL RESEARCH COUNCIL, TRANSPORTATION RESEARCH BOARD, DRIVING AND THE BUILT ENVIRONMENT ii-iii (2009), available at http://www.nap.edu/catalog.php?record_id=12747#toc (describing authors and sponsorship).

⁵⁹ *Id.* at 4; see also *id.* at 31-66 (describing further the relationship between density and vehicle miles traveled).

⁶⁰ *Id.* at 7.

⁶¹ See Edward L. Glaeser & Matthew Kahn, *The Greenness of Cities*, HARVARD UNIVERSITY, JOHN F. KENNEDY SCHOOL OF GOVERNMENT 1 (Mar. 2008), available at http://www.sallan.org/pdf-docs/greencities_final.pdf (“[L]ow-density development . . . is associated with far more carbon dioxide emissions than higher density construction.”).

⁶² *Id.*

⁶³ See *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007) (describing carbon dioxide as a major greenhouse gas).

⁶⁴ See Glaeser & Kahn, *supra* note 61, at 5.

⁶⁵ *Id.* at 8.

⁶⁶ *Id.* at 5.

per-household CO₂ emissions from transportation.⁶⁷ For example, New York's suburban households emitted over 3800 more pounds of transportation-related CO₂ per household than did city residents.⁶⁸

Smart growth advocates point out that sprawl has less technical side effects as well. In some regions, the majority of suburban jobs are not accessible by public transit at all.⁶⁹ Even where suburbs are transit-accessible, they are not within reasonable commuting distance of most transit users: for example, in New York City's suburbs, only fourteen percent of workers can reach the typical job by transit without commuting over ninety minutes.⁷⁰ Where people need a car to reach most jobs or other destinations, people too young, old, poor, or disabled to drive are effectively shut out of civic life.⁷¹

Residents of places where walking is unpleasant or dangerous are likely to get less exercise (and thus be in worse health, other factors being equal) than might otherwise be the case.⁷² A recent study of transit users in Charlotte, North Carolina suggests that less car-dependent environments can create health benefits. The study's authors surveyed residents of neighborhoods near the city's new light rail line before and after the completion of the line. Use of light rail was associated with an eighty-one percent reduction in the likelihood of obesity.⁷³

⁶⁷ *Id.* at 8.

⁶⁸ *Id.* (subtracting suburbanites' 6172 pounds of automobile-related emissions per household from the 2367 pounds of public transit-related emissions per household of city residents). New York suburbanites emitted more home heating emissions than city residents as well; however, this was not the case in all metropolitan areas studied. *Id.*

⁶⁹ See Adie Tomer, *Where the Jobs Are: Employer Access to Labor by Transit*, BROOKINGS 7 (July 11, 2012), <http://www.brookings.edu/~media/research/files/papers/2012/7/transit%20labor%20tomer/11%20transit%20labor%20tomer%20full%20paper.pdf> (displaying a chart showing data for numerous metropolitan areas; for example, in Baton Rouge area, only fifteen percent of suburban jobs are accessible by transit at all).

⁷⁰ *Id.*

⁷¹ See Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 258 n.11 (2006) (describing non-environmentalist critiques of sprawl in more detail); Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 FORDHAM URB. L.J. 1183, 1201 (2004) ("Many jobs have shifted to the suburbs . . . where public transportation is inadequate or nonexistent.").

⁷² Katherine Silbaugh, *Sprawl, Family Rhythms and the Four-Day Work Week*, 42 CONN. L. REV. 1267, 1273 (2010) (citing an American Journal of Health Promotion study examining the relationship between obesity and sprawl).

⁷³ John M. McDonald et al., *The Effect of Light Rail on Body Mass Index and Physical Activity*, AM. J. PREVENTATIVE MED., available at <http://www.ncbi.nlm.nih.gov/pubmed/20621257>; see also Vanessa Russell-Evans & Carl S. Hacker, *Expanding Waistlines and Expanding Cities: Urban Sprawl and its Impact on Obesity, How the Adoption of Smart Growth Statutes Can Build Healthier And More Active Communities*, 29 VA. ENVTL. L.J. 63, 86-87 (2011) (citing numerous other studies).

Principles commonly associated with smart growth include not only growth management policies such as limiting development of agricultural land,⁷⁴ but also improving non-automotive transportation options such as bicycling, mass transit, and walking, as well as land use policies related to the latter goal such as mixing land uses and more dense development.⁷⁵ One treatise summarizes smart growth as follows: “everything that sprawl is not.”⁷⁶

C. Comprehensive Planning and Smart Growth: Two Trends Intermingled

American lawyers, planners, and academics generally tend to consider municipal comprehensive planning to be valuable both in its own right and as a vehicle for achieving smart growth.⁷⁷ Land use professionals value planning because a comprehensive plan explains the policies behind zoning decisions (in states that require zoning to be consistent with the plan) and limits a municipality’s power to make arbitrary zoning decisions.⁷⁸

Some commentators go even further, suggesting that a comprehensive plan is a necessity for smarter growth. The American Planning Association, a nationwide organization of land use planners,⁷⁹ has published a book stating that smart growth by definition means “[u]sing comprehensive planning to [build communities embodying smart growth principles].”⁸⁰ And, after proposing numerous smart growth-oriented

⁷⁴ See JUERGENSMEYER & ROBERTS, *supra* note 10, at 298.

⁷⁵ *Id.* The other smart growth principles listed by Juergensmeyer and Roberts include urban revitalization, reducing taxes, costs of infrastructure, and traffic congestion. *Id.* These goals, however, are so widely shared that they are not distinctive to the smart growth movement.

⁷⁶ *Id.*

⁷⁷ See Daniel R. Mandelker, *Planning and the Law*, 20 VT. L. REV. 657, 657 (1996) (“Most land use professionals support statutes and court decisions that mandate [comprehensive] planning and require zoning to be consistent with a plan.”); see also KRISTOF BEN ASSCHE ET AL., *A Perspective on Planning, Smart Growth, and Place Branding*, in INTERNATIONAL PLACE BRANDING YEARBOOK: MANAGING SMART GROWTH AND SUSTAINABILITY 69, 70 2012 (Frank M. Go & Robert Govers eds., 2013) (“[A]cademia in the US . . . championed the smart growth concept as a repackaging of what is basically comprehensive planning” while “[g]overnments in major cities either believed in the intrinsic value of comprehensive planning or were interested in the . . . promises of smart growth.”).

⁷⁸ See *infra* Part V.

⁷⁹ See Jean L. Coleman & Suzanne Sutro Rhees, *Where Land And Water Meet: Opportunities for Integrating Minnesota Water and Land Use Statutes For Water Sustainability*, 39 WM. MITCHELL L. REV. 920, 950 (2013) (describing the APA as “the national membership organization for planning professionals”).

⁸⁰ See MORRIS, *supra* note 8, at 28.

revisions of zoning codes, the same book also notes: “if the community does not have a current comprehensive or master plan, it cannot achieve smart growth.”⁸¹ Similarly, one land use treatise states that without comprehensive plans, the smart growth movement could not exist.⁸² Law review articles have also equated comprehensive planning and smart growth.⁸³

Even critics of smart growth sometimes treat smart growth and comprehensive planning as almost synonymous. For example, one law review article states that “[s]mart growth programs affect state and local communities under state land use planning statutes that mandate local comprehensive planning for counties and municipalities”⁸⁴ and then went on to question the constitutionality of such programs.⁸⁵

III. PLANNING IS NOT SUFFICIENT

Approximately thirty-two states require a comprehensive plan of some sort,⁸⁶ and the majority of municipalities have comprehensive plans⁸⁷—

⁸¹ *Id.* at 25.

⁸² See JUERGENSMEYER & ROBERTS, *supra* note 10, at 37-38 (“Without comprehensive and legally enforceable plans . . . neither movement [referring to the smart growth and new urbanist movements] could exist.”). The new urbanist movement is closely allied with the smart growth movement, but is more focused on the details of street and building design. *Id.* at 300 (stating that new urbanism is more focused on “architectural designs”).

⁸³ See, e.g., Katherine A. Woodward, *Form Over Use: Form-Based Codes and the Challenge of Existing Development*, 88 NOTRE DAME L. REV. 2627, 2638 (2013) (defining smart growth as “[u]sing comprehensive planning [to revitalize a community]”); Ellen Margrethe Basse, *Urbanization and Growth Management in Europe*, 42/43 URB. LAW. 385, 394 (2010/2011) (same).

⁸⁴ James E. Holloway and Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life under the Takings and Other Provisions*, 9 DICK. J. ENVTL. L. & POL’Y 421, 464 (2001).

⁸⁵ *Id.* at 465-67 (focusing on policies that might increase land use regulation and suggesting that harm to property owners might raise constitutional questions of various types).

⁸⁶ See Long, *Overcoming Neoliberal Hegemony in Community Development*, *supra* note 7, at 364-65 (stating that “[a]s many as eighteen states” do not require a comprehensive plan, indicating that at most thirty-two require such a plan).

⁸⁷ See Mary W. Blackford, *Putting the Public’s Trust Back in Zoning: How the Implementation of the Public Trust Doctrine will Benefit Land Use Regulation*, 43 HOUS. L. REV. 1211, 1232 (2006) (stating that most municipalities have comprehensive plans); Donna Jalbert Patalano, *Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines*, 28 B.C. ENVTL. AFF. L. REV. 683, 698 (2001) (“Most municipalities use a comprehensive plan as a ‘preliminary, sketchy, first-draft’ version of their zoning ordinance.”).

plans that, in several states, actually regulate the content of zoning codes.⁸⁸ But the existence of a comprehensive plan is not sufficient to reduce sprawl for two reasons. First, some plan provisions actually promote sprawl. Second, even a seemingly anti-sprawl plan may have language too equivocal to effectively promote smart growth.

A. The Wrong Kinds of Plans

Comprehensive plans sometimes have language that promotes sprawl by requiring single-use, low-density development or streets that are too wide to be safe and comfortable for pedestrians.

1. Single-use low-density sprawl

A comprehensive plan, like a zoning code, may encourage low-density, single-use development—either directly by mandating such development, or indirectly through parking and setback regulation.⁸⁹ Such restrictions reduce the number of residences that can be within walking distance of jobs, shops, or public transit, thus making cities less walkable.

a. Directly restricting density

For example, Jacksonville, Florida (“Jacksonville”) is the dominant city in one of the most automobile-dependent regions in the United States.⁹⁰ That city’s comprehensive plan devotes most of the city’s residential acreage to low-density residential use.⁹¹ In particular, the plan’s future land use map allocates 138,949 acres to low-density residential use, as opposed to 23,187 to medium-density housing and only 74 to high-density housing.⁹²

Even within the city’s “urban priority areas,” the maximum density in low-density zones is generally seven units per acre.⁹³ The plan adds that

⁸⁸ See *supra* notes 29-36 and accompanying text.

⁸⁹ See Lewyn, *supra* note 2, at 114-17 (citing numerous examples of anti-density zoning).

⁹⁰ See McKenzie, *supra* note 6, at 5-6 (among the fifty largest U.S. metropolitan areas, only four have a lower percentage of transit ridership than Jacksonville.)

⁹¹ See JACKSONVILLE PLANNING AND DEV. DEP’T, 2030 COMPREHENSIVE PLAN, FUTURE LAND USE ELEMENT 155, available at <http://www.coj.net/departments/planning-and-development/community-planning-division/comprehensive-plan.aspx> [hereinafter JACKSONVILLE LAND USE PLAN] (displaying an aerial view of Jacksonville with 2030 land use zoning).

⁹² *Id.* at 149.

⁹³ *Id.* at 70-71 (describing “urban” part of city and stating general rules); see also *id.* at

because zoning regulations will allow numerous types of zoning districts within the city's low-density areas, "the average residential density in each category will be much lower than the maximum allowable density."⁹⁴ So under Jacksonville's current plan, many of the city's low-density residential zones will have fewer than seven units per acre.

Such low densities virtually guarantee automobile-dependent cities. As a general rule, a neighborhood must have at least seven to fifteen dwelling units per acre to support significant public transit ridership, because only such compact neighborhoods have a critical mass of people living within walking distance of a bus or train stop.⁹⁵ 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.⁹⁶ Low density also reduces walkability even in the absence of transit service; in a less compact environment, fewer people can walk to shops and jobs because fewer people live within walking distance of shops and jobs.⁹⁷ For the same reason, low density reduces bicycling; because bicycles are slower than automobiles, fewer people will bicycle to a destination five miles away than to a destination five blocks away.⁹⁸

Some comprehensive plans are even more aggressively anti-density than Jacksonville's plan. For example, the comprehensive plan of Alpharetta, Georgia ("Alpharetta") (an affluent outer suburb of Atlanta, Georgia)⁹⁹

73 (noting an exception to the seven-unit-per-acre rule).

⁹⁴ *Id.* at 69.

⁹⁵ 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) (explaining that seven units per acre supports bus service once every half-hour).

⁹⁶ BLAIS, *supra* note 50, at 60-61.

⁹⁷ In addition, low density may cause social harms not directly related to walkability. See David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1673 (2013) (explaining that economics scholarship shows that "density provides individuals with reduced shipping costs, the benefits of market depth, and information spillovers"). On the other hand, it could be argued that these benefits of density are outweighed by the harm caused by density-related congestion. See Lewyn, *supra* note 2, at 111-12.

⁹⁸ See John R. Nolon, *Land Use For Energy Conservation and Sustainable Development: A New Path Toward Climate Change Mitigation*, 27 J. LAND USE & ENVTL. L. 295, 320 (2012) (emphasis added)(explaining that higher density means that because "the distance between origin and destination is shorter [therefore] walking, bicycling and mass transit services are more feasible").

⁹⁹ Michael Pearson, *Kurey's Face, Name Purged Councilman may Appeal Ouster*, ATLANTA J. & CONST., Aug. 20, 2005, at B1, available at 2005 WLNR 13113879 (describing Alpharetta as a "business-oriented suburb . . . about 26 miles from Atlanta"); Editorial, *Access to Public Records Lets us Peek Inside Government's Doors*, THE INDIANAPOLIS STAR, Mar. 12, 2006, at E2, available at 2006 WLNR 25289645 (describing Alpharetta as a "chic"

allows no densities higher than ten dwelling units per acre.¹⁰⁰ Thus, the most compact areas allowed by Alpharetta's plan are only slightly more compact than Jacksonville's low-density areas.

The plan adds that in Alpharetta's "low density residential" area, the maximum density is two or three units per acre.¹⁰¹ Moreover, most of the city's land is devoted to such use: the plan provides that only 3.5% of the city's land is to be "high-density residential," as opposed to 34.2% for "low density residential" and "very low density residential."¹⁰² 4.6% of the city's land is in an intermediate density category, and the rest is devoted to civic and commercial use.¹⁰³ So, as a practical matter, roughly three-fourths of Alpharetta's residential land is devoted to low-density residential use.

Even plans that purport to be anti-sprawl may include anti-density regulations. For example, the comprehensive plan of Boise, Idaho ("Boise") incorporates "smart growth"¹⁰⁴ principles such as the promotion of walkable neighborhoods.¹⁰⁵ But even Boise's plan¹⁰⁶ places much of the city in a low-density "suburban" zone.¹⁰⁷ The plan states that in the "suburban" zone, the appropriate density range is between three and five units per acre,¹⁰⁸ a level not significantly different from Alpharetta or Jacksonville.¹⁰⁹ The suburban zones are not even Boise's least dense: the plan also provides for "large lot" zones with no more than one or two dwelling units per acre.¹¹⁰ As noted above, such low densities are incompatible with significant levels of public transit service.¹¹¹

suburb).

¹⁰⁰ FINAL DRAFT, CITY OF ALPHARETTA, 2030 COMPREHENSIVE PLAN 32, *available at* http://www.alpharetta.ga.us/files/docs/pdfs/F&D/CD/Agenda_Final-Draft_6151100175_09-26-11.pdf [hereinafter ALPHARETTA PLAN] (stating that "high density residential" areas allow a maximum of 10 dwelling units per acre).

¹⁰¹ *Id.*

¹⁰² *Id.* at 89.

¹⁰³ *Id.*

¹⁰⁴ Jeanne Huff, *Idaho Smart Growth Doles Out Annual Awards*, IDAHO BUS. REV., NOV. 13, 2012, *available at* 2012 WLNR 24688806.

¹⁰⁵ *Id.*

¹⁰⁶ CITY OF BOISE, IDAHO, BLUEPRINT BOISE, *available at* <http://pds.cityofboise.org/planning/comp/blueprint-boise/> [hereinafter BLUEPRINT].

¹⁰⁷ *Id.* at Future Land Use Map (between ch.3 and ch.4).

¹⁰⁸ *Id.* at 3-20.

¹⁰⁹ JACKSONVILLE LAND USE PLAN, *supra* note 91, at 69-71; ALPHARETTA PLAN, *supra* note 100, at 89 and accompanying text.

¹¹⁰ See BLUEPRINT, *supra* note 106, at 3-19. It is worth noting, however, that the city does allow higher density zones as well. *Id.* at 3-22. Boise's mix of zones is not unique among smart growth-oriented plans. For example, Seattle's comprehensive plan seeks to promote smart growth. See David Fox, *Halting Urban Sprawl: Smart Growth in Vancouver and Seattle*, 33 B.C. INT'L & COMP. L. REV. 43, 54 (2010) (Seattle's plan "furthers Smart

b. Single-use zoning

The comprehensive plans discussed above combine low density with single-use zoning: that is, their land use maps include separate commercial and residential zones. These residential zones are sometimes so large that residents will not be within walking distance of anything but other houses. For example, Jacksonville's future land use map shows that one low-density residential area at the city's southern edge¹¹² will be about six miles wide.¹¹³ The comprehensive plan freezes this status quo in place not only through its future land use map, but also by stating more broadly that the city may allow commercial expansion near residential areas only if such expansion "maintains the existing residential character [of such areas]."¹¹⁴

Even smart growth-oriented plans sometimes segregate commercial uses in ways that reduce walkability. For example, the Boise plan suggests that the suburban zone will consist of residential areas served by commercial "activity centers."¹¹⁵ However, the city's Land Use Map suggests that these activity centers will sometimes be more than three miles apart.¹¹⁶

Obviously, few people living in the middle of these housing-only monocultures will be willing to walk (or even bike) a couple of miles to the nearest shop or job. Thus, the size of some plans' residential zones effectively mandates automobile dependence.

Growth policies"). But the plan nevertheless emphasizes that one of its goals is to "protect low-density, single-family neighborhoods." CITY OF SEATTLE, TOWARD A SUSTAINABLE SEATTLE, 2.13, http://www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/dpdd016650.pdf [hereinafter SUSTAINABLE SEATTLE] (emphasis added).

¹¹¹ See *supra* notes 95-98 and accompanying text.

¹¹² JACKSONVILLE LAND USE PLAN, *supra* note 91, at 156 (displaying a future land use map which shows low-density residential zone between San Jose Boulevard and Interstate Highway 95, ending at city's southern limit).

¹¹³ See Driving Directions from 12909 San Jose Boulevard, Jacksonville, FL, to Bartram Park Boulevard, Jacksonville, FL, GOOGLE MAPS, <http://maps.google.com> (follow "Get Directions" hyperlink; then search "A" for "12909 San Jose Boulevard, Jacksonville, FL" and search "B" for "Bartram Park Boulevard, Jacksonville, FL"; then follow "Get Directions" hyperlink).

¹¹⁴ JACKSONVILLE LAND USE PLAN, *supra* note 91, at 35.

¹¹⁵ See BLUEPRINT, *supra* note 106, at 3-20.

¹¹⁶ See *id.* at 3-5 to 3-6. For example, the map illustrates that there will be "activity centers" in the city's southwest corner at Overland and Lake Hazel Roads. *Id.* The distance between the Overland/Five Mile Road intersection (the site of one activity center) and the Lake Hazel/Five Mile Road (the site of the nearest activity center to the south) is 5.2 miles. See Driving Directions from Overland Park Boulevard, Jacksonville, FL, to Hazel Lake Drive, Jacksonville, FL, GOOGLE MAPS, <http://maps.google.com> (follow "Get Directions" hyperlink; then search "A" for "Overland Park Boulevard, Jacksonville, FL" and search "B" for "Hazel Lake Drive, Jacksonville, FL"; then follow "Get Directions" hyperlink).

c. Parking regulations

Some comprehensive plans generally purport to favor smart growth;¹¹⁷ nevertheless, the Seattle plan states that the city seeks to “[e]stablish off-street parking requirements for new development.”¹¹⁸ Although minimum parking requirements are not always mentioned in comprehensive plans, such requirements are virtually universal in the United States.¹¹⁹

Land that is used for parking lots cannot be used for housing or commerce. It follows that minimum parking requirements, by increasing the amount of land used for parking, artificially limit population density and thus reduce neighborhood walkability and transit use.¹²⁰ For example, in 1961, Oakland, California required apartment buildings to build one parking space per dwelling unit.¹²¹ Within three years of this ordinance, the number of apartments per acre in Oakland had decreased by thirty percent.¹²² If, as suggested above, other forms of anti-density regulation make cities more automobile-dependent,¹²³ it logically follows that minimum parking requirements do so as well.

By forcing landowners to build parking instead of residential and commercial buildings, minimum parking requirements also reduce the amount, and thus increase the price, of urban housing and commerce. Thus, minimum parking requirements may force people and businesses to move to suburbs in search of cheaper land. To be sure, these regulations also affect suburban land. But vacant land is often cheaper and more plentiful in the least developed suburbs, so suburban developers can more easily comply with minimum parking requirements by purchasing additional land.¹²⁴ By contrast, developers in already-developed cities and older suburbs may not be able to purchase land so easily.

¹¹⁷ See JACKSONVILLE LAND USE PLAN, *supra* note 91, at 155.

¹¹⁸ SUSTAINABLE SEATTLE, *supra* note 110, at 2.11. Further, it is noteworthy that Seattle’s parking policies may be more moderate than those of other municipalities. While other cities might apply such requirements universally, the Seattle plan notes the city’s willingness to consider removing such requirements in the more urbanized areas of the city, and to prevent parking from standing between buildings and the street. *Id.* at 2.12 (explaining that the city will “consider removing minimum parking requirements” in “urban centers” and will “generally prohibit street level parking between buildings and the street”); see also McIntosh, *infra* note 130 (explaining why pedestrians are worse off when parking is in front of buildings).

¹¹⁹ See SHOUP, *supra* note 48, at 22, 25 (2005).

¹²⁰ See *supra* notes 95-98 and accompanying text (explaining density/walkability relationship).

¹²¹ See SHOUP, *supra* note 48, at 143.

¹²² *Id.* at 144.

¹²³ See generally Freilich, *supra* note 95 (explaining the density/walkability relationship).

¹²⁴ Michael Lewyn, *What Would Coase Do? (About Parking Regulation)*, 22 FORDHAM

These regulations also facilitate automobile-dependent development by artificially subsidizing driving. Minimum parking requirements increase the supply of parking, and thus reduce the market price of parking.¹²⁵ As a result, ninety-nine percent of vehicle trips in North America are to destinations with free parking.¹²⁶ To the extent that free parking is a result of government regulation, it is essentially a government subsidy of drivers.

Who pays for this subsidy? At first, landowners pay, because they pay for the construction of parking lots and forego revenue from land that could be used for purposes other than parking.¹²⁷ But “landowners may pass the cost of free parking on to their customers.”¹²⁸ For example, a landlord might seek to recoup the cost of parking through higher rents for commercial tenants (who in turn may pass such costs to their customers by charging higher prices for goods and services) and residential tenants (who presumably pay higher rents than would otherwise be the case).¹²⁹

It follows that minimum parking requirements lead to increased residential and commercial rents, and thus require society as a whole to subsidize driving.¹³⁰ And where driving is cheaper, it is cheaper and more convenient for people to move to automobile-dependent suburbs. Thus, minimum parking requirements also encourage sprawl by making auto-oriented suburbs more attractive.¹³¹

ENVTL. L. REV. 89, 92 (2010).

¹²⁵ Richard Wilson, *Suburban Parking Requirements: A Tacit Policy For Automobile Use And Sprawl*, 61 J. AM. PLAN. ASS'N 29, 34 (1995) (“When developers are required to provide more parking than is demanded, the oversupply tends to push the market price down to zero.”).

¹²⁶ BLAIS, *supra* note 50, at 145.

¹²⁷ Lewyn, *supra* note 124, at 97.

¹²⁸ *Id.*

¹²⁹ *Id.* at 146; cf. VICTORIA TRANSPORT POLICY INSTITUTE, TRANSPORTATION COST AND BENEFIT ANALYSIS II—PARKING COSTS, 5.4:19, available at <http://www.vtpi.org/tca/tca0504.pdf> (study estimating that each “additional residential parking space effectively increases U.S. urban housing unit costs by \$52,000 to \$117,000”).

¹³⁰ Minimum parking requirements also reduce walkability because landowners who are forced to build parking often build parking in front of buildings, forcing pedestrians to walk through parking lots to reach destinations. See SHOUP, *supra* note 48, at 107; Jill McIntosh, *It's No Cakewalk Being a Pedestrian*, TORONTO STAR, July 18, 2009, available at 2009 WLNR 13724302 (explaining that parking lots are “dangerous” because drivers are “busy looking for spots or avoiding cars backing out, making pedestrians vulnerable”). Some cities try to discourage landowners from placing parking in front of buildings. See SUSTAINABLE SEATTLE, *supra* note 110, at 2.12 (stating that the city will “generally prohibit street level parking between buildings and the street”).

¹³¹ Common arguments for minimum parking requirements are that these rules are necessary to (1) prevent drivers from congesting traffic while searching for on-street parking, and (2) to prevent commercial parking from “spilling over” from commercial areas into residential streets. See Lewyn, *supra* note 124, at 93-96. These arguments lack merit

d. A small setback for pedestrians

Seattle's comprehensive plan requires "building setback requirements from property lines . . . [for] multifamily developments."¹³² Mandatory setbacks, like minimum parking requirements, reduce density and thus reduce walkability¹³³ because every foot of land used for setbacks cannot be used for housing. Setbacks also force pedestrians to spend more time walking between buildings and sidewalks, thus making their commutes longer and more inconvenient.

2. Anti-pedestrian street design

Jacksonville's comprehensive plan includes a "Transportation Element."¹³⁴ The Transportation Element creates right-of-way minimums, such as a 150-foot minimum for major arterials (that is, the most heavily trafficked streets)¹³⁵ and a 120-foot minimum for quieter¹³⁶ minor

for two reasons. First, parking requirements may increase driving to such an extent that on balance they increase, rather than decreasing, traffic congestion. *See generally* Freilich, *supra* note 95; BLAIS, *supra* note 50; Schleicher, *supra* note 97; Nolon, *supra* note 98; SHOUP, *supra* note 48; Wilson, *supra* note 125 (explaining how these requirements increase driving). Second, numerous alternatives may reduce these externalities without the same negative effects as minimum parking requirements. *See infra* notes 197, 199 and accompanying text (discussing various strategies, including charging market prices for on-street parking and requiring permits for drivers in residential neighborhoods).

¹³² SUSTAINABLE SEATTLE, *supra* note 110, at 2.17. The city raises a variety of justifications for this rule. First, the city claims that building setbacks "ensure access to light and air [and] provide a sense of privacy" *Id.* But all human beings breathe air no matter where buildings are placed, so air is simply irrelevant to setback requirements. Similarly, light exists wherever there is sun (except to the extent tall buildings cast shadows over a street)—so light does not justify setback requirements except in areas dominated by skyscrapers. Second, the city claims that setbacks provide "a sense of privacy." *Id.* The city supplies no evidence for this assertion. I live in a fifteen-story building, and I do not see how my apartment would be any more "private" if it was separated from the street by a patch of grass or a parking lot. Finally, the city claims that setbacks "provide adequate transition between zones of different intensities." *Id.* This claim may justify setbacks at the boundary of different zones, but not elsewhere.

¹³³ *See* Freilich, *supra* note 95; BLAIS, *supra* note 50; Schleicher, *supra* note 97; Nolon, *supra* note 98 and accompanying text (explaining density/walkability relationship).

¹³⁴ CITY OF JACKSONVILLE 2030 COMPREHENSIVE PLAN, TRANSPORTATION ELEMENT, <http://www.coj.net/departments/planning-and-development/docs/community-planning-division/2030-comp-plan-postings/cp-posted-as-of-10-30-14/2030-transportation-element-may-2014-posted-10-14.aspx> (last visited Oct. 10, 2014) [hereinafter JACKSONVILLE TRANSPORTATION PLAN].

¹³⁵ *See* JACKSONVILLE, FLA. ORDINANCE CODE § 654.106(mm)(6) [hereinafter JACKSONVILLE CODE] (defining term).

¹³⁶ *See* JACKSONVILLE TRANSPORTATION PLAN, *supra* note 134, at 35 (contrasting major

arterials.¹³⁷ Assuming that the city typically devotes about twenty feet of right-of-way to sidewalks and shrubbery,¹³⁸ these requirements mean that a major arterial might have about 130 feet of pavement and minor arterials 100 feet. Since the plan also requires most traffic lanes to be twelve feet wide (and sixteen feet wide for “outside” lanes closest to intersections)¹³⁹ it logically follows that major arterials could have as many as ten 12-16 foot lanes, and even minor arterials might have seven or eight lanes.

Jacksonville’s wide streets make that city more automobile-dependent because such streets are both inconvenient and dangerous for pedestrians and bicyclists—inconvenient because a wide roadway takes more time to cross than a narrower street,¹⁴⁰ and dangerous because the more time a pedestrian or bicyclist spends on such a street, the more time he or she spends exposed to vehicle traffic.¹⁴¹

Planners mandate wide streets in order to help motorists drive more rapidly.¹⁴² But when government succeeds in encouraging fast driving, it increases the risk of pedestrian injury in three ways. First, a fast driver has a narrow field of vision.¹⁴³ A motorist driving thirty miles per hour has a 150-degree field of vision.¹⁴⁴ By contrast, a motorist driving at twice that speed has only a fifty-degree field of vision.¹⁴⁵ Thus, a fast driver is less likely than a slower driver to notice a pedestrian (or for that matter, other drivers).¹⁴⁶

Second, even a motorist who *does* notice another road user is less likely to be able to stop in time while driving at a rapid speed. A motorist who is driving forty miles-per-hour will be able to stop 120 feet after noticing a

and minor arterials).

¹³⁷ JACKSONVILLE CODE, *supra* note 135, at § 654.106(mm)(7).

¹³⁸ The city requires new local streets serving residential areas to include four-foot sidewalks and new dedicated local streets serving non-residential areas to include five-foot sidewalks. JACKSONVILLE TRANSPORTATION PLAN, *supra* note 134, at 36-37.

¹³⁹ *Id.* at 33.

¹⁴⁰ See *Donavan v. Jones*, 658 So.2d 755, 765 (La. Ct. App. 1995).

¹⁴¹ *Id.*; see also Wallace Immen, *City Seeks Solution to Commute Crunch*, GLOBE AND MAIL, Apr. 26, 2002, at A22, available at 2002 WLNR 12038490 (discussing that in downtown Toronto, pedestrians “have to run to beat the changing light” on wide streets).

¹⁴² See Stephen H. Burrington, *Restoring the Rule of Law and Respect for Communities in Transportation*, 5 N.Y.U. ENVTL. L.J. 691, 701 (1996) (explaining that traffic engineers build wide streets out of “solicitude toward fast traffic”).

¹⁴³ *Id.* at 704, n.50.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*; cf. SIERRA CLUB, STOP SPRAWL: STREETS AND TRAFFIC, <http://www.sierraclub.org/sprawl/articles/narrow.asp> (last visited Oct. 10, 2014) (explaining that in one community studied, “a typical 36 foot wide residential street has 1.21 [accidents per mile per year] as opposed to 0.32 for a 24 foot wide street”).

pedestrian or other road user.¹⁴⁷ By contrast, a motorist driving half that speed will be able to stop only forty feet after seeing the other road user.¹⁴⁸

Third, a car traveling rapidly is more likely to kill or maim a pedestrian or bicyclist than a slow-moving vehicle. A non-motorist has a 3.5% chance of death from a car traveling fifteen miles per hour, but the likelihood of death increases to over eighty percent when the vehicle is traveling at three times that speed.¹⁴⁹

In addition, wide streets may create a visually disorienting and uncomfortable environment for pedestrians. Numerous commentators suggest that pedestrians are “drawn to streets with a feeling of intimacy and enclosure”¹⁵⁰ and that wide streets make pedestrians feel less enclosed.¹⁵¹

B. A Good Start, but Only a Start

Sometimes plans may fail to limit sprawl, not through aggressively pro-sprawl provisions, but by provisions that are so equivocal as to be meaningless. For example, Boise's plan states that the city wishes to promote “compact, walkable development patterns that support transit.”¹⁵² The plan tries to reach this goal by providing for “mixed-use activity centers.”¹⁵³ Boise's plan states that these centers will be near established neighborhoods, so that residents of nearby blocks can walk to shopping, schools, parks, and jobs.¹⁵⁴

¹⁴⁷ See Joey Ledford, *The Lane Ranger Speeding Cars Terrify Neighborhoods*, ATLANTA JOURNAL AND CONSTITUTION, Aug. 27, 1997, at B, available at 1997 WLNR 3173969 (“At 20 mph, it takes you 20 feet to react [to a pedestrian or vehicle in the street] and another 20 feet to stop. At 40 mph, it's 40 feet to think and another 80 feet to stop.”).

¹⁴⁸ *Id.*

¹⁴⁹ See Burrington, *supra* note 142, at 704 (indicating eighty-three percent risk of death from car traveling forty-four miles-per-hour). Burrington refers to pedestrians, but there is no reason to believe that a bicyclist would be in less danger.

¹⁵⁰ Paul Zykovsky, *Building Livable Communities with Transit*, LOCAL GOVERNMENT COMMISSION, <http://www.lgc.org/build-with-transit>.

¹⁵¹ *Id.* (reasoning less enclosure possible “in a wide open area with busy traffic passing closely by”); see also ANDRES DUANY, ELIZABETH PLATER-ZYBERK & JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 78 (1st ed. 2001) (“If a street is to provide the sense of enclosure that pedestrians desire—if it is to feel like a room—it cannot be too wide.”); see also J.H.CRAWFORD, *CARFREE CITIES* 44 (2000) (“[L]ong strips of low buildings bordering wide streets fail to create a sense of enclosure [desirable to pedestrians].”).

¹⁵² See BLUEPRINT, *supra* note 106, at 2-9.

¹⁵³ *Id.* at 2-34.

¹⁵⁴ *Id.*

On the other hand, the same plan states that these centers must also be “of a scale that is *compatible* with the surrounding neighborhood”¹⁵⁵—a phrase which implies that if the surrounding neighborhood is automobile-dominated sprawl, the “activity center” must be equally so. For example, if a neighborhood is dominated by streets too wide to be safe for pedestrians and buildings set back far from the street, it could be argued that “activity centers” should contain similar features in order to be “compatible with the surrounding neighborhood.”¹⁵⁶

Boise’s plan also states that the city will “[p]rotect existing business and industrial areas from . . . incompatible or non-complimentary uses”¹⁵⁷ Because the plan does not detail when businesses and residences are “compatible,” this language could be used to thwart mixed-use development.

Similarly, Seattle’s plan is full of language that could be used to oppose compact, pedestrian-oriented development. The plan states that the city wishes to “permit limited amounts of commercial use in what are otherwise residential zones . . . to . . . provide retail and service uses in close proximity”¹⁵⁸ This language seems designed to promote neighborhood walkability—but on the other hand, the plan’s use of the term “limited” gives the city ample discretion to defeat this objective through restrictive zoning.

This discretion is reinforced by statements on the same page that the city wishes to establish “multifamily residential use as the predominant use in multifamily areas, to *preserve the character* of [such] areas”¹⁵⁹ and that the city wishes to “[l]imit the number and type of non-residential uses permitted in multifamily areas . . . to protect these areas from negative impacts of *incompatible uses*.”¹⁶⁰ The city’s invocation of neighborhood “character” and “incompatible uses” gives it ample discretion to choke off real mixed-use development, since a project that makes a neighborhood more pedestrian-friendly (for example, by increasing the amount of shopping within walking distance of houses) by definition changes the neighborhood’s “character” and thus is at least partially incompatible with the status quo.

The Seattle plan also states that the city “[s]eeks] to focus development in transit and pedestrian-friendly-urban villages while maintaining *compatibility* between new development and the surrounding area through

¹⁵⁵ *Id.* (emphasis added).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 2-71.

¹⁵⁸ SUSTAINABLE SEATTLE, *supra* note 110, at 2.16.

¹⁵⁹ *Id.* (emphasis added).

¹⁶⁰ *Id.* (emphasis added).

standards regulating the size and density of development.”¹⁶¹ On the one hand, the city wants to focus development on transit-friendly areas, which seems to imply more density in these areas. On the other hand, the city wants “compatibility” with the status quo, which could be interpreted to allow as little change as possible.

C. What Went Wrong?

As explained above, comprehensive plans often purport to endorse smart growth.¹⁶² Even the comprehensive plan of Alpharetta states that development should “reduce daily vehicle use, improve air quality, promote a transit-supportive infrastructure, [and] create a pedestrian-friendly environment.”¹⁶³ Similarly, Jacksonville’s plan states that the city seeks to “discourage urban sprawl”¹⁶⁴ and encourage “smart growth practices.”¹⁶⁵

Yet, the comprehensive plans of Alpharetta and Jacksonville frustrate smart growth by restricting development compact enough to support public transit.¹⁶⁶ Why is there such a gap between rhetoric and policy? As a general rule, zoning became popular in the United States long before comprehensive plans became common.¹⁶⁷ Thus, most cities and counties had no comprehensive plan when they enacted zoning codes—which means that by the time the first plans were drafted, a city’s land use map and density may already have been set in stone by existing zoning.¹⁶⁸ In such a situation, the city’s path of least resistance was probably to create a plan that reflects existing zoning. Of course, a city that wished to aggressively promote smart growth could have enacted a plan that allowed more density, a greater mix of uses, or less parking than the zoning ordinance—but such a plan might have met with resistance from city residents satisfied with the status quo.

¹⁶¹ *Id.* at 2.21 (emphasis added).

¹⁶² See BLUEPRINT, *supra* note 106, at 2-20.

¹⁶³ ALPHARETTA PLAN, *supra* note 100, at 12.

¹⁶⁴ JACKSONVILLE LAND USE PLAN, *supra* note 91, at 8.

¹⁶⁵ *Id.*

¹⁶⁶ See ALPHARETTA PLAN, *supra* note 100; see also JACKSONVILLE LAND USE PLAN, *supra* note 91.

¹⁶⁷ See JUERGENSMEYER & ROBERTS, *supra* note 10, at 24 (explaining that in the early years of zoning, “many communities prepared and adopted zoning ordinances without ever making [a] general, comprehensive plan”).

¹⁶⁸ See Patalano, *supra* note 87, at 698. For example, Jacksonville had no comprehensive plan until 1970. See Tony Robbins, *Program Corner*, 1ST COAST PLANNER 4 (May/June 2010) at 4, <http://web.archive.org/web/20110427222343/http://floridaplanning.org/firstcoast/newsletters/May-June%202010.pdf>.

IV. PLANS ARE NOT (COMPLETELY) NECESSARY

As noted above, municipal comprehensive plans may contain the same sort of pro-sprawl provisions as municipal zoning codes.¹⁶⁹ Presumably, these policies may be altered through anti-sprawl plan provisions—so a comprehensive plan certainly *could* be a useful means of implementing smart growth policies. For example, the plan could prohibit the zoning code from mandating any densities too low to support public transit, or protect a landowner's right to choose how much parking, if any, it wished to build.

But just because a comprehensive plan could alter pro-sprawl policies does not mean that a comprehensive plan is the *only* way to alter those policies. Instead, local zoning codes or statewide legislation can be, and in fact have been, used to alter these pro-sprawl land use policies.

A. Density

For example, both zoning codes and comprehensive plans often limit density, thus making society more automobile-dependent by reducing the number of people who can live within walking or biking distance of shops, jobs or public transit.¹⁷⁰ In theory, a comprehensive plan could restrict a municipality's right to limit density by providing that zoning could not require densities lower than X units per acre.¹⁷¹

But the same goal could be achieved through a zoning code amendment. For example, Jacksonville's zoning code currently contains a wide variety of zones, including low-density, medium-density, and high-density zones.¹⁷² Even in the more compact low-density zones, the city caps density at seven units per acre¹⁷³—barely, if at all, enough to support significant public transit service.¹⁷⁴ However, the city could amend the zoning code to allow more density. At a minimum, the city could raise the density caps slightly, so that landowners could build subdivisions that were compact enough to support more transit service. A more radical city leadership could simply eliminate the low-density zones altogether, so that the city's lowest-density zones resembled Jacksonville's medium-density

¹⁶⁹ See *supra* Part III.

¹⁷⁰ See *supra* Part III.A.1.

¹⁷¹ Cf. BLUEPRINT, *supra* note 106, at 3-9 (explaining that "Regional Activity Centers" should have densities greater than twenty units per acre).

¹⁷² See JACKSONVILLE CODE, *supra* note 135, §§ 656.305 to .307 (1999).

¹⁷³ *Id.* § 656.305.

¹⁷⁴ Freilich, *supra* note 95 and accompanying text (at least seven to fifteen units per acre required for significant transit service).

zone (in which the maximum density is typically twenty units per acre).¹⁷⁵ Even in suburban neighborhoods dedicated to single-family homes, such transit-supportive zoning is hardly unprecedented: for example, in Mississauga, Ontario, a suburb of Toronto,¹⁷⁶ one area is zoned for thirteen single-family homes per acre.¹⁷⁷

B. Single-Use Zoning

As noted above, single-use zoning also impedes neighborhood walkability by creating residence-only zones that are not within walking distance of public transit, shops, or jobs.¹⁷⁸ Just as comprehensive plans can be used to mandate single-use zoning, they may also be used to allow mixed-use zones.¹⁷⁹ But zoning codes too can allow a mix of uses; in fact, numerous cities have recently adopted “form-based codes”¹⁸⁰ designed to facilitate exactly that.¹⁸¹

While traditional zoning regulates uses, form-based codes primarily regulate the form of development.¹⁸² One model form-based code, the

¹⁷⁵ See JACKSONVILLE CODE, *supra* note 135, § 656.306. It should be noted that because Florida requires cities to comply with comprehensive plans, the city would also have to amend its comprehensive plan. See Long, *Overcoming Neoliberal Hegemony in Community Development*, *supra* note 7, at 361 n.61. However, this change would not be necessary in states that do not require municipal zoning to be consistent with comprehensive plans. See *supra* text accompanying note 7 (suggesting that most states do not require such consistency).

¹⁷⁶ See GORDON BRUNSKILL, MOSCATO DRAWING ON WORLD CUP EXPERIENCE, ST. C. CENTRE DAILY TIMES, NOV. 14, 2003, at 1B, available at 2003 WLNR 16289999 (“Mississauga a suburb west of Toronto.”).

¹⁷⁷ MISSISSAUGA, ONTARIO, ZONING BY-LAW § 4.2.2.6.1, table 4.2.1, available at <http://www6.mississauga.ca/online/maps/planbldg/ZoneBylaw/DZBR1/Part%204%20-%20R01.pdf> [hereinafter MISSISSAUGA BY-LAW]. Specifically, the area is zoned for 295 square meters per house. *Id.* A square meter is 10.76 square feet. See Goh Yihan, Tort Law In The Face of Land Scarcity in Singapore, 26 ARIZ. J. INT’L & COMP. L. 335, 343 (2009). Thus, each house must include about 3174 square feet of land (295 x 10.76), or just under one-thirteenth of an acre. See Arthur Allan Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 1905 (defining one acre as containing 43,560 square feet).

¹⁷⁸ See *supra* notes 85-89 and accompanying text.

¹⁷⁹ See generally BLUEPRINT, *supra* note 106, 3-8 to -17 (designating certain spots as “mixed-use activity centers”).

¹⁸⁰ See *Form-Based Codes? You’re Not Alone*, PLACEMAKERS.COM <http://www.placemakers.com/how-we-teach/codes-study/> (last visited Oct. 2, 2014) (explaining that 279 codes have been adopted; eighty-four percent of them have been adopted since 2003).

¹⁸¹ See H. William Freeman, *A New Legal Landscape for Planning and Zoning: Using Form-Based Codes to Promote New Urbanism and Sustainability*, 36 MICH. REAL PROP. REV. 117, 120 (2009) (“Form-Based Codes allow for a mixture of land uses . . .”).

¹⁸² *Id.*

SmartCode, divides land into rural zones, a suburban zone, a general urban zone, an “urban center” zone and an “urban core” zone.¹⁸³ Although the SmartCode regulates form-related issues such as building heights and the distance between buildings and the street,¹⁸⁴ it regulates the use of land less intensely. For example, the SmartCode provides that within the code’s “suburban zone,” most structures will be residential—but, unlike some plans that favor single-use zoning,¹⁸⁵ allows some small stores and offices in that zone.¹⁸⁶ Within the SmartCode’s more urban zones,¹⁸⁷ residential, retail, and office uses are all permitted.¹⁸⁸

C. Minimum Parking Requirements

As noted above, municipal comprehensive plans sometimes impose minimum parking requirements, thus reducing density beyond the requirements of anti-density regulations and forcing landowners to subsidize drivers.¹⁸⁹ In theory, a comprehensive plan could limit the scope of such regulations.¹⁹⁰

But zoning amendments have also been used to liberalize parking regulations. Some zoning codes have completely eliminated minimum parking requirements for regional downtowns.¹⁹¹ Similarly, the zoning

¹⁸³ See Richard S. Geller, *The Legality of Form-Based Zoning Codes*, 26 J. LAND USE & ENVT'L. L. 35, 44 (2010).

¹⁸⁴ *Id.* at 45-46 (skyscrapers usually in “core” zone, while two-to-five story buildings usually in “urban center” zone); see also *id.* at 47 (structures set back from street in more suburban zones, and closest to street in urban zones).

¹⁸⁵ See JACKSONVILLE LAND USE PLAN, *supra* note 91; see also BLUEPRINT, *supra* note 106.

¹⁸⁶ See Geller, *supra* note 183, at 55 (explaining that “residential neighborhoods may have restricted commercial and office uses in buildings of a residential character,” such as “a small restaurant, seating no more than twenty persons”).

¹⁸⁷ See CENTER FOR APPLIED TRANSECT STUDIES, SMARTCODE VERSION 9.2, available at <http://www.transect.org/codes.html> [hereinafter SMARTCODE] (describing these zones as follows: “T-4 General Urban Zone” which is “mixed use but primarily residential”; “T-5 Urban Center Zone” dominated by “higher density mixed use building”; and “T-6 Urban Core Zone, which has “greatest variety of uses”).

¹⁸⁸ *Id.* at SC40 (listing permitted uses by zone, and showing that all of these uses allowed in T-4, T-5 and T-6 zones).

¹⁸⁹ See Freilich, *supra* note 95.

¹⁹⁰ For example, Seattle’s plan suggests the removal of parking requirements in the city’s more urban neighborhoods, and the imposition of maximum as well as minimum parking requirements. See SUSTAINABLE SEATTLE, *supra* note 110, at 2.12.

¹⁹¹ See, e.g., Maya Rao, *Downtown Minneapolis is Seen as Drowning in a Sea of Parking Lots*, STAR TRIBUNE, JULY 25, 2012, at 1B, available at 2012 WLNR 15632535 (in 2009, Minneapolis “eliminated minimum parking requirements for buildings in [its] downtown zoning district”); Steven Doyle, *Parking Rule Changes on Hold*, HUNTSVILLE TIMES,

code of Portland, Oregon has eliminated minimum parking requirements for small residential buildings near public transit stations.¹⁹² Although the city has retained such requirements for larger buildings, these buildings need not provide as much parking as buildings in more automobile-oriented locations.¹⁹³ The very largest buildings in a high-transit area must provide 0.33 parking spaces per dwelling unit.¹⁹⁴ By contrast, in other parts of the city, landowners must provide one parking space per dwelling unit.¹⁹⁵

Cities often enact minimum parking requirements in order to prevent “spillover parking.” When buildings fail to provide parking for customers, some customers might park on nearby residential streets—a result that inconveniences residents of those streets who wish to park near their homes.¹⁹⁶ By contrast, if every apartment building or commercial building provides enough parking spaces for every conceivable user, their customers will never have a reason to park on residential streets.

However, minimum parking requirements are not the only way to prevent spillover parking. Cities may also amend their zoning ordinances to institute a parking permit system—that is, to limit parking on a residential street to residents of the street and their guests.¹⁹⁷

Another reason for minimum parking requirements is to prevent “cruising”—that is, drivers wasting time searching for scarce parking spaces, thus creating congestion and pollution.¹⁹⁸ This problem too can be addressed through other forms of legislation. A city may deter cruising by setting parking meter prices high enough to deter some driving, thus

JUNE 26, 2009, at 5A, *available at* 2009 WLNR 13026220 (“[T]he downtown C-3 General Business [Z]one would continue as is, with no minimum parking requirements.”).

¹⁹² See PORTLAND, OR., ZONING CODE § 33.226.110[D](1)(a) (2014), *available at* <http://www.portlandoregon.gov/bps/article/53320> (eliminating requirements for buildings with less than 30 residential units, if such buildings “less than 1500 feet from a transit station” or within 500 feet of transit with “20-minute peak hour service”).

¹⁹³ *Id.* at § 33.226.110[E].

¹⁹⁴ *Id.* at § 33.226.110[D](1)(d).

¹⁹⁵ *Id.* at tbl.266-2.

¹⁹⁶ See Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 766 (1999) (for example, if church provides its worshippers with an insufficient number of parking spaces, city has an interest in “ensuring that the spillover from the church parking lot does not deprive neighbors of reasonable opportunity to park in their own neighborhood”).

¹⁹⁷ See *Cnty. Bd. of Arlington, Cnty. Va. v. Richards*, 434 U.S. 5 (1977) (upholding such a system and quoting from zoning ordinance)(citation omitted).

¹⁹⁸ See *Stroud v. City of Aspen*, 532 P.2d 720, 723 (Colo. 1975) (upholding minimum parking requirements because such rules ensure that cars “may be placed in a stall and stilled” rather than “clog[ging] the streets, air and ears of our citizens [while in search of] parking facilities”).

ensuring that enough spaces are vacant to allow enough parking for any driver who is willing to pay the price.¹⁹⁹

D. Setbacks

As discussed above, comprehensive plans occasionally require buildings to be set back from streets, thus lengthening pedestrian commutes and reducing density.²⁰⁰ Form-based codes are a common antidote to this policy. For example, Buffalo, New York is in the process of creating a new form-based code.²⁰¹ Although the code itself is not yet enacted, the city has created graphics showing sample buildings in each zoning district. These diagrams show that in most of the city's mixed-use and commercial areas, buildings will be in front of sidewalks, rather than being set back behind yards of landscaping or parking.²⁰² Similarly, the SmartCode mandates minimal setbacks of only two to six feet in its more urban zones.²⁰³ In those zones, the SmartCode actually creates *maximum* setbacks that are smaller than the typical suburban setback.²⁰⁴ Thus, the SmartCode might be as effective as a comprehensive plan in reducing setbacks.

E. Wide Streets

As noted above, the transportation sections of comprehensive plans may regulate street width—and in doing so, may require streets that are too wide to be easily crossed by pedestrians.²⁰⁵ Where a comprehensive plan already addresses this issue, it should be reformed by allowing narrower rights-of-way.

But where a comprehensive plan does not already mandate wide streets, it need not be amended (or enacted, if no comprehensive plan yet exists). Most municipalities regulate street widths through subdivision

¹⁹⁹ See SHOUP, *supra* note 48, at 296-303 (describing proposal in detail).

²⁰⁰ See *supra* notes 132-33 and accompanying text.

²⁰¹ See *A Preview of Buffalo's New Zoning*, BUFFALO GREENCODE 2 (June 4, 2012), http://www.buffalogreencode.com/documents/A_Preview_of_Buffalo%27s_New_Zoning.pdf (indicating the city's new ordinance will be form-based).

²⁰² *Id.* at 5-8 (showing numerous examples).

²⁰³ See SMARTCODE, *supra* note 187, at SC42. However, the code still mandates setbacks of at least twenty-four feet in its T-3 "suburban" zone. *Id.*

²⁰⁴ Compare *id.* (stating a maximum setback of twelve to eighteen feet in T-4, T-5 and T-6 zones), with Chad D. Emerson, *Making Main Street Legal Again: The Smartcode Solution to Sprawl*, 71 MO. L. REV. 637, 645 n.36 (2006) ("Under conventional [American zoning] codes, for example, front setbacks must either be a [twenty-five]-foot grass yard or a paved parking lot.").

²⁰⁵ See *supra* Part III.A.2.

ordinances.²⁰⁶ Form-based codes sometimes seek to combine zoning codes and subdivision ordinances, and thus address street width as well as land use.²⁰⁷ For example, the SmartCode lists a wide variety of possible street designs; however, it proposes no street more than eighty feet wide, and no street with more than four driving lanes.²⁰⁸ Moreover, these street widths are maximums not minimums: in some areas, the code allows streets as narrow as ten feet.²⁰⁹ Thus, the SmartCode might be just as effective as a comprehensive plan amendment in addressing the problem of overly-wide streets.

F. A Note on Statewide and Regional Legislation

All of the sprawl-generating policies discussed above could also be eliminated or limited through statewide legislation. For example, a state could amend its zoning enabling legislation to completely eliminate municipalities' ability to discriminate on the basis of density²¹⁰ (except perhaps in environmentally sensitive areas),²¹¹ or to provide that a city could not mandate densities lower than the seven to fifteen dwelling units per acre sufficient to support public transit. Because states typically include a wide range of places (from the most rural to the most urban), this sort of proposal may be less feasible than local zoning reform. For similar reasons, state legislation might not be the most appropriate way to address other issues traditionally addressed in zoning ordinances (such as separation of uses, density or parking).

However, a state could accommodate regional diversity by creating regional governing bodies for its urban areas, and giving those authorities the power to override local zoning to create rules friendlier to non-motorists. For example, Oregon created a metropolitan government for the Portland region that has the power to override local zoning.²¹²

²⁰⁶ See Emerson, *supra* note 204, at 682 (noting that while zoning ordinance typically regulates land use, "subdivision regulations focus more on dimensional standards such as street widths").

²⁰⁷ *Id.*

²⁰⁸ See SMARTCODE, *supra* note 187, at SC30. However, the SmartCode does allow six-lane streets with two lanes set aside for on-street parking. *Id.*

²⁰⁹ *Id.*

²¹⁰ See Michael Lewyn, *You Can Have It All: Less Sprawl and Property Rights Too*, 80 TEMPLE L. REV. 1093, 1107-13 (2007) (discussing concept in more detail).

²¹¹ *Id.* at 1107 n.91.

²¹² See Robert Liberty, *Give and Take Over Measure 37: Could Metro Reconcile Compensations for Reductions in Value with a Regional Plan for Compact Urban Growth and Preserving Farmland?*, 36 ENVTL. L. 187, 193-97 (2006) (describing Metro, a regional government for Portland area). Metro's code in fact requires Portland-area jurisdictions to

Two issues related to sprawl are more likely to be amenable to statewide regulation. States regulate street design through traffic manuals²¹³ that may be used not only by state road planners, but also by local officials.²¹⁴ Even when these manuals are not technically binding upon local governments, courts defer to such manuals in determining whether a city has negligently designed its streets.²¹⁵ Currently, these manuals consider pedestrians' interests (if at all) by listing slim, walkable streets as one possible option among many.²¹⁶ But in theory, a state could limit municipalities' right to design roadways for dangerously fast traffic—for example, by recommending or requiring a maximum street width for roads other than limited-access highways.

Another issue that is amenable to statewide regulation is the location of development. As noted above, this article defines sprawl as automobile-dependent suburban development.²¹⁷ The regulations discussed above are primarily related to *how* development occurs: that is, the “automobile-dependent” half of my definition. However, statewide regulation can address *where* development occurs: that is, the “suburban” half. For example, Oregon has required its regional governments to establish urban

set forth minimum densities. See OR. METRO, THE METRO CODE, § 3.07.120(B), *available at*

http://www.oregonmetro.gov/sites/default/files/0307_eff_011812_including_maps_for_title_4_6_and_14_updated_010814_ord_13-1316final.pdf. But because the code does not state how high these minimum densities must be, it is not clear whether the code in fact promotes density to any significant degree.

²¹³ See, e.g., CAL. DEPT. OF TRANSP., MAIN STREETS: FLEXIBILITY IN DESIGN AND OPERATIONS, *available at* <http://www.nh.gov/dot/org/projectdevelopment/highwaydesign/contextsensitivesolutions/documents/CalTrans-Main-streets-flexibility-in-design.pdf> [hereinafter CALIFORNIA MAIN STREETS]; VA. DEPT. OF TRANSP., ROAD DESIGN MANUAL, *available at* http://www.extranet.vdot.state.va.us/locdes/Electronic_Pubs/2005%20RDM/RoadDesignCoverVol.1.pdf; STATE OF N.J. DEPT. OF TRANSP., ROADWAY DESIGN MANUAL, *available at* <http://www.state.nj.us/transportation/eng/documents/RDM>; OR. DEPT. OF TRANSP., HIGHWAY DESIGN MANUAL (2012), *available at* http://www.oregon.gov/ODOT/HWY/ENGSERVICES/Pages/hwy_manuals.aspx#2012_English_Manual [hereinafter OREGON HIGHWAY] (discussing purpose in preface).

²¹⁴ OREGON HIGHWAY, *supra* note 213 and accompanying text; CALIFORNIA MAIN STREETS, *supra* note 213, at 3 (explaining that the purpose of the manual is to “assist communities [as well as state planners]”).

²¹⁵ See Girard Fisher, *Design Immunity for Public Entities*, 28 SAN DIEGO L. REV. 241, 245 (1991) (opining that if city conforms to “established engineering standards” such as state manual, its actions more likely to be reasonable).

²¹⁶ See CALIFORNIA MAIN STREETS, *supra* note 213, at 8 (discussing lane reduction as one possible option, especially in downtown areas); see also OREGON HIGHWAY, *supra* note 213, § 6.2.2.1 (suggesting that in densely populated areas, streets may have narrower lanes and other features designed for slower traffic).

²¹⁷ See Lewyn, *supra* note 2 and accompanying text.

growth boundaries around its cities,²¹⁸ which, by restricting development in newer suburbs, increases the amount of development in cities and existing suburbs (as opposed to newer suburbs).²¹⁹ Only statewide or regional regulation can achieve effective growth boundaries because if one city or county creates growth boundaries in order to keep development out of its rural or suburban sections, development will merely leapfrog to other municipalities that refuse to enact such limits.²²⁰

Of course, funding decisions are also amenable to statewide reform. A state may choose to spend more money on bicycle facilities, sidewalks, and public transit, rather than devoting most of its budget to highways.²²¹

V. PLANS ARE HELPFUL BUT IN WAYS THAT ARE NOT ALWAYS RELATED TO SMART GROWTH

For the reasons stated above, it appears that municipal comprehensive plans will not inevitably limit sprawl, and that a wide variety of policies other than comprehensive plans might limit sprawl. But this does not mean that comprehensive plans are a bad thing—only that such plans are not absolutely necessary or sufficient to reduce sprawl.

In fact, a comprehensive plan can improve a municipal zoning code in three ways. First, a comprehensive plan can set forth the goals and policies²²² underlying the code—for example, *why* a municipality wishes to

²¹⁸ See OR. REV. STAT. § 268.390(3)(a); see also Attkisson, *supra* note 20 at 1001 (describing growth boundary system in more detail).

²¹⁹ *Id.* at 1001-02 (explaining that one of Oregon's objectives was to "establish a clear limit on sprawl" and that "Portland has witnessed a dramatic increase in both the volume and proportion of multiple-family and attached single-family housing, as well as an increase in the proportion of smaller and more affordable developed, single-family lots—all of which indicate an increase in the density of the region. This increase in density directly corresponds to less sprawl and greater preservation of rural landscapes") (footnotes omitted).

²²⁰ *Id.* at 1003. It is noteworthy, however, that if a state is more effective at discouraging suburban development than at encouraging infill, it could limit the amount of new housing produced, thus creating a housing shortage and increasing housing prices. See Steven J. Eagle, *A Prospective Look at Property Rights and Environmental Regulation*, 20 GEO. MASON L. REV. 725, 745 n.140 (2013) (citation omitted). But see Jeffrey A. Michael & Raymond B. Palmquist, *Environmental Land Use Restriction and Property Values*, 11 VT. J. ENVTL. L. 437, 453-54 (2010) (noting that numerous studies have yielded unclear results as to the effect of growth boundaries on land prices). The wisdom of this argument is beyond the scope of this article.

²²¹ See, e.g., Ryan Seher, *I Want to Ride My Bicycle: Why and How Cities Plan for Bicycle Infrastructure*, 59 BUFF. L. REV. 585, 614-16 (2011) (describing Oregon's commitment to bicycle infrastructure).

²²² See JUERGENSMEYER & ROBERTS, *supra* note 10, at 26 (explaining that the comprehensive plan is "future-oriented" and establishes "goals and objectives for future land

increase parking through minimum parking requirements, reduce parking through maximum parking requirements, or leave parking up to the free market. Rather than merely stating a requirement as a zoning code would, a comprehensive plan can describe general policy goals underlying that requirement,²²³ and perhaps even set forth data about the city's conditions and needs. Thus, a well-drafted plan can be to a zoning code what a legislative history is to a state or federal statute—a document that explains the purpose of the law in order to guide the judges, landowners and officials who must follow and/or implement the law.

This advantage of comprehensive plans, however, is not specifically tied to smart growth or sprawl. A smart growth-oriented plan can inform future policymakers that the goal of the zoning code is to promote smart growth. However, a pro-sprawl plan can easily inform policymakers that the goal of the code is to promote sprawl. Additionally, however, a plan may also embody goals not directly related to urban form. For example, a city may create a plan that is designed to exclude lower-income people from upper-income neighborhoods²²⁴ or a plan designed to limit such exclusion by encouraging landowners to build affordable housing.²²⁵

In this regard, a comprehensive plan is similar to a government budget. A government budget might set forth “liberal goals” such as mitigating income inequality or “conservative goals” such as imprisoning felons. However, in either case, the existence of a budget might allow a city or state to achieve these goals more efficiently than if the jurisdiction passed individual appropriation bills without considering how much revenue the government wished to spend.

A second advantage of a comprehensive plan is that it can be used to prevent arbitrary zoning decisions. For example, if a city has to comply

use”); MORRIS, *supra* note 8, at 6 (explaining that the comprehensive plan “a policy document”); Meck, *supra* note 17, at 316 (stating that planning “provides the policy framework for the administration of land use controls”). Note that some descriptions of the purposes of the comprehensive plan are far more general. For example, one article states that comprehensive plans “set out goals for the betterment of a jurisdiction’s citizenry.” Yusuf Z. Malik, *The Religious Land Use and Institutionalized Persons Act: A Perspective on the Unreasonable Limitations Provision*, 78 TENN. L. REV. 531, 561 (2011). But nearly any government action is arguably for the “betterment of [the] citizenry”; thus, this definition of the goals of planning is too broad to be accurate. *Id.*

²²³ See JUERGENSMEYER & ROBERTS, *supra* note 10, at 26 (explaining that the comprehensive plan is not a “static blueprint” but instead may be “periodically reevaluated and amended”).

²²⁴ Cf. JUERGENSMEYER & ROBERTS, *supra* note 10, at 206 (explaining that some states prohibit such “exclusionary zoning”; however, U.S. Supreme Court has declined to do so).

²²⁵ *Id.* at 216 (discussing “inclusionary zoning” techniques designed to achieve such goals).

with a preexisting plan, it may be less likely to make arbitrary, whimsical zoning decisions.²²⁶ Assuming for the sake of argument that comprehensive plans are less likely to be arbitrary than zoning ordinances,²²⁷ this argument applies just as much to sprawl-oriented comprehensive plans as to plans furthering smart growth. Just as a plan may reflect a consistent vision of pedestrian-friendly development, it may also reflect a consistent vision of sprawling, automobile-oriented development.

Third, planning is comprehensive. While a zoning ordinance might address land use in isolation, a comprehensive plan may be more likely to address a wide variety of related concerns, such as land use, transportation, and environmental issues.²²⁸ For example, Jacksonville's comprehensive plan includes not only a "land use" element and a "transportation" element, but also sections relating to housing, historic preservation, recreation, conservation, capital improvements, public schools, other infrastructure, and intergovernmental relations.²²⁹

Because a comprehensive plan is not always limited to land use, such a plan will promote a community's vision more effectively than zoning alone. The drafters of a truly comprehensive plan, for example, will consider land use issues while drafting the plan's transportation section, but this is true whether the planners favor sprawl or smart growth. Thus, a completely sprawl-oriented comprehensive plan will promote sprawl more effectively than zoning alone, just as a smart growth-oriented plan might promote smart growth more effectively than zoning alone.

On the other hand, not all comprehensive plans embody a coherent vision. In the real world of politics, a comprehensive plan may be a compromise between a variety of visions. For example, the comprehensive plans of Boise and Seattle contain both provisions that seem to favor smart growth and provisions that could be interpreted to favor sprawl.²³⁰

²²⁶ See Mandelker, *supra* note 77, at 658 (stating that a member of an American Bar Association committee asked "land use lawyers and professors" why comprehensive plans were important, to which the most common answer "was that the most important function of the comprehensive plan is to prevent arbitrary land use decisions"); see also *id.* at 659-60 (listing numerous examples of arbitrary decisions such as zoning that applies different rules to similarly situated landowners).

²²⁷ *Id.* at 662 (noting possibility that comprehensive plans, like zoning rules, may reflect capture of political process by special interests).

²²⁸ See JUERGENSMEYER & ROBERTS, *supra* note 10, at 28 (planning process may address "land use, transportation, environment, utilities, housing" and other issues).

²²⁹ See JACKSONVILLE LAND USE PLAN, *supra* note 91.

²³⁰ See *supra* notes 104-11, 115-33, 152-60 and accompanying text.

In sum, comprehensive planning is a tool that enables a community to achieve its vision more effectively—yet this tool can be used just as easily for sprawl as for smart growth.

VI. CONCLUSION

The purpose of this Article is to criticize attempts to equate municipal comprehensive plans with smart growth. Although both comprehensive plans and smart growth may be desirable, they need not go together. A comprehensive plan, like a zoning ordinance, is a procedural tool that may be used to achieve a wide variety of substantive ends.

It follows that the mere existence of a comprehensive plan is not sufficient to create smarter growth. In fact, comprehensive plans sometimes favor sprawl by mandating single-use, low-density zoning and wide, automobile-oriented streets. Further, comprehensive plans are not necessary to achieve smarter growth. Although a comprehensive plan can encourage smart growth by allowing compact development, mixed use, and narrower streets, a reformed zoning code can also achieve these goals. A comprehensive plan can be useful insofar as it explains or consistently applies the policies behind a municipal zoning code—but this benefit applies to sprawl-oriented plans and codes as well as to those that encourage smart growth.

