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# FORM OVER USE: FORM-BASED CODES AND THE CHALLENGE OF EXISTING DEVELOPMENT

*Katherine A. Woodward\**

## INTRODUCTION

My grandmother spent most of her adult life in Brownsburg, Indiana, a suburb of Indianapolis. When she first moved there in the 1950s, it was a traditional American small town. There was one stoplight at the corner of Main and Green Streets, with a two-block downtown area featuring a bank, a mom and pop drug store with a soda fountain, a movie theater, a restaurant, a bar, and a café. Just a few minutes' walk down the sidewalk was the public library. The owners of these downtown businesses lived above their stores in apartments. My grandparents' first house was on O'Dell Street, a residential, tree-lined street within walking distance of the downtown area. Everyone knew everyone, and my mother complained that she couldn't go to the drug store without her parents hearing about it from nosy neighbors.

Over the years, however, more and more cars began crowding the narrow streets, and a one-stoplight town became two, then four. My grandparents moved to a house a mile outside of town, surrounded by cornfields, to get away from the traffic and noise. Eventually, the buildings at Main and Green were razed to make room for expanding streets, and the library was moved to the far end of town. In their place, large shopping centers with huge parking lots were built. No one walked on the sidewalks anymore because everyone needed a car to get where they wanted to be in a practical amount of time. The town began to sprawl out in cookie cutter subdivisions, office parks, and strip malls. For most of my childhood, my grandmother complained about all the "new folks in their ugly houses" and the "endless construction" in town, but was mostly immune to these changes in her little house amidst the cornfields. Then, a farmer nearby sold his lot to a devel-

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oper who would build another subdivision, and another farmer across the street sold his lot to a church. Sprawl had finally come to her backyard.

Today, on the corner of Main and Green Streets, there is a CVS on one side with a large, and usually empty, parking lot, and a bank on the other with an equally large, empty parking lot. In fact, in Brownsburg's new proposed zoning ordinance, over eleven pages are dedicated to parking standards and requirements alone.<sup>1</sup> The town is dominated by big box retail stores, fast food restaurant chains, and large thoroughfares allowing residents to travel in their cars from home, to work, to school, and to shop. In fact, they cannot get to any of these locations without traveling in their car.

The reason Brownsburg has transformed from the cohesive, community-oriented small town it used to be to the sprawling, commercial, unremarkable place it is now is conventional, or Euclidean, zoning ordinances. By mandating single-use zones, such as residential, commercial, and office, and creating stringent setback, parking, and low-density requirements, conventional zoning incentivizes towns to spread indefinitely, often without a comprehensive plan in mind.<sup>2</sup> This spread then requires amply wide roads to accommodate the amount of resulting traffic, which is unsafe for pedestrians—and daily needs are usually so far away that they are not walkable at any rate—thus, a car-centric, rather than pedestrian-centric, culture results.<sup>3</sup>

If my grandmother were around to see Brownsburg today, she would probably say she liked it better the way it was in the 1950s. And the New Urbanists, proponents of the new zoning alternative called form-based codes, would agree with her. The New Urbanism movement grew “out of widespread dissatisfaction with suburban sprawl,” and advocates high density, mixed-use development in place of conventional zoning's low density, single-use pattern.<sup>4</sup> The choice, as New Urbanists see it, is between “either a society of homogenous pieces, isolated from one another in often fortified enclaves, or a society of diverse and memorable neighborhoods, organized into mutually supportive towns, cities, and regions.”<sup>5</sup> Their goal is to create pedestrian-friendly communities that mix commercial, residential, and office uses, locating daily needs within a reasonable walking distance and making dependence on automobiles a thing of the past.<sup>6</sup>

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1 TOWN OF BROWNSBURG PLANNING DEP'T, ZONING ORDINANCE DRAFT F § 5.57 (2012), available at [http://www.brownsburg.org/egov/docs/1351174199\\_886230.pdf](http://www.brownsburg.org/egov/docs/1351174199_886230.pdf) [hereinafter BROWNSBURG ZONING ORDINANCE].

2 See Richard S. Geller, *The Legality of Form-Based Zoning Codes*, 26 J. LAND USE & ENVTL. L. 35, 38 (2010).

3 See *id.*; see also Nate Berg, *Brave New Codes*, ARCHITECT, July 2010, at 50, 52, available at <http://www.architectmagazine.com/codes-and-standards/brave-new-codes.aspx>.

4 Geller, *supra* note 2, at 37.

5 ANDRES DUANY ET AL., *SUBURBAN NATION* 23 (2010).

6 Geller, *supra* note 2, at 39; see also Andres Duany & Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 *FORDHAM URB. L.J.* 1445, 1447 (2002) (“They have addressed the need for compact, walkable urban areas with mixed uses that re-invigorate the public realm; lesson reliance on auto use; enable public transit; and socially, culturally and economically integrate regions.”).

In essence, New Urbanists want to recreate the traditional American city and town—the Brownsburg of the 1950s.<sup>7</sup> Form-based codes attempt to produce this result by “controlling physical form, with a lesser focus on land use, through city or county regulations.”<sup>8</sup> The primary focus of form-based codes is the design of buildings, rather than their use. Planners using form-based codes are focused on creating a space that is aesthetically pleasing and friendly to pedestrians, designed in accordance with a comprehensive plan including public spaces, tree-lined streets, and narrow roads.<sup>9</sup>

Proponents of form-based codes are enthusiastic and argue that their benefits are almost innumerable. The words of husband and wife team Daniel and Karen Parolek provide a rosy picture:

[C]ity planners are excited to have a regulatory framework that has a clear intent and is easy to understand and administer; developers and builders are enthusiastic about having clear direction from the new regulations and often a streamlined approval process; and residents and elected officials are delighted to see development creating quality places that build upon the unique characteristics of their communities.<sup>10</sup>

Despite this excitement, conventional zoning is firmly entrenched in the existing development of American towns and cities, and a move to form-based codes on a broad scale is not easily achieved.

This Note will argue that form-based codes can better serve the original purposes for which zoning ordinances were created in areas of new development. Form-based codes can create towns that more efficiently control traffic, promote public health and sense of community, and make transportation, public goods, schools, and parks more readily available to residents, just as traditional towns once did. Recreating the traditional town in a nation dominated by suburban sprawl, however, is not an easy task, nor can it be accomplished overnight. Communities that have already been shaped by conventional zoning will find it difficult to convert to a new form-based code regime due to existing use-based permits and regulatory controls, in addition to likely resistance from developers and residents who are used to conventional zoning’s approval procedures. Areas of new development provide a blank slate for form-based codes to populate, and will prove a useful tool for creating new communities. Form-based codes cannot be implemented on a wide scale, however, while the effects of conventional zoning—such as big box retail, exclusive automobile usage, wide streets with high-speed traffic, and large subdivisions—remain so deeply embedded in our national fabric. Therefore, the most favorable compromise is to allow form-

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7 See Emily Talen, *Design by the Rules: The Historical Underpinnings of Form-Based Codes*, 75 J. AM. PLAN. ASS’N 144, 158 (2009) (noting that form-based codes “emulate” the “uniform frontage, small blocks and lots, pedestrian orientation, and emphasis on the public realm” that characterized pre-twentieth century urban centers); *infra* notes 86–95 and accompanying text (discussing the historical underpinnings of form-based codes).

8 DANIEL G. PAROLEK ET AL., FORM-BASED CODES 4 (2008).

9 Duany & Talen, *supra* note 6, at 1447.

10 PAROLEK ET AL., *supra* note 8, at 4–5.

based codes to be implemented gradually in areas of new development, while retaining a form of conventional zoning for those areas that have already been fully developed according to that regulatory scheme. When new development is planned in those areas, a phase-out of sorts can begin whereby the planning commission can either grant a variance or special exception for the planned development area and implement a form-based code regime in that area, or the area can simply be removed from the zoning map and developed accordingly.

Part I of this Note will describe the development and purposes of conventional, or Euclidean, zoning, and will then discuss the myriad of problems created by it—most notably, urban sprawl. Part II will survey the response of New Urbanists to conventional zoning, and present the idea of the Transect and the details of the structure and implementation of form-based codes. Part III will explain how, despite their imperfections and criticisms, form-based codes can better carry out the original purposes of conventional zoning, but will likely be limited only to areas of new development. Part IV will conclude.

## I. CONVENTIONAL ZONING AND ITS DISCONTENTS

### A. *The Advent of Zoning*

Conventional zoning, which “regulate[s] land based on how a landowner uses a particular piece of land,”<sup>11</sup> originated as an effort to remedy the dismal conditions of cities in the late nineteenth century.<sup>12</sup> Before zoning, the only tools local governments had available to them to protect the health, safety, and welfare of citizens were nuisance laws and building codes.<sup>13</sup> The first comprehensive zoning code was adopted in New York City in 1916.<sup>14</sup> This new code “categorized land uses, created districts appropriate for those categorized uses, and then transposed the districts, or zones, onto a map of

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11 Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637, 639 (2006).

12 See Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVTL. L. 395, 397 (2008) (describing the “deplorable living conditions” in cities during the Industrial Revolution, and noting that “the primary goal of zoning was to separate noxious uses—such as slaughterhouses, tanneries, and other nuisances—from residential or commercial areas”).

13 Emerson, *supra* note 11, at 649; see also JULIAN CONRAD JUERGENSEMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 44 (2d ed. 2003) [hereinafter *LAND USE PLANNING*].

14 *LAND USE PLANNING*, *supra* note 13, at 44.

the city.”<sup>15</sup> It also included height and bulk controls for buildings within the various zones.<sup>16</sup>

One of the aims of the first zoning ordinances was to separate factories from residential areas,<sup>17</sup> which resulted in increased life expectancies and significantly cleaner cities.<sup>18</sup> Emboldened by their success in this regard, planners began separating more than simply “incompatible” land uses from the rest; they implemented a “near universal segregation of each primary land-use type from others,” creating cities that had separate areas for residential, commercial, and industrial uses.<sup>19</sup> Many local governments went still further, separating single-family homes from multi-family (apartment) housing.<sup>20</sup>

The constitutionality of this practice was addressed in *Village of Euclid v. Ambler Realty Co.*,<sup>21</sup> when the Supreme Court considered a challenge to an early zoning ordinance alleging that its limitation on uses substantially reduced the value of the plaintiff’s property, amounting to a deprivation of property without due process. After holding that the ordinance was a valid exercise of the Village’s police power because it had a substantial interest in protecting the public from the harmful effects of industrial sites,<sup>22</sup> the Court addressed what it felt was the real issue: “the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.”<sup>23</sup>

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15 Emerson, *supra* note 11, at 650. Jan Krasnowiecki, however, has argued that the purpose of New York City’s zoning code was only to keep encroaching sweatshops out of the high-end Fifth Avenue shopping and residential district; that “New Yorkers were concerned with the problem of how to *prevent change in a fully developed community*, not with how to control the development of a new community.” Jan Z. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719, 723 (1980) (emphasis in original). Thus, Krasnowiecki argues, the code was not concerned with how *new* development would take shape, but rather how *existing* development could maintain its character, making it an unworkable method for planning new communities. *Id.* at 720, 724.

16 LAND USE PLANNING, *supra* note 13, at 44.

17 Emerson, *supra* note 11, at 651.

18 DUANY ET AL., *supra* note 5, at 32–33; *see also* Talen, *supra* note 7, at 153 (“Zoning was designed to remedy the negative externalities of the industrial city, stabilizing residential property values while keeping industrial areas efficient and functional.”).

19 PAROLEK ET AL., *supra* note 8, at 6.

20 LAND USE PLANNING, *supra* note 13, at 77–78 (noting that preserving single-family exclusive zones “has been, and remains in many communities, the goal of zoning”). The Supreme Court in *Euclid* seemed to agree with the view that exclusive single-family home zones were necessary to maintain the residential character of a neighborhood. *See infra* notes 26–27 and accompanying text.

21 272 U.S. 365 (1926).

22 *Id.* at 389.

23 *Id.* at 390.

In a move that would shape the course of land use planning for the remainder of the twentieth century,<sup>24</sup> the Court decided that segregation of residential, business, and industrial uses bore “a rational relation to the health and safety of the community” because it protected children from increased traffic and health hazards, made firefighting easier, and prevented the “disorder” that accompanied commercial and industrial areas from infiltrating residential ones.<sup>25</sup> Within residential areas themselves, the Court found that separating single-family homes from apartment housing was also warranted because “very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.”<sup>26</sup> Once several apartment complexes were built in a residential area, the Court concluded, they became a nuisance, and “the residential character of the neighborhood and its desirability as a place of detached residences [were] utterly destroyed.”<sup>27</sup>

Though the Court did not give a rousing endorsement to the ordinance, noting that the justifications given for it were merely “sufficiently cogent to preclude us from saying . . . that such provisions are clearly arbitrary and unreasonable,”<sup>28</sup> the opinion was interpreted as a broad seal of approval for the implementation of what came to be known as “Euclidean” zoning.<sup>29</sup> It is important to note here that in cautiously approving the implementation of use-based zoning, the Court explicitly provided that this method of planning was to be “determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.”<sup>30</sup> Thus, it is clear that the Court anticipated that zoning would provide a way to maintain the character of an already-established community. Indeed, there is evidence that Euclid’s own zoning ordinance was designed merely “to protect existing land use patterns and

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24 See LAND USE PLANNING, *supra* note 13, at 44 (“After the *Euclid* decision, so-called Euclidean or use zoning swept the country. . . . [T]he landscape was divided into a geometric pattern of use districts.”).

25 *Euclid*, 272 U.S. at 391.

26 *Id.* at 394.

27 *Id.* Some authors note that the reasoning behind this part of the Court’s opinion was influenced by the perception at the time that apartment housing was “substandard and undesirable.” PAROLEK ET AL., *supra* note 8, at 7. Others have suggested that there were uglier forces at work—that “[z]oning rules, like many of the other moral reforms of the late nineteenth and early twentieth centuries, were designed to significantly reduce the likelihood that middle- and upper-class children would come into contact with poor, immigrant, or black culture.” Richard H. Chused, *Euclid’s Historical Imagery*, 51 CASE. W. RES. L. REV. 597, 613 (2001). Chused argues that the Court was able to approve of zoning’s “overt licensing of segregation by class” by describing apartment housing, rather than its residents, as a nuisance. *Id.* at 614–15.

28 *Euclid*, 272 U.S. at 395.

29 PAROLEK ET AL., *supra* note 8, at 6–7; see also LAND USE PLANNING, *supra* note 13, at 46 (“[I]t was the deferential review of *Euclid* . . . that created the climate that allowed comprehensive zoning to flourish.”).

30 *Euclid*, 272 U.S. at 388.

property values.”<sup>31</sup> The Court’s opinion did not discuss how such restrictions would work when applied to new development.<sup>32</sup> However, cities and towns across the nation immediately began creating single-family residential, commercial, office, and industrial zones, with low-density requirements, minimum lot sizes, and large thoroughfares connecting all of the elements.<sup>33</sup> Euclidean zoning, while originally intended for existing communities, became the norm for new development in the mid to latter half of the twentieth century.<sup>34</sup>

The popularity of Euclidean zoning was encouraged by the creation of the Standard State Zoning Enabling Act (SSZEA).<sup>35</sup> Developed by the Department of Commerce, the SSZEA was a model statute for states to use in drafting zoning-enabling laws, based in large part on the 1916 New York City zoning code.<sup>36</sup> The SSZEA both “expressly and implicitly encouraged a single use regulatory system,”<sup>37</sup> in that section one allowed local governments to regulate “the location *and use* of buildings, structures, and land for trade, industry, residence, or other purposes,”<sup>38</sup> while section two provided for the creation of districts that corresponded to each type of use.<sup>39</sup> Neither section provided for the possibility of mixing uses within districts.<sup>40</sup> Section three stated that the purpose of zoning was:

to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.<sup>41</sup>

After its publication in 1924, the SSZEA became very influential, and all fifty states eventually adopted it in some form.<sup>42</sup> The reason for its popularity is evident: local governments desired to achieve the goals articulated by

31 Chused, *supra* note 27, at 603.

32 See *infra* Part II (discussing conventional zoning’s inability to create unique new communities).

33 John M. Barry, Note, *Form-Based Codes: Measured Success Through Both Mandatory and Optional Implementation*, 41 CONN. L. REV. 305, 310 (2008); see also Duany & Talen, *supra* note 6, at 1451 (describing these developments).

34 LAND USE PLANNING, *supra* note 13, at 44.

35 U.S. DEP’T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (1926), available at <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf> [hereinafter STANDARD STATE ZONING ENABLING ACT].

36 Emerson, *supra* note 11, at 653. Herbert Hoover, then Secretary of Commerce, appointed Edward M. Bassett, a lawyer who had chaired the New York City committee that developed the 1916 code, to be the primary drafter of the SSZEA—thereby assuring that the New York code would become the model for all of America. *Id.*

37 *Id.* at 652.

38 STANDARD STATE ZONING ENABLING ACT, *supra* note 35, § 1 (emphasis added).

39 *Id.* § 2.

40 Emerson, *supra* note 11, at 653.

41 STANDARD STATE ZONING ENABLING ACT, *supra* note 35, § 3.

42 LAND USE PLANNING, *supra* note 13, at 47–48.



section three of the SSZEA, including promoting the health, safety, and welfare of their citizens by reducing fire hazards and providing more open light and air, and the SSZEA provided a standardized, Department of Commerce-approved method of doing so.<sup>43</sup> Indeed, when viewed in the context of the deplorable conditions existing in most cities in the late nineteenth and early twentieth centuries,<sup>44</sup> single-use zoning was “a logical response to . . . [the] problems of that time.”<sup>45</sup> Today, zoning remains the dominant method of land planning in the United States.<sup>46</sup>

### B. Problems Created by Zoning

Despite zoning’s early successes, the past few decades have made clear that strict land use separation is both outdated and inefficient. Technological advances such as modern sewer systems and fire prevention techniques have made the primary reasons for zoning (i.e., stagnant water and sewage in the streets, frequent fires, and other health hazards) largely irrelevant.<sup>47</sup> In fact, justifications for single-use zoning such as preserving residential neighborhoods as a safe place for children, and providing an easier route for firefighters to reach residential areas, are now outdated by the changes zoning itself has created. In regards to the safety of children, subdivisions are frequent targets for burglaries and other crimes, and even roads in residential areas are often wide enough for four lanes of traffic with high speed limits, creating great danger to children and other pedestrians.<sup>48</sup> Similarly, firefighting has not been made easier because of single-use zoning, as communities are now much more spread out with disconnected road networks, making it more difficult and time consuming for firefighters to reach their destination.<sup>49</sup> Zoning itself has wrought fundamental changes in our communities, and although all fifty states did adopt the SSZEA in some form, many have since criticized it as antiquated and have called for major changes.<sup>50</sup>

Another problem with conventional zoning ordinances is that they are inefficient because they are both long and complicated—so much so that “even the most highly trained planner, urban designer, or developer often

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43 Emerson, *supra* note 11, at 654.

44 See LAND USE PLANNING, *supra* note 13, at 18 (describing the typical 19th century American city as “characterized by filth, stench and stagnant water in the streets” and noting that “deadly diseases such as yellow fever, cholera, typhoid, typhus, scarlet fever and diphtheria were commonplace”); see also Garvin & Jourdan, *supra* note 12, at 397 (describing those poor conditions).

45 Emerson, *supra* note 11, at 654.

46 See LAND USE PLANNING, *supra* note 13, at 43.

47 Emerson, *supra* note 11, at 654.

48 Geller, *supra* note 2, at 64.

49 *Id.*

50 LAND USE PLANNING, *supra* note 13, at 48; see also PAROLEK ET AL., *supra* note 8, at 9 (“[M]any communities remain dissatisfied with the character and quality of the places that conventional zoning has fostered (or as often, their *lack* of character and quality).”).

struggles to ascribe meaning to the principles embedded in these codes.”<sup>51</sup> For example, the zoning ordinance in the town of Brownsburg, Indiana, population of only 21,661,<sup>52</sup> is 263 pages long.<sup>53</sup> A typical zoning ordinance includes chapters that describe various use districts (either as a list or a matrix), provides a map of the various use zones, and then describes height, bulk, and density controls, various standards, and definitions of terms.<sup>54</sup> While the 1916 New York City and 1922 Euclid, Ohio ordinances had only a few use zones, modern ordinances can have up to thirty zones, containing not only basic zones for residential, industrial, and commercial uses, but also single-family, duplex, multi-family residential, historical, institutional, and other specialized zones.<sup>55</sup> Brownsburg alone has twenty-three.<sup>56</sup> Use, height, and bulk restrictions can be combined together to control population density by requiring minimum lot sizes, maximum families or units per acre, and yard percentage.<sup>57</sup> Since the main focus is control over land use and density, these ordinances are “largely silent on matters of form beyond the most basic height, floor-area, and setback limits for individual buildings.”<sup>58</sup> This silence, in theory, should mean that as long as developers can comply with the multitude of limitations, their projects can be approved no matter what shape the final product takes. To the frustration of developers, planners, and citizens alike, this is often not the case.

Districts are zoned broadly, and in an ideal world, compliant development would occur “as of right” in those districts without interference from local governments.<sup>59</sup> The reality, however, is that “little significant development has occurred or can occur without changing the rules for each individual case.”<sup>60</sup> Developers often are afraid to propose a beneficial project for the community because it would require too many variances,<sup>61</sup> or they

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51 Garvin & Jourdan, *supra* note 12, at 396.

52 U.S. CENSUS BUREAU, *State and County QuickFacts, Brownsburg (town), Indiana* (revised Jan. 10, 2013), <http://quickfacts.census.gov/qfd/states/18/1808416.html>.

53 BROWNSBURG ZONING ORDINANCE, *supra* note 1.

54 Garvin & Jourdan, *supra* note 12, at 402; LAND USE PLANNING, *supra* note 13, at 69–70.

55 LAND USE PLANNING, *supra* note 13, at 70.

56 BROWNSBURG ZONING ORDINANCE, *supra* note 1, §1.02.

57 *Id.*

58 Peter Katz, *Form First: The New Urbanist Alternative to Conventional Zoning*, PLANNING, Nov. 2004, at 16.

59 Krasnowiecki, *supra* note 15, at 752.

60 *Id.*

61 “A variance is an administrative authorization to use property in a manner otherwise not allowed by the zoning ordinance.” LAND USE PLANNING, *supra* note 13, at 157. A variance is usually easier for developers to obtain than a rezoning, but is more likely to be overturned on appeal because courts review them with closer scrutiny. *Id.* at 157–58. Courts generally require that developers meet a four-part standard to be granted a variance: “(1) that the land in question cannot yield a reasonable return as currently zoned, (2) that the plight of the landowner is due to unique or unusual circumstances and not conditions generally prevailing through the neighborhood, (3) that the variance requested

believe they would not receive discretionary approval.<sup>62</sup> Often, the desirable uses for a site are unclear, and without formal guidelines developers can waste significant time and money on a project that is ultimately rejected as unsuitable for the specified zone.<sup>63</sup> This guessing game produces great costs, to both developers and the community at large, for development that might bring greater character, tourism, or commerce to the area can be rejected based on the Zoning Board's decision that the proposed use, or even the form the proposed use takes, does not comport with the zone in which it would be built.

Conventional zoning's compartmentalization of uses and lack of a clear direction in form also leads to the inefficient result that we know as urban sprawl<sup>64</sup>: communities comprised of large, winding residential subdivisions, big box shopping centers, strip malls, office parks, and multi-lane, high-speed thoroughfares.<sup>65</sup> These patterns are the same across America; no town using conventional zoning has a unique character because it requires none.<sup>66</sup> Suburban towns created by conventional zoning are not aesthetically pleasing, and do not have unique identities.<sup>67</sup> Despite the Standard State Zoning Enabling Act's recommendation that "[zoning] regulations shall be made with reasonable consideration . . . to the character of the district,"<sup>68</sup> and the Supreme Court's directive in *Euclid* that zoning ordinances be customized "in connection with the circumstances and the locality,"<sup>69</sup> Euclidean zoning

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will not alter the essential character of the neighborhood, and (4) that the variance not issue if it would be contrary to the public interest." *Id.* at 160.

62 See Mary Madden & Bill Spikowski, *Place Making with Form-Based Codes*, URBAN LAND, Sept. 2006, at 174, 178.

63 *Id.*

64 Urban sprawl has been defined as

development that expands in an *unlimited and noncontiguous (leapfrog) way outward* from the solidly built-up core of a metropolitan area. In terms of land-use type, sprawl can define both *residential and nonresidential development*. In sprawled areas, residential development comprises primarily single-family housing, including significant numbers of distant units scattered in outlying areas. Nonresidential development includes shopping centers, strip retail outlets along arterial roads, industrial and office parks, and freestanding industrial and office buildings, as well as schools and other public buildings.

Julian C. Juergensmeyer, *An Introduction to Urban Sprawl*, 17 GA. ST. U. L. REV. 923, 925 (2001).

65 DUANY ET AL., *supra* note 5, at 26–30; see also Garvin & Jourdan, *supra* note 12, at 398 (noting that while the original purpose of subdivisions was to "provide an efficient method to identify land for sale," they have evolved into a form of community planning in the absence of planning from conventional zoning); Madden & Spikowski, *supra* note 62, at 174 ("Most zoning and subdivision ordinances actually promote the sprawling development patterns that citizens oppose.").

66 See Barry, *supra* note 33, at 310–11.

67 *Id.*; see also Garvin & Jourdan, *supra* note 12, at 398 (noting that "traditional zoning practices continue to be devoid of details that would promote the notion that beauty in the built environment" reflects in the character of the community and its citizens).

68 STANDARD STATE ZONING ENABLING ACT, *supra* note 35, § 3.

69 *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

is merely “proscriptive”—it restricts the kind of development that can take place in a certain area based on what that development will be used for, making sure only that new uses are consistent with existing ones.<sup>70</sup> Unfortunately, whether or not a certain use comports with the uses around it does not bear much of a relation to whether the character of a community is preserved. This lack of concern for the larger picture is one of the main reasons why this form of land use regulation does not produce unique, memorable communities—its “preference for functionalism over beauty” lends itself only to blandness.<sup>71</sup>

Sprawl forces Americans to spend ever more time in their cars traveling from place to place because it is, in most cases, not possible to live within walking distance of daily needs.<sup>72</sup> After reading a conventional ordinance, “one might easily conclude that they are organized, written, and enforced in the name of a single objective: making cars happy.”<sup>73</sup> This auto dependence not only creates large amounts of traffic and pollution, but also eliminates the social interaction that might otherwise take place when walking from place to place,<sup>74</sup> contributes to health problems because exercise is no longer a required part of daily life, and causes “tens of thousands” of deaths annually from traffic collisions and other accidents.<sup>75</sup> The sheer size of the communities resulting from sprawl also discourages the use of mass transit.<sup>76</sup> As one New Urbanist put it: “Life once spent enjoying the richness of community has increasingly become life spent alone behind the wheel.”<sup>77</sup> Additionally, the large volume of cars requires massive parking lots to accommodate them. The parking lots are usually placed directly along the sides of roadways for easy access, but paradoxically, they are often half-empty because they are built to accommodate the capacity amount of visitors during holiday shopping seasons.<sup>78</sup> These parking requirements take up valuable real estate and create an ever more unfriendly environment for pedestrians, especially at night when suburban commercial centers become deserted.

All of these problems, taken together, mean that American towns no longer have unique identities, vibrant public spaces, or a strategic plan for growth with clear guidelines for development. They simply spread, without regard to creating a unique community. A particularly illuminating way to see the problem is to consider that, under a typical zoning ordinance, “the classic American main street, with its mixed-use buildings right up against the

70 Duany & Talen, *supra* note 6, at 1452.

71 Garvin & Jourdan, *supra* note 12, at 398.

72 Barry, *supra* note 33, at 310; *see also* Emerson, *supra* note 11, at 641 (“Euclidean codes deter the creation of walkable neighborhoods and town centers because the mixture of uses needed (whether it be office use, retail use, or residential use) to sustain a vibrant street life are often not built within walking distance of each other.”).

73 DUANY ET AL., *supra* note 5, at 35.

74 *Id.*

75 Geller, *supra* note 2, at 38.

76 *Id.*

77 DUANY ET AL., *supra* note 5, at 23.

78 *See* Geller, *supra* note 2, at 50–52.

sidewalk, is now illegal.”<sup>79</sup> Indeed, the American cities that are the greatest tourist attractions—New York, San Francisco, and smaller cities like Charleston and Nantucket—could not be built under today’s zoning codes.<sup>80</sup> Part II of this Note will consider the New Urbanist response to conventional zoning, and the basics of form-based codes.

## II. NEW URBANISM, THE TRANSECT, AND THE FORM-BASED CODE

New Urbanists feel strongly that the remedy to the inefficiency and unsustainability of sprawl lies in eliminating the current system of separating uses. The problem with conventional zoning, in their mind, is that “in spite of its regulatory controls, it is not functional: it simply does not efficiently serve society or preserve the environment.”<sup>81</sup> New Urbanists advocate what is called “smart growth” in place of conventional zoning’s unruly sprawl. Smart growth has been defined as:

[U]sing comprehensive planning to guide, design, develop, revitalize and build communities for all that have a unique sense of community and place; preserve and enhance valuable natural and cultural resources, equitably distribute the costs and benefits of development, expand the range of transportation, employment and housing choices in a fiscally responsive manner; value long-range, regional considerations of sustainability over short term incremental geographically isolated actions; and promote[ ] public health and healthy communities. Compact, transit accessible, pedestrian-oriented, mixed use development patterns and land reuse epitomize the applications of the principles of smart growth.<sup>82</sup>

By creating pedestrian-friendly communities that mix uses instead of separating them, New Urbanists argue, we can control the pace of sprawl and recreate the traditional towns of old.<sup>83</sup> New Urbanists identify several principles of traditional towns that they desire to emulate through smart growth: a clear center, where common activities are located and the uniqueness and vibrancy of the community is on display; a five-minute walk for residents to reach daily needs, including living, working, shopping, and eating; a street network with small blocks, providing both pedestrians and drivers with varying choices to get to their destinations; narrow, versatile streets that both slow down traffic and create a friendly environment for pedestrians; mixed use as a result of a comprehensive plan with deliberately detailed form requirements, including the size of the building and its setback from the street; and special sites for special buildings, such as city halls, churches, schools, or

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79 DUANY ET AL., *supra* note 5, at 21; see Madden & Spikowski, *supra* note 62, at 174 (arguing that under current zoning ordinances, “mixed uses and pedestrian-friendly streets are difficult, if not illegal, to build”).

80 See Barry, *supra* note 33, at 307; Emerson, *supra* note 11, at 637.

81 DUANY ET AL., *supra* note 5, at 36.

82 LAND USE PLANNING, *supra* note 13, at 323.

83 See, e.g., Elizabeth Plater-Zyberk, *Foreword* to PAROLEK ET AL., *supra* note 8, at ix, x–xii.

other civic buildings. These buildings are meant to display the character of the community, and are given a place of prominence.<sup>84</sup>

New Urbanists posit that adhering to these principles of planning will create a public realm that is both functional and attractive. Their goal, summed up succinctly, is this: “compact, walkable urban areas with mixed uses that re-invigorate the public realm; lessen reliance on auto use; enable public transit; and socially, culturally, and economically integrate regions.”<sup>85</sup>

The New Urbanist focus on form over use is not a new development; rather, it is a return to the kind of planning that has been used since ancient times. Conventional zoning, with its exclusive regulation of uses, is actually an anomaly in the history of urban planning.<sup>86</sup> Historically, “urban codes imposed order and uniformity to protect public health and safety and property values, and at times to provide social control.”<sup>87</sup> Planned towns and cities tended to use “interconnected patterns for street and block design.”<sup>88</sup> This kind of planning has been in use since at least the fourth century BC, when the Ancient Greeks passed laws regulating the size of streets and mandating that every town contain an *agora*, or public square.<sup>89</sup> Roman architects designed standardized, interconnected street networks.<sup>90</sup> Renaissance designers in the sixteenth century focused their city planning efforts on the form of buildings and their fit within the overall context of the surrounding area.<sup>91</sup> Amsterdam was redesigned in the seventeenth century according to a comprehensive plan, which created the city’s famous canal system and established specified locations and construction rules for streets, public buildings, and residential areas.<sup>92</sup> In the United States, mandatory design rules were also common early on. Philadelphia was designed in the seventeenth century with “four quadrants of gridded, tree-lined streets, public squares, and a commercial center at a harbor on the Delaware River.”<sup>93</sup> The city of Savannah, Georgia was designed in the eighteenth century according to a plan that dictated the sizes of streets, lots, and buildings.<sup>94</sup> Notably, it was common throughout European history to restrict new development from spreading

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84 See DUANY ET AL., *supra* note 5, at 37–40; see also Garvin & Jourdan, *supra* note 12, at 399 (adding “[s]timulating infill and rehabilitation activity” to this list).

85 Duany & Talen, *supra* note 6, at 1447.

86 See Talen, *supra* note 7, at 153; see also Emerson, *supra* note 11, at 641 (“[I]t has only been within the last seventy-five years that suburban developments have become increasingly synonymous with the unsustainable sprawl of use-based zoning.”).

87 Talen, *supra* note 7, at 156.

88 Emerson, *supra* note 11, at 647.

89 Talen, *supra* note 7, at 1447.

90 *Id.* at 147. The emperor Augustus imposed regulations creating multiple classifications of street width, ranging from fifteen to forty feet, depending on where a particular street was located relative to the core of the city. *Id.* at 150.

91 Emerson, *supra* note 11, at 648.

92 Talen, *supra* note 7, at 147.

93 Geller, *supra* note 2, at 42.

94 Talen, *supra* note 7, at 147.

into undeveloped areas.<sup>95</sup> New Urbanists aim to follow the lead of these historic planning methods.

The main way New Urbanists propose to achieve their goals is through the concept of the “Transect,” and within it, the form-based code.

### A. *The Transect*

The Transect is a new kind of zoning code that creates a range of human environments on a continuum from most rural or natural to most urban.<sup>96</sup> These new zones, in order, are: Natural, Rural, Sub-Urban, General Urban, Urban Center, Urban Core, and the Special Districts.<sup>97</sup> Each environment has its own section, with specified building *types* that fit in that environment. The Transect positions each building type or form in its correct place within the larger context of the continuum, rather than focusing on each individual structure’s use.<sup>98</sup> Figure 1, from New Urbanist planning firm Duany Plater-Zyberk & Co.’s *SmartCode*, illustrates the concept of the Transect:

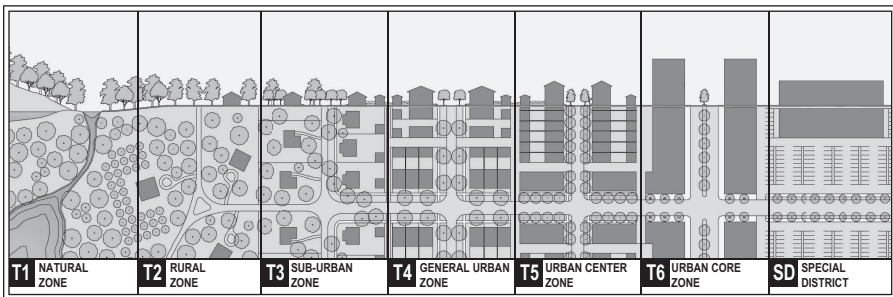


FIGURE 1: “A TYPICAL RURAL-URBAN TRANSECT, WITH TRANSECT ZONES”<sup>99</sup>

Transect zoning, New Urbanists argue, remedies the suburban conventional zoning problems of the “urbanizing of the rural”—that is, office towers and other urban-style buildings in an otherwise natural environment—and the “ruralizing of the urban”—empty, mostly unused space (like parking lots and strip malls) in urban areas.<sup>100</sup> The idea is that the form a building takes,

95 *Id.* at 149. Talen notes that new buildings were built on top of old building sites in Elizabethan England, and German cities forbade new construction in areas that did not already have public utilities and preexisting infrastructure to support it. *Id.*

96 See Duany & Talen, *supra* note 6, at 1453; see also PAROLEK ET AL., *supra* note 8, at 9 (stating that the Transect “look[s] at communities more in terms of variations in the scale and intensity of development than in differences in land uses”).

97 DUANY PLATER-ZYBERK & CO., SMARTCODE VERSION 9.2, at vii (2009), available at <http://www.transect.org/docs/3000-BookletSC-pdf.zip> [hereinafter SMARTCODE]. The SmartCode is a model form-based code that incorporates the continuum of the Transect into its design. For descriptions of the environments that should exist in each zone, see *id.* at xi.

98 Emerson, *supra* note 11, at 641.

99 SMARTCODE, *supra* note 97, at vii.

100 Duany & Talen, *supra* note 6, at 1454.

no matter how perfect on its own, may be inappropriate when placed in the incorrect environment—as one author has suggested, it would be like wearing a perfectly made tuxedo to a square dance.<sup>101</sup> Thus, office towers should not be located in a Sub-Urban Zone with residential subdivisions, but rather should be located in the Urban Center (two to five story buildings) or Urban Core Zones (up to eight stories), where their form is more consistent with their surroundings.<sup>102</sup> Houses with large front yards belong in the Sub-Urban zone, but not in the General Urban Zone, where the “build-to” lines are much closer to the street.<sup>103</sup> Wide streets and open parks belong in the Rural and Sub-Urban Zones, while multi-story buildings and public squares belong in the General Urban, Urban Center, and Urban Core Zones.<sup>104</sup> Forms that require large amounts of space, such as commercial big box stores and shopping malls with their attendant large parking lots, should be located in the Special Districts outside the urban areas.<sup>105</sup>

These separations of form, and the continuum from rural to urban, make sense in the abstract, but under conventional zoning codes they have been completely ignored and made impossible by use separation, combined with low-density requirements, mandatory setbacks, and required amounts of parking per square foot.<sup>106</sup> The Transect seeks to reorganize the way development and uses are regulated. It does not completely eliminate separation of uses; rather, it diminishes their importance by creating a matrix of “building functions” that fit within a specified zone on the continuum.<sup>107</sup> This allows for a range of uses within a certain zone, so long as the development complies with the form requirements of that zone.<sup>108</sup> Noxious uses, such as heavy industrial, manufacturing, and airports, are still separated under the Transect because they do not belong in Urban or Sub-Urban areas.<sup>109</sup> The Transect’s continuum also widens the design options developers have available to them, “whether it be single use, low density, semi-rural development or a mixed-use, high density, urban development, regulating always by where that type of development is appropriate within the rural-to-urban environment.”<sup>110</sup> In contrast to conventional codes, where developers can only create buildings meant to serve one use, the Transect allows developers to create

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101 Emerson, *supra* note 11, at 642.

102 *Id.* at 644; SMARTCODE, *supra* note 97, at SC45–46, Table 15C, 15D (defining heights). These height requirements can be adjusted based on the locality, and intermediate sub-zones can be created to accommodate other building heights, such as mid-rise or skyscrapers. Geller, *supra* note 2, at 47.

103 Geller, *supra* note 2, at 47.

104 Duany & Talen, *supra* note 6, at 1453.

105 Geller, *supra* note 2, at 45. Included in this list are also “college campuses, cemeteries, utility plants, industrial facilities, adult entertainment, and vehicle service centers.” *Id.* at 55.

106 See Duany & Talen, *supra* note 6, at 1452.

107 Geller, *supra* note 2, at 53.

108 *Id.*

109 PAROLEK ET AL., *supra* note 8, at 12.

110 Emerson, *supra* note 11, at 645.



multi-use buildings in accordance with the form requirements of the various zones, and allows them the flexibility to craft according to their individual needs and styles.<sup>111</sup> This is where form-based codes become important.

### B. *The Form-Based Code*

Form-based codes are the tool planners use to create the Transect's continuum. They are defined as "[a] method of regulating development to achieve a specific urban form" that aims to "create a predictable public realm primarily by controlling physical form, with a lesser focus on land use, through city or county regulations."<sup>112</sup> Unlike conventional zoning ordinances, which are described as "proscriptive" or merely preventing certain development in certain areas, New Urbanists posit that form-based codes are "prescriptive" in that they are specifically designed to "create complete places by combining private and public development, streetscapes, and public spaces into a unitary urban environment."<sup>113</sup> Form-based codes do this by creating detailed requirements for the design of both buildings and the "built environment"—the way all of the components of the community come together as a whole.<sup>114</sup>

Form-based codes are inherently customizable for each place in which they are used because they are created based upon a community's shared ideal for their built environment.<sup>115</sup> They are designed so that "planners, citizens, developers, and other stakeholders can move easily from a shared physical vision of a place to its built reality."<sup>116</sup> This ideal is achieved through a specific set of steps. First, public design workshops called "charettes" are held, where citizens become engaged in creating their new community through multi-day meetings.<sup>117</sup> At these workshops, planning teams present renderings of new mixed-use, pedestrian-friendly development, and new ordinances to go with them.<sup>118</sup> Though usually met with incredulity and skepticism of the prospects for success, these plans are debated and tweaked until participants begin to feel a sense of ownership and optimism that such development could actually take place in their community.<sup>119</sup> The results of the charrette are then compiled into a "consensus vision" with drawings, diagrams, and a comprehensive regulating plan. The plan must include all

111 PAROLEK ET AL., *supra* note 8, at 11–12.

112 *Id.* at 4.

113 Matthew J. Lawlor, *Gaining Ground in the Final Frontier: Surveying Legal Issues Raised by New England's Form-Based Codes*, 43 URB. LAW. 839, 839–40 (2011); see Duany & Talen, *supra* note 6, at 1452; Gardin & Jourdan, *supra* note 12, at 401.

114 Katz, *supra* note 58, at 19.

115 Robert J. Sitkowski & Brian W. Ohm, *Form-Based Land Development Regulations*, 38 URB. LAW. 163, 164 (2006) (noting that form-based codes are "designed to be place-specific").

116 Katz, *supra* note 58, at 16.

117 *Id.* at 19.

118 PAROLEK ET AL., *supra* note 8, at 14.

119 *Id.*

existing and planned public spaces, buildings, and natural areas.<sup>120</sup> New Urbanists claim that the plan should be simple enough to fit on a single page, with physical characteristics of building types summarized in diagram form.<sup>121</sup>

Though the codes certainly are customizable for each locality that decides to use them, there are several components that all form-based codes must have. The first is a Regulating Plan, which is the final result of the charette. The Regulating Plan includes a map of the community, displaying the zones of the Transect but also detailing actual buildings, streets, build-to lines, and certain design elements.<sup>122</sup> This stands in direct contrast to conventional zoning maps, which often only depict large swaths of land zoned for certain uses, without reference to actual streets or buildings.<sup>123</sup> The Regulating Plan has three functions: administrative, direct regulation, and planning. The administrative function allows developers to see at a glance where different designs apply within the different zones, and provides them a reference point in the code to find more specific and detailed rules for development. The direct regulation function specifies design elements within the plan, such as frontage requirements or street width requirements. Finally, the planning function is served in the development of the plan itself. By creating boundaries between zones and prescribing development standards for the various zones in a lot-by-lot fashion, the plan defines what the public realm will look like.<sup>124</sup>

The second element of form-based codes is Building Form and Functional Design Standards. These are the heart of the form-based code because they control the details of the design and physical characteristics of buildings within the various zones. These design standards are provided for each zone of the Transect, enabling the gradual continuum from a natural environment, to a sub-urban single-family home environment, to the apartment complexes, retail, and office towers of the urban core. The standards include regulations for “lot sizes, building placement and form, use, parking, encroachments, and frontage types . . . .”<sup>125</sup> Building minimum and maximum heights and lot sizes are particularly important, as this ensures consistency within each particular zone of the Transect.<sup>126</sup> For each zone, the code provides an overview of the zone’s intended physical form and characteristics, followed by building placement and form regulations, parking regulations, a detailed permissible use diagram, encroachments, and allowable frontage and building types.<sup>127</sup> This involves navigating the relationship

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120 Katz, *supra* note 58, at 19.

121 *Id.*

122 Sitkowski & Ohm, *supra* note 115, at 164.

123 PAROLEK ET AL., *supra* note 8, at 17.

124 *Id.*

125 *Id.* at 15.

126 Katz, *supra* note 58, at 19.

127 PAROLEK ET AL., *supra* note 8, at 39–40. Frontage is defined as “the way a building engages the public realm.” *Id.* at 59. This can include yards, porches, fences, terraces,

between the public realm, the buildings themselves, and private spaces, which can be a very complicated undertaking.

One of the advantages of using Building Form Standards instead of conventional zoning's minimum setbacks and lot coverage requirements is that it creates a more predictable and consistent result within each environment. Lot coverage requirements do not take into account how one building will relate to another or form part of a defined community—they merely provide percentages. Building Form Standards, on the other hand, govern both how buildings relate to the street and to each other through build-to lines, minimum and maximum height requirements, and lot sizes, creating a uniform and aesthetically pleasing result.<sup>128</sup> Minimum and maximum setbacks can be used to transition between zones; for example, when transitioning from a more urban to a more sub-urban zone, the rear setbacks of the more urban buildings can be increased to be more consistent with the lot sizes and setbacks of the sub-urban zone.<sup>129</sup> Building Form Standards are also usually provided in a matrix for ease of comprehension, with diagrams concerning building height, coverage, and permissible uses within each zone.<sup>130</sup> This matrix should be able to fit onto one page, and indeed, even the City of Miami's new form-based zoning code has managed to fit its "Building Function and Use" matrix on a single page.<sup>131</sup>

The third required element of form-based codes is Public Space Standards. These standards cover the character and quality of the public realm, which includes plazas, parks, thoroughfares, and other open spaces. Public Space Standards can be separated into two major elements: thoroughfares and civic spaces.<sup>132</sup>

First, thoroughfare standards are regulations of the width and dimensions of streets, sidewalks, curb heights, street tree positioning, street furniture, on-street parking, and the interaction of the street with the first floors of buildings.<sup>133</sup> Street regulations are central to the success of the form-based code, as in order to create pedestrian-friendly communities, pedestri-

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stoops, storefronts and awnings, and arcades. The regulation of frontage types is particularly important in the creation of a walkable community, as the goal is to facilitate interactions by making pedestrians feel comfortable walking from place to place. This is achieved through requirements of minimum depths, heights, and widths of frontages in the various zones to create consistency. *Id.* at 59–61. For a diagram of various frontage types, see SMARTCODE, *supra* note 97, at SC36.

128 PAROLEK ET AL., *supra* note 8, at 40–41.

129 *Id.* at 43.

130 Sitkowski & Ohm, *supra* note 115, at 164. For an example of this matrix, see SMARTCODE, *supra* note 97, at SC40.

131 MIAMI, FLA. MIAMI 21 ZONING CODE, art. 4, tbl. 3, IV.8 (2012), available at <http://www.miami21.org/PDFs/AsAmended-April2012-VolI.pdf> [hereinafter MIAMI 21]; see SMARTCODE, *supra* note 97, at SC40. *Contra* BROWNSBURG ZONING ORDINANCE, *supra* note 1, §§ 2.02–2.45 (the small town of Brownsburg, Indiana's conventional zoning use matrix spans forty-five pages).

132 PAROLEK ET AL., *supra* note 8, at 28.

133 *Id.* at 15; Sitkowski & Ohm, *supra* note 115, at 164–65.

ans must be shielded from moving traffic, feel comfortable in the street environment, and be able to reach desirable destinations in a reasonable walking distance.<sup>134</sup> For this reason, streets in the urban zones are narrower, requiring vehicles to move more slowly, and are connected in a defined gridded network.<sup>135</sup> Parking is often moved behind buildings so as not to interfere with the urban landscape, and businesses are required to share parking to reduce the amount of spaces needed.<sup>136</sup> Neighborhoods are defined by how far the average pedestrian can walk comfortably in up to ten minutes, also known as the “pedestrian shed.”<sup>137</sup> In the more rural areas, high-speed thoroughfares are permitted because it is less likely that automobiles will cross paths with pedestrians.<sup>138</sup> This is in marked contrast to the streetscape of conventional zoning ordinances, which feature “high-speed, multi-lane, car-centric freeways that frequently dissect the urban, walkable framework of downtowns and main streets.”<sup>139</sup> Thoroughfare types can be calibrated to the environment of each zone (i.e., alleys and narrow streets versus avenues and boulevards), and are assigned to certain locations through the Regulating Plan.<sup>140</sup>

Second, civic spaces, such as parks and plazas, are also calibrated to each particular zone. Conventional zoning often produces very large parks and recreational areas that are not within walking distance of residential areas, and are out of tune with an urban environment.<sup>141</sup> Form-based codes attempt to remedy this problem by creating numerous, manageably sized public spaces that are within a one-half mile radius of residences and offices, and are built to comport with their particular zone.<sup>142</sup> Thus, large parks may belong in the Rural or Sub-Urban zones, but they do not belong in the Urban Center or Urban Core zones because of the high density desired in those zones, and the hiding places large parks provide for criminals and other vagrants. Similarly, a concrete plaza may be perfect for the Urban Core zone, but completely inappropriate for the Sub-Urban or Rural zones,

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134 PAROLEK ET AL., *supra* note 8, at 29.

135 *Id.*; SMARTCODE, *supra* note 97, at SC29–30.

136 See Geller, *supra* note 2, at 50–53 (describing the calculations used to create parking lots with shared spaces and detailing other parking changes made by the SmartCode); see also PAROLEK ET AL., *supra* note 8, at 50–53 (detailing the problems resulting from conventional zoning’s minimum parking requirements, including increased housing costs, low density, traffic congestion, pollution, and lack of flexibility; proposing ways to provide adequate parking in the various Transect zones in anticipation of demand without oversupplying).

137 Geller, *supra* note 2, at 57.

138 SMARTCODE, *supra* note 97, at SC29–30 (restricting thoroughfares with no parking and speeds over thirty-five miles per hour to T1 and T2, the Natural and Rural Zones).

139 Emerson, *supra* note 11, at 644.

140 PAROLEK ET AL., *supra* note 8, at 29.

141 *Id.* at 35.

142 See SMARTCODE, *supra* note 97, at SC41–42 (providing a diagram of various civic spaces, and their permitted uses in the various zones).

where the natural environment is more prevalent.<sup>143</sup> Civic spaces are usually placed at the heart of each neighborhood, as they are crucial to the development and interaction of the community.

The fourth required element of form-based codes is the Administrative Provisions. In order for form-based codes to be functional, they must have a clear and defined application process and development approval standards. The goal is to promote predictability and efficiency by allowing certain development as of right in the zones, and certain development by warrant.<sup>144</sup> New Urbanists seek to implement an administrative approval process, rather than approval through public hearings or discretionary review, which can be inefficient, “unpredictable, and time consuming.”<sup>145</sup> There can be multiple levels of administrative review, including simple administrative approval, or reports and recommendations made to a planning commission, or a design review board for more complicated projects.<sup>146</sup> New Urbanists disapprove of discretionary review as a general matter because it “is inherently subjective and can therefore undermine the intent of the community’s vision and the [form-based code] by requiring ill-advised changes to proposed projects.”<sup>147</sup> Solely administrative review, they argue, is possible under form-based codes because of the code’s specificity in the Regulating Plan, Building Form, and Public Space requirements, creating a high level of predictability and a specific framework for developers crafting proposals, while also eliminating vagueness concerns. Also, because of the public approval that plays such an important role in the formation of form-based codes and the shaping of a vision for the community from its inception, New Urbanists posit that discretionary review would not be necessary.<sup>148</sup> Sometimes variances can be granted under a form-based code regime, but they require mandatory findings of necessity to ensure that the community’s vision and the built environment will not be adversely affected.<sup>149</sup>

The fifth, and optional, element of form-based codes is the Architectural Standards. If included, these are the most controversial aspects of form-based codes. These standards provide diagrams and graphics displaying the styles of buildings, the materials, colors, and construction techniques that are permitted, and depicting how they should be incorporated into building elements such as the walls or roofs.<sup>150</sup> New Urbanists provide a range of levels at which Architectural Standards can be used, with the highest level being “complete regulation by style down to very specific details thoroughly drawn

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143 *Id.*

144 *Id.* at SC40 (providing matrix laying out types of development as of right and by warrant in the various Transect zones); see Geller, *supra* note 2, at 59 (quoting SMARTCODE, *supra* note 97, at SC4 and noting that a warrant is approval for a practice that would not otherwise fit within the provisions of the code, but still satisfies the code’s intent).

145 Lawlor, *supra* note 113, at 841.

146 PAROLEK ET AL., *supra* note 8, at 88.

147 *Id.* at 89.

148 *Id.*

149 *Id.*

150 Sitkowski & Ohm, *supra* note 115, at 165; see Katz, *supra* note 58, at 19–20.

and dimensioned in an architectural pattern book,” and the lowest being no architectural standards at all.<sup>151</sup> Architectural Standards are legally thorny because while they can create unique, consistent places, they also restrict the freedom of developers to create their own styles. Planners have to be careful when infusing the codes with aesthetic regulations, for they can easily fall into the extremes of vagueness on one end, and Stepford-esque mandated uniformity on the other.<sup>152</sup> For these reasons, some form-based codes do not include Architectural Standards at all, while others include only the most basic guidelines as to color and materials.

### III. IMPLEMENTATION: THE CHALLENGES PRESENTED BY EXISTING DEVELOPMENT

Form-based codes present the best option for creating cohesive communities through new development in the twenty-first century. In contrast to the sprawling, characterless, anti-pedestrian development created by conventional zoning, form-based codes can produce a rural to urban continuum that allows for both the traditional single-family homes Americans so love, and the mixed-use, pedestrian-friendly town centers that make up the public life of the community.

In fact, form-based codes can best serve the purposes for which Euclidean zoning was originally enacted. The Supreme Court in *Euclid* approved the separation of uses in order to protect children from increased traffic and health hazards, make firefighting easier, and prevent the “disorder” that resulted when commercial and industrial areas infiltrated residential ones.<sup>153</sup> The Standard State Zoning Enabling Act of 1926 stated in section three that the purpose of zoning was:

to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.<sup>154</sup>

However, conventional zoning no longer serves most of the purposes for which it was designed. Congestion in the streets has only increased due to widespread auto usage, because daily necessities, separated by use from residential areas, are no longer within walking distance.<sup>155</sup> Firefighting has not

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151 PAROLEK ET AL., *supra* note 8, at 78; see Garvin & Jourdan, *supra* note 12, at 407 (noting that architectural design standards “can range in specificity from general (for example, building materials should be earth tone in color) to extremely particular (for example, buildings located along Main Street shall incorporate materials that range in color from Pantone 134 to 156 or directly match the existing color of a historic structure located within 100 feet of the building subject to these regulations)”).

152 Talen, *supra* note 7, at 157 (“There is a continuing tension between infusing aesthetic goals into the planning process, and coding prescribed forms.”).

153 *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926).

154 STANDARD STATE ZONING ENABLING ACT, *supra* note 35, § 3.

155 See *supra* text accompanying note 72.

been made easier because firefighters must travel longer distances to reach fires, especially in isolated residential subdivisions.<sup>156</sup> Health and the general welfare have declined due to hours spent driving from place to place rather than walking, and increased fatalities from auto accidents.<sup>157</sup> Children are not safer because subdivisions feature wide streets and large amounts of traffic, and are often targets for crime.<sup>158</sup> Finally, providing adequate transportation, water, sewerage, and other public requirements to previously undeveloped areas due to ever-spreading development imposes significant costs on local governments.<sup>159</sup> The only purposes that zoning has successfully served are providing adequate light and air and preventing the overcrowding of land and concentration of population through complete separation of uses, minimum setbacks, and low density requirements. It is debatable whether these are beneficial achievements. Thus, in addition to all of the ancillary negative effects that have occurred as a result of conventional zoning, this method of planning has not achieved most of the purposes for which it was created.

Form-based codes, on the other hand, strive to lessen congestion in the streets by creating pedestrian-friendly thoroughfares with narrower streets and on-street parking, thus both reducing the amount of traffic by encouraging residents to walk, and slowing the traffic that does exist to safer speeds.<sup>160</sup> Thoroughfares are often designed in the Urban Core Zones to have a central multi-lane boulevard allowing high-speed traffic, separated from the slower lanes and pedestrian traffic by planting strips.<sup>161</sup> This method of street design also aids firefighting efforts, as trucks would not have to compete with slower traffic to reach their destination quickly, and without the disconnected, sprawling roads of conventional zoning communities, they can more efficiently and quickly reach their destination.

Form-based codes can easily promote health and general welfare simply by their design. Living in a residential area that is within a ten-minute walking distance of daily needs such as groceries, schools, work, restaurants, retail, parks, and other public goods incentivizes walking, rather than driving. This is beneficial for both health and social welfare, as residents are likely to interact with each other on sidewalks, in stores, and in parks and plazas. These increased opportunities for meaningful social interaction simply are not possible in a community shaped by conventional zoning, for residents are forced to reach all of these necessities by driving alone in their cars.

Form-based codes also can provide adequate light and air, along with avoiding the overcrowding of land and undue population concentration. Creating mixed-use communities does not mean that overcrowding will

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156 See *supra* text accompanying note 49.

157 See *supra* text accompanying notes 72–77.

158 See *supra* text accompanying note 48.

159 LAND USE PLANNING, *supra* note 13, at 318.

160 See *supra* text accompanying notes 134–135.

161 PAROLEK ET AL., *supra* note 8, at 31.

result; minimum lot sizes, setbacks, and permitted uses prevent these adverse effects. Minimum and maximum height requirements in the various zones on the Transect's continuum also ensure that skyscrapers will not tower over single-family homes or five-story mid-rise apartments, blocking the light. Every form has its place, and it is organized by the Regulating Plan into the various Transect zones to create consistent environments.

Finally, form-based codes make the provision of various services, such as water, sewerage, electricity, and other utilities, far simpler than conventional zoning codes. Since they are designed to create higher-density, mixed-use communities rather than spread out, single-use communities, the same infrastructure can be utilized for residences, offices, restaurants, and retail. The costs involved in constantly creating new infrastructure lines can be severely reduced or even eliminated through the principles of smart growth.<sup>162</sup>

Importantly, the Standard State Zoning Enabling Act did not expressly provide that zoning regulation was limited to the use of land.<sup>163</sup> Instead, it recommended that “[s]uch regulations shall be made with reasonable consideration, among other things, to the character of the district and its particular suitability for particular uses . . . with a view to conserving the value of buildings . . . .”<sup>164</sup> This wording recognizes the guiding principle built into form-based codes: the intersection of form, or the “character of the district,” and use. Both are important in creating a sustainable, unique, and desirable community. Conventional zoning focuses exclusively on the latter, sacrificing the character of a community’s built environment in the process. Form-based codes, in contrast, both satisfy all of the original purposes of zoning noted in the SSZEA and regulate development with an eye to the particular character of the locality.

Form-based codes provide many additional benefits not mentioned or contemplated during the enactment of conventional zoning. First, they are easier and simpler to read than conventional zoning ordinances. Zoning ordinances, fairly simple at the time of *Euclid*, have since evolved into “a complicated set of prohibitions of all imaginable incompatibilities.”<sup>165</sup> They are long, complicated, wordy, and sometimes nearly impossible to decode for planners and non-planners alike.<sup>166</sup> Form-based codes instead make use of concise diagrams, drawings, and matrices to “make the requirements and physical vision understandable to the general public, government officials, developers, and the professionals who work with them.”<sup>167</sup> Anyone can see, at a glance, which building types and uses are permitted in the various Transect zones, and which are not. Public involvement is particularly important

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162 LAND USE PLANNING, *supra* note 13, at 318–22.

163 Sitkowski & Ohm, *supra* note 115, at 167.

164 STANDARD STATE ZONING ENABLING ACT, *supra* note 35, § 3.

165 Talen, *supra* note 7, at 158.

166 See Garvin & Jourdan, *supra* note 12, at 396 (adding that “even the most highly trained planner, urban designer, or developer often struggles to ascribe meaning to the principles embedded in these codes”).

167 Geller, *supra* note 2, at 81.



for the development of the code itself, and thus it must be simple enough that those who do not specialize in urban design and planning can understand the requirements of the code.

Second, form-based codes provide a significantly greater degree of predictability for developers seeking project approval. Under conventional zoning, almost no new development can take place without a variance or some other discretionary approval because many districts are not zoned with enough specificity to develop as of right. Developers can incur significant costs planning and shaping a proposal, only to have it rejected as incompatible with the uses of existing development in that particular zone.<sup>168</sup> Form-based codes remedy this problem by creating technical, extremely detailed, and clear guidelines for the form that new development should take in each zone of the Transect. They are “packed with specific instructions, details, and unique graphics and illustrations, the majority of which are geared toward the design of the physical space.”<sup>169</sup> The Regulating Plan places each building type in certain areas, even regulating down to individual lots. This makes the approval process smoother and more efficient, while also reducing vagueness concerns, because developers know exactly what specifications they must meet to build in a certain zone. Depending on whether a certain code contains architectural design standards or not, developers may have the freedom to dictate the style of the building once the form is approved. This both provides developers with autonomy and allows for a fair degree of certainty that a project meeting the specifications of the Building Form Standards for the particular zone will be approved.

There is empirical evidence of the streamlined approval process in Denver resulting from form-based codes. Denver adopted its new form-based zoning code in 2010, replacing a 54-year-old conventional code in its entirety.<sup>170</sup> In addition to recognizing benefits from consolidation of the administrative process in one agency—producing a unified and efficient response to development inquiries—the city’s zoning-change requests dropped dramatically. In 2008, under the old ordinance, there had been 52 successful zone-changing requests; in 2009 there had been 55. These requests “often led to confrontations between developers, area residents and city officials.”<sup>171</sup> In 2010, the year the new code was enacted, the number dropped to 13 and remained low at 21 in 2011. Developers appreciate the specificity of the new code because they can now spend less time fighting with the city and residents and more time crafting useful and beneficial projects.<sup>172</sup>

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168 See *supra* text accompanying notes 59–63.

169 Garvin & Jourdan, *supra* note 12, at 401.

170 Dennis Huspeni, *Denver’s New Zoning Code Delivers*, DENVER BUS. J. (June 29, 2012, 4:00 AM), <http://www.bizjournals.com/denver/print-edition/2012/06/29/denvers-new-zoning-code-delivers.html?page=all>.

171 *Id.*

172 *Id.*

This is not to say that form-based codes are a magic formula for success in all localities, however. The most significant problem that form-based codes face going forward is not the codes themselves; rather, it is the *existing* framework created by conventional zoning, which has shaped most new development in the nation since the *Euclid* decision in 1926. Land owners, developers, and zoning boards are all accustomed to the processes and rules of conventional zoning, and may have existing land use and expectation rights that they stand to lose if the conventional ordinance is suddenly replaced in full by a form-based code.<sup>173</sup> There are also significant cost concerns; creating high quality mixed-use communities necessarily means that property values will skyrocket, making housing options for low and middle-income families scarce.<sup>174</sup> Additionally, because of the political realities created by replacing an entire zoning ordinance with a form-based code, many concessions have to be made that may produce significant deviations from the ideals of New Urbanism and the SmartCode.<sup>175</sup>

For example, in 2009 Miami became the first major city in the United States to adopt a form-based zoning code that entirely replaced an old conventional code.<sup>176</sup> The old code had produced unfortunate results in that it had “allowed high-rises to tower over bungalows, gave private interests free rein over public property and blocked with construction water views that folks in Topeka would die for.”<sup>177</sup> Passing the new form-based code, however, was very difficult because “[d]evelopers who could almost always count on a free ride in Miami saw it coming to an end.”<sup>178</sup> As a result of many special interest pressures, the code was ultimately compromised. No improvements were made to Miami’s lack of a decent mass transit system, and the car-centric culture was perpetuated by the new code. Parking garages are now hidden behind residential, retail, or other uses, but they “face no actual reduction in required capacity from the previous code.”<sup>179</sup> Though there has been a significant increase in construction after the passage of the code, some of the new development has still not conformed to New Urbanist ideals.<sup>180</sup> The city faces many challenges going forward in creating the ideal it envisioned in the Miami 21 code.

Thus, exclusive and mandatory replacement of entire conventional codes with form-based zoning codes is probably a more drastic change than most localities can handle. A better solution, though one not espoused by the New Urbanists because they believe it will “create an incoherent

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173 See Emerson, *supra* note 11, at 671.

174 STEWART E. STERK & EDUARDO M. PEÑALVER, LAND USE REGULATION 74 (2011).

175 Emerson, *supra* note 11, at 671.

176 Geller, *supra* note 2, at 44.

177 Editorial, *Good for Miami*, MIAMI HERALD, Jan. 15, 2011, at 24A.

178 *Id.*

179 Sean McCaughan, *Miami’s New Urbanist Experiment*, THE ARCHITECT’S NEWSPAPER (Feb. 6, 2012), <http://archpaper.com/news/articles.asp?id=5874>.

180 *Id.* (discussing the new Miami Marlins ballpark as “hostile to its urban context,” with large parking garages surrounding it and no nearby public transportation available).

result,”<sup>181</sup> is to create a hybrid code. A hybrid code is one that retains the basic framework of the conventional zoning code, but adds portions that are drafted according to a form-based code. This can be accomplished by providing a variance for the sections of a community that are open to new development and can be crafted according to the principles of the Transect and form-based codes. In these sections, the form-based code can be exclusive and mandatory. Several localities have adopted this approach, limiting the exclusive and mandatory format to “certain defined areas within a jurisdiction such as a Central Business District or other downtown area.”<sup>182</sup>

Alternatively, in order to facilitate the transition from conventional zoning to form-based codes, municipalities can create a parallel code format whereby the conventional ordinance and the form-based code exist side by side, and developers can choose which one they wish to calibrate their proposals to, increasing the design options available to them.<sup>183</sup> This would certainly drastically reduce or eliminate the political conflict that arises as a result of a full replacement code, but since using the form-based code would not be mandatory, it might produce the same result as merely maintaining the conventional zoning code.<sup>184</sup> Additionally, it might create a chaotic kind of community where certain developers create low-density, single-use buildings with large parking lots, next to others who create high-density, mixed-use areas—a very incongruous picture.

For this reason, this Note advocates creating a hybrid code of sorts in most municipalities that can be changed periodically as more developers seek to create projects conforming with the principles of form-based codes. Initially, perhaps, only a few sections of a community may be granted a variance or special exception in which they can create the mixed-use, pedestrian-friendly areas form-based codes allow. Once residents see the appeal and efficiency of these areas, however, they may petition for other areas to be given a variance or even to be rezoned accordingly, and the movement will likely spread. In this way, a gradual move back to the traditional towns of old can be effected, without the sudden and chaotic changes that would be brought by a complete replacement and overhaul of a municipality’s zoning code.

#### CONCLUSION

Form-based zoning codes are the best tool available for municipalities to move back to the future—to create traditional towns through new regulations—in areas of new development. Conventional zoning has proven itself wholly inefficient, unsustainable, and unable to achieve the purposes for

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181 Emerson, *supra* note 11, at 670.

182 *Id.* at 671. Emerson points to Petaluma, California as an example of this kind of patchwork code—the municipality set aside 400 acres in which it imposed a mandatory and exclusive form-based code, but the option is unavailable to developers outside that area. *Id.*

183 *Id.* at 672.

184 *Id.*

which it was originally enacted. It has led to sprawling, unremarkable, characterless communities that force their residents to drive many miles simply to obtain daily needs. These changes have led to significant health problems, increased fatalities from car accidents, greater pollution in the environment, and high costs to localities in new infrastructure and other necessities created by sprawl. Form-based codes, with their emphasis on the form the built environment takes rather than what individual buildings are used for, are a return to the concept that the form of a community shapes its character and its vibrancy. Form-based codes will allow American towns and cities to become unique, sustainable, and healthy places—but only if implemented in the correct way. Trying to replace a conventional zoning code in one fell swoop with a form-based code in an area that has already been shaped by single-use, low-density regulations would cause a political and legal fight that would result in a compromised code unable to live up to the full potential New Urbanists envision. By instead gradually granting variances or special exceptions for form-based development, municipalities can allow the beneficial effects of mixed-use, high-density, pedestrian-friendly communities to seep into the consciousness of the community and produce a demand for more.

