

# The Curbside Commons: Parking and Property in Portland, Oregon

By Solomon Rotstein\*

I. Introduction .....	1
II. Portland’s Minimum Off-Street Parking Requirements Exist Within a Larger Framework of Low-Emissions Urban Planning .....	3
A. State-Level Guidance: 1973–1991 .....	3
B. Portland Takes the Lead: 1991–2002 .....	5
C. The 20-Minute Neighborhood: The 2009 Climate Action Plan and the 2012 Portland Plan .....	6
III. The Extent of Inner-Portland Residential Development Without Off-Street Parking, and Its Relationship to Car Ownership and VMT .....	8
A. Extent of Development .....	8
B. Impact on Car Ownership and VMT .....	9
IV. The Right to Park .....	11
A. Trespass and Nuisance .....	12
B. Socialization and Subsidy .....	12
C. The Curbside Commons .....	13
V. Conclusion .....	15

## I. INTRODUCTION

Long-heralded as a “green” city<sup>1</sup> with an almost-mythical quality of life,<sup>2</sup> Portland, Oregon, unsurprisingly, is inscribing concerns over climate change into the very fabric of its land use

\* J.D. Candidate, Columbia Law School, Class of 2016

1. Business Insider, *Infographic: Why Portland May Be America’s Greenest City*, BUSINESS INSIDER (Mar. 29, 2013, 4:23 PM), <http://www.businessinsider.com/portland-green-city-infographic-2013-3> [<http://perma.cc/ZV6X-QWST>].

2. *Portlandia* (IFC television broadcast) (satirizing and celebrating life in Portland, Or.).

planning.<sup>3</sup> By 2035, city planners hope that eighty percent of Portlanders will live within a “complete neighborhood,”<sup>4</sup> defined as one in which all essential goods and services are available within a twenty minute walk from a resident’s home. Planning documents expressly cite concerns over GHG emissions as a rationale for this vision.<sup>5</sup> One set of seemingly innocuous policies with the potential to play an outsized role in the actualization of the complete neighborhood are minimum off-street parking requirements, and, as a corollary, a regime for allocating on-street parking space. When buildings are pushed further apart to make room for parking lots, the feasibility of twenty-minute walkability in the neighborhood decreases.<sup>6</sup> More fundamentally, parking is the “terminal”<sup>7</sup> of the very car-based transportation system whose negative environmental effects the complete neighborhood attempts to mitigate.

Fortunately, from the perspective of sustainable growth and climate change resilience, Portland operates under legislative mandates at the local<sup>8</sup> and state<sup>9</sup> levels to reduce the number of parking spaces per resident. Attuned to these mandates, to the role of parking in a city composed of complete neighborhoods, and, ultimately, to low-carbon development goals, city planners view minimum off-street parking requirements with scrutiny. A 2002 amendment to Portland’s zoning code codified these views: minimum requirements for off-street parking were

3. CITY OF PORTLAND & MULTNOMAH COUNTY CLIMATE ACTION PLAN 2009 (2009), available at <https://www.portlandoregon.gov/bps/article/268612> [<https://perma.cc/V9LQ-JS5L>].

4. Portland Plan Summary (2012), available at <http://www.portlandonline.com/portlandplan/index.cfm?c=58776&a=405753> [<http://perma.cc/H7SD-D6PB>].

5. See CITY OF PORTLAND & MULTNOMAH COUNTY CLIMATE ACTION PLAN 2009, *supra* note 3.

6. DONALD SHOUP, THE HIGH COST OF FREE PARKING 93 (2006) (defining accessibility as a combination of mobility and proximity, and noting that off-street parking decreases mobility by means other than the car while also decreasing proximity).

7. *Id.* at 9.

8. PORTLAND BUREAU OF PLANNING AND SUSTAINABILITY, COMPREHENSIVE PLAN 1980 (amended Nov. 2011), available at <https://www.portlandoregon.gov/bps/47556> [<http://perma.cc/2S8C-PP3A>].

9. OREGON DEP’T OF LAND CONSERVATION & DEV., OREGON’S STATEWIDE PLANNING GOALS & GUIDELINES, Goal 12: Transportation (2012), available at [http://www.oregon.gov/lcd/docs/goals/compilation\\_of\\_statewide\\_planning\\_goals.pdf](http://www.oregon.gov/lcd/docs/goals/compilation_of_statewide_planning_goals.pdf) [<http://perma.cc/L7YG-DNQB>].

waived for new commercial and multi-family residential development “well served” by public transit.<sup>10</sup> However, in spring of 2013, city planners narrowed the scope of the 200 amendments in response to public outcry over large residential development projects without off-street parking.

An examination of Portland’s minimum off-street parking requirements and on-street parking allocation regimes leads to the following conclusions: (1) although reducing or eliminating minimum off-street parking requirements has had little measurable effect on car ownership and use, the long-term effects of these policies remain promising; (2) the 2002 amendments, and, to a lesser extent, the policies in place after their subsequent rollback, demonstrate Portland’s movement from managing the curbside as a “subsidized commons” to a true commons; and (3) city planners should consider demand-side regulation of curbside parking space.

## II. PORTLAND’S MINIMUM OFF-STREET PARKING REQUIREMENTS EXIST WITHIN A LARGER FRAMEWORK OF LOW-EMISSIONS URBAN PLANNING

Unlike many American cities, in which minimum off-street parking requirements are set arbitrarily,<sup>11</sup> the requirements in Portland reflect state and city level land use and sustainable growth policies. In fact, the 2002 zoning code amendments reflect sustainable development policies articulated in the 1993 Global Warming Reduction Strategy and 2001 Local Climate Action Plan, precursors to the low-emissions, “complete neighborhood” public policy outlined in Portland’s 2009 Climate Action Plan (“CAP”) and 2012 Portland Plan (“PP”). This section briefly traces the historical development of these policies.

### A. State-Level Guidance: 1973–1991

The 1973 passage of Oregon Senate Bill 100 (“SB 100”) created urban growth boundaries, Oregon’s “big bang” of land use planning. SB 100 requires “that local government plans be

10. PORTLAND, OR. ZONING CODE § 33.266.110 “Table 266-2” (2013).

11. See DONALD SHOUP, THE HIGH COST OF FREE PARKING 75–111 (2006) (describing planning for parking as “pseudoscience”).

consistent with state land use planning goals.”<sup>12</sup> One such goal<sup>13</sup> sets forth criteria for area-wide transportation plans. Transportation plans must, amongst other things, consider “all modes of transportation including mass transit . . . rail, highway, bicycle, and pedestrian;” “minimize adverse . . . environmental impacts and costs;” and “conserve energy.”<sup>14</sup> Furthermore, local transportation plans must “avoid principal reliance on any one mode of transportation.”<sup>15</sup>

Despite these laudable goals, a Land Conservation and Development Commission (“LCDC”) study at the end of the 1980s found that, while urban growth boundaries had “done a good job of containing growth,” “the pattern of development within urban growth boundaries . . . was dominated by low-density subdivisions and highway oriented commercial development.”<sup>16</sup> Correspondingly, “[d]uring the 1980s, vehicle miles traveled per person—or per capita VMT—increased by about 50%.”<sup>17</sup> In response, the LCDC developed a Transportation Planning Rule (“TPR”) in 1989 to 1991.<sup>18</sup> The 1991 TPR<sup>19</sup> required Portland to adopt “land use and subdivision regulations” that “achieve[] a ten percent reduction in the number of parking spaces per capita . . . over the planning period.”<sup>20</sup>

12. Martha Bianco & Sy Adler, *The Politics of Implementation: The Corporatist Paradigm Applied to the Implementation of Oregon’s Statewide Transportation Planning Rule*, 21 J. PLAN. EDUC. & RES. 5, 6 (2001).

13. OR. ADMIN. R. 660-015-0000(12) (2008), available at [http://www.oregon.gov/lcd/docs/goals/compilation\\_of\\_statewide\\_planning\\_goals.pdf](http://www.oregon.gov/lcd/docs/goals/compilation_of_statewide_planning_goals.pdf) [<http://perma.cc/L7YG-DNQB>].

14. *Id.*

15. *Id.*

16. OREGON DEP’T OF LAND CONSERVATION & DEV., THE STATUS OF TRANSPORTATION PLANNING IN OREGON’S METROPOLITAN AREAS (2004), available at <http://www.oregon.gov/LCD/docs/lcdc/mporptatta.pdf> [<http://perma.cc/XKM8-SGXV>].

17. *Id.*

18. *Id.*

19. OR. ADMIN. R. 660-012-0045, available at [http://arcweb.sos.state.or.us/pages/rules/oars\\_600/oar\\_660/660\\_012.html](http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_012.html) [<http://perma.cc/99P3-7ZDH>].

20. OREGON DEP’T OF LAND CONSERVATION & DEV., OREGON’S STATEWIDE PLANNING GOALS & GUIDELINES, Goal 12: Transportation (2012), available at [http://www.oregon.gov/lcd/docs/goals/compilation\\_of\\_statewide\\_planning\\_goals.pdf](http://www.oregon.gov/lcd/docs/goals/compilation_of_statewide_planning_goals.pdf) [<http://perma.cc/L7YG-DNQB>].

## B. Portland Takes the Lead: 1991–2002

1991 also marked the enactment of Portland’s zoning code, Title 33.<sup>21</sup> Title 33 regulated, amongst many other things, minimum off-street parking requirements for new development. Two years after Title 33, in 1993, Portland published its Global Warming Reduction Strategy,<sup>22</sup> becoming the first city in the country to publish a climate action plan.<sup>23</sup> The Strategy called for a ten percent reduction in per capita vehicle miles traveled (“VMT”) by 2010—five years earlier than mandated by Oregon’s TPR.<sup>24</sup> Portland revised and greatly expanded the Strategy in 2001 when it issued its Local Action Plan on Global Warming. One policy of note in the Local Action Plan is Transportation, Telecommunication, and Access Objective 2: “Make the private cost of driving reflect the full cost to society.”<sup>25</sup>

Amendments to the zoning code in 2002 directly addressed the private and social costs of driving through the lens of parking. Typically, large multi-family residential development in Portland required, at a minimum, one parking space for every two dwelling units.<sup>26</sup> The 2002 amendment significantly relaxed these requirements for areas “well served by transit”: new buildings of 30 units or less, located on residentially zoned lots within 1500 feet of a transit station, or 500 feet of a transit street with 20-minute peak hour bus service, were no longer required to provide any off-site parking.<sup>27</sup> Similarly zoned and located buildings of 31 to 40 units, 41 to 50 units, and 51 or more units only had to provide 0.2, 0.25, and 0.33 spaces per unit, respectively.<sup>28</sup> Most importantly, minimum off-street

21. PORTLAND, OR. ZONING CODE § 33 (2013), available at [https://www.portlandonline.com/bps/title33\\_complete\\_print.pdf](https://www.portlandonline.com/bps/title33_complete_print.pdf) [<https://perma.cc/38ZL-VMUT>].

22. CITY OF PORTLAND, GLOBAL WARMING REDUCTION STRATEGY (1993), available at <http://www.portlandoregon.gov/bps/article/112110> [<http://perma.cc/7Z9X-P3NM>].

23. Michael Dotten, Portland, *Oregon Releases Aggressive Municipal Climate Plan* (December 2, 2009), <http://www.martenlaw.com/newsletter/20091202-portland-climate-plan> [<http://perma.cc/MG4X-LVMG>]; see CITY OF PORTLAND & MULTNOMAH COUNTY CLIMATE ACTION PLAN 2009, *supra* note 3, at 4.

24. See OREGON’S STATEWIDE PLANNING GOALS & GUIDELINES, *supra* note 20.

25. CITY OF PORTLAND & MULTNOMAH COUNTY, LOCAL ACTION PLAN: GLOBAL WARMING 23 (Apr. 2001), available at <http://www.portlandoregon.gov/bps/article/112115> [<http://perma.cc/U7CD-JN86>].

26. PORTLAND, OR. ZONING CODE § 33.266.110 “Table 266-2” (2013).

27. PORTLAND, OR. ZONING CODE § 33.266.110(D) (2013).

28. PORTLAND, OR. ZONING CODE § 33.266.110(D)(1)(b) (2013).

parking requirements were removed completely for new residential buildings of any size, so long as they were built on lots zoned for commercial use,<sup>29</sup> and close enough to transit stations or streets to qualify as “well served by transit” under the ordinance.<sup>30</sup> This relaxation of minimum off-street parking requirements certainly shifted the cost of parking, but seemed to do so in a direction contrary to that recommended in the 2001 Local Climate Action Plan, as the 2002 amendment reduced development and rental costs<sup>31</sup> while forcing neighbors to bear the social costs of street, and curb, congestion. As discussed below, conflict over developments permitted under the 2002 amendment’s “well served by public transit” exemption further tested the amendment’s cost-shifting regime.

### C. The 20-Minute Neighborhood: The 2009 Climate Action Plan and the 2012 Portland Plan

The interlocking policy goals of reduced car dependency, increased residential density, and low-emissions development led to the concept of the “20-minute complete”<sup>32</sup> neighborhood as the backbone of Portland’s land use directives. The 20-minute neighborhood first appeared in the City of Portland and Multnomah County Climate Action Plan (“CAP”) 2009,<sup>33</sup> and is also a core element of the Portland Plan of 2012.<sup>34</sup>

CAP created ambitious carbon emissions goals for Portland and Multnomah County over the next half-century: a 10% reduction below 1990 levels by 2010, a 40% reduction by 2030, and an 80% reduction by 2050.<sup>35</sup> Land use and transportation, christened “Urban Form and Mobility” play a vital role in this process, because, despite “a higher percentage of bicycle

29. PORTLAND, OR. ZONING CODE § 33.266.110(D)(2) (2013). The residential/commercial zoning system is cumulative, and thus a building zoned for ostensibly more intensive commercial uses may also be used for less intensive residential uses.

30. See *supra* note 27.

31. PORTLAND BUREAU OF PLANNING & SUSTAINABILITY, COST OF ONSITE PARKING + IMPACTS ON AFFORDABILITY (Nov. 2012), available at <https://www.portlandoregon.gov/bps/article/420062> [<http://perma.cc/PZP3-7926>].

32. See CITY OF PORTLAND & MULTNOMAH COUNTY CLIMATE ACTION PLAN 2009, *supra* note 3, at 38.

33. See *id.*

34. See Portland Plan Summary, *supra* note 4.

35. See CITY OF PORTLAND & MULTNOMAH COUNTY CLIMATE ACTION PLAN 2009, *supra* note 3.

commuters,” “no increase in emissions from transportation since 1990,” and impressive TriMet ridership, “transportation of goods and people accounts for 40 percent of Multnomah County carbon emissions.”<sup>36</sup>

From the standpoint of land use, CAP Objective 5 proposes the 20-minute neighborhood as a model for achieving the type of density and mobility necessary to achieve Portland’s ambitious emissions targets: by 2030, 90% of Portland residents will be able to “easily walk or bicycle to meet all basic daily, non-work needs and have safe pedestrian or bicycle access to transit.”<sup>37</sup> The 20-minute neighborhood is shorthand for the type of neighborhood envisioned in Objective 5. A 20-minute complete neighborhood includes grocery stores and other “neighborhood oriented commercial,” such as bars, restaurants, and drug stores, as well as transit stops, parks, and schools within  $\frac{1}{4}$ ,  $\frac{1}{2}$ , or full mile distances from residences.<sup>38</sup> Objective 6 shows the corollary to such neighborhoods: a 30% reduction in VMT per capita by 2030.<sup>39</sup>

The Portland Plan further develops, as it was required to by CAP,<sup>40</sup> the concept of the 20-minute neighborhood as a centerpiece of the city’s approach to reducing endogenous carbon emissions and building in resilience to a changing climate.<sup>41</sup> Under the umbrella of the Plan’s “Healthy Connected Cities” prong, the Portland Plan seeks to codify the Healthy Connected City, essentially a 20-minute complete neighborhood with an even richer local fabric, into the Comprehensive Plan.<sup>42</sup> Pursuant to its Healthy Connected Cities initiative, the Portland Plan articulates eleven separate goals under the rubric of Vibrant Neighborhoods Centers.<sup>43</sup> The timeline for developing a critical mass of such neighborhoods suggest a slight retreat from CAP’s ambition, but nevertheless evidences a strong commitment: 80% of

36. *See id.* at 38.

37. *See id.* at 39.

38. *See id.* at 40.

39. *See id.* at 42.

40. *See id.* at 39 (“Actions to be completed before 2012 . . . make 20-minute neighborhoods a core component of the Portland Plan.”).

41. *See* Portland Plan Summary, *supra* note 4.

42. *Id.*

43. *Id.* at 16.

Portland residents will live in a 20-minute complete neighborhood by 2035.<sup>44</sup>

### III. THE EXTENT OF INNER-PORTLAND RESIDENTIAL DEVELOPMENT WITHOUT OFF-STREET PARKING, AND ITS RELATIONSHIP TO CAR OWNERSHIP AND VMT

Empirical evidence shows that developers have readily availed themselves of the 2002 zoning amendments to build ever-larger residential buildings without off-street parking. The reason for this shift in development may be explained by economic modeling, commissioned by Portland's Bureau of Planning and Sustainability, which demonstrates that unbundling the cost of parking from the cost of development can reduce apartment unit rental prices by as much as fifty percent while maintaining developer ROI. Studies aimed at establishing a nexus between residency in such buildings, lower rates of car ownership, and decreased VMT have been less conclusive, however.

#### A. Extent of Development

Until 2006, developers, surprisingly, did not take advantage of the relaxed minimum parking requirements. From 2006–2012, however, 55 apartment buildings without off-street parking, comprising 1,270 units, were permitted.<sup>45</sup> A year-on-year breakdown of these numbers reveals a trend towards development without off-street parking. Between 2006 and the collapse of the housing market in 2008, of 78 the building permits issued in zones without minimum parking requirements, only 26 were for buildings with no parking.<sup>46</sup> These numbers have now reversed: from 2010–2012, 42 multi-family developments were permitted in areas “well served by transit,” only 29 of which do not have off-street parking.<sup>47</sup> Also of note, the average size of multi-family developments without off-street parking increased over this period, from an average

44. *Id.* at 24.

45. PORTLAND BUREAU OF PLANNING & SUSTAINABILITY, MINIMUM PARKING REQUIREMENTS FOR MULTI-FAMILY BUILDINGS 7, 8 (2012), available at <https://www.portlandoregon.gov/bps/article/420058> [<https://perma.cc/EZG7-RAGH>].

46. *Id.*

47. *Id.*



of 26 dwelling units per development in 2010 to an average of 35 in 2012.<sup>48</sup>

The degree to which an eliminated or reduced off-street parking requirement can incentivize new development should not be underestimated. A Portland Bureau of Planning and Sustainability (“BPS”) study compared the cost of no off-street parking to five forms of off-street parking using an “Envision Tomorrow Prototype Builder & Return on Investment (ROI) Model.”<sup>49</sup> The model used, as a baseline, a hypothetical 10,000 square foot building with 50 dwelling units, no off-street parking, and a monthly per-unit rental price of \$800–1150 at a developer ROI of 7–10%. Adding 19 surface parking spaces would reduce the number of units to 30 while pushing unit rents into the \$1200–1800 range in order to achieve a 7–10% developer ROI. Underground parking conserved more dwelling units, but at a higher cost: 33 underground parking spaces would allow the project to retain 44 dwelling units, but the average rental value of each unit would range from \$1300–1900 at a 7–10% developer ROI.<sup>50</sup>

The Envision study may, if anything, understate the costs of parking. The monthly rent calculations in the table above spread the cost of the parking amongst all apartments in the building. A more likely scenario is that, while some of the cost may be “baked-in” to all units, a price disparity will emerge between the units with and without assigned parking spaces. While this distribution would preserve some units in a more affordable state than the model indicates, it will also significantly increase the rental price of any unit with assigned parking.

## B. Impact on Car Ownership and VMT

Lessening off-street parking requirements eases both sides of the reciprocal relationship between public transit and residential density. Public transit is a pricey public good that, even with heavy use, often relies on tax dollars to make up budget shortfalls.<sup>51</sup> An “if you build it, they will come”

48. *Id.*

49. See COST OF ONSITE PARKING + IMPACTS ON AFFORDABILITY, *supra* note 31.

50. *Id.*

51. Alex Goldmark, *NY MTA: Suburban Passengers Get \$7 Subsidy Per Ride, Subway Riders, A Buck*, TRANSP. NATION (Aug. 23, 2012, 7:16 PM), <http://www.wnyc>.

approach to public transit is rarely economically or politically feasible. Policies that encourage infill building at high densities around existing transportation networks help cities maximize their public transit infrastructure. When the same policy incentivizes new development around expanding transit networks, the economic and political calculus behind these investments becomes more favorable.

The relationship between residency in no-parking buildings and VMT is tougher to quantify. A study commissioned by the city of Portland Bureau of Sustainability found no statistically significant difference in car ownership between residents of buildings, located along transit corridors, with and without parking.<sup>52</sup> While the 116 respondents are almost certainly too small of a sample size to prove anything conclusive, at first glance the no-parking buildings do not seem to reduce car ownership any more than do the buildings with parking. More encouraging is the study's finding that sixty-four percent of surveyed residents commute to work via means other than a single-occupancy vehicle.

Other studies have found that VMT and the cost of car ownership are inversely related.<sup>53</sup> Taking this relationship as causal, the immediate conclusion is that the 2002 amendments will increase VMT, because they have lowered the price of car ownership by "unbundling" parking from rental prices. Monetary costs, while the easiest to measure, are not the only costs involved. If an increase in neighborhood density makes the process of finding a curbside parking space sufficiently aggravating, perhaps residents will drive less. On a more positive note, increasing residential density may decrease VMT because a higher level of density can support a thicker patchwork of commercial establishments. Under this premise, the reduced parking requirements would have a desirable

[org/story/283927-mta-suburban-passengers-get-7-per-ride-subway-riders-a-buck/](http://story/283927-mta-suburban-passengers-get-7-per-ride-subway-riders-a-buck/)  
[<http://perma.cc/RW9L-7AC3>].

52. PORTLAND BUREAU OF PLANNING & SUSTAINABILITY, CITY OF PORTLAND PARKING IMPACTS FOR NEW TOD ALONG PORTLAND INNER CORRIDORS: PARKING STUDY (Nov. 2012), *available at* <https://www.portlandoregon.gov/bps/article/420059> [<https://perma.cc/A3WS-4ZHM>].

53. *See* SHOUP, *supra* note 6, at 569–70. One cited study concluded that a 10% increase in car ownership costs reduced VMT by 6.8% in the Netherlands and 4.8% in Norway. Another cited study, conducted by the American Automobile Association, found that VMT decreases by half of the percentage increase in car ownership costs. *Id.*

effect on VMT, because they would lay down the type of residential density that can help make neighborhood-oriented businesses profitable. The ability to support neighborhood amenities in greater number may also divert neighbors, living on adjacent side streets in single family residences, from car use, by, for example, choosing to have dinner at the restaurant a few blocks away rather than at the one across town.

#### IV. THE RIGHT TO PARK

New residential construction along rapidly developing corridors such as SE Division and N Mississippi galvanized resistance on many fronts, as concerns over gentrification, affordable housing, local aesthetics, and traffic coalesce around an emerging physical structure.<sup>54</sup> An eighty-one-unit apartment building, the largest development without off-street parking in the city, at the intersection of SE Division and SE 37<sup>th</sup> street, became a lightning rod for residents' grievances.<sup>55</sup>

A recurring concern is that such development exerts undesirable pressure on the availability of nearby curbside parking. This ostensibly neutral concern about parking availability tends to function as a discursive vehicle through which established residents can assert a property interest in curbside space, at the expense of newcomers. This assertion poses three corollary questions. First, does the elimination of off-street parking requirements subsidize new development at the cost of established residents' comfort, or does the elimination merely put an end to developers and tenants being forced to subsidize established residents' easy access to the curb? Second, should Portland continue to operate the curb as a commons, or should it somehow privatize curbside parking? Third, if Portland does privatize the curbside, should the right to park "run with the land," or be unbundled from neighborhood home ownership?

54. Colin Staub, *SE Developments "Green" or Greedy?*, PORTLAND SPECTATOR (Oct. 2013) <http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1051&context=spectator> [http://perma.cc/V956-6NSH].

55. Elliot Njus, *Portland City Council Approves Minimum Parking Requirement for Large Apartment Buildings*, OREGONLIVE (April 10, 2013, 6:26 PM) [http://www.oregonlive.com/front-porch/index.ssf/2013/04/portland\\_city\\_council\\_approves.html](http://www.oregonlive.com/front-porch/index.ssf/2013/04/portland_city_council_approves.html) [http://perma.cc/YJ2V-C2ZK].

### A. Trespass and Nuisance

A December 13, 2012 memorandum from the BPS chief planner to then-mayor Sam Adams outlined a number of citizen concerns regarding “parking impacts,” including the “loss of on-street parking for residents” and lessened “street appeal” leading to a decline in property values.<sup>56</sup> These sentiments express, in informal and emotionally charged terms, the notion that residents have, or should have, a property interest in curbside parking space in their neighborhoods. The fear of loss sounds in trespass and echoes the right to exclude, while concerns over deteriorating property values evoke nuisance. A month prior to the memorandum, during the BPS public meeting, residents took issue with developers’ avoiding the cost of constructing off-street parking.<sup>57</sup> The underlying complaint, particularly in the context of an appeal to local authorities, is that the minimum parking rules have shifted the costs of tenants’ parking from the developers to the neighbors, or, conversely, the “free parking” entitlement from the neighbors to the developer.

### B. Socialization and Subsidy

Fundamentally, the residents assert that the 2002 amendment socializes, rather than privatizes, the cost of car ownership. The BPS study, discussed above, lends some credence to the residents’ argument: developers can build more cheaply in the absence of off-street parking requirements.<sup>58</sup> Freeing developers and tenants from these monetary costs imposes congestion costs on the neighbors. However, depicting this shift as an unjust, counterproductive socialization of costs requires leaving undisturbed a crucial assumption: that the neighbors themselves, merely by virtue of owning or renting a home in a neighborhood, are entitled to park on nearby streets.

This assumption is by no means axiomatic; there is no divine right to park. Ultimately, these residents were able to park easily, and free of charge, on public streets because minimum off-street parking requirements forced developers to build

56. MINIMUM PARKING REQUIREMENTS FOR MULTI-FAMILY BUILDINGS, *supra* note 45, at 5.

57. *See* Staub, *supra* note 54.

58. *See* COST OF ONSITE PARKING + IMPACTS ON AFFORDABILITY, *supra* note 31.

private parking lots. Arguably, developers, and their tenants, have been subsidizing curbside parkers all along.

### C. The Curbside Commons

The December 2012 memorandum also noted that there are “[n]o real incentives for people not to have cars.”<sup>59</sup> Presumably, these residents were referring to the lack of incentives for tenants of the buildings in question not to have cars, because it is unlikely that the residents actually wanted the city government to make it even harder for *them* to drive and park. One wonders, nevertheless, about what type of incentives the commenter had in mind. The main incentive not to have a car in particular neighborhoods, holding constant general maintenance costs, is the hassle of parking it on the street and the price of off-street parking. If congestion is insufficient to generate this hassle, then perhaps the residents’ complaints were premature. This, in fact, was the finding of the BPS study.<sup>60</sup>

The question of incentives, however, correctly frames Portland’s apparent attitude towards parking in increasingly dense neighborhoods. On-street parking is a limited resource. In most American jurisdictions, city planners force developers to build an excessive number of off-street parking spaces,<sup>61</sup> thereby subsidizing “free” on-street parking by creating sufficient off-street supply. Portland has taken measures to terminate this subsidy, but has seemingly hoped that demand will take care of itself as neighborhoods densify beyond the vehicular carrying capacity of their streets. It seems as if Portland city officials are deliberately instigating a tragedy of the curbside commons.

In response to this tragedy, real or perceived, Donald Shoup, a professor of urban planning at UCLA and possibly the leading academic studying the role of parking in transit-oriented development, published an opinion piece in the *Oregonian*<sup>62</sup> proposing a residential overnight permitting

59. MINIMUM PARKING REQUIREMENTS FOR MULTI-FAMILY BUILDINGS, *supra* note 45, at 5.

60. See COST OF ONSITE PARKING + IMPACTS ON AFFORDABILITY, *supra* note 31.

61. See SHOUP, THE HIGH COST OF FREE PARKING, *supra* note 6, at 19–65.

62. Donald Shoup, *Portland Should Consider Overnight Parking Permits to Solve Its Parking Headache*, OREGONLIVE (Jan. 5, 2013, 5:05 AM) <http://www.oregonlive.com/>

scheme to allocate curbside space. Under Shoup's proposal, residents, on a block-by-block basis, could elect to require permits for overnight parking on their block. Residents would be charged a nominal fee for these permits, such as the fifteen dollar per year Los Angeles charges in a similar scheme.<sup>63</sup> If space allows, nonresident permits could be sold at the market rate, with the revenue from those sales earmarked for improvements on that block.<sup>64</sup> Most importantly, tenants in apartment buildings without off-street parking would be ineligible for these permits.<sup>65</sup>

Although couched in the discourse of free-market economics, Shoup's proposal in effect merely reinstates the homeowner subsidy that Portland city government, pursuant to the 2001 directive to privatize rather than socialize the costs of driving,<sup>66</sup> has worked to remove. Shoup's proposal, as a Portland Bureau of Transportation ("PBOT") response brief points out, privatizes the "right-of-way" by granting residents the right to exclude newcomers from the curb.<sup>67</sup> This is a "dangerous precedent to set."<sup>68</sup> Moreover, because homeowners are generally "wealthier and whiter" than renters, the subsidy is ostensibly regressive and lacks "equitable justification."<sup>69</sup>

From the standpoint of putting an end to inequitable curbside subsidies, instituting a nominally priced residential permit program may be worse than simply waiting for driving and parking to become impracticable. However, there are other, bolder, ways to permit. As Shoup has argued elsewhere, Portland could institute a "cap-and-trade" permitting system.<sup>70</sup> City planners could calculate the number of parking spaces available in a neighborhood, and place these permits up for

[opinion/index.ssf/2013/01/portland\\_should\\_consider\\_overn.html](http://perma.cc/C2B8-XJP8) [<http://perma.cc/C2B8-XJP8>].

63. *Id.*

64. *Id.*

65. *Id.*

66. See LOCAL ACTION PLAN: GLOBAL WARMING, *supra* note 25.

67. Sara Schooley, *PBOT Staff Response to Dr. Shoup's Editorial on Overnight Parking Permits* (March 1, 2013) <https://www.portlandoregon.gov/bps/article/445151> [<https://perma.cc/KSG5-F2TV>].

68. *Id.*

69. *Id.*

70. SHOUP, THE HIGH COST OF FREE PARKING, *supra* note 6, at 450 ("The simplest way to convert a parking permit district into a parking benefit district is to sell a limited number of daytime permits to nonresidents. This policy resembles the cap-and-trade approach to protecting the environment.").

auction. Unlike the permits in Shoup's proposal, which "run with the land," these permits would be freely transferable. Per-person limits could counter hoarding and speculation. Of course, the wealthier homeowners could wield their superior purchasing power to outbid the presumably poorer newcomers.<sup>71</sup> On the other hand, most of these homeowners have garages and driveways, so their incentive to pay market rates for curbside space would presumably be lower than that of renters whose dwellings do not have off-street parking so conveniently attached. Unbundling the cost of parking from the cost of housing is an important step in correcting the type of market failures that Portland currently faces.<sup>72</sup>

## V. CONCLUSION

A final challenge, from the perspective of low-carbon, high-density urban planning, is to separate residents' legitimate concern from purely parochial complaints. NIMBYism is never pretty nor productive, but the prospect of largely politically progressive<sup>73</sup> Portlanders (nearly all of whom accept climate change as scientific fact) challenging higher residential densities because of inconveniences to their car-based lifestyle rings particularly hollow. The transition to a low-emissions, resilient city, as outlined in CAP, will require all Portlanders to make certain adjustments.

City planners, however, need to do more to smooth this transition. After several BPS studies and months of public hearings, the City Council, in April of 2013, extended the existing 2002 tiered system to all buildings employed in "household use," regardless of whether they were zoned residentially or commercially.<sup>74</sup> Essentially, the Council downzoned commercially zoned property to comply with the residentially-zoned minimum parking requirements,<sup>75</sup> although

71. PBOT's assumption that homeowners are wealthier than renters may be true generally, but is not a foregone conclusion in the context of the large developments at issue here, which are market-rate and widely viewed as instruments of gentrification.

72. See SHOUP, *THE HIGH COST OF FREE PARKING*, *supra* note 6, at 559–78.

73. Drew Desilver, *Chart of the Week: The Most Liberal and Conservative Big Cities*, PEW RESEARCH CENTER (August 8, 2014), <http://www.pewresearch.org/fact-tank/2014/08/08/chart-of-the-week-the-most-liberal-and-conservative-big-cities/> [http://perma.cc/P8LW-TP3C].

74. *Id.*

75. PORTLAND, OR. ZONING CODE § 33.266.110, *supra* note 33.

developers can “buy down” up to fifty percent of their parking requirements by constructing, among other things, more bike parking.<sup>76</sup>

This compromise between developers, neighborhood newcomers, and established neighborhood, although less conducive to density than the 2002 amendments, is unlikely to seriously disrupt progress towards the CAP and Portland Plan 20-minute neighborhood goals. It fails, however, to address the deeper issues about curbside entitlements. Hopefully, BPS, the Portland Sustainability Commission, and the City Council will begin to develop a more comprehensive approach to parking which includes answers to the pressing question of who is entitled to curbside parking rights. Only once that question is resolved can city planners begin developing a mechanism for the use and transfer of those rights.

Parking a few blocks further from home, or merely tolerating increased vehicular traffic on side streets adjacent to burgeoning dining and entertainment corridors, seems a small price to pay for sustainable growth. On the other hand, Portland natives understand that the city’s appeal transcends microbrews, Stumptown Coffee, and naked bike rides: the best way to “keep Portland weird” is through resident activism and local democracy. A policy, however well intentioned, that residents perceive as a nuisance or a windfall to deep-pocketed developers has little chance of success. Adjusting to a low-carbon, reduced VMT future will remain a contentious process, even in progressive Portland.

76. PORTLAND, OR. ZONING CODE § 33.266.110(E) (2013).