

*Upscaling the Neighborhood*

Nicole Stelle Garnett\*

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*Introduction*

In recent years, America’s older suburbs—sometimes called ‘inner ring’ or ‘first’ suburbs—have received a tremendous amount of popular and scholarly attention.<sup>1</sup> A sense of doom pervades much of the commentary on these communities, which are home to approximately one-fifth of the nation’s population.<sup>2</sup> A steady stream of reports warn that many of our inner-ring communities are on a path of decline that will lead inevitably to the social and economic crises facing inner city communities.<sup>3</sup> Inner-ring suburbs are, according to these

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\* John P. Murphy Foundation Professor of Law, Notre Dame Law School.

<sup>1</sup> See, e.g., MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY (2002); BERNADETTE HANLON, ONCE THE AMERICAN DREAM: INNER-RING SUBURBS OF THE METROPOLITAN UNITED STATES (2010); WILLIAM H. HUDNUT III, HALFWAY TO EVERYWHERE: A PORTRAIT OF AMERICA’S FIRST-TIER SUBURBS (2003); ELIZABETH KNEEBONE & ALAN BERUBE, CONFRONTING SUBURBAN POVERTY IN AMERICA (2013); WILLIAM H. LUCY & DAVID L. PHILLIPS, CONFRONTING SUBURBAN DECLINE: STRATEGIC PLANNING FOR METROPOLITAN RENEWAL (2000).

<sup>2</sup> MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY (1998).

<sup>3</sup> Peter Dreier & Todd Swanstrom, *Suburban Ghettos like Ferguson are Ticking Time Bombs: The Protests there might be the First in a Wave of Suburban Riots*, WASH. POST, Aug. 21, 2014.

accounts, our next ghettos. The 2014 riots in Ferguson, Missouri—a poor, predominantly African American suburban community—heightened these anxieties about the future of the inner-ring, leading some to warn that the unrest in the St. Louis suburb was reflective of a pervasive and deep suburban dysfunction resulting from failed public policies at all levels of government.<sup>4</sup> Inner-ring suburbs have assumed a symbolic role previously reserved for struggling urban communities: They have become the poster children for all of the land-use and local government reforms *du jour*, a complete discussion of which is beyond the scope of this article.

Diagnosing the root cause of inner-suburban decline is no small task. (And, the task is made more complex by the fact that not all inner-ring suburbs are declining). Land-use and local-government scholars, especially those in the legal academy, tend to regard the woes of the inner suburbs in distributional terms. They argue that inner-ring communities are the defenseless victims of economic and demographic shifts beyond their control, shifts fueled by excessively fragmented local government authority over the “inputs” of a successful communities, including taxation, education, and land use planning. These scholars, who assert that this system of fragmented power ignores modern economic, social and political realities within metropolitan regions, tend to promote intra-metropolitan resource redistribution and the regional consolidation of local government authority.

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Pete Saunders, *The Death of America's Suburban Dream: The Events in Ferguson, Missouri Reveal the 'Resegregation' of America's Once-aspirational Inner Suburbs*, THE GUARDIAN, Sept. 5, 2014, Jeff Smith, *In Ferguson, Black Town, White Power*, NEW YORK TIMES, Aug. 17, 2014.

<sup>4</sup> ROBERT PUENTES & DAVID WARREN, ONE-FIFTH OF AMERICA: A COMPREHENSIVE GUIDE TO AMERICA'S FIRST SUBURBS (February 2006), <http://www.brookings.edu/research/reports/2006/02/metropolitanpolicy-puentes>.

While many elected leaders of inner-ring suburbs likely share these concerns, they find themselves powerless to enact laws with extraterritorial effects since their local powers stop at municipal boundaries. What they do have the power to address—through various combinations of land use regulations, economic development subsidies, and eminent domain—are their communities’ aesthetic challenges. And there is plenty of (at least anecdotal) evidence that inner-ring leaders attribute that their economic and demographic woes, at least in part, to the (negative) aesthetics of the local built environment. They therefore seek to use the tools of land-use planning to implement internally driven solutions that will “fix” their communities’ aesthetic problems by “upscaling” them.

At one level, these strategies might be seen as both proactive and laudable. I have elsewhere exhorted local government leaders to use land use policies to promote redevelopment from within.<sup>5</sup> The impulse to use the tools of land use policy (including zoning and eminent domain) represents an internal effort to address the challenges facing older suburbs by making them more attractive to affluent would-be residents from outside of the community. As Alan Ehrenhalt has observed, “It’s become increasingly clear that the demand in this country for an urban lifestyle—a hip lifestyle if you prefer—is considerable greater than the supply of places that offer it. Some way or other, this demand will be met. One way to meet it is ... the reclamation of modest working-class suburbs on the edges of our largest cities.”<sup>6</sup> All too frequently, however, upscaling efforts have (intended and unintended) negative consequences for current residents, who face as consequences either expropriation or gentrification (or both). And,

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<sup>5</sup> NICOLE STELLE GARNETT, *ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA* (2010); Robert C. Ellickson, *City, Heal Thyself*, 116 *YALE L.J. POCKET PART* 199 (2006), <http://yalelawjournal.org/forum/city-heal-thyself>.

<sup>6</sup> Alan Ehrenhalt, *The Saga of an Inner Suburb’s Struggle for an Identity*, *GOVERNING*, March 2016, <http://www.governing.com/columns/assessments/gov-columbia-heights-minnesota-suburbs.html>.

these “upscaling” efforts carry a high risk of failure, in which case the policies result in lose-lose propositions for the communities seeking to implement them.

Efforts to upscale struggling neighborhoods are, to be sure, nothing new. Indeed, today’s modest upscaling efforts of inner-ring suburbs pale in comparison the massive slash-and-burn upscaling that characterized postwar urban renewal efforts (the results of which hardly recommend the practice).<sup>7</sup> But modern upscaling efforts do have distinctive characteristics, thanks in large part to the emergence of new tools of land use regulation promoted by self-styled “new urbanists”—a group of architects and urban planning professionals who promote the development of mixed-land-use neighborhoods.<sup>8</sup> The new urbanists’ growing influence is reflected not only in the shifting design of American development practices, including redevelopment efforts, but also in the fact that the regulatory tools they favor—“transect zoning” and “form-based codes”—have moved into the mainstream in recent years. These tools, which are increasingly featured in inner-ring upscaling efforts, focus specifically on the aesthetics of the built environment. And, they are attractive to local leaders eager to reverse their communities’ fortunes from within. Unfortunately, while promoted as a way to “simplify” land use regulations, these tools are often exactly the opposite: They are detailed, complex, and carry within them high compliance costs. And, their effective implementation sometimes requires the

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<sup>7</sup> On Urban Renewal, *see generally, e.g.*, URBAN RENEWAL, THE RECORD AND THE CONTROVERSY (James Q. Wilson, ed. 1966); JOHN C. TEAFORD, THE ROUGH ROAD TO RENAISSANCE: URBAN REVITALIZATION IN AMERICA 44-80 (1990); BERNARD J. FRIEDAN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 15-38 (1991); CHARLES N. GLAAB, A HISTORY OF URBAN AMERICA (3d ed. 1983); ZANE L. MILLER, THE URBANIZATION OF MODERN AMERICA: A BRIEF HISTORY (1973).

<sup>8</sup> *See Charter of the New Urbanism*, CONGRESS FOR THE NEW URBANISM (2001), [http://www.cnu.org/sites/files/charter\\_english.pdf](http://www.cnu.org/sites/files/charter_english.pdf) (stating the principles of the new urbanism); *What is CNU?*, CONGRESS FOR THE NEW URBANISM, [http://www.cnu.org/who\\_we\\_are](http://www.cnu.org/who_we_are) (last visited Aug. 30, 2011) (stating the principles of the new urbanism); *see also* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 149-54 (1999) (describing principles of the new urbanism).

use of eminent domain to erase the vestiges of development shaped by traditional Euclidean zoning practices.

This article explores current efforts to upscale inner-ring suburbs, with a particular focus on the regulatory devices in the new urbanist toolbox. Part I provides a brief overview of America's inner-ring suburbs. Part II reviews the proposals to address their challenges through regionalization and redistribution. Part III examines efforts to address the inner-ring as an aesthetic problem, both with traditional tools of redevelopment and with the regulatory tools of the new urbanism. The final section of the paper makes the case that the benefits of upscaling, and especially the use of transect zoning and form-based coding have been oversold, and its costs underappreciated. These codes are hardly a panacea, and suburban leaders would do well to resist the deceptive allure of controlled land-use diversity that they offer.

### *I. The Inner-Suburban "Problem"*

Generalizations about the current state of inner-ring suburbs are risky, given the stark regional and intra-metropolitan variation among inner-ring communities. For example, inner suburban communities in the south and Sunbelt are quite distinct from those in the "old and cold" metro regions of the Northeast and the Midwest. Moreover, while some older suburbs, like Ferguson, Missouri, are poor, majority-minority communities, others are extremely affluent. Indeed, many of the wealthiest communities in the United States are tony older suburbs. Indeed, despite the gloom pervading much of the commentary, inner-ring suburbs continue to be relatively wealthier, and have a better-educated workforce, lower rates of unemployment, and higher housing values than the national median.<sup>9</sup>

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<sup>9</sup> Puentes and Warren, *supra* note 4, at 5-7.

That said, inner-ring suburbs unquestionably have undergone dramatic demographic transformations in recent decades. To begin, as demographer William Frey has observed, these suburbs are “not just for white people anymore.”<sup>10</sup> Many inner-ring communities that were once exclusively or almost-exclusively white—and have been indicted by some scholars as the beneficiaries of “white flight”<sup>11</sup>—are today racially diverse. A majority of racial minorities in the nation’s largest metropolitan areas now live in suburbs,<sup>12</sup> including just over fifty percent of African Americans in the largest metro regions.<sup>13</sup> The bulk of suburban population gains over the past two decades were attributable to minority migration to suburbs, especially inner-ring suburbs. These demographic shifts include unprecedented 'black flight' from cities,<sup>14</sup> dramatic increases in Hispanic suburban population share,<sup>15</sup> and the emergence of new suburban immigrant gateways and 'ethnoburbs.'<sup>16</sup> In 2014, sixty-one percent of immigrants lived in suburbs (up from just over fifty percent in 2000), and the available evidence strongly suggests that increasing numbers of immigrants are shunning traditional “gateway” cities and settling directly in suburbs, especially in inner-ring communities.<sup>17</sup>

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<sup>10</sup> William H. Frey, *The Suburbs: Not Just for White People Anymore*, *The New Republic*, Nov. 24, 2014.

<sup>11</sup> See generally THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (1996); ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940-1960* (1983); See KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* (2005). *But cf.* See ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* 27-28 (2005) (observing that many urban neighborhoods were once suburbs later absorbed by annexation into the urban polity); GERALD GAMB, *URBAN EXODUS: WHY THE JEWS LEFT BOSTON AND THE CATHOLICS STAYED* 24-26 (1999) (arguing that neighborhood change began in the 1920s, with rise of the streetcar suburb and culminated in 1950s and 1960s).

<sup>12</sup> Frey, *supra* note 10.

<sup>13</sup> Alana Semuels, *No, Most Black People Don't Live in Poverty—or Inner Cities*, *THE ATLANTIC*, Oct. 12, 2016.

<sup>14</sup> See ANDREW WIESE, *PLACES OF THEIR OWN: AFRICAN-AMERICAN SUBURBANIZATION IN THE TWENTIETH CENTURY* 5-10 (2004). For a demographic overview of African-American suburbanization, see STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE* 211 (1997).

<sup>15</sup> See William H. Frey, *Melting Pot Suburbs: A Study of Suburban Diversity*, in *REDEFINING URBAN & SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000*, VOL. I 155, 167-74 (Bruce Katz & Robert E. Lang, eds. 2003).

<sup>16</sup> WEI LI, *ETHNOBURB* (2009); JOHN ICELAND, *WHERE WE LIVE NOW: IMMIGRATION AND RACE IN THE UNITED STATES* 38 (2009).

<sup>17</sup> In 1999, the U.S. immigrant population was evenly divided between urban areas and suburban ones. Michael Jones-Correa, *Reshaping the American Dream: Immigrants, Ethnic Minorities, and the Politics of the New Suburbs*, in *THE NEW SUBURBAN HISTORY* 183 (Kevin M. Kruse and Thomas J. Sugrue, eds. 2006). While is difficult to

Many inner-ring suburbs also are facing new economic strains. A comprehensive study of the economic and demographic profiles of sixty-four inner-ring suburban counties undertaken by Robert Puentes and David Warren in 2006 found that, while the median income in inner-ring suburbs remains about twenty-five percent higher than the nation's median, income levels in inner-ring suburbs were stagnating. Puentes and Warren also found that while growth rates in inner-ring suburbs outpaced central cities, inner suburbs grew at only half the rate of newer outer-ring suburbs. And, growth stagnation is frequently coupled with an aging population and stagnating or declining housing values. Finally, Puentes and Warren found that the poverty rates in inner-ring suburbs was increasing, even as national income levels rose and poverty levels declined.<sup>18</sup> In fact, during first decade of the twentieth-first century, the number of poor individuals living in the suburbs rose by more than half, which was more than twice the 23 percent rate of increase in cities. Moreover, the number of poor people living in poor suburban neighborhoods—that is, neighborhoods where poverty rates exceed 40 percent—rose by 63 percent between 2001 and 2010. These neighborhoods are, not surprisingly, concentrated in inner suburban communities.<sup>19</sup>

## II. *The Inner Ring as a Distributional Problem: The Regionalist Response*

The dominant view among legal academics is that the challenges facing inner-ring suburbs as a result of these demographic shifts—such as a declining tax base, strains on public education,

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discern how many of these new suburbanites spent time in major American cities before moving to suburban homes, evidence from the 2000 census suggests that many immigrant move directly to the suburbs upon arriving in the U.S. During the 1990s, suburban areas in gateway metros gained more immigrants in *absolute numbers* as well as percentage growth. (The suburban immigrant population in Atlanta and Los Vegas increased by 283- and 251-percent, respectively!) Audrey Singer, “The Rise of New Immigrant Gateways,” Brookings Institution (2004), <https://www.brookings.edu/research/the-rise-of-new-immigrant-gateways/>.

<sup>18</sup> Robert Puentes & David Warren, “One-Fifth of America: A Comprehensive Guide to America’s First Suburbs,” Brookings Institution (February 2006), <http://www.brookings.edu/research/reports/2006/02/metropolitanpolicy-puentes>.

<sup>19</sup> ELIZABETH KNEEBONE & ALAN BERUBE, *CONFRONTING SUBURBAN POVERTY IN AMERICA* (2013)

aging infrastructure, increasing crime and a heavier social-service burden—reflect a distributional problem that is endemic to the structure of U.S. local government law. Many scholars have built a careful case that the current system of fragmented and overlapping local authority is irrational and inefficient, for a number of related reasons: According to critics, the fragmentation of local power among dozens, if not hundreds, of municipalities guarantees that local decisions will adversely affect other localities within a region. Arbitrarily drawn local boundaries enable localities to impose costs on their neighbors: exclusionary zoning forces poorer cities to shoulder the burden of housing low income individuals,<sup>20</sup> competition for attractive land uses fuels suburban sprawl,<sup>21</sup> environmental, and natural resource problems transcend municipal boundaries, etc.<sup>22</sup> Metropolitan fragmentation also increases the transactions costs associated with inter-local bargaining, leading, according to many observers, to a suboptimal level of government cooperation to address interlocal externalities.<sup>23</sup> Moreover, the proliferation of multiple special purpose governments with overlapping jurisdictions may reduce political accountability, encourage excessive investment in certain government functions, and enable municipalities to dodge tax- and debt-limitations.<sup>24</sup> According to critics, the

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<sup>20</sup> See, e.g., Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 177 (William A. Fischel, ed. 2006) (discussing use of exclusionary zoning in inter-municipal competition); Briffault, *Boundary Problem*, *supra* note 22, at 1136-37 (describing exclusionary zoning); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to the New Regionalism*, 88 *GEO. L.J.* 1987, 1993-95 (2000).

<sup>21</sup> See Nicole Stelle Garnett, *Trouble Preserving Paradise?* 87 *CORN. L. REV.* 158, 163 (2001) (summarizing literature).

<sup>22</sup> See, e.g., DAVID RUSK, *CITIES WITHOUT SUBURBS* 85-86 (2 ed. 1995), ORFIELD, *supra* note 2, at 87; Richard Briffault, *Localism and Regionalism*, 48 *BUFFALO L. REV.* 1, 18-21 (2000) 18-21; Richard Briffault, *The Local Government Boundary Problem in Metropolitan Governance*, 48 *STANFORD L. REV.* 1115, 1132-33, 1147-50 (2006); Cashin, *supra* note 20, at 2043.

<sup>23</sup> See, e.g., NEAL R. PEIRCE, *CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD* 97-99 (1993); Briffault, *Boundary Problem*, *supra* note 22 at 1147-50.

<sup>24</sup> See Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 *N.Y.U. L. REV.* 190, 204-207 (2001) (discussing accountability problems raised by special purpose authorities). See also CHRISTOPHER R. BERRY, *IMPERFECT UNION: REPRESENTATION AND TAXATION IN MULTILEVEL GOVERNMENTS* (2009); Jacob Gerson & Christopher Berry, *Fiscal Consequences of Electoral Institutions*, 52 *J. L. & ECON.* 469 (2009).



“fragmentation” of American metropolitan regions enforces intra-metropolitan inequalities, leaving older struggling suburbs to play a constant, and futile, game of “catch up.” They are unable to finance improvements in local services without raising taxes, but tax increases in turn make inner-ring suburbs less attractive places to live. As Bernadette Hanlon has argued, “The ‘push factors’ of deteriorating schools and poor services combined with relatively high tax rates encourage further population loss, particularly of any remaining high income families.”<sup>8</sup>

Critics who view the problems of the inner-ring suburbs in distributional terms tend to endorse redistributive policy solutions: Growth management is promoted as a means of redirecting residents who might otherwise locate in outer suburbs into older, built-up areas. Tax-base sharing is endorsed as a mechanism for ensuring the “fair” distribution of fiscal resources across municipalities in a metropolitan region. And new regional-government structures are proposed to tame the excesses of inter-municipal competition for resources and residents, allocate the inputs required for new development (such as infrastructure funds), and foster intra-metropolitan collaboration.<sup>25</sup> Commentators such as Richard Briffault and Myron Orfield specifically link the need for regional policy solutions to the plight of inner-ring suburbs. As Briffault has argued, “for many poorer urban municipalities—especially the older, declining suburbs, which lack even the business districts, housing stock, and cultural amenities of older cities ... [a] regionalist strategy that recognizes the relationships and connections among localities in a metropolitan area is essential.”<sup>26</sup> These arguments are not without intuitive appeal, although—as I have written elsewhere—it is unclear whether the costs of policies designed to tame the woes of metropolitan fragmentation will sacrifice too many of the benefits of the inter-

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<sup>25</sup> See, e.g., Richard Briffault, *Our Localism, Part I: The Structure of Local Government Law*, 90 COLUMBIA LAW REVIEW 1, 18-24 (1990).

<sup>26</sup> Richard Briffault, *Beyond City and Suburb: Thinking Regionally*, 116 YALE L.J. POCKET PART 203 (2006), <http://yalelawjournal.org/forum/beyond-city-and-suburb-thinking-regionally>.

municipal competition predicted by Charles Tiebout.<sup>27</sup> Indeed, all regionalist solutions share a this challenge: It is generally accepted that, once incorporated, suburban localities use a variety of regulatory and taxation policies to compete for Charles Tiebout's "consumer voters,"<sup>28</sup> a reality that leads many economists to argue that metropolitan fragmentation subjects local governments to some approximation of market forces and makes them more responsive to constituent preferences.<sup>29</sup>

### III. *The Inner-Ring as an Aesthetic Problem: The Land-Use Planning Response*

Upscaling efforts are a true Tiebout-ian response to the struggles of inner-ring communities. They seek to attract new residents by addressing, from within, the aesthetic shortcomings of older suburbs. Over the past several decades, many struggling *urban* communities have experienced a renaissance, thanks to a confluence of factors: Serious crime has declined; policing and other local government policies have renewed a focus on the impediments to residents' quality of life; and Americans' (or, at least elite Americans') suburban affinities have waned and aesthetic preference shifted to favor eclectic, more-vibrant, diverse urban

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<sup>27</sup> Nicole Stelle Garnett, "Suburbs as Exit, Suburbs as Entrance," *Michigan Law Review* 160, (November 2997): 277; Nicole Stelle Garnett, "Unbundling Homeownership: Regional Reforms from the Inside Out," *Yale Law Journal* 119, (June 2010): 1905; Charles M. Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy* 64, no. 5 (October 1956): 416-24.

<sup>28</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417-20 (1956). See also generally THE TIEBOUT MODEL AT 50: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES (William A. Fischel, ed. 2006).

<sup>29</sup> See, e.g. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS, CH. 10 (2001); John D. Donohue, *Tiebout? Or Not Tiebout? The Market Metaphor and America's Devolution Debate*, 11 J. ECON. PERSP. 73, 74 (1997) (asserting that "[d]iverse policy regimes can cater to heterogeneous preferences"); Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, in PERSPECTIVES ON PUBLIC CHOICE 73, 83-85 (Dennis C. Mueller ed., 1997) (arguing that inter-local competition will increase efficiency in production of public goods); Richard F. Wagner & Warren E. Weber, *Competition, Monopoly, and the Organization of Government in Metropolitan Areas*, 18 J. L. & ECON. 661, 684 (1975) ("[A]n increase in the number of competing and overlapping governments will lead the public economy to more closely perform as a competitive industry."), See also, e.g., MARK SCHNEIDER, THE COMPETITIVE CITY: THE POLITICAL ECONOMY OF SUBURBIA 63-69 (1989) (purporting to find that tax rates and government expenditures are lower in more fragmented metropolitan areas). Cf. Fennell, *Exclusion's Attraction*, *supra* note 20, at 177 ("Tiebout's ideas cannot be fully appreciated without taking into account the place of exclusion both as an attractive item . . . available to consumer-voters and as a constraint on the choice sets that consumer-voters encounter.")

communities.<sup>30</sup> The “urban rebound” phenomenon has not be experienced equally in all cities, and, indeed, a case can be made that it has been oversold. Edward Glaeser and Jesse Shapiro helpfully reminded urban boosters, during the last few decades, “Warm, dry places grew. Cold, wet places declined.”<sup>31</sup> And, I have elsewhere cautioned that the rebound phenomena has primarily been fueled by elites, especially young professionals, whose urban sojourns tend to persist only as long as they remain childless.<sup>32</sup> But the renewed fortunes of so many large urban centers has set many local government leaders “on a hunt to put sex in the city” in order to attract the kinds of residents and businesses who are, well, attracted to sexy cities.<sup>33</sup>

Inner-suburban leaders also are eager to attract them, but many inner suburbs are decidedly unsexy. That is to say, to the extent that a primary driver of the urban rebound is a shift in elite preferences, especially aesthetic preferences, for urban over suburban environs, many inner-ring suburbs find themselves unable to catch the wave. Note that Briffault’s observation above is couched in both distributional an aesthetic terms: Inner-ring suburbs are not only victims of an unjust system of local government law, but they find themselves unable to reform from within because they lack the physical and cultural “amenities” favored by wealthier would-be residents.<sup>34</sup> Many observers share Briffault’s concern that the built environment in many older suburbs is aging, unattractive, and unappealing to elites. These observers contrast the housing and commercial stock in many inner-ring suburbs (tract, ranch and split-level houses and strip malls) to the older, more architecturally appealing homes and commercial buildings found in

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<sup>30</sup> See NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 73-74 (2009); Edward Glaeser & Joshua Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275 (2006).

<sup>31</sup> Edward L. Glaeser & Jesse M. Shapiro, *City Growth: Which Places Grew and Why*, in 1 REDEFINING URBAN AND SUBURBAN AMERICA: EVIDENCE FROM CENSUS 2000, at 13, 31 (Bruce Katz & Robert E. Lang eds., 2003).

<sup>32</sup> Chicago piece about tax credit scholarships

<sup>33</sup> John Leland, *On a Hunt for Ways to Put Sex in the City*, N.Y. TIMES, Dec. 11, 2003.

<sup>34</sup> Briffault, *Beyond City and Suburb*, *supra* note 25.

central cities and select early suburbs.<sup>35</sup> The Manhattan Institute’s Aaron Renn recently observed, for example, that “[i]n some ways, struggling inner-ring suburbs are harder to revive than central cities.... [because] unlike inner-city neighborhoods, inner-ring suburbs often have additional serious structural challenges. They often lack of good transit access, for example. They also sometimes are dominated by older, smaller Cape Cod or ranch-style housing that in need of repairs and out of favor in the market. And they don’t have the distinctive assets of central city downtowns to draw on.”<sup>36</sup> This critique is primarily directed not at the true “first suburbs,” as inner-ring suburbs are sometimes called, but at what more accurately might be called the second suburbs. The first American suburbs were developed prior to the Great Depression, and tend to have the older housing stock and traditional street front commercial districts that are now in favor.<sup>37</sup> The second wave of suburbs, which were developed on a massive scale in the postwar period, lacks such amenities. These homes and communities are considered by many to be aesthetically challenged timepieces with little to offer in the frenzied metropolitan competition for wealthier residents.<sup>38</sup>

The distributional view of inner-suburban problems suggests policy solutions that would minimize competition between municipalities. The aesthetic view suggests a different approach, one that seeks to overcome impediments to competition and renewal imposed by the presumably unappealing built environment of post-war suburbs. Critics raising aesthetic concerns assert that

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<sup>35</sup> D. Jamie Rusin, *et al.*, *New Suburbanism: Reinventing Inner ring Suburbs*, URBAN LAND MAGAZINE (July 8, 2013), <http://urbanland.uli.org/planning-design/new-suburbanism-reinventing-inner-ring-suburbs/>;

<sup>36</sup> Aaron Renn, *How to Save a Dying Suburb*, CITYLAB (Sept. 19, 2017), <https://www.citylab.com/equity/2017/09/suburbs-should-merge/540258/>.

<sup>37</sup> *See, e.g.*, Stephen Koff, *Why Some Inner-Ring Suburbs Succeed*, CLEVELAND.COM, July 12, 2016, [http://www.cleveland.com/metro/index.ssf/2016/07/the\\_secret\\_to\\_a\\_successful\\_sub.html#0](http://www.cleveland.com/metro/index.ssf/2016/07/the_secret_to_a_successful_sub.html#0). *See also generally*, BRUEGMAN, *supra* note \_\_\_, 21-41.

<sup>38</sup> *See* Pete Saunders, *Inner Ring Suburbs Could Use Some Attention*, FORBES (Sep. 28, 2016) (distinguishing suburbs in the “forty to sixty year range”).

inner suburbs cannot be expected to compete because they lack the inputs needed to fuel successful regeneration, especially the types of residential and commercial structures attractive to would-be gentrifiers. In a recent book, for example, Ellen Dunham-Jones and June Williamson argue that suburbs need to be “retrofitted” to reflect contemporary architectural and urban design preferences and accommodate modern land use patterns. That is, “isolated privately owned malls and aging office parks” need to be demolished and replaced by “multiblock, mixed-use town centers,” “[e]dge center agglomerations of suburban office and retail...interlaced with residences and walkable streets,” “ambitious new public transit networks ... proposed, constructed and integrating into rapidly developing suburban contexts,” and [a]rchaic zoning ordinances ... thoroughly overhauled to permit higher-density, mixed-use development.<sup>39</sup> Similarly, Pete Saunders argued in *Forbes* that inner-ring suburbs can avoid a “dystopian” future by taking a few steps to address their aesthetic woes. These included: “contemporize your housing stock,” “diversify your housing stock,” and “make walkability a priority.”<sup>40</sup>

Not surprisingly, new urbanists tend to embrace the view that inner-ring suburbs’ many problems flow, in large part, from aesthetic challenges.<sup>41</sup> From its inception, the new urbanism has been, in important respects, an aesthetic critique of suburbia, which new urbanists view as an affront to good urban design. Over the last few decades, the new urbanists have mounted a remarkably successful public relations campaign against traditional zoning practices and the suburban land-use patterns resulting from them. The new urbanists’ case against zoning is part anti-suburban polemic and part pro-urban philosophy.<sup>42</sup> At heart, the new urbanists’ claim is that

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<sup>39</sup> Ellen Dunham-Jones & June Williamson, *RETROFITTING SUBURBIA: URBAN DESIGN SOLUTIONS FOR REDESIGNING SUBURBS 3* (2011).

<sup>40</sup> Saunders, *supra* note 38.

<sup>41</sup> D. Jaimie Rusin, et al., *New Suburbanism: Reinventing Inner-Ring Suburbs*, URBANLAND, July 8, 2013.

<sup>42</sup> See e.g., LÉON KRIER, *THE ARCHITECTURE OF COMMUNITY* 104 (2009) (“Functional zoning replaces the organic order of the city with the mechanical disorder of the suburbs.”).

cities are good for us, and suburbs are bad. Or, to put the claim into social science terminology, the new urbanists claim that cities generate social capital while suburbs inhibit it.<sup>43</sup> Thus, it follows that zoning laws that mandate a single-land-use, “suburban” built environment ought to be scrapped. These claims build, in important ways, upon Jane Jacobs’s enormously influential book, *The Death and Life of Great American Cities*. Jacobs wrote at the apex of the urban renewal period—a time when urban planning ideology and practices strongly favored the imposition of single-land-use patterns on our cities, even to the point of demolishing mixed-land-use communities in order to replace and modernize them. She vehemently rejected the accepted wisdom that dense, mixed-land-use urban neighborhoods were hopelessly antiquated and unhealthy. On the contrary, she argued that mixed-land-use neighborhoods are critical to city life.<sup>44</sup> But, importantly, Jacobs cautioned that her ideas should be not be applied to suburbs because they are “totally different organisms from great cities.”<sup>45</sup> New urbanists have thrown that caution aside. They emphatically believe that suburbs need to be urbanized.

The new urbanists’ also disregard Jacobs’ skepticism about using the tools of land use planning to transform the aesthetics of the built environment. While new urbanists echo Jacobs in their embrace of urban land-use patterns, their preferred method of achieving them departs dramatically from her skepticism of government intervention to reorder and upscale communities and her relatively libertarian belief that cities best thrive when they are left alone by the government.<sup>46</sup> The new urbanism is far from a libertarian project. On the contrary, new

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<sup>43</sup> For a thoughtful discussion of the new urbanism and social capital, see Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 559–61 (2006).

<sup>44</sup> See generally JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

<sup>45</sup> *Id.* at 22 (“I hope no reader will try to transfer my observations into guides about what goes on in towns, or little cities, or in suburbs . . .”).

<sup>46</sup> See ANDRÉS DUANY ET AL., SMARTCODE: VERSION 9.2 iv (2012) (“[The SmartCode] is meant to be law . . . administered by municipal planning departments and interpreted by elected representatives of local government.”); *What Are Form-Based Codes?* FORM BASED CODE INSTITUTE <http://www.formbasedcodes.org/what-are-form->

urbanists believe that coercive action is required to achieve good urban design because, to borrow from James Howard Kuntsler, “Standards of excellence in architecture and town planning have collapsed....What is thrown away must now be reconstructed, spelled out, and reinstated ... through formal codes....These codes will invoke in words and graphic images standards of excellence that previously existed in the minds of ordinary citizens but which have been forsaken and forgotten. The codes, therefore, aim to restore the collective cultural consciousness.”<sup>47</sup>

The codes that the new urbanists promote to accomplish this goal, reject traditional zoning practices, which regulate based upon *land use*, in favor of a system of aesthetic controls that regulates the the appropriate *form* of buildings in a given neighborhood.<sup>48</sup> Their regulatory alternative to zoning traces its origins to architect Andrés Duany’s 2003 “SmartCode,” which proceeds upon the assumption that development naturally progresses from urban (most intense) to rural (least intense).<sup>49</sup> Duany calls this progression the “transect”<sup>50</sup> and urges cities to replace use zoning with the regulation of building form appropriate to the various “transect zones” along the progression.<sup>51</sup> Duany’s “SmartCode” articulated progressively less dense “transect zones”—urban core, urban center, general urban, sub-urban, rural, and natural.<sup>52</sup> Subsequent

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based-codes (last visited May 30, 2012) (“[F]orm-based codes are regulatory, not advisory.”).

<sup>47</sup> JAMES HOWARD KUNTSLER, HOME FROM NOWHERE: REMAKING OUR EVERYDAY WORLD FOR THE 21<sup>ST</sup> CENTURY 134-35 (1996).

<sup>48</sup> See DANIEL PAROLEK ET AL., FORM-BASED CODES 4,12 (2009) (describing form-based codes as a method to regulate new urbanist-style development by controlling physical form rather than land use).

<sup>49</sup> ANDRÉS DUANY ET AL., SMARTCODE & MANUAL (2006), [http://www.dpz.com/pdf/3000-SmartCode\\_v8.0%20combined.pdf](http://www.dpz.com/pdf/3000-SmartCode_v8.0%20combined.pdf) (including the complete SmartCode v8.0)

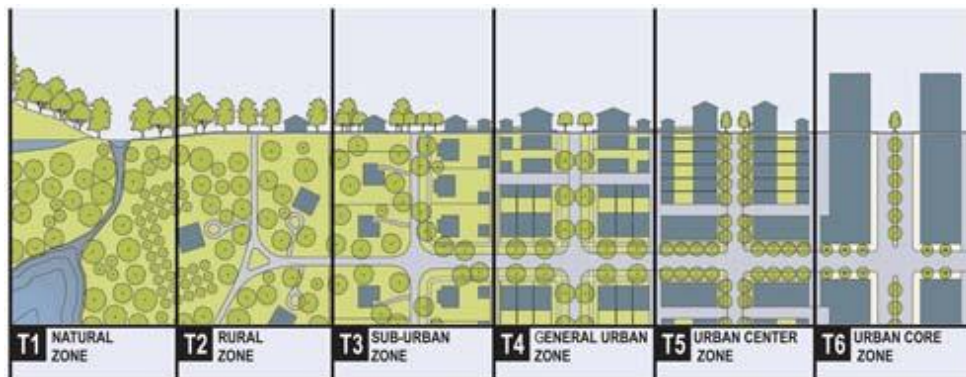
<sup>50</sup> New urbanists borrow the concept of the “transect” from biologists and ecologists, who use the transect—a cut or a path through part of the environment showing a range of different habitats—to study the symbiotic elements natural habitats. MICHAEL ALLABY, DICTIONARY OF THE ENVIRONMENT 387 (defining an environmental transect as a “cross-section of an area, used as a sampling line for recording the vegetation”).

<sup>51</sup> *Id.* at C2; Andrés Duany & Emily Talen, *Transect Planning*, 68 J. AM. PLAN. ASS’N, 245, 245–49 (2002).

<sup>52</sup> ANDRES DUANY ET.AL., SMARTCODE & MANUAL xi (2009).

transect zoning schemes, by and large, adopt this formula, depicted in Figure One, which assumes a natural progression of urban development from more dense to less.<sup>53</sup>

Figure One: The Urban Transect



Source: Center for Applied Transect Studies

Drawing upon this concept, proponents of transect zoning urge regulators to scrap traditional zoning codes, which regulates based upon property *uses*, in favor of a system of regulation based upon building density and form. Thus, transect zoning permits a wide variety of land uses throughout a community, provided that these land uses are carried out in buildings that are appropriate in size and design to the zone where they are located.<sup>54</sup> The extent of the new urbanists’ influences is increasingly reflected in the fact that they also are successfully convincing regulators to adopt “transect zoning” laws and the “form-based” codes that accompany and supplement them.<sup>55</sup> The available evidence suggests that increasing numbers of local governments are implementing the concepts as alternatives (or supplements) to traditional

<sup>53</sup> CENTER FOR APPLIED TRANSECT STUDIES: THE TRANSECT, <http://www.transect.org/transect.html> (“Before the automobile, American development patterns were walkable, and transects within towns and city neighborhoods revealed areas that were less urban and more urban in character. This urbanism could be analyzed as natural transects are analyzed.”)

<sup>54</sup> See DANIEL PAROLEK ET AL., FORM-BASED CODES 18-19 (2009)

<sup>55</sup> See Doris Goldstein, *New Urbanism: Recreating Florida by Rewriting the Rules*, 80 Fla. B.J. 63 (2006); Philip Langdon, *Form Based Codes Reach Critical Mass*, BETTER! CITIES & TOWNS, Apr. 1, 2010, available at <http://bettercities.net/article/form-based-codes-reach-critical-mass>.



zoning practices.<sup>56</sup> Local governments as large as Miami, Denver and Cincinnati and as small as 100-person villages have enacted these devices into law, although the scope of their reach varies by jurisdiction, with some applying city-wide and other to specific neighborhoods or redevelopment projects.<sup>57</sup>

Proponents of transect zoning argue that the codes defining the appropriate building forms along the transect, known in the vernacular as form-based codes, ought to be “simple” and “short.”<sup>58</sup> In implementation, however, these codes frequently do not live up to the ideal but rather can run into the hundreds of pages. New urbanists have specific ideas about how buildings should look—they should not only be architecturally “appropriate,” but “welcoming” in their details.<sup>59</sup> Many form-based codes favor “traditional” building designs—that is, those reminiscent of the pre-zoning communities that adherents to the movement champion as a planning ideal.<sup>60</sup> And, while most new urbanists argue that form-based codes are distinct from architectural regulations, in practice, many form-based codes mandate architectural design elements in painstakingly excruciating detail.<sup>61</sup> As one critic of Denver’s transect zoning reform

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<sup>56</sup> As of September 2010, there were 332 form-based codes that meet Form-Based Code Institute criteria. See SMARTCODE COMPLETE: CODE STUDY <http://www.smartcodecomplete.com/learn/links.html> (last visited June 1, 2010).

<sup>57</sup> <http://transect.org/transect.html>.

<sup>58</sup> *Id.* at 39.

<sup>59</sup> See generally KRIER, *supra* note 42.

<sup>60</sup> See *id.* at 239, 247-50 (touting the values of traditional architecture and its applicability to modern planning).

<sup>61</sup> See Nate Berg, *Brave New Codes*, ARCHITECT MAGAZINE (July 1, 2010), [http://www.formbasedcodes.org/files/Brave\\_new\\_codes.pdf](http://www.formbasedcodes.org/files/Brave_new_codes.pdf). There are both practical and political reasons that architectural details pervade transect zoning regulations. Practically, which building “forms” belong in a given transect zone is not a self-evident proposition, but rather must be spelled out in architectural codes. See Jerry Weitz, *Form-Based Codes: A Supportive but Critical Perspective*, PRACTICING PLANNER, (2005). Politically, detailed architectural restrictions likely serve to placate groups resistant to regulatory changes favoring mixed land uses, including especially homeowners worried about protecting their property values from externalities generated by non-residential land uses. For example, my own research with Margaret Brinig found that local responses to a California statute mandating that zoning laws be amended to permit accessory dwelling units (*i.e.*, “granny flats”) in single-family neighborhoods frequently incorporated architectural regulations. Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One’s Own? Accessory-Dwelling-Unit Reforms and Local Parochialism*, 45 URBAN LAWYER 519 (2013).

complained, “at 730 pages, not including 76 neighborhood maps and six Overlay District maps, the new zoning code is being called an improvement. It is a control-freak fantasy, with detailed rules for every aspect of city life.”<sup>62</sup>

#### IV. *Upscaling in Action: A Cautionary Tale*

Transect zoning and form-based codes are attractive to inner-ring suburban leaders, since they are billed as tools that will help them remedy the aesthetic challenges that prevent their communities from competing with their suburban neighbors, both older and newer. And, since local governments are empowered by state zoning enabling acts to enact land-use regulations, even non-home rule communities can employ this tool from within.<sup>63</sup> But, contrary to the claims of new urbanist boosters, transect zoning and form-based codes are not a *simple* solution to anything, and certainly not the aesthetic woes of inner-ring suburbs. Not only do the codes impose high compliance costs, but both their organizing principle—the transect—and their aspirational aesthetics at odds with the built landscape of most postwar suburbs. As a result, many new urbanist efforts in inner-ring suburbs start with a bulldozer, raising both distributional and constitutional questions.

##### A. *Compliance Costs*

In an important recent paper, Daniel Shoag and Peter Ganong examine the macroeconomic puzzle that has stumped economists for decades. Historically, regional incomes in the United States converged because residents of states with lower median incomes moved to wealthier states. About thirty years ago, this convergence stopped. Shoag and Ganong demonstrate that

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<sup>62</sup> Kenny Be, *Everybody Must Get Zoned*, DENVER WESTWORD BLOG (Jan. 20, 2010 8:36 am), [http://blogs.westword.com/latestword/2010/01/everbody\\_must\\_get\\_zoned.php?page=1](http://blogs.westword.com/latestword/2010/01/everbody_must_get_zoned.php?page=1).

<sup>63</sup> See Robert J. Sitkowski & Brian W. Ohm, *Enabling New Urbanism*, 34 URB. LAW. 935 (2002).

the culprit is land use regulations that price lower-skilled, lower-income workers out of more-affluent states.<sup>64</sup> Form-based codes are not likely to ameliorate the situation, but instead to further restrict inter-jurisdictional mobility within metropolitan areas.

As discussed previously, transect zoning is billed as embracing a simple theory about how to regulate urban development, which is that buildings appropriate for the city center should go in the city center, regardless of their use, and suburban buildings should look suburban, again, regardless of their use. In its implementation, however, transect zoning is anything but simple. As a practical matter, as even some proponents acknowledge, form-based codes frequently impose high compliance costs.<sup>65</sup> These costs flow in large part from the imposition of architectural standards, which, at a minimum, require securing the services of an architect to ensure compliance but may also require expensive materials.<sup>66</sup> This extra layer of difficulty supplements pre-existing regulations of “building form,” including building codes and the accessibility regulations of the Americans with Disabilities Act (ADA).<sup>67</sup> Moreover, the public-choice realities discussed above often require that form-based codes supplement, rather than

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<sup>64</sup> Peter Ganong & Daniel Shoag, *Why has Regional Income Convergence Stopped?*, 102 J. URB. ECON. 76 (2017).

<sup>65</sup> See, e.g., Joseph E. Gyourko & Witold Rybczynski, *Financing New Urbanism Projects: Obstacles and Solutions*, 11 HOUSING POL’Y DEBATE 733, 739-40 (2000) (concluding, based on an extensive survey of builders and developers, that new urbanist projects are more expensive); Philip Langdon, *The Not-So-Secret Code: Across the U.S., Form-Based Codes Are Putting New Urbanist Ideas into Practice*, AM. PLAN. ASS’N, Jan. 2006, at 24, 28 (asserting that the cost of form-based codes “exceeds that of a conventional land-use plan” making citywide form-based coding “prohibitively expensive”).

<sup>66</sup> See Ajay Garde, *Designing and Developing New Urbanist Projects in the United States: Insights and Implications* 11 J. OF URB. DESIGN 33, 43-44 (2006) (noting that architectural features, materials and highly detailed design codes are cost burdens associated with New Urbanism); PLANNING DESIGN GRP., ECONOMIC RETURN ON NEW URBANISM 1, 3 (2007) (asserting that the 15% to 30% increased costs associated with New Urbanism in Central Florida are due primarily to architectural design, increased infrastructure and additional operation and maintenance costs).

<sup>67</sup> See, e.g., CNTY. OF SANTA BARBARA PLANNING & DEV. DEP’T, LOS ALAMOS BELL STREET DESIGN GUIDELINES 24 (2011) (mandating that ramps and guiderails should complement the overall design intent while conforming with existing building code and ADA requirements). For a discussion of general building costs associated with ADA compliance, see John Haman, *Cost of ADA Compliance Unavoidable for Builders*, ARK. BUS., March 17, 1997, at 31, available at <http://bi.galegroup.com/essentials/article/GALE|A19405289/7f9e54986aa0df2a9b2efb8435e803e1>.

supplant, pre-existing zoning regulations.<sup>68</sup> Essentially, these codes are the equivalent of a highly technical performance-zoning overlays.<sup>69</sup>

Real estate developments governed by transect zoning and form-based codes look and feel very different from the developments (both urban and suburban) that preceded them for decades. In the interest of full disclosure, I happen to share the new urbanists' aesthetic preferences that produce this look and feel. But the codes implementing the aesthetic preferences of new urbanism can consume dozens, even hundreds, of pages of architectural renderings. They also contain bizarre jargon familiar only to those schooled in new urbanism.<sup>70</sup> For example, the Park East Development Code, which regulates a redevelopment area in Milwaukee, Wisconsin, provides the following guidance to developers:

- “Street level facades shall include visual features and design details that enrich the pedestrian experience. While visual interaction with all stories of the building is encouraged, visual interaction by means of clear, non-tinted windows (glazing) is required along the street frontage of a building.”<sup>71</sup>

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<sup>68</sup> See Kaizer Rangwala, *Hybrid Codes Versus Form-Based Codes*, NEW URB. NEWS, May 2009, at 13 (noting that, despite plans for city-wide form-based codes, limited resources, development, and political pressures forced officials to adopt hybrid codes or overlay districts in Phoenix and Ventura); see also John M. Barry, *Form Based Codes: Measured Success Through Both Mandatory and Optional Implementation*, 41 CONN. L. REV. 305, 331 (2008) (offering parallel form-based codes that supplement conventional zoning as a solution when there is public opposition to mandatory form-based codes); DONALD L. ELLIOTT, A BETTER WAY TO ZONE: TEN PRINCIPLES TO CREATE MORE LIVEABLE CITIES 37-38 (2008) (asserting that form-based codes are likely to supplement rather than replace conventional zoning because of lack of time, money, and political support).

<sup>69</sup> Performance zoning regulates land use by establishing parameters designed to limit the negative impact of the use. Although performance zoning is more flexible than conventional zoning, it is often difficult to administer and no major city has replaced Euclidean zoning in favor of performance zoning. See JULIAN CONRAD JUERGENSEMEYER & THOMAS ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 101 (2d ed. 2007); ELLIOTT, *supra* note 68, at 23-26. For an example of a highly detailed form-based overlay, see Jeremy E. Sharp, An Examination of the Form-Based Code and Its Application to the Town of Blacksburg 21 (Nov. 4, 2004) (unpublished Masters in Urban & Regional Planning thesis, Va. Polytechnic Inst. & State Uni.), available at <http://scholar.lib.vt.edu/theses/available/etd-12172004-140622/unrestricted/SharpFINALmajorpaper.pdf> (noting that South Miami's highly detailed form-based overlay regulates the uses on each floor of buildings in the urban zone).

<sup>70</sup> See Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVL. L 395, 406 (2008).

<sup>71</sup> CITY OF MILWAUKEE, PARK EAST REDEVELOPMENT PLAN: DEVELOPMENT CODE 6, ¶ 4.1.1 (2004), available at <http://city.milwaukee.gov/ImageLibrary/Groups/cityDCD/parkeast/plan/DevelopmentCode/DevCodeChap1.pdf>.

- “[T]he area behind the glazing must be Street Activating Uses . . . Street Activating Uses are those open to the public . . . Street Activating Uses can also include areas that are not open to the public, yet still activate the street.”<sup>72</sup>
- “Detailing of the base of the buildings should be used to enhance the human scale qualities of the building.”<sup>73</sup>

This kind of jargon, which pervades form-based codes, poses both legal and practical difficulties. Legally, the Supreme Court’s “vagueness” doctrine makes clear that the Due Process Clause requires laws to provide clear notice of what is expected for compliance as well as guidelines for government officials charged with enforcement.<sup>74</sup> Unfortunately, the common alternative to these jargonistic details is to insert illustrative examples of “appropriate” buildings into form-based codes. These illustrations often take the form of photographs of “acceptable” and “unacceptable,” as illustrated below in the form-based code governing the development of the inner-suburban Columbia Pike in Arlington County, Virginia. Again, however, except for the trained new urbanist eye, this practice, however, does little to address vagueness problems.

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<sup>72</sup> *Id.* at ¶ 4.1.2.

<sup>73</sup> *Id.* at 8, ¶ 4.1.5.

<sup>74</sup> *See* *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (invalidating Chicago’s Gang Congregation Ordinance on vagueness grounds); *Anderson v. City of Issaquah*, 851 P.2d 744, 751 (Wash. Ct. App. 1993) (invalidating architectural regulations on vagueness grounds and observing that “[a] statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” (alteration in original) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926))); *Garvin & Jourdan*, *supra* note 70, at 411-13.

Figure Two



Anecdotal evidence suggests that compliance costs have stalled some redevelopment efforts, when developers balked at the expense and time consumed by administrative review.<sup>75</sup> It ought to go without saying that compliance costs are particularly problematic in resource-strapped communities, like many inner-ring communities, where current residents and business owners likely lack the resources to negotiate the complexities of new urbanist codes. Of course,

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<sup>75</sup> See Robert Steuteville, *Survey: Combine New Code with Activities and Investment*, NEW URB. NEWS, Apr. 1, 2010, at 7 (noting that only twenty-nine percent of the communities that adopted form-based codes during or after 2007 have had projects built); Mark Simpson, *Cost and Business Resistance Kill Orlando Suburb Beautification and Traffic Calming Effort*, TRANS. NATION (Apr. 2, 2011), <http://transportationnation.org/2011/04/02/cost-and-business-resistance-kill-orlando-suburb-beautification-and-traffic-calming-effort/> (noting the cost of a form-based redevelopment project as a reason for its rejection); Ed Tombari, *The Future of Zoning?*, 22 LAND DEV. 23, 25 (2009) (noting development drawbacks to Arlington, Virginia's form-based overlay that include having to go back to the Planning Board in order to make minor façade changes).

current residents and businesses are not the targets of upscaling efforts, but rather more-affluent would-be residents and businesses. The Tiebout-ian challenge posed by transect zoning, however, is that a struggling community is unlikely to attract new development by increasing development costs. Over time, if upscaling efforts succeed, then the high “price” set by a new urbanist codes may become acceptable. But, as an initial matter, a developer is unlikely to strike a bargain with a local government that makes the following offer: “Invest in our community; it will cost you a fortune.” As a result, inner suburbs frequently find themselves offsetting the high compliance costs with generous economic development subsidies, including—as discussed below—free land. Debates about the wisdom of local economic development subsidies are beyond the scope of this article, but suffice it to say that economists are in agreement that not all economic development subsidies are wise.<sup>76</sup>

But, even successful upscaling—through form-based codes or otherwise—carries a risk of driving up housing costs, as well as the costs of running businesses. Critics of inner suburbia frequently lament that many residents move up and out to newer suburbs with more attractive housing styles (read: McMansions, not split-levels). That is undoubtedly true, but it not necessarily lamentable. Not only is the economic mobility reflected in such moves, generally speaking, a good sign, but these moves also free up quality housing stock for families and individuals of more-modest means. The reality is that the housing “filtering” process has, for generations, been one of the most important sources of affordable housing in the United States. The goal of the New Urbanist retrofit of inner suburbs essentially is to stop the filtering process, with the result being gentrification that prices-out many potential new suburban residents.

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<sup>76</sup> CITES

Pulling up the suburban ladder at a time when immigrant and minorities are finally reaching its rungs raises serious transitional fairness issues.<sup>77</sup>

### *B. The Trouble with the Transect*

The foundational planning principle of new urbanism, reflected in the concept of the urban transect, is that urban development “naturally” proceeds from more to less dense—from urban, to suburban, to rural.<sup>78</sup> After decades of zoning, however, the urban transect often is more reflective of new urbanists’ preferences and aspirations for urban development than the actual facts on the ground in most American communities. In many places, urban development no longer proceeds neatly along the “transect” new urbanists would like to impose through regulation. On the contrary, the density gradients<sup>79</sup> of some metropolitan areas (for example, Los Angeles) are either flat or proceed from less dense, to more dense, to less dense again.<sup>80</sup> While new urbanists would like to reverse this trend, they have not satisfactorily addressed how to confront communities with development patterns that fail to approximate the urban transect. In fact, transect zoning has been imposed in locales where development patterns are entirely

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<sup>77</sup> Thomas Bier, *Moving Up, Filtering Down: Metropolitan Housing Dynamics and Public Policy*, Discussion Paper: Brookings Institution Center on Urban and Metropolitan Policy, September 2001, <http://www.brookings.edu/~media/research/files/reports/2001/9/metropolitanpolicy%20bier/bier.pdf>; Matthew Yglesias, *Filtering: How to Get Growth without Gentrification*, *Moneybox* (blog), *Slate*, Dec. 11, 2012, accessed April 15, 2015, [http://www.slate.com/blogs/moneybox/2012/12/11/filtering\\_vs\\_gentrification\\_how\\_to\\_get\\_urban\\_growth\\_without\\_displacement.html](http://www.slate.com/blogs/moneybox/2012/12/11/filtering_vs_gentrification_how_to_get_urban_growth_without_displacement.html).

<sup>78</sup> See Emily Talen, *Help for Urban Planning: The Transect Strategy* 7 *J. URBAN DESIGN* 293, 294 (2002) (analogizing urban systems to the natural spatial ordering of ecosystems).

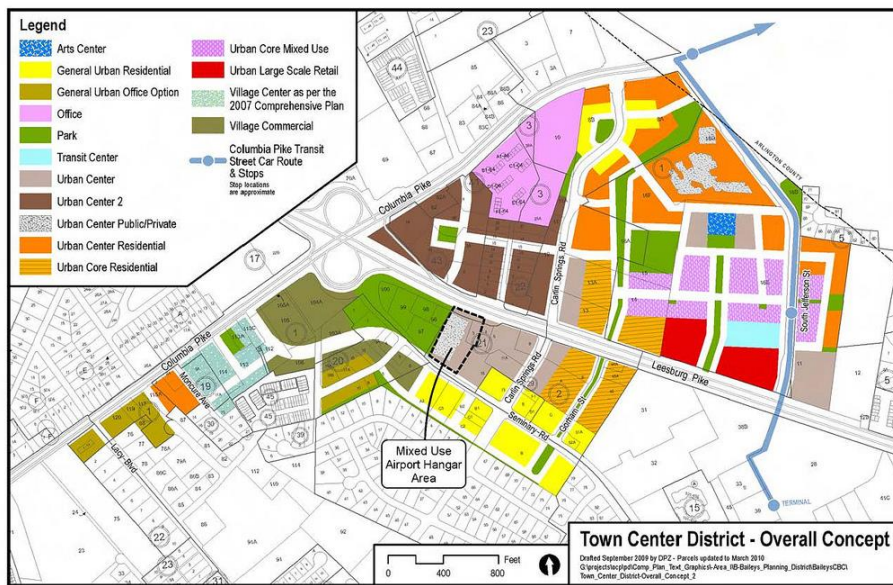
<sup>79</sup> Density gradients measure the variation in population density as one moves away from a city center. See BRUEGMANN, *supra* note 11, at 19.

<sup>80</sup> See *Id.* at 20 (noting that the density gradients of London and other major cities have flattened over time); Nicole Stelle Garnett, *Save the Cities, Stop the Suburbs?*, 116 *YALE L.J.* 598, 604 (2006) (noting that density gradients flattened as a result of rapid suburbanization in the twentieth century); Matthew Luck & Jianguo Wu, *A Gradient Analysis of Urban Landscape Pattern: A Case Study from the Phoenix Metropolitan Region*, 17 *LANDSCAPE ECOLOGY* 327, 333-34 (2002) (finding that Phoenix’s density patterns form more of a “U” shape, with density moving from less dense to more and then less dense); Jean-Paul Rodriguez, *POPULATION DENSITY BY DISTANCE FROM CITY CENTER*, [http://people.hofstra.edu/geotrans/eng/ch6en/conc6en/distancedensity\\_sample.html](http://people.hofstra.edu/geotrans/eng/ch6en/conc6en/distancedensity_sample.html) (last visited Sept. 18, 2012) (depicting relative density gradients of select cities and noting that the gradients of American cities are generally flatter than Asian and European cities and in some instances peak at various peripheral points).



divorced from the urban transect’s predictions (for example, Arlington, Virginia).<sup>81</sup> And not surprisingly, in these places, the “transect” is defined to fit existing development patterns rather than the ideal progression new urbanists prefer.<sup>82</sup> In fact, transect zoning has been imposed in locales where development patterns are entirely divorced from predictions of how the urban transect would develop. Columbia Pike is, again, a case in point. Consider, for example, the regulating plan for Baileys Crossroads, a neighborhood along the Columbia Pike corridor. Not surprisingly, in suburban places like this, the transect is defined to fit existing development patterns, rather than the ideal progression New Urbanists prefer.

Figure 3: Columbia Pike Transect



<sup>81</sup> For illustrations of Arlington, Virginia’s scattered developmental density patterns, see ARLINGTON CNTY. PLANNING DIV., PLANNING RESEARCH & ANALYSIS TEAM, PLANNING RESEARCH BRIEF 7: FORECAST 8.0 & DENSITY, [http://www.arlingtonva.us/departments/CPHD/planning/data\\_maps/page80626.aspx](http://www.arlingtonva.us/departments/CPHD/planning/data_maps/page80626.aspx) (last visited June 18, 2012).

<sup>82</sup> See ARLINGTON, VA., ZONING ORDINANCE, § 20, app. A (2003), available at <http://www.columbiapikeva.us/revitalization-story/columbia-pike-initiative/columbia-pike-form-based-code/> (providing for various revitalization districts rather than following the progressive transect pattern); PLAN CINCINNATI: DRAFT PLAN, <http://www.plancincinnati.org/#draft> (last visited June 19, 2012) (showing disparate areas of activities targeted for transect-zoning); see also ELLIOTT, *supra* note 68, at 31-32 (noting that because transect zoning is so ambitious, it has been adopted in only a few cities and, where adopted, is “mandatory in only specific areas of each city.”).

### C. Imposition of a Uniform Urban Aesthetic

Real estate developments governed by transect zoning and form-based codes look and feel very different from the developments that preceded them for decades. As the above discussion of the transect suggests, this is particularly the case with respect to postwar suburbia. As previously acknowledged, I happen to share the new urbanists' aesthetic preferences that produce this look and feel. This fact, however, does not alleviate my concerns about using the law to impose aesthetic preferences on the built landscape. On the contrary, if the new urbanists' critique of twentieth-century planning practices teaches anything, it is that using public land use regulations to impose architectural fads on the urban landscape can lead to unfortunate, even socially damaging, results.<sup>83</sup> Interestingly, architects have opposed the imposition of transect zoning in some jurisdictions precisely because they worry about a legally imposed urban aesthetic.<sup>84</sup>

Transect zoning and form-based codes seek to reverse over a century of planning practices that reflect what the new urbanists consider wrongheaded aesthetic preferences. In fact, new urbanism arises as a response to (and rejection of) not only the single-land-use world that zoning regulations created but also the dominant post-war suburban aesthetic that previous generations of planning professionals preferred.<sup>85</sup> As Richard Chused has devastatingly documented, the Progressive Era proponents of zoning believed they could solve urban problems

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<sup>83</sup> See, e.g., D. Bradford Hunt, *What Went Wrong with Public Housing in Chicago? A History of the Robert Taylor Homes*, 94 J. IL. STATE HISTORICAL SOC'Y 96, 97 (2001) (citing the CHA's decision to build high-rises as part of the reason for the failure of the Robert Taylor Homes); Keith Aoki, *Race, Space and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning and Gentrification*, 20 FORDHAM URB. L.J. 699, 700 (1992); EMILY TALEN, CITY RULES: HOW REGULATIONS AFFECT URBAN FORM 133 (2011).

<sup>84</sup> See generally Nate Berg, *Brave New Codes*, ARCHITECT MAG., July 1, 2010.

<sup>85</sup> See KRIER, *supra* note 42, at 11-13 (noting the "fiasco of the suburbs is the tragic illustration" of "erroneous [urban] planning" and architectural design); Gabriele Tagliaventi, *Something Has Changed*, 1 A&C INT'L J. ARCHITECTURE & URBANISM 9, 11-12 (2002) (noting the new forms and architectures of the post-war era as reasons for the decline of urban culture).

by legislating a planned order and rejecting the traditional “organic” one that new urbanists have since adopted.<sup>86</sup> The rapid expansion and democratization of suburban development after World War II enabled these planning ideals to be imposed legislatively *ex ante*, thus guaranteeing an anti-urban aesthetic on wide swaths of the American built environment.<sup>87</sup>

The urban-renewal experience even more vividly illustrates the danger of imposing a uniform aesthetic through public land use regulations. The “urban renewal” ideal emerged during the middle of the twentieth century when planning intellectuals became convinced that American cities were in a state of rapid deterioration.<sup>88</sup> City planners and municipal leaders hoped to renew urban communities primarily through the wholesale destruction and reconstruction of existing neighborhoods, which would transform communities mired in pre-zoning, mixed-use patterns into communities developed pursuant to a rational plan.<sup>89</sup> The goal, in the words of one proponent, was “to reconstruct the city . . . [by] building everything in its proper place.”<sup>90</sup> In other words, urban “renewal projects sought to ‘modernize’ the city by replacing mixed-use neighborhoods with” the single-use communities that new urbanists condemn. “Planners also were enamored of modernist architecture and favored unadorned, sterile buildings, set apart from [traditional urban neighborhoods].”<sup>91</sup> Today, urban renewal is not only widely condemned on

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<sup>86</sup> See generally Richard Chused, *Euclid’s Historical Imagery*, 51 CASE W. RES. L. REV. 597, 598-99 (2001) (discussing the ideological priors of early zoning proponents).

<sup>87</sup> See NICOLE STELLE GARNETT, *ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA* 41-43 (2010) (describing the FHA’s role in shaping post-war suburbia).

<sup>88</sup> See generally, e.g., BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* 15-37 (5th prt. 1994) (summarizing history of urban renewal); JON C. TEAFORD, *THE ROUGH ROAD TO RENAISSANCE: URBAN REVITALIZATION IN AMERICA, 1940–1985*, at 44-81 (1990) (same).

<sup>89</sup> See, e.g., FRIEDEN & SAGALYN, *supra* note 88, at 16 (Planners believed that the existing cities were obsolete and that “[t]o replace the obsolete city with this new vision would mean tearing down much of what was there.”); LOUIS JUSTEMENT, *NEW CITIES FOR OLD: CITY BUILDING IN TERMS OF SPACE, TIME, AND MONEY* 3 (1946) (“The time has come to rebuild our cities. The mere redevelopment of blighted areas will not provide the inspiration that we shall need to achieve the . . . goal of arresting further urban decay.”); LEWIS MUMFORD, *FROM THE GROUND UP* 226-229 (1956) (arguing that clearance was the only solution to cities’ problems); TEAFORD, *supra* note 88, at 105 (characterizing the “eradication of slums” as the “ultimate dream of planners”).

<sup>90</sup> LUDWIG HILBERSEIMER, *THE NEW CITY: PRINCIPLES OF PLANNING* 158 (1944).

<sup>91</sup> GARNETT, *supra* note \_\_\_, at 45.

humanitarian, economic, architectural, and urban planning grounds,<sup>92</sup> but perhaps most ironically, city planners are demolishing urban-renewal-era projects and replacing them with new-urbanist projects like those destroyed in the name of renewal a half century ago.<sup>93</sup>

The new urbanists assure skeptics that the aesthetics reflected in form-based codes are not problematic because they reflect a consensus developed during participatory planning sessions known as “charrettes.”<sup>94</sup> Furthermore, they promise that form-based codes can be amended to reflect shifting aesthetic preferences.<sup>95</sup> These assurances do not sufficiently assuage my anxieties. After all, traditional zoning practices are themselves localized and participatory, and they have produced the precise aesthetic that new urbanists reject. Moreover, an urban aesthetic resulting from past legal mistakes is more difficult to change than the law itself.

Buildings, it turns out, are more permanent than words. And that is not necessarily a bad thing.

On the contrary, in many inner-suburban communities, recent demographic shifts have led to the adaptive reuse of commercial structures considered obsolete by many new urbanists. For example, many inner-ring suburbs, features many strip malls filled with stores serving newly arrived immigrant populations, including the one in suburban Indianapolis depicted in Figure 4.

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<sup>92</sup>See *id.*; see also, generally, e.g., MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL* (1964) (arguing that the costs of urban renewal vastly outweighed the benefits).

<sup>93</sup>See GARNETT, *supra* note 87, at 154 (describing urban redevelopment programs that replace modernist high-rise structures with new-urbanist style buildings); Catesby Leigh, *New Urbanists Point the Way Forward*, CITY J. (April 18, 2008), <http://www.city-journal.org/2008/bc0418cl.html> (noting that New Urbanists are replacing dysfunctional urban-renewal housing with a more traditional approach to design).

<sup>94</sup>*Public Outreach: What is a Charette?*, TOWN PAPER, [http://www.tndtownpaper.com/what\\_is\\_charrette.htm](http://www.tndtownpaper.com/what_is_charrette.htm) (last visited Nov. 30, 2012).

<sup>95</sup>See, e.g., Berg, *supra* note 84, at 53.

Figure 4



Although these uses do not match the aesthetic preferred in most form-based codes, they can serve the residents of the community surrounding them well. As a result, just as the modernists' wrecking balls destroyed functional urban communities during the postwar urban renewal period, so might the New Urbanists' codes target suburban communities that function well for the thousands of newcomers who are discovering them.

#### *D. The Lure of the Wrecking Ball*

The relative permanence of buildings, especially the kinds of buildings that new urbanists disfavor and inner-suburban leaders consider an impediment to economic renewal leads to my final concern about upscaling: Sometimes changing land use regulations is not enough. To implement the new urbanist ideals, sometimes buildings—even entire neighborhoods have to go.

Proponents of new urbanism and form-based codes admit as much. For example, consider the Chicago Metropolitan Agency for Planning’s guidebook, *Form-Based Codes: A Step-by-Step Guide for Communities*, which was developed in conjunction with the GO TO 2040 Planning Campaign and is endorsed by the new-urbanist Form Based Codes Institute. The document recommends that municipalities engage the services of new urbanist consultants to assist with laying the groundwork for the implementation of a form-based code. The first step, according to the document, is to “define your form-based code area.” Targeted areas include, *inter alia*, “deteriorating strip commercial corridors” and—ominously—“areas that have been targeted for economic revitalization, are undergoing changes in land ownership, or are the location of planned infrastructure improvements.”<sup>96</sup> The document also recommends that the consultants to “analyze existing conditions,” including “which areas are currently slated for major changes in scale and/or use” and then conduct site visits to “make an initial assessment of how much each neighborhood should change” and “note potential locations for new neighborhoods.”<sup>97</sup>

The Ohio Supreme Court’s decision in *Norwood v. Horney* resulted from an example of upscaling by bulldozer. The City of Norwood, Ohio, an inner-ring suburban Cleveland community, had resolved to use eminent domain to acquire homes in a single-family neighborhood for use by a private developer. Norwood is a small municipality entirely encapsulated within the city limit of Cincinnati. Historically home to both large industry and single-family homes, Norwood’s industrial base has eroded, and along with it, an important source of tax revenue. The predominant residential character of the city’s non-industrial areas had also change, with businesses slowly coming to occupy single-family home structures. In the

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<sup>96</sup> FORM-BASED CODES: A STEP-BY-STEP GUIDE FOR COMMUNITIES 17, available at <https://formbasedcodes.org/content/uploads/2013/11/CMAP-GuideforCommunities.pdf>.

<sup>97</sup> *Id.* at 22.

early 2000s, a private developer, Rookwood Partners, entered into discussions about redeveloping one of the city’s neighborhoods. The plans necessitated Rookwood acquiring title to a large number of single-family homes in order to transform the community into a mixed-land-use new urbanist development. Rookwood succeeded in voluntarily negotiating purchases with most of the targeted homeowners. When negotiations with a few homeowners, the city undertook a redevelopment study of the neighborhood (using Rookwood’s funds), which concluded that it was “deteriorating” (although acknowledging that the neighborhood was not blighted and that most of the homes in the area were in good condition). Based on this study, and the conclusion that the “continuing piecemeal conversion” of the homes into businesses would be detrimental to the area, the city resolved to condemn the homes and transfer the property to Rookwood for redevelopment. Ultimately, the Ohio Supreme Court held that the use of eminent domain under these circumstances violated the Ohio constitution.<sup>98</sup>

### *Conclusion*

Local leaders in older suburbs rightly want to promote economic growth by transforming the local built new life. New urbanists promise that this goal can be not only accomplished, but can be micromanaged through land-use policies. The promise is undoubtedly attractive to local leaders who feel trapped by the geographic footprint imposed by zoning, but are wary of land use deregulation. Nonetheless, inner-ring suburban leaders would do well to resist the deceptive allure of controlled diversity and the promise of legally imposed aesthetics. When upscaling occurs organically (and many, many, examples of gentrifying and gentrified neighborhoods suggests that it often does), the benefits of the transition likely outweigh the not-insubstantial

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<sup>98</sup> City of Norwood v. Horney, 853 N.E.2d 1115 (Oh. 2006).

costs.<sup>99</sup> But forced upscaling—through land use regulations and eminent domain—can not only backfire (and many, many examples of failed redevelopment projects suggests that it often does), but can also deplete the reservoir of vitality and diversity that can enliven and enrich struggling inner-suburban communities. Arguably, inner-suburban communities need less land-use regulation, not more. A different vision of regulatory reform—one which embraces the goal abandoning the regulatory straightjacket of single-use zoning but eschews the desire to control the aesthetic details of the transition from single-use to multi-use communities (which I have previously called “mixed use zoning without the strings”)—would better enable these communities to promote growth, maintain a stable supply of affordable housing, and harness the entrepreneurial energies of the individuals, families, and business who now call older suburbs home.<sup>30</sup>

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<sup>99</sup> Peter Byrne, *Two Cheers for Gentrification*, 46 HOWARD L.J. 405 (2003).



