



2012

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Recommended Citation

Lewyn, Michael (2012) "Land Use Regulation: It Just Gets Worse," *University of Baltimore Journal of Land and Development*: Vol. 2: Iss. 1, Article 2.

Available at: <http://scholarworks.law.ubalt.edu/ubjld/vol2/iss1/2>

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ARTICLES

LAND USE REGULATION: IT JUST GETS WORSE

Michael Lewyn*

I. Introduction

Some commentators treat suburban sprawl (by which I mean automobile-dependent land development)¹ as the result of the free market at work.² Even sprawl critics sometimes adopt this frame, by treating sprawl as the natural result of consumer preference and suggesting that urban planners oppose this natural order.³

But in *City Rules*, urban planning professor Emily Talen shows not only how zoning and similar land use regulations generate automobile-dependent suburban sprawl, but also how these regulations have become stricter, more pro-sprawl, and more complex over time. Talen proposes to reform these regulations through municipal codes that promote more walkable, less automobile-dependent development.

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Review, *City Rules: How Regulations Affect Urban Form*, Emily Talen (Island Press, 2012).

1. See Michael M. Maya, *Transportation Planning and the Prevention of Urban Sprawl*, 83 N.Y.U.L. REV. 879, 879 (2008) (defining sprawl as “automobile-dependent development on the fringes of existing cities”).
2. See, e.g., Steve Berg, *Life in the Slow Lane*, STAR TRIBUNE, Oct. 13, 2002, at 31A, available at 2002 WLNR 12182440 (Atlanta planner Chick Krautler explained automobile-dependent sprawl of Atlanta as follows: “people wanted to drive . . . it was that simple.”); *Growing Pains*, STAR TRIBUNE, Ap. 8, 2001, at 26A, 2001 WLNR 10311854 (“The auto-dependent patterns of the 1950s are still alive in Minnesota. Some celebrate this trend as a market-driven expression of who we are”); Brian Williams, *Land Use Conference Offers No Easy Answers*, COLUMBUS DISPATCH, Mar. 26, 1997, at 1C, available at 1997 WLNR 6806462 (employee of community development corporation asserted that “people are moving to sprawling, auto-dependent suburbs [because] . . . The market is working.”)
3. See, e.g., Dan Tarlock, *Fat and Fried: Linking Land Use Law, The Risks of Obesity, and Climate Change*, 3 PITT J. ENVTL. & PUB. HEALTH L. 31, 32-33 (2009) (“planners have long advocated . . . a centralized, dense mix of commercial and residential development, pedestrian access to vibrant shopping [and] effective public transportation networks” while “citizens have largely rejected this model as unsuited to the American experience of endless, cheap land”).

Talen's description of existing regulations is masterful; she shows how municipal codes have become ever more aggressive in enforcing suburban sprawl, while at the same time becoming more complex and incoherent. The review goes on to discuss Talen's suggestions for regulatory reform, but suggests that "Not In My Back Yard" (NIMBY) sentiment may frustrate her proposals.

Talen's discussion of existing municipal codes focuses on three areas: (1) street patterns, (2) regulation of land uses, and (3) urban form. Each of these issues will be addressed in turn, and then this review shall address Talen's suggestions for regulatory reform.

II. Pattern

After a couple of introductory chapters, Talen addresses urban pattern- that is, "rules for laying out towns, streets and houses"⁴ such as rules for street and block size.

Governments have regulated streets for centuries: for example, ancient Roman laws specified appropriate street layouts for military bases.⁵ In the early 20th century, government regulated lot and block size through subdivision regulation.⁶ Over time, government has tended to require longer blocks and larger lots.

A. Blocks

As late as 1929, most subdivision ordinances required blocks to be no more than 200-600 feet long.⁷ Talen notes that today's cities usually require longer blocks.⁸ She uses Gilbert, Arizona (a suburb of Phoenix)⁹ as an example, pointing out that Gilbert allows blocks as long as 1500 feet¹⁰ and in fact has blocks as long as 1200 feet.¹¹

Here, Talen may actually understate the severity of government regulation. She mentions that Gilbert PERMITS very long blocks, but she could have emphasized that many municipalities REQUIRE such long blocks. For example, Huntsville, Alabama requires that blocks along arterial streets (that is, major streets carrying cross-town traffic)¹² and

4. EMILY TALEN, CITY RULES: HOW REGULATIONS AFFECT URBAN FORM 37 (2012).

5. *Id.*

6. *Id.* at 47.

7. *Id.* at 49 ("In 1929, the range was around 200-600 feet" though some cities allowed 800-1000 foot blocks).

8. *Id.* ("[R]ules for block sizes were significantly smaller in the early decades of the twentieth century.").

9. *In re Lewis*, 157 B.R. 555, 556 (Bkrcty. E.D. Pa. 1993) (Gilbert "a suburb of Phoenix").

10. *See* TALEN, *supra* note 4, at 80.

11. *Id.* at 74.

12. *See Nashvillians Against I-440 v. Lewis*, 524 F. Supp. 962, 992 (M.D. Tenn. 1981) ("arterial" streets are those "carrying heavy loads of cross-town traffic").

connector streets (streets intersecting with such streets)¹³ be 1000 feet long.¹⁴ Similarly, Jacksonville, Florida allows only four intersections per mile (or one every 1320 feet)¹⁵ on “major arterial” streets.¹⁶

Such long blocks discourage walking because pedestrians have to travel longer distances to reach intersections (and thus to cross streets) than they would in a street with shorter blocks and more frequent intersections.¹⁷ Furthermore, long blocks make it more difficult for pedestrians to reach streets parallel to those blocks, because instead of taking a quick left or right turn at an intersection, a pedestrian must sometimes go out of his or her way to the end of a long block, then turn onto the parallel street, then backtrack to reach their destination.¹⁸ It follows that by requiring longer blocks over time, local governments have made their regulations more and more anti-pedestrian.

B. Lots

Zoning ordinances in the 1920s typically required lots to be 40 feet wide.¹⁹ Some cities allowed smaller lots: for example, in Cleveland, lots in older neighborhoods were 25 feet wide and 110 feet long (or 2750 square feet),²⁰ and in no zoning district did the city require more than 5000 square feet of lot area per household.²¹

However, lot size requirements steadily marched upward after World War II.²² Talen focuses on Phoenix as an example of modern zoning. Phoenix has created a “residential infill district” to encourage downtown development.²³ Presumably, a downtown district should be the most compact in the city—yet even in this so-called downtown area,

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13. See Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 284 (2006) (defining collector streets).
 14. See HUNTSVILLE, ALA., CODE OF ORDINANCES, app. B, art. 4.2(3) (2010) available at <https://library.municode.com/index.aspx?clientId=12962>.
 15. There are 5280 feet in a mile. *Robinson v. Arrugetta*, 415 F. 3d 1252, 1254 n. 2 (11th Cir. 2005). So a street with four intersections per mile has one intersection every 1320 feet (5280 divided by four).
 16. JACKSONVILLE, FLA., ORDINANCE CODE § 654.115 (2012) available at <http://www.municode.com/resources/gateway.asp?pid=12174&sid=9>.
 17. See Jeff Gray, *Police Blaming Accident Victims, Pedestrian Says*, GLOBE & MAIL, Mar. 15, 2004, at A8, available at 2004 WNL.R 18380258 (stating that in suburban Toronto there is “trouble for pedestrians” because of large streets that “barely allow pedestrians enough time to cross and the long blocks that provide so few safe opportunities to do so.” (emphasis added)).
 18. See Michael Lewyn, *How Overregulation Causes Sprawl (Even In A City Without Zoning)*, 50 WAYNE L. REV. 1171, 1189 (2005); HAROLD DiRIENZO, THE CONCEPT OF COMMUNITY: LESSONS FROM THE BRONX 88 (2008) (shorter blocks allow variety of routes to destination).
 19. See TALEN, *supra* note 4, at 49.
 20. *Id.* at 79.
 21. *Id.* at 48.
 22. *Id.* at 49.
 23. *Id.* at 61.

zoning is far more restrictive, and requires far larger lots, than in a typical 1920s neighborhood. Subdivided lots in this area must be at least 60 by 94 feet, and must encompass at least 6000 square feet (or just under 1/7 of an acre)²⁴ - far more than the typical lots in 1920s cities.²⁵ And most suburbs limit density even more aggressively, requiring minimum lot sizes of one-fourth of an acre or more.²⁶

Such large-lot requirements make neighborhoods automobile-dependent. In areas with fewer than seven to fifteen dwelling units per acre,²⁷ very few people will live within a short walk of a bus or train stop, and transit ridership will therefore be low,²⁸ which in turn means that transit agencies will rarely serve such areas.²⁹ Thus, antidensity regulations effectively reduce the utility and frequency of transit service.

Low-density zoning inconveniences pedestrians as well as transit riders, because such zoning reduces the number of people who can live within walking distance of any given destination. For example, imagine two neighborhoods near a grocery store: one with 20 residences per acre and another with 2 houses per acre. In the latter neighborhood, far fewer people will live within a short walk of the grocery store.

III. Land Use

One original purpose of zoning was to keep noxious land uses away from homes.³⁰ But the first zoning codes were not highly restrictive: although commercial uses were kept apart from housing, commercial zones were still within walking distance of housing so people could walk to shops and jobs.³¹ These codes were also simple: for example, Chicago's first zoning ordinance had only four districts and was only 20 pages long.³² Early 20th-century supporters of zoning sought to organize uses by levels of intensity; the most intense uses were to be near

24. See Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 1905 (1985) (defining one acre as containing 43,560 square feet).

25. See TALEN, *supra* note 4, at 61; *supra* text accompanying notes 19-21 (describing 1920s zoning).

26. See 3 EDWARD H. ZIEGLER, ARDEN H. RATHKOPF, AND DAREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 21:66 (4th ed. 2011) ("in suburban single-family residential areas, minimum lot sizes typically range from one-quarter to two acres.").

27. See Robert H. Freilich, *The Land Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 URB. LAW. 547, 552 n.18 (1998).

28. See PAMELA BLAIS, PERVERSE CITIES: HIDDEN SUBSIDIES, WONKY POLICY, AND URBAN SPRAWL, 60-61 (UBC Press 2010).

29. *Id.* at 61 (a "minimum threshold density is needed to support a rudimentary level of transit service . . . [a]s densities increase, so, too, does the economic viability of higher levels of service").

30. See TALEN, *supra* note 4, at 89.

31. *Id.* at 105-06.

32. *Id.* at 104 (citing numerous other examples).

downtown, while detached houses and other less intense uses were to be at the city's outskirts.³³

Talen argues that zoning has failed in three ways. First, zoning has become preposterously complex: even small towns have over a dozen zones,³⁴ and Phoenix has 264 zoning categories³⁵ (including twenty-seven for just one part of downtown).³⁶

Second, residential zones are sometimes so large as to make cities and suburbs unwalkable: a residential zone can stretch for miles, making it impossible for its residents to walk to jobs or shops.³⁷

Third, despite its restrictiveness, zoning has not always achieved its primary mission of separating incompatible land uses. Talen points out that in Phoenix, single-family homes are adjacent to traffic-generating uses such as eight-lane freeways³⁸ and car dealerships.³⁹

At the same time, zoning codes often outlaw highly compatible uses. For example, apartments are more compatible than houses with commerce because apartments are by definition, more dense and thus more heavily trafficked than a block full of single-family homes. Thus, to subject apartment-dwellers to single-use zoning provides them with the worst of both worlds: the density of apartment living without the walkability of jobs and shops nearby. Yet many codes keep apartments out of commercial zones and vice versa.⁴⁰

IV. Form

Talen next addresses urban form, which she defines as “three-dimensional character”⁴¹ such as setbacks and street design.

A. *Street width*

Talen points out that in the early 20th century, government regulated street width only as a function of building height: taller buildings required wider streets.⁴² But later in the 20th century government regulated street width in order to speed traffic, leading to ever-wider streets.⁴³ For example, in Tuscon, Arizona, major “collector” streets must be 90-120 feet wide, and “arterial” streets must be six lanes and as wide as 150 feet.⁴⁴ By contrast, in New York’s 1898 building code, even in the zones with the tallest buildings (which presuma-

33. *Id.* at 50.

34. *Id.* at 120 (for example, Urbana, Illinois, has eighteen zones).

35. *Id.* at 58.

36. *Id.* at 59.

37. *Id.* at 73 (showing map of Phoenix as example).

38. *Id.* at 58.

39. *Id.* at 62.

40. *Id.* at 62, 64.

41. *Id.* at 127.

42. *Id.* at 130-31 (citing examples from New York).

43. *Id.* at 159.

44. *Id.* at 162.

bly were to have the widest streets) the minimum street width was only 79 feet.⁴⁵

Areas with wide streets are more automobile-dependent because such streets are both inconvenient and dangerous for pedestrians- inconvenient because a wide roadway takes more time to cross than a narrower street,⁴⁶ and dangerous because the more time a pedestrian spends on such a street, the more time he or she spends exposed to traffic.⁴⁷

Government builds wide streets in order to help motorists drive more rapidly.⁴⁸ But fast traffic also makes streets more dangerous for pedestrians in three ways. First, a motorist has a narrower field of vision the faster he or she drives. A motorist driving 30 miles per hour has a 150-degree field of vision.⁴⁹ By contrast, a motorist driving at twice that speed has only a 50-degree field of vision,⁵⁰ and is thus less likely to notice a pedestrian (or for that matter, other drivers).⁵¹

Second, even a motorist who does notice a pedestrian is less likely to be able to stop in time if he or she is driving at a rapid speed. A motorist who is driving 40 miles per hour will be able to stop 120 feet after noticing a pedestrian or another vehicle.⁵² By contrast, a motorist driving half that speed will be able to stop only 40 feet after seeing the other road user.⁵³

Third, a car traveling rapidly is more likely to kill or maim a pedestrian than a slow-moving vehicle. A pedestrian has a 3.5 percent chance of death from a car traveling 15 miles per hour, but the likelihood of death increases to over 80 percent when the vehicle is traveling at three times that speed.⁵⁴

45. *Id.* at 131.

46. See *Donovan v. Jones*, 658 So.2d 755, 765 (La. App. 1995).

47. See Wallace Immen, *City seeks solution to commute crunch*, *GLOBE AND MAIL*, April 26, 2002, at A22, available at 2002 WLNR 12038490 (pedestrians "have to run to beat the changing light" on wide streets).

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

49. *Id.* at 704 n. 50.

50. *Id.*

51. See Burrington, *supra* note 48, at 704 n.50; cf. Peter Swift, *Residential Street Typology and Injury Accident Frequency*, available at <http://www.sierraclub.org/sprawl/articles/narrow.asp> (last visited December 20, 2012) (in one community studied, "a typical 36 foot wide residential street has 1.21 a/m/y (Ed: accidents/mile-year) as opposed to 0.32 for a 24 foot wide street").

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

53. *Id.*

54. See Burrington, *supra* note 48, at 704 (83 percent risk of death from car traveling 44 miles per hour).

Talen also shows how municipalities have subtly widened streets by expanding curb radii- a measurement of the edge of a block.⁵⁵ Where curb radii are as small as 5 feet (as in Akron, Ohio's 1920 regulations), blocks end at right angles.⁵⁶ By contrast, some modern regulations require 30-50 foot radii, which means blocks have rounded edges.⁵⁷

Larger curb radii shave space from sidewalks, thus effectively widening streets and making it harder for pedestrians to cross those streets.⁵⁸ In addition, large curb radii enable cars to turn corners without slowing down,⁵⁹ thus increasing vehicle speed and thus the danger to pedestrians from speeding cars.⁶⁰

B. Setbacks

In the early 20th century, setback rules were simple and did little to limit landowner discretion.⁶¹ For example, in 1923 St. Louis had four zones, and in three of them, the city allowed landowners to cover all of the first story of a lot (although the city did regulate lot coverage on upper stories).⁶² So for all practical purposes, St. Louis did not require buildings to be set back from the street.

But after the 1920s, governments created ever more restrictive setback rules, pushing buildings farther away from the street and from each other.⁶³ For example, Gilbert, Arizona requires the intersections of arterial streets to be shielded from public view by a 250 foot by 50 foot landscape buffer.⁶⁴ Because parking is not included in the landscape buffer,⁶⁵ these figures actually understate the distance between sidewalks and actual buildings. And even where no intersection is involved, most commercial and multifamily buildings must be 100 feet from the street.⁶⁶

Just as wide streets endanger pedestrians by forcing them to spend lots of time crossing traffic-infested streets, large setbacks inconve-

55. See TALEN, *supra* note 9, at 164.

56. *Id.* at 168-69 (showing examples).

57. *Id.* at 169 (showing examples); cf. Richard Geller, *The Legality of Form-Based Zoning Codes*, 26 J. LAND USE & ENVTL. L. 35, 67 (2010) (modern suburban street corners "often have a twenty-five foot or greater turning radius").

58. See Douglas G. French, *Cities Without Soul: Standards for Architectural Controls with Growth Management Objectives*, 71 U. DET. MERCY L. REV. 267, 275 (1994) (widest curb radii may "force pedestrians to walk twice as far to cross the street").

59. *Id.* at 274 (wide curb radii "enable cars to turn corners without decelerating").

60. *Id.* at 274-275 (describing dangers to pedestrians from high-speed traffic).

61. See TALEN, *supra* note 9, 143, 145, (rules tended to be "simple. . .and not very constraining.>").

62. *Id.* at 145. (In the fourth zone, landowners could build on 60 percent of their land in corner lots, and 50 percent in other lots.).

63. *Id.* at 145-46.

64. *Id.* at 164.

65. See *Id.*

66. *Id.* at 172.

nience and endanger pedestrians by forcing them to spend time crossing through buffers and traffic-infested parking lots.⁶⁷ By contrast, where shops and other destinations flank the sidewalk, pedestrians can reach their destinations quickly and conveniently.⁶⁸ Thus, the growth of setback requirements is another example of government's anti-pedestrian trend.

V. Reforms

Talen posits two alternatives to existing pro-sprawl codes:⁶⁹ increased flexibility and increased predictability. After discussing the late 20th-century trend towards making land use regulation more flexible, she endorses codes that are more predictable and yet favor more pedestrian-friendly development.

A. *The Failure of Flexible Zoning*

Talen begins by discussing the fruits of flexibility. Municipalities have made zoning codes more flexible in a variety of ways.⁷⁰ For example, Planned Unit Development (PUD) ordinances allow developers to ignore existing codes, subject to regulations established for that

67. Jil McIntosh, *No cakewalk being a pedestrian*, TORONTO STAR, July 18, 2009, at W2, available at 2009 WLNR 13724302 ("Parking lots are also dangerous. Although drivers aren't going fast, they're busy looking for spots or avoiding cars backing out, making pedestrians vulnerable. . .").

68. And enjoyably as well. See French, *supra* note 58, at 280 ("small setbacks and shopfront windows provide more interesting scenery for pedestrians and create a feeling of connection between the buildings and the public spaces bordering them.").

69. Talen does not argue against sprawl, except through a chance remark here and there. See TALEN, *supra* note 4, at 201 (existing zoning codes have led to income and racial segregation, spatial mismatch between jobs and housing, and traffic congestion), 204 (referring to "sheer illogic. . . [of] a system that puts homes next to highways, that won't allow a church to feed the homeless, that blocks neighborhoods from having grocery stores because of use restrictions, or that allows an entire community to exclude the poor"). However, some of the books mentioned in her bibliography make a more detailed argument against auto-oriented sprawl. See TALEN, *supra* note 4, at 207-22. See generally ANDRES DUANY, ELIZABETH PLATER-ZYBERK & JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000); JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961); JAMES HOWARD KUNSTLER, *HOME FROM NOWHERE: REMAKING OUR EVERYDAY WORLD FOR THE TWENTY-FIRST CENTURY* (1998) (arguing that urban renewal was a disastrous fantasy that rebuked everything known about civic design). For shorter critiques of sprawl, see, e.g., Edward L. Glaeser and Matthew Kahn, *The Greenness of Cities*, http://www.hks.harvard.edu/rappaport/downloads/policybriefs/greencities_final.pdf (critiquing sprawl's environmental impacts); Michael Lewyn, *Suburban Sprawl: Not Just An Environmental Issue*, 84 MARQ. L. REV. 301(2000) (discussing non-environmental concerns).

70. See TALEN, *supra* note 4, at 176-77 (citing numerous examples, including but not limited to PUDs).

particular development by the local government.⁷¹ But PUD ordinances do not give developers an absolute right to create more pedestrian-friendly subdivisions; instead, local government has wide discretion to negotiate the terms of developments in PUD zones.⁷² Local governments have often not used this discretion to promote (or even to allow) more pedestrian-friendly urban development.⁷³ Instead, PUD development is often quite similar to the development that existing zoning standards would otherwise mandate, because local governments have the discretion to refuse to allow anything else.⁷⁴

Moreover, the wide variety of discretionary rules has made zoning more complex; for example, New York's 1961 zoning code was more than three times the size of its prior code.⁷⁵ The proliferation of rules means that developers must get more variances from those rules.⁷⁶ As a result, zoning is burdensome, especially for small-scale builders without political power.⁷⁷

Talen writes that one alternative might be to create a zoning code with a few vague rules (as opposed to a large number of detailed rules combined with lots of exceptions to those rules).⁷⁸ For example, a 19th-century German building law stated that in "deciding what shall be the kind of building allowed, and as to whether factories and workshops shall be allowed, the existing character of the district . . . and its needs must be taken into account."⁷⁹ But as Talen notes, there may not be enough consensus on appropriate methods of urban development for such a code to be workable.⁸⁰

B. Predictability

As an alternative to the status quo, Talen seems to support a renewed emphasis on predictability—but predictability with a different agenda than that of mid-20th century zoning. While 20th century zoning focused on limiting density and accommodating the automobile, Talen emphasizes zoning provisions designed to make American streets safe and comfortable for nondrivers again.

71. See Amir Steinhart, *Old Shtetlism and New Urbanism: Uncovering The Implications of Suburban Zoning Laws for Community Life Through The Jewish-American Experience*, 24 NOTRE DAME J. L. ETHICS AND PUB. POLICY 255, 281 (2010).

72. *Id.* (pointing out that local governments usually use this discretion to "limit development to conventional zoning standards" rather than allowing significant mixing of uses).

73. *See id.* at 282.

74. *Id.*; see also TALEN, *supra* note 4, at 182-83 (showing example of PUD with huge setbacks).

75. *Id.* at 177.

76. *Id.* at 180.

77. *Id.*

78. *Id.* at 194-94.

79. *Id.* at 195.

80. *Id.* at 195-96.

For example, she notes that in the past decade dozens of jurisdictions have adopted various forms of “form-based codes”⁸¹—codes designed to mandate a predictably pedestrian-friendly urban form.⁸² These codes typically require narrower street widths, shorter curb radii, and a greater diversity of land uses within zones than does conventional zoning.⁸³ Ideally, form-based codes actually increase landowners’ freedom by giving them automatic permission to build, without having to fight their way through layers of discretionary review or bargain for political favors.⁸⁴ Nevertheless, some architects have criticized form-based codes as too rigid, and suggest that clear codes might inhibit architectural creativity.⁸⁵

Another alternative is ad hoc borrowing from code provisions governing various cities’ most pedestrian-friendly zones. Talen supplies numerous examples from existing codes; her examples impose maximum rather than minimum setbacks (thus allowing pedestrians to reach buildings more easily), and allow residential as well as commercial uses.⁸⁶

C. *Hey, Wait A Minute. . .*

From a pro-pedestrian perspective, both types of reform would be an improvement upon current land use codes. But I wonder whether Talen is overly optimistic about which reforms are politically feasible.⁸⁷

She points out that “61 percent of housing stock is in the form of single-family, detached dwellings, yet two thirds of housing demand in the coming years, fueled by milenials and baby boomers, will be in the form of one- or two-person households.”⁸⁸ Thus, zoning rules “are going to have to help small units and compact urbanism thrive.”⁸⁹

81. *Id.* at 185.

82. *Id.* (form-based codes and similar reforms designed to facilitate “the production of a more pedestrian-oriented public realm”).

83. *Id.*

84. *Id.* at 284 (explicit codes increase freedom by “shield[ing] designers from the vagaries of bureaucracy or politics”).

85. *Id.* at 189.

86. *Id.* at 198-200 (showing code provisions as well as photos).

87. I also note that she does not extensively discuss free-market alternatives to zoning; the closest she comes to doing so is pointing out that Houston, which has no formal zoning code, is “hardly a model to emulate.” *Id.* at 181; cf. Lewyn, *supra* note 18, at 270-289 (pointing out that Houston has a wide variety of pro-sprawl land use regulations, including regulations limiting density and requiring wide streets). But this omission is understandable given the purpose of her book. It seems to me that her book is not about how to balance her preferred development patterns against other values such as expanding property rights; rather, her book is more narrowly focused on how regulations might be reformed to promote those development patterns.

88. TALEN, *supra* note 4, at 204.

89. *Id.*

But smaller households do not necessarily mean compact development. Household sizes have been declining for decades. In 1980, the average household had 2.76 people; in 2008, the average household had 2.57 people.⁹⁰ The number of single-person households has nearly doubled (from about 18.3 million to about 31.4 million), while the number of families with children has increased by only about 15% (from 31 million to just over 35 million).⁹¹

But this trend has not always led to more compact development. A small household need not live in a small apartment; where land costs are relatively low, a one- or two-person household can choose to buy a house (or at least a larger apartment). And that is exactly what has occurred in recent decades. Residences built in the 2000s were actually more likely to be single-family homes than in the 1980s; in the 1980s, about 60 percent of new construction consisted of single-family homes, a proportion that increased to 75 percent in the 2000s.⁹²

Furthermore, those homes are larger than in the past: the median single-family house size grew from 1500 square feet in the 1960s to 2200 square feet in the late 2000s.⁹³ Similarly, multifamily units grew over time as well. In 1980, 10 percent of new multifamily housing units used under 600 square feet of land, while only 1 percent were that small in 2007.⁹⁴ At the other end of the spectrum, the percentage of multifamily units consuming over 1200 square feet of land grew from 19 percent in 1980 to 50 percent in 2007.⁹⁵

And because most American households own cars,⁹⁶ new housing (whether single-family or multi-family) need not be in a pedestrian- or transit-friendly area. In fact, only 32.5 percent of all homes built in the late 2000s were near public transportation, as opposed to 50.2 percent of all homes built in the 1980s.⁹⁷ Thus, there is no reason to believe that smaller households will necessarily live in pedestrian- or transit-friendly neighborhoods.⁹⁸ To put the reality another way: even if

90. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 at 54, <http://www.census.gov/compendia/statab/2012/tables/12s0059.pdf> [hereinafter 2012 ABSTRACT].

91. *Id.*

92. Mousumi Sarkar, *How American Homes Vary By The Year They Were Built 2* (U.S. CENSUS BUREAU Working Paper No. 2011-18, June 2011), http://www.census.gov/hhes/www/housing/housing_patterns/pdf/Housing%20by%20Year%20Built.pdf.

93. *Id.*

94. U.S. Census Bureau, *Number of Multifamily Units Completed by Square Feet Per Unit*, at http://www.census.gov/construction/chars/pdf/mfu_sqft_2007.pdf [hereinafter MULTIFAMILY].

95. *Id.*

96. See 2012 ABSTRACT, *supra* note 90, at 628 (Only 8.7 million out of over 111 million households lack access to vehicle).

97. See MULTIFAMILY, *supra* note 94, at 5.

98. This does not mean, of course, that these households prefer to live in automobile-dependent sprawl. Because land use regulation generally favors such sprawl, it may be that such regulation prevents consumer demand for

smaller households make smaller houses and apartments a little more desirable, their existence is not a sufficient condition for less sprawling development.

Talen also suggests that single-use zoning is out of sync with public sentiment, because “[s]mall retailers that fulfill daily needs are much more likely now to be perceived as a amenity than as a disamenity.”⁹⁹ Indeed, one recent opinion poll commissioned by the National Association of Realtors shows that about 60 percent of Americans would like to have shops within walking distance of their residence.¹⁰⁰

But this statistic does not mean that mixed use is likely to win out in local zoning disputes, because even if the majority of voters favor mixed use in principle, a vocal minority of “Not In My Back Yard” (NIMBY) activists may be the only people whose voices are heard by municipal government.

This scenario is likely because it is rational both for neighborhood residents to oppose rezonings and for municipal politicians to heed their voice. Most people like their current neighborhoods.¹⁰¹ And if they find the status quo desirable, it would be rational for them to oppose any change in the status quo. Even a change that may seem desirable in the abstract, such as a new store nearby, creates some risk of unintended consequences- so it is only natural for someone (espe-

more pedestrian-friendly neighborhoods from being met. Cf. JONATHAN LEVINE, *ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND USE* 131, 153-61 (2006) (suggesting that this is the case, based on surveys of both consumers and developers; for example, one survey showed that about eighty percent of developers would develop more compactly in inner suburbs if regulation was less restrictive, and another showed that percentage of consumers wishing to live in pedestrian-friendly neighborhoods was higher than the number who actually lived in such areas).

99. TALEN, *supra* note 4, at 204.
100. See *Americans Looking for More Walkability in Neighborhood*, DAILY HERALD, May 13, 2011, at 10, available at 2011 WLNR 9772083 (National Association of Realtors survey showed that “nearly six in 10 would prefer to live in a neighborhood with a mix of houses and stores and other businesses within an easy walk.”); see also *Changing Gears*, HOUSTON CHRONICLE, Apr. 29, 2012 at B11, available at 2012 WLNR 9092207 (51 percent of Houston residents would prefer a smaller house within walking distance of shops to a house with a bigger yard further from amenities).
101. See U.S. DEP’T OF HOUSING AND URBAN DEV. AND U.S. CENSUS BUREAU SERIES, H150/09, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2009 at 24 (2011) (out of 111 million householders asked to rate their neighborhoods on 1-10 scale with 10 being the best, 91 million rated their neighborhoods as above 7, and median rating was somewhere between 8 and 9). In fact, even the majority of householders with below poverty-level incomes (who presumably are less likely to be able to afford to move to another area) mostly rated their neighborhoods as above a 7 on a 1-10 scale. *Id.* (indicating that out of 15.7 million below-poverty householders surveyed, over 11.1 million rated their neighborhoods as above a 7).

cially a homeowner who has invested thousands of dollars in a house in the neighborhood) to oppose any change.¹⁰²

Even if the majority of neighborhood residents support zoning reform, the anti-reform minority may have more political power if they are more vocal. For example, suppose that a municipality proposes to rezone a neighborhood to allow more mixed-use development in neighborhood X, and that 1 percent of the neighborhood comes to a city council meeting to oppose the rezoning. A mayor or city councilor could rationally believe that if he supports the project, the anti-rezoning 1 percent will vote against her, and possibly even give money and/or volunteer to assist her opponent in the next election, while the supporters of the project (including (a) neighborhood residents who don't come to the meeting, (b) potential future residents who might find the neighborhood more desirable if the rezoning is enacted, and (c) voters who believe the rezoning is good for the city as a whole because it would decrease driving and thus pollution) are either unaware of the rezoning proposal, or do not care enough about the issue to make voting decisions based on the rezoning. In that situation, it is highly rational for the city councilor to oppose the rezoning, since by doing so she might gain the votes of the 1 percent passionately opposed to the rezoning, without losing votes among the apathetic pro-rezoning majority.

This scenario is quite common.¹⁰³ For example, even in New York City, the most transit-oriented city in the United States, the city has responded to NIMBY pressure by rezoning thousands of blocks to reduce density.¹⁰⁴ This does not mean that zoning reform will never occur: Talen cites numerous examples of anti-sprawl provisions in current zoning codes.¹⁰⁵ But it does mean that zoning reform may be politically difficult, and supporters of compact development will lose as many battles as they win.

102. See Jonathan H. Adler, *Jurisdictional Mismatch In Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 132 (2005) (“Homeowners tend to be very risk averse about local changes or developments that have the potential to depress land values, and this risk aversion “pervades all of local political decisions. Even those homeowners who are not particularly concerned about the environmental effects of proposed developments or industrial activities are likely to recognize that prospective buyers might be. . .” (quoting WILLIAM A. FISCHER, *THE HOME VOTER HYPOTHESIS* 163 (2001))).

103. See Greg Greenway, *Getting the Green Light for Senate Bill 375: Public Engagement for Climate-Friendly Land Use in California*, 10 PEPP. DISP. RESOL. L.J. 433, 442 (2010) (infill development not as common as professional planners would like because when one landowner proposes such development, other neighborhood “residents frequently organize to oppose such development.”).

104. See Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget”*, 62 CASE W. RES. L. REV. 81, 84-85 (2012).

105. See TALEN, *supra* note 4, at 187-89.

V. Conclusion

Some discussion of American sprawl is based on a simple narrative: the market has created sprawl, and anti-sprawl planners seek to subvert the will of the market. Talen turns this narrative on its head, using example after example to show how municipal codes may actually become more pro-sprawl over time. These regulations guided the market towards sprawl, accommodating automobiles and ignoring the pedestrian.