

NOTES

DIVIDE AND SPRAWL, DECLINE AND FALL: A COMPARATIVE CRITIQUE OF EUCLIDEAN ZONING

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I. INTRODUCTION

As many commentators have pointed out, the land use patterns prevalent in the United States since the advent of Euclidean-style zoning¹ have played a direct role in the development of a surprisingly broad range of problems: “[b]y fostering or requiring low density development with a high separation of uses, Euclidean zoning is one of the great generators of suburban sprawl, with all of its environmental, economic, and social costs.”² These costs include pollution,³ loss of wilderness and farmland,⁴ racial and socioeconomic segregation of the population,⁵ and legal obstacles to effective urban rehabilitation.⁶ Moreover, in combination with prevailing patterns of local funding, the socioeconomic segregation caused by Euclidean zoning perpetuates itself by channeling less well-off children into chronically under-equipped public schools and stretching the resources of many urban municipalities too thin, leaving them to choose between raising property tax rates or allowing their infrastructure to decay. That devil’s bargain bolsters the tendency of middle- and higher-income people to live in suburbs rather than cities, deepening the downward spiral in which many American cities find themselves. And the damage goes even further: “many current zoning practices disregard or even work against crime prevention goals”⁷ in both cities and suburbs. This is particularly problematic in light of the fact that “Euclidean systems of separation—conventional zoning—have been

1. That is, since 1916, when New York became the first city to implement zoning laws of the type later upheld in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). “Operating from the premise that everything has its place, [Euclidean] zoning is the comprehensive division of a city into different use zones.” JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 4.2, at 80 (1998) (cited in BLACK’S LAW DICTIONARY under Euclidean zoning). The terms “zoning” and “Euclidean zoning” will be used interchangeably here.

2. Jay Wickersham, *Jane Jacob’s Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. ENVTL. AFF. L. REV. 547, 557 (2001). For an overview of the costs associated with sprawl, see Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 184 (1997).

3. G.S. Kleppel, *Urbanization and Environmental Quality: Implications of Alternative Development Scenarios*, 8 ALB. L. ENVTL. OUTLOOK J. 37, 40 (2002).

4. *Id.* See also Timothy Beatley & Richard C. Collins, *Americanizing Sustainability: Place-Based Approaches to the Global Challenge*, 27 WM. & MARY ENVTL. L. & POL’Y REV. 193, 196-97 (2002).

5. See, e.g., Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1048 (1996); Richard H. Chused, *Euclid’s Historical Imagery*, 51 CASE W. RES. L. REV. 597, 605-06 (2001).

6. See, e.g., Nicole Stelle Garnett, *Ordering (And Order In) The City*, 57 STAN. L. REV. 1, 5 (2004) (stating that “when property is over- or misregulated, property regulations may impede efforts to restore a vibrant, healthy, and organic public order”) [hereinafter Garnett, *Ordering*].

7. Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1108 (2002).

implemented ubiquitously” in the United States:⁸ “[a]bout ninety-seven percent of incorporated communities zone.”⁹

“[O]ne of the strongest criticisms of Euclidean zoning ever written,”¹⁰ Jane Jacobs’s seminal 1961 book *The Death and Life of Great American Cities*, inspired the New Urbanism movement and an entire body of literature suggesting solutions to suburban sprawl and its attendant problems.¹¹ However, while some American municipalities have experimented with the ideas advanced by New Urbanists and related theorists,¹² no true legal solution to the problem has emerged: “most of the old presumptions of Euclidean zoning have remained in place,”¹³ with variances and other project-specific exceptions being used to mitigate some of the problems in piecemeal fashion.¹⁴ As a result, however persuasive the solutions of Jacobs and later thinkers may be, with few exceptions they remain theoretical: either they have not been tried in practice, or they have been implemented so recently, so tentatively,¹⁵ or in such a small or unique area that it is difficult to determine whether they actually solve the problems caused by Euclidean zoning.

This Note argues that the land use patterns that have prevailed in France for most of the last century,¹⁶ as well as the legal mechanisms that underlie them, integrate many of the most widely accepted theories on optimal land use and thus provide a model that American urban planners can use when considering changes to their existing zoning laws. In other words, the French experience implementing a given theory of land use can illustrate whether the theory works, while the law underlying that implementation can provide guidelines on the legal and administrative framework most conducive to putting that theory into practice. Because “Paris provides one excellent model of urbanism,”¹⁷ and because extensive information is available about it, land

8. Andres Duany & Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 FORDHAM URB. L.J. 1445, 1451 (2002).

9. Andrew G. Dietderich, *An Egalitarian’s Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 29 (1996).

10. Wickersham, *supra* note 2, at 548.

11. See, e.g., Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 953 n.119 (2003).

12. See, e.g., Beatley & Collins, *supra* note 4, at 201-06 (describing and critiquing approaches used in Maryland, New Jersey, Texas, and Oregon).

13. Wickersham, *supra* note 2, at 556.

14. *Id.*

15. See, e.g., Beatley & Collins, *supra* note 4, at 204 (explaining how low ambitions and half-hearted implementation have limited the success of some attempts at limiting sprawl).

16. With the exception of the country’s post-World War II flirtation with Modernism.

17. Ray Gindroz, *City Life and New Urbanism*, 29 FORDHAM URB. L.J. 1419, 1420 (2002).

use patterns in Paris and the surrounding region will be the focus of comparison. There will also be some discussion of France in general, because, as a highly centralized country with regional, national, and even transnational land use planning operating in tandem with local rules,¹⁸ many statements about France also apply to Paris and vice-versa. Finally, a brief overview of similarities and differences between relevant French and U.S. land use law and political structures will be provided to indicate the extent to which the principles underlying French land use law are compatible with and feasible in the U.S. system.

II. EUCLIDEAN PROBLEMS

Euclidean zoning reflects a functionalist view of the city as a “machine, rather than an ever-evolving organism.”¹⁹ The theory supports the view that society functions best when cities and the surrounding land are segregated into districts that strictly limit the uses to which properties there can be put: “Euclidean zoning . . . reflects a longstanding value judgment that the appropriate way to order different land uses is to separate them from one another into single-use zones.”²⁰ The legal rationale for zoning is simple: “[r]estrictions upon the free use of private land must find their justifications in some aspect of the police power,²¹ asserted for the public welfare.”²² However, while substantive due process challenges to zoning ordinances will fail unless they show the ordinance has no rational relation to the police power goals of public health, safety, or welfare,²³ the courts have tended to stretch

18. See, e.g., Roger W. Wilkinson, *1998 And the Law Royer Turns Twenty-Five: Combatting the Commercial Suburbanization of France, Since 1973*, 21 SUFFOLK TRANSNAT'L L. REV. 391, 395-97 (1998); Clifford Larsen, *What Should Be the Leading Principles of Land Use Planning? German Perspective*, 29 VAND. J. TRANSNAT'L L. 967, 997 n.136 (1996).

19. Wickersham, *supra* note 2, at 553.

20. Garnett, *Ordering*, *supra* note 6, at 4.

21. The police power is, of course, “[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.” BLACK’S LAW DICTIONARY 1196 (8th ed. 2004).

22. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 74 (1976) (quoting *Euclid*, 272 U.S. at 387-88). In general, when the government restricts a property owner’s freedom in order to prevent a public harm, it is an act of police power requiring no compensation to the owner; compensation is only required under the Takings Clause when the restriction is imposed to confer a public benefit. ROBERT R. WRIGHT & MORTON GITELMAN, *LAND USE IN A NUTSHELL* 103 (West Group, 2000).

23. *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2083 (2005) (citing *Euclid* for the proposition that a zoning ordinance will “survive a substantive due process challenge so long as it was not ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.’”).

the zoning rationale to the absolute limit: “the line ‘which in this field separates the legitimate from the illegitimate assumption of [police] power is not capable of precise delimitation. It varies with circumstances and conditions.’ . . . But even those historic police power problems need not loom large *or actually be existent* in a given case.”²⁴ In other words, with some exceptions, when it comes to zoning the police power is more or less whatever the local legislature says it is. As a result, it is common for zoning codes to define restrictions in such detail that the owner’s freedom to use the property as she sees fit is reduced to almost nil.²⁵

In addition to the clack of a clear relationship between the police power and such narrow use restrictions, “[t]he fundamental problem with Euclidean zoning is that it . . . ignores how cities actually operate.”²⁶ Ample literature supports the argument that the theory behind such zoning is simply wrong;²⁷ it has been argued that the decline of American cities and the damaging growth pattern we call sprawl “are caused by a failed regulatory code.”²⁸ As for the environmental impact of zoning and the resultant sprawl, “[t]here is no other area in environmental law where the goals of the regulatory program are not just indifferent, but actively hostile, to the best thinking in the field.”²⁹ Yet further, Euclidean zoning provides a legal mechanism whereby certain classes of people can be effectively barred from living in a neighborhood or even an entire municipality without that exclusion violating any recognized constitutional right.³⁰ This is not a mere theoretical possibility, but a statement of how zoning has been used in the ninety years since its inception;

24. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974) (quoting *Euclid*, 272 U.S. at 387) (emphasis added) (citation omitted).

25. For example, in New York, owners of property designated as Use Group 12B in Manufacturing Districts 2 and 3 can use their property only for “antique stores; art galleries, commercial; candy or ice cream stores; cigar or tobacco stores; delicatessen stores; jewelry or art metal craft shops; music stores; and newsstands.” New York City Zoning Resolution, art. 4, ch. 2, § 42-13 (2005), available at <http://www.nyc.gov/html/dcp/pdf/zone/art04c02.pdf>. It is unclear what police power rationale could possibly underlie such restrictions on property rights: if a commercial art gallery or a music store in this zone pose no threat to public welfare, the proposition that a non-commercial art gallery or a bookstore would pose one, and thus the justification for prohibiting it, seems difficult to support.

26. Wickersham, *supra* note 2, at 563.

27. See, e.g., Garnett, *Ordering*, *supra* note 6, at 5; Wickersham, *supra* note 2.

28. Duany & Talen, *supra* note 8, at 1452.

29. Wickersham, *supra* note 2, at 554.

30. In addition to the fact that disparate impact is insufficient to invalidate a zoning ordinance, *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977), and that zoning ordinances do not directly target any protected class, “zoning is, by tradition and by jurisprudence, a matter of local concern, in which federal courts are reluctant to intrude.” *Westhab, Inc. v. City of New Rochelle*, 2004 U.S. Dist. LEXIS 9926 (S.D.N.Y. 2004), at *30.

this Note will primarily address the racial and socioeconomic segregation perpetuated by zoning, but the same backdoor methods have been used to discriminate against gay couples and straight couples who prefer, for whatever reason, not to marry.³¹

To distinguish the effects of Euclidean zoning from those of the land use law prevalent in France, this Note describes how zoning perpetuates five major problems: (1) urban sprawl; (2) racial and socioeconomic segregation; (3) environmental degradation and energy waste; (4) adverse economic impact; and (5) diminished quality of life.

A. Urban Sprawl and Decaying Cities

Urban sprawl has been defined as “low-density, land-consuming, automobile-dependent, haphazard, non-contiguous (or ‘leapfrog’) development on the fringe of settled areas, often near a deteriorating central city or town, that intrudes into rural or other undeveloped areas.”³² During the sprawl process, “cities’ footprints . . . expand at much faster rates than population growth, creating an increasingly scattered car-dependent landscape.”³³ This scattering of the population “requires significant development of new facilities and services, with accompanying abandonment and underutilization of existing facilities.”³⁴ Those “existing facilities” are America’s cities: “the story of suburban expansion is one of urban exodus,”³⁵

31. For example, in February 2006, the town of Black Jack, Missouri denied an occupancy permit to an unmarried couple with three children on the grounds that they did not meet the zoning ordinance’s definition of a family. This made it illegal for them to live in the home they had just bought. Eun Kyung Kim, *Unwed Couple, Kids Face Boot by Black Jack*, ST. LOUIS POST-DISPATCH, Feb. 21, 2006. The children’s mother said, “I refuse to run down to the courthouse and get married just so I can live in my own home.” *Id.* Such ordinances are common in that region, *id.*, though it could be argued that they are unconstitutional under *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). As for gay couples, the Ohio Court of Appeals recently noted with approval that “courts have already rejected *Lawrence [v. Texas]* as a basis to challenge laws involving . . . the definition of ‘family’ for zoning purposes. . . .” *Ohio v. Jenkins*, 2004 Ohio App. LEXIS 6663, at *16-17 (2004). The definition of family is not the only contested territory in the effort to use zoning laws to perpetuate discrimination against gays; in 1993, residents of a Charlotte, N.C. neighborhood went to court over a zoning board decision allowing the opening of a church that ministered to gay parishioners. Editorial, *Gays and the Church Unless Laws are Broken, Gays Should Be Allowed to Worship at a New Church in Matthews*, CHARLOTTE OBSERVER, Dec. 9, 1993, at 22A, available at 1993 WLNR 1622401.

32. Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PA. L. REV. 873, 874 (2000).

33. Beatley & Collins, *supra* note 4, at 197.

34. Freilich & Peshoff, *supra* note 2, at 184.

35. Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 MINN. L. REV. 459, 491 (2005) [hereinafter Garnett, *Suburbia*] (reviewing RICHARDSON DILWORTH, *THE URBAN ORIGINS OF SUBURBAN AUTONOMY*

in which the “more affluent . . . abandon[] central cities for the suburban fringe.”³⁶ But cities lose more than just people in this process: the costs of the infrastructure needed to support suburbs, such as sewers, utility-line extension,³⁷ and road improvements, have been disproportionately borne by cities.³⁸

As a result of urban municipalities essentially being forced to underwrite the departure of the middle class, sprawl goes hand in hand with the socioeconomic decline of America’s inner cities. As the middle and upper classes moved to residential suburbs, jobs followed: suburban municipalities used zoning to turn former farmland and wilderness into commercial and industrial parks, so in the 1980s alone, “suburbs received 95% of new office jobs and 120% of net manufacturing job growth.”³⁹ This shift in the location of offices and manufacturing plants changed urban centers from “centers of production and distribution of material goods to centers of administration, information exchange, and higher-order service provision.” As a result, jobs remaining in the downtown core require higher levels of education, which many city residents do not possess.⁴⁰ Meanwhile, Euclidean zoning “virtually guarantees that the automobile will be crucial in accomplishing

(2005)).

36. Martha A. Lees, *Expanding Metropolitan Solutions Through Interdisciplinarity*, 26 N.Y.U. REV. L. & SOC. CHANGE 347, 347 (2001-01) (book review).

37. See, e.g., Mark Weiner, *Water Agencies May Merge: Joining OCWA, Metropolitan Water Board Could Save Money*, *Legislators Say*, THE POST-STANDARD (Syracuse (N.Y.)), Nov. 21, 2005, at B3, available at 2005 WLNR 18832289 (stating that water distribution infrastructure funded by property tax-backed bonds was built because the municipality “couldn’t serve new industry opening outside the city,” but now “as suburban growth has fueled [the water authority’s] expansion . . . it may be unfair to continue using property taxes to support the infrastructure”); State *ex rel.* City of Wheeling v. Renick, 116 S.E.2d 763 (1960) (permitting development company to bring action against city-owned sewer utility seeking to compel it to extend sewer lines at city’s expense).

38. See, e.g., ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM 8-15 (2000); Ed Bolen, Kara Brown, David Kiernan & Kate Konschnik, *Smart Growth: A Review of Programs State by State*, 8 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 145, 147 (2002) (describing recent efforts by some cities to reduce or eliminate their spending on infrastructure improvements for suburbs); John T. Marshall, *Florida’s Downtowns: The Key to Smart Growth, Urban Revitalization, and Green Space Preservation*, 29 FORDHAM URB. L.J. 1509, 1510 (2002) (stating that “Florida’s cities have paid for a disproportionate share of new roads and sewer systems to connect new communities to surrounding metropolitan areas.”).

39. Jeremy R. Meredith, Note, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 458 (2003) (citing Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 302 (2000)).

40. *Id.* (quoting WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 39 (1987)).

one's daily business,"⁴¹ but "the absence of car ownership [among urban poor] and the inadequacy of public transit systems combine to create a scenario where city residents find it difficult to gain access to employment."⁴² As a result, today's city dwellers find themselves trapped in "once vibrant, economically integrated neighborhoods that [are now] . . . communities in which almost everyone [is] poor."⁴³

It has been noted that "[t]his pervasive urban landscape is not simply the result of individual choices about where to live or to create a business. It is the product of a multitude of governmental policies."⁴⁴ While sprawl has been called "the root cause of many land-use problems across the country,"⁴⁵ this Note argues that both sprawl and the associated decline of the inner cities are more usefully analyzed as the primary symptoms and inevitable result of Euclidean zoning. Zoning fuels sprawl

both because exclusionary techniques (such as minimum lot size and square footage requirements) necessitate vast amounts of land and because . . . [wealthier suburbs [use their zoning power to] exclude new development, especially of less desirable land uses, effectively pushing it outward to communities with more lenient land use policies. Over time . . . the cycle . . . repeats itself. The result is the sprawling "leapfrog" style development that characterizes our municipal areas.⁴⁶

By creating a legal framework uncannily conducive to sprawl⁴⁷ and the associated urban decline, Euclidean zoning imposes an enormous cost: it "increases development costs to the suburbs, diminishes the quality of life factors needed to sustain viable economic growth, and requires the consumption of the greatest amount of land and resources."⁴⁸ Moreover, it raises housing costs, which increases the financial strain on middle-class families while further reducing the ability of lower-income families to improve their lot in life.⁴⁹ It also "generates traffic congestion, dependence

41. Kleppel, *supra* note 3, at 47.

42. Meredith, *supra* note 39, at 459.

43. Angela Glover Blackwell, *It Takes a Region*, 31 *FORDHAM URB. L.J.* 1303, 1304 (2004).

44. Frug, *supra* note 5, at 1048.

45. Freilich & Peshoff, *supra* note 2, at 185.

46. Garnett, *Suburbia*, *supra* note 35, at 487-88.

47. "[T]he current legal structure . . . provides significant incentives for local governments to adopt land uses that lead to sprawl." Harvard Law Review Association, *Old Regionalism, New Regionalism, and Envision Utah: Making Regionalism Work*, 118 *HARV. L. REV.* 2291, 2293 (2005).

48. Freilich & Peshoff, *supra* note 2, at 184.

49. See, e.g., Scott T. Hall., Note, *Fountain of Cities: An Examination of Urban Growth and Growth Management with a Regional Proposal for Greater Kansas City*, 13 *KAN. J.L. & PUB. POL'Y* 619, 624 (2004) (summarizing how sprawl and zoning raise housing costs); Randolph R. Lowell, *Coastal Smart*

on oil, extraordinary transportation costs for families, higher costs to deliver municipal services, and pollution.”⁵⁰ Smart Growth, discussed below, proposes a persuasive solution to sprawl, but it cannot be implemented in anything more than a patchwork and half-hearted fashion without a radical change in American zoning law.

B. Racial and Socioeconomic Segregation

i. Historical Background: Euclid in Context

The hallmark of Euclidean zoning is its insistence on dividing the landscape into zones segregated by use and building type:⁵¹ single-family residential, multi-family residential, commercial, light industrial, and so on. While separation of uses was “[i]nitially . . . a European idea intended to remove factories from residential neighborhoods,”⁵² it was also almost immediately understood as a means of excluding poor and minority populations from middle- and upper-class neighborhoods. As Judge Westenhaver put it when *Euclid I* was heard in District Court, “[t]he blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance.”⁵³ While the Supreme Court spoke in more veiled terms, nevertheless, in comparing Euclidean zoning to a codification of common-law nuisance doctrine,⁵⁴ it teetered on the edge of redefining “nuisance” to include the mere presence of lower-income neighbors:

[T]he coming of apartment houses [to single-family areas] . . . has sometimes resulted in destroying the entire section for private house purposes . . . very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. . . . Under these

Growth, 22 PACE ENVTL. L. REV. 231, 234-35 (2005) (citing a 1992 New Jersey study projecting that new homes in sprawl developments would cost \$12,000-\$15,000 more than they would “in more compact development[s]”).

50. James A. Kushner, *Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENVTL. L. & POL’Y 45, 46-47 (2002-03).

51. Garnett, *Ordering*, *supra* note 6, at 4. She continues: “City officials schooled in this ideology may naturally tend to equate ordered land uses with the absence of disorder. They also may be wrong.” *Id.* at 5.

52. Kleppel, *supra* note 3, at 47.

53. *Ambler Realty Co. v. Vill. of Euclid (Euclid I)*, 297 F. 307, 313 (N.D. Ohio 1924).

54. *Vill. of Euclid v. Ambler Realty Co. (Euclid II)*, 272 U.S. 365, 387-89 (1926).

circumstances, apartment houses, which in a different environment would be . . . entirely unobjectionable . . . come very near to being nuisances.⁵⁵

The *Euclid* Court apparently assumed that families unable to afford single-family homes were so undesirable that zoning for the express purpose of keeping such families out of middle-class neighborhoods was a reasonable government response.

It has been suggested that “the racism of the era in which [*Euclid II*] was decided” provides an important clue as to why a Court with “well-known objections to many forms of government economic regulation” approved a zoning system that greatly limited the rights of property owners to use their property as they saw fit.⁵⁶ The 1920s were a time of “unprecedented levels of immigration . . . [as well as] migration from the southern United States.”⁵⁷ Legislation passed in 1921 and 1924 had imposed a quota system favoring immigrants “from northern Europe and severely limiting entry from other parts of Europe and the rest of the world.”⁵⁸ More ominously,

[t]he Ku Klux Klan was a major political force at the time. . . . Indeed, the power of the Klan was the subject of debate in Congress just before *Euclid* came before Judge Westenhaver. A movement favoring anti-lynching legislation . . . passed in the House of Representatives, only to die in a Senate filibuster.⁵⁹

Moreover, the Supreme Court had endorsed racially restrictive covenants the same year it upheld Euclidean zoning.⁶⁰ Although zoning ordinances excluding specific ethnic groups from particular neighborhoods had been held unconstitutional in 1917 on freedom of contract grounds,⁶¹ that case was deliberately engineered by the parties to get around the racism of the justices;⁶² the defendant, who entered into the real estate contract for the

55. *Id.* at 394-95.

56. Chused, *supra* note 5, at 597-98.

57. *Id.* at 599.

58. *Id.* at 608-09.

59. *Id.* at 608.

60. See *Corrigan v. Buckley*, 271 U.S. 323 (1926).

61. See *Buchanan v. Warley*, 245 U.S. 60 (1917), cited in *Euclid I*, 297 F. at 312.

62. Professor Chused describes the actions of the *Buchanan* parties as: a clever strategic move . . . [that] placed the white seller at the forefront of the case and presented the courts with a “simple” claim by a white man that he was entitled to seek specific performance. . . . The Supreme Court took the bait, finding the racial zoning scheme invalid [because] it infringed upon the . . . right of a white man to be free from unlawful constraints on the enforcement of a contract. . . .
Chused, *supra* note 5, at 606.

specific purpose of challenging the zoning ordinance, was the president of the local NAACP.⁶³ But *Euclid I* made it possible to accomplish the same discriminatory purpose more discreetly: simply removing the possibility of economic diversity within a given neighborhood went a long way towards preventing racial and ethnic minorities from moving in. Meanwhile, separating residential use from any and all economic use, rather than just from clear nuisances such as industrial compounds, obviously means there will be no businesses in the neighborhood; this means lower-income outsiders, who most likely already have no social connections in higher-income neighborhoods, no longer even have a reason to visit.

ii. Euclid's Legacy: A Great Divide

The decline of inner cities has had a disproportionate effect on minorities.⁶⁴ The separationist principles of Euclidean zoning have “segregat[ed] populations by social class and undermin[ed] the mixed-use, mixed-income characteristics of cities that . . . had been the wellspring of their vibrancy and economic vitality. Mixed-use, mixed-income neighborhoods turned into single-use, single-income enclaves connected by roads for vehicles, not pedestrians.”⁶⁵ This change in the American landscape was made possible by zoning, “the point of [which] is to put ‘everything in its place,’ to segregate economic from noneconomic activities, rich from poor.”⁶⁶ Such zoning “quarantines uses so that they will not infect one another,”⁶⁷ an approach that inevitably results in “quarantining” different populations.

Meanwhile, suburban zoning has created problems for the middle class: “[t]he biggest challenge out there is affordable housing. Most towns pride themselves on 2-acre zoning,”⁶⁸ that is, laws that prohibit building homes on lots smaller than two acres, making property too expensive for the average family.⁶⁹ Likewise, minimum square footage requirements for the houses

63. Josh Whitehead, Note, *Using Disparate Impact Analysis to Strike Down Exclusionary Zoning Codes*, 33 REAL EST. L.J. 359, 363 (2005).

64. Meredith, *supra* note 39, at 459.

65. Gindroz, *supra* note 17, at 1423.

66. Garnett, *Ordering*, *supra* note 6, at 21.

67. Wickersham, *supra* note 2, at 553.

68. Douglas Foy, Massachusetts' Chief of Commonwealth Development, *quoted in* Sam Allis, *Whither I-495?*, BOSTON GLOBE, Aug. 22, 2004, at A2, *available at* 2004 WLNR 3586750.

69. “Exclusionary zoning is a common tool employed by local municipalities to exclude whatever segment of the population they deem undesirable.” Michael Kling, Note, *Zoned Out: Assisted-Living Facilities and Zoning*, 10 ELDER L.J. 187, 198 (2002). While exclusionary zoning in general is illegal in

themselves exclude buyers who cannot afford that much space; of course this keeps out less-wealthy families of any race, but it disproportionately affects minorities.⁷⁰ “Perhaps the most significant aspect of the ‘white flight’ . . . [of] the past fifty years is that much of that flight has been to independent municipalities” with comprehensive zoning powers.⁷¹ Although “it is illegal for towns to set a minimum house value, . . . zoning [and] subdivision regulations . . . can implicitly have the same effect.”⁷²

Even in more affordable areas, separating residential zones by housing type dramatically reduces the ability of lower-income people, and by extension minorities and new immigrants, to move into the area. For example, neighborhoods restricted to single-family housing prohibit not only apartment buildings but even duplexes, a housing type that enables lower-income owners to afford their mortgage by renting out half the structure.⁷³ It is also common to impose minimum sizes for side yards and/or to create separate zones for attached and detached single-family housing,⁷⁴ preemptively segregating families who can afford lawns from those who cannot. This is not mere coincidence; “fear of what is euphemistically called ‘the inner city’—a fear that has fueled the migration to the suburbs—has been a reference to the black poor.”⁷⁵ Having set the stage for socioeconomic segregation, the Euclidean approach then perpetuates it into the next generation: zoning that keeps out lower-income neighbors also helps prevent lower-income children from going to the same schools as middle- and upper-class children.

some states, such as New Jersey, *see, e.g.*, *So. Burlington County NAACP v. Mount Laurel Tp.*, 336 A.2d 713 (N.J. 1975), the point at which a minimum lot size becomes “exclusionary” varies widely: even five-acre minimums have been upheld. *See, e.g.*, *County Comm’rs. of Queen Anne’s County v. Miles*, 228 A.2d 450 (Md. 1967).

70. *See, e.g.*, Whitehead, *supra* note 63, at 371.

71. *Id.*

72. William T. Bogart, “Trading Places”: *The Role of Zoning in Promoting and Discouraging Intrametropolitan Trade*, 51 CASE. W. RES. L. REV. 697, 709 (2001).

73. The problem with excluding duplexes is that buying a duplex and renting out half of it enables a lower-income family to get a foothold in property ownership that they might not otherwise be able to afford. *See, e.g.*, Alex Mindlin, *The Accidental Landlord*, N.Y. TIMES, June 19, 2005 (profiling a working-class Dominican man who parlayed his first home, a dilapidated \$15,000 Brooklyn duplex he purchased in 1980, into a small empire). Prohibiting duplexes cuts off this avenue to the American dream, and it does so without providing any clear benefit to neighbors, since duplexes do not inherently cause more negative impact (traffic, noise, etc.) than single-family homes. This fact can be illustrated by comparing the impact of a quiet, one-car family of three renting half their duplex to an elderly relative with the impact of a three-car family of two parents and four rowdy teenagers in a single-family house: the impact depends on the residents themselves, not on the housing type.

74. *See, e.g.*, PITTSBURGH, PA, ZONING CODE art. 1, § 902.01.A.1(a) (2006).

75. Frug, *supra* note 5, at 1064.

Perhaps surprisingly, America's racially segregated pattern of land use is relatively recent: "[i]n 1900 . . . [u]rbanized African Americans lived in neighborhoods that, on average, were close to 90 percent white."⁷⁶ Given that the U.S. population as a whole was 88% white at that time,⁷⁷ city-dwelling African Americans in 1900 were integrated into white neighborhoods at a rate approximately identical to their proportion of the population. "[I]n the 1880's and 1890's, racially integrated neighborhoods had flourished in many American cities, especially in the South."⁷⁸ Obviously, that has changed. By 1930, in the wake of Supreme Court affirmation of restrictive covenants and Euclidean zoning, the seeds of the urban black ghetto were sown.⁷⁹ As the ghettos grew and "white flight" accelerated, "[o]ver the past 50 years, most large American cities have devolved from great economic engines that people of all walks of life called home to forgotten, largely abandoned, warehouses of the metropolitan poor."⁸⁰

C. Environmental and Energy Problems

"Despite the existence of distinct social and economic problems, the direct link between environmental harms and urban sprawl is easier to observe. Perhaps for this reason, environmentalists have been among the most outspoken critics of sprawl."⁸¹ The environmental criticisms of it are obvious: sprawl "swallows prime agricultural land and often encroaches upon environmentally sensitive areas."⁸² While less than one-fifth of U.S. land is high-quality farmland, between 1992 and 1997 urban sprawl consumed an average of two acres of American farmland per minute.⁸³ In addition to the loss of virgin land, sprawl threatens to simply fill small states to capacity; Maryland's decision to implement a smart-growth pattern of land use⁸⁴ rather

76. *Id.*

77. U.S. CENSUS BUREAU, UNITED STATES—RACE AND HISPANIC ORIGIN; 1790 to 1990, 1 (2002), <http://www.census.gov/population/documentation/twps0056/tab01.pdf>. Whites represented 87.9% and blacks 11.6% of the total population in 1900. *Id.*

78. Whitehead, *supra* note 63, at 361.

79. See Frug, *supra* note 5, at 1064-65.

80. Whitehead, *supra* note 63, at 359.

81. Meredith, *supra* note 39, at 463.

82. Bogart, *supra* note 72, at 713 n.61 (quoting ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA 14 (1994)).

83. AMERICAN FARMLAND TRUST, FARMING ON THE EDGE REPORT 1 (2006), <http://www.farmland.org/resources/fote/default.asp>; <http://www.farmland.org/farmingontheedge/Farming%20on%20the%20Edge.pdf>.

84. For a discussion of Maryland's program, see Parris N. Glendening, *Maryland's Smart Growth*

than the traditional urban sprawl rested in part on the state's Department of Planning "sobering prediction [that] [i]f growth patterns d[id] not change, development w[ould] consume as much land . . . over the next twenty-five years as it has during the entire 368-year history of the [s]tate."⁸⁵

In addition to obliterating farmland and wilderness, sprawl increases air pollution and aggravates global warming⁸⁶ by making people dependent on cars: "[t]ransportation is responsible for one-third of all greenhouse gases generated by Americans," and "[b]etween 1969 and 1990, while the population of the United States increased by 21 percent, the number of miles driven per capita grew 72 percent."⁸⁷ Meanwhile, sprawl pollutes the watershed via "runoff containing chemicals from asphalt, automobile emissions, horticultural fertilizers and pesticides."⁸⁸ This problem is exacerbated by "the extensive use of impervious surfaces, reduction of vegetative buffers and inferior but mandatory approaches to storm water management[, which] reduce[s] the ability of the landscape to manage contaminant loading"; the development attributes that exacerbate the problem are most prevalent in suburbs.⁸⁹

Because these effects have been so thoroughly discussed elsewhere,⁹⁰ this Note will not dwell on them. The key point here is that the environmental effects of sprawl arise from two factors: population density and energy waste. Density, of course, is a direct result of zoning: minimum lot sizes define the density of a development. Waste of energy is more complex, but zoning in a way that obligates residents to use cars to accomplish the slightest errand is clearly more wasteful than zoning for compact neighborhoods with schools and small shops within walking distance. America is zoning for pollution and global warming; we are zoning our farmland and wilderness out of existence.

Initiative: The Next Steps, 29 FORDHAM URB. L.J. 1493 (2002).

85. *Id.* at 1497.

86. See generally Peter Newman, *Urban Design, Transportation and Greenhouse*, in GLOBAL WARMING AND THE BUILT ENVIRONMENT 69, 69-71 (Robert Samuels et al. eds., 1994) (discussing environmental impact of sprawl and car dependence).

87. Anne Maurer, *Smart Growth Principles and the Fair Housing Act: An Examination of the Loudoun County Revised General Plan*, 13 J. AFFORDABLE HOUS. & CMTY. DEV. L. 239, 241 n.31 (2004) (citing David J. Cieslewicz, *The Environmental Impacts of Sprawl*, in URBAN SPRAWL: CAUSES, CONSEQUENCES & POLICY RESPONSES 26 (Gregory D. Squires ed., 2002)).

88. Kleppel, *supra* note 3, at 53.

89. *Id.*

90. See, e.g., Newman, *supra* note 86; Kleppel, *supra* note 3; Lowell, *supra* note 49, at 231.

D. *Economic Impact*

Jane Jacobs, one of the most famous critics of Euclidean zoning, “is an economic libertarian who believes in the creative power of the market.”⁹¹ She “criticizes the sorting out of functions into single-use districts . . . because it stifles the cross-fertilization of ideas and experiences that is so important to a city’s economic and social health.”⁹² Indeed, a central part of the land use model she proposes “is the goal of economic diversity: the richness of business ideas and opportunities that flourish in a city. . . . ‘Cities may fairly be called natural economic generators of diversity, and natural economic incubators of new enterprises.’”⁹³ Her critique may sound theoretical, but it rests on a solid base: Euclidean zoning and its aftereffects, namely urban sprawl and declining cities, impose costs that “can be measured in dollars.”⁹⁴ It adversely impacts the economy in several ways: by distorting the real estate market; imposing massive infrastructure costs and associated tax increases; increasing the cost of housing and transportation; and reducing the ability of lower-income people—which includes, of course, not only those we normally think of as “the poor” but also many artists and budding entrepreneurs—to find work or create self-employment.

Euclidean zoning distorts the real estate market in so many ways that it manages to simultaneously conflict with conservative, libertarian, and liberal values. In addition to increasing the average price of housing,⁹⁵ “[t]he fact that a zoning map allows high density housing in some areas, only single family housing in others, only industrial and commercial use in designated locations, and high rise office buildings in downtown areas, creates great disparity in value among a city’s many properties.”⁹⁶ While “[a] local regulation imposing a maximum land value would almost certainly be viewed as a [Fifth Amendment] taking, . . . zoning laws that effectively impose a maximum land value have been upheld. . . .”⁹⁷ And because municipal zoning authorities, rather than the market, dictate what housing types will be available

91. Wickersham, *supra* note 2, at 548.

92. *Id.* at 550-51.

93. *Id.* at 549.

94. Lowell, *supra* note 49, at 234.

95. See, e.g., Dietderich, *supra* note 9, at 31.

96. Norman Marcus, *New York City Zoning—1961-1991: Turning Back the Clock—But with an up-to-the-Minute Social Agenda*, 19 *FORDHAM URB. L.J.* 707, 717 (1992). The disparity of which Marcus speaks has a direct effect on individual owners and, because it impacts property tax revenues, an indirect effect on city finances.

97. Bogart, *supra* note 72, at 715.

and favor single-family homes, “profitable sites for [multifamily housing] are artificially scarce”⁹⁸ and thus artificially expensive. Such a situation is clearly incompatible with free-market principles, and since affordable housing often means some type of multi-family housing, it is also hostile to the goal of increasing the access of lower-income families to affordable housing. In addition, Euclidean zoning increases the burden on middle-class families: while the artificial scarcity of multi-family sites might be expected to reduce the cost of single-family homes by increasing the availability of single-family sites, this possibility is nullified by the tendency of suburban municipalities to require large minimum lot and house sizes.⁹⁹ That “forces people to consume land and improvements they do not want,”¹⁰⁰ at a higher cost than they would pay were they allowed to buy only the amount of property they want. “This forced consumption is inefficient because the recipient could sell the extra land and improvements on the market for more than what they are worth to the recipient. . . .”¹⁰¹

It has already been mentioned that sprawl “leads to tremendous demand for expanded public services and infrastructure, all of which cost substantially more to provide”¹⁰² to a scattered population than to a more compact one. The problem is enormous in scope: nearly fifteen years ago, “[a] New Jersey study estimated that over a twenty-year period, capital costs associated with sprawl would exceed \$1.3 billion with annual maintenance costs of over \$400 million.”¹⁰³ Single-use zoning and urban sprawl are an expensive combination: a 1989 Urban Land Institute monograph estimated that “providing services to a three unit per acre development located ten miles from central facilities and employment centers” would cost \$48,000—in 1989 dollars—while “[t]he same costs for a home in a twelve-unit per acre development, located closer in with an equal mix of townhouses, garden apartments and single family [homes], would be 50% lower.”¹⁰⁴ Current land-

98. Dieterich, *supra* note 9, at 32.

99. Ordinances setting a minimum floor area for single-family homes have been upheld. *See, e.g.*, *Builders Service Corp. v. Planning & Zoning Comm’n of Town of East Hampton*, 545 A.2d 530, 536-38 (Conn. 1988); *Lionshead Lake, Inc. v. Wayne Twp.*, 89 A.2d 693, 696 (N.J. 1952), *cert. denied*, 344 U.S. 919 (1953).

100. Dieterich, *supra* note 9, at 32.

101. *Id.* Dieterich also notes that “[s]uch forced consumption is also inefficient if it stops producers from substituting cheaper factors of production (such as technology and design) for land.” *Id.*

102. David C. Levy & Rachael P. Melliar-Smith, *The Race for the Future: Farmland Preservation Tools*, 18 NAT. RESOURCES & ENV’T 15, 17 (2003).

103. Lowell, *supra* note 49, at 235.

104. Shelby D. Green, *The Search for a National Land Use Policy: For the Cities’ Sake*, 26 FORDHAM URB. L.J. 69, 76 n.42 (1998).

use policies “forc[e] our citizens to pay higher and higher taxes to cover the infrastructure costs created by sprawl.”¹⁰⁵ Moreover, the way suburban municipalities use Euclidean zoning “segregates the tax base into wealthy suburban and poor urban components, creating a greater disparity between property tax rates and the return in public services per tax dollar paid.”¹⁰⁶

But single-use zoning has even more direct effects on the financial situation of American families. It reduces people’s ability to respond efficiently to economic developments, such as by starting a business in their garage to seize a new opportunity or renting out rooms in their home to get through a difficult period.¹⁰⁷ Separating residential use from any and all economic uses, rather than just from clear nuisances such as heavy industry, not only makes it more difficult for lower-income people to get to work by locating the workplace farther away, it eliminates the option of supporting themselves entrepreneurially by preventing them from living and working in the same space. Live/work spaces are increasingly popular, but Euclidean zoning tends to banish them to undesirable areas¹⁰⁸ and to prevent people from starting a business in their home unless they already live in such a space.¹⁰⁹ Zoning thus effectively snuffs out small-scale entrepreneurialism in residential zones; meanwhile, the transportation costs necessary to get to jobs located in other zones fall “disproportionate[ly] . . . on working families of low or modest incomes.”¹¹⁰ Those costs can make employment virtually impossible for lower-income city dwellers: if they cannot afford a reliable car and public

105. Glendening, *supra* note 84, at 1496.

106. Dieterich, *supra* note 9, at 32.

107. In addition to the fact that renting out a room in one’s home might be considered an impermissible business activity, the right of a homeowner to do so depends on the local zoning code’s definition of “family.” For example, in Pittsburgh, no more than three unrelated people can live together in a single-family home, and they can only do so if they “share[] common facilities as considered reasonably appropriate for a family related by blood, marriage or adoption.” PITTSBURGH, PA, ZONING CODE art. 9, ch. 926, § 76(b) (2006). Thus a homeowner who already has two relatives in his house cannot take in a boarder, and a boarder who does not share use of the kitchen is unlawful.

108. *See, e.g.*, Suzanne Hamlin, *The Benefits of Living Above the Store*, N.Y. TIMES, Sept. 19, 2004, at § 11, Col. 1, Real Estate Desk, at 1 (stating that, while mixed-use property in New York City is primarily in less-desirable locations such as “big commercial strips, often in what would be considered fringe residential neighborhoods,” the market for such property is rising).

109. Even when people live in such a space, their use of it may be rigidly regulated. For example, New York City defines live/work artists’ lofts as “one or more rooms in a non-residential building . . . occupied . . . and arranged and designed for use by, and . . . used by, not more than four non-related artists, or an artist and his household”; it further states that “[a]n artist is a person so certified by the New York City Department of Cultural Affairs.” NEW YORK CITY ZONING RESOLUTION art. 1, § 12-10 Definitions, available at <http://www.nyc.gov/html/dcp/pdf/zone/content.pdf>.

110. Glendening, *supra* note 84, at 1503.

transport is inadequate, their only hope is to find work within walking distance,¹¹¹ but zoning removed that option long ago.

In cities zoning thus “encourage[s] the concentration of poverty,” which is “economically significant if, as some argue, it creates destructive ‘feedback’ effects such as abandonment cycles, landlord milking, speculative disinvestment, and ‘red-lining.’”¹¹² And people living in city centers are not the only ones affected: “zoning that is too rigorous can actually destroy the possibility of employment in a suburb.”¹¹³ The former governor of Maryland, Parris Glendening, who spearheaded that state’s Smart Growth policy, implicitly criticized single-use zoning when he noted “the importance of developing housing opportunities in proximity to real job opportunities.”¹¹⁴

E. Reduced Quality of Life

Although quality of life has no legal definition, it can fairly be called a hot topic, and as a result some general parameters have emerged.¹¹⁵ Good quality of life is associated with the presence in one’s everyday life of positive factors such as health, pleasant surroundings, fulfilling work and educational opportunities, satisfying recreational activities, proximity to friends and loved ones, and, of course, enough time to enjoy these positive factors. Bad quality of life is associated with the presence of negative factors such as crime, pollution, and anything else that could be described as the opposite of a positive factor: poor health, lack of time, etc. While quality of life is obviously important for individuals, its importance to the city, region and state should not be underestimated: it is emerging as a critical factor in the post-millennial economy. “[A] Wall Street Journal article highlighted ten factors that high-tech industry leaders consider when making location decisions. . . . The third factor was . . . a good quality of life. In contrast, financial

111. Meredith, *supra* note 39, at 459.

112. Dieterich, *supra* note 9, at 32-33.

113. Bogart, *supra* note 72, at 712 n.55.

114. Glendening, *supra* note 84, at 1503.

115. See generally Douglas M. Hershman, *Quality of Life Issues in Relation to the Homebuilding Industry*, 18 DEL. LAW. 19 (2000) (noting the importance of one’s immediate surroundings to quality of life and the detrimental impact of urban sprawl); James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENVTL. L. 1, 22 (2001) (stating that quality of life includes access to a wide range of recreational opportunities, access to the great outdoors, and an absence of pollution); Beatley & Collins, *supra* note 4, at 218 (citing health and education as factors); Bob Cindrich, *Work, Love, Play and the Quality of Life*, 5 LAWYERS J. 6 (2003) (discussing satisfying work, time with family and friends, health, and other factors).

incentives—long the mainstay of state economic development strategies—came in last.”¹¹⁶

Euclidean zoning is not conducive to quality of life. To take one obvious example, its “isolationist patterns that separate[] uses” have created a landscape in which “we no longer walk anywhere. Our kids are bussed or driven, and every little venture from home becomes a voyage.”¹¹⁷ For elderly people in particular, this is a nightmare: in a city or suburb whose very structure makes people dependent on cars, becoming unable to drive is synonymous with becoming unable even to accomplish everyday errands, let alone enjoy social and recreational activities. Meanwhile, “the psychological and financial cost of long commutes”¹¹⁸ takes a toll on working adults, particularly parents, whose commutes rob them of time with their children.¹¹⁹ This dependence on cars also has health consequences, because it removes all but the briefest walking from most people’s daily lives. When Maryland launched “a statewide campaign to encourage walking as a means of preventing obesity, cardiovascular disease, and other chronic diseases” as part of its 2002 Smart Growth initiative, the legacy of Euclidean zoning placed considerable obstacles in the way: the state had to “help local communities better understand methods to design more walkable neighborhoods”¹²⁰ and “aggressively retrofit[] existing roads with long-needed sidewalks.”¹²¹ As the governor put it, Maryland’s Smart Growth “effort is more than a fight against . . . sprawl. It is a fight for . . . a better quality of life.”¹²²

Euclidean zoning also interferes with other factors associated with quality of life. While the definition of a pleasant environment is clearly subjective, it is worth noting that Euclidean “biases make it nearly impossible to create a new development that replicates the qualities that make historic neighborhoods like Boston’s Beacon Hill or Back Bay so attractive,”¹²³ but zoning-mandated lot sizes, square footages, and other regulations minutely

116. Glendening, *supra* note 84, at 1496, citing Chen May-Yee, *The Global Battle: ‘Let’s Make a Deal,’* WALL ST. J., Sept. 25, 2000, at R. 10.

117. Gindroz, *supra* note 17, at 1424.

118. Whitehead, *supra* note 63, at 359.

119. See, e.g., Peter T. Kilborn, “*Relos*”: *America’s Domestic Expatriates*, INT’L HERALD TRIB., June 2, 2005, at 3 (describing high-income new arrivals to suburbia who “found good schools, safe streets, neighbors they like and a big house and a yard. But they did not count on the grueling traffic, on how far away everything seems . . . or on the stresses of a breadwinner’s travels.”).

120. Glendening, *supra* note 84, at 1501.

121. *Id.* at 1506.

122. *Id.* at 1495.

123. Wickersham, *supra* note 2, at 558.

dictating the physical features of the homes in a given zone strongly promote cookie-cutter suburbs with identical homes on identical cul-de-sacs. Meanwhile, the sheer distance between the various locations of everyday life complicates social and recreational activities and wastes time: the average American spends fifty-five minutes a day driving.¹²⁴

As for crime, the *Euclid* court speculated that zoning would reduce it: “[a] place of business in a residence neighborhood furnishes an excuse for any criminal to [enter] . . . where, otherwise, a stranger would be under the ban of suspicion.”¹²⁵ This is simply incorrect: first, most crimes are not committed by strangers or outsiders.¹²⁶ Second, “[m]ixed-use districts that provide housing, offices, shops, and other services, attract a far wider range of people, while spreading out their activities over longer periods of time. Consequently, the streets . . . are . . . safer both day and night, while being less congested at peak periods.”¹²⁷ *Euclid*’s legacy is visible in the quality of life in America’s inner cities, where “[a] crisis of economic stagnation deprives our poorest neighborhoods of the commercial activity that might promote a healthy street life . . . [and] public spaces once filled with busy shoppers have become the ‘turf’ for gang members and drug dealers.”¹²⁸

III. PROPOSED SOLUTIONS: NEW URBANISM AND SMART GROWTH

“New Urbanism reflects an American version of the European compact city, where the mixing of shops and residence in the urban center is designed to generate city life and attract pedestrians toward a higher density, less automobile-dominated community.”¹²⁹ In direct contrast to Euclidean zoning, “[t]he foundational planning principle of new urbanism . . . is . . . that relatively dense, mixed-use development is necessary for healthy community life.”¹³⁰ Indeed, “a growing number of scholars, planners, and architects have

124. U.S. DEP’T OF TRANSP., BUREAU OF TRANSP. STATISTICS, NAT’L HOUSEHOLD TRAVEL SURVEY DAILY TRAVEL QUICK FACTS (2005), http://www.bts.gov/programs/national_household_travel_survey/daily_travel.html.

125. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 393 (1926) (citation omitted).

126. *See, e.g.*, FBI, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 2002, available at http://www.fbi.gov/ucr/cius_02/html/web/offreported/02-nmurder03.html (stating that 75.6% of murder and manslaughter victims knew their assailant); Press Release, Bureau of Justice Statistics, U.S. Dep’t of Justice, Women Usually Victimized By Offenders They Know (Aug. 16, 1995), available at <http://www.bedfordcountysoc.org/resources/domestic/DOJstat.htm>.

127. Wickersham, *supra* note 2, at 550.

128. Garnett, *Ordering*, *supra* note 6, at 33-34.

129. Kushner, *supra* note 50, at 52.

130. Garnett, *Ordering*, *supra* note 6, at 33.

rediscovered Jacobs's objection to zoning laws' segregation of land uses."¹³¹ They contend that Euclidean fragmentation of uses is detrimental to safety, to residents' sense of community, and to economic vitality;¹³² in designing the most livable, efficient cities, then, "the challenge is to zone actively for density and a mixture of uses."¹³³ Smart Growth, meanwhile, is not a type of city design but a way of organizing overall development at the regional level. It "envisions a reduction in the extension of low-density suburban subdivisions as the predominant pattern of development[,]. . . embrac[ing] policies that target infrastructure subsidies to designated growth areas and that direct government investments to . . . renovation and revitalization [rather than] . . . new development on the suburban periphery."¹³⁴

The two approaches support and amplify each other. Because a major premise of Smart Growth is that "[o]nly through revitalizing urban centers can growth be accommodated without further urban sprawl and a rising threat to the urban ecology,"¹³⁵ the urban center it advocates is essentially a New Urbanist one, "characterized by mixed-use, compact, walkable communities, built onto existing towns and communities, where open space is protected."¹³⁶ Smart Growth "generally involves [public] transit-oriented development, walkable communities, mixed land uses and housing types, higher densities, and open space preservation."¹³⁷ It "is based on the recognition that sprawl can no longer deliver either affordable or accessible housing without terrible traffic congestion and that cities failing to adopt Smart Growth systems will miss out on economic development and the sought-for opportunities that come with growth."¹³⁸ A land-use code that followed Smart Growth principles, then, would "permit accessory buildings to be used as dwellings, dwelling unit types to be mixed, home occupations and live or work units, and housing in commercial zones."¹³⁹ It would be designed to achieve a "balanced urban development pattern that creates inclusive housing, supports home-based business, defines the public realm, facilitates pedestrian accessibility, and minimizes the use of the car while supporting public transit."¹⁴⁰

131. *Id.* at 32.

132. *See generally* Frug, *supra* note 5; Wickersham, *supra* note 2.

133. Wickersham, *supra* note 2, at 558.

134. Kushner, *supra* note 50, at 49.

135. *Id.* at 52.

136. Beatley & Collins, *supra* note 4, at 198-99.

137. Harvard Law Review Association, *supra* note 47, at 2291.

138. Kushner, *supra* note 50, at 49.

139. Duany & Talen, *supra* note 8, at 1452.

140. *Id.* at 1447.

The potential benefits to the environment and the economy are clear, and it has also been argued that implementing Smart Growth and New Urbanism together is “the best feasible strategy for reforming American urban design and rejuvenating its cities and suburbs . . . [while also] offering minority and poor communities the best opportunity for enhanced access to employment, community destinations, and an improved urban living environment.”¹⁴¹ Whether these arguments are true or not cannot be demonstrated by any American city, because zoning law and local government structure have hampered efforts to implement these ideas; existing Smart Growth efforts are pilot projects established too recently to show definitive results, and true New Urbanism has not been tried on a large scale, since “most communities enact New Urbanism on a parcel-by-parcel basis through an overlay zoning amendment enacted at the developer’s request.”¹⁴² But “[t]he New Urbanist approach is really not new; it comes from observations of cities that work.”¹⁴³ We now turn to one such city: Paris.

IV. THE FRENCH EXPERIENCE

A. *Smart Growth Is Normal; New Urbanism Is Nothing New*

i. *Lack of Urban Sprawl and Inner-City Decline*

Paris is the capital of Ile-de-France, a region covering 4,648 square miles with a population of 10,952,011.¹⁴⁴ By comparison, the New York metro area covers 13,847 square miles¹⁴⁵ and contains 21,923,089 people.¹⁴⁶ It is clear at first glance that the Paris area is more densely populated than the New York area: 2,361 inhabitants per square mile for Paris versus 1,583 for New York. However, these numbers do not account for open land. New Jersey, which has thirteen counties considered part of the New York metro area, is sprawling so rapidly that it is projected to become “the first state . . . to exhaust its supply

141. Kushner, *supra* note 50, at 74.

142. *Id.* at 64.

143. Gindroz, *supra* note 17, at 1437.

144. As of the 1999 census.

145. The definition of the New York metro area used here is that of the U.S. Geological Survey, which includes a total of twenty-nine counties in the states of New York, New Jersey, and Connecticut. See U.S.G.S., NEW YORK METRO. REGION: MAPPING CHANGE THROUGH TIME, available at http://landcover.usgs.gov/urban/info/new_york/index.asp.

146. Based on the 2004 Census. See <http://www.nyc.gov/html/dcp/html/census/popcur.shtml>.

of land available for development.”¹⁴⁷ The situation in the Paris metro area is quite different: fully 80% of Ile-de-France is farmland, woods, or forest.¹⁴⁸ That leaves only 20% of the region—929.6 square miles—as land used for housing, industry and commerce, infrastructure, etc., which gives the region a much higher density of 11,781 people per square mile. Interestingly, Manhattan, which as an island measuring under twenty-three square miles is by far the most densely populated city in America, is much denser than Paris: it houses 66,429 people per square mile,¹⁴⁹ while Paris intra muros houses 52,387.¹⁵⁰ New York thus manages to have both extreme population density at its core and sprawl everywhere else. In contrast, despite its population density, the Paris region is not a stifling megalopolis surrounded by empty land. Big-city life is obviously an option for residents interested in that lifestyle, but those who prefer the quiet life can find it: Paris has upscale single-family home sections,¹⁵¹ and 60% of the municipalities in Ile-de-France have populations of less than 2,000 people.¹⁵² Obviously, they use their land very differently than we do: we sprawl, they don’t.¹⁵³

As for inner-city decline, there is no such thing in Paris. The center of Paris contains the Louvre, the Latin Quarter, and residential areas whose value

147. Laura Mansnerus, *New Jersey Is Running Out of Open Land It Can Build On*, N.Y. TIMES, May 24, 2003.

148. INSTITUTE FOR URBAN PLANNING AND DEVELOPMENT OF THE PARIS-ÎLE-DE-FRANCE REGION, ATLAS DES FRANCILIENS VOL. I, summary available at http://www.iaurif.org/fr/ressources_doc/publications/publicationsrecentes/atlas/somatlas1.htm.

149. Manhattan island is 22.4 square miles, with a population of 1,488,000. Greater New York Chamber of Commerce, *New York City Facts and Figures*, http://nyc.chamber.com/NYC_FACTS.html. The fact that New York is more densely populated than Paris is no doubt due to the fact that it permits much taller buildings in the urban core. For purposes of comparison, Chicago has only 12,603 people per square mile and the city of Los Angeles just 8,198. WORLD ALMANAC 417, 420 (2006).

150. WORLD BOOK ENCYCLOPEDIA 160 (2006).

151. Article UG.1.2 of the Paris zoning code, noting that the zoning map defines a few areas within Paris’s General Urban zone that happened to develop as primarily single-family homes and villas (i.e. small mansions), forbids new construction for industrial use, small craft workshops, warehouse or office purposes in those defined areas, except in two such areas, where small craft workshops may still be built. Note that the uses themselves are not forbidden, only new construction designed for those uses; also, commercial activities other than those specified are apparently permitted.

152. INSTITUTE FOR URBAN PLANNING AND DEVELOPMENT OF THE PARIS-ÎLE-DE-FRANCE REGION, ATLAS RURAL ET AGRICOLE DE L’ÎLE-DE-FRANCE, summary available at http://www.iaurif.org/fr/ressources_doc/publications/publicationsrecentes/atlas/atlas_rural.htm.

153. In offering lifestyle options ranging from apartments in the densely-populated urban core to single-family homes in rural areas, the organization of the Paris region resembles the “sequence of environments [that] . . . eliminates the ‘urbanizing of the rural’ . . . [and] the ‘ruralizing of the urban,’” precisely as Duany and Talen have argued American cities should. Duany & Talen, *supra* note 8, at 1453-54.

and desirability is indicated by their price per square foot: according to a 2005 senate report, on average residential real estate in Paris *intra muros* is worth 4,745€/m², or \$525/sq. ft.¹⁵⁴ The oldest, most central parts of the city are not only the ones built along the most traditional French lines (i.e. ubiquitous mixed-use neighborhoods and mixed-income buildings, as described in (ii) below); they are also the most expensive. In late 2004/early 2005, the average sale price for real estate in the Latin Quarter was 6,387 €/m² and on the Ile Saint-Louis, a small island just east of the island on which Notre Dame is located, April 2005 prices were 6,000-9,000€/m² for most properties, rising to 8,000-15,000€/m² for apartments overlooking the Seine or situated in former mansions.¹⁵⁵

It is quite telling that Paris's closest socioeconomic equivalent to America's inner cities are the few areas that were not planned or built in the traditional French mode: namely, the suburbs where social housing was built during the 1960s and the 1970s in strict Modernist style, which, in a radical departure from French urban tradition, separates uses and housing types, thereby segregating and isolating the population. Just as the buildings in these areas resemble American ghetto housing projects, the history of these troubled suburbs resembles that of the American inner cities subjected to the mid-twentieth century Urban Renewal movement, which "is now widely thought to have been a disaster for the low-income people and communities it purported to assist."¹⁵⁶ These suburbs are not familiar to tourists, but their names—e.g., Seine-Saint-Denis, Seine-et-Marne and Val-d'Oise—should ring a bell for American readers who followed the November 2005 news stories about rioting among Paris's urban poor: these places were the tinderbox for social unrest.¹⁵⁷ It might almost be said that they were designed for that.

154. FRENCH SENATE REP., QUEL RETOURNEMENT POUR LE MARCHÉ IMMOBILIER?, available at <http://www.senat.fr/rap/r05-006/r05-0065.html>. One square meter equals 10.76 square feet, making the price 441€/sq. ft. The exchange rate used is that of Feb. 16, 2006.

155. KHS apartment rentals, citing Paris Chambre des Notaires, *Le marché immobilier, ventes—avril 2005*, available at <http://www.khs.fr/ParisArchives.cfm?IDTexteNewsArchives=154>.

156. David J. Barron, *The Community Economic Development Movement: A Metropolitan Perspective*, 56 STAN. L. REV. 701, 706 (2003).

157. Kim Willsher, *A country in flames . . . French cities teeter on the edge of anarchy*, THE DAILY TELEGRAPH (London, UK), Nov. 6, 2005.

ii. Mixed Use: A Structural Approach

In contrast to the Euclidean approach, Paris has generally tolerated or even explicitly encouraged mixed uses within a single district.¹⁵⁸ The Euclidean approach is visible in almost all American cities and towns. New York City's zoning code is a model of typically American complexity: it not only distinguishes residential, commercial and manufacturing use zones, it subdivides them into eighteen different "use groups,"¹⁵⁹ each of which may be further subdivided into between three and ten subgroups.¹⁶⁰ The subgroups are further distinguished by varying requirements on features such as parking, setback, and "floor area ratio,"¹⁶¹ such that two otherwise identical sub-subgroups may differ in one or more of those requirements.¹⁶² In contrast, the most recent Paris zoning code divides the city and surrounding greenspace into just four zones, three of which are neither residential nor commercial,¹⁶³ the city's houses, apartment buildings, shops, cafés, offices, and other commercial establishments thus fall within a single zone, General Urban.¹⁶⁴ Obviously, General Urban is by definition mixed use.

The previous Paris zoning code, passed in 1977,¹⁶⁵ was somewhat more complex; it divided the city into eleven zones and supported some specialization where it already existed, "favoring, for example, employment

158. Paris is not alone in this: France's Code of Urbanism requires municipalities to adhere to the principle of "diversity of urban functions," i.e. mixed use, and to pay particular attention to the balance of jobs and housing in a given area. C. Urb. Art. L. 121-1(2).

159. See "NYC Zoning Glossary," http://www.nyc.gov/html/dcp/html/zone/glossary.shtml#use_group.

160. See, e.g., "New York City Zoning Residence Districts," http://www.nyc.gov/html/dcp/html/zone/zh_resdistricts.shtml (stating that the residential use groups are subdivided into the basic categories R1 through R10, each of which may be further subdivided).

161. See, e.g., "New York City Zoning Commercial Districts," http://www.nyc.gov/html/dcp/html/zone/zh_commdistricts.shtml (stating that the numerical suffix used in some zoning classifications indicates variations in parking, floor area ratio, and other such requirements).

162. In most New York City zones, special permits, variances, and similar methods of bureaucratic waiver may allow for exceptions to one or more general rules. This is also typical of American zoning codes, whose detail and complexity make it necessary to create a bureaucratic apparatus by which at least a minimal degree of flexibility can be introduced into the system.

163. Those three are Zone N (Nature and Forests); Zone UV (Green Urban), i.e. parks and other public landscaped areas; Zone UGSU (Major Urban Services), i.e. train stations and rail lines, hospitals, waste treatment centers, water reservoirs, riverside ports, convention centers, and major centers of industrial distribution. Detailed descriptions of each zone are available at <http://www.v2asp.paris.fr/v2/urbanisme/PLU/Reglement/Default.ASP>.

164. In French, "zone urbaine générale." This covers everything not covered by the previous three zones.

165. The Plan d'Occupation des Sols. Law of 28 Feb. 1977.

where it was already strongly present.”¹⁶⁶ However, the Paris definition of favoring one use did not include absolutely barring others: efforts to favor residential use in already heavily residential areas, for example, only forbade commercial uses that involved “*significant* job creation.”¹⁶⁷ In some 400 years of urban planning, Paris’s 1967 *Plan d’Urbanisme Directeur* law was the first attempt to zone for use, defining business, residential, university and administrative (government) zones.¹⁶⁸ This law lasted only a decade; the 1977 reforms redefined most areas not in terms of use but in terms of the density of the built environment.¹⁶⁹ As any visitor to the city can confirm, the result of allowing owners the freedom to use their buildings as they see fit is that the basic necessities of everyday life—stores, schools, banks, cafés, churches, doctor’s offices, cultural amenities, etc.—are all within easy walking distance of residences. This dispersal of commercial activity throughout the city also means that many people’s jobs are within walking distance, and indeed, many Parisians actually do walk to work.¹⁷⁰ Paris exemplifies Jane Jacobs’s belief that “[t]he most effective mixture of uses are fine-grained: each block should bring together different uses, and not be dominated by a single activity, no matter how thriving.”¹⁷¹

Many American planners, accustomed to the strict control Euclidean zoning gives U.S. municipalities, might wonder how a major city could allow owners so much freedom over such a long time without descending into chaos. The expected result might be a proliferation of nuisances and of jarring buildings that conflict with the surrounding neighborhood. A visit to Paris will demonstrate that chaos has not occurred, and the reasons it has not should be familiar to any American lawyer. Uses that are or tend to be nuisances have been prevented, of course, but not by barring up front any use that might conceivably disturb the residents; instead it is done through a combination of

166. Paris City Hall, *Zonage et destinations*, http://www.paris.fr/portal/Urbanisme/Portal.lut?page_id=971&document_type_id=5&document_id=962&portlet_id=2416.

167. Paris City Hall, *Zonage et destinations*, http://www.paris.fr/portal/Urbanisme/Portal.lut?page_id=971&document_type_id=5&document_id=962&portlet_id=2416 (emphasis added).

168. Law of 6 Feb. 1967.

169. The 1967 law is also responsible for certain details of the Paris skyline: it set 31 meters as the maximum height for buildings in the city center and 37 meters for buildings on the outer edges of Paris *intra muros*, apart from a tiny number of Modernist projects in southern Paris.

170. Paris City Hall has published charts illustrating that, with the exception of a few areas at the city’s outskirts, at least 10% of Parisians walk to work, and in about one-third of Paris neighborhoods, including some of the wealthiest areas in the center-west of the city, more than 19% of people do. DIAGNOSTIC DÉPLACEMENTS, at 65, fig. 44 [hereinafter Paris, DÉPLACEMENTS], available at http://www.v2asp.paris.fr/fr/urbanisme/plu/rapport_presentation/diagnostic/Diagnostic_Deplacements.pdf.

171. Wickersham, *supra* note 2, at 550.

servitudes,¹⁷² rudimentary zoning for use,¹⁷³ and appropriate civil or administrative action, e.g., nuisance suits or environmental enforcement. In other words, Paris uses a system that roughly parallels the one most American states used prior to the advent of Euclidean zoning: it explicitly prevents a few obvious nuisances or hazards, and it gives affected parties the option of enforcing servitudes or shutting down less-obvious nuisances themselves by bringing suit. Beyond those limits, unless an owner buys a *copropriété* (condominium) with contractually agreed restrictions, she is free to use her property as a home, an office, an art studio, or whatever else she pleases.¹⁷⁴ Paris testifies to the truth of Jacobs's statement that "[i]ntricate minglings of different uses in cities are not a form of chaos. On the contrary, they represent a complex and highly developed form of order."¹⁷⁵

As for the relative absence of unsightly buildings, this is at least in part due to the fact that Paris has historically tended to zone for structures rather than uses. Between 1607 and 1902, zoning was used to set maximum building heights,¹⁷⁶ to regulate building materials due to fire risk,¹⁷⁷ and to impose

172. French law recognizes three types of servitudes: public servitudes (e.g. for protection of natural resources or historically significant sites, or for public utilities such as underground cables; see Code de l'Urb., Art. R. 126-1); servitudes of urbanism (e.g. imposing maximum building heights); and private servitudes (e.g. to ensure that owner A does not build a structure that impedes owner B's enjoyment of B's property). It is worth noting that as a general rule all three types address structures rather than uses. The first two types are discussed in JACQUELINE MORAND-DEVILLER, *DROIT DEL'URBANISME*, at 23-24 (Daloz ed., 6th ed. 2003). Private servitudes in France function very similarly to the U.S., in that they run with the land unless the parties agree otherwise and they are enforceable by affected parties (i.e. neighbors) rather than by the government. All the public servitudes in Paris are listed in a single document, available at <http://www.v2asp.paris.fr/fr/urbanisme/PLU/Annexes/ANN1.pdf>.

173. I.e., the classification of major industrial and similarly large-scale, high-impact uses (train stations, hospitals, etc.) into the Major Urban Services zone. See *supra* note 161.

174. The few exceptions to this freedom affect a comparatively tiny number of owners: in the Paris region (Ile-de-France), most new non-residential uses that require very large spaces, and thus might create traffic, noise, or similar nuisances if left unregulated, require an *agrément* (official permission) in addition to construction permits. *Agrément* is theoretically required for construction, expansion or rehabilitation of any space used for industrial, commercial, professional, administrative, technical, scientific or teaching use. C. Urb. Art. R. 510-1. However, the exceptions nearly swallow the rule: certain municipalities, certain uses (e.g. retail stores, see Art. 510-6-I(2), and movie theaters, see Art. 510-6-I(2)), all industrial and warehouse properties under 5000m² (53,820 sq. ft.), and all other non-residential uses occupying less than 1000m² (10,764 sq. ft.), are exempted. Art. 510-6-I. Likewise, Art. 510-6-I(5) exempts mere changes in use or changes of users/owners from this requirement. In fact, when a law was proposed that would have required mayoral permission for owners of buildings used in commerce or trade to change their buildings to a different use, the Constitutional Counsel declared it unconstitutional as a violation of property rights and the right to do business. Cons. Const. no. 2000-436, 7 Dec. 2000, J.O. 14 Dec. 2000.

175. Cited in Wickersham, *supra* note 2, at 563.

176. The Royal Declaration of 10 April 1783 and the Patent Letters of 28 August 1784 fixed the maximum building height—defined as the height of the façade, not including rooftop rooms—at the width

minimum courtyard sizes to promote access to sunlight and free circulation of air.¹⁷⁸ This has continued to the present day, with Paris's General Urban district subdivided not into use zones but into areas of different maximum heights and structure types.¹⁷⁹ This focus on structures explains not only the ubiquity of mixed-used property, since the government is only minimally attentive to uses, but also the visual harmony of the city; aesthetic considerations have long been a high priority.¹⁸⁰ In both old and new parts of Paris, aesthetic façade restrictions are enforced¹⁸¹ and new construction is conditioned on the requirement that the building envelope harmonize with surrounding structures.¹⁸² This requirement explains the near-total absence of skyscrapers in Paris: the city proper has only six buildings over 110m (361 feet), five of which are shorter than 140m (459 feet), and all of them were built under the short-lived 1967 zoning law.¹⁸³ Paris's skyscrapers are located primarily in La Défense, an area just west of the city proper that was

of the street on which the façade faced.

177. Wooden elements on the exterior of buildings must be covered with plaster. Edict of 1607, promulgated by King Henri IV. Fire safety measures seem to have been in vogue in the seventeenth century: New York's first such law was passed in 1648. RICHARD PLUNZ, A HISTORY OF HOUSING IN NEW YORK CITY 1 (1990).

178. Decree of 13 Aug. 1902.

179. Articles UG.10 and UGSU.10 describe colored lines on the city's planning maps that "define, according to their color, the vertical height of the building envelope applicable to buildings that front on the street, and, according to their type (continuous line, dotted line . . .), the shape of the roofline." Paris City Hall, *Local Urban Plan Definitions: Filet de couleur*, available at http://www.v1.paris.fr/V2/urbanisme/PLU/Lexique_PLU.asp. The height of buildings with no setback from the street is generally still, as in the eighteenth century, defined relative to the width of the street (including sidewalks). Figures 5-9 in the following document illustrate the relationship between street width and the maximum façade height of buildings fronting on streets, while figure 10 illustrates additional allowable rooflines and total heights. http://www.v1.paris.fr/fr/Urbanisme/PLU/Reglement/Reglement_Figures.pdf.

180. Safety and aesthetic concerns can combine: the classic Paris roof, with its Mansard style and graceful tilt back from the façade, is an example. This roof style derives from the Royal Declaration of 10 April 1783 and the Patent Letters of 28 August 1784, which regulated the angle at which rooftop rooms had to lean back from the façade. These laws were made because people whose poverty relegated them to living on rooftops built precarious dwellings there, and in addition to being unattractive, there was concern that the flimsy structures might fall into the street; tilting them back made them both less visible and less likely to fall.

181. Façade restrictions are not only architectural in nature: for example, antennae and satellite dishes are only permitted on roofs and must be set back far enough to make them impossible to see from any public space, while air conditioning units must be placed so as to limit their visual impact. Paris Zoning Code, Art. UG11.1.3(3).

182. Paris Zoning Code, Art. UG11.1.3 (stating that new construction must integrate with the existing neighborhood, taking account of proportion, scale, and façades of surrounding buildings, but specifically stating that new construction can be contemporary in style).

183. See Paris: High-Rise Buildings (Completed), <http://www.emporis.com/en/wm/ci/bu/sk/li/?id=100603&bt=9&ht=2&sro=1>.

constructed specifically for such structures. The point of separating structure types is to create architecturally coherent neighborhoods: Paris *intra muros* is built largely from limestone and plaster, or concrete treated to look like plaster,¹⁸⁴ and with few exceptions it caps building heights at the width of the street plus a variable but small number of meters.¹⁸⁵ La Défense, meanwhile, is all tall buildings in steel and glass.¹⁸⁶

Even in the context of plans to improve quality of life for Paris residents, city authorities remain preoccupied with structures, particularly their beauty and character: “the harmony of the city, of its colors, shapes, and materials . . . the specificity of its neighborhoods, the coherence of their organization . . . [and] the nature of the shops that increase the charm of Paris streets necessitate particular attention and careful work on the part of construction-industry actors.”¹⁸⁷ This approach could be described as a vision of the city as a work of art that is perpetually in progress; the question is not where unwanted uses should be banished to, but what architectural techniques can be used to harmoniously blend all uses into the surrounding landscape. Construction or rehabilitation of industrial shipping ports on the river Seine, for example, “must be accompanied with a particular effort to integrate them into this sensitive site . . . [and] must be compatible with the continuity and quality of leisurely walks along the banks of the Seine.”¹⁸⁸ In a nutshell, Paris city planning lets owners put their property to virtually any use they want, so long as they do so within structures that are regulated to enhance safety, beauty, and quality of life for everyone. Aesthetically pleasing mixed-use neighborhoods are the natural result.

184. The Paris Zoning Code states that “limestone and plaster are dominant in Paris and give the city its general tonality,” and while this should be respected, the use of other materials and colors that coordinate with the existing urban fabric is not forbidden. It notes, however, that materials and colors may be restricted if construction is within an architecturally homogenous area. Art. UG.11.1.3(4).

185. See, e.g., Paris Zoning Code Art. UG.10.3-10.4. Defining maximum building heights according to the width of the street on which the buildings face, as Paris has long done, could be based on safety concerns such as reducing traffic congestion by limiting the number of people living on narrow streets, but it also has the aesthetic result of inciting all the owners on the street to make their buildings the maximum, and thus the same, height.

186. Even La Défense is mixed use, with 150,000 jobs and 20,000 inhabitants. See the web site of the Hauts-de-Seine county council, <http://www.hauts-de-seine.net/portal/site/hds>, click on Cadre de Vie, then Urbanisme, then La Défense.

187. Paris City Hall, Local Urbanism Plan, Planning and Durable Development, Ch. 1 (Improving the Quality of Life for All Parisians in a Lasting Way), at 3, http://www.v2asp.paris.fr/fr/urbanisme/PLU/PADD/PADD_CadreVie.pdf. Note, “durable development” is a literal translation of a French term describing city, regional and national planning that aims to coordinate economic progress, social welfare, and environmental protection.

188. *Id.* at 6.

iii. Building(s) for People

This Note has listed five key consequences of Euclidean zoning: (1) urban sprawl and the corresponding deterioration of city centers; (2) racial and socioeconomic segregation; (3) environmental and energy problems; (4) adverse economic impacts; and (5) reduced quality of life. While Paris's lack of urban sprawl and its vibrant city center have already been discussed, an analysis of the environmental status or energy usage of the Paris region is beyond the scope of this Note; suffice to say that French law has "provisions requiring consideration of traffic-minimization measures in . . . land use planning,"¹⁸⁹ Paris proper averages only 0.5 cars per household,¹⁹⁰ and the less-wasteful, less-polluting energy policies of France and of Western Europe in general are well known.¹⁹¹ What remains, then, is a brief discussion of economics, segregation, and quality of life. They will be treated together.

Though an examination of the Paris economy is beyond the scope of this article, it should be clear by now that since sprawl has not happened in Paris, the associated economic impact—such as massive infrastructure expenses and the displacement of jobs to areas many people have trouble getting to—is a non-issue there. Again, it is only in the Modernist social-housing wastelands outside the city proper that people are physically isolated from economic activity. The government recently responded to that problem by designating every neighborhood in France that is characterized by deteriorating residential buildings and "a marked imbalance between housing and jobs"¹⁹² as a "Sensitive Urban Zone," which qualifies businesses relocating there for a subsidized incentive package.¹⁹³ In effect, the government is trying to make

189. Richard L. Ottinger & Mindy Jayne, *Global Climate Change Kyoto Protocol Implementation: Legal Frameworks for Implementing Clean Energy Solutions*, 18 PACE ENVTL. L. REV. 19, 35 n.101 (2000).

190. Paris, DÉPLACEMENTS, *supra* note 170, at 58. The Paris region as a whole, meanwhile, averages 0.9 cars per household. *Id.*

191. For example, the U.S. Department of the Environment's E.I.A. INT'L ENERGY ANNUAL shows that Western Europe produces only somewhat more than half as many carbon dioxide emissions as North America. See Table 2, Global Carbon Dioxide Emissions by Region from 1980-2002, <http://www.calvert-henderson.com/energy-table2.htm>. This is despite an equivalent quality of life and a population that exceeds North America's by some 50 million people.

192. The French phrase is "un déséquilibre accentué entre l'habitat et l'emploi."

193. FRENCH SENATE REP., LE PROJET DE LOI D'ORIENTATION ET DE PROGRAMMATION POUR LA VILLE ET LA RÉNOVATION URBAINE: UNE RÉPONSE AUX INSUFFISANCES DE LA POLITIQUE DE LA VILLE, <http://www.senat.fr/rap/a02-403/a02-4032.html>. The French term for these neighborhoods is "Zone Urbaine Sensible."

those areas mixed use to repair the economic—and hence, social—damage done by experimenting with single-use, Urban Renewal-style housing projects. Meanwhile, newer social housing has been integrated into the ordinary fabric of Paris life rather than being banished to outside the city proper.¹⁹⁴

As for socioeconomic segregation, building structure emerges as the key issue. “Only 26% of homes in Ile-de-France are single-family homes; 7 out of 10 are apartments.”¹⁹⁵ The Paris area thus offers classic big-city living, with an unusual quirk: “[a] substantial part of the city’s greatness derives from the fact that the upper floors of the buildings in all districts are residential and that each structure has a mixed-income population.”¹⁹⁶ This is due to building design: in buildings that predate elevators, the best apartments—that is, the largest ones with the highest ceilings and the most elaborate decorative details—are in the first two floors above ground level, where wealthy families live.¹⁹⁷ Smaller apartments that require residents to climb more stairs are correspondingly less desirable; these intermediate floors house the middle class.¹⁹⁸ At the top are garrets, small rooms whose ceilings follow the roofline; these were once used for storage and servants’ quarters¹⁹⁹ and are now rented to artists and students.²⁰⁰ “All of these residential spaces sit on top of public uses. The approach offers an abiding principle for contemporary development of urban spaces.”²⁰¹

This basic concept of a single building containing apartments of very different values has persisted even when legal or technological changes have

194. For example, the new Paris zoning code defines certain neighborhoods as lacking affordable rental housing, and requires new residential developments that exceed 1000m² in those areas to set aside 25% of the development for affordable housing. Paris Zoning Code, UG2.3(1). There are, of course, incentives for such construction; see, e.g., Construction Code, Title 3 (describing subsidies and favorable loans for construction, acquisition, and renovation of social housing).

195. INSTITUTE FOR URBAN PLANNING AND DEVELOPMENT OF THE PARIS-ILE-DE-FRANCE REGION, ATLAS DES FRANCILIENS VOL. II, summary available at http://www.iaurif.org/fr/ressources_doc/publications/publicationsrecentes/atlas/somatlas2.htm. The term translated here as “single-family homes” is *maisons individuelles*.

196. Gindroz, *supra* note 17, at 1421. This is generally true in Paris, with the unfortunate exception of the 1960s-70s era Modernist housing projects: they typically dedicate all floors, not just the ones above ground level, to residential use, and contain apartments too similar to each other to permit notable variation in value.

197. *Id.* With the introduction of elevators, the hierarchy was altered. See notes 202-03, *infra*, and accompanying text.

198. Gindroz, *supra* note 17, at 1421.

199. *Id.* at 1421.

200. Attic apartments are called “chambres de bonne,” literally “maid’s rooms,” and are commonly rented to students. LAROUSSE FRENCH-ENGLISH ENGLISH-FRENCH DICTIONARY UNABRIDGED 144 (1993).

201. Gindroz, *supra* note 17, at 1421.

altered building structures. The city's control over building structure enables it to impose minimum standards, like the 1902 rule setting the minimum area of an interior courtyard at thirty square meters,²⁰² that have sometimes modified the pattern of desirable apartments: those facing the courtyard were left for servants and the poor in pre-1902 buildings whose cramped courtyards inhibited access to fresh air, but in post-1902 buildings, particularly with the rise of street noise due to cars, street-facing apartments became cheaper and courtyard-facing ones more expensive.²⁰³ The advent of elevators likewise shifted the pattern without destroying it; for example, since the city's planning regulations still impose some form of Mansard-style roof in most districts, and thus top-floor rooms whose ceilings follow the roofline,²⁰⁴ the top floor alone may not be suitable for American-style penthouse apartments, but developers can give upper floors a different value in other ways. They can make them more desirable by turning the top two stories into a loft with a mezzanine under the roofline, placing less desirable apartments underneath; or they can keep them cheaper by focusing their construction or renovation budget on the apartments below, which become correspondingly more desirable and expensive.

This pattern contrasts powerfully with the American approach: a century before the ill-fated Urban Renewal movement, New York City developers were already building poorly-constructed residential developments consisting of a concentrated mass of identical homes targeted exclusively towards the poor—that is, slums.²⁰⁵ Euclidean zoning, which New York City invented in 1916, simply provided a legal framework that set this pattern of segregation in stone by providing municipalities with a mechanism to prevent future development that did not follow the principle of separating uses and housing types, and, by extension, socioeconomic groups.

In contrast, avoiding socioeconomic segregation is an express goal of France's Code of Urbanism, which requires city plans and municipal maps—the rough equivalent of American zoning maps—to adhere to the principle of

202. Decree of Aug. 13, 1902.

203. Antoine Le Bas, *Maison, immeuble et compagnie: le singulier pluriel du logement de banlieue: enquêtes dans les Hauts-de-Seine 1840-1940*, <http://www.culture.gouv.fr/culture/revue-inv/insituans/lebas/html/lebas.html>.

204. Paris City Hall. Figures 5-10 illustrate the relationship between street width, façade height, and the size and shape of rooflines. http://www.v1.paris.fr/fr/Urbanisme/PLU/Reglement/Reglement_Figures.pdf.

205. For example, the Gotham Court complex, built in 1850 to house 140 poor families, consisted of tenements each of which faced an alley and “contained two dwellings measuring ten feet by fourteen feet . . . subdivided into two rooms, both without cross ventilation.” PLUNZ, *supra* note 177, at 6.

mixité sociale, or socioeconomic diversity.²⁰⁶ The concept of mixed-income residential areas does not, of course, imply a complete intermingling of all possible social classes in one building or even one neighborhood. However, in Paris, a notable degree of socioeconomic diversity exists even in the most expensive areas—that is, even in neighborhoods whose residents presumably have the resources, knowledge and clout to exclude unwanted neighbors to the greatest extent the law allows. The Ile Saint-Louis, originally built up in the 17th century as mansions and villas for the wealthy,²⁰⁷ is now largely apartments built within these original structures; the real estate prices cited above²⁰⁸ suffice to show that there are no poor people living there. However, the price range is very wide: the highest-priced residences, at 15,000€/m², or \$1663/sq. ft., are worth 250% more than the lowest-priced ones. Given that the entire island is only approximately 720m long by 200m wide²⁰⁹ (787 x 219 yards), this is the equivalent of an American neighborhood measuring a block and a half by four blocks in which prices for homes *of the same size* range anywhere from \$400,000 to \$1 million.²¹⁰ Of course, since homes on Ile Saint-Louis come in a range of sizes and some apartments are available for rent, the income mix is even greater than this price range would suggest.²¹¹

As for quality of life, “France . . . meets or exceeds the United States on many measures of health and well-being. French life expectancy is higher, child mortality is lower, and education levels are about the same.”²¹² Paris’s walkability is demonstrated by the fact that 54.4% of all trips Parisians take within the city are on foot.²¹³ And while education levels may be roughly equal, the results are not: mixed-income neighborhoods mean mixed-income schools,²¹⁴ and in international comparisons, French elementary and high

206. C. Urb. Art. L. 121-1(2).

207. See, e.g., MSN Encarta encyclopedia entry for Paris, § II-A, “Islands.”

208. See footnote 156, *supra*, and accompanying text.

209. http://fr.wikipedia.org/wiki/%C3%8Eles_pariennes (French Wikipedia page comparing the sizes of all the islands in Paris).

210. Those who have difficulty imagining how values per square foot could vary that widely within a tiny, fairly homogenous area that is all part of the same school district need only consider the variables: e.g., ordinary apartment with low ceilings, no parking and no view on a relatively busy street versus perfectly restored 18th-century apartment with parking, fourteen-foot ceilings, marquetry floors, and gilded woodwork located in a former mansion on a quiet pedestrian street with a river view.

211. In March, 2006, perusal of French real estate web sites such as www.district-immo.com and www.seloger.com showed Ile Saint-Louis studio apartments for rent as low as 490€/month, and sales with asking prices ranging from studios at 240,000€ to five-room apartments at 2,630,000€.

212. Beatley & Collins, *supra* note 4, at 218.

213. Paris, DÉPLACEMENTS, *supra* note 170, at 58.

214. Note that, due to differences in the way schools are funded, even socioeconomically segregated schools in France would not be as underfunded as in the U.S.: local and regional governments are

school students consistently outperform Americans. A 2004 comparison of fourth-graders' attitudes to reading found French children to be the most enthusiastic, while Americans tied with English children for least enthusiastic.²¹⁵ In a 1998 international study of the advanced mathematics skills of high school seniors in forty-five countries, "the United States' score of 442 was below the international average of 501. Only Austria (436) scored lower. France, with a score of 557, finished atop the rankings in this category."²¹⁶ This is despite the fact that France actually spends 23% less per student than the United States on primary and secondary education.²¹⁷ The factors that go into educational performance are obviously very complex, but studies in America have shown that underprivileged children learn better in mixed-income classrooms.²¹⁸ This supports an inference that, whatever other factors may be interacting to give French students such good results, their average scores on international comparisons are not dragged down by large numbers of seriously underperforming peers, since in France more lower-income children get a good education—simply because they get the same education as their wealthier neighbors.

B. French Legal and Political Structures That Make This Possible

While the political and legal framework underlying land use in France is different than in the U.S., similar principles underpin both systems. An in-depth discussion is beyond the scope of this article, but a few points may help illustrate that Paris's approach to land use is not totally alien to American ways. At least one scholar has noted that "[t]he word 'police' as used in 'police power' may have . . . entered English from French,"²¹⁹ a point

responsible for only 26% of education spending in France, versus 92% in the U.S. Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *COMPARATIVE INDICATORS OF EDUCATION IN THE UNITED STATES AND OTHER G8 COUNTRIES: 2004*, at 19. <http://nces.ed.gov/pubs2005/2005021.pdf> [hereinafter N.C.E.S., *COMPARATIVE*]. The point here is thus not so much that Paris's mixed-income residential areas give lower-income children access to better-funded schools, although that is to some extent the case, but that lower-income children get the exact same curriculum, teachers, and materials as middle-class children.

215. N.C.E.S., *COMPARATIVE*, *supra* note 214, at 31.

216. Mark Sullivan, *Study Finds U.S. High School Seniors Lag Behind Global Peers in Math and Science*, *THE BOSTON COLLEGE CHRONICLE*, vol. 6, no. 12, Feb. 26, 1998, available at http://www.bc.edu/bc_org/rvp/pubaf/chronicle/v6/f26/timss.html.

217. N.C.E.S., *COMPARATIVE*, *supra* note 214, at 16.

218. See, e.g., David Rusk, *Classmates Count: Housing Policy is Also School Policy* (Gamaliel Fdn. 1999), available at <http://www.gamaliel.org/Strategic/StrategicpartnersRuskChatauqua.htm>.

219. David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 *U. COLO. L. REV.* 497, 501 (2004).

confirmed by the Oxford English Dictionary;²²⁰ usage of the phrase *pouvoir de police* in French law illustrates that it is the same concept.²²¹ Land use law as a means of enforcing the principle that “one may not use one’s own property to the injury of another” has been traced back to an English legal text written in 1187,²²² some five generations after the 1066 Norman Invasion imposed French language and customs on England, and the same concept is found in a French-language text dating from 1290.²²³ Even some aspects of French land use law that appear quintessentially French are perfectly at home on U.S. legal soil: although American cities generally do not consider aesthetics to the extent Paris does, zoning laws passed solely for aesthetic reasons have been held to be a valid exercise of the police power so long as the standards used are adequate and appropriately applied.²²⁴ And as for Smart Growth, the Paris region uses incentives to channel growth into certain areas,²²⁵ which is obviously compatible with American traditions: Maryland’s initiative does likewise, albeit with different incentives.²²⁶

In many American zoning cases, the key argument is that the ordinance so reduces the owner’s property value that it amounts to a taking requiring compensation under the Fifth Amendment.²²⁷ The French concept of *expropriation* is similar to takings, but it is simpler and in some ways more favorable to owners.²²⁸ For example, if the owner and the state cannot agree on a purchase price, the decision will be made by a judge, as in the U.S., but the costs of that civil action are borne entirely by the state regardless of the

220. COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY VOL. II 2227 (1971).

221. See, e.g., CODE GÉNÉRAL DES COLLECTIVITÉS TERRITORIALES, Art. L-2211-1 (stating that mayors’ *pouvoir de police* is what gives them the ability to act in the name of public safety); Cour adm. d’appel de Douai, Nov. 29, 2004, N° 02DA00265, unpublished (analyzing a lawsuit over a construction permit in terms of the Code of Urbanism and the *pouvoir de police* of the municipal authorities who granted the permit).

222. Thomas, *supra* note 219, at 502-03.

223. *Id.* at 503.

224. See, e.g., Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995); Parking Ass’n of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994).

225. C. Urb. Art. L. 510-1(III) and R. 510-6 (requiring official permission—a complex bureaucratic process—for development of commercial, industrial, and similar uses in Ile-de-France, but exempting development in certain targeted areas).

226. Glendening, *supra* note 84, at 1494.

227. E.g., Nollan v. California Coastal Com., 483 U.S. 825, 836 (1987) (holding it to be a taking if the municipality conditions a building permit on the granting of a public easement across the owner’s private beach).

228. This may be part of the reason such lawsuits are much less common in France. One study indicates that suits by developers seeking zoning approval are about nine times less common than in the U.S. Jeffrey M. Sellers, *Litigation as a Local Political Resource: Courts in Controversies Over Land Use in France, Germany, and the United States*, 29 LAW & SOC’Y REV. 475, 486 (1995).

outcome.²²⁹ The state must also pay moving costs for those displaced by the expropriation²³⁰ and incidental damages such as lost rental income,²³¹ and displaced owners have preferential status for certain benefits that help mitigate the impact of their property loss, such as low-interest construction loans.²³² And while the concept of expropriation does not apply to acts by the state that merely diminish the value of property without physically affecting it,²³³ such acts are by definition much less common: what typically provokes takings lawsuits in America is rezoning a parcel to a less profitable use, but that cannot often happen in a country that barely zones for use at all. The other common trigger for takings lawsuits in the U.S. is the placing of uniquely onerous conditions on construction permits,²³⁴ but the French Code of Urbanism prohibits conditioning building permits on anything other than mitigating risks that the construction itself would pose to public safety or health.²³⁵ As such, many widely cited U.S. land use cases would probably never have arisen in France.

The key political difference in French land use law is that the power to regulate land use is diffused between the nation, each region, and each municipality.²³⁶ In contrast, “[l]and use control in the United States traditionally has been the domain of local government[;] . . . most states have passed enabling statutes that grant zoning power to municipal and county governments, which then may choose to exercise the powers granted,”²³⁷ and as evidenced by the fact that 97% of incorporated communities in the U.S. use Euclidean zoning,²³⁸ municipal and county governments offered that power

229. C. Exprop. Art. L13-5.

230. C. Exprop. Art. L13-26.

231. Michel Huyghe, *Expropriation pour cause de l'Utilité Publique*, JCP G 2004, I 143, ¶ 17.

232. C. Exprop. Art. L14-2.

233. However, if a partial taking makes the owner unable to continue using the remaining property in the normal way, she can force the state to expropriate the remaining property with full compensation. C. Exprop. Art. L13-10. Interestingly, expropriation law does apply if the state's act in physically taking part or all of someone's property immediately *raises* the value of what was taken: in that case, the state must compensate the owner not only for the loss of what she had, but for the lost profit. C. Exprop. L13-12.

234. *E.g.*, *Nollan v. California Coastal Com.*, 483 U.S. 825 (1987).

235. C. Urb. Art. R. 111-2.

236. The effects of this diffusion are seen in the margin within which local and regional authorities can operate; for example, in cases where an *agrément* (official permission from the city) is required before a building permit may issue, the decision to grant or deny it must be compatible with Paris's official planning and growth policy. Art. 510-7.

237. Thomas R. McKeon, *State Regulation of Subdivisions: Defining the Boundary Between State and Local Land Use Jurisdiction in Vermont, Maine, and Florida*, 19 B.C. ENVTL. AFF. L. REV. 385, 387-88 (1991).

238. Dietderich, *supra* note 9, at 29 (citing CHARLES M. HAAR, LAND-USE PLANNING 185 (1977)).

almost universally take it. Such statutes, based on the 1922 Standard Zoning Enabling Act, were of course necessary because under the U.S. system, the power to regulate the land within a state inheres in the state itself, not in municipalities. During the 1960s and 1970s some states began a “quiet revolution” to take some of these powers back; the American Law Institute promulgated a Model Land Development Code, which, *inter alia*, “submit[ted] any development that is of regional impact or affects an area of critical concern to extra scrutiny under a state-mandated procedure before approval.”²³⁹ This new approach was adopted by several states, but never caught on; where it was implemented, the question of where local power stops and state power begins continues to be an issue.²⁴⁰ France’s political structure is quite different from America’s, but for those interested in exploring how a similar approach to zoning can be implemented within a federal system more structurally similar to the U.S., Germany offers an intriguing example.²⁴¹

V. CONCLUSION

The French example seems to demonstrate that proponents of New Urbanism and Smart Growth are right: a planning process that incorporates these principles “produce[s] an urbanism that is fundamentally unlike conventional sprawl, featuring urban areas that are compact, pedestrian-oriented, and containing mixed uses. It . . . produce[s] viable urban settings that people . . . want to live in,²⁴² thereby reducing pressure to consume natural habitats and convert more land to low-density sprawl.”²⁴³ The unfortunate experience of Paris’s Urban Renewal-style social housing, meanwhile, demonstrates that even in a country with a renowned social safety net and an excellent, centrally-funded education system, single-use, socioeconomically segregated neighborhoods have a devastating impact on their residents in both human and economic terms.

In other words, city planning really does matter: welfare and more equitable funding for education cannot compensate for an urban landscape that is designed to make people fail. “Smart Growth [advocates] must better engage the public, stakeholder groups, and governmental institutions in understanding the relationship between land use issues and our overall quality

239. McKeon, *supra* note 237, at 389.

240. *Id.* at 391.

241. See Larsen, *supra* note 18, for an in-depth examination of German land use.

242. As evidenced by real estate values in Paris *intra muros*.

243. Duany & Talen, *supra* note 8, at 1467.

of life.”²⁴⁴ Clearly, legal and political changes must take place in order for this solution to be workable in the United States. The alternative, however, is to maintain a status quo that is at odds with all parts of the political spectrum: Euclidean zoning violates conservative principles by distorting the market and restricting property rights to an absurd degree, and it offends liberal ones by perpetuating America’s decades-long slide into stark racial and socioeconomic segregation. In most American municipalities, “conformity with the [zoning] ordinance has . . . become an end rather than a means of achieving a better quality of life or addressing some greater community vision.”²⁴⁵ It is time for this to change.

244. Glendening, *supra* note 84, at 1507.

245. Kleppel, *supra* note 3, at 47.