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Rocking the Suburbs: Incentive Zoning as a Tool to Eliminate Sprawl

I. INTRODUCTION

For many people driving down the interstate, viewing the peripheral landscape is not the first concern, especially when faced with rush hour traffic. What would these people see if they did have the time to look to their left and right while driving? This question may seem silly to many as foliage and greenery may be the only landscape available to view on both sides of the interstate—especially if in a climate conducive to “greener pastures.” However, if one could view a panoramic of the landscape what one would likely see may be similar to the following: on the very near left is a burgeoning city with its own structure and aesthetic features. Further to the left is a small village, town, hamlet, or some other small growth. The same can be viewed to the right, only this time it appears that the tiny village is now much larger, almost eating into the larger city it appeared to be breaking away from. A few miles down the road is another small grouping of homes without any hint of shopping centers, gas stations, or any other commercial development. Still further on is a dusty dirt road leading out to more tiny hamlets as if each grouping was its own feudal kingdom.

This sporadic growth technique has often been coined “sprawl” and, though not limited to such situations, has increasingly come under fire in a time when more individuals are concerned about the environment, air and environmental pollution, and the decreasing view of the American farming landscape. Sprawl has been defined as “low-density development on the edges of cities and towns that is poorly planned, land-consumptive, automobile-dependent [and] designed without regard to its surroundings.”¹ Without pointing the finger of blame at the landowners who either sell their property to developers or develop the property themselves, it is important to consider first that growth is inevitable as population increases and that it provides many necessary and important benefits for the economy.

To some minor extent, the growth and popularity of suburban lifestyle has perpetuated and fed the growing craze of sprawl. Movies

1. Robert H. Freilich, *Smart Growth in Western Metro Areas*, 43 NAT. RESOURCES J. 687, 687 (2003) (quoting Richard Moe, *Alternatives to Sprawl*, LINCOLN INST. OF PUB. POL’Y 4 (1995)).

such as “The Burbs” and television series including “Desperate Housewives” portray the suburban community as mainstream and desirable. The problem is that home prices in many regions are too expensive for families, especially younger families, requiring the further growth and development on the suburban fringe to provide affordable housing. The appreciation of home prices in many parts of the country coupled with the relaxed lending standards for homebuyers created a self-perpetuated development epidemic which fed on new suburban developments. This has only fueled the discussion on urban sprawl.

Robert Freilich, a leading scholar on land use issues, describes seven major crises arising from urban sprawl: “[1] central city and first- and second-ring suburban decline, [2] environmental degradation through loss of wetlands and sensitive lands and air and water quality degradation, [3] energy over-utilization, [4] fiscal insolvency and infrastructure and service deficiencies, [5] agricultural land loss, [6] housing inaffordability, and [7] diminished public health.”² Other criticisms of sprawl are that “it requires significant development of new capital facilities and services, with accompanying underutilization of existing built-up area facilities.”³ Yet as home prices continue to climb individuals continue to push the fringes of suburban development further out.

In an effort to curb sprawl, a number of states have enacted statutes geared toward smart growth.⁴ Such statutes, in addition to providing other benefits, “[reduce] the consumption of land for roads, houses, and commercial buildings by channeling development to areas with existing infrastructure or contiguous to existing growth.”⁵ When effectively used, “[smart growth] centers growth on urban, older suburban areas, transportation corridor centers, and New Urbanist Villages, thus

2. *Id.* at 687–88.

3. *Id.* at 687.

4. *See, e.g.*, California, CAL. GOV'T CODE § 65915 (West 2007); Colorado, COLO. REV. STAT. ANN. § 24-32-3201 (West 2006); Connecticut, CONN. GEN. STAT. ANN. § 22a-103 (West 2007); Delaware, DEL. CODE ANN. tit. 7, § 7508 (2006); Florida, FLA. STAT. ANN. § 420.615 (West 2006); Illinois, 65 ILL. COMP. STAT. ANN. 5/11-13-1 (West 2005); Kentucky, KY. REV. STAT. ANN. § 198A.720 (West 2006); Maine, ME. REV. STAT. ANN. tit. 30-A, § 5283 (2006); Maryland, MD. ANN. CODE art. 66B, § 12.01 (2006); Massachusetts, MASS. GEN. LAWS ANN. ch. 40R, § 13 (West 2004); Minnesota, MINN. STAT. ANN. § 473.255 (West 2006); Nevada, NEV. REV. STAT. ANN. § 278.250 (West 2006) (amended 2007); New Hampshire, N.H. REV. STAT. ANN. § 674:21 (2006); New Jersey, N.J. STAT. ANN. § 40:55D-65 (West 2004); Oregon, OR. REV. STAT. ANN. § 197.296 (West 2005); Rhode Island, R.I. GEN. LAWS § 42-128-8.1 (2006); Texas, TEX. LOC. GOV'T CODE ANN. § 373A.054 (Vernon 2006); Utah, UTAH CODE ANN. § 63-38F-1704 (West 2006); Virginia, VA. CODE ANN. § 15.2-2201 (West 2006); Washington, WASH. REV. CODE ANN. § 36.70A.540 (West 2007); West Virginia, W. VA. CODE ANN. § 8A-3-1 (West 2007).

5. Freilich, *supra* note 1, at 691.

preserving green space, wetlands, and farmland.”⁶

Efforts to curb the checkerboard of development on the fringes of suburban communities have led a number of cities and states⁷ around the country to adopt priority growth districts, also called priority growth areas, which “direct development to selected locations and also specify a design that is attractive to the community’s current and future residents.”⁸ Priority growth areas are generally areas within a community that the city or municipality has specifically set up as priority areas for future growth because of the area’s existing infrastructure, including the area’s location near transit corridors. However, the economic viability of projects for developers is still a concern for cities and municipalities in effectively directing development to selected locations. In ensuring that such growth districts attract developers, a number of mechanisms including incentive zoning are employed.

The focus of this paper is on incentive zoning in priority growth districts. Specifically, the paper focuses on incentive zoning through the lens of New Urban communities and how these communities can best accommodate incentive zoning through clustered development and density bonuses. Part II addresses the smart growth initiatives, their case law underpinnings, and how priority growth districts fit into the smart growth plan. Part III examines incentive zoning as a method of fueling New Urban communities that further smart growth initiatives. Part IV looks at the Daybreak development and the surrounding developments in both South Jordan and West Jordan, Utah, and the Glenwood Park and Vickery developments in greater Atlanta, Georgia. In particular, this section will examine any statutory incentives created to drive development of these communities with any potential negative ramifications flowing from an absence of statutory incentives. Part V provides a summary and discussion of smart growth initiatives and focuses on the effectiveness of incentive zoning in New Urban communities. Finally, Part VI provides a brief conclusion.

6. *Id.*

7. *See, e.g.*, Hawaii, HAW. REV. STAT. § 226-114 (2006); Maine, ME. REV. STAT. ANN. tit. 30-A, § 4349-A (2006); North Carolina, N.C. GEN. STAT. ANN. § 143-506.10 (West 2006); Oregon, OR. REV. STAT. § 197.298 (2005); Vermont, VT. STAT. ANN. tit. 24, § 2793c (2005); Washington, WASH. REV. CODE ANN. § 36.70A.020 (West 2007).

8. JEREMY STONE ET AL., *Breaking Ground: Planning and Building in Priority Growth Districts*, YALE SCH. OF FORESTRY & ENVTL. STUD. 3 (2005).

II. SMART GROWTH INITIATIVES AND PRIORITY GROWTH DISTRICTS

A. *Smart Growth Initiatives*⁹

The concern over “adverse impacts of sprawling land use development” is not new.¹⁰ “Daniel Patrick Moynihan warned over forty years ago that, ‘[i]t is becoming increasingly apparent that American government, both national and local, can no longer ignore what is happening as the suburbs eat endlessly into the countryside.’”¹¹ Additionally, a recent report by the real estate industry stated that “America is dominated by a culture of single-family homes, lawns, and endless shopping strips, punctuated by turning lanes, gasoline stations, and blacktop parking lots.”¹² While these things are not inherently bad, they lead to a large separation in the population and a decrease in social interaction, smog and congestion from increased reliance on the automobile, and a quickened timeframe for creating blighted communities. As the population pushes further out, it leaves in its wake urban and first- and second-ring suburban decline.

It should be noted that growth in itself is not bad. In fact, growth helps by “bring[ing] jobs, wealth, tax revenues, and amenities.”¹³ What should be understood is that “certain patterns of scattered, haphazard

9. The author realizes that the term “smart growth” has come under criticism by cynics who describe the movement as a “lumping” of everything growth oriented into a term called smart growth. See, e.g., Timothy Beatley & Richard Collins, *Smart Growth and Beyond: Transitioning to a Sustainable Society*, 19 VA. ENVTL. L.J. 287, 291 (2000) (“The smart growth tag neatly creates a rhetorical advantage by contrasting it with what can only be considered ‘dumb’ growth. The use of the word smart is simply smart.”); John W. Frece, *Symposium 2005: Twenty Lessons From Maryland’s Smart Growth Initiative*, 6 VT. J. ENVTL. L. 106, 114 (2005) (“Even before the initiative was enacted, it became obvious that those who opposed ‘Smart Growth’ must inevitably favor ‘dumb growth.’ No one wanted to be seen as favoring ‘dumb growth.’”); 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, 53 (2003) (“Smart Growth is a vague doctrine that attempts to target infrastructure capital improvement subsidies, such as roads, utilities, and schools toward land planned for urbanization and away from areas currently not identified or planned for urbanization.”); Robert J. McMurry, *Update: Smart Growth—Is it Working?*, SF08 ALL-ABA 597, 601 (2000) (“But ‘Smart’ Growth is good marketing; everything else, by definition, must be Dumb Growth.”); Chris J. Williams, *Do Smart Growth Policies Invite Regulatory Takings Challenges? A Survey of Smart Growth and Regulatory Takings in the Southeastern United States*, 55 ALA. L. REV. 895, 896 (2004) (“Like sprawl, the term ‘smart growth’ is given a variety of meanings by different individuals and groups based on their perspectives.”).

10. Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 250 (2000).

11. *Id.* (quoting Daniel Patrick Moynihan, *New Roads and Urban Chaos*, THE REPORTER, Apr. 14, 1960, at 20).

12. *Id.* (quoting PRICEWATERHOUSECOOPERS & LEND LEASE REAL ESTATE INVESTMENTS, EMERGING TRENDS IN REAL ESTATE 22 (1999)).

13. *Id.* at 248.

development . . . cause adverse impacts,” and are harmful.¹⁴ Thus, the purpose of smart growth is to

balance economic development and limit sprawl by channeling growth to areas that have already been developed; to revitalize and prevent the decline of existing urban and suburban areas; to promote more compact urban form; to protect open space, farmland, forests, and environmentally sensitive areas from suburban encroachment; to reduce the public cost of providing infrastructure and services to new development by making more efficient use of existing resources; to protect the natural environment; and to provide affordable housing.¹⁵

A number of techniques have been employed to curb sprawl and provide smart growth. These include interim development controls and moratoriums on future growth,¹⁶ timing controls requiring adequate public facilities before future development,¹⁷ and urban growth boundaries. Much of the smart growth revolution stems from the seminal decision of *Golden v. Planning Board of Ramapo*.¹⁸ The decision in *Ramapo* created the smart growth era after the court determined that “where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for ‘phased growth,’” and furthermore, “the challenged ordinance is not violative of the Federal and State Constitutions.”¹⁹

As one of the most significant land use cases ever,²⁰ the decision in *Ramapo* has led states to implement controlled and timed growth measures similar to the measures adopted in *Ramapo* in an effort to keep the pace of growth commensurate with the town’s ability to provide facilities and services to accommodate the growth.²¹ Many innovations in this growth have been proposed under the umbrella of smart growth, and one such form has been the implementation of priority growth districts, which help by funneling development into areas in suburban and ex-urban communities where there is existing infrastructure and means to

14. *Id.* at 253.

15. *Id.* at 255–56.

16. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302 (2002).

17. *See* *Golden v. Planning Bd. of Ramapo*, 285 N.E.2d 291 (N.Y. 1972).

18. *Id.*

19. *Id.* at 304–05.

20. Dozier & Hagman, Comment, *Ranking Land Development and Environmental Cases and Courts*, 4 ENVTL. COMMENT 4 (1978).

21. *See* statutes cited *supra* note 4.

accommodate the increase in population.

B. Priority Growth Districts

Jeremy Stone, editor at the Land Use Law Center at the Pace University Law School recently published a book with the Yale School of Forestry & Environmental Studies which discusses the importance of priority growth districts in the age of smart growth.²² Priority growth districts are a recent outgrowth of smart growth innovation, and have been created as a way to retard urban sprawl and preserve the environment. Priority growth districts are defined as

specially selected areas where, through the comprehensive planning process, a community has determined that growth is desirable, compatible with existing uses, and can be implemented in a manner that will enhance the larger community by providing needed housing alternatives, preserving open space, and adding retail, commercial and community uses that support the tax base.²³

The introduction of priority growth districts has arisen as “an innovative land use technique that can be used by communities to manage and define future growth in a way that creates more livable places.”²⁴ As proposed, the priority growth district concept is “particularly suited for outlying suburban and ex-urban counties, where the rate of growth is significant but there is still a rural character that can be preserved.”²⁵

The goal of a priority growth district is to identify “where roadways and other infrastructure either exist or can be accommodated.”²⁶ The purpose of this is to ensure that rather than developing hodge-podge, checkerboard neighborhoods throughout cities, towns, and hamlets, there is current and existing transit corridors and infrastructure available to accommodate growth, thereby keeping growth harmonious with the overall community plans.

The benefits from adopting smart growth techniques, including priority growth districts, are summarized as follows: First, “[d]evelopment is implemented as planned neighborhoods or centers that have previously been designated and selected with meaningful

22. STONE ET AL., *supra* note 8, at 11.

23. *Id.* at 15–16.

24. *Id.* at 11.

25. *Id.*

26. *Id.*

community input,” replacing “an adversarial and reactionary land use process with a proactive and constructive one.”²⁷ Second, priority growth districts reduce “the overall demand for new sprawl development” by “respond[ing] to the housing demands of current and future residents.”²⁸ One way this is accomplished is by allowing the aging population to relocate within the district to more appropriate housing, including condominium and apartment housing, while leaving the larger homes to the “young newly formed households.”²⁹ Third, “[priority growth districts] protect natural resources by designating areas to be preserved within the districts as well as relieving development pressures on outlying open space areas in other portions of the community.”³⁰ Fourth, congestion problems can be reduced. “Mixed uses can reduce traffic generation beyond the district by ‘capturing’ trips between uses within the district.”³¹ Fifth, and as an ancillary benefit to the previous benefit, is the potential health benefits by increased use of alternative transportation modes, “such as walking, bicycling, jitneys, and the like.”³² Sixth, “[priority growth districts] facilitate efficient and predictable capital planning for infrastructure such as roads, utilities, transit facilities, and schools.”³³ This efficiency is created by replacing the customary “case-by-case, problem-solving approach of constructing highway intersection improvements and other capital improvements to mitigate individual project impacts.”³⁴ Seventh, priority growth districts “reduce infrastructure costs.”³⁵ These reduced costs occur from “shorter, narrower roads and shorter utility distribution systems.”³⁶ More important to Jeremy Stone was that

[priority growth districts] support centralized facilities that allow economies of scale and more efficient and effective technology, such as central water and sewage treatment plants and community storm water management and water quality facilities, rather than relying upon individual septic and storm water systems that may not be properly or regularly maintained. The more effective central systems have positive

27. *Id.* at 14.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 14–15.

35. *Id.* at 15.

36. *Id.*

environmental and economic benefits.³⁷

Eighth, “[priority growth districts] bring a mix of land uses that enhance and diversify the local tax base, generating additional revenues to meet the costs of municipal and educational services.”³⁸

Jeremy Stone suggests that “[b]y combining [priority growth districts] with incentive zoning . . . allowable densities can be reduced in other parts of the community and open space preserved.”³⁹ This technique of combining priority growth districts with incentive zoning is a goal in many communities including West Jordan, Utah.

C. Communities Implementing Priority Growth Districts

The popularity of priority growth districts has become evident in many communities across the country. In *Breaking Ground: Planning and Building in Priority Growth Districts*, a number of communities are mentioned that have adopted or are in the process of implementing priority growth districts.⁴⁰ States adopting and implementing priority growth districts include: New York,⁴¹ Maryland,⁴² South Carolina,⁴³ Florida,⁴⁴ Alabama,⁴⁵ California,⁴⁶ Colorado,⁴⁷ Georgia,⁴⁸ Louisiana,⁴⁹

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. See STONE ET AL., *supra* note 8, at 17–19, 85–101; Four Corners, East Fishkill, New York, <http://www.eastfishkillny.org/pdf/plan/plan14.pdf> (last visited Oct. 29, 2007); Town Center, LaGrange, New York, <http://www.lagrangetowncenter.com> (last visited Feb. 15, 2008); Warwick Grove, Warwick, New York, <http://www.warwick-grove.com> (last visited Oct. 29, 2007).

42. See STONE ET AL., *supra* note 8, at 125; Lakelands, Gaithersburg, Maryland, <http://www.lakelands.org> (last visited Oct. 29, 2007).

43. See STONE ET AL., *supra* note 8, at 63, 130–31; Habersham, Beaufort, South Carolina, <http://www.habershamsc.com> (last visited Oct. 29, 2007); Harborside, Richland County, South Carolina, <http://www.lakecarolina.com/about/towncenter.shtml> (last visited Oct. 29, 2007); Maybank Green, I'on, South Carolina, <http://www.ioncommunity.com> (last visited Oct. 29, 2007).

44. See STONE ET AL., *supra* note 8, at 121–24; Amelia Park, Fernandina Beach, Florida, http://www.lendryhomes.com/communities/ap/main_frame.htm (last visited Oct. 29, 2007); Avonlea, Stuart, Florida, <http://www.avonleahome.com> (last visited Oct. 29, 2007); Botanica-Sea Plum, Jupiter, Florida, http://www.newurbancommunities.com/communities/profile.asp?CID=879&page=profile&status=fl_active (last visited Oct. 29, 2007); Longleaf, New Port Richey, Florida, <http://www.longleaftown.com> (last visited Oct. 29, 2007); Seaside, Walton County, Florida, <http://www.alysbeach.com> (last visited Oct. 29, 2007); Winthrop, Brandon, Florida, http://www.dpz.com/project.aspx?Project_Number=9929&type=3 (last visited Oct. 29, 2007).

45. See STONE ET AL., *supra* note 8, at 119–20; Mt. Laurel, Birmingham, Alabama, <http://www.mtlaurel.com> (last visited Oct. 29, 2007); The Preserve, Hoover, Alabama, <http://www.birminghamhomereview.com/The-Preserve/> (last visited Feb. 15, 200); Providence, Huntsville, Alabama, <http://www.villageofprovidence.com> (last visited Oct. 29, 2007).

46. See STONE ET AL., *supra* note 8, at 120–21; Doe Mill Neighborhood, Chico, California, <http://www.doemill.com> (last visited Oct. 29, 2007).

Massachusetts,⁵⁰ Michigan,⁵¹ New Jersey,⁵² New Mexico,⁵³ North Carolina,⁵⁴ Oregon,⁵⁵ Tennessee,⁵⁶ Texas,⁵⁷ Virginia,⁵⁸ and Washington.⁵⁹ Not listed in this group, but likely meeting the qualifications and specifications of a priority growth district, would be Utah, with the Daybreak⁶⁰ development in South Jordan.

A by-product of priority growth districts is the growing popularity of New Urban communities, which follow a pattern of clustering of high density development interspersed with commercial and residential buildings. Included in the discussion of priority growth districts is the use of incentive zoning to accomplish the goals and objectives of these districts.

47. For example, Belle Creek, Commerce City, Colorado and Prospect, Longmont, Colorado. See STONE ET AL., *supra* note 8, at 121.

48. See STONE ET AL., *supra* note 8, at 124; Glenwood Park, Atlanta, Georgia, <http://www.glenwoodpark.com> (last visited Oct. 29, 2007); Vickery, Forsythe County, Georgia, <http://www.hedgewoodhomes.com> (last visited Oct. 29, 2007).

49. See STONE ET AL., *supra* note 8, at 125; River Ranch, Lafayette, Louisiana, <http://riverranch.info/riverranch/index.htm> (last visited Oct. 29, 2007).

50. See STONE ET AL., *supra* note 8, at 125; Mashpee Commons, Mashpee, Massachusetts, <http://www.mashpeecommons.com> (last visited Oct. 29, 2007).

51. See STONE ET AL., *supra* note 8, at 125; Town Commons, Howell, Michigan, <http://www.towncommonslc.com> (last visited Oct. 29, 2007).

52. For example, Old York Village, North Burlington, New Jersey. See STONE ET AL., *supra* note 8, at 126.

53. See STONE ET AL., *supra* note 8, at 127; Aldea de Santa Fe, Santa Fe, New Mexico, <http://www.aldeadesantafe.com> (last visited Oct. 29, 2007).

54. See STONE ET AL., *supra* note 8, at 127; Afton Village, Concord, North Carolina, <http://www.aftonvillage.com> (last visited Oct. 29, 2007); Cheshire, Black Mountain, North Carolina, <http://www.villageofcheshire.com> (last visited Oct. 29, 2007); Devaun Park, Calabash, North Carolina, <http://www.devaunpark.com> (last visited Oct. 29, 2007); Southern Village, Chapel Hill, North Carolina, <http://www.southernvillage.com> (last visited Oct. 29, 2007); Woodsong, Shallotte, North Carolina, <http://www.villageofwoodsong.com> (last visited Oct. 29, 2007).

55. See STONE ET AL., *supra* note 8, at 127; Fairview Village, Fairview, Oregon, <http://www.fairviewvillage.com> (last visited Oct. 29, 2007).

56. See STONE ET AL., *supra* note 8, at 127; Lenox Village, Nashville, Tennessee, <http://www.lenoxvillage.com> (last visited Oct. 29, 2007); Pleasant View Village, Pleasant View, Tennessee, <http://www.pleasantviewvillage.com> (last visited Oct. 29, 2007).

57. See Home Town, North Richland Hills, Texas, <http://www.hometownnrh.com> (last visited Oct. 29, 2007); Plum Creek, Kyle, Texas, <http://www.plumcreektx.com> (last visited Oct. 29, 2007); Village of Colleyville, Colleyville, Texas; STONE ET AL., *supra* note 8, at 132–33.

58. For example, Belmont Greene, Loudoun County, Virginia, and Belmont Bay, Prince William County, Virginia. See STONE ET AL., *supra* note 8, at 133; Belmont Bay, Prince William County, Virginia, <http://www.belmont-bay.com> (last visited Oct. 29, 2007).

59. For example, Lookout Ridge, Washougal, Washington. See STONE ET AL., *supra* note 8, at 134.

60. See Daybreak, South Jordan, Utah, <http://www.daybreakutah.com/> (last visited Oct. 29, 2007).

III. INCENTIVE ZONING AS A MEANS OF FURTHERING NEW URBANISM

A. *Background*

“Incentive Zoning is a development in land use regulation that encourages the creation of certain amenities and land use designs that a community wishes to promote.”⁶¹ Under an incentive zoning method, developers provide the amenities and designs desired by the city in exchange for development incentives. Incentive zoning has arisen as a formula of encouragement for developers to participate in certain projects. Under incentive zoning, the “more intens[ive] use of property will generate greater profits for the developer, which is the *quid pro quo* for providing the amenity or design sought by the community.”⁶² The standard benefit granted to developers is a density bonus on the property.⁶³ In other words, “[t]hrough incentive zoning, a municipality may receive certain amenities or design restrictions related to a particular development project in exchange for granting [the density bonus].”⁶⁴ The New York Court of Appeals described the purpose of incentive zoning as “based on the premise that certain uneconomic uses and amenities will not be provided by private development without economic incentive. The economic incentive frequently used . . . is the allowance of greater density within a proposed building, more floor area than permitted under general rules.”⁶⁵

B. *New York Statutory Acceptance of Incentive Zoning*

The first state to codify the application of incentive zoning was New York. New York adopted incentive zoning among towns and villages in 1991.⁶⁶ The bill adopting incentive zoning was codified as section 261-b of the Town Law and section 7-703 of the Village Law.⁶⁷ The section states that the purpose of incentive zoning “shall be to advance the town’s specific physical, cultural and social policies in accordance with the town’s comprehensive plan and in coordination with other

61. Michael Murphy & Joseph Stinson, *Incentive Zoning* (1996) in Pace University School of Law Land Use Law Center, L.U.C.A.S., <http://www.law.pace.edu/landuse/incent.html> (last visited Apr. 24, 2007).

62. *Id.*

63. *Id.*

64. *Id.*

65. Terry Rice, *Zoning and Land Use*, 43 SYRACUSE L. REV. 615, 622–23 (1992) (quoting *Asian Am. for Equal. v. Koch*, 527 N.E.2d, 265, 269 (N.Y. 1988)).

66. *Id.* at 622.

67. *Id.* at 623.

community planning mechanisms or land use techniques.”⁶⁸ The statute also defines “incentives or bonuses” as “adjustments to the permissible population density, area, height, open space, use, or other provisions of a zoning ordinance or local law for a specific purpose authorized by the town board.”⁶⁹ Community benefits are defined as “open space, housing for persons of low or moderate income, parks, elder care, day care or other specific physical, social or cultural amenities, or cash in lieu thereof, of benefit to the residents of the community authorized by the town board.”⁷⁰ “Each district in which incentives or bonuses may be awarded must be designated by the local legislative body in its zoning ordinance or local law and must be depicted on the municipality’s official zoning map.”⁷¹ As part of the smart growth model and incorporated in incentive zoning, “[p]rior to designating any district to receive incentives or bonuses, it must be found that the district contains adequate resources, environmental quality, and public facilities, including adequate transportation, water supply, waste disposal, and fire protection.”⁷² The same principles guiding the effective use of incentive zoning also apply to New Urban communities and priority growth districts.

The New York Town Law also requires the consideration of environmental impacts from the incentive zoning. The statute states that “the town board shall, in designating such districts, determine that there will be no significant environmentally damaging consequences and that such incentives or bonuses are compatible with the development otherwise permitted.”⁷³ In other words, incentive zoning cannot be used arbitrarily and must still conform to the public health, safety, and welfare of the community. Additionally, where a major purpose of incentive zoning is to allow for affordable housing for low-income individuals, the statute requires that

[p]rior to the adoption or amendment of the zoning ordinance or local law pursuant to this section to establish a system of zoning incentives or bonuses the town board shall evaluate the impact of the provision of such system of zoning incentives or bonuses upon the potential development of affordable housing gained by the provision of any such incentive or bonus afforded to an applicant or lost in the provision by

68. N.Y. TOWN LAW § 261-b(2) (McKinney 2007).

69. *Id.* § 261-b(1)(a).

70. *Id.* § 261-b(1)(b).

71. Rice, *supra* note 65, at 624.

72. *Id.*

73. N.Y. TOWN LAW § 261-b(3)(c) (McKinney 2007).

an applicant of any community amenity to the town. Further, the town board shall determine that there is approximate equivalence between potential affordable housing lost or gained or that the town has or will take reasonable action to compensate for any negative impact upon the availability or potential development of affordable housing caused by the provisions of this section.⁷⁴

Finally, if the town board finds that there is no “suitable community benefit or amenity” immediately feasible, “the board may require, in lieu thereof, a payment to the town, of a sum of [cash] to be determined by the board.”⁷⁵ The provision providing for a cash payment in lieu of an added amenity is provided to allow the city to offset the increased density in an area when the developer is unable to produce an amenity suitable to the community. Where the developer would normally “buy” the increased density for the development through spending money on amenities the community desires, the ability to pay a sum of cash in lieu of an amenity provides the town with a way to recoup the costs for the density bonus above the existing zoning limit where developers do not “buy” their bonus with a specified amenity.

The result of the New York statute was that municipalities were given the authority to create districts where incentive zoning was permitted. The detriments of these districts, as mentioned in the statute, cannot outweigh the benefits, especially when dealing with the issue of creating a housing market that is affordable for low-income individuals. Also, the use of incentive zoning has helped lead the smart growth revolution, including the use of clustering and New Urbanism. Under both approaches, the environmental impact of a development is considered with the goal in mind to protect and preserve.

IV. NEW URBANISM CASE STUDIES: GLENWOOD PARK, VICKERY, AND DAYBREAK

A. *New Urbanism*

The use of New Urbanism in accomplishing the goals of priority growth districts has been increasingly popular. “Originating largely from the design professions, New Urbanism focuses on building walkable, mixed use neighborhoods with a strong sense of place as an alternative to sprawling low-density, single-use, automobile dependent

74. *Id.* § 261-b(3)(g).

75. *Id.* § 261-b(3)(h).

development.”⁷⁶ One focus of New Urban communities is that “[w]ithin neighborhoods, a broad range of housing types and price levels can bring people of diverse ages, races, and incomes into daily interaction, strengthening the personal and civic bonds essential to an authentic community.”⁷⁷

B. Daybreak, Utah

In 1994, Kennecott Utah Copper Corporation conceived of a project in South Jordan, Utah that considered “where and how people will want to live, how much open space [people desire], [the] types of recreational options residents [want to] enjoy, and where retail, business, and transportation hubs [would be] best located.”⁷⁸ Initially named Sunrise, the project was renamed Daybreak, and in 2001, Kennecott Land was established to focus “exclusively on the opportunity to develop Kennecott Utah Copper Corporation’s significant non-mineral land and water rights.”⁷⁹

Kennecott Land owns 93,000 acres of land along the “West Bench of the Oquirrh Mountains and in Tooele Valley.”⁸⁰ Among the 93,000 acres, 80,000 are situated in the Salt Lake Valley. These 80,000 acres constitute approximately 53% of the undeveloped land remaining in the Salt Lake Valley.⁸¹ The Daybreak community features approximately 4,200 acres of land and is the first development project of Kennecott Land.⁸² “Since the 4,200-acre community opened in June 2004, some 1,000 homes have been sold and about 14,000 homes are planned over the next 10 to 15 years.”⁸³ Not only does the community feature numerous homes, but Daybreak will also feature “[a] major commercial center [that] will provide jobs and shopping.”⁸⁴ Additionally, “[t]he Mid-Jordan light-rail line and Mountain View Corridor are planned through the Daybreak community, [and] Oquirrh Lake, [a man-made lake on approximately

76. Brian W. Ohm & Robert J. Sitkowski, *Integrating New Urbanism and Affordable Housing Tools*, 36 URB. LAW. 857, 857 (2004).

77. *Id.* (quoting Congress for the New Urbanism, *Charter of the New Urbanism* (1993), at 2, available at http://www.cnu.org/cnu_reports/Charter.pdf (last visited Sept. 6, 2004)).

78. Kennecott Land News Release, *Kennecott Land Announces Name and Time Line for Development*, Apr. 29, 2003, available at <http://www.kennecottland.com/assets/releases/Daybreakname.doc>.

79. *Id.*

80. Kennecott Land, Questions & Answers at 1, http://www.kennecottland.com/assets/q_a.pdf (last visited Apr. 25, 2007).

81. Kennecott Land News Release, *supra* note 78, and accompanying text.

82. Kennecott Land, Questions & Answers, *supra* note 80 and accompanying text.

83. *Id.* at 2.

84. *Id.*

eighty acres] will provide fishing, boating and bird-watching.”⁸⁵ Even more ambitious, the development anticipates over thirty-five miles of trails,⁸⁶ and has even discussed the possibility of snow-skiing on the Oquirrh Mountain range.⁸⁷

The Daybreak development is an example of a priority growth district and has embraced the New Urban concept of development. The Daybreak community itself has planned for 2.4 million square feet of retail space, 5.2 million square feet of office space, and 1.5 million square feet of flexible industrial space to be built over the next fifteen years.⁸⁸

However, South Jordan has yet to codify incentive zoning in the city’s municipal code. Under the South Jordan Municipal Code,

[a]t any time after the approval of a [Planned Community] zone plan, community structure plan, master subdivision plat, project plan/preliminary subdivision plat or final project plan/subdivision, the developer and the city may enter into a development agreement reflecting all conditions of approval of the applicable plan and such other matters as the city and the developer may agree.⁸⁹

The effect of this provision is to grant the city and the developer the opportunity to create a private development agreement with provisions and conditions not set forth in the local municipal code. For South Jordan, where incentive zoning is not codified, the ability to increase density in the Daybreak development would hinge upon private agreement with the city. Whether or not Daybreak was required to set aside land for open space above the city requirement of 25% is a matter between the individual parties. Additionally, any other amenity that Daybreak provided through its development would be left to private agreement between the city and developers.

Though South Jordan and the Daybreak development have yet to incorporate incentive zoning⁹⁰ through city statute, the Daybreak New

85. *Id.*

86. *Id.*

87. Kennecott Land, Open Space, <http://www.kennecottland.com/Mjk2.html> (last visited Apr. 25, 2007).

88. Kennecott Land, Economic Development, <http://www.kennecottland.com/MzMw.html>. (last visited Apr. 25, 2007).

89. SOUTH JORDAN, UTAH, CODE § 17.72.230 (2003).

90. This is not to say that density bonuses were not granted to Daybreak, but simply that incentive zoning is currently not permissible under South Jordan municipal code. It may very well be that the fruits of incentive zoning were granted to Daybreak in the form of density bonuses, but for other developers, density bonuses are conditioned solely on the ability to negotiate effectively with cities through private development agreements.

Urban community has affected surrounding cities. In May, 2006, West Jordan City met to discuss the possible amendment to the city's General Plan Land Use Map to provide for approximately 6,600 acres of land, known as the West Side Planning Area, which would be similar to Daybreak in its development.⁹¹ The overall development of the 6,600 acres, representing much of the remaining undeveloped land in West Jordan, would have the following look:

<i>Zone</i>	<i>Base Density D.U. Per Acre</i>	<i>Maximum Density D.U. Per Acre</i>
VLSFR	1.00	2.00
LSFR	2.01	4.50
MFR	4.51	9.00
HFR	9.01	18.00
MU	NA	25.00

It was anticipated that approximately 3.5% of the land would be used for Very Low Density development (VLSFR), defined as 1.0-2.0 dwelling units per acre.⁹³ The Low Density development (LSFR) would constitute nearly 50% of the land and would hold between 2.01-4.5 dwelling units per acre.⁹⁴ The city would also provide approximately 30% of the land for Medium Density development (MFR) containing 4.51-9.0 dwelling units per acre.⁹⁵ High Density development (HFR) would constitute over 11% of the development and afford 9.01-18.0 dwelling units per acre.⁹⁶ The Mixed-Use development (MU) was granted over 5% of the total development and would allow for between 12.0-25.0 dwelling units per acre.⁹⁷ This proposal was voted on and passed six to one,⁹⁸ with the stipulation that “[z]oning districts be prepared reflecting incentive based concepts for bonus density for amenities beginning with the low number of each residential category.”⁹⁹ Additionally, when West Jordan City discussed the possibility of

91. Minutes of West Jordan City Council Meeting, May 23, 2006, at 8-16, available at <http://www.ci.west-jordan.ut.us/files/06May23.pdf>.

92. WEST JORDAN, UTAH, ORDINANCE § 89-3-1106(a) (2006).

93. Minutes of West Jordan City Council Meeting, *supra* note 91, at 10.

94. *Id.*

95. *Id.* at 11.

96. *Id.*

97. *Id.*

98. *Id.* at 16.

99. *Id.* at 15

including either incentive zoning in the West Side development or simply redrafting the Planned Community development code,¹⁰⁰ the city noted that “[i]ncentive zoning has received attention as communities implement smart growth principles into [their] planning and development processes,”¹⁰¹ and that “[t]he common types of community benefits or amenities for which local governments have devised incentive programs are urban design, human services including affordable housing, and transit access.”¹⁰² West Jordan City initially¹⁰³ came up with five categories of importance in granting density bonuses under incentive zoning. These categories include: Trails/Open space, Streetscape Design, Smart Growth Subdivision Design, Building Design, and Transportation Enhancement.¹⁰⁴

Furthermore, West Jordan City created an incentive and density bonus chart, which listed both required and optional bonuses under each of the categories the city considered important in the implementation of the incentive zoning bonuses.¹⁰⁵ In calculating the bonus, the developer would go through the following analysis: “[If] a developer wishes to develop a parcel of land that has a land use designation of Low Density Residential . . . [the developer can] decide that [he/she] want[s] to opt for any additional amenities other than that which is *now* required under the new implantation portion of the code.”¹⁰⁶ The developer is not required to add any other amenities from that which is required. However, “[if] the developer desires to develop in the same land use category but intends to introduce several amenities into the development, the developer would view the “Density Calculator Chart,” aggregate the percentage density bonus and then multiply this number by the beginning

100. Minutes of the City of West Jordan Mid-Year Strategic Planning Meeting, July 11, 2006, at 10–12, *available at* http://www.ci.west-jordan.ut.us/files/06Jul11_Mid-Year1.pdf [hereinafter Mid-Year Strategic Planning Meeting].

101. *Id.* at 10.

102. *Id.* at 10–11.

103. The five categories proposed in the Mid-Year Strategic Planning Meeting held July 11, 2006, were eventually condensed into four when the West Side Planning Area Ordinance was passed. *See* WEST JORDAN, UTAH, ORDINANCE § 89-3-1106(c). The category of “Transportation Enhancement” was eliminated.

104. Mid-Year Strategic Planning Meeting, *supra* note 100 at 11.

105. *Id.*

106. Memorandum Regarding Implementation Zoning-Density Bonus Incentives from Gregory Mikolash, Senior Planner, to West Jordan City Council (July 17, 2006) (on file with author) [hereinafter Memorandum to West Jordan City Council].

density to determine the new density after the incentive bonus.¹⁰⁷ The city noted that

[t]he only way in which a developer will be able to reach “Maximum Density” in each land use category would be for 100% of the listed amenities to be installed in the development. It is not possible for a developer to increase density in any given land use category beyond the “Maximum Density,” nor is it possible to give 110% and jump to a different land use category . . . [thus] a development in a low density residential land use category could not exceed 4.5 dwelling units per acre.¹⁰⁸

Thus, in the case of West Jordan, and the West Side Specific Area Plan, the city’s initial evaluation on what amenities or programs it considers important has great weight in determining how much of a density bonus is allotted for the developer. The initial evaluation for determining the respective “weight” given each amenity can take a number of approaches including [1] the actual cost of providing the stated amenity, or [2] the relative importance of having such an amenity in the development. For West Jordan, what appears to be the most important amenity based on the Density Incentive Chart is “Trails & Open Space” as this particular feature grants up to a 22% density bonus to the developer.¹⁰⁹ Although it appears that much of the density bonus hinges on the cost of the specific attribute or feature the developer wants to incorporate, the Density Incentive Chart as proposed fails to include any incentive or bonus for providing a certain percentage of affordable housing, a potential area of concern for a growing community with a limited amount of remaining developable area.

C. Glenwood Park, Atlanta, Georgia

Another example of a New Urban development located in a priority growth district is Glenwood Park of Atlanta, Georgia. In 2003, the Glenwood Park development was the recipient of a “Congress for New Urbanism Charter Award in the neighborhood, district, and corridor

107. *Id.* See hypothetical where the chosen amenities equal 60% on the “Density Calculator Chart.” This number is then multiplied by the particular “Beginning Density,” see table *supra* at 92, e.g., 2.01 for LSFR, to come up with the new density, in this case 3.216 (1.60 x 2.01 =3.216) dwelling units per acre. For another approach in calculating density bonuses see SUFFOLK, VA., UNIFIED DEVELOPMENT ORDINANCE § 31-409 (2001), available at <http://www.suffolk.va.us/citygovt/udo/index.html>.

108. Memorandum to West Jordan City Council, *supra* note 106.

109. WEST JORDAN, UTAH, ORDINANCE § 89-3-1106(c) (2006).

category.”¹¹⁰ In 2006, Glenwood Park was the recipient of the Urban Land Institute’s development of the year for Atlanta. The Glenwood Park development is a “28 acre, 425-unit community” located outside of downtown Atlanta, Georgia.¹¹¹ The development includes “single-family houses, condominiums, lofts, apartments, and live/work units.”¹¹² Among its many features, the community sits “adjacent to a proposed transit line and has two civic squares.”¹¹³ Additionally, the community features over 20,000 square feet of office space while also providing over 80,000 square feet of retail space.¹¹⁴ Like other New Urban developments, Glenwood Park features narrower streets, wider tree-lined sidewalks, clustering in residential areas, and open parks and areas for residents to go for recreation.¹¹⁵

Access to transit corridors and alleviating traffic and congestion is of particular importance in New Urban communities. Glenwood Park is located directly off Interstate 20 outside of downtown Atlanta and has access to mass transit as well as major interstate arteries. The 28-acre project required a \$25 million land investment, and an additional \$140 million building and construction investment.¹¹⁶ However, like Daybreak, Glenwood Park has yet to specifically adopt incentive zoning in the municipal code.

D. Vickery, Cumming, Georgia

The Vickery development consists of 214 acres in Forsyth County, Georgia.¹¹⁷ Like other New Urban communities, Vickery is located next to a transit corridor, thereby allowing residents greater access to transit opportunities. “The master plan calls for approximately 70 units consisting of 431 single-family detached homes, 125 town homes, and additional lofts and live/work units located in the town center.”¹¹⁸ Additionally, the development includes over 100,000 square feet of retail space and over 50,000 square feet of office space.¹¹⁹ The commercial

110. STONE ET AL., *supra* note 8, at 124.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Janet Jones Kendall, *Glenwood has Perfect Recipe for Urban Success*, ATLANTA BUS. CHRON., Sept. 25, 2006, available at <http://atlanta.bizjournals.com/atlanta/stories/2006/09/25/focus3.html?t=printable>.

117. STONE ET AL., *supra* note 8, at 124.

118. *Id.*

119. *Id.*

space is mixed use with much of the office space above the retail space.¹²⁰ Beyond the commercial space, the community dedicates “55 acres [to] parks and open green ways.”¹²¹

Forsyth County, like South Jordan, Utah, and Atlanta, has yet to adopt incentive zoning by statute. The express provision dealing with the Vickery development states that

[t]he maximum number of dwelling units per acre in residential areas of the planned unit development should not exceed 1.2 times the gross density recommended by the future land use map of the comprehensive plan for the unit of land unless such density is found [by] the board of commissioners to be justified to achieve the goals of the land use plan.¹²²

Thus, absent a private agreement between developers and commissioners “justifying” the additional density, the county does not specifically permit incentive zoning.

V. DISCUSSION

A. *New Urban Communities: Eliminating or Perpetuating Sprawl?*

One of the major attractions of New Urban communities such as those featured in Daybreak, Glenwood Park, and Vickery is that they follow a timed, smart growth program that funnels growth into priority growth districts or areas where existing infrastructure is in place to avoid the nightmare of growth without planning and structure. However, it is not entirely clear that the initiatives lumped together as “smart growth” actually curb sprawl. While the academic and theoretical approach to smart growth seems to indicate that sprawl can be overcome, this may not be the case. For Daybreak, and South Jordan, Utah, the inclusion of a New Urban community on the west side of town may help create more livable communities. However, one major concern for Daybreak, Glenwood Park, and Vickery should surround the availability of affordable housing within the communities.

120. *Id.*

121. *Id.*

122. FORSYTH COUNTY, GA., ORDINANCE § 20A-3.3 (2006).

*B. Does Incentive Zoning Need to Be Changed to Accommodate¹²³
Affordable Housing?*

The incentive zoning concept adopted by West Jordan, Utah, accommodates many amenities in the West Side Planning Area. The city, however, neglects to include any bonus for the inclusion of affordable housing within the 6,600 acres of the planning area. Commentators have noted that “[d]emand for new housing has increased in recent years, particularly within the suburban fringe around metropolitan areas.”¹²⁴ This statement was made concerning growth in California over thirty years ago.¹²⁵ However, the statement is applicable¹²⁶ in many states and

123. Compare incentive zoning where the incentive underlying the granting of density bonuses is outlined in municipal code or ordinance, with the adoption of mandatory inclusionary zoning. *See, e.g.,* Brian Lerman, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 391 (2006):

The major disadvantage of voluntary [inclusion] programs is that the incentives that have to be granted to entice a developer can be detrimental to the municipality by burdening the environment and local infrastructure. Incentives that merely offset the cost of the affordable housing units may not be a sufficient inducement for developers. Another disadvantage to voluntary programs is that developers are provided an element of choice: if the ultimate market-rate buyer is willing to pay a premium that exceeds the public incentives for affordable housing, the developer will forego the optional program. On the other hand, mandatory programs require all developers to comply with the mandatory set-aside of affordable units regardless of incentives, and thus provide more benefits to the community than voluntary programs.

See also Julie M. Solinski, *Affordable Housing Law in New York, New Jersey, and Connecticut: Lessons for Other States*, 8-FALL J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 36, 66 (1998):

However, the combination of incentive zoning and other techniques will not provide the powerful catalyst that a statute mandating that affordable housing be a priority would produce. Certainly, some developers will be attracted to the density bonuses provided by incentive zoning; nevertheless, without a mandate, most will seek to provide whatever type of housing they can for profit, perhaps never giving affordable housing another thought. . . . Without a statute on which to rely for support, why would developers litigate an affordable housing application denial when they could just as easily build luxury housing and make a larger profit?

But see Ann S. Mathews, Comment, *Inclusionary Zoning in Westchester County, New York: Is it a Viable Tool to Reduce a County-Wide Housing Crisis?*, 27 PACE L. REV. 89, 113 (2006) (“[A] generic inclusionary ordinance with mandatory set-aside provisions will not be sufficient to make a marked difference in the availability of affordable housing. True success is contingent upon providing flexibility to developers and options within the ordinance.”).

124. Gregory Mellon Fox & Barbara Rosenfeld Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1015 (1976).

125. Though this study was conducted over thirty years ago, the principles discussed are still relevant to the discussion of affordable housing.

126. *See* Seattle Planning Commission, *Incentive Zoning*, Feb. 2007, at 8, available at http://www.seattle.gov/planningcommission/docs/SPC_IncZon.pdf (stating that “[b]ecause funds gained from Incentive Zoning might be relatively small in some areas or zones with more

especially relevant in the Salt Lake Valley, Utah. These commentators continue: “[t]he escalation in housing expense shows no sign of abating and the trend could have broad social and economic consequences.”¹²⁷ Furthermore, “[t]raditional solutions have failed to remedy the problem.”¹²⁸ In an attempt to remedy this solution, “housing density bonuses”¹²⁹ have emerged “as a means of encouraging the construction of moderate-cost housing by private developers within the community.”¹³⁰ Housing density bonus programs are a subset or type of bonus programs enacted, similar to typical amenity bonuses seen in the West Jordan, Utah plan. However, “[a] housing development bonus program has two main goals.”¹³¹ Primarily, the purpose of these programs is to “help meet the critical needs of low- and moderate-income people by expanding the supply of moderately priced housing in the community.”¹³² A separate purpose, and one more related to the smart growth initiatives, is to “assure the dispersal of such housing throughout the developing areas of the community,” without funneling low and moderate income individuals into the more affordable declining urban and suburban rings, or pushing them further out into sprawling developments.¹³³ Case studies examined the effectiveness of voluntary,

constrained height limits, these funds should not be spread over a wide variety of uses, but should be focused on achieving a smaller, definable, list of goals.”). Of particular importance to Seattle was trying to “[m]aximize harder to gain public improvements” rather than supplying public benefits that are readily available through other land use tools. *Id.* The Seattle Planning Commission suggests focusing incentive zoning on areas that have incentives “much less readily available,” such as affordable housing initiatives. *Id.*

127. Fox, *supra* note 124, at 1015–16.

128. *Id.* at 1016.

129. “A housing density bonus program requires developers to provide a certain percentage of newly contributed units at a price below the prevailing market price of the new units.” *Id.* at 1027. The following illustrates how such a density bonus works:

[A] city may require that large residential developments will include twenty percent of the total units as below market price . . . dwellings. In return, the developer may be granted a twenty percent increase in the total number of units as a “bonus” to encourage his participation in the program and perhaps to compensate his decreased revenues from the [below market price] dwellings. The net effect is that the developer builds 120 percent of the units originally proposed and rents or sells 100 percent at the prevailing market rate and 20 percent at a price below the market price. Because bonus units are constructed on land already purchased for the original housing project, the streets, sewers, water mains, driveways, and landscaping are already provided. The additional units therefore add relatively few costs for site preparation, and the increased density permitted on the site offsets the costs of constructing the [below market price] units.

Id.

130. *Id.* at 1016.

131. *Id.*

132. *Id.*

133. *Id.*

encouraged, and mandated housing density bonuses with a range of success.¹³⁴ The results of several studies show that “[t]he voluntary ordinances are not as successful in providing [below market price] units as the mandatory programs.”¹³⁵ Of particular concern was the reluctance of developers to “cooperate with voluntary programs because of uncertainty about the profitability of the density bonus.”¹³⁶ Commenting further, “[m]any [developers] do not understand how the bonus operates to reduce land costs and to increase the amount of profit realized on the investment.”¹³⁷ Thus without mandatory provisions, oftentimes there was a “breakdown in the negotiation process.”¹³⁸ Thus as a conclusion, it has been noted that

[p]rograms seeking only voluntary compliance with [below market price] provisions and granting no density bonus to the developer appear to yield the poorest results in low cost housing. Programs encouraging voluntary compliance by granting a density bonus, however, seem to generate some construction of necessary housing. Programs imposing mandatory compliance with [below market price] requirements have achieved the best results, particularly when combined with a density bonus to allow the developer to recoup his expenses and to avoid allegations of taking for public use without just compensation.¹³⁹

When examined in relation to curbing urban sprawl and implementing smart growth techniques, developments such as Daybreak, Glenwood Park, and Vickery commonly fail inasmuch as they do not adequately provide affordable housing. The use of incentive zoning can be a powerful tool to bring needed amenities into communities, to preserve open space, and to encourage healthy and greener living. However, if not implemented correctly, incentive zoning may not succeed in its desired attempt to funnel growth into priority growth districts thereby curbing further sprawl. Without adequate affordable housing opportunities, low- and moderate-income families are unable to purchase homes in these New Urban communities and must either take refuge in further suburban development, live in the inner urban and declining suburban rings, or stay located in apartments in blighted communities and areas where low-income housing can be found.

134. *Id.* at 1036–67.

135. *Id.* at 1067.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1067–68.

According to Gregory Mellon Fox and Barbara Rosenfeld Davis, the appropriate remedy is granting developers mandatory density bonuses for developing a percentage of below-market-price homes. Under the West Side Planning Area and its incorporation of incentive zoning to encourage added amenities, the City of West Jordan neglected to include any density bonus relating to affordable housing. Such a situation can and ought to be maintained, as it provides one of the most powerful retardants against further sprawl. Growth will continue, and if individuals cannot find growth in communities where they live, they will travel further out or further in to find adequate housing.

1. Weaknesses and criticisms

One major criticism of New Urban communities is that they are simply a “new style of sprawl rather than an alternative to sprawl.”¹⁴⁰ This argument gains strength when combined with a glaring failure in many New Urban communities to provide affordable housing. However, the debate continues on whether requiring mandatory affordable housing is worthwhile or even viable under economic principles.¹⁴¹ Even still, when New Urban communities are developed in priority growth districts it can lead to the gentrification of low-income individuals. If this is indeed the case, then rather than preventing the further promulgation of urban sprawl, developers of New Urban communities cast out low-income individuals to either outlying fringes (where affordable housing can be found) or else push these individuals into the first- and second-ring declining suburban or even urban communities. Though communities such as Daybreak, Glenwood Park, or Vickery include town homes or condos for lower income individuals, the high housing values in these communities may still prevent low-income individuals from purchasing and surviving, let alone thriving. In fact, one study indicated that average home prices in a New Urban community were \$30–40,000 higher¹⁴² than similar homes outside the community. This increase in cost of living in a New Urban community can inadvertently exclude many individuals from affording status. One commentator noted that “[m]inority and poor communities in America have a long history of

140. Ohm & Sitkowski, *supra* note 76, at 857 (citing Peter Calthorpe, *New Urbanism: A Blueprint for Building a Better Neighborhood*, DENVER POST, Apr. 26, 1998, at F-01).

141. See Benjamin Powell & Edward Stringham, *The Economics of Inclusionary Zoning Reclaimed: How Effective are Price Controls?*, 33 FLA. ST. U. L. REV. 471 (2005). But see Laura Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539 (1995); Barbara Ehlrich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971 (2002).

142. STONE ET AL., *supra* note 8, at 106.

not benefiting from urban planning initiatives and not being included in the planning process.”¹⁴³ Additionally, it was observed that “[d]ata demonstrates that African-American housing consumption is greater in sprawl communities, with Black households residing in larger units that they are more likely to own, which increases their affordability.”¹⁴⁴ Furthermore, this same commentator suggests that “New Urbanism may generate a significant integrative effect on neighborhoods,”¹⁴⁵ and “to the extent that New Urbanism occurs in the central city, minority group members that have resisted suburban migration might be more inclined to move to an attractive New Urbanist neighborhood.”¹⁴⁶ However, in conclusion it is suggested that “neither leadership and resources nor public opinion nor demand needed to increase spending for the essential transportation infrastructure and to ease adoption of an integrated land use plan exist.”¹⁴⁷ Finally, that “[f]or [smart growth] to occur, financing instruments and capital to fund the infill and redevelopment of the urban center must be developed.”¹⁴⁸

While commentators such as James Kushner suggest that smart growth through New Urbanism is likely to be ineffective, many agree that “if [New Urban developments are] designed around transit, [they] could dramatically improve access to jobs and other services while offering more diverse neighborhoods.”¹⁴⁹ By designing New Urban developments around transit and other infrastructure, individuals of all income levels can live together in communities with access to jobs and services necessary for individuals to survive and thrive without moving to the suburban or ex-urban fringes.

James Kushner’s conclusion errs in the gaping exception at the end of his analysis: “For [effective smart growth] to occur, financing instruments and capital to fund the infill and redevelopment of the urban center must be developed.”¹⁵⁰ While it is acknowledged that James Kushner is discussing New Urbanism from an urban standpoint, the point is effective for suburban communities as well. Where smart growth techniques such as priority growth districts are implemented, cities have the ability to funnel growth to desirable areas and have the ability to increase affordable housing. This financing tool derives from incentive zoning. Through cities identifying the need for affordable housing in the

143. Kushner, *supra* note 9, at 66.

144. *Id.*

145. *Id.* at 70.

146. *Id.*

147. *Id.* at 72–73.

148. *Id.*

149. *Id.* at 45.

150. *Id.* at 73.

community and providing a sufficient density bonus to developers to complete economically viable projects, cities receive the financing and capital necessary both to fund urban infill and redevelopment and to funnel growth to priority growth districts in suburban communities, thereby helping to alleviate sprawl.

2. *Socio-economic barriers*

The lack of affordable housing in New Urban communities may or may not be an inadvertent exclusion for low-income individuals. With the clustering of living quarters in these communities, families are forced into sharing less space. Part of the disadvantage of sharing less space is that communities are forced into closer interaction with each other, interaction that may or may not be welcomed. One method which seems to be used regardless of its constitutionality for dealing with this potential problem is to erect an invisible gate around a gateless community that shields residents from what they may consider to be the “unwieldy” and “undesirable.” This figurative invisible gate is generally erected by the prices charged for homes in a development, where families with low or moderate income are unable to afford entry due to the price of the homes. Even Daybreak could be said to contain an invisible gate, as the starter priced condominiums in the development range from the \$170,000’s.¹⁵¹ During times of loosened lending standards, people may qualify for entry into “invisibly gated” communities and such an issue may not be as evident. However, as is prevalent across the country since the sub-prime lending debacle, lenders are tightening up on lending standards and making it more difficult for families to qualify for loans once available, and the problems with the invisible gate will likely become worse as families struggle to find affordable housing. In the instance that families can find suitably priced housing, many of the condominium units are situated at the very outskirts of the New Urban community, providing a buffer between transit arteries and the development hub of single family homes. Glenwood Park features townhomes, condominiums, and single family homes. Townhomes in Glenwood Park start in the mid-\$400,000 range, though they do provide a rooftop deck and green building techniques.¹⁵² Condominiums in the development are more reasonably priced with

151. Daybreak, http://www.daybreakutah.com/search_results.php?builder=&pricerange=150000-174999&bedrooms=1-9&bathrooms=&sqfootage=0-9999&stories=&x=33&y=16 (last visited Oct. 24, 2007).

152. Glenwood Park, <http://www.glenwoodpark.com/core/item/page.aspx?s=6227.0.78.6078> (last visited Apr. 25, 2007).

average prices from the \$165,000 range to \$295,000 for the first phase of development.¹⁵³ However, single family homes in Glenwood Park are considerably more expensive with an average starting price just below \$500,000 and ratcheting up from there.¹⁵⁴ The Vickery development, located in a more rural community in Forsyth County, advertises itself as a community with homes from the \$300's to the \$1,000,000s.¹⁵⁵

The goal of these communities was to provide a community where all types of individuals could reside—with young families in single family residences and seniors in either townhomes or condominiums. The practical effect of many of these communities, however, is a barrier on low-income individuals, as if these gateless communities were in fact gated. According to *The Urban Lawyer*, the goal of New Urban communities is that

“[w]ithin neighborhoods, a broad range of housing types and price levels can bring people of diverse ages, races, and incomes into daily interaction, strengthening the personal and civic bonds essential to an authentic community.” Despite [the] theoretical emphasis on providing a diverse housing stock, observers have criticized traditional neighborhood developments and other New Urbanist-influenced projects for not meeting a diversity of housing needs.¹⁵⁶

Where individuals are encouraged to interact with the community in a shared space environment, they may not object to segregating low-income individuals from the community. However, if sprawl is to be deterred, then municipalities will need to conjure up a remedy to the invisible gate surrounding many of its pristine communities. If municipalities harness the ability to use incentive zoning, many of these disparities can be narrowed. One option would be for municipalities to codify density bonuses for developers including a certain amount of units at affordable pricing.¹⁵⁷

In setting the appropriate amenity bonus, cities can elect to allot a larger density bonus to developers willing to build a certain portion of the development at affordable rates. While cities like West Jordan in its

153. Glenwood Park, <http://www.glenwoodpark.com/net/content/page.aspx?s=19741.0.78.6078> (last visited Apr. 25, 2007).

154. Glenwood Park, <http://www.glenwoodpark.com/core/item/page.aspx?s=16807.0.78.6078> (last visited Apr. 25, 2007).

155. Vickery, <http://www.vickeryvillage.com> (last visited Oct. 30, 2007).

156. Ohm & Sitkowski, *supra* note 76, at 857 (quoting CONGRESS FOR NEW URBANISM, CHARTER FOR THE NEW URBANISM 2 (1993), *available at* http://www.cnu.org/sites/files/charter_english.pdf).

157. *Id.*

West Side Planning area often apportion the density bonus on an equal footing with the cost of providing the amenity, the more appropriate remedy may be to combine the approaches. First, establish the key core amenities that the city desires using as a base point the availability of other remedies and procedures to satisfy certain public concerns. Next, factor in the appropriate cost for the developer in providing the specific amenity. Finally, make adjustments to the density bonuses allotted according to overall need in the community, rather than the cost to the developer. If the city can create a high enough payoff for the developer, the city can effectively guarantee that the developer will provide the amenity. The payoff for the developer need not be so high that cities will be described as “bargaining away the police power” or granting financial windfalls for developers. The issue in many developments, including Daybreak, Glenwood Park, and Vickery, is that the cities have failed to establish concrete guidelines for developers to empower them to create the necessary changes for affordable housing. If cities can address the need for providing affordable housing then sprawl can be greatly reduced.

C. Crisis Averted: Incentive Zoning Mechanisms as a Cure to Urban Sprawl?

As mentioned in the introduction to this paper, Robert Freilich has described seven major crises arising from urban sprawl. The use of incentives may give municipalities a conduit for avoiding these crises.

1. Central city and first- and second-ring urban decline

Under incentive zoning and through the use of priority growth districts, cities can target blighted areas where redevelopment is needed, or through using steps similar to those outlined in *Ramapo*, cities can adequately attract developers to help build in areas where adequate infrastructure and services are found. The ability to correct central city and first- and second-ring urban decline will come from the use of appropriate incentives for developers and amenities to the city. As seen in the West Side Planning Area proposed by the City of West Jordan, Utah, city planners have the power to determine what amenities are important for the city for both aesthetic and fiscal reasons. Attaching appropriate density bonuses to these amenities can help provide developers with the needed incentive to take on projects that would otherwise be financially risky. Incentive zoning need not be the only means of providing incentives for developers to help avoid urban and

suburban ring decline. Determining the appropriate amount of density bonus or incentive for developers will hinge on a number of factors. However, these factors should include the cost to the developer while also maintaining integrity to the overall level of preference for the desired amenity or service in the community. In the West Side Planning Area, for example, the density bonus for trails/open space was limited to approximately 22%, which should reflect both proportionate cost to the developer for providing the incentive but also limit the amount of trails developers will provide. This is usually accomplished by putting a cap on the total amount of bonuses that can be obtained by providing the entire amenity the city desired. Furthermore, if the goal of cities is to help prevent further urban and suburban ring decline, the use of incentive zoning may need to be substantiated more in a code provision or other form showing that the granting of the incentive is required upon the providing of the amenity.

2. *Environmental degradation through loss of wetlands and sensitive lands and air and water quality degradation*

The use of incentive zoning coupled with strong municipal help in funneling growth into priority growth districts can minimize major effects of environmental degradation. The primary means of accomplishing this goal is through the use of New Urban development which is particularly well suited to incentive zoning due to the clustering of development with density bonuses and green space requirements. The West Side Planning Area is an example of the types of incentives municipalities can grant to accomplish the purpose of protecting the environment. The West Side Planning Area purposefully takes into consideration its effects on the environment through its designation of density bonuses. The plan grants its largest density bonus for the “[i]nstallation of enhanced open space/recreational amenities in excess of that required per City standards.”¹⁵⁸ This open space need not be limited to installing a golf course throughout the community, but could be left as forest, wetlands, or other specific area natural to the environment. In fact, an ordinance governing the West Side Planning Area provides that

because there may be instances where a proposed project is incapable of meeting one or several of the improvements and amenity criteria . . . a developer may install substitute improvements; wherein the weighted value of such an improvement or amenity shall be approved by the City

158. WEST JORDAN, UTAH, ORDINANCE § 89-3-1106(c) (2006).

Council in their review of the Preliminary Development Plan.¹⁵⁹

The result of these regulations is greater flexibility in creating and granting incentives to developers. In order to further the preservation of the environment, cities will need to make an effort to ensure that bonuses are great enough to provide an incentive to developers to select this type of improvement in their development. As with other forms of incentives, cities may find greater success in implementing these plans if the granting of bonuses is mandated by municipal code as opposed to being voluntary and subject to the discretion of the city.

3. *Energy over-utilization*

One primary benefit of New Urban planning and New Urban communities is providing walkable communities that provide opportunities for individuals to escape the crutch of automobiles and to enjoy energy-efficient and environmentally-efficient commutes. For these benefits to accrue, the funneling mechanisms of priority growth districts must be dovetailed with incentive zoning or another form of incentive to developers. Transfer of Development Rights (TDR's) may also provide the needed incentive for developers, but TDR's may not be as popular amongst developers if they feel that the transfer of certain rights and benefits in one location are not equal to the benefits received in another. To encourage developers to build walkable, green, and energy-efficient communities, incentive zoning can provide options to developers in choosing where to develop. The benefit of a density bonus in New Urban communities for the developer is that it may provide a greater incentive to develop in an area than a simple TDR. Where TDR's may be prone to benefit the government, incentive zoning may be more beneficial to developers, which can help promote the New Urban communities, thereby perpetuating effective energy use. In general, TDR's are often more beneficial to the government because the rights transferred by developers in order to develop may not be equal to the rights the government receives, whereas incentive zoning generally grants the developer added density at a lower cost of obtaining the density—essentially purchasing the added density for a bargain.

The other facet of energy-efficient communities that helps eliminate sprawl is the development centered on transit corridors. Suburban families still need to leave the “community” to work and play, and through greater access to these corridors—whether the interstate, bus, or

159. WEST JORDAN, UTAH, ORDINANCE § 89-3-1106(d) (2006); *see also id.* § 89-3-1106(f).

other mass transit—individuals can cut down on energy utilization. For example, the Glenwood Park development is nestled directly next to I-20 in Atlanta, Georgia and is also connected directly with Glenwood Ave. and the Glenwood Memorial Connector, and access to the bus system, MARTA, is directly off of Glenwood Ave.¹⁶⁰ The Vickery community in Forsyth County, Georgia also features effective energy utilization through green construction techniques and proper placement near transit corridors such as Georgia 400.¹⁶¹

Both of these communities pale in comparison to Kennecott Land's plans for the West Bench of Salt Lake County, Utah. Daybreak, with over 4,100 acres already developed, is large enough to be an independent city. The community has been developed using green-space initiatives and plans for a major transit corridor in the center of the community.¹⁶² The community already sits on one transit corridor, Bangerter Highway, and also plans for a light rail in the community.¹⁶³

4. *Fiscal insolvency and infrastructure and service deficiencies*

The *Ramapo* case led the country into a time of smart growth controls and ideas used to help prevent further problems with communities unable to keep pace with continued growth. Perhaps the biggest smart growth concept that can help prevent further urban sprawl is the use of priority growth districts. The greatest benefit of these districts is the ability of cities to adequately keep pace with growth and sustain it in ways that do not cut back on the solvency of cities and allow for the appropriate maintenance and use of existing infrastructure. However, naming an area a priority growth district alone will not accomplish the goal of channeling development to these regions that can support it. Municipalities should look to incentive zoning among other techniques which can, if appropriately enacted, leave developers with confidence that these areas are prepared for development and that viable, economically successful development will result. In order for this to happen, cities may need to adopt amendments to local zoning ordinances mandating density bonuses or other incentives for developers to encourage their participation in developments within priority growth districts.

160. Glenwood Park, <http://glenwoodpark.com/net/content/item.aspx?s=27719.0.78.6078> (last visited Apr. 25, 2007).

161. Vickery, <http://www.vickeryvillage.com> (last visited Oct. 30, 2007).

162. Daybreak, <http://www.daybreakutah.com/masterplan.htm> (last visited Apr. 25, 2007).

163. *Id.*

5. *Agricultural land loss*

One of the biggest objectives of smart growth is the preservation of environmental and agricultural land. As described by Daniel Patrick Moynihan, “it is becoming increasingly apparent that American government, both national and local, can no longer ignore what is happening as the suburbs eat endlessly into the countryside.”¹⁶⁴ The purpose of priority growth districts, in addition to funneling development to areas with infrastructure that can support growth, is to preserve agricultural land. Though theoretically sound in the academic realm, using priority growth districts to help preserve agricultural land will hinge on a couple of events. First, the desire to put the land to its most efficient and economical use will continue to grow so long as the need to grow outward continues uninhibited. Additionally, individuals have a general right under the Constitution to use their property as they see fit, within the confines of the law. Therefore, to encourage preservation of agricultural land, absent a slow in market forces that encourage development, incentive zoning could be adopted. In order to provide a mechanism that can help curb sprawl into agricultural communities, cities would need to evaluate the importance of maintaining this land in comparison to the value of other amenities or needs the community is seeking. Requiring a mandatory incentive bonus in those parts of the community located within a priority growth district would provide one avenue for discouraging development on agricultural land. This can be accomplished through developing brown-fields or other land not suitable for agricultural use. Both Glenwood Park and Daybreak followed this type of approach. If all the developable land in the community is agricultural, another approach is granting greater density bonuses, or bonuses that more quickly bring a developer to the maximum density for a type of development through blocking off portions of the agricultural land as open space. This would effectively serve two purposes. First, it would preserve agricultural land, by “fencing off” land that was to be left undeveloped, and second, it can help preserve the identity of the community. A major focus of New Urban developments is to build communities that are suitable to the identity of the community while also incorporating effective and efficient building techniques. This can be accomplished through this type of incentive.

164. Pollard, *supra* note 10, at 250 (quoting Moynihan, *supra* note 11).

6. *Diminished public health*

The ability of incentive zoning to overcome diminishing public health can be grouped into much of the same discussion as the previous urban sprawl issues. However, the promotion of public health is one of the more readily applicable benefits to New Urban communities. Through the use of incentive zoning, cities can promote communities that are pedestrian friendly, contain more public parks and facilities, and encourage healthier lifestyles. The city of West Jordan, through the West Side Planning Area, thought highly enough of pedestrian-friendly and walkable communities that they designated these as required amenities for developers developing in the community.¹⁶⁵ Additionally, the community required “[d]edication of open space, trail corridors or ‘in lieu of fees’ in accordance with the Comprehensive General Plan and the Parks, Recreation and Trails Master Plan.”¹⁶⁶ Through the use of open space, trails, walkable communities with minimum setback requirements, the New Urban communities help reduce negative effects of sprawl by encouraging residents to get out and walk around. By using incentive zoning, municipalities can ensure that public health is given priority and importance in communities.

VI. CONCLUSION

The effects of decades of sprawl have come full circle with many communities and citizens. In an attempt to cut down on traffic and congestion, to raise public health, to reunite neighbors with strong local communities, and to save agricultural and wildlife land, priority growth districts have been proposed in a number of states to combat the continuing reach of sprawl. These districts help to protect outlying areas by funneling development to areas—both suburban and ex-urban—that are near transit corridors and can effectively increase density without decreasing lifestyle for its citizens.

In an attempt to motivate developers to help solve the continuing problem of sprawl, municipalities have implemented incentives for developers who use smart growth strategies. Most of these incentives take the form of density bonuses, allowing developers to increase the number of units on a given parcel of land in exchange for the developer giving up property or cash. Additional incentives include leniency in height, floor area, and setback requirements.

165. WEST JORDAN, UTAH, ORDINANCE § 89-3-1106(c) (2006).

166. *Id.*

While these forms of incentive zoning have proven helpful and have overcome many issues relating to developer motivation in undertaking New Urban community developments, they are not entirely sufficient, and a number of other forms of incentive zoning should be entertained to combat the criticisms of New Urban communities. One major effort in future incentive zoning agreements should focus on providing more affordable housing. This goal can be accomplished by city councils providing an incentive bonus to developers for allotting a certain number of units in the development as affordable housing. Additionally, through a prioritization of amenities, cities can more effectively specify which amenities are most desirable by providing higher density bonuses for the inclusion of important amenities into the community.¹⁶⁷ If cities can adopt amendments requiring incentive zoning for certain amenities, such as affordable housing, then sprawl, to a great extent, may be limited and controlled. In certain developments such as Glenwood Park, where twenty-eight acres are involved, the need for government to step in may be limited by the accessibility of affordable homes in other areas in the community. However, in situations involving considerably more land, like Daybreak with nearly 4,200 acres and the West Side Planning Area with over 6,600 acres, then a very well-crafted and hands-on approach must be taken by cities to ensure there is adequate affordable housing, and incentive zoning is a key to succeeding. Without the effective use of zoning techniques such as incentive zoning, cities merely end up with a “new style of sprawl rather than an alternative to sprawl.”¹⁶⁸

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167. Seattle Planning Commission, *supra* note 126, at 8.

168. Ohm & Sitkowski, *supra* note 76, at 857 (quoting Peter Calthorpe, *New Urbanism: A Blueprint for Building a Better Neighborhood*, DENVER POST, Apr. 26, 1998, at F-01).

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