

# Smart Sprawl? Green Aspirations and the Lowdown on High-Density Suburbia

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## I. INTRODUCTION

*Reading Woods, an expensive condominium development<sup>1</sup> north of Boston, is a quintessential example of suburban sprawl. Built in 2011, Reading Woods comprises 408 units, with unlimited parking for each.<sup>2</sup> From Reading Woods, residents cannot walk to a public library,<sup>3</sup> a bank,<sup>4</sup> or a grocery store;<sup>5</sup> they often opt to drive to the nearby strip mall instead. If they really wanted to, residents could walk to a chain restaurant, but they would have to risk crossing I-95 first. I-95 is familiar to them—a backyard of sorts—rushing past 100 feet away. Given these facts, it is perplexing that a Smart Growth Overlay District enabled the development of Reading Woods.*

Many hail high-density development as the smart growth solution to sprawl.<sup>6</sup> While mixed-use high-density and urban residential high-density may be valid solutions, exclusively residential high-density suburban development is anything but smart.<sup>7</sup> Ironically,

1. At Reading Woods, a two-bedroom condominium sells for \$450,000, Reading Woods, <http://www.pulte.com/communities/ma/reading/reading-woods/91936/index1.aspx#UtBMZ6VU1G4> [<http://perma.cc/V529-E2AV>] (last visited Jan. 7, 2015).

2. *Id.*

3. Technically, it is possible to walk to a public library, but it involves forty-six minutes of walking along a two-lane, high-volume road. See Google Maps, [www.maps.google.com](http://www.maps.google.com) (last visited Jan. 7, 2015).

4. Again, technically, it is possible to walk to a bank, but it involves walking fifty minutes on a high-volume, sidewalk-less road. See Google Maps, [www.maps.google.com](http://www.maps.google.com) (last visited Jan. 7, 2015).

5. It would require a forty-minute walk on a sidewalk-less, high-volume road to reach a grocery store. See Google Maps, [www.maps.google.com](http://www.maps.google.com) (last visited Jan. 7, 2015).

6. Joel P. Dennison, *New Tricks for an Old Dog: The Changing Role of the Comprehensive Plan Under Pennsylvania's "Growing Smarter" Land Use Reforms*, 105 DICK. L. REV. 385, 385 (2001) ("Smart Growth advocates want sequenced, higher density, mixed use, environmentally friendly development that better matches land use goals and infrastructure systems."). Sprawl is the low-density development of land outside of urban centers and detached from public resources, yielding car-dependency and disruption of natural resources.

7. See Robert H. Freilich, *The Land-Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 URB. LAW. 547, 572 (1998) (discussing the traffic generated by high-density residential developments).

developers build these High-Density Islands, as I will refer to them, using the legal techniques developed for smart growth programs. However, smart growth tools depend on co-implementation to achieve their purported benefits.<sup>8</sup> When applied individually, smart growth and anti-sprawl programs can yield exclusively residential high-density suburban development. Thus, High-Density Islands merely add density to suburban sprawl and exacerbate the very problems smart growth seeks to correct. Without public infrastructure to accommodate low-carbon-emitting lifestyles for the additional and existing residents, High-Density Islands deepen suburbia's car-dependency.<sup>9</sup>

High-Density Islands spur other critical problems that enfeeble efficacious land use planning, such as civic disengagement, high public costs, homogeneity, bromidic buildings, public health hazards, and environmental justice concerns.<sup>10</sup> The construction of High-Density Islands cannot continue without crippling America's physical and cultural environment.

Part II of this Note defines smart growth and presents the basic tools that, when implemented without adherence to the overall principles of smart growth, yield High-Density Islands. Part III defines the criteria of High-Density Islands and explores the environmental, cultural, economic, architectural, health, and

8. See Derek Bayne, *Bioregionalism and Environmental Regulation: A Policy Consideration for Future Environmental Reforms*, 17 U. BALT. J. ENVTL. L. 1, 31 (2009) ("Coordination of Smart Growth programs—if only their objectives—across state boundaries can help evade the problems inherent when legal and ecological boundaries are not the same."); Parris N. Glendening, *Maryland's Smart Growth Initiative: The Next Steps*, 29 FORDHAM URB. L.J. 1493, 1502 (2002) (explaining coordination of smart growth policies renders "genuine Smart Growth projects"); Parris N. Glendening, *Smart Growth: Maryland's Innovative Answer to Sprawl*, 10 B.U. PUB. INT. L.J. 416, 427 n.47 (2001) (advocating that a government official "coordinate State policies to ensure that every department and agency is acting in accord with the principles of Smart Growth" for optimal success); Andrew P. Gulotta, *Darkness on the Edge of Town: Reforming Municipal Extraterritorial Planning & Zoning in Illinois to Ensure Regional Effectiveness & Representation*, 28 ST. LOUIS U. PUB. L. REV. 495, 525 (2009) (describing coordination in implementing Smart Growth policies as "requisite" for their success).

9. Casey Mills, *Without Transit Funding, State's Smart Growth Efforts Not Enough*, BEYOND CHRON (Sept. 4, 2008), <http://www.beyondchron.org/news/index.php?itemid=6052> [<http://perma.cc/D8YD-KMM5>].

10. See *infra* Part II. Environmental Justice is a well-established federal legal doctrine addressing how communities may be disproportionately exposed to environmental hazards as a result of their social or economic demographics. See Alan Ramo, *Environmental Justice As an Essential Tool in Environmental Review Statutes: A New Look at Federal Policies and Civil Rights Protections and California's Recent Initiatives*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 41 (2013).

environmental justice concerns they present. Finally, Part IV broaches potential solutions that would enable compatibility between suburban high-density residential development and smart growth.

## II. SMART GROWTH ZONING AND HOW IT GIVES RISE TO HIGH-DENSITY DEVELOPMENTS IN SUBURBAN AREAS

Smart growth refers to the intelligent use of our public resources and the legal authority to create sustainable communities and landscapes.<sup>11</sup> Smart growth seeks citizen input in order to create a growth plan tailored to the community.<sup>12</sup> The incorporation of smart growth into land use planning is critical to combat sprawl. Sprawl causes a loss of open space, traffic congestion, pollution, public health endangerment, car-dependency, and increased energy consumption.<sup>13</sup> Sprawl exacerbates existing problems, including strain on government budgets, flood damage, and lack of community engagement.<sup>14</sup> Sprawl creates and contributes significantly to habitat loss and fragmentation, the spread of invasive species, overexploitation of biological resources, and the decline of biodiversity.<sup>15</sup> Most disconcertingly, sprawl is widely cited as a leading cause of climate change.<sup>16</sup>

The tenets of smart growth can thwart sprawl. These tenets are: containing development to areas with strong infrastructure in order to avoid duplicating infrastructure; providing various housing options, especially affordable housing; facilitating predictable land use and equitable development; providing various transportation options; improving environmental quality by conserving open space; preserving local culture and natural environmental features by involving the community in designing

11. JOHN R. NOLON, WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH I (2001).

12. Patricia E. Salkin, *Sorting Out New York's Smart Growth Initiatives: More Proposals and More Recommendations*, 8 ALB. L. ENVTL. OUTLOOK J. 1, 3 (2002) ("Smart Growth is described as a framework for communities to make informed decisions about how and where they grow.").

13. Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 303 (2000).

14. *Id.*

15. Justina C. Ray, *Sprawl and Highly Mobile or Wide-Ranging Species*, in NATURE IN FRAGMENTS 181 (Elizabeth A. Johnson & Michael W. Klemens eds., 2005).

16. *Id.*

new developments; promoting compact development; and making neighborhoods safer and more livable.<sup>17</sup>

#### A. State Experience with Smart Growth Programs Indicate That Smart Growth Techniques Can Lead to High-Density Developments

Zoning can promote smart growth. Zoning regulates the use to which land within various parts of a city may be put.<sup>18</sup> A number of local zoning tools purport to promote smart growth. These zoning programs include smart growth districts, clustering, planned unit developments, overlay zoning, and density bonuses.<sup>19</sup>

For decades, numerous zoning programs, also known as smart growth programs, have achieved some levels of success across the nation,<sup>20</sup> most notably in Florida,<sup>21</sup> New Jersey,<sup>22</sup> Maryland,<sup>23</sup> Massachusetts,<sup>24</sup> New York,<sup>25</sup> and Oregon.<sup>26</sup> These programs share the basic tenets of smart growth. Fundamentally, these smart growth programs attempt to combat sprawl and reduce car dependency by allowing high-density development, increasing

17. GREGORY K. INGRAM, ARMANDO CARBONELL, YU-HUNG HONG & ANTHONY FLINT, SMART GROWTH POLICIES: AN EVALUATION OF PROGRAMS AND OUTCOME 2 (2009), available at <http://www.lincolnst.edu/pubs/smart-growth-policies.aspx> [<http://perma.cc/VEJ9-FGML>].

18. BLACK'S LAW DICTIONARY 717 (9th ed. 2009), available at Westlaw BLACKS.

19. NOLON, *supra* note 11, at 1.

20. For a state-by-state description of smart growth programs, see ED BOLEN, KARA BROWN, DAVID KIERNAN & KATE KONSCHNIK, SMART GROWTH: STATE BY STATE 10-125, <http://gov.uchastings.edu/public-law/docs/smartgrowth.pdf> [<http://perma.cc/5LGR-44Y2>] (last visited Jan. 7, 2015).

21. See GROWTH MANAGEMENT IN FLORIDA: PLANNING FOR PARADISE (Timothy S. Chapin et al. eds., 2007).

22. Legislation by municipality, see N.J. DEP'T OF STATE, *Smart Growth Areas*, <http://www.state.nj.us/state/planning/smart.html> [<http://perma.cc/J93Y-RPBL>] (last visited Jan. 7, 2015).

23. See MD. DEP'T OF PLANNING, *Smart Growth Legislation: Sustainable Growth & Agricultural Preservation Act of 2012*, <http://planning.maryland.gov/OurWork/2012Legislation.shtml> [<http://perma.cc/YJE3-XS3Z>] (last visited Jan. 7, 2015); see also MD. DEP'T OF PLANNING, *Smart Growth Legislation: 2010 Sustainable Communities Legislation*, <http://planning.maryland.gov/OurWork/2010Legislation.shtml> [<http://perma.cc/8UXH-FA8V>] (last visited Jan. 7, 2015).

24. See Smart Growth Zoning and Housing Production, MASS. GEN. LAWS ANN. ch. 40R, § 9 (West 2004), and Community Preservation Act, MASS. GEN. LAWS ANN. ch. 44B, § 5 (West 2013).

25. See PATRICIA E. SALKIN, 3 N.Y. ZONING LAW & PRAC. § 32A:61 (4th ed. 2014).

26. See Comprehensive Land Use Planning Coordination, Land Conservation and Development Department, OR. REV. STAT. ANN. § 197.075 (West 2014).

access to public transportation, and re-introducing a nostalgic Main Street ideal.<sup>27</sup>

Within their smart growth programs, some states have used legal techniques and incentives such as eliminating subsidies that facilitate sprawl;<sup>28</sup> promoting infill development by streamlining procedure;<sup>29</sup> offering tax breaks;<sup>30</sup> facilitating Brownfields redevelopment;<sup>31</sup> improving existing infrastructure;<sup>32</sup> siting government buildings in 'smart growth' areas;<sup>33</sup> and instituting programs to preserve open space and farmland.<sup>34</sup>

Anti-sprawl programs attribute sprawl, in part, to low-density development and therefore advocate for high-density development.<sup>35</sup> Many of the aforementioned techniques facilitate the building of high-density development. For example, infill development yields high-density structures to fill gaps between existing structures.<sup>36</sup> Additionally, the preservation of open space allows a developer to cluster development potential in one area with high-density development.<sup>37</sup> Finally, the avoidance of

27. SALKIN, *supra* note 25.

28. Arizona, Colorado, Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Rhode Island, South Carolina, Washington, and West Virginia. BOLEN ET AL., *supra* note 20, at 5.

29. Colorado, Florida, Georgia, Maine, Maryland, New Jersey, Pennsylvania. *See id.* at 6.

30. Colorado, Connecticut, Illinois, Maryland, New Jersey, Pennsylvania. *See id.*

31. Colorado, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Missouri, Ohio, Pennsylvania, Wisconsin. *See id.*

32. Arizona, Illinois, Maryland, Massachusetts, Ohio, Washington. *See id.*

33. Maine, New Hampshire, New York, Oregon, Tennessee. *See id.*

34. Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington. *See id.* at 7.

35. Richard A. Forsten, *Land Use "Reform" and the Law of Unintended Consequences: Are We Headed Where We Want to Go?*, 18-FALL DEL. LAW. 5, 7 (2000) ("[H]igher density development . . . could actually reduce sprawl.").

36. 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, 66 (2003) (advocating for "targeting development towards a revitalized higher density central city with the development of higher density in-fill").

37. Scott L. Reichle, *Utilization of Cluster Developments, Conditional Zoning and Transfer of Development Rights in Conjunction with Conservation Easements as a Means of Sustainable Land Development in Virginia*, 9 APPALACHIAN J.L. 21, 35 (2009) ("[C]luster developments should provide an appropriate vehicle for offsets of property placed in conservation in exchange for higher density development.").

duplicating infrastructure encourages clustered, high-density development surrounding that infrastructure.<sup>38</sup>

## B. The Misuse of Smart Growth Techniques

Smart growth zoning practices tend to increase allowances for high-density housing on a parcel of land.<sup>39</sup> While high-density can help solve many problems of sprawl, it cannot do so alone; in fact, high-density can exacerbate the problem of sprawl by adding units and cars in suburban environments if there is insufficient infrastructure to accommodate the added density. The following section will discuss a number of smart growth techniques and illustrate how they can exacerbate sprawl.

### 1. Clustering

Clustering aims to protect open space.<sup>40</sup> Traditional zoning allots set acreage to each unit built.<sup>41</sup> Clustering, however, groups units together and the acreage that would have been allotted to each unit is preserved adjacent to the parcel developed. As one court has described it, clustering is “a device for grouping dwellings” such that the density of “some portions of the development area” would increase “in order to have other portions free of buildings.”<sup>42</sup> Municipalities sometimes pair clustering with density bonuses and other density incentives to encourage high-density housing.<sup>43</sup>

Clustering proponents argue that open space offsets the high-density of residential development.<sup>44</sup> Open space may be used for anything from raising livestock to Christmas tree farming to nature preserves.<sup>45</sup> Use conditions may be mandatory, but often are not.<sup>46</sup> Private developers typically regulate open space and may lease the

38. Kushner, *supra* note 36, at 66 (advocating “the development of higher density in-fill around the stops of rail, subway, bus, or other transit alternatives”).

39. NOLON, *supra* note 11, at 1.

40. *Id.* at 34.

41. *Id.*

42. Orinda Homeowners Comm. v. Board of Supervisors, 90 Cal. Rptr. 88, 90 (Cal. Ct. App. 1970).

43. Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283, 294 (2004).

44. There are numerous examples of successful clustering where preservation of open space does offset nearby higher-density areas, such as in the Long Island Pine Barrens. *Id.*

45. *Id.* at 295.

46. *Id.*

land to others.<sup>47</sup> Residents of high-density developments may use adjacent parcels of open space if it is converted into nature trails.

Clustering may also be non-contiguous, deferring or removing many of its benefits.<sup>48</sup> Non-contiguous clustering is similar to traditional clustering, in that the development capacity of an entire parcel of land can be used for high-density residential development on a piece of that parcel while the rest is maintained as open space.<sup>49</sup> However, non-contiguous clustering allows the open space to be on parcels not adjacent to the high-density development.<sup>50</sup> In fact, the open space parcel and the developed parcel may be miles apart.<sup>51</sup> In non-contiguous clustering, multiple sites combine their development capacity on a single parcel so that it may be developed with higher-density than zoning laws ordinarily permit.<sup>52</sup> In this sense, non-contiguous clustering is similar to the transfer of development rights (“TDR”), which allows a developer to purchase development credits from another landowner elsewhere in order to build more units than zoning permits.<sup>53</sup> The same criticism of TDR can apply to non-contiguous clustering: the land that transfers its development capacity may have never utilized the full density allocation permitted.<sup>54</sup> Thus, using tools like non-contiguous clustering or TDR can yield more units than otherwise permitted, and can certainly yield high-density residences.<sup>55</sup>

## 2. Planned Unit Developments

Planned unit development refers to a holistic method of zoning that allows developers to build without ordinary zoning restrictions.<sup>56</sup> In traditional zoning, known as Euclidean zoning, regulation is by the building lot, so municipalities regulate the size

47. *Id.*

48. CHRIS STURM & NICOLE HEATER, PRESERVING LAND THROUGH COMPACT GROWTH: CASE STUDIES OF NON-CONTIGUOUS CLUSTERING IN NEW JERSEY 5 (2012), available at <http://www.njfuture.org/wp-content/uploads/2012/05/NJ-Future-Non-Contiguous-Clustering.pdf> [<http://perma.cc/85ZH-6PHK>].

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. NOLON, *supra* note 11, at 36.

54. See Joseph D. Stinson, *Transferring Development Rights: Purpose, Problems, and Prospects in New York*, 17 PACE L. REV. 319, 327 (1996).

55. See *id.*

56. See Michael Fedun, *A Proposal for Improving Vermont's Statutory Requirements for Planned Unit Development*, 14 VT. L. REV. 591, 608–09 (1990).



and placement of each building a developer builds.<sup>57</sup> In planned unit developments, the law treats a parcel of land holistically and zoning regulations do not dictate the size, use, or placement of buildings no matter how many buildings the developer plans to build.<sup>58</sup> The developer has much freedom to determine the use of each space on the parcel and may cluster residences.<sup>59</sup> Planned unit development proponents support this laissez-faire development.<sup>60</sup> They cite benefits such as the inclusion of more units of affordable housing (or more units generally),<sup>61</sup> facilitation of senior citizen living centers,<sup>62</sup> and increased conservation of open space.<sup>63</sup> Overall, planned unit development zones may include exponentially more units than Euclidean zones.<sup>64</sup>

Planned unit developments may take the form of a planned unit development residential overlay or a planned unit development senior citizen residential overlay. Municipalities may superimpose something called an overlay zone on an existing zone to supplement the underlying zone's requirements.<sup>65</sup> They may also use overlay zoning to encourage or discourage development in certain areas.<sup>66</sup> For instance, a planned unit development residential overlay would restrict the planned unit developments to residential purposes, yielding high-density residential developments.<sup>67</sup>

57. *See id.*

58. *See id.*

59. *See id.*

60. *See generally* Byron R. Hanke, *Planned Unit Development and Land Use Intensity*, 114 U. PA. L. REV. 15 (1965).

61. *See* Fedun, *supra* note 56.

62. *See id.*

63. *See id.* at 592.

64. *See id.*

65. NOLON, *supra* note 11, at 33–34.

66. *Id.* at 33.

67. Given all the flexibility and developer choice in planned unit developments, developers can abuse this zoning technique. *See* Fedun, *supra* note 56, at 592 (“[T]here exists the potential for abuse of planned unit development. In order to provide guidance to the municipal bodies that approve land development, proper statutory safeguards must exist. Without these safeguards, developers would be able to employ the provisions for planned unit developments solely to circumvent other zoning regulations. Such abuse can result in unsatisfactory land development and can lead to the evisceration of zoning and planning.”).

### 3. Density Bonuses

At least twenty-two states employ density bonuses to encourage developers to build projects that meet community objectives.<sup>68</sup> A density bonus is a relaxation of density limits that offers an incentive to developers to provide certain public benefits.<sup>69</sup> Under a density bonus, a municipality can allow clustering of residences at higher density calculations than previously permitted.<sup>70</sup> States design density bonuses to encourage affordable housing construction<sup>71</sup> or environmental preservation.<sup>72</sup> The statutory language establishing density bonuses ranges from specific, with particular public objectives stated, to vague, sometimes leaving much to a developer's discretion.<sup>73</sup> Proponents assert that the

68. By combing through the land use laws of the fifty states, I found twenty-two with density bonus incentives: California, CAL. GOV'T CODE § 65915 (West 2014), *amended by* Cal. Legis. Serv. Ch. 682 1 (2014); Colorado, COLO. REV. STAT. ANN. § 30-28-401 (West 2014); Connecticut, CONN. GEN. STAT. ANN. § 8-2i (West 2014); Delaware, DEL. CODE ANN. tit. 7, § 7508 (West 2014); Florida, FLA. STAT. ANN. § 420.615 (West 2011); Kentucky, KY. REV. STAT. ANN. § 198A.720(9)(f) (West 2013); Maryland, MD. CODE ANN., LAND USE § 7-401 (West 2012); Massachusetts, MASS. GEN. LAWS ANN. ch. 40S, § 1 (West 2014); Minnesota, MINN. STAT. ANN. § 473.255(a) (West 2014); Nevada, NEV. REV. STAT. ANN. § 278.250 (West 2013); New Hampshire, N.H. REV. STAT. ANN. § 674:21 (2012); New Jersey, N.J. STAT. ANN. § 52:27D-321.1 (West 2008); New York, N.Y. GEN. MUN. LAW § 699-b (McKinney 2009); North Carolina, N.C. GEN. STAT. ANN. § 160A-383.4 (West 2009); Oregon, OR. REV. STAT. ANN. § 197.309 (West 2014); Rhode Island, R.I. GEN. LAWS ANN. § 42-128-8.1 (West 2014); South Carolina, S.C. CODE ANN. § 6-29-510(D)(6) (2007); Texas, TEX. LOC. GOV'T CODE ANN. § 373A.054 (West 2005); Vermont, VT. STAT. ANN. tit. 24, § 4414(7)(c) (West 2014); Washington, WASH. REV. CODE ANN. § 36.70A.540 (West 2009); Washington, D.C., D.C. CODE § 6-1041.09 (2007); West Virginia, W. VA. CODE ANN. § 8A-3-1(e) (West 2004).

69. BLACK'S LAW DICTIONARY 717 (9th ed. 2009), *available at* Westlaw BLACKS.

70. Scott L. Reichle, *supra* note 37, at 34.

71. Also known as inclusionary zoning. *See* California, CAL. GOV'T CODE § 65915 (West 2014); Connecticut, CONN. GEN. STAT. ANN. § 8-2i (West 2014); Florida, FLA. STAT. ANN. § 420.615 (West 2011); Maryland, MD. CODE ANN. LAND USE § 7-401 (West 2012); Massachusetts, MASS. GEN. LAWS ANN. ch. 40, § 1 (West 2014); Minnesota, MINN. STAT. ANN. § 473.255(a) (West 2014); Nevada, NEV. REV. STAT. ANN. § 278.250 (West 2013); New Hampshire, N.H. REV. STAT. ANN. § 674:21 (2014); New Jersey, N.J. STAT. ANN. § 52:27D-321.1 (West 2008); New York, N.Y. GEN. MUN. LAW § 699-b (McKinney 2009); Oregon, OR. REV. STAT. ANN. § 197.309 (West 2014); Rhode Island, R.I. GEN. LAWS ANN. § 42-128-8.1 (West 2014); South Carolina, S.C. CODE ANN. § 6-29-510(D)(6) (2007); TEX. LOC. GOV'T CODE ANN. § 373A.054 (West 2005); Vermont, VT. STAT. ANN. tit. 24, § 4414(7)(c) (West 2014); Washington, WASH. REV. CODE ANN. § 36.70A.540 (West 2009); Washington, D.C., D.C. CODE § 6-1041.09 (2007).

72. *See* Colorado, COLO. REV. STAT. ANN. § 30-28-401 (West 2014); Nevada, NEV. REV. STAT. ANN. § 278.250 (West 2013); Rhode Island, R.I. GEN. LAWS ANN. § 42-128-8.1 (West 2014).

73. For example, New Hampshire allows the awarding of density bonuses to development projects for "innovative land uses" New Hampshire, N.H. REV. STAT. ANN. § 674:21 (2014). Similarly, West Virginia awards density bonuses for "innovative land use," W. VA. CODE ANN.

purpose of density bonuses is to promote good design, and that density is an afterthought.<sup>74</sup> They claim it is not a program in bartering for density—that developers do not use it to negotiate for higher density allocations.<sup>75</sup> However, that can be the effect, yielding high-density developments with many more units than ordinarily permitted.

### III. HIGH-DENSITY ISLANDS AND HOW THEY DEBILITATE THE AMERICAN SOCIAL, CIVIC, AND PHYSICAL LANDSCAPE

High-Density Islands are suburban residential high-density developments, located at a driving distance from commercial, civic, or cultural amenities, and sandwiched between a highway<sup>76</sup> and a mall. The term should evoke a sense of what they are: isolated monstrosities, cut off from communities, local government, nature, public transportation, and sidewalks. Like an island, they purport to be luxurious,<sup>77</sup> but these residences are merely expensive and new. Built by large developers, they sport inelegant, cookie-cutter designs, prominently featuring parking lots and garages.<sup>78</sup> These Big Box residences foster car-dependent, anti-social, environmentally detrimental lifestyles. Ironically, developers build them using Smart Growth zoning provisions. However, the only features that are “green” are their flowery, oxymoronic names<sup>79</sup> and their brochure claims.<sup>80</sup>

High-Density Islands are neither rare nor irrelevant. Fifty-five million Americans live in developments similar to High-Density Islands, including master-planned communities, gated

§ 8A-3-1(e) (West 2004). Kentucky awards density bonuses for “creative local planning,” KY. REV. STAT. ANN. § 198A.720(9)(f) (West 2013); and Nevada for any project that enhances the state’s land use goals, NEV. REV. STAT. ANN. § 278.250 (West 2013).

74. Reichle, *supra* note 37, at 31.

75. *Id.*

76. Scholars are in general agreement that highways lead to adjacent development. See Lewyn, *supra* note 13, at 318 (explaining the concept of “highway-driven residential developments”).

77. For example, Reading Commons calls itself a “luxury apartment community” that is “conveniently located.” Reading Commons, BOZZUTO, <http://www.bozzuto.com/apartments/communities/433-reading-commons> [<http://perma.cc/7BTF-QR9A>] (last visited Jan. 7, 2015).

78. Such as Pulte Home Corp, Lincoln Properties, UDR, and Avalon.

79. Note names like “Arborpoint at Seven Springs,” “Wildflower Estates,” and “Avalon at the Pinehills.”

80. For example, developer UDR boasts on its brochures of its donations to a tree-planting non-profit.

communities, and other types of common-interest communities.<sup>81</sup> While High-Density Islands share many features of other versions of private development, they spark unique concerns. High-Density Islands add density to suburban sprawl, exacerbating the environmental problems that sprawl creates.<sup>82</sup> They undermine traditional American values of civic engagement by replacing community and nature with mall-centric living.<sup>83</sup> The shared isolation of the homogenous residents reinforces these detrimental values.<sup>84</sup> Economically, High-Density Islands are anathema to communities as they drive up the cost of government and weaken town centers.<sup>85</sup> However, for developers, High-Density Islands lead to higher profit margins than traditional development, inciting their multiplication.<sup>86</sup> Architecturally, developers continue to seek high returns, creating generic, cookie-cutter structures, cloneable across the nation.<sup>87</sup> High-Density Islands are commonly sited adjacent to high-volume roads, subjecting residents to air pollution and such significant adverse health effects as premature death.<sup>88</sup> These concerns are particularly relevant to low-income and elderly populations, as affordable housing and retirement overlays are frequently tacked on to High-Density Islands.<sup>89</sup> Most alarming of all, there are no movements against High-Density Islands, and more and more \$2500/month units sell out to nescient suburbanites.

#### A. Environmental Concerns

The primary environmental concern arising from High-Density Islands is the addition of density to suburban sprawl.<sup>90</sup>

81. Paul Bannister, *Homeowners Associations: Devils or Angels?*, BANKRATE (Jan. 1, 2004), <http://www.bankrate.com/finance/real-estate/homeowner-associations-devils-or-angels-1.aspx> [http://perma.cc/6FU8-NSN3]. See also Josh Mulligan, Note, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J.L. & PUB. POL'Y 533, 542 (2004) (“[As of] 1992, 32 million Americans lived in a private community in which a homeowner’s association owns the roads, sidewalks and parks.”).

82. See *infra* Part III.A.

83. See *infra* Part III.B.

84. See *id.*

85. See *infra* Part III.C.

86. See *id.*

87. See *infra* Part III.D.

88. See *infra* Part III.E.

89. See *infra* Part III.F.

90. See generally NATURE IN FRAGMENTS: THE LEGACY OF SPRAWL (Elizabeth A. Johnson & Michael W. Klemens eds., 2005).

While smart growth attempts to combat sprawl, some tools of smart growth, when used improperly, yield High-Density Islands that merely add units and cars to a suburban landscape of rambling development and congested roadways, in other words “clustered sprawl.”<sup>91</sup> Without infrastructure to accommodate low-carbon emitting lifestyles, these added units and cars further burden suburban environments.<sup>92</sup>

### 1. Increase in Residential Units

Adding residences in car-dependent areas is environmentally problematic. The average U.S. residential unit has a carbon footprint of forty-eight metric tons of carbon emissions per year, primarily from home electricity and motor vehicle use.<sup>93</sup> Giving density bonuses, transferring development rights, and rezoning as planned unit development districts increase these metrics by adding car-dependent units, which exacerbates the causes of climate change.<sup>94</sup>

Of all smart growth legal tools, density bonuses contribute most to this problem.<sup>95</sup> Theoretically, without density bonuses, the tools of smart growth do not yield a net change in total population because development rights are simply transferred to create higher-density developments.<sup>96</sup> Without density bonuses, developers theoretically offset the clustered density with conservation

91. See Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283, 296–97 (2004).

92. See Mills, *supra* note 9.

93. Christopher M. Jones, *Carbon Footprint of Typical U.S. Household*, COOL CLIMATE NETWORK (Aug. 3, 2011, 2:00 PM), <http://coolclimate.berkeley.edu/footprint> [<http://perma.cc/ZXZ7-9QTU>].

94. See George M. Morris, Note, *In the Shadows of Affordable Housing—A New Legacy Emerges*, 2 RUTGERS J.L. & URB. POL'Y 380, 383 n.26–27 (2005). In a New Jersey study, Morris found several examples where implementing smart growth tools led to an increase in the overall number of residential units in a municipality compared with traditional zoning practices. “[In Mt. Laurel], [f]or example, the Birchfield Planned Unit Development construction brought 242 single-family homes, 291 townhomes, 328 condominiums and apartments and a business center to the township on land that previously would have held only 100 homes.” That is the difference between 861 units under the Planned Unit Development district and 100 under traditional zoning. Morris gives a second example in Mt. Laurel where rezoning converted a zoning allotment of 200 homes into the building of 854 units.

95. See generally Michael Floryan, *Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices*, 37 PEPP. L. REV. 1039, 1090–97 (2010) (discussing the advantages and disadvantages of using density bonuses as incentives for developers to build affordable housing).

96. See Reichle, *supra* note 37, at 21 (discussing the merits of small, high-density developments and the land use mechanisms to enable that zoning structure).

easements.<sup>97</sup> However, density bonuses, by definition, are gifts to developers in large part because developers are under no obligation to offset additional density with open space.<sup>98</sup> Density bonuses can be significant. For example, in a zone in Washington, D.C., developers receive two square feet of bonus density for every one square foot of residential use developed, yielding total developments three times the size of that originally permitted.<sup>99</sup> Massachusetts goes so far as to pay each municipality that grants density bonuses \$3000 per extra unit granted.<sup>100</sup> Ironically housed under Massachusetts' smart growth legislation, this chain of incentives—from state to municipality to developer—can yield a significant increase in the number of energy-consuming units in the suburbs.<sup>101</sup>

Another density bonus that creates incentives contrary to the stated objectives in the law is North Carolina's Land-Use Development Incentives.<sup>102</sup> North Carolina allows counties and municipalities to offer density bonuses to developers whose projects decrease energy consumption.<sup>103</sup> The statute reads:

Counties and municipalities, for the purpose of reducing the amount of energy consumption by new development, and thereby promoting the public health, safety, and welfare, may adopt ordinances to grant a density bonus . . . if the developer . . . agrees to construct new developments that the municipality determines, based on generally recognized standards established for such purposes, makes a significant contribution to the reduction of energy consumption.<sup>104</sup>

97. *Id.*

98. BLACK'S LAW DICTIONARY 717 (9th ed. 2009), *available at* Westlaw BLACKS.

99. D.C. MUN. REGS. tit. 11, § 1706. (West 2009); *cf.* Kristen David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S.C. L. REV. 573, 581 n.37 (2009) ("On a list of twenty developed countries, only the United States and Australia are building new homes that average more than 2,000 square feet.")

100. 760 MASS. CODE REGS. § 59.06 (West 2014).

101. For example, in Billerica, MA, the maximum density is twelve units/acre. However, under these incentives, the developers of the Villas of Old Concord built 324 units on 9.57 acres—or, thirty-four units/acre. No conservation land was dedicated to offset this increase in density. *See* The Villas at Old Concord Environmental Notification Form, <http://www.env.state.ma.us/mepa/pdffiles/enfs/012203em/12948.pdf> [<http://perma.cc/5RJY-L3NA>] (last visited Jan. 7, 2015); *Zoning By-Laws of the Town of Billerica*, [http://www.jjmanning.com/packets/Billerica%20zoning\\_by-laws.pdf](http://www.jjmanning.com/packets/Billerica%20zoning_by-laws.pdf) [<http://perma.cc/BP2K-3EHK>] (last visited Jan. 7, 2015).

102. N.C. GEN. STAT. ANN. § 160A-383.4 (West 2009).

103. *Id.*

104. *Id.*

However, the statute does not specify criteria for reduction of energy consumption. Thus, there is a contradiction between incentivizing developments that reduce some degree of energy consumption and awarding developers additional units that inevitably contribute to energy consumption.<sup>105</sup> Density bonuses nearly always result in net energy consumption increases whereas other incentives may not. Thus, nearly any incentive besides density bonuses could make this a model statute. Other states similarly seek to protect the environment by granting developers density bonuses, seemingly disregarding the detrimental effects additional units have on the environment.<sup>106</sup> In doing so, legislatures imprudently create two categories of development: dirty development and extra development.

Non-contiguous cluster developments may also result in a net increase of units due to the uncertainty of development value on the preserved parcel of land.<sup>107</sup> The parcel maintained as open space may never be as intensely developed as the parcel that assumes the undeveloped parcel's development rights.<sup>108</sup> For example, a developer is far more likely to develop a parcel of land conveniently located near highways and malls, while a distant parcel may never be attractive enough for a developer to develop.<sup>109</sup> Thus, due to transferrable development rights or clustering, the total development capacity of the two parcels is crammed into

105. Cf. Andrew Rudin, *Energy Efficiency's False Hope*, 151 NO. 5 PUB. UTIL. FORT. 8, 10 (May 1, 2013). ("Once purchased, more energy efficient products lower the cost of using energy services. Increasing the efficiency of a process or product usually lowers operating costs and increases consumption. Efficiency puts energy on sale. As the cost of operation falls, consumption is increasingly justified. Lowering the cost of electricity and fuel increases their consumption. The only debate is how much. Some people call this the 'Jevons Effect.'")

106. See COLO. REV. STAT. ANN. § 30-28-401 (West 1996) (granting density bonuses "to preserve open space, protect wildlife habitat and critical areas, and enhance and maintain the rural character of lands with contiguity to agricultural lands suitable for long-range farming and ranching operations"); R.I. GEN. LAWS ANN. § 42-128-8.1 (West 2005) (granting density bonuses for "environmental protection; water supply protection; and agricultural, open space, historical preservation, and community development pattern constraints").

107. Cf. Lauren A. Beetle, Note, *Are Transferable Development Rights a Viable Solution to New Jersey's Land Use Problems?: An Evaluation of TDR Programs Within the Garden State*, 34 RUTGERS L.J. 513, 525 (2003) ("Uncertainty over the value of development credits in the market has also been an area of strong criticism.").

108. See *id.*

109. There is an active debate about whether highways spur development. Roger Nober, *Federal Highways and Environmental Litigation: Toward A Theory of Public Choice and Administrative Reaction*, 27 HARV. J. ON LEGIS. 229, 259 n.149 (1990).

one.<sup>110</sup> Without the manipulation and transference of development rights, which arguably overestimates the full net development potential of land and ensures it is all developed, there may be fewer units, and thus fewer energy-consuming units.<sup>111</sup>

Finally, planned unit developments, too, can increase the net number of units on a parcel of land.<sup>112</sup> Euclidean zoning ensures the government can monitor the number of units built, but under planned unit developments, developers may have the flexibility to choose the number of units to satisfy their project objectives.<sup>113</sup> In Mt. Laurel, New Jersey, for example, one study showed that a developer built 861 units in a planned unit development district.<sup>114</sup> Under Euclidean zoning, the developer would have been unable to build more than 100 units.<sup>115</sup>

## 2. Car-Dependency and Walkability

Given that they are not within walking distance to commercial centers, jobs, schools, or public transportation hubs, High-Density Islands are car-dependent.<sup>116</sup> One scholar defines car-dependence as the inability to live without cars, “just as a smoker cannot live without cigarettes and a drug addict without drugs.”<sup>117</sup> It is “the radical monopoly of automobiles, a monopoly which has negative

110. See Beetle, *supra* note 107.

111. See *id.*

112. See Morris, *supra* note 94.

113. Daniel R. Mandelker, *Legislation for Planned Unit Developments and Master-Planned Communities*, 40 URB. LAW. 419, 422 (2008). The rules for planned unit developments vary by municipalities, however.

114. See Morris, *supra* note 94.

115. *Id.*

116. The median Walk Score of the High-Density Islands I sampled was 28 and the average was 32. Walk Score is a website that determines how pedestrian-friendly an address is, by calculating the distance between the address and various commercial and civic points. An address can be a “Walker’s Paradise,” “Very Walkable,” “Somewhat Walkable,” or “Car-dependent.” Walk Score considers properties whose numbers are below 50 “Car-dependent,” the most-environmentally unfriendly label. For an explanation of the Walk Score rating scheme, see WALK SCORE, <http://www.walkscore.com/live-more/> [<http://perma.cc/KJ8P-P3U2>] (last visited Jan. 7, 2015). Columbia Law School, for example, has a Walk Score of 94, while Mt. Rushmore has a Walk Score of 11. Columbia Law School Walk Score, <http://www.walkscore.com/score/435-w-116th-st-new-york-ny-10025> [<http://perma.cc/45U3-5ARN>] (last visited Jan. 7, 2015); Mt. Rushmore Walk Score, <http://www.walkscore.com/score/13000-hwy-244-keystone-sd-57751> [<http://perma.cc/8N4D-FJZ7>] (last visited Jan. 7, 2015). See Appendix 1 for a list of the High-Density Islands sampled.

117. John Andrew Brunner-Brown, Comment, *Thirty Minutes or Less: The Inelasticity of Commuting*, 43 GOLDEN GATE U. L. REV. 355, 391 n.33 (2013).



effects even on those who do not own a car.”<sup>118</sup> Another scholar posits that car-dependency is environmentally devastating.<sup>119</sup> Car-dependency results in increased traffic congestion, air pollution, greenhouse gas emissions, energy consumption, and traffic accidents.<sup>120</sup> It contributes to the nation’s rising levels of obesity and to a generally unfulfilling community life for suburban residents.<sup>121</sup>

Sprawl and car-dependency go hand in hand.<sup>122</sup> According to one scholar, “[s]prawl produces a segregated pattern of development, which forces many people to drive to their destinations and causes highly congested roadways and longer commutes.”<sup>123</sup> High-density development cannot decrease car dependency in the sprawling suburbs without walkable neighborhoods and a corresponding availability of public transportation.<sup>124</sup> High-Density Islands offer neither.<sup>125</sup> Developers build and advertise High-Density Islands with the assumption that residents have cars, use cars, and want to use cars.<sup>126</sup> Often, multiple spaces of free parking accompany each unit.<sup>127</sup> Advertisements for the High-Density Islands boast of being

118. *Id.* (internal quotation marks omitted).

119. See generally Michael E. Lewyn, *The Urban Crisis: Made in Washington*, 4 J.L. & POL’Y 513, 545 (1996).

120. Winter King, *Smart Growth Meets the Neighbors*, 34 *ECOLOGY L.Q.* 1349, 1352 (2007).

121. *Id.* See also ANDRES DUANY, ELIZABETH PLATER-ZYBERK & JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* xxiii (2010) (“For all of the household conveniences, cars, and shopping malls, life seems less satisfying to most Americans, particularly in the ubiquitous middle-class suburbs, where a sprawling, repetitive, and forgettable landscape has supplanted the original promise of suburban life with a hollow imitation.”).

122. See Brunner-Brown, *supra* note 117, at 361 (“Decreases in urban density correspond to increases in car ownership because individuals cannot perform daily functions without personal transportation, thus creating ‘automobile dependence.’”).

123. Kacie A. Hohnadell, *Community Planning Act: The End of Meaningful Growth Management in Florida*, 42 *STETSON L. REV.* 715, 718 (2013).

124. See generally Mills, *supra* note 9.

125. The median Walk Score of the High-Density Islands the author sampled is 28; the average is 32. See Appendix 1 for a list of the High-Density Islands sampled. See also *supra* note 116 for a brief description of Walk Score and its rating scheme.

126. For example, Reading Commons advertises its car-friendly apartment features. Reading Commons, BOZZUTO, <http://www.bozzuto.com/apartments/communities/433-reading-commons/features> [<http://perma.cc/M5XA-CXEG>] (“The property is right by I-95/128 and I-93, and makes commuting into the city a breeze.”) (last visited Jan. 7, 2015).

127. Most High-Density Islands the author sampled included unlimited free parking. For example, each unit at Reading Commons has garage parking available. Reading Commons, BOZZUTO, <http://www.bozzuto.com/apartments/communities/433readingcommons/features> [<http://perma.cc/M5XA-CXEG>] (last visited Jan. 7, 2015).

conveniently located between highway intersections.<sup>128</sup> High-Density Islands are so hostile to pedestrians that sidewalks do not lead into or out of the premises.<sup>129</sup> Without crucial infrastructure like public transportation and sidewalks, the clustered sprawl of High-Density Islands will keep residents numerous and car-dependent<sup>130</sup>—something our planet cannot tolerate without contributing significantly to climate change.<sup>131</sup>

### 3. The Illusion of Environmentalism

In some ways, High-Density Islands purport to help the environment, but fall short of making a significant impact. Some High-Density Islands, for example, offer Energy Star<sup>132</sup> appliances in the units.<sup>133</sup> However, more broadly, High-Density Islands limit environmental progressivism.<sup>134</sup> For example, due to covenants, conditions, and restrictions in private developments, rules prohibit installing solar panels.<sup>135</sup> These “institutionalized impediments for homeowners who wish to make energy efficient changes to their property”<sup>136</sup> are not offset by Energy Star appliances, which the federal government increasingly mandates anyway.<sup>137</sup> In addition to the restrictions on individual homeowners, developers of High-Density Islands routinely forgo opportunities to include green

128. See Reading Commons, *supra* note 126.

129. See *supra* note 116.

130. See generally Mills, *supra* note 9.

131. See generally John R. Nolon, *Zoning, Transportation, and Climate Change*, N.Y. ZONING L. & PRAC. REP. 8 (2007), available at <http://digitalcommons.pace.edu/lawfaculty/457/> [<http://perma.cc/C66M-EJ3G>].

132. Energy Star is a government-issued eco label, designating the top 25 percent most energy efficient products within a particular category. See Megan S. Houston, *Ecolabel Programs and Green Consumerism: Preserving A Hybrid Approach to Environmental Regulation*, 7 BROOK. J. CORP. FIN. & COM. L. 225, 243 (2012).

133. U.S. DEP'T OF ENERGY, *High-Performance Builder Case Study: Pulte Homes and Communities of Del Webb—Las Vegas Division* (2008), [http://apps1.eere.energy.gov/buildings/publications/pdfs/building\\_america/builders\\_challenge\\_spotlight\\_pulte.pdf](http://apps1.eere.energy.gov/buildings/publications/pdfs/building_america/builders_challenge_spotlight_pulte.pdf) [<http://perma.cc/J9J2-XY63>].

134. Mark A. Pike, *Green Building Red-Lighted by Homeowners' Associations*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 923, 924 (2009) (“[C]ovenants, conditions, and restrictions (‘CCR’) have made it extremely difficult for many Americans to make their homes more energy efficient.”).

135. See *id.* at 928.

136. *Id.* at 925.

137. See, e.g., 42 U.S.C.A. § 6201. One could argue that if the federal government implements energy efficiency programs, it is misleading to attribute efficiency improvements to smart growth policies.

building in their designs.<sup>138</sup> Large-scale implementation of renewable and energy efficient infrastructure<sup>139</sup> could make green building a reality, but developers of High-Density Islands ignore this potential.<sup>140</sup>

Another overstated environmental benefit from High-Density Islands is open space. Some—but not all—High-Density Islands preserve open space in order to offset clustering. However, open space does not preserve nature in a way beneficial to nature, but in a way beneficial to humans.<sup>141</sup> Open space protects farmland, watersheds, scenic vistas, and recreational interests, not necessarily compatible with biodiversity.<sup>142</sup> Only conserving open space in a careful matter—“considering factors such as habitat quality, habitat diversity, habitat connectivity, and known locations of plant and wildlife populations”—can ensure the maintenance of biodiversity.<sup>143</sup> Essentially, suburban developments like High-Density Islands fragment habitats by creating disconnected open space parcels, yielding biodiversity loss.<sup>144</sup>

## B. Value Concerns

High-Density Islands appeal to certain environmentally and socially degrading American values, like automobile driving, segregation and exclusiveness, and mall-centric living.<sup>145</sup> High-Density Islands are typically located alongside a highway and in

138. Sarah B. Schindler, *Following Industry's Leed®: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285, 345 (2010) (“By freezing in time an evolving standard, a city will miss out on positive new developments.”).

139. Including wind turbines and solar panels.

140. See Hannah J. Wiseman & Sara C. Bronin, *Community-Scale Renewable Energy*, 4 SAN DIEGO J. CLIMATE & ENERGY L. 165, 170, 179–82 (2013) (arguing that community-scale renewable energy infrastructure is the more cost-effective and feasible way to implement this technology).

141. Johnson & Klemens, *supra* note 90 at x (Open space is “focused on meeting human wants and needs.”).

142. *Id.*

143. Jayne Daly & Michael W. Klemens, *Integrating Conservation of Biodiversity into Local Planning*, in NATURE IN FRAGMENTS 325 (Elizabeth A. Johnson & Michael W. Klemens eds., 2005). See also Michael W. Klemens & Elizabeth A. Johnson, *Creating a Framework for Change*, in NATURE IN FRAGMENTS 356 (Elizabeth A. Johnson & Michael W. Klemens eds., 2005) (“Clusters designed in the absence of an ecosystem or a landscape context often fail to protect biodiversity.”).

144. Stephen Farber, *The Economics of Biodiversity in Urbanizing Ecosystems*, in NATURE IN FRAGMENTS 279 (Elizabeth A. Johnson & Michael W. Klemens eds., 2005). See also Klemens & Johnson, *supra* note 143, at 356.

145. See generally Mulligan, *supra* note 81.

close proximity to a mall. The highways isolate residents physically and psychologically from local government, as more condo clubhouses replace community centers.<sup>146</sup>

### 1. Barriers to Civic Engagement

High-Density Islands attempt to simulate urban environments, but they have no equivalent downtown or civic center.<sup>147</sup> There is no town hall or community involvement beyond, at most, a shared aerobics class, which itself is limited to the exclusive residents of the High-Density Island.<sup>148</sup> High-Density Islands contribute to the replacement of civic engagement with exclusionary indulgences: enclosed malls and isolated shopping centers replace Main Street,<sup>149</sup> gated communities and clustered sprawl replace neighborhoods,<sup>150</sup> and industrial parks replace downtown office buildings.<sup>151</sup> No public spaces surround High-Density Islands, contributing to resident detachment from local government.<sup>152</sup> This detachment contributes to “the conditions of loneliness and alienation that exist in modern metropolitan society, where the dominant free-market paradigm and privatization of time and space have left little room for public life.”<sup>153</sup>

Detachment from local government is undeniably problematic in a democracy.<sup>154</sup> Additionally, increasing time spent in private

146. See Norman N. Hansen & Gregory J. Almquist, *The Development of Senior Housing in the United States*, 38 NO. 3 REAL EST. REV. J. 10 (2009).

147. See Mulligan, *supra* note 81, at 547.

148. See generally Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (May 2006).

149. See Mulligan, *supra* note 81, at 538.

150. *Id.*

151. *Id.*

152. *Id.*

153. Jesse Newmark, *Legal Aid Affairs: Collaborating with Local Governments on the Side*, 21 B.U. PUB. INT. L.J. 195, 202–03 (2012).

154. See Harold A. McDougall, *Social Change Requires Civic Infrastructure*, 56 HOW. L.J. 801, 833 (2013) (“Direct civic participation in local government is the most effective means to ensure that policies of public concern are being implemented.”); Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137 (2008) (analyzing the problems resulting from lack of civic engagement in local government, including the emergence of dominant special interest groups and citizen alienation); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 106 (2003) (arguing citizen apathy and lack of grassroots participation in local government leads to higher levels of social injustice and inequality); Jennifer Shkabatur, *Digital Technology and Local Democracy in America*, 76 BROOK. L. REV. 1413, 1423 (2011) (“Citizen participation may improve the quality of policy

spaces like malls and gated communities means more regulated behavior and the suspension of constitutional rights like free speech.<sup>155</sup>

## 2. Detachment from Open Space

Certain legal tools like non-contiguous clustering keep High-Density Islands even further from nature.<sup>156</sup> Non-contiguous clustering allows developers to offset high density by preserving open space.<sup>157</sup> However, the open space is not adjacent; it is several miles away from the development.<sup>158</sup> The purpose of traditional clustering is “to provide open spaces for recreation and [to improve] quality of life in areas of the development in exchange for higher density.”<sup>159</sup> But when the open space is located miles away, High-Density Islanders may not benefit from it. One scholar acknowledges that, “if the parcel designated for open space is non-contiguous, this could make access difficult and defeat one of the underlying designs of the statute.”<sup>160</sup> With developments severed from open space, the one natural highlight of living in a High-Density Island is literally removed, leaving residents with views only of highways, garages, and shopping centers. The most accessible parcel of nature is then an acidic green strip of grass lining the development perimeter, sporting a sign that reads, “Keep off the grass.”

## 3. Proximity to Malls and American Consumerism

High-Density Islands are very close to malls,<sup>161</sup> giving residents plenty of opportunity to engage in the “phenomenon of American consumption.”<sup>162</sup> Consumerism is already deeply ingrained in

and decision making, as the diversity of experience, opinion, and knowledge within a group can render the whole greater than the sum of its parts.”).

155. See Mulligan, *supra* note 81, at 534 (“The right to free speech in public spaces is becoming irrelevant in the United States.”).

156. See Reichle, *supra* note 37, at 34.

157. See *id.* at 35.

158. See *id.* at 21–24.

159. *Id.* at 34.

160. *Id.*

161. From my case studies, the average distance between a mall and a High-Density Island is 2.6 miles; the median is 1.8 miles. See Appendix 1 for a list of the High-Density Islands I sampled.

162. Jason J. Czarnezki, *Everyday Environmentalism: Concerning Consumption*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10,374, 10,374 (2011).

American culture.<sup>163</sup> As one scholar writes, “Americans simply have adopted a culture of spending more money and absorbing more resources in order to accumulate more.”<sup>164</sup> As more people live near and spend more time in malls, “the already bloated influence that the values of consumerism exert over our lives grows even larger.”<sup>165</sup> Developers use the influence of consumerism as a selling point. High-Density Island brochures heavily advertise their proximity to malls as a covetable amenity.<sup>166</sup>

#### 4. Community Homogeneity

Finally, if High-Density Islands attract residents with similar wants and priorities, neighbors can reinforce one another’s values, further solidifying the negative values that High-Density Islands arguably enable.<sup>167</sup> As High-Density Islanders engage in similar daily trajectories of driving and consuming, they may falsely believe that this routine is acceptable and prevalent in the wider community.<sup>168</sup> One scholar argues that the “practice of sorting people by homogenous architecture and behavior . . . create[s] islands of security and tranquility in the midst of a rapidly changing society.”<sup>169</sup> High-Density Islanders may not seek change or more fulfilling lives since they are out of touch with the more progressive values of actualized smart growth.

163. See generally Bradley A. Harsch, *Consumerism and Environmental Policy: Moving Past Consumer Culture*, 26 *ECOLOGY L.Q.* 543, 545–46 (1999).

164. Czarnecki, *supra* note 162, at 10,378.

165. Jennifer Niles Coffin, *The United Mall of America: Free Speech, State Constitutions, and the Growing Fortress of Private Property*, 33 *U. MICH. J.L. REFORM* 615, 627 (2000).

166. For example, Reading Commons advertises, “Life at Reading Commons is full of opportunities with countless shopping and dining options close by. You can be shopping in minutes at the Burlington Mall, Wayside Commons, or the Woburn Mall.” *Reading Commons*, “Welcome Home” (on file with author). Highlands at Dearborn advertises, “If you’re in the mood to shop, take a short trip to Northshore Mall, only two miles away.” *Highlands at Dearborn Promotional Material* (on file with author).

167. See Paula A. Franzese, *Building Community in Common Interest Communities: The Promise of the Restatement (Third) of Servitudes*, 38 *REAL PROP. PROB. & TR. J.* 17 (2003) (describing the persuasiveness of relevant social norms in common-interest communities).

168. See *id.*

169. A. Dan Tarlock, *Touch and Concern is Dead, Long Live the Doctrine*, 77 *NEB. L. REV.* 804, 808 (1998).

### C. Economic Concerns

High-Density Islands are financially beneficial for no one but the developer, to whom they are an economic boon.<sup>170</sup> High-Density Islands are extremely cost effective for developers, yielding higher profit margins than developments with fewer units, even when factoring in the cost of conserving open space.<sup>171</sup> Higher profit margins derive from smaller construction footprints<sup>172</sup> and the building of fewer infrastructures.<sup>173</sup> This includes reduced expenses for road construction, utility construction, site preparation and grading, run-off control, and water and sewer construction costs.<sup>174</sup> Additionally, conserved open space can ironically serve as free advertising space for the developer, on which to place a sign, for example.<sup>175</sup> Unsurprisingly, therefore, developers are eager to build High-Density Islands. As a result, High-Density Islands have begun to dominate community visions.<sup>176</sup> One scholar writes, “the creation of community visions is dominated by those ideas or components that do provide a specific economic benefit to a specific individual or group of individuals.”<sup>177</sup> As long as developers benefit economically from High-Density Islands, these developments will appear compatible with community vision.<sup>178</sup> Unfortunately, the developers’ “growth machine” vision is sufficiently persuasive to prompt local governments to implement only their ideas.<sup>179</sup> “[B]asic microeconomic principles” ensure that this remains the case.<sup>180</sup> In a capitalistic society, economics will not change High-Density Islands, only civic engagement can.<sup>181</sup>

170. Reichle, *supra* note 37, at 23, 42.

171. *Id.* at 23, 42.

172. A building’s construction footprint refers to the size and shape of its base. See BLACK’S LAW DICTIONARY 717 (9th ed. 2009), available at Westlaw BLACKS.

173. Reichle, *supra* note 37, at 23.

174. Reichle, *supra* note 37, at 42.

175. *Id.*

176. Jerrold A. Long, *Overcoming Neoliberal Hegemony in Community Development: Law, Planning, and Selected Lamarckism*, 44 URB. LAW. 345, 393 (2012).

177. *Id.*

178. *See id.*

179. *Id.* at 350.

180. *Id.*

181. *Id.* at 393 (“[T]here are outcomes that the market would not otherwise recommend or provide because no means exist to ensure that the entity or individual providing the good can benefit from providing the good. A particular alternative community design is of no

Despite the high levels of support for High-Density Islands, no economic argument can be made in support of them as good for communities or government.<sup>182</sup> The added population brought by High-Density Islands burdens communities and their infrastructure.<sup>183</sup> Taxation does not offset the environmental costs of supporting High-Density Islanders.<sup>184</sup> The Vermont legislature evaluated the cost of highway developments and concluded:

(A) Strip development along highways and scattered residential development not related to community centers cause increased cost of government, congestion of highways, the loss of prime agricultural lands, overtaxing of town roads and services and economic or social decline in the traditional community center.

(B) Provisions should be made for the renovation of village and town centers for commercial and industrial development, where feasible, and location of residential and other development off the main highways.<sup>185</sup>

Importantly, the Vermont legislature notes the increased cost to government and the decline of the traditional community center.<sup>186</sup> Thus, as High-Density Islanders remove themselves from community involvement, they cause a broader public debilitation that affects the community at large.

#### D. Architecture and Design Concerns

No High-Density Island would win an architecture award.<sup>187</sup> Developers Duany, Plater-Zyberk, and Speck are proud of that.<sup>188</sup>

specific economic value to a single potential provider, even if it is a public good of potentially great social value.”).

182. Cf. William E. Roper & Elizabeth Humstone, *Wal-Mart in Vermont—the Case Against Sprawl*, 22 VT. L. REV. 755, 758 (1998) (discussing the challenges Vermont has faced in integrating big box retailers into the local environments).

183. See generally David J. Saia, *Land Use—Lack of Judicial Guidance in Exclusionary Zoning—In re Appeal of Shore*, 524 Pa. 436, 573 A.2d 1011 (1990), 64 TEMP. L. REV. 339, 346 (1991) (discussing Pennsylvania’s common law on land use, particularly how exclusionary zoning can force the absorption of burdensome growth in suburban communities).

184. See Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 ECOLOGY L.Q. 401, 408 (1987).

185. *Id.* at 483 n.246.

186. *Id.*

187. Scholars are in agreement that subdivisions yield generic, bland, cookie-cutter architecture, yet they have hope that planned unit developments will yield unique designs. However, comparing side-by-side images of High-Density Islands proves there is little variation between them. See David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon’s Rule, Legislative Reform, and the Current State of Affairs in North*



They admonish architects who strive for their creations to appear on the cover of *Architecture* magazine rather than blend in with their surroundings.<sup>189</sup> However, the goal of blending in, while enabling developers to cut down costs by mass-producing their projects, leaves the American landscape generic and bland. Drive along I-95, and Massachusetts looks the same as New Jersey, which looks the same as Maryland, which—palm trees excluded—looks the same as Florida. From the drab colors to the chintzy doorways, nothing about the architecture is unique. There is no design concept behind High-Density Islands other than a regurgitated reminiscence of colonial architecture, reduced to faux shutters, vinyl ‘clapboards,’ and misplaced Corinthian columns.<sup>190</sup> This could be attributed to the lack of architects involved in the projects.<sup>191</sup> Duany et al. acknowledge, “more and more projects are being completed with hardly any architects involved at all, especially in the suburbs.”<sup>192</sup> Instead, subcontractors repeat designs almost from memory, generating slight variation and very little aesthetic accomplishment.<sup>193</sup> Even if architects were to replace subcontractors as designers, Duany et al. doubt that any “architect is talented enough to overcome the requirement that two-thirds of the façade must be dedicated to garage doors.”<sup>194</sup> If design were constrained not by car-centric attitudes and developer profit projections, but rather by aesthetic zoning,<sup>195</sup> the smart growth aspirations of “beauty”<sup>196</sup> potentially could be realized. However,

*Carolina*, 35 WAKE FOREST L. REV. 671, 672 (2000) (“The unique character and sense of place that makes towns and cities special is being replaced by a homogenous mix of cookie cutter malls and subdivisions.”); Ferdinand S. Tinio, Annotation, *Zoning: Planned Unit, Cluster, or Greenbelt Zoning*, 43 A.L.R.3d 888, § 2(a) (1972) (arguing planned unit developments allow for more creativity and flexibility in architecture).

188. DUANY ET AL., *supra* note 121, at 240 (“Architects design their buildings less for their surrounding neighborhoods than for the cover of *Architecture* magazine.”).

189. *Id.*

190. *Id.* at 57 (describing High-Density Islands as having “plastic plumbing, hollow doors, flimsy walls, [and] vinyl cladding”); *see also* Doris S. Goldstein, *New Urbanism: Recreating Florida by Rewriting the Rules*, 80 FLA. B.J. 63 (2006) (explaining how developers of gated interest communities “look[] for [their] models to the towns and cities that were designed before World War II”).

191. DUANY ET AL., *supra* note 121, at 57.

192. *Id.* at 213.

193. *Id.*

194. *Id.* at 81.

195. Zoning designed to preserve the aesthetic features or values of an area. *See* BLACK’S LAW DICTIONARY 717 (9th ed. 2009), *available at* Westlaw BLACKS.

196. N.Y. ENVTL. CONSERV. LAW § 6-0107(2)(e) (McKinney 2010) (including “the enhancement of beauty” as one of New York’s smart growth goals).

several courts have called aesthetic zoning improper,<sup>197</sup> and twelve states disallow it altogether,<sup>198</sup> making an adequate set of aesthetic zoning regulations and architectural review unlikely.

Some, however, defend the architecture of High-Density Islands, satisfied with its familiarity, and hence, popularity.<sup>199</sup> At best, High-Density Islands strive to look Disney-esque in appearance.<sup>200</sup> This jejune pursuit is fit for parody—only in America would architects aspire to imitate a theme park.<sup>201</sup> In a perfect illustration of this aspiration, one scholar earnestly suggested that, rather than paving roads, developers should build narrow, gravel roads around High-Density Islands in order to devise a rural ambiance.<sup>202</sup>

197. Kenneth Regan, Note, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 *FORDHAM L. REV.* 1013, 1014 n.12 (1990) ("In addition, courts in fourteen states have noted in dicta that zoning based on aesthetics alone may be improper."). See *Village of Hudson v. Albrecht, Inc.*, 458 N.E.2d 852, 856–57 (Ohio 1984), *dismissed*, 467 U.S. 1237 (1984); *Bd. of Cnty. Comm'rs v. CMC of Nevada, Inc.*, 670 P.2d 102, 104 (Nev. 1983); *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741, 757 (N.D. 1978), *appeal dismissed*, 440 U.S. 901 (1979), *aff'd on other grounds*, 317 N.W.2d 810 (N.D. 1982); *Warren v. Municipal Officers*, 431 A.2d 624, 629 n.6 (Me. 1981); *South of Second Assocs. v. Georgetown*, 580 P.2d 807, 811 (Colo. 1978) (*en banc*); *Duckworth v. City of Bonney Lake*, 586 P.2d 860, 867 (Wash. 1978) (*en banc*); *Dawson Enter. Inc. v. Blaine Cnty.*, 567 P.2d 1257, 1268–69 (Idaho 1977); *Piper v. Meredith*, 266 A.2d 103, 107–08 (N.H. 1970); *Reid v. Architectural Bd. of Review*, 192 N.E.2d 74, 76 (Ohio 1963); *Farley v. Graney*, 119 S.E.2d 833, 843, 44 (W. Va. 1960); *Stoner McCray Sys. v. City of Des Moines*, 78 N.W.2d 843, 848–49 (Iowa 1956); *City of New Orleans v. Levy*, 64 So. 2d 798, 802–03 (La. 1953); *Vermont Salvage Corp. v. Village of St. Johnsbury*, 34 A.2d 188, 194–95 (Vt. 1943); *General Outdoor Adver. Co. v. City of Indianapolis*, 172 N.E. 309, 312 (Ind. 1930); *City of Providence v. Stephens*, 133 A. 614, 617 (R.I. 1926).

198. Regan, *supra* note 197, at 1014 ("[T]welve states do not permit zoning based solely on aesthetics.")

199. See generally DUANY ET AL., *supra* note 121.

200. Michael Sorkin, *Variations on a Theme Park*, in *VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE* xi–xii (Michael Sorkin ed., 1992) ("[A]n architecture of deception which, in its happy-face familiarity, constantly distances itself from the most fundamental realities. The architecture of this city is almost purely semiotic, playing the game of grafted signification, theme-park building. Whether it represents generic historicity or generic modernity, such design is based in the same calculus as advertising, the idea of pure imageability, oblivious to the real needs and traditions of those who inhabit it.")

201. See generally ADA LOUISE HUXTABLE, *THE UNREAL AMERICA: ARCHITECTURE AND ILLUSION* (The New Press, 1999).

202. Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 *NAT. RESOURCES J.* 283, 296–97 (2004) ("While critics of clustering worry that this technique will cause loss of exurban or rural character, subdivisions designed with these concerns in mind can mitigate, if not eliminate, such concerns. . . . Instead of having separate driveways onto the arterial roads, creating a more urban feel, a subdivision should be designed so the entire tract is set back from the main road with only one access point to the road and houses accessing a loop or network of small streets. These streets should be

## E. Health Concerns

High-Density Islands are often located alongside highways, leaving residents vulnerable to increased health risks.<sup>203</sup> Some health risks result from the poor lifestyle habits that living alongside a highway facilitates.<sup>204</sup> Research shows that living in suburban sprawl causes a decrease in physical activity, as people must drive rather than walk or bike.<sup>205</sup> A sedentary lifestyle increases the risk of heart disease, stroke, and other adverse health effects associated with obesity.<sup>206</sup> Additionally, more time spent driving increases the risk of being involved in an automobile accident,<sup>207</sup> which kill 360,000 Americans a year.<sup>208</sup>

While the foregoing health risks are associated with suburban living in general, the health hazards of living in close proximity to a highway are unique to High-Density Islands.<sup>209</sup> Overwhelming evidence indicates that people living near highways experience significant health risks from exposure to motor vehicle emissions.<sup>210</sup> These risks include asthma,<sup>211</sup> lung cancer,<sup>212</sup> low birth weights and premature births,<sup>213</sup> shorter life spans,<sup>214</sup> reduced lung functioning in children,<sup>215</sup> and leukemia in children.<sup>216</sup> There are

gravel and narrower than traditional urban subdivision streets to create a rural neighborhood feel.”).

203. Of my twenty-nine case studies, the average distance from a highway was 247 meters. The median distance from a highway was seventy-six meters. See Appendix 1.

204. Hohnadell, *supra* note 123, at 718.

205. *Id.*

206. *Id.*

207. *Id.*

208. U.S. Census, *Table 1103. Motor Vehicle Accidents—Number and Deaths: 1990 to 2009* (2012), <http://www.census.gov/compendia/statab/2012/tables/12s1103.pdf> [<http://perma.cc/9249-Q3KC>].

209. Patrick J. Skelley II, *Defending the Frontier (Again): Rural Communities, Leap-Frog Development, and Reverse Exclusionary Zoning*, 16 VA. ENVTL. L.J. 273, 304 n.173 (1997).

210. Gregory M. Rowangould, *A Census of the US Near-Roadway Population: Public Health and Environmental Justice Considerations*, 25 TRANSP. RES. PART D: TRANSPORT & ENV'T 59 (2013) available at <http://www.sciencedirect.com/science/article/pii/S1361920913001107> [<http://perma.cc/9HN2-U57T>].

211. SIERRA CLUB, *HIGHWAY HEALTH HAZARDS 1* (2004), available at [http://www.sierraclub.org/sprawl/report04\\_highwayhealth/report.pdf](http://www.sierraclub.org/sprawl/report04_highwayhealth/report.pdf) [<http://perma.cc/ZLM6-C2H7>].

212. *Id.*

213. *Id.* at 7.

214. *Id.* at 10.

215. *Id.* at 9.

216. *Id.* at 1.

approximately 100,000 premature deaths resulting from highway pollution each year in America.<sup>217</sup>

With these scientific conclusions, it is shocking that stretches of land bordering highways are commonly zoned for residential development. There are currently 59.5 million Americans living within a danger zone—500 meters<sup>218</sup>—of high volume roadways.<sup>219</sup> High-Density Islands are built significantly closer than 500 meters to highways—the highest volume roadways.<sup>220</sup> Of the 29 High-Density Islands that I sampled, 23 are located within 500 meters of busy highways like I-95, some as close as 15 meters.<sup>221</sup> Currently, only 0.1% of the US population<sup>222</sup> lives this close to highways.<sup>223</sup> However, with each High-Density Island developed, hundreds to thousands of adults and children are added to this demographic, and thus subjected to significant health risks, including death.<sup>224</sup> Additionally, there are very few air quality monitors located in these areas to track these risks and inform residents.<sup>225</sup>

#### F. Environmental Justice Concerns

Smart growth programs that facilitate the development of High-Density Islands often use density bonuses and other incentives to spur the inclusion of moderate or low-income housing or elderly living communities.<sup>226</sup> Given the multitude of problems facing High-Density Island residents, low-income and senior citizen populations are disproportionately affected. Most disconcerting is the disproportionate effect of disenfranchisement,<sup>227</sup> lack of exposure to open space,<sup>228</sup> and highway health hazards<sup>229</sup> on low-income and senior citizen populations.

217. *Id.* at 1–2.

218. 1640 feet or 0.3 miles.

219. Rowangould, *supra* note 210, at 61.

220. *Id.*

221. Fifty feet.

222. Approximately 400,000 persons.

223. Rowangould, *supra* note 210.

224. *Cf.* Rowangould, *supra* note 210, at 66 (“While prior research has focused on the largest urban areas, these results indicate that exposure to high concentrations of mobile source emissions from living in close proximity to high volume roads is potentially a much larger and more widespread public health concern.”).

225. Rowangould, *supra* note 210, at 66.

226. *See supra* Part II.D.3. *See also* Fedun, *supra* note 56, at 612 (“[P]lanned unit development presents greater possibilities for low cost and senior citizen housing.”).

227. *See supra* Part II.B.1.

228. *See supra* Part II.A.

As discussed, common-interest communities like High-Density Islands detach residents from local government through psychological and physical barriers such as highways, distance from community centers, and semi-autonomous, self-contained gated communities.<sup>230</sup> Marginalized groups, including the low-income and the elderly, risk disenfranchisement as residents of High-Density Islands. These are groups that must be civically engaged in order to ensure social justice and equality.<sup>231</sup> The disenfranchisement is exacerbated when the internal community is homogenous and exclusionary,<sup>232</sup> and where affordable housing is visibly set apart.<sup>233</sup> Integration is less likely since “community-building” amenities (e.g., clubhouses and gyms) often cost an additional fee, keeping them “in the family.”<sup>234</sup>

Some of the problems relevant to all High-Density Islanders are particularly acute with respect to low-income and senior citizen populations because they may not have the money or mobility to overcome the problems.<sup>235</sup> For example, if there is no open space adjacent to the High-Density Island, it is possible that wealthier, more agile residents could seek out a park, whereas the low-income and elderly may not have sufficient funds or mobility to do so. Similarly, the highway health hazards are particularly acute for seniors because air pollution exacerbates existing lung conditions that seniors may have.<sup>236</sup> The low-income residents may not have adequate health insurance coverage to seek out the care they may

229. See *supra* Part II.E.

230. See *supra* Part II.B.1.

231. Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 106 (2003) (arguing citizen apathy and lack of grassroots participation in local government leads to higher levels of social injustice and inequality).

232. See Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 456 (2006).

233. See Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 566 (2007).

234. See Strahilevitz, *supra* note 232, at 456 (analyzing the ways segregation arises in new residential developments).

235. See Andrew D. Appleby, *Pay at the Pump: How \$11 per Gallon Gasoline Can Solve the United States' Most Pressing Challenges*, 40 CUMB. L. REV. 3, 32 (2010).

236. See Karen Graham, *Living Near Highways May Be Hazardous to Your Health*, DIGITAL JOURNAL (Nov. 6, 2013), <http://digitaljournal.com/article/361634#ixzz2o8kIIqFz> [<http://perma.cc/U39N-NL52>] (“The health care community has known for a long time that people living within 300 feet of major roadways were more prone to respiratory ailments, allergies, certain kinds of cancers and heart disease. The elderly and very young children seemed to be hit even harder, studies have shown.”).

need. There is also a concern that the affordable housing is sited closest to the highways on these development sites.<sup>237</sup>

#### IV. BRINGING HIGH-DENSITY ISLANDS IN CONFORMITY WITH THE TENETS OF SMART GROWTH

The most obvious solution to restore the principles of Smart Growth is to ban High-Density Islands altogether. Municipalities and developers will likely not accept such a Draconian change, but there are several requirements a municipality could place on developers seeking to build High-Density Islands.

##### A. Identifying High-Density Islands

The first challenge is to identify when a High-Density Island is proposed. Municipalities can ask:

How car-dependent will this development be? Where is the nearest public transportation hub, and is it reliable? Is there a plan in place to build transportation infrastructure around the development?

How close to the highway is the development? Is it in the 500-meter danger zone?<sup>238</sup>

Is the development solely for residential use?

Is the architecture or design of the development unique? Does it harmonize with the local color of the community?

How easily can residents of the development access the town center?<sup>239</sup>

Once a proposal has been identified as a High-Density Island, there are steps a municipality can take to improve and bring it in line with the thinking of Smart Growth.

##### B. Combatting Highway Development

One way to protect residents from the health hazards of highway pollution is to establish a buffer zone between highways and development. If such a buffer would infringe too much on open

237. Rowangould, *supra* note 210 (“[P]ersons belonging to a racial minority group or with lower household incomes are more likely to live near a high volume road.”).

238. *See supra* Part III.E.

239. Many town centers, particularly historic centers, lack parking. If this is the case, then even if the town center is within driving distance of the High-Density Island, residents are more likely to stop at the mall to find a parking space and then walk down Main Street.

space, municipalities could mandate that developers set up publicly accessible air quality monitors to track the pollution levels. Also, the leasing process could include an informed consent statement—future tenants must establish they are aware of the dangers of highway-adjacent living.<sup>240</sup> An equivalent informed consent statement could apply for condominium purchases.

### C. Concurrency Requirements

As established, High-Density Islands exacerbate the car-dependency of suburban sprawl because there are no easily accessible public transportation hubs.<sup>241</sup> A program that would match the rate of residential high-density development with the development of public infrastructure could alleviate this issue.<sup>242</sup> Such a program is known as an adequate public facilities law, rate of growth ordinance, or concurrency.<sup>243</sup> Concurrency is an effective tool for managing growth and ensuring that residential growth does not outpace public infrastructure growth that can accommodate low-carbon emitting lifestyles.<sup>244</sup> High-Density Island growth rate is undeniably faster than the public infrastructure growth rate given that the former is privately run and profit driven while the latter is a function of government facing tight budgets.<sup>245</sup> Concurrency programs help alleviate this budgetary imbalance by asking the developer to fund the public infrastructure in order to gain approval for his project.<sup>246</sup> However, the Supreme Court has recently questioned the practice of conditioning development permits on funding government projects under its recent proportionality and reasonability standards.<sup>247</sup>

240. Precedent for this exists. For example, in Massachusetts, landlords leasing a unit built before 1978 must have tenants sign the Lead Law Notification, alerting tenants to the health dangers of lead paint. See generally, Philip B. Posner, *Due Diligence: Home Inspections and Environmental and Land Use Law*, RRETI MA-CLE 4-1 (discussing home inspection and due diligence requirements in Massachusetts and how they relate to land use planning).

241. See *supra* Part III.A.2.

242. Adam Strachan, *Concurrency Laws: Water as a Land-Use Regulation*, 21 J. LAND RESOURCES & ENVTL. L. 435, 435 (2001).

243. *Id.*

244. *Id.*

245. See generally Orlando E. Delogu et al., *Some Model Amendments to Maine (and Other States') Land Use Control Legislation*, 56 ME. L. REV. 323, 334 (2004) (discussing, in part, rate of growth ordinances, which forces development to slow in order to ensure there is sufficient time to build matching public infrastructure).

246. See Hohnadell, *supra* note 123, at 724–726.

247. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013).

Critics of concurrency argue that it effectively imposes a moratorium on growth.<sup>248</sup> They also claim concurrency unfairly shifts the burden of providing and funding public infrastructure from the government to the private developer.<sup>249</sup> Critics further describe this as an “artificial[] interfere[nce] with the natural forces of growth.”<sup>250</sup> However, permitting “natural growth” to continue will only saturate the suburbs with High-Density Islands and insufficient public infrastructure to support residents, leading to car-dependency instead.<sup>251</sup>

Other than funding, a primary obstacle to building public infrastructure to accommodate High-Density Islanders is the potential infeasibility.<sup>252</sup> Public transportation does not exist in suburbs in the same way that it does in dense urban environments because it is impractical.<sup>253</sup> There are simply not enough residents to make building public transportation in suburbs cost-effective.<sup>254</sup> Suburbia does not suddenly become high density simply because a high-density development enters the area. Thus, the addition of 500 residents in a High-Density Island, while significant in terms of the added carbon emissions, is not reason enough to build extensive public transportation.<sup>255</sup> It may be impossible to cost-effectively provide infrastructure to accommodate High-Density Islanders, making green living and High-Density Island living incompatible.<sup>256</sup>

#### D. Smart Growth Impact Statements

Many states admirably outline smart growth goals.<sup>257</sup> However, in the implementation of individual tools of smart growth, those goals

248. Hohnadell, *supra* note 123, at 726.

249. *Id.*

250. *Id.*

251. See Roberta F. Mann, *On the Road Again: How Tax Policy Drives Transportation Choice*, 24 VA. TAX REV. 587, 607 (2005).

252. Winter King, *Smart Growth Meets the Neighbors*, 34 ECOLOGY L.Q. 1349, 1352 (2007) (book review).

253. *Id.* (“[P]ublic transit is generally infeasible in low-density communities, [thus] suburban residents become car-dependent.”).

254. Lewyn, *supra* note 119, at 522 (1996) (“Auto-dependence occurs because suburbs generally are too scarcely populated to support reliable public transportation.”).

255. *See id.*

256. *See id.*

257. See INGRAM, CARBONELL, HONG & FLINT, *supra* note 17. For a state-by-state description of smart growth programs, see BOLEN, BROWN, KIERNAN & KONSCHNIK, *supra* note 20, at 10–125.



may be undermined. To combat this, smart growth impact statements could be required for each new development in order to assess the effects the project would have on smart growth goals. New York has adopted such a program under its Smart Growth Public Infrastructure Policy Act.<sup>258</sup> It requires smart growth impact statements for public projects to ensure they meet the state's smart growth criteria.<sup>259</sup> This could extend to private projects, particularly if they require zoning variances. By submitting a smart growth impact statement, the public can learn about the environmental trauma of High-Density Islands.

#### E. Mixed-Use Development

Mixed-use developments combine residential, commercial, office, industrial, and recreational uses in one area.<sup>260</sup> This can create a more pedestrian-friendly, diverse, and accessible community.<sup>261</sup> Land use planners argue that mixed-use development is incompatible with Euclidean zoning, since Euclidean zoning designates discrete purposes for each parcel of land.<sup>262</sup> However, the alternative to Euclidean zoning, the planned unit development, can allow developers too much freedom of design, which can yield a profit-driven vision, rather than a community vision.<sup>263</sup> If mixed-use development is to be successful, diverse, and organic—not a pre-assembled city dropped from the sky—then multiple private and public voices would need to take part in the development, preferably over the long term. A city's land use office could carefully consider which use to assign to each parcel of land, rather than leave such decisions to detached developers. Additionally, if each High-Density Island included a

258. Lisa Grow Sun, *Smart Growth in Dumb Places: Sustainability, Disaster, and the Future of the American City*, 2011 BYU L. REV. 2157, 2164 (2011).

259. *Id.*

260. Dorothy D. Nachman, *When Mixed Use Development Moves in Next Door: Finding a Home for Public Discourse and Input*, 23 FORDHAM ENVTL. L. REV. 55, 56–57 (2012).

261. *See id.* at 56.

262. *See id.* at 57 (arguing mixed-use development is “largely incompatible with existing Euclidean zoning that divides land into single use districts and fails to provide sufficient flexibility for the mixed use development that is at the heart of new urbanism”). *See also* Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVTL. L. 395, 399 (2008) (Mixed-use development is part of a movement that “is both a reaction to, and a departure from, the roots and current realities of conventional zoning.”).

263. *See* David W. Craig, *Planned Unit Development as Seen from City Hall*, 114 U. PA. L. REV. 127, 130 (1965).

cantina,<sup>264</sup> which sold basic necessities like milk, bread, and batteries, that could save a significant number of car trips each year.<sup>265</sup> Unfortunately, the cantina would likely have to have limited hours and products to remain economically feasible, necessitating consumers to shop elsewhere at times.

#### F. Replacing Density Bonuses with Other Incentives

Municipalities should eliminate density bonuses. Even if density bonuses are effective in stimulating affordable housing development, they have net negative effects on the environment and its inhabitants by gifting developers additional, energy-consuming units.<sup>266</sup> In order to encourage the building of affordable housing, municipalities should instead entice developers with incentives like tax exemptions,<sup>267</sup> financing assistance,<sup>268</sup> site locating assistance,<sup>269</sup> streamlined permitting,<sup>270</sup> waivers of permit fees,<sup>271</sup> government provision or subsidization of infrastructure in support of development,<sup>272</sup> or more flexible development standards.<sup>273</sup>

264. Corner stores are currently associated with less affluent neighborhoods, but they can be valuable in cutting down on car trips to shopping centers. See Bekah Mandell, *Feasts of Oz: Class, Food, and the Rise of Global Capitalism*, 20 S. CAL. INTERDISC. L.J. 93, 96 (2010) (“[P]oor urban neighborhoods are home to bodegas, corner stores, and convenience stores.”).

265. See Jessica E. Jay, *The “Malling” of Vermont: Can the “Growth Center” Designation Save the Traditional Village from Suburban Sprawl?*, 21 VT. L. REV. 929, 941 (1997).

266. See *supra* Part II.D.

267. Including property tax exemptions and sales/use tax exemptions. See Jennifer L. Gilbert, *Selling the City Without Selling Out: New Legislation on Development Incentives Emphasizes Accountability*, 27 URB. LAW. 427, 430 (1995). See also Jennie C. Nolon & John R. Nolon, *Zoning and Land Use Planning*, 40 REAL EST. L.J. 237, 247–48 (2011).

268. Incentives could include construction loans, machinery and equipment loans, bond financing, and the creation of an enterprise loan fund. Gilbert, *supra* note 267, at 430.

269. *Id.*

270. J. Michael Marshall & Mark A. Rothenberg, *An Analysis of Affordable/Work-Force Housing Initiatives and Their Legality in the State of Florida, Part I*, 80 FLA. B.J. 79 (2008), at 79–80.

271. Clayton H. Collins, *Affordable Housing Options Under Pennsylvania’s Three Legislative Regimes*, 28 J.L. & COM. 247, 262 n.118 (2010).

272. *Id.*

273. E.g., building height. With one caveat: municipalities must still be careful not to compromise the end goals of smart growth. Marshall & Rothenberg, *supra* note 270, at 80.

### G. Aesthetic Zoning and Architectural Review Boards

Even if aesthetic zoning is disfavored, municipalities must prevent franchise architecture from engulfing local residences.<sup>274</sup> There is precedent in local regulation of big box retail architecture<sup>275</sup>: some localities prevent “cookie-cutter visual sameness” in order to prevent the homogenization of their architecture, and mandate that chain stores conform to local standards of beauty.<sup>276</sup> This could also apply to residential architecture.<sup>277</sup>

Architectural review boards are another way to regulate cookie-cutter designs.<sup>278</sup> Municipalities can bestow on these boards the power to reject development applications for projects that will look “excessive[ly] similar[.]” to every other High-Density Island in the nation.<sup>279</sup> These architectural review boards strive to maintain a local quality in architecture and prevent “the monotony in the appearance” of mass produced housing.<sup>280</sup>

274. Franchise architecture refers to the cookie-cutter commercial storefronts across the nation (e.g., the McDonalds arches). Franchise architecture in the residential sense is when all of Avalon’s, Pulte’s, or Toll Brothers’ properties look the same. See Daniel A. Spitzer & Jill L. Yonkers, *A Guide to Regulating Big Box Stores, Franchise Architecture, and Formula Businesses*, 7 NO. 4 NEW YORK ZONING LAW AND PRACTICE REPORT 1 (2007).

275. *Id.* Big box retail architecture refers to “the behemoth retailers that prefer an architecture of rectangular, single-story unadorned structures reaching 200,000 square feet or more.” Examples include Home Depot and Walmart. Patricia E. Salkin, *Municipal Regulation of Formula Businesses: Creating and Protecting Communities*, 58 CASE W. RES. L. REV. 1251, 1251 (2008).

276. Ross Atkin, *Conserving American Character, Town by Town*, CHRISTIAN SCI. MONITOR 11, Oct. 2, 2002, <http://www.csmonitor.com/2002/1002/p11s03-lihc.html> [<http://perma.cc/TG4S-X3TZ>]. See also Salkin, *supra* note 275, at 1287.

277. A land use planning movement called New Urbanism seeks to create “architecture and landscape design [that] grow[s] from local climate, topography, history, and building practice, thus avoiding the monotony of conventional suburban development and creating places of character and distinction.” Garvin & Jourdan, *supra* note 262, at 406 (internal quotation marks omitted). Unfortunately, many examples of New Urbanism architecture look suspiciously like the architecture of High-Density Islands. However, the principles espoused by the New Urbanists, if effectuated, would solve the architectural gloom presented by modern mass development.

278. Cf. Katherine A. Woodward, *Form over Use: Form-Based Codes and the Challenge of Existing Development*, 88 NOTRE DAME L. REV. 2627, 2628 (2013) (advocating for the return of the traditional town—free of big box stores—through the implementation of form based codes, or zoning that does not regulate use as much as it regulates physical structure).

279. ARDEN H. RATHKOPF ET AL., 2 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 16:17 (4th ed. 2013).

280. *Id.*

## V. CONCLUSION

Smart growth can save the American landscape from the burdens of sprawl, but only if the tenets are implemented in tandem. Implementing an isolated technique does not guarantee environmental progress, and can even be more environmentally damaging than traditional land use tools. The High-Density Island is the consequence of building under a pretense of smart growth. Developers inevitably seek higher profits, but municipalities should not be complicit in their business ventures. The environmental damage from increasing the car-dependent population, and the various other implications—from public health to town governance—is alarming. Adding density does not solve sprawl when public infrastructure does not accommodate new residents. In order to rescue the tenets of smart growth, municipalities must cast away High-Density Islands and recognize there is no quick fix to sprawl. Opportunities exist to more strategically and comprehensively implement smart growth policies—as discussed in any theoretical dialogue on smart growth. The problem with smart growth is in its lack of implementation—not lack of promise. But developers, government, and residents must first recognize that true smart growth lives only at the intersection of theory and application.

## APPENDIX 1: SAMPLED COMMUNITIES

This list reflects the communities I sampled to generate the relevant statistics discussed in this note.

<b>High-Density Island Name</b>	<b>Location</b>
Beacon Village	Burlington, MA
14 North	Peabody, MA
Highlands at Dearborn	Peabody, MA
Inwood West	Woburn, MA
Reading Commons - in overlay zoning	Reading, MA
Reading Woods	Reading, MA
Heritage at Stone Ridge	Burlington, MA
Arborpoint at Market Street	Lynnfield, MA
Richmond Vista	Wakefield, MA
Westborough Village	Westborough, MA
Regency at Assabet Ridge	Marlborough, MA
Wildflower Estates	Westfield, MA
Regency Place	Wilmington, MA
Oakridge Village	North Andover, MA
Rose Court	Danvers, MA
Spicket Commons	Methuen, MA
Brookhaven	Lexington
Avalon	Lexington
Arborpoint at Seven Springs	Burlington, MA
Jefferson	Bellingham, MA
Union Place Apartments	Franklin, MA
Edgewood Apartments	North Reading, MA
Villas at Old Concord	Billerica, MA
Bell Wheeler Hill	Marlborough, MA
Avalon at the Pinehills	Plymouth, MA
Flanders Hill	Westborough, MA
The Residences at Westborough Station	Westborough, MA
Northwood at Sudbury	Sudbury, MA
West Village Apartments	Mansfield, MA